The University of the State of New York

The State Education Department
State Review Officer

No. 08-101

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

Appearances:
Ingerman Smith, LLP, attorneys for respondent, Susan E. Fine, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's independent educational evaluation (IEE). The appeal must be dismissed.

Initially, a procedural matter must be addressed. The parent attached four documents to her petition and seeks to submit the documents as additional evidence for consideration (Pet. Exs. A-D). The district objects to the consideration of the additional evidence on the grounds that although the documents were not available at the time of the impartial hearing, the documents are not necessary in order to render a decision in this matter. The district also attached one document to its answer as additional evidence for consideration (Answer Ex. A). The parent did not object to the district's 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 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; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Giving the district's argument due consideration, I agree with the district's objection to the proffered additional evidence and therefore, I decline to accept the documents because they are not necessary in order to render a decision in this appeal. I also decline to accept the additional evidence attached to the district's answer as it was available at the time of the impartial hearing and is not necessary in order to render a decision in this appeal.

At the time of the impartial hearing, the student attended an integrated special class in a district elementary school and received related services of speech-language therapy, occupational therapy (OT), and vision therapy (Tr. pp. 69-70; Dist. Exs. 13 at pp. 1-4; 14 at pp. 1-4; 15 at pp. 1-4).[1] In addition, the student received assistive technology services/support, support for school personnel related to behavioral intervention consultations, and physical therapy (PT) consultant services (Dist. Exs. 13 at pp. 3-4; 14 at pp. 3-4; 15 at p. 4).[2] The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

On June 4, 2007, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop his individualized educational program (IEP) for the 2007-08 school year (Dist. Ex. 13 at p. 1). The CSE meeting included the following individuals in attendance: the district's director of special education (director), a district psychologist, a regular education teacher, a special education teacher, a speech-language therapist, an occupational therapist, a physical therapist, a behavioral consultant, an additional parent member, the president of a special education parents' group, and the student's mother (id.; see Tr. pp. 67-68). According to the IEP, the CSE based its recommendations for special education programs, related services, extended school year (ESY) services, program modifications/ accommodations/supplementary aids and services, assistive technology devices/support, school personnel support, and testing accommodations on several tests and evaluations, including, but not limited to, the following: the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), dated April 2007; an OT annual review report, dated April 2007; a PT annual review report, dated February 2007; and speech-language testing, dated March 2007 (Dist. Ex. 13 at pp. 1-7; see Dist. Exs. 6; 8).[3] Based upon the information presented, the CSE recommended placement in a 15:1 integrated special class and related services of OT, speech-language therapy, and vision therapy (Dist. Ex. 13 at p. 2). The CSE also recommended that the student receive ESY services during summer 2007 in a 15:1 non-integrated special class and related services of OT, speech-language therapy, and vision therapy (id. at p. 3). The CSE developed annual goals to address the student's identified needs in the areas of reading (10 annual goals), writing (5 annual goals), mathematics (5 annual goals), speech-language (9 annual goals), motor skills (5 annual goals), and vision (6 annual goals) (id. at pp. 7-13). The CSE noted in the IEP that the parent requested an assistive technology evaluation and although the CSE did not believe it was necessary at that time, the CSE agreed to "honor the parent's request" (id. at p. 1; see Tr. pp. 75-77). The parent also requested a "team meeting" in September with the student's vision therapist to "streamline goals and effective strategies," as well as a "team meeting" in November to review the student's "reading program and [vision therapy]" (Dist. Ex. 13 at pp. 1-2).

[1] Unless otherwise noted, the citations to the impartial hearing transcript refer to the June 13, 2008 transcript (Tr. pp. 1-259).

[2] A notation in the student's individual educational program (IEP) described the integrated special class as "team taught in a regular education class by a regular education teacher, a special education teacher or teacher assistant, with collaborative planning" (Dist. Ex. 13 at p. 2).

[3] The director testified at the impartial hearing that the 2007-08 IEP also included a history of the student's evaluations (Tr. pp. 93-94; see Dist. Ex. 13 at pp. 5-7). The student's 2007-08 IEP contains testing and evaluation results for approximately 21 assessments dating between January 2005 and April 2007 (see Dist. Ex. 13 at pp. 5-7).

On August 7, August 30, and September 4, 2007, the parent privately obtained a neuropsychological evaluation of the student to "refine an understanding of his cognitive strengths and weaknesses for purposes of educational planning" (Dist. Ex. 10 at p. 1). Based upon the hearing record, the parent privately paid for the neuropsychological evaluation, and she did not request the evaluation from the district or seek reimbursement for the costs of the private evaluation from the district (see Tr. pp. 13, 86-88, 227, 233-37; Dist. Ex. 10). The director testified at the impartial hearing that the CSE had reviewed the evaluation report (Tr. pp. 86-88). Based upon the evidence submitted at the impartial hearing, it appears the district did not receive the evaluation report, dated December 18, 2007, until April 28, 2008 (Dist. Ex. 10 at p. 1).

