



The University of the State of New York

The State Education Department State Review Officer

No. 08-099

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:

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

Law Offices of George Zelma, attorneys for respondents, George Zelma, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that the district's Committee on Special Education (CSE) erred in its determination that respondents' (the parents') daughter should not be classified as a student with a disability. The district also appeals from the decision of the impartial hearing officer which ordered it to reimburse the parents for their daughter's residential tuition costs at the Elan School (Elan) for the 2006-07 school year. The appeal must be sustained.

Initially, two procedural matters must be addressed. First, the parents assert as an affirmative defense in their answer that the district's petition should be dismissed for procedural defects pursuant to 8 NYCRR 279.4(a) of the State regulations, in that the petition fails to provide sufficient particulars as to the reasons for challenging the impartial hearing officer's decision, fails to include accurate hearing record cites and misidentifies the impartial hearing case number that is being appealed, among other infirmities. The district filed a reply, as provided for in 8 NYCRR 279.6 of the State regulations, arguing that the petition was procedurally sufficient and that the misidentified impartial hearing case number was a mere typographical error, excusable because the pleadings otherwise accurately identify the matter and the parties. A hearing record for the case has been prepared and submitted by the district and the parents have been able to formulate a proper answer to the allegations set forth in the petition. Further, a review of the district's petition shows that the district clearly indicated the reasons for challenging the impartial hearing officer's decision, identified the findings, conclusions and orders to which it takes exceptions and indicated what relief it is seeking. Contrary to the parents' contention, I find that the district's petition is not procedurally defective and I decline to dismiss the appeal on that ground (Application of a Child

Suspected of Having a Disability, Appeal No. 93-07;¹ see Application of a Student with a Disability, Appeal No. 08-072; Application of a Student with a Disability, Appeal No. 08-033; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096).

Second, the parents' submitted additional evidence with their answer, consisting of items already contained in the hearing record, and copies of e-mails exchanged between the parties' attorneys after the hearing record had closed. To the extent that the district objects in its reply to the submission of the additional evidence, 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 hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 08-037; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003). In this case, I find that some of the additional evidence submitted is already contained in the hearing record and the rest of the additional evidence submitted is not relevant to the disposition of this case. Therefore, in the exercise of my discretion, I decline to consider the additional evidence submitted by the parents.

At the time of the impartial hearing, the student was attending Elan (Tr. p. 26). Elan is an out-of-State residential program that has not 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). During the 2006-07 school year, Elan was approved by the Commissioner of Education as an emergency interim placement for students (Tr. p. 558). According to Elan's staff, after completing the program at Elan, most students go directly to college (Tr. p. 492). The student's eligibility for special education services as a student with an emotional disturbance is in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The student's prior educational history is described in Application of the Dep't of Educ., Appeal No. 06-077, and will not be repeated here in detail. Briefly, the student attended a district school for kindergarten and in first grade began attending a private school (Parent Ex. E at p. 1). The student reportedly exhibited behavioral problems from an early age and required tutoring to keep up with her peers academically (Tr. pp. 318-19; Parent Ex. E at pp. 1-2). The hearing record reflects that during the student's tenth grade year, she exhibited behavior that included drug involvement and running away as well as failing grades, and in June 2004 the student was asked to leave the private high school she was attending (Tr. p. 28; Parent Exs. C at p. 2; E at p. 2). The student then briefly attended two other private high schools, which she was also asked to leave as a result of truancy, theft of student property, and drug use (Tr. pp. 29, 336-40; Parent Exs. C at p. 3; D at p. 2; E at p. 2; G at p. 2). Thereafter, the student attended an out-of-State private residential school for part of her eleventh grade year (2004-05) which she was also asked to leave as a result of "manipulative, deceitful, and lying behavior," and she was subsequently enrolled by the parents in a private "wilderness program" (Tr. pp. 30, 73; Dist. Ex. 7 at p. 2; Parent Ex. E at p. 2). The parents enrolled the student at Elan on January 30, 2006 (Tr. pp. 358-59; Parent Ex. O). On the

¹ The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

Elan application for admission, which they completed on the date of enrollment, the parents reported that the student was not "sad or low" and not "thinking about suicide" (Dist. Ex. 22 at p. 4).

On August 31, 2006, a State Review Officer (SRO) decision was rendered in Application of the Dep't of Educ., Appeal No. 06-077, an appeal regarding the parents' request for tuition reimbursement for the student's attendance at Elan and at another private school for the 2005-06 school year. The decision in Application of the Dep't of Educ., Appeal No. 06-077 denied the parents' tuition reimbursement request finding that while the impartial hearing officer found that the student "exhibited inappropriate types of behavior or feelings under normal circumstances," the hearing record did not show that the student's condition had affected her educational performance to the extent that the student required special education services and programs (Application of the Dep't of Educ., Appeal No. 06-077; see 34 C.F.R. § 300.8[c][4][c]; 8 NYCRR 200.1[zz][4][iii]). Ultimately it was found that the hearing record in that case did not afford a basis for classifying the student with an emotional disturbance (Application of the Dep't of Educ., Appeal No. 06-077). That case was appealed to the federal District Court in the Southern District of New York and a decision is pending there.²

By letter dated June 26, 2006, the parents requested a CSE meeting to discuss their daughter's educational needs and to develop an individualized education program (IEP) (Dist. Ex. 4). Seven weeks later, on August 15, 2006, the district sent the parents a notice of referral and a request for consent for an initial evaluation (Dist. Exs. 5; 6).

