



The University of the State of New York

The State Education Department State Review Officer

No. 08-102

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 New York City Department of Education

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from that part of the decision of an impartial hearing officer, which ordered respondent's (the district's) Committee on Special Education (CSE) to consider a placement for the student in a 12:1+1 special class with counseling services for the 2008-09 school year. The parent also appeals the impartial hearing officer's order that the district arrange to have an independent psychiatric evaluation of the student conducted at public expense. The appeal must be sustained in part.

The student has been offered a diagnosis of an attention deficit disorder (ADD) and exhibits fine-motor, handwriting and organizational difficulties that negatively affect his school performance (Dist. Ex. 23 at p. 3). In the classroom setting, he can exhibit behaviors that are distracting to other students, work refusal and difficulty with self-control (Dist. Exs. 14; 23 at p. 4). His overall cognitive and academic achievement skills are in the average range, with the exception of deficits in math fluency (the ability to quickly complete math calculations) (Dist. Ex. 9 at pp. 6, 8-9).

At the time of the impartial hearing in December 2007, and February, May and June 2008, the student, subsequent to the impartial hearing officer's December 11, 2007 interim pendency order, was being educated at one of the district's community schools in a sixth grade general education setting and receiving special education teacher support services (SETSS) and counseling pursuant to his March 2007 individualized education program (IEP) (Tr. pp. 38-39; IHO Order on Pendency at p. 3).

The student's eligibility for special education services as a student with an other health impairment (OHI) was not in dispute at the outset of this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). On June 11, 2008, the CSE convened and changed the student's classification from OHI to a student with an emotional disturbance (ED) (Dist. Ex. 23 at p. 1; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). On the final date of the impartial hearing, the parent objected to the change in the student's classification in her closing statement (Tr. p. 480). The June 11, 2008 IEP was annulled by the impartial hearing officer in this matter and that determination has not been appealed.

From kindergarten through the beginning of fifth grade, the student attended a private parochial school (Dist. Exs. 4 at p. 1; 9 at pp. 1-3).¹ While in the first and second grades, the student received grades in the "B" to "A" range (Dist. Ex. 9 at p. 2). In second grade, the student exhibited behavioral difficulties, described in the hearing record as problems with "self-control," completing assignments, focus, attention and following rules (id.). By report, in January 2004, an occupational therapist conducted an occupational therapy (OT) evaluation of the student, which revealed decreased muscle strength and fine-motor weakness that affected the student's proprioceptive processing, visual-motor and gross and fine-motor skills, for which he received OT services (id. at pp. 3-4). In third grade, during the 2004-05 school year, the student's grades were generally in the "B" range, although it was reported that his behavior became more of a concern (id. at p. 2). The student required a great deal of supervision and guidance to complete in-class assignments and was also provided with classroom accommodations (id.). In February 2005, a neurologist evaluated the student and offered a diagnosis of ADD with associated visual-motor perceptual difficulties (id. at p. 3). A neurological assessment was conducted by a developmental/behavioral pediatrician who offered the student a diagnosis of apraxia (id.).

During the 2005-06 school year while in fourth grade, the student's academic grades ranged from "C" to "A" and his behavior became more of a concern (Dist. Ex. 9 at p. 2). The student's effort and conduct grades ranged from "F" to "C minus" (id.). Although the student's performance on fourth grade standardized tests was at or above learning standards, he refused to complete work in school (id. at pp. 2-3). In spring of the student's fourth grade year, the student's private parochial school informed the parent that, although the student would be promoted to the fifth grade, the student's effort would be monitored closely to determine if he could remain at that parochial school (id. at p. 3). The student began the fifth grade during the 2006-07 school year at the same private parochial school (id.). An October 2006 progress report stated that the student did not complete in-class tests and his class work completion in all classes was unsatisfactory (id.).

In early November 2006, the student was removed from the private parochial school by his mother and placed at a second private school to continue his fifth grade year (Tr. p. 220; Dist. Ex. 9 at p. 3). While at this private school, the student was placed in a classroom of 15 students, but did not respond to teachers' questions and, at times, went under his desk (Tr. pp. 237-38). The principal of the private school indicated that the school did not have the resources to assist the student and, after one week, she asked the parent to withdraw the student from the private school, and the parent agreed (Tr. pp. 238-39).