On August 8, 2007, a consultant for special education and assistive technology performed the assistive technology evaluation requested by the parent—and agreed to by the CSE—at the June 4, 2007 CSE meeting (Dist. Ex. 3 at pp. 1-5).

On September 3, 2007, the student's mother e-mailed the director to request, among other things, that her son be "assessed/screened in September for his skills" (Parent Ex. 1A at p. 1). The director responded via e-mail on September 4, 2007 that she would discuss all of the parent's concerns identified in her e-mail with the "[t]eam" that would be meeting on September 5, 2007 (see Parent Ex. 2A). On September 5, 2007, the student's mother e-mailed the director to express her thanks to the "team" that she spoke to that morning for their honesty and helpfulness; she requested a copy of the notes from the "team" meeting and to schedule a CSE meeting to revise her son's IEP (id.). The student's teacher responded via e-mail to the student's mother within approximately 20 minutes and included the meeting notes requested, which indicated the following: the student would be "screened" in reading, math, and writing per the parent's request; the student would receive five 60-minute sessions per week of math; and district personnel would work on implementing the student's "multi-sensory reading sessions" (see Parent Ex. 3A).

On September 6, 2007, the district's educational evaluator e-mailed the student's mother and noted that, as requested, she would "screen [the student] in basic academic skills using a standardized test to see where he left off after summer school" during the following week (Parent Ex. 4A; see Tr. pp. 181-82, 184-85; Dist. Ex. 9; Parent Ex. 5A). The student's mother responded later that same afternoon via e-mail that she appreciated meeting the educational evaluator and that she appreciated "all [of her] help the other morning" listening to concerns about her son (Parent Ex. 4A).

Pursuant to the parent's request via e-mail of September 3, 2007, the district's educational evaluator administered selected subtests of the WJ-III ACH (version B) to the student on September 17, 2007 to determine "what [the student] retained after summer school" in the areas of reading, math, and writing (Dist. Ex. 9 at pp. 1-3; see Parent Exs. 1A at p. 1; 3A-5A; see also Tr. pp. 83, 85). The educational evaluator testified that she chose to administer selected subtests of the WJ-III ACH to "inform the parent and the teachers of basic skill areas" (Tr. pp. 185-87). She also testified that the results were provided to the parent and to the student's teachers to help them "plan instruction" (Tr. p. 195). The director testified at the impartial hearing that the CSE had not reviewed the results because it was "to assist at the building level . . . to help the teachers guide their instruction" (Tr. p. 86).

On November 12, 2007, the student underwent a visual reevaluation by a private provider (Dist. Ex. 4 at pp. 1-2; see Tr. p. 77). At the impartial hearing, the director testified that the reevaluation arose as a result of the student's initial visual evaluation, which had been previously requested by the parent and agreed to by the district (Tr. pp. 77-78; Dist. Ex. 4 at p. 1). Based upon the hearing record, it appears that the district received the visual reevaluation report on December 4, 2007 (Dist. Ex. 4 at p. 2).

On November 14, 2007, a subcommittee of the CSE convened to review the assistive technology evaluation report, dated October 24, 2007 (Dist. Exs. 3 at p. 1; 14 at p. 1; see Tr. pp. 76-77).[4] The assistive technology evaluator attended that CSE subcommittee meeting, and the CSE subcommittee added assistive technology consultation and support to the student's IEP for December 2007 through June 2008 (Dist. Ex. 14 at pp. 1, 4; see Tr. pp. 94-95).[5] According to the meeting notes in the IEP, the CSE subcommittee also discussed the parent's request to add additional time to the student's IEP for the behavioral consultant to observe the student (see Dist. Ex. 14 at pp. 1, 4; Tr. p. 95). The CSE subcommittee agreed to the parent's request even though the special education teachers "had no knowledge of this request" (Dist. Ex. 14 at pp. 1, 4; see Tr. p. 95).

The CSE convened on December 17, 2007 to review and discuss the visual reevaluation performed on November 12, 2007 (Dist. Ex. 15 at pp. 1-2). During the meeting, the psychologist unexpectedly left to attend to "a crisis situation," and although she was not able to return to the CSE meeting, the CSE proceeded to review and discuss the reevaluation report (id. at p. 1).