A district social worker obtained a social history from the student's mother on September 8, 2006 (Dist. Ex. 7 at p. 1). The social history indicated that the student was in the twelfth grade at Elan and that the parents intended to have her evaluated by a private psychological examiner because the student was not permitted to come home (id.). The student's mother further reported that since the student had been at Elan she had "go[ne] from a B student to an A student," was doing her homework, was very compliant with the rules, and "dressed appropriately to the school's standard;" however, she was still stealing (id.).³ The student's mother signed the consent for initial evaluation on September 9, 2006 (Dist. Ex. 6).

A private psychological examiner, engaged by the parents, conducted an evaluation of the student on October 16, 2006 at Elan and produced a psychological evaluation summary dated October 27, 2006 (Parent Ex. F at p. 1).⁴

² Civil Docket #:1:06-cv-15524 (MGC).

³ The social history references an "attached social history dated September, 23, 2005" for information regarding the student's educational history prior to Elan, birth history and developmental milestones, and family composition (Dist. Ex. 7 at pp. 1, 2).

⁴ The hearing record reveals that the parents had obtained the name of the private psychological examiner who they engaged to conduct the October 2006 evaluation from Elan (Tr. pp. 279-81). The private psychological examiner had been involved with approximately eight other impartial hearings regarding students from the district and each time he appeared on behalf of parents after being referred by Elan (id.). He also apparently provides testimony in other states on behalf of parents related to Elan placements (see, e.g., In re Warwick Sch. Dist., 102 LRP 28571 [SEA PA 2002]).

The private psychological examiner reported that his evaluation of the student included a review of the student's progress reports from Elan, prior high school records, prior evaluations, and prior impartial hearing decisions, a developmental history obtained from the student's mother, administration of selective subtests of an instrument identified in the hearing record as the "Woodcock-Johnson Third Edition," administration of the Achenbach Child Behavior Checklist (CBCL) and other projective testing, and an interview of the student conducted on October 16, 2006 while the student was in attendance at Elan (Parent Ex. F at p. 1). It does not appear that the private psychological examiner interviewed any of the student's then current school personnel.

The private psychological examiner noted that the student had previously received diagnoses of a conduct disorder, childhood onset type mild; trichotillomania (compulsive hair pulling); an expressive language disorder mild; a "mood disorder" for which she was treated with medication in the tenth grade; that the presence of borderline personality features had been noted; and that the student had been "involved in different therapeutic venues," which included dialectic behavior therapy (DBT), for several years (Parent Ex. F at pp. 1, 3).

The evaluation summary indicated that the student described herself as "someone who always wanted to be liked and that being connected to others was very important to her" (Parent Ex. F at p. 3). The student reported to the private psychological examiner that she engaged in "cutting" behavior for "joining with others" (*id.*). The student also reported lying to and stealing from her peers, stating that she "needed to do it" and that she "liked the rush" of stealing (*id.*). The student reportedly at times, stole from her friends and would subsequently buy them something with the stolen items which, the private psychological examiner opined demonstrated the "depth of her desire to be accepted as well as her poor impulse control" (*id.*). The evaluation summary indicated that the student described herself as "emotionally vulnerable" and often acting "like a drama queen" (*id.* at p. 8). The student reported that she easily became jealous, which quickly turned to anger and that when she started to "react," she quickly escalated to a high level, which the private psychological examiner opined endorsed many of the characteristics of those who struggle with emotional dysregulation and specifically those with a borderline personality disorder (BPD) (*id.*).

In order to gather subjective information regarding the student's feelings and behavior, the student was given the youth self report (YSR) version of the CBCL to complete (Parent Ex. F at p. 9). The student's responses on the YSR yielded scores in the normal range for the somatic complaints, thought problems, attention problems, aggressive behavior, anxious/depressed and withdrawn scales; and scores in the clinical range for social problems and delinquent behavior scales (*id.*). The private psychological examiner noted that the behaviors that make up the delinquent behavior scale are closely associated with actions that fall under the clinical diagnosis of a conduct disorder (*id.*). The student's score on the internalizing domain was in the normal range, while her score on the externalizing domain was in the clinical range, as was her total competence score (*id.*).⁵

The private psychological examiner also administered a variety of projective instruments (Parent Ex. F at p. 9). He determined that the results indicated that the student had extremely high

⁵ The hearing record reveals that a "total competence score" combines every clinical social scale on the CBCL to measure how effective a person is overall (Dist. Ex. F at p. 9).

needs for recognition and nurturance, and a "very tightly held belief that even when she tries she will not be able to change things and be successful" (id.). The private psychological examiner opined that the "collision" between the student's "desperate desire for acceptance and nurturance" and her belief that these needs cannot be achieved was a major component of her mood vacillation (id.). The psychological examiner also administered the Millon Adolescent Clinical Inventory (MACI), to the student who identified lonely\depressed and fearful\worrying as the problems that troubled her most (id. at p. 10). The private psychological examiner determined that the student's MACI profile suggested a severe level of disturbance consistent with "a borderline personality pattern" and noted that the student's responses were consistent with those on several of the other personality inventories administered (id.).