¹ This timeframe represents the school years of 2001-02 through November 2006.

In November 2006, after removing the student from the private school, the parent enrolled the student at the district's "neighborhood" community school (Tr. pp. 55-56; Dist. Ex. 9 at p. 3).² The student was reportedly "overwhelmed" by the public school environment, namely the size and makeup of the classes, as well as the demands of the class and was unable to "sustain" himself in the classroom (Dist. Ex. 9 at p. 3). The student received in-school suspensions for episodes of leaving class and hiding in the school building (id.).

Also, in November 2006, at the parent's request, a district school psychologist conducted a psychoeducational evaluation of the student due to her concerns about the student's attention and OT needs (Dist. Ex. 4 at p. 1). The school psychologist administered the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), which yielded verbal comprehension and working memory scores in the average range, perceptual reasoning scores in the high average range, processing speed scores in the borderline range and a full scale IQ score in the average range of intellectual ability (id. at pp. 2, 4). The psychologist also administered the Woodcock-Johnson Tests of Academic Achievement (WJ-III ACH), which revealed at or above grade level reading and applied problem skills, and below grade level calculation and math fluency skills (id. at pp. 3-4). The school psychologist indicated that the student's math scores were questionable because he refused to complete tasks in which he did not demonstrate mastery (id. at p. 3). The student's writing samples were characterized by immature handwriting, disorganization and rudimentary understanding of punctuation and sentence structure (id.).

Behaviorally, the school psychologist described the student as "oppositional in a passive aggressive manner," "highly manipulative" and "defiant" (Dist. Ex. 4 at pp. 1-2). The report described examples of the student's behavior, such as labeling himself "uncooperative" during tasks he refused to complete, and his refusal to comply with parental and examiner requests (id.). The school psychologist opined that the student was "overly empowered" and was observed to control his mother, who in turn, minimized his behavioral difficulties (id. at pp. 2-3). The report also indicated that the parent felt "sorry" for the student who had experienced recent losses in his life and that she made excuses for the student's unacceptable behavior (id. at p. 3). The school psychologist stated that the student exhibited emotional difficulties and his need for control superseded his motivation for academic success (id.). The school psychologist summarized that the student's oppositional and defiant behavior was "his major school difficulty" at the time (id.).

On March 8, 2007, the CSE convened to review the student's program (Dist. Ex. 2). Participants included the parent, the district representative, who was also the school psychologist, a district regular education teacher, the district social worker, an additional parent member, an "IEP teacher",³ the provider of the student's in-school counseling services and a guidance counselor (Tr. pp. 359, 361; Dist. Ex. 2 at p. 2). The March 2007 CSE considered, and the resultant IEP described, the results of the student's performance on the November 2006 psychoeducational evaluation (Dist. Ex. 2 at p. 3; see also Dist. Ex. 4). The March 2007 IEP stated that the student was "a youth who feels dependant, powerless and sad. He is overly empowered and his behavior is characterized by oppositionalism and defiance. He is manipulative toward adults, often

² The parent's due process complaint notice refers to the proximity of the requested public school as "two blocks away from [the parent's] house" and for ease of reference in this decision, the requested school where the student received pendency services will be referred to as the "neighborhood school" (Dist. Ex. 0).

³ The description of the role and credentials of the "IEP teacher" was not explained by the hearing record.

successfully. He has suffered many losses in his life this year" (*id.* at p. 4). The March 2007 CSE determined that the student did not require a behavioral intervention plan (BIP) and that his behavior did not seriously interfere with instruction (*id.*).⁴ The March 2007 CSE reported that the student was offered a diagnosis of apraxia and exhibited fine-motor deficits, for which he received private OT services (*id.* at p. 5). The March 2007 IEP also noted that the student was offered a diagnosis of ADD, for which he was administered medication (*id.* at p. 1). The March 2007 CSE determined that the student was eligible for special education services as a student with an OHI and developed annual goals to address his needs in the areas of reading, math and social skills and (*id.* at pp. 1, 6-7).