On February 29, 2008, the student's mother e-mailed a letter dated March 1, 2008, to the director requesting "independent evaluations at public expense" because they "disagree[d] with the results of the school's evaluation" (Dist. Ex. 16 at p. 1). The parent requested "Full Educational testing by LindaMood Bell" and that the district pay for the testing (id.). The parent noted that the district "waited until February 2008 to update" the student's IEP goals "to meet his current methodology," which had to be "prompted by the parent" (id.). In addition, the parent asserted that the goals "did not meet [her son's] unique needs or learning style" and further, that the district "failed to create [an] updated Independent Educational Plan" for her son (id.).

By e-mail to the director, dated March 6, 2008, the student's mother requested the agenda for the upcoming "redo CSE" on March 10, 2008, as well as a list of low-income attorneys in the area (Parent Ex. 10A). The student's mother noted in the e-mail that she had previously e-mailed the secretary in the district's special education office "about sending paperwork for the Speech and Language" to the parent's requested speech-language evaluator (id.; see Tr. p. 100; Parent Ex. 32A at Ex. 7, p. 1). The e-mail indicated that the student's mother had "not heard from [the district's director] about [her] other two request[s]," that her other child would be tested at "[Lindamood

[4] Based upon the evidence submitted at the impartial hearing, it appears that the district received the assistive technology evaluation report on October 24, 2007 (Dist. Ex. 3 at p. 1). The CSE subcommittee attendees included the following: the director, the district's educational evaluator, a psychologist, a regular education teacher, two special education teachers, a speech-language therapist, an occupational therapist, a behavior consultant, the assistive technology evaluator, the president of a special education parents' group, a friend of the parent, and the student's mother (Dist. Ex. 14 at p. 1). Approximately seven members of the CSE subcommittee had attended the student's annual review on June 4, 2007 (compare Dist. Ex. 13 at p. 1, with Dist. Ex. 14 at p. 1).

[5] The assistive technology evaluator was not a district employee (Tr. pp. 75-77; see Dist. Ex. 3).

Bell]" on March 14, 2008, and that she would like "to do both children's testing that day" (Parent Ex. 10A). On March 7, 2008, the student's mother e-mailed her son's special education teacher about her concerns regarding the student's goals and his reading program, and she requested work samples addressing the student's goals (Parent Ex. 7A). The e-mail noted that the student's mother had requested and was awaiting approval for "LindaMood Bell testing," which would "allow the team to really assess how [her son] was progressing" and provide the CSE with information to "discuss what goals need to be on [her son's] IEP" (id.). The student's mother requested that that the teacher "keep working on all current IEP goals" until her son had been evaluated by Lindamood-Bell and the CSE had reviewed the report (id.).

Due to the unexpected departure of the psychologist at the December 2007 CSE meeting, the CSE agreed to reconvene at a later date "as a formality and [to] ensure regulatory procedures" were followed, and thus, the CSE met on March 10, 2008 (Dist. Ex. 15 at p. 1; see Tr. pp. 96-98).[6] The meeting notes in the March 2008 IEP indicated that the student had been receiving increased vision therapy services since the December 2007 CSE meeting (Dist. Ex. 15 at pp. 1, 3; see Tr. pp. 96-98). The CSE raised and discussed the parent's concern noted in a "November memo" about "over testing" her son, as well as the parent's February 2008 request for an "independent [s]peech and [l]anguage evaluation and an initial request for a [central auditory processing] evaluation" (Dist. Ex. 15 at p. 1; see Tr. pp. 98-99).[7] The hearing record indicated that the parent's concern about "over testing" related to receiving the district's request for consent on September 24, 2007 to perform the student's triennial testing and that she did not want "testing done at that time" because her son had been "recently evaluated" in a neuropsychological evaluation during summer 2007 (see Tr. pp. 98-99, 199-204, 219-20, 222-27, 233-39, 243-44). While the parent refused to provide consent to the district in September 2007 to perform the student's triennial testing, she did provide her consent in March 2008 for the district to perform triennial testing (see Tr. pp. 222-27, 233-39; see also Dist. Ex. 11).

The meeting notes in the March 2008 IEP indicated that when asked, the parent declined the CSE's offer to contact the behavior consultant, the assistive technology provider, and the vision therapist to participate via teleconference during the CSE meeting (Dist. Ex. 15 at p. 1). In addition, the meeting notes further indicated that when asked whether she had any other concerns or issues to address at the meeting, the parent stated that she "did not" (id.). The CSE indicated in the meeting notes that the parent's requested speech-language evaluation with a specific evaluator was "in the process as a request for an Independent Evaluation," and additionally, that the CSE agreed to consider the parent's request for a central auditory processing (CAP) evaluation after the CSE had an "opportunity to review findings" from the independent speech-language evaluation (id.).

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[6] The March 10, 2008 CSE attendees included the following: the director, a psychologist, a regular education teacher, two special education teachers, a speech-language therapist, an additional parent member, the president of a special education parents' group, an additional member of the special education parents' group, and the student's mother (Dist. Ex. 15 at p. 1). The March CSE included approximately nine members who had attended the CSE subcommittee meeting on November 14, 2007 (compare Dist. Ex. 15 at p. 1, with Dist. Ex. 14 at p. 1).