The evaluation summary noted the psychologist's opinion that although the student could function on a "satisfactory day-to-day basis," she frequently experienced "periods of marked emotional and behavioral dysfunction as evidenced by her transitory behaviors such as self harm, trichotillomania, temper tantrums etc." (Parent Ex. F at p. 10). The student reported being "hypersensitive and apprehensively ill-at-ease" to the psychologist and that she experienced "a constant and confusing undercurrent of tension, sadness, and anger" (id.) The private psychological examiner determined that dysthymic features were interwoven with the student's "fretful and anxious feelings" and that her "low self-esteem and apprehensive fear of loss lead her to feel increasingly hopeless as well as to think at times that suicide might be the best way out," which he opined was likely the cause of her prior hospitalization for an overdose (id.).

The private psychological examiner offered Axis I diagnoses of a conduct disorder, childhood onset type (mild); a major depressive disorder, recurrent, severe without psychotic features; a generalized anxiety disorder; and a parent-child relational problem (Parent Ex. F at pp. 10-11). The private psychological examiner also offered an Axis II diagnosis of a "R/O"⁶ BPD, indicating that although the student met the diagnostic criteria for BPD, the diagnosis was not generally given until adulthood and he opined that he "fully expect[ed] that the BPD diagnosis [would] be applied to her accurately within the next 2-5 years" (id.). The private psychological examiner noted that the student's current assessment was consistent with previous evaluations and observations by other treatment providers, which he determined indicated that the student's difficulties were emotionally based and though, at times, she seemed capable and in control, her behavior was not willful and that he "firmly believ[ed] that [the student] was seriously emotionally disturbed" (id. at p. 11). He indicated that the student displayed a "lifelong pattern of emotional instability, reactivity to situations that often seem out of place, extreme fear of emotional vulnerability and impulsive reactions that often result in delinquent behavior" (id.). He concluded that: (1) the evaluation does not suggest significant learning difficulties and the student's difficulties have not had an adverse impact on her education in terms of academics; (2) there is an underlying disturbance of mood and unhappiness inappropriate to the situation that has existed for a long time; (3) when the student has been emotionally available for her education, or the setting has met her needs such as her current placement, she is able to appropriately engage in her education; (4) without a structured setting that is able to mitigate her emotional distress and maintain accountability across all settings, the student is unable to be successful in school and in social relationships; and (5) the student does meet criteria for identification as a student with a

⁶ Testimony indicates that "R/O" means "rule out" (Tr. p. 251).

'Serious Emotional Disturbance' and that she is in need of a highly structured residential placement in order to access her education (id.).

He recommended that the student continue in a structured residential placement where "the opportunity for avoidance and deflection of blame onto others cannot exist" (Parent Ex. F at p. 11). Although the private psychological examiner stated that the student required DBT which he indicated was the only evidence based treatment shown to be effective with personality structures such as the student's, he opined that its use was premature and that the student needed to be in an "environment that interrupts, redirects, and then reinforces her behavior for taking the appropriate redirection and is able to provide a sense of accomplishment, such as ascending a level system" (id. at pp. 11-12). He recommended no immediate treatment or services for the major depressive disorder, recurrent, severe without psychotic features, which he had diagnosed.⁷

Following receipt of the October 2006 private psychological evaluation summary, the CSE convened on November 15, 2006 (Dist. Ex. 13 at p. 1). The meeting was attended by the district's psychologist who also acted as a district representative, the student's mother, a district regular education teacher, a district special education teacher, and an additional parent member (Tr. pp. 50-51; Dist. Ex. 13 at p. 2;). The CSE meeting also included the parents' attorney, and, participating via conference call, an Elan psychologist, an Elan regular education history teacher, an Elan "house director," and the Elan coordinator of special education services (Tr. p. 51; Dist. Ex. 13 at p. 2). The hearing record reflects that in addition to the October 2006 private psychological evaluation summary, the CSE reviewed and considered information from the Elan staff regarding the student's grades and academic performance, a 2005 neuropsychological evaluation and a 2006 social history report (Tr. p. 194; Dist. Ex. 13 at pp. 3, 4, 6). The CSE determined that the student was ineligible for special education services (Dist. Ex. 13 at p. 1). The district's psychologist documented the "rationale" of the CSE and wrote, among other things, (1) that there was consensus that the student was not learning disabled; (2) that her history teacher reported to the CSE that there were no behavior issues, that the student was focused, was great at expressing herself, and was a great class participant; (3) that she has the ability to learn and that nothing was impacting her ability to learn and do well academically; and (4) the student was "not...emotionally disturbed because her current grades are in the 90's and [she] is doing well academically," (Tr. p. 196; Dist. Ex. 14). She also recorded that in terms of the student's social and emotional development that the school staff reported that the student was somewhat passive but behaved in a respectful fashion (Dist. Ex. 14).