The March 2007 CSE recommended placement of the student in a general education program with various testing accommodations, assistive technology, five periods per week of 8:1 SETSS, and one 30-minute group counseling session per week (Dist. Ex. 2 at pp. 1, 10). The March 2007 CSE considered and rejected a general education placement without additional services for the student because the student "exhibits deficits in learning, is diagnosed with dysgraphia and social deficits. He requires academic remediation and counseling" (*id.* at p. 9). The March 2007 CSE also considered a special class for the student, but determined it to be "too restrictive at this time" (*id.*).

On May 4, 2007, a psychologist observed the student in a classroom setting (Dist. Ex. 5). By observation, the student did not complete class work as requested by the teacher, despite indicating he would do so (*id.*). The student drew in his notebook instead of attending to and completing the class activity (*id.*).⁵

On May 25, 2007, a teacher report of the student's performance was completed (Dist. Ex. 10). The report indicated that the student did not appear to interact with peers on a regular basis and that his teacher often had to repeat a question before he would respond (*id.*). Although the student responded fairly well to positive verbal reinforcement in a small group setting, he had not demonstrated much progress since he began receiving SETSS in December 2006 (*id.*).

Over three dates in May 2007 and two dates in June 2007, the parent obtained a private neuropsychological evaluation of the student (Tr. pp. 68-69; Dist. Ex. 9). The evaluator administered the WISC-IV, which yielded verbal comprehension and perceptual reasoning scores in the high average range and working memory, processing speed and a full scale IQ score in the average range of cognitive ability (Dist. Ex. 9 at pp. 5-7). The evaluator also administered the WJ-III ACH, which yielded average to high average cluster standard scores in all areas assessed, including oral language and broad reading, math and written language skills (*id.* at pp. 7-9). The student's performance on the WJ-III ACH math fluency and writing fluency subtests were in the borderline range and low average range, respectively (*id.* at pp. 8-9). An assessment of the student's memory suggested to the evaluator that the student's verbal memory skills were in the average to high average range and that his visual memory skills were in the low average to average

⁴ The March 2007 IEP states that the student's behavior could be addressed by the special education classroom teacher; however, the CSE recommended a general education program with five periods of SETSS per week for the student (Dist. Ex. 2 at pp. 1, 4).

⁵ At a date not specified in the hearing record, the student was removed from the neighborhood school and was "home-schooled" (Dist. Ex. 9 at pp. 1, 3).

range, both subject to attentional and effort variability (id. at pp. 9-10). The student's expressive language skills were described as "generally strong" and his phonological skills "solid," while his comprehension skills varied from low to high average depending on the task (id. at p. 11). The student exhibited difficulty with gross and fine-motor control, visuospatial processing, visuomotor integration and visual perceptual skills (id. at pp. 12-13).

The neuropsychological evaluation report indicated that the student participated in private psychotherapy (Dist. Ex. 9 at p. 2). The evaluator reported that after the student's initial resistance to completing test items and decreased effort observed on the first day of the evaluation, the student's participation and effort improved significantly on the second and subsequent days of testing (id. at p. 4). During latter testing sessions, the student demonstrated "considerable cooperation," "excellent effort and desire to perform well," "good persistence" and humor, which appeared to aid his ability to keep working over time (id.). At times, the student demonstrated limited frustration tolerance, which resulted in an inability to respond appropriately to "ordinary demands" (id. at pp. 4, 15). The evaluator characterized the student's presentation as "somewhat immature" in that he exhibited a lack of self-regulation, elevated energy, impulsivity and excessive attempts to control the environment (id. at p. 4). The evaluator also reported that the student exhibited hyperactivity in the form of excessive "fidgetiness" and the need to "move about" to sustain effort, which enabled the student to remain engaged in a task (id. at p. 13). Measures of the student's attention and executive functions and the parent's completion of a behavior rating scale revealed the student's difficulty with sustained attention, ongoing processing, distractibility and mental control, described as the ability to hold information in his head and work on it internally (id. at pp. 13-16). The evaluator noted that the severity and type of behavioral difficulty reported by the parent was far less than observed and reported by school personnel (id. at p. 16). The evaluator recommended continuing psychotherapy and behavior modification interventions to address the student's behaviors (id.).