[7] The hearing record does not contain the parent's February 2008 request for the independent speech-language evaluation and the initial request for the central auditory processing (CAP) evaluation discussed at the March 2008 CSE meeting (see Tr. pp. 1-259; Dist. Exs. 2-4; 6; 8; 9-16; Parent Exs. 1A-5A; 7A-17A; 19A-21A; 23A; 27A-32A; Joint Ex. 1; IHO Ex. 2).

On March 11, 2008, the student's mother e-mailed the director and provided the director with her account of the issues discussed at the March 10, 2008 CSE meeting (Parent Ex. 8A at pp. 1-2). Among other things, the parent's e-mail indicated that the CSE "agreed to do educational testing" on her son, that the CSE needed to "review [her son's] neuro testing," and that although the CSE discussed the parent's requests for an independent speech-language evaluation and a CAP evaluation, she now realized "[the CSE] did not talk about the LindaMood Bell testing that [she] requested" (id. at p. 2). The student's mother had not received any response addressing her request for Lindamood-Bell testing, and she noted that if the district did not respond by "the end of the week . . . I will accept your silence as your approval for the evaluation and will schedule an appointment" (id.). She further indicated that the Lindamood-Bell evaluation was necessary because the district failed to provide appropriate goals for her son (id.). The student's mother concluded the e-mail by stating that as a result of learning at the March 10, 2008 CSE meeting that the district would no longer perform annual testing prior to a student's annual review but would conduct testing every three years, she requested that the district conduct "educational and related service testing and review of that testing before any annual review for [her] three children" (id.).

The parent had the student evaluated at a Lindamood-Bell center on March 21, 2008 (Joint Ex. 1 at p. 1).

On March 21, 2008, the student's mother e-mailed a March 20, 2008 letter to the secretary in the district's special education office and copied the e-mail to the director (Parent Ex. 9A at p. 3). The March 20, 2008 letter was addressed to the director and followed-up on the parent's March 11, 2008 e-mail seeking a response from the district regarding the requested IEE with Lindamood-Bell and reiterated her request for an IEE for "full educational testing by LindaMood Bell because [she] disagreed with the district's updated Independent Educational Plan for [her son] and lack of measureable progress void of objective values" (id.). On March 26, 2008, the secretary in the district's special education office responded to the student's mother via e-mail, indicating that she met with the director that same day regarding the requested IEE and that the director would address her concerns and questions (id.). The student's mother responded via e-mail on the same date to the secretary and thanked her for her response (id.).

By e-mail to the director, dated March 31, 2008, the student's mother forwarded a copy of the March 20, 2008 letter with additional questions inserted into the letter and further noted that the "district caused the delay in this IEE request" (Parent Ex. 9A at p. 2). The e-mail referred to a State complaint previously filed by the parent against the district regarding a delayed response to a previous IEE requested for another of the parent's children, and indicated that a "second [S]tate complaint will be filed tomorrow on this issue . . . if you do not rectify this by the time I arrive at [Lindamood-Bell]" (id.).

The director responded via e-mail on March 31, 2008 to the student's mother, indicating that she would respond further when she returned to her desk (Parent Ex. 9A at p. 1). In her e-mail, the director "strongly" advised the parent to "fax or drop . . . off" letters at the special education office relating to "important matters, requiring written responses, departmental procedural follow through and/or requests involving committee business," as she did not consistently read e-mails (id.).

By due process complaint notice dated March 31, 2008, the district sought an impartial hearing to challenge the parent's request for an IEE alleging that the district's evaluations were appropriate and accurately conveyed the student's learning abilities (see Parent Ex. 32A at Ex. 1). The district also alleged that qualified professionals administered the evaluations in the student's native language and produced valid and reliable measures (id.). As a proposed resolution, the district noted that "[a]ny additional subtests may be requested to further explore specific areas this parent may have as a concern" (id.).

On April 1, 2008, the director provided a further response via e-mail to the parent's questions in the March 20, 2008 letter/March 21, 2008 e-mail (Parent Ex. 15A; see Parent Ex. 9A at pp. 1-3). The director first indicated that she had been unable to respond to some of the parent's e-mails because they had been sent during a school holiday when the special education office was closed (Parent Ex. 15A at p. 1).[8] In addition, the director also noted that she did not view the parent's March 1, 2008 e-mail requesting the IEE until March 26, 2008, after she returned from the school vacation and when her secretary brought it to her attention on that day (id.; see Parent Ex. 9A at p. 3). As for the parent's March 20, 2008 "notice" sent regarding the IEE appointment scheduled for March 21, 2008, the director indicated that both the notice and the IEE appointment occurred during the school holiday when she was unable to respond to the parent (id.). The director also noted that she had previously notified the student's mother on "February 14 in response to an Email sent from [the parent] on Feb. 5th that [she did] not check or respond to Emails on a daily basis" and further instructed the student's mother to copy other individuals, such as the secretary in the special education office, on her correspondence requiring "follow up with the CSE, in order to avoid you feeling that I am creating delays" (id.). The director advised the parent that the district had filed a request for an impartial hearing regarding the parent's requested IEE with Lindamood-Bell (id.).