The parents filed a due process complaint notice dated February 20, 2008 seeking tuition reimbursement for their placement of the student at Elan for the 2006-07 school year (Dist. Ex. 1). The parents alleged that since the student had been placed at Elan, she had made significant emotional and academic progress (id. at p. 2). The parents alleged that the November 15, 2006 CSE failed to properly classify the student and failed to recommend an appropriate program for the student for the 2006-07 school year (id. at p. 3). The parents further alleged that the November 2006 CSE based its decision not to classify the student on insufficient data, failed to consider the

⁷ I note that the October 2006 private psychological examiner's report was not contained in the hearing record of the previous case involving this student, Application of the Dep't of Educ., Appeal No. 06-077.

student's history of school failure, and failed to consider the opinions of the professionals who had personal knowledge of the student (id.).

An impartial hearing began on May 9, 2008 and concluded on June 19, 2008, after three days of testimony (Tr. pp. 20, 314, 525). In support of its case, the district submitted documentary evidence and presented one witness, the district's psychologist who also was the district representative at the CSE meeting (Tr. pp. 42-43, 50). In support of their case, the parents submitted documentary evidence and presented five witnesses including the private psychological examiner who conducted the October 2006 psychological evaluation of the student, the student's father, a clinical psychologist at Elan, Elan's director of education and an Elan social worker (Tr. pp. 216, 318, 488, 557, 577).

The impartial hearing officer rendered his decision on August 4, 2008 (IHO Decision at p. 12). The impartial hearing officer discussed the factual and legal arguments of both parties and then described the contents of the testimony of each of the witnesses (id. at pp. 2-9). The impartial hearing officer determined that the private psychological examiner's opinion that the student exhibited two of the five criteria for an emotional disturbance classification⁸ and that the resulting emotional disturbance affected her school performance was convincing (id. at pp. 11-12). The impartial hearing officer further found that Elan was an appropriate placement for the student and that the student had been making good progress there (id. at p. 12). Lastly the impartial hearing officer found that the equities were in the parents' favor and ordered that the district provide full reimbursement for tuition costs at Elan for the 2006-07 school year (id.).⁹

The district appeals from the impartial hearing officer's decision, asserting that: (1) the impartial hearing officer erred in finding that the student met the requirements for a classification of an emotional disturbance because the November 2006 CSE was properly constituted and correctly determined that the student exhibited none of the five emotional disturbance factors and that the student in fact suffered from a conduct disorder and engaged in willful bad behavior; (2) the impartial hearing officer erred in finding that Elan was appropriate for the student because the parents failed to demonstrate that the program at Elan met the student's unique educational needs and the impartial hearing officer failed to provide basis in the hearing record for his conclusion that Elan was appropriate; and (3) the impartial hearing officer erred in finding that the equities lie with the parents because the parents failed to cooperate with the CSE by refusing to bring the

⁸ Specifically, criteria "[C]" "inappropriate types of behavior or feelings under normal circumstances" and "[D]" "a general pervasive mood of unhappiness or depression" (see 34 C.F.R. § 300.8[c][4]).

⁹ Although, in his decision, the impartial hearing officer provided a recitation of the evidence presented to him at the impartial hearing, his decision lacks any specific cites to transcript pages or exhibit numbers. State regulations provide in relevant part that "[t]he decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. Furthermore, the impartial hearing officer's legal reasoning and analysis of the parents' claims was sparse, encompassing only a few sentences in the 12-page decision (IHO Decision at pp. 11-12). State regulations provide that "[t]he decision of the impartial hearing officer ... shall set forth the reasons and the factual basis for the determination" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is encouraged to comply with State regulations, cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that references applicable law in support of his conclusions.

student to the district to be evaluated and by failing to provide timely consent to the district for an evaluation.

The parents answer, contending that: (1) the impartial hearing officer correctly held that the student should be classified as emotionally disturbed because the student meets at least two of the five criteria for emotional disturbance and there is ample evidence in the hearing record to show that her disability adversely affected her educational performance; (2) the impartial hearing officer properly found that the program at Elan was reasonably calculated to confer educational benefits to the student because the school's counseling program met her psychological needs and the setting met her behavioral needs as demonstrated by her behavioral and academic progress made at the school; and (3) the impartial hearing officer correctly found that the equities favored the parents because the parents cooperated with the CSE by consenting to evaluations shortly after the consent request was made by the district. Additionally, the parents assert that although they refused to remove the student from Elan to travel back to New York for an evaluation, they did so upon the advice of Elan staff. The parents also argue that the equities lie in their favor because the district agreed to an independent evaluation, paid for by the parents and the parents presented that evaluation, as well as earlier evaluations, to the CSE and brought Elan staff members to the CSE meeting.