On June 19, 2007, the CSE convened to develop an IEP for the student for the 2007-08 school year (Dist. Ex. 1). Participants included the parent, the district representative, who was also the school psychologist, a district regular education teacher, a district social worker, the student's counselor, an IEP teacher, a guidance counselor and two assistant principals (id. at p. 2). The resultant June 2007 IEP contained the results of the recent psychoeducational cognitive and academic assessment findings and teacher estimates of the student's reading and math abilities (id. at p. 3). The June 2007 IEP stated that the student's performance was dominated by what appeared at times to be "overwhelming anxiety" that caused him to be virtually unable to function in school (id. at p. 4).⁶ The student often fled the classroom and completed little if any class work; appearing to be "emotionally shaken" by his recent personal life experiences (id.). When the student was relaxed, he was observed to have adequate insight and self-awareness (id.). He was further described as "bright" and a student who enjoyed playing and interacting with peers (id.). The June 2007 IEP indicated that the student's efforts to manipulate his mother had been observed and that she responded in "an overly protective manner" (id.). The June 2007 CSE determined that the student required a BIP but that his behavior did not seriously interfere with instruction and could be addressed by a special education classroom teacher (id. at pp. 4, 5). The student's BIP identified leaving the classroom and lack of class work completion as behaviors that interfered with his learning and provided strategy/support suggestions to attempt to change the behaviors (id. at p.

⁶ The June 2007 IEP states that the student had been diagnosed with "anxiety" (Dist. Ex. 1 at p. 6).

12). The June 2007 CSE concluded that programs of general education, team teaching, SETSS and special class in a specialized school would not adequately meet the student's needs, and for the 2007-08 school year recommended placement of the student in a 12:1+1 special class, with one group counseling session and one individual counseling session per week, accommodations and assistive technology (id. at pp. 1, 10-11).

On August 20, 2007, the CSE reconvened to review the student's private neuropsychological evaluation report (Tr. p. 68; Dist. Ex. 3). Participants included the parent, the district representative, who was also the school psychologist, a district social worker, a special education teacher and an additional parent member (Dist. Ex. 3 at p. 2). The resultant August 2007 IEP reported the student's May/June 2007 WJ-III ACH test and cognitive assessment results (Dist. Exs. 3 at p. 3; 9). The August 2007 CSE changed the student's recommendation to a 13:1 collaborative team teaching (CTT) program and added the use of a portable word processor to facilitate written expression (Dist. Ex. 3 at pp. 1-3, 5). No changes were made to the student's counseling services or BIP (compare Dist. Ex. 1 at pp. 11-12, with Dist. Ex. 3 at pp. 10-11). Although the parent agreed to place the student in a CTT program, she rejected the location of the school that was offered to the student (Tr. pp. 476-77).

At the commencement of the 2007-08 school year, the parent placed the student in a third private school (Tr. p. 63). According to the principal of the neighborhood school, the parent removed the student from the third private school two months into the school year pursuant to the third private school's request (Tr. p. 70). The hearing record notes that the parent subsequently home-schooled the student until he was placed in a district program (Tr. pp. 73-74).

By "Authorization to Attend Special Education Program" dated November 2, 2007, the CSE offered the student a placement in a CTT class with related services at the neighborhood school (Dist. Ex. 18). By a Final Notice of Recommendation (FNR) dated November 7, 2007, the CSE offered the student a placement in a CTT class with related services at a different community school (Dist. Ex. 19). The principal of the neighborhood school stated that the district's "OSEPO" made a "mistake" when it offered the student a placement in his school (Tr. pp. 72-73).⁷

By letter dated November 14, 2007, the parent requested an impartial hearing and placement of the student in the sixth grade CTT class at the neighborhood school (Dist. Ex. 0). The parent rejected the CSE's second placement offer of November 7, 2007, requested pendency for the student at the neighborhood school and, if that was not possible, requested the implementation of home instruction until the issue was resolved (id.). Lastly, the parent asserted that the student was not receiving "a free and appropriate education" (id.).

⁷ It appears that the principal was referring to respondent's Office of Student Enrollment Planning and Operations (OSEPO).