On April 1, 2008, the impartial hearing officer notified the parties of his appointment by the district to hear the matter and suggested that during the resolution session period, the parents "may use this period to explain to the District/CSE why they object to the public evaluation" (Parent Ex. 32A at Ex. 2). On April 10, 2008, the parent filed a State complaint alleging that the district improperly appointed the impartial hearing officer in the instant matter because the appointment did not follow the proper rotational order (Parent Ex. 32A at Exs. 3, pp. 1-6; 3A). By letter dated April 12, 2008, the parent informed the impartial hearing officer of her State complaint and asked the impartial hearing officer to recuse himself from the matter (Parent Ex. 32A at Ex. 4). By letter dated April 16, 2008, the impartial hearing officer acknowledged receipt of the parent's letter, and he continued to suggest that the parties attempt to resolve the matter during the resolution session period and further, that the parties share information about the evaluation(s) challenged (Parent Ex. 32A at Ex. 5, pp. 1-2). The impartial hearing officer, at that time, declined to recuse himself (Parent Ex. 32A at Ex. 5, p. 2). On April 16, 2008, the parent challenged the sufficiency of the district's due process complaint notice; on April 21, 2008, the district responded to the parent's challenge (Parent Ex. 32A at Exs. 7, pp. 1-7; 10, pp. 1-2). The parent also e-mailed the district's superintendent on April 16, 2008 to request information regarding the district's educational evaluator, her qualifications, and her experience administering the WJ-III ACH

[8] Upon review of the 2008 calendar, it appears that the director was referring to the week of March 17-21 as the period of time when the school holiday occurred.

because "the district [was] taking [her] to hearing over the testing" performed "in September" (Parent Ex. 12 A; see Parent Exs. 17A; 20A).

On April 21, 2008, the impartial hearing officer found that the district's due process complaint notice was sufficient and that the parties understood the nature of the dispute (Parent Ex. 32A at Ex. 11, pp. 1-2). By letter dated April 28, 2008, the parent again asked the impartial hearing officer to recuse himself alleging that the impartial hearing officer must not have any personal or professional conflict affecting his ability to remain impartial and objective (Parent Ex. 32A at Ex. 12). Ultimately, the parent prepared a motion seeking the recusal of the impartial hearing officer, dated May 9, 2008, which the parent submitted into evidence at the conclusion of the impartial hearing held on June 13, 2008 (Parent Ex. 32A; see Tr. pp. 32-65, 246-49).

On June 4, 2008, the district and the impartial hearing officer convened to initiate the impartial hearing (June 4, 2008 Tr. pp. 1-5). According to the transcript, the parties held a pre-hearing conference on May 16, 2008, and established, among other things, dates for the impartial hearing (id. at p. 4). After the parent failed to appear, the impartial hearing officer adjourned the impartial hearing, and the parties then reconvened on June 13, 2008 (Tr. p. 1). At that time, both parties presented testimonial and documentary evidence, and the impartial hearing concluded on the same day (id. at pp. 1-259; Dist. Exs. 2-4; 6; 8; 9-16; Parent Exs. 1A-5A; 7A-17A; 19A-21A; 23A; 27A-32A; Joint Ex. 1; IHO Ex. 2). The parties also submitted post-hearing briefs subsequent to the conclusion of the impartial hearing (see Tr. pp. 251-53; Dist. Post-Hr'g Brief at p. 10; Parent Post-Hr'g Brief at p. 18).

At the impartial hearing, the district's educational evaluator testified that she had a Bachelors degree in child study with a double major in elementary education and special education, as well as a minor in English (Tr. pp. 123-24). Professionally, the educational evaluator testified that she served in a "variety of setting, including self-contained, integrated, resource room, [and] special reading programs" in the past 17 years with the district (Tr. p. 124). She also had experience teaching at the graduate level about the assessment, diagnosis, and remediation of reading disabilities (Tr. pp. 124-25, 180). The educational evaluator further testified that she was permanently certified in "elementary education, special education, [and] reading" and that she also held a "Wilson Level I certification" (Tr. pp. 180-81). As an educational evaluator in the district, her responsibilities included the administration of all standardized tests and educational evaluations, including evaluating students for initial eligibility determinations, three-year reevaluations, and declassification (Tr. p. 182). At the time of the hearing, she had administered educational evaluations and standardized tests in the district for 17 years, and her undergraduate course work included testing assessment courses (id.). Her testimony also included her experience administering the WJ-III ACH, as well as explanations of the student's testing performed on September 17, 2007, the selected subtests of the WJ-III ACH used, and the student's results (Tr. pp. 184-95).