The Office of State Review requested letter briefs from the parties on October 24, 2008 and November 25, 2008 (see 8 NYCRR 279.10[b]). These briefs were submitted by the parties in a timely fashion and have been considered in the review of this appeal.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are: (1) to ensure that students with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent

seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). This case commenced after the statute took effect, on February 20, 2008 (Dist. Ex. 1 at p. 1).

Initially, I will consider the impartial hearing officer's determination that the student should have been classified by the CSE as a student with an emotional disturbance.

A student with an emotional disturbance must meet one or more of the following five characteristics:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (*id.*). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (*id.*; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at *9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04

[2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz, 307 F. Supp. 2d at 399; see also M.H. v. Monroe-Woodbury Cent. Sch. Dist., 2008 WL 4507592 [2d Cir. Oct. 7, 2008]). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546). Moreover, as noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clarke, 48 IDELR 77).

The district argues that the impartial hearing officer erred in finding that the student met any of the five criteria for emotional disturbance set forth in the statute and State regulations, while the parents argue that the impartial hearing officer correctly found that at least two of the criteria were met.¹⁰ At the outset, I note that although a CSE is required to consider reports from privately retained experts, 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 support of the CSE's determination to not classify the student as emotionally disturbed, the district presented testimony from its school psychologist who was also the district representative at the November 2006 CSE meeting (Tr. p. 44). The hearing record reflects that although the district's psychologist had never met the student (Tr. p. 153), she holds a Masters degree in clinical psychology, a PhD in urban school psychology, a "four year post doctoral certificate" in psychoanalysis and psychotherapy, and has practiced as a school psychologist for more than 30 years (Tr. p. 77).

Although the impartial hearing officer found that the student met criteria (C): "[i]nappropriate types of behavior or feelings under normal circumstances," the district's psychologist testified that that "nothing [the student] does seems to have affected her ability to learn or her educational performance when she chooses to do so ... even if she was doing all these other types of behaviors ... it seems she could settle down when she wanted to and learn and study, and apply herself" (Tr. pp. 77-78). In her testimony, the district's psychologist also disagreed with the private psychological examiner's opinion that the student was disabled and stated that in her opinion, the student suffered from a conduct disorder, a diagnosis given to the student by two previous evaluators, evidenced by willful behavior that could best be described as social maladjustment (Tr. pp. 52-54). The district's psychologist defined a conduct disorder as "going against the norms," which she indicated could be defying the norms of the school, defying school regulations, or defying the acceptable social norms of society (Tr. pp. 75-76). She opined that the student's behavior was typical of a person with a conduct disorder, stating that individuals with a

¹⁰ There appears to be consensus among the witnesses from both sides of the case that the student did not manifest criteria (A): "an inability to learn that cannot be explained by intellectual, sensory, or health factors;" criteria (B): "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;" or criteria (E): "a tendency to develop physical symptoms or fears associated with personal or school problems" (Tr. pp. 59, 74, 85-86, 273-74; see 34 C.F.R. § 300.8[c][4]).

conduct disorder do not disregard rules all of the time (Tr. p. 77). She testified that "if it serves their best interests, they can choose to obey the rules. So long as they are getting what they want. And then when they want something else, and it goes against the rules, they will go against the rules" (*id.*). The district's psychologist further testified regarding the traits of a social maladjustment, which she indicated included being "manipulative;" exhibiting "antisocial acts" such as drug use, lying, or stealing; impulsiveness; a need for immediate gratification; blaming others for one's problems and a need for control (Tr. p. 94). Although she indicated that a student could be both socially maladjusted and emotionally disturbed, such determination was made on a case-by-case basis and based on a close review of clinical material, and she opined that the behaviors exhibited by the student were not behaviors that would satisfy any of the five criteria; therefore, the student did not qualify as a student with an emotional disturbance under the IDEA (Tr. pp. 54, 59, 74, 77-78, 79-80, 85-86, 132). During her testimony, the district's psychologist referenced a 2005 report from a private neuropsychological evaluation in which that evaluator indicated that the student's reality testing was grossly intact (Tr. pp. 123-24). The district's psychologist opined that this signified that the student was "quite capable of being aware of her surroundings and aware of her impact and ability to make choices," that the student could perceive reality the way other people perceived it, that she was not in a world of her own, and that she could understand the rules of society, she just disobeyed them (Tr. pp. 124, 157). The district's psychologist further testified that she believes that the student knows right from wrong and chooses to engage in delinquent behavior (Tr. pp. 150-51). She indicated, however, that she did not disagree with the June 2005 private evaluator's opinion that the student experienced "considerable personal stress stemming from issues of self esteem and the conflict engendered by her persistent need for nurturing and affection and her impuls[ive] willful obstinate behavior" and that the resulting anxiety often was sufficient to compromise the student's judgment thereby exacerbating her negative and often self-destructive behaviors (Tr. pp. 160-61).