The impartial hearing convened on December 5, 2007 and concluded on June 19, 2008, after four days of testimony (Tr. pp. 1, 12, 206, 417).⁸ On December 11, 2007, the impartial hearing officer issued an interim decision on pendency, which ordered the student to return to the neighborhood school and receive a general education program with SETSS and counseling services based upon the last agreed upon IEP of March 2007 (IHO Order on Pendency at pp. 2-3). On December 13, 2007, the district's school psychologist, social worker, IEP teacher and the parent met and developed the student's interim service plan (ISP), while awaiting the outcome of the impartial hearing (Dist. Ex. 20). The resultant December 2007 ISP recommended continuation of the student's general education program with SETSS and counseling services and added full-time 1:1 paraprofessional support (*id.* at pp. 1-2). In mid-December 2007, the student began attending the neighborhood school pursuant to the ISP (Tr. pp. 113, 117-18, 159, 361).⁹

At the impartial hearing, the parent presented documentary evidence and offered testimony of the student's private psychologist, who had met with the student for approximately six one-hour sessions (Tr. pp. 327, 337; Parent Ex. A). The district presented documentary evidence and offered testimony of the principal and two assistant principals from the neighborhood school, the principal from the community school offered by the November 7, 2007 FNR, two teachers from the neighborhood school, the student's paraprofessional, the principal and the student's teacher from the private parochial school, the principal of the second private school, a district psychologist, a guidance counselor, a social worker and a school psychologist (Tr. pp. 35, 113, 132, 157, 172, 189, 217, 236, 244, 270, 297, 327, 359, 397, 443; Dist. Exs. 0-23).

By interim decision dated March 24, 2008, the impartial hearing officer ordered, pursuant to the agreement of the parties, that the district conduct a functional behavioral assessment (FBA) and develop a BIP for the student (IHO Interim Order at p. 2). In March 2008, the district's staff conducted a series of interviews with the student, the parent and two of the student's teachers and also completed a "record review" to identify the student's "problematic behaviors" (Dist. Ex. 21).

⁸ The hearing record does not contain any documents, testimony, or other statements as to why it took approximately six months to complete the impartial hearing. Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30 day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (*see* 8 NYCRR 200.5[j][5][i]-[iv]). Although there is some indication in the hearing record that the parent requested an adjournment and it was granted (*see* Tr. pp. 3, 14, 209, 415; *see also* Dist. Ex. 0), there is no documentation in the hearing record or explanation in the impartial hearing officer's decisions regarding extensions that may have been granted and the reasons why they were granted. I encourage the impartial hearing officer to ensure that the impartial hearings, over which she presides, comply with federal and State regulations.

⁹ Apparently the parent filed a "state complaint" pursuant to 8 NYCRR 200.5(l) pertaining to matters not directly raised as issues on appeal. By letter dated January 4, 2008, a regional associate from the Vocational and Educational Services for Individuals with Disabilities (VESID) of the New York State Education Department informed the parent of the status of her complaints against the district regarding the student's placement at the public school building of her choice and the development of his IEPs (*see* Dist. Exs. 7; 8; 12; 16; 17; Parent Ex. A). VESID sustained many of the parent's allegations and ordered that the district take remedial action (Parent Ex. A at pp. 2, 4, 6, 9, 10).

The results suggested that apparent functions of the student's behaviors included attempts to leave the situation, decrease stimulation and anxiety and obtain negative teacher/peer attention, as well as, avoidance of task completion, compliance with requests and feelings of embarrassment (*id.* at p. 1).

On May 8, 2008, the district developed a BIP for the student (Dist. Ex. 22). Identified behaviors that interfered with the student's learning included his refusal to complete class work, unresponsiveness to his teachers and engagement in unusual, non-aggressive and disruptive behaviors in the classroom (*id.*). Identified strategies to be used to change the student's behavior included talking to the student in a calm manner, encouraging the student to respond, allowing extra response time, then ignoring the student if he remained unwilling to speak, taking the student out of the classroom for a break or providing him with a non-academic task (*id.*). Supports employed to help the student change his behavior included continuation of in-school counseling and paraprofessional services (*id.*). The hearing record suggests that on May 8, 2008 the "review team" met and agreed that a psychiatric evaluation of the student was "warranted" (Tr. p. 385). The parent did not attend the May 8, 2008 meeting due to an unexpected emergency (Tr. pp. 399-400, 408).