In her opening statement, the student's mother stated that she requested reimbursement for the IEE with Lindamood-Bell because the cost was "not covered by [her] insurance" (Tr. p. 13). She further stated that in September 2007, she requested that her son "be tested again" to determine "his present levels of performance" and to determine whether his program needed to be "adjusted" (Tr. p. 16). The student's mother stated that the district used the September 2007 testing to "develop the student's multisensory reading program for the 2007-08 school year" and that throughout the year, she continued to express concerns that her son was not making progress (Tr. pp. 16, 215). She concluded by stating that the September 2007 testing was not adequate to develop a reading program that met her son's individual needs, and therefore, the reading program based upon the testing was also inadequate (Tr. p. 17; see Tr. pp. 237-38).

In her direct examination, the student's mother testified that she requested the IEE with Lindamood-Bell because she knew her son "needed educational testing done" (Tr. p. 213). With respect to her concerns about her son's progress in reading, she testified that she had communicated throughout the school year with her son's teachers about her concerns (Tr. pp. 215-17). At a meeting, the student's teachers informed her that the student's reading program recommended testing specific to that reading program prior to its implementation, which had not been performed, and further, that the teacher providing the instruction was not trained in the reading program (id.; see Tr. pp. 241-42). The student's mother testified that she became concerned about the "method of instruction" and that the "proper testing" had not been performed, thus, prompting her to request the IEE (Tr. pp. 216, 218). In addition, the student's mother testified that she had previously requested an IEE with Lindamood-Bell—"and the district didn't question it"—for one of her other children, so she believed that the district would accommodate this request for the same type of testing (Tr. pp. 213, 218-19).

When asked specifically about her disagreement with the testing performed in September 2007, the student's mother testified "that it did show that [her son] regressed over the summer" and that no recommendations arose as a result of the testing (Tr. p. 221). She also testified about her "confusion" regarding the district's newly established policy to no longer conduct "routine" testing prior to annual reviews, which prompted her to consent to the triennial evaluation the district had requested earlier in September 2007 (Tr. pp. 222-27, 238-40, 243; see Parent Ex. 8A at pp. 1-2).[9]

By decision dated July 31, 2008, the impartial hearing officer denied the parent's request to be reimbursed for the IEE performed by Lindamood-Bell (IHO Decision at pp. 10-13). The impartial hearing officer noted that the CSE had, on more than one occasion, "routinely reviewed" numerous "public and private evaluations" conducted during the student's educational history, and in particular, at the June 4, 2007 CSE and November 14, 2007 CSE subcommittee meetings (id. at p. 10). He further noted that the "assessments and evaluations" provided sufficient information to develop the student's IEP "with the appropriate goals and objectives . . ., tailored to meet the unique needs of the student" and that the parent had the opportunity to participate in the development of the student's IEPs (id.). In addition, the impartial hearing officer concluded that the district's evaluations and assessments had been conducted by "qualified and certified personnel" (id.). After citing several regulatory provisions relating to evaluations, determinations regarding needed evaluations, and the use of the evaluative data, the impartial hearing officer focused his analysis on the use of screenings to determine instructional strategies (id. at pp. 10-11). In particular, the

[9] The district's educational evaluator performed the student's triennial evaluation on April 28 and 29, 2008 (Tr. p. 199; Dist. Ex. 11).

impartial hearing officer noted: "[t]he screening of a student by a teacher or a specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education" (id. at p. 11; see 8 NYCRR 200.4[b][8]). He concluded that in this case, the parent requested that the district screen her son in September 2007 in order to assess whether the student regressed during summer 2007, and that it was this September 2007 screening that the parent challenged and "not the District's evaluation" (IHO Decision at p. 11). The impartial hearing officer noted that when asked to identify the district evaluation challenged by the parent, she provided no reply, and that in testimony, the parent stated that the September 2007 screening should have provided her with her son's "'present levels of performance on all academic levels'" (id.). The impartial hearing officer noted, however, that the student's 2007-08 IEP developed at the June 4, 2007 CSE meeting clearly indicated "her son's present levels of performance in all academic levels and his individual needs were transposed into goals and objectives" (id.). He further noted that when the district requested the parent's consent in September 2007 to conduct the student's spring 2008 triennial evaluation—which the parent refused—she could have asked the district to conduct the student's triennial evaluation in fall 2007, but failed to do so (id.). The impartial hearing officer also noted that the parent chose a private evaluation because she did not believe she would encounter "any problem" requesting it (id.). The impartial hearing officer then set forth the regulations relating to IEEs, and noted that at times the district inconsistently applied its own procedures by allowing the parent to obtain "independent evaluations without providing the CSE with the need for the particular evaluation" (id. at p. 12).