Regarding criteria (D): "[a] general pervasive mood of unhappiness or depression," which the impartial hearing officer also found was present, the district's psychologist referred in her testimony to an undated evaluation conducted by a child and adolescent psychiatrist when the student was 16 years old and testified that, "[the student] has had periods of depression and periods of unhappiness, but she was also diagnosed as being cyclothymiac, and that means cyclical" (Tr. p. 79; Parent Ex. G). The district's psychologist also opined that, "it's not like she had a severe depression and was in a depression constantly. She goes back and forth. And I think this fits a conduct disorder. She could be happy when she was getting what she wants, she could be depressed when she wasn't" (Tr. p. 80).

The district's psychologist noted in her testimony that although the private psychological examiner included a diagnosis of a major depressive disorder in his evaluation summary, he made no recommendations for a psychiatric evaluation of the student or for any treatment, which she opined was "atypical" (Tr. pp. 97-99, 106-07). The district's psychologist testified that the DBT, which the private psychological examiner indicated the student required, referred to the student's conduct disorder and was used predominantly to treat patients with a BPD, not a major depressive disorder (Tr. pp. 110-12). The district psychologist also noted that although the private psychological examiner's 2006 evaluation report indicated that the student met the criteria for a diagnosis of a major depressive disorder, his evaluation report indicated that the student's manner throughout the session was polite and easygoing, that she demonstrated a cooperative and thoughtful approach, was oriented to all spheres, and that there was no obvious psychopathology

(Tr. p. 91). She testified that the CSE placed a lot of "weight" on these statements and she opined that these were not characteristics associated with a major depression (id.).

The private psychological examiner who performed the October 2006 evaluation testified that in the presence of typical situations an adolescent might face, such as rejection or a typical critical comment, the student in the instant case would have a "really intense or extreme reaction to that" and that "rather than let it go or move through it very quickly, [she would] hang onto it for a longer period of time" (Tr. p. 233). He testified that the student was "desperate" for acceptance and nurturance and that because of her "really limited emotional flexibility" any little disappointment or setback would cause her to "make a mountain out of a molehill," which he described as a "pretty miserable place" emotionally for the student (Tr. pp. 233-34). He stated that the student's hypersensitivity led her to the behavior of "scanning her environment and again picking up all kinds of things that everybody else would see and pay no attention to because they don't seem relevant" and that the student's behavior "far exceeds what you would expect as typical adolescent turmoil" (Tr. pp. 240, 252).

The private psychological examiner further testified that the student's dysthymia was "pervasive" because it had "exist[ed] for quite a while, not just situationally" and that the student reported feelings of loneliness, depression, fearfulness and worrying, that she was "always feeling lonely, feeling depressed" and that she feels "very isolated, that she can't connect well" and that she was "constantly on guard" from feeling vulnerable and that people were "unaccepting" of her (Tr. pp. 236-37, 241). Notably, the private psychological examiner agreed that the student properly had a diagnosis of a conduct disorder, and could be considered "socially maladjusted," but that she was in addition, "seriously" emotionally disturbed (Tr. pp. 255-57; Parent Ex. F at p. 11). He testified that the student's anxiety and emotional distress were not under her control, but that the outlet of that distress resulted in behavior and actions that fall under the diagnosis of conduct disorder; however, the private psychological examiner believed that behavior was not entirely willful and by choice, but was at least partially a product of her clinical emotional issues (Tr. pp. 247-48). The hearing record also reflects that the private psychological examiner holds a Masters degree in school psychology, a doctorate in school psychology with an emphasis in neuropsychology, and has practiced for approximately 20 years (Tr. pp. 217-19).

In light of the above, I find that even if the impartial hearing officer's finding that the student satisfied criteria (C) and (D) of the definition of emotional disturbance is correct; as further described below, the hearing record reflects that the student's educational performance was not adversely affected such that she required special education.

A review of the hearing record shows that the student's academic performance has been inconsistent and that she has often received average or above average grades at the same time that she has failed other classes (Dist. Ex. 25; Parent Ex. W). Teacher comments were similarly inconsistent, with teachers from the second private high school attended by the student noting that the student often did not complete homework assignments and needed to take her academic studies more seriously (Dist. Ex. 25 at pp. 6-7; Parent Ex. W at pp. 3-5).¹¹

¹¹ I note that the evidence contained in Parent Ex. W and Dist. Ex. 25 consisting of grades and progress reports from the student's various high school placements, was not contained in the hearing record of the previous case involving this student, Application of the Dep't of Educ., Appeal No. 06-077.

A June 2002 progress report completed at the end of the student's eighth grade year indicated that the student achieved grades of 74 ("C") in language arts, 78 ("C") in social studies, 78 ("C") in science, 80 ("B") in mathematics, 98 ("A") in art, and 85 ("B") in computer science (Dist. Ex. 25 at p. 3).¹² Regarding the student's skill development in each content area, the progress report noted primarily "outstanding" and "satisfactory" ratings with "needs improvement" indicated in reading, specifically vocabulary development and organization and comprehension of assignments; in writing, specifically organization and completion of assignments; in social studies, specifically organization and completion of homework; and in science, specifically organization and completion of homework (*id.*).