On June 11, 2008, the CSE convened to develop the student's IEP for summer 2008 and the 2008-09 school year (Dist. Ex. 23). Participants included the parent, a district representative, three regular education teachers, a school psychologist, a district social worker, the student's grandfather, two special education teachers, an additional parent member, an IEP teacher and a counseling provider (*id.* at p. 2). The resultant June 2008 IEP offered the student testing accommodations, classroom modifications, a BIP, and annual goals and short-term objectives in the areas of social/emotional, written expression, math, study skills and OT (*id.* at pp. 3, 7-9, 12-13). The June 2008 CSE determined that the student continued to exhibit social/emotional deficits, which interfered with his learning, despite receiving services and interventions (*id.* at p. 11). The June 2008 CSE reported that the student presented with "some behaviors" that caused his teachers to be concerned for his safety and the safety of others (*id.*). The June 2008 CSE changed the student's classification from a student with an OHI to a student with an ED and recommended for summer 2008, a 12:1+1 special class and related extended school year (ESY) services (*id.* at p. 1). For the 2008-09 school year, the June 2008 CSE recommended placement in a 12:1+1 special class in a community school, one group session of counseling per week, one individual session of OT per week and assistive technology (*id.* at pp. at 1, 12).

By decision dated August 5, 2008, the impartial hearing officer determined that due to her December 11, 2007 Order on Pendency, the neighborhood school was responsible for providing the student with a free appropriate public education (FAPE) (IHO Decision at p. 9). The impartial hearing officer found that the student was not making progress in his current general education setting with SETSS (*id.* at p. 10). Additionally, the student had "experienced" a CTT environment without the label and the benefit of instruction from a CTT teacher; however, the impartial hearing officer maintained that the student did "not derive[] educational benefit from the unofficial" CTT class (*id.*). The impartial hearing officer noted that despite being the least restrictive environment (LRE) on the continuum of special education placements, the CTT program was not appropriate for the student (*id.*). Further, the impartial hearing officer also found that the "impressive" program at a different community school was not appropriate for the student (*id.* at pp. 10-11). The impartial hearing officer noted, that other than the parent, the membership composition of the June

11, 2007 and August 20, 2007 CSEs differed (id. at p. 11). The impartial hearing officer maintained that the August 20, 2007 IEP was not appropriate because the CSE did not adequately consider all of student's previous reports and evaluations and, thereby, did not recommend an appropriate placement (id.). Additionally, based upon testimonial and evidentiary evidence, the impartial hearing officer determined that the student was entitled to receive OT services and that the BIP should include specific strategies to assist the student in controlling behaviors that interfered with academic success (id.). Lastly, the impartial hearing officer annulled the June 11, 2008 IEP because she found that the change of the student's classification from OHI to ED was improper without first conducting a psychiatric evaluation and demonstrating the appropriateness of the ED classification (id. at pp. 11-12). Accordingly, the impartial hearing officer ordered that the matter be remanded back to the CSE to consider placement of the student at the neighborhood school in a small structured 12:1+1 class with counseling, to refine the BIP, to order OT and to schedule an independent psychiatric evaluation at public expense (id. at p. 12).

The parent appeals from that part of the decision of the impartial hearing officer, which ordered the CSE to consider a placement for the student in a 12:1+1 special class with counseling services. The parent also appeals the impartial hearing officer's order that the district arrange for an independent psychiatric evaluation of the student at public expense.¹⁰ As relief, the parent requests that the student remain at the neighborhood school. Additionally, the parent requests that the student's classification remain as OHI and that he be placed in a general education program with SETSS and paraprofessional services. Lastly, the parent requests OT and revision of the FBA and BIP.

In its answer, the district maintains that the petition is procedurally and substantively improper and that the student's pendency placement should be a 12:1+1 program. The district makes numerous legal arguments regarding the student's pendency placement and various arguments about the impartial hearing officer's determinations with respect to the student's June 2007 and June 2008 IEPs, which were not the subject of the parent's November 14, 2007 due process complaint notice.¹¹ As relief, the district requests that the parent's appeal be dismissed in its entirety; however, the district does not assert a cross-appeal.