The impartial hearing officer then turned to the parent's argument that the district unreasonably delayed in responding to her request for the IEE with Lindamood-Bell (IHO Decision at pp. 12-13). He found that the parent requested the IEE on March 1, 2008, that the district initiated an impartial hearing on March 31, 2008, and thus, concluded that the parent's argument was without justification (id.). The impartial hearing officer denied the parent's request to be reimbursed for the IEE with Lindamood-Bell and ordered the district to review its policies and procedures regarding IEE requests, train all relevant staff regarding IEE requests, and develop procedures to use independent contractors to prevent conflicts of interest (id. at pp. 13-14).

On appeal, the parent asserts that the sole issue to be determined is whether the district sustained its burden to prove that the September 17, 2007 evaluation disputed by the parent was appropriate and alleges that the impartial hearing officer failed to make such a determination. The parent argues that she is entitled to reimbursement for the IEE based upon the following grounds: the district's witnesses failed to establish that the district's test administrator followed the appropriate test protocols during the evaluation and thus, the district cannot meet its burden to demonstrate that the evaluation was appropriate; the impartial hearing officer erred when he allowed the district's April 2008 educational evaluation report into evidence, since it was conducted after the IEE and it was not the evaluation disputed by the parent; and the district unreasonably delayed in responding to the parent's request for an IEE, unreasonably delayed in seeking an impartial hearing, and committed procedural violations. The parent notes, however, that a State Review Officer need not address the arguments asserted regarding delays and procedural violations because the district witnesses' insufficient testimony is dispositive.

Generally, the parent contends that the impartial hearing officer's decision contains factual and legal errors, including, but not limited to, the following: the impartial hearing officer mischaracterized, misinterpreted, or failed to adequately consider both testimonial and documentary evidence; he failed to adequately comprehend and apply relevant regulations; he

applied a flawed legal analysis; he demonstrated bias and incompetence; and he drafted a decision with no clear rationale. The parent seeks to annul the impartial hearing officer's decision and seeks a determination on appeal that the district failed to offer her son a free appropriate public education (FAPE)[10] by unnecessarily delaying a response to the parent's request for an IEE and by denying the parent's request for an IEE. The parent seeks reimbursement for the IEE and for costs associated with pursuing the impartial hearing and appeal.

In its answer, the district contends that the parent's appeal should be dismissed in its entirety, alleging as affirmative defenses that the parent failed to timely serve the petition, that the parent failed to clearly indicate the reasons for challenging the impartial hearing officer's decision, that the impartial hearing officer did not demonstrate bias or incompetence, and that the impartial hearing officer's decision is fully supported by the hearing record and should be sustained. In particular, the district denies that the parent disagreed with the September 17, 2007 testing and further denies that it unnecessarily delayed in seeking an impartial hearing following the parent's request for the IEE.

After reviewing the hearing record, I agree with the impartial hearing officer's conclusion that the parent is not entitled to reimbursement for the Lindamood-Bell evaluation conducted on March 21, 2008 (see IHO Decision at pp. 10-13) Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). In his decision, it appears that the impartial hearing officer concluded that the September 17, 2007 testing performed by the district constituted a screening—as opposed to an evaluation—based upon regulatory definitions (see 8 NYCRR 200.4[b][8]), and further, that the reasons articulated by the parent for disagreeing with the screening were either without merit or did not constitute a proper basis upon which to predicate a request for an IEE, namely, a disagreement with an evaluation performed by the district (see IHO Decision at pp. 10-13). And, although the parent correctly alleges in her appeal that the impartial hearing officer's decision failed to include a determination as to whether the district sustained its burden to establish that the September 2007 testing was appropriate, reaching that issue necessarily presumes that the impartial hearing officer found that the parent disagreed with an evaluation performed by the district. Absent those findings, further analysis by the impartial hearing officer was unwarranted and the impartial hearing officer need not reach the issue of the appropriateness of the district's testing (see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 235 [D. Conn. 2005] [finding that the appropriateness of a district's evaluation was not at issue when a request for an IEE was not based on a disagreement with an existing public evaluation, but rather on a parental desire for an additional source of information]).

[10] 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 educational program required under section 1414(d) of this title.

(20 U.S.C. § 1409[d]).