For the 2002-03 school year, when the student was in the ninth grade, she reportedly earned grades of "P" in social studies, Hebrew I, and physical education and grades of "F" in English I, geometry, conceptual physics, and music (Parent Ex. W at p. 2).¹³ The student subsequently attended summer school during summer 2003 and earned grades of "A" in English I, 88 ("B+") in geometry, and 78 ("C+") in modern world history (Dist. Ex. 25 at p. 5; Parent Ex. W at p. 2). For the 2003-04 school year when the student was in the tenth grade, she reportedly earned grades of "F" in English II, "F" in social studies II, "C-" in algebra II, "F" in chemistry, "B+" in Hebrew II, "F" in music, and "P" in physical education (Parent Ex. W at p. 2). As a result of behavioral incidents, the student was asked to leave that school in June 2004 (Parent Exs. C at p. 2; F at p. 4). During summer 2004, the student participated in two writing courses at a local college for which she earned four undergraduate credits and received grades of "B+" and "B" (Parent Ex. W at p. 2).

The parents enrolled the student in a second private high school for the 2004-05 school year, when the student was in the eleventh grade (Parent Ex. E at p. 2). December 2004 interim progress notes indicated that in advanced U.S. history, algebra II and trigonometry, and health, the student exhibited "good" behavior in the classroom, was not completing all of her assigned homework on time, and was "failing to meet expectations" (Parent Ex. W at pp. 3-5). The student received first semester grades of "C+" in English II, "C-" in English III, "F" in advanced U.S. history, "F" in health education, and "P" in physical education (*id.* at p. 2).¹⁴ A January 2005 report card indicated that the student received test scores of 100, 75, 100, and 95 in English, but that her quarter grade was affected by not handing in two "critical" papers and that the student's teacher in advanced U.S. history reported that the student had "missed a considerable amount of homework," did not "do test corrections for any of her tests and quizzes," did not "make an effort to read the newspaper regularly" for weekly quizzes, and did not do "any extra credit" (Dist. Ex. 25 at p. 7).

The hearing record reflects that the student was expelled during the second semester of the 2004-05 school year for engaging in drug use with peers, "another incident involving theft of

¹² The progress report does not specify the time period covered by the report (Dist. Ex. 25 at p. 3).

¹³ Although not clarified in the hearing record, it is presumed that "P" indicates "pass" and "F" indicates "fail." The hearing record reflects that the school attended by the student did not provide ninth grade students with grades (Dist. Ex. 25 at p. 4). A "secondary school record" prepared by one of the private day school attended by the student contains a cumulative record of the student's grades from eighth grade through eleventh grade (Parent Ex. W at p. 2).

¹⁴ The secondary school record indicates "w/d" for chemistry and the symbol "-" for algebra II/trigonometry, enriched (Parent Ex. W at p. 2).

student property," and "cut[ting] classes" (Parent Exs. C at p. 3; D at p. 2; G at p. 2). The student was subsequently enrolled by her parents in a third private high school in February 2005 (Parent Ex. C at p. 3). She was expelled from the third private high school after two months, following an incident involving the theft and use of a classmate's credit card (*id.*). A document issued by the third private high school dated September 1, 2005 reflected that the student achieved grades of "B" in English III, "F" in U.S. history, "B+" in advanced geometry, "B-" in ecology, "C" in study skills, "B" in art, and "F" in physical education and that the student received an "A" in health and a "B" in U.S. history in summer school; however, it is not clear in the hearing record which private high school the student was attending at the time she received the aforementioned grades (Parent Ex. W at p. 1). The parents placed the student in her first residential placement on August 17, 2005 (Parent Ex. E at p. 2). A progress report dated November 2005 from that residential placement indicated that the student received grades of "B" in novel, "D" in U.S. history, "D" in pre-calculus, "C" in chemistry, "B" in beginning Spanish and "A" in studio art (Dist. Ex. 25 at p. 9). According to her mother, the student did not want to comply with the rules of the residential placement and the placement did not allow her to continue there (Tr. p. 73; Dist. Ex. 7 at p. 2).¹⁵

A report card from Elan for the first quarter of the 2006-07 school year reflected that the student achieved an overall academic average of 93.7 and high honor roll status (Dist. Ex. 20 at p. 1). The student received grades of 92 in environmental science, 96 in English IV, 93 in U.S. history, and "P" in physical education (*id.*). October 2006 educational progress reports for the student's core academic classes at Elan all indicated a rating of "excellent" for "student attitude," "understanding of subject," "class participation," and "homework quality;" a rating of "always" for "follows directions;" a rating of "on time" for "homework is submitted;" and a rating of "high" for "testing performance" (*id.* at pp. 2-4). Teacher comments reflected that in environmental science "she [wa]s an upbeat student who smile[d] often," that she "excelled in all areas" in English IV "from the first day of the first quarter to the last," and that she had shown improvement in her writing and was better prepared for quizzes in history (*id.*).