The parent filed a reply to the district's answer requesting that a State Review Officer obtain educational records regarding the student from the New York State Department of Education, VESID and Special Education Quality Assurance. The parent also attached exhibits for a State Review Officer's consideration. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parent's reply does not respond either to procedural defenses interposed by the district or address additional documentary evidence served with the answer, therefore, I will not consider it (Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-37). Additionally, a reply may

¹⁰ The parent does not appeal the portion of the impartial hearing officer's order that the CSE consider placement of the student at the neighborhood school.

¹¹ The impartial hearing officer's December 11, 2007 pendency decision has not been appealed by the district.

not be used to generally respond to each of the allegations made in the answer, as the parent has attempted to do (Application of a Child with a Disability, Appeal No. 05-100; Application of the Bd. of Educ., Appeal No. 05-023; Application of a Child with a Disability, Appeal No. 04-002).

At the outset, I will address the procedural matters arising on appeal. The district contends that the petition should be dismissed because it is procedurally defective, namely (1) the petition fails to include any references to the hearing record, in violation of 8 NYCRR 2179.8[b]; (2) the allegations in the petition are not set forth in numbered paragraphs, in violation of 8 NYCRR 279.8[a][3]; and (3) the parent improperly raised issues in the petition that were not raised in her due process complaint notice or at the impartial hearing. As to the first matter, State regulation directs that "[t]he petition, answer, reply and memorandum of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]; see Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-022; Application of a Student with a Disability, Appeal No. 08-003 [dismissing a petition that *inter alia* did not reference the hearing record]). However, I decline to dismiss the petition on this ground. As to the second matter, although the district correctly states that the parent failed to number the allegations in her petition for review (see 8 NYCRR 279.8[a][3]), I decline to dismiss the petition on this ground (see Application of a Student with a Disability, Appeal No. 08-048; Application of a Child with a Disability, Appeal No. 07-099). I note that the parent is a pro se party in this appeal and caution the parent to comply with the regulations in the future.

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). Here, the parent's due process complaint notice requests placement of the student in a CTT class and her petition requests placement of the student in a general education program with SETSS and the support of a paraprofessional (Dist. Ex. 0; see Pet. at p. 8). The district asserts that the parent's request for the latter program was not raised by the parent in her due process complaint notice or at the impartial hearing (Answer ¶ 62). However, the impartial hearing officer did not issue an order placing the student in either a general education or CTT class, and therefore there was no placement order for the parent to appeal (IHO Decision at p. 12).

I now turn to the issue of the impartial hearing officer remanding the matter back to the CSE to consider a placement for the student in a small structured 12:1+1 class. Federal regulations require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; see 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with general class placement (34

C.F.R. § 300.115[b]). The impartial hearing officer determined, based upon testimonial evidence, that the student in his current placement of a general education setting (also termed by the impartial hearing officer as the "unofficial" CTT class) with SETSS and counseling was not making progress or succeeding (IHO Decision at p. 10).

The principal of the neighborhood school stated that the student "[was] doing poorly academically. He [was] doing poorly behaviorally. He hasn't been doing much work. He doesn't focus. He's been basically almost to the point where at times out of control" (Tr. p. 50). Additionally, the student was not passing his classes, typed curse words on his word processor directed toward other students and verbally threatened other students (Tr. p. 51). Essentially, the principal testified that the student was "not performing as a picture of a CTT child" (*id.*). The student's regular education teacher for homeroom, math and science testified that the student refused to do class work, copy notes, take out his books or respond to teacher requests or questions (Tr. p. 116). She further stated that "his behavior is very erratic," and cited talking to the classroom heater, as an example (*id.*). The student's regular education teacher for English and social studies asserted that the student was not cooperative, never on task, was always being reprimanded and did not socialize with other students (Tr. p. 141). The student also exhibited "strange behaviors" in her class, such as writing curse words directed toward others on his word processor, spontaneously lining up chairs in the middle of the classroom and punching his desk (Tr. p. 144). The English and social studies teacher further testified that the student needed a "small, nurturing setting" where his needs could be met (Tr. p. 150). An assistant principal of the neighborhood school testified that the student ran out of the classroom and hid for no reason (Tr. pp. 175-76). He maintained that a CTT class was not an appropriate setting for the student (Tr. p. 179).

The student's 1:1 paraprofessional testified that he has "never seen somebody in such dramatic need of intervention as [the student]" (Tr. p. 163). The school psychologist who prepared the November 13, 2006 psychoeducational report testified that the student's emotional problems interfered with the student's functioning and that she would recommend either a 12:1+1 class or a therapeutic environment for the student (Tr. pp. 248, 252-53). The principal of the private parochial school testified that the student refused to take tests or do class work, would not cooperate with teachers and was "becoming more and more difficult with the other students" (Tr. p. 221). The student's teacher from the private parochial school testified that the student needed a small class setting with the benefit of a special education teacher (Tr. p. 277). The district's social worker also testified that a small class setting would be academically, socially and emotionally beneficial to the student as the student was not "thriving in his present placement of a general education classroom setting with SETSS and counseling" (Tr. p. 365).

I need not modify the impartial hearing officer's decision to direct that a CSE reconvene and consider a particular placement on the continuum of services (see 8 NYCRR 200.6). I do note however, that a CSE is already required to consider the continuum of services when developing an IEP (see 8 NYCRR 200.6; see also 34 C.F.R. § 300.115) and that they are required to develop a program which provides special education in the LRE (8 NYCRR 200.6[a]; see 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]; see also *P. v. Newington*, 2008 WL 4509089 at *6 [2d. Cir. Oct. 9, 2008]). Further, the hearing record demonstrates that despite the completion of an FBA and development of a BIP for the student, the June 2008 CSE concluded that he required a more restrictive placement due to his behavioral difficulties. However, this conclusion appears to be based in good part upon behavior that took

place prior to the implementation of the BIP that resulted from the FBA. Upon reconvening, the CSE must consider anew the appropriateness of the program and placement that it recommends.

I turn next to the impartial hearing officer's decision to order an independent psychiatric evaluation at public expense for the student. The impartial hearing officer has the authority to order the CSE to conduct additional evaluations if warranted (see, e.g., Application of the Bd. of Educ., Appeal No. 04-076; Application of a Child with a Disability, Appeal No. 04-004 [affirming a series of evaluations ordered by an impartial hearing officer and remanding to the CSE]; Application of a Child with a Disability, Appeal No. 02-108 [affirming an impartial hearing officer's order for a psychiatric evaluation]; Application of the Bd. of Educ., Appeal No. 98-30 [affirming an impartial hearing officer's order for an assistive technology evaluation]; but see Application of a Child with a Disability, Appeal No. 94-27 [annulling an impartial hearing officer's order for a psychiatric evaluation]). Based upon testimonial and documentary evidence, the impartial hearing officer determined that the student's writings and drawings "raised a red flag" and that it was appropriate to order an independent psychiatric evaluation of the student at public expense (IHO Decision at p. 12).

The hearing record reflects that the student had experienced difficulty participating in the classroom several years prior to the 2007-08 school year (Tr. pp. 216-17, 220-23, 236-38, 241-42). According to district staff from the neighborhood school, including the principal, two regular education teachers and the student's social worker, the student's difficulty participating in the general education classroom during the 2007-08 school year persisted (Tr. pp. 33-36, 50-53, 91, 116-18, 121-24, 133, 140-42, 362-66, 370). The hearing record reflects that the student's regular education teachers and 1:1 paraprofessional did not find the 1:1 paraprofessional support and SETSS enough to meet the student's needs (Tr. pp. 118, 149-50, 163). The private psychologist testified that during his individual sessions, the student did not exhibit the types of behaviors observed in the classroom, although the private psychologist acknowledged that he had never observed the student at school (Tr. pp. 327-29, 336, 340). Similarly, the social worker who provided the student's small group counseling services testified that during her sessions the student did not exhibit the same negative behaviors that he demonstrated in the classroom (Tr. pp. 362-63). The hearing record does not provide an explanation for the discrepancy between the student's behaviors in 1:1 or small group settings and his behaviors in the classroom.

The testimony of district staff, including the student's 1:1 paraprofessional, regular education teacher, assistant principal and social worker, reflects that the student had become increasingly isolated from his peers (Tr. pp. 129, 162-63, 176-77, 403-05).¹² The district's social worker who participated at the May 2008 review meeting, testified that the team was concerned about