In addition, an independent review of the hearing record supports a determination that regardless of whether the September 17, 2007 testing constituted a screening or an evaluation, the reasons asserted by the parent for requesting the IEE fail to articulate an actual disagreement with the September 17, 2007 testing—as pointed out by the impartial hearing officer and as argued by the district in its answer—that would entitle the parent to request, or to receive reimbursement for, an IEE. The hearing record indicates that in September 2007, the district's educational evaluator administered selected subtests of the WJ-III ACH to "screen" the student's basic skills in reading, mathematics, and writing—in accord with the parent's request—to determine whether the student regressed during summer 2007 (see Tr. pp. 181-82, 184-95; Dist. Ex. 9 at p. 1; Parent Exs. 1A at p. 1; 2A-5A). The evidence also establishes that prior to the September 2007 testing, the district and the parent understood that the purpose of the requested testing was to assess whether the student regressed during summer 2007 (see Tr. pp. 86, 181-82, 184-95, 221; Dist. Ex. 9 at p. 1; Parent Exs. 1A at p. 1; 2A-5A). When directly asked to state her disagreement with the September 2007 testing, the parent acknowledged in her testimony that the September 2007 testing demonstrated regression, but that no recommendations flowed from the testing (Tr. p. 221). District witnesses testified that the results of the September 2007 testing were distributed to the parent and to the student's teachers to guide or plan instruction, but were not reviewed by the CSE (Tr. pp. 86, 195; see Tr. pp. 185-87).

According to the hearing record, the parent asserted the following reasons for requesting the IEE with Lindamood-Bell: the district "waited until February 2008 to update" the student's IEP goals "to meet his current methodology" and the goals "did not meet [her son's] unique needs or learning style" (Dist. Ex. 16); the district "failed to create [an] updated Independent Educational Plan" for her son (id.); the IEE would "allow the [CSE] team to really assess how [her son] was progressing" and would provide information to "discuss what goals need to be on [her son's] IEP" (Parent Exs. 7A; 10A); the IEE was necessary because the district failed to provide appropriate goals for her son (Parent Ex. 8A); she requested an IEE for "full educational testing by LindaMood Bell because [she] disagreed with the district's updated Independent Educational Plan for [her son] and lack of measureable progress void of objective values" (Parent Ex. 9A); the cost of the IEE was "not covered by [the parent's] insurance" (Tr. p. 13); the September 2007 testing should have provided information about her son's "present levels of performance" and whether his program needed to be "adjusted" (Tr. pp. 16, 217); her son "needed educational testing done" (Tr. p. 213); and further, that the September 2007 testing was not adequate to develop a reading program that met her son's individual needs, and therefore, the reading program based upon the testing was also inadequate (Tr. pp. 16-17, 215-18; see Tr. pp. 237-38; Parent Ex. 14A; see also Parent Ex. 11A). In addition, the student's mother testified that she had previously requested an IEE with Lindamood-Bell—"and the district didn't question it"—for one of her other children, so she believed that the district would accommodate this request for the same type of testing (Tr. pp. 213, 218-19).

Simply stated, the abovementioned reasons do not show a disagreement with the district's September 2007 testing, but rather, evinced a disagreement with the student's 2007-08 IEP, including the reading program implemented during the 2007-08 school year, and the annual goals set forth in the student's 2007-08 IEP relating to the student's reading ability and skills (see Tr. pp. 13, 16, 213, 215-19, 237-38; Dist. Ex. 16; Parent Exs. 7A-10A; 14A; see also Parent Ex. 11A).

With respect to the alleged delay in responding to the parent's request for the IEE, I note that if a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L., 363 F. Supp. 2d. at 234 [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for IEE at public expense]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where district failed to demonstrate that its evaluation was appropriate]). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357 at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027). In addition, an unnecessary delay in the district seeking an impartial hearing to contest a parent's request for an IEE may result in district liability for an IEE at public expense (Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289 [N.D. Cal. Dec. 15, 2006] [finding the district liable to pay for an IEE due to nearly three months unnecessary delay in requesting an impartial hearing]; but see L.S. v. Abington Sch. Dist., 2007 WL 2851268 at *9, *10, *13 [E.D. Pa. Sept. 28, 2007] [six week delay in the district requesting an impartial hearing to dispute parent's request for IEE reimbursement is consistent with procedures and intent of IDEA where the district first attempted to resolve the matter]; see also Letter to Sapperstone, 21 IDELR 1127 [OSEP 1994][there is no specific time period within which a district must request an impartial hearing to dispute a parent's request for IEE reimbursement, but an impartial hearing request may not be delayed such that it interferes with a free appropriate public education]). Given the evidence presented, I find no reason to disturb the impartial hearing officer's determination that the district did not unreasonably delay in responding to the parent's IEE request (see IHO Decision at pp. 12-14).

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS DISMISSED.

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

PAUL F. KELLY
STATE REVIEW OFFICER