At the impartial hearing, the district's psychologist testified that the reason the student was found not eligible for special education programs and services was because the evaluations reviewed by the CSE indicated that the student was capable of doing schoolwork but chose not to, that she was expelled by a number of schools due to delinquent behaviors such as lying and stealing, and that she was performing well academically at Elan (Tr. pp. 54, 59, 74-75, 77-78, 79-80, 85-86). The district's psychologist testified that she believed that the student's good grades at Elan and elsewhere were an indication that she could do well in classes when she decided to apply herself (Tr. p. 66). As evidence of this, she pointed to the student's grades, standardized test scores, and neuropsychological evaluations, which reflected that the student had "managed to learn and continue[d] to manage to learn" despite her exhibition of socially maladjusted behaviors (Tr. p. 164). The district's psychologist further testified that the student had managed to accumulate a body of knowledge that had increased every year and that she had "kept up" with her age peers (*id.*). She further pointed to the 2006 private psychological examiner's evaluation report in which the student reported to the private psychological examiner that her pattern in school was doing poorly or failing the first half of the year, and then "busting her butt" during the second half of the year and doing "okay" (Tr. p. 164; Parent Ex. F at p. 4). The district's psychologist testified that

¹⁵ There is no information in the hearing record regarding the student's educational performance at the wilderness program she attended following her first residential placement.

she found it significant that according to the 2006 private psychological examiner's evaluation report, the student did not report any particular problems with learning and said that paying attention in class was never a problem if she bothered to try, citing to the effort she made in an attempt to be accepted at a particular high school for the ninth grade (Tr. p. 179; Parent Ex. F at p. 4). The district's psychologist further testified that these statements demonstrated "very purposeful behavior" and were indicative that the student was capable of making choices and exhibiting judgment and that she was capable of understanding that at times she made choices that were "against societal norms" and probably "hurtful to herself" (Tr. p. 181). The district's psychologist expressed that when the student "felt like it," she made the choices to learn and study (Tr. p. 182).

The private psychological examiner who conducted the October 2006 evaluation of the student also testified regarding the student's educational performance (Tr. pp. 225-32, 236-40, 259-60). When asked whether the student was usually emotionally available for her education or whether she had difficulties truly participating in her education before attending Elan, the private psychological examiner answered that based on the student's school records and the reports of the student and her parents, "she was there and not being able to function" (Tr. p. 227). He opined that "if you look at not so much academic test scores like on standardized tests, that you look at her classroom performance and her functioning in those environments ... she was not successful" (*id.*). However, I find that the hearing record reflects that the student's erratic grades and failure to succeed at the schools she has attended are better attributed to her truancy, drug and alcohol use, and delinquent behavior rather than to any emotional disturbance (*see, e.g., N.C. v. Bedford*, 473 F. Supp. 2d at 547-49, *aff'd* 2008 WL 4874535 [2d Cir. Nov. 12, 2008]).

The hearing record reveals that a June 2005 private neuropsychological evaluation report, a July 2005 report from a private therapist providing the student with DBT, and an undated report from a private child and adolescent psychiatrist, all reveal that the student has a history of drug use dating back to at least 2004 which, in addition to her stealing behavior, was cited as the reason for her expulsion from all three private high schools that she attended (Parent Exs. C; D; G). A July 2005 report from the student's DBT therapist stated that the student's participation in treatment was "poor" and that within the first six months of treatment the student broke three "cardinal rules" including coming to treatment under the influence of drugs on more than one occasion (Parent Ex. D at p. 1). The therapist also reported that although the student had stopped cutting herself, purging, and pulling out her hair; her lying, stealing, school truancy, and drug use continued (*id.* at p. 2). He also stated that despite the student being upset that she was caught stealing and consequently being asked to leave school, she had no remorse for the friend whose credit card she had stolen and used (*id.*). Moreover, the hearing record reflects that a 2005 neuropsychological evaluation report indicated that any attempts by the parents to establish control were met by the student threatening to cut herself or pull out her hair, which the evaluator characterized as a powerful means of gaining control over the significant adults in her family that the student had adopted (Dist. Ex. 18 at p. 7; Parent Ex. C at p. 7).

In sum, I find upon reading the whole record, that the weight of the evidence in the hearing record supports the district's position and does not support the impartial hearing officer's decision that the CSE failed to properly classify the student as disabled under the IDEA (IHO Decision at pp. 11-12).

I have considered the parties' remaining contentions, including the parents' assertion that a classroom observation was not performed by the district, and find that in light of my determinations herein, any procedural arguments are not dispositive.¹⁶

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated August 4, 2008 is annulled in its entirety.

Dated: **Albany, New York**
 January 9, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

¹⁶ Although the district did not conduct a classroom observation of the student at Elan, the hearing record reflects that the CSE participants from Elan included in addition to its psychologist, coordinator of special education services, and the student's house director; the student's regular education history teacher who provided specific information to the CSE regarding the student's classroom performance (Dist. Ex. 13 at pp. 2, 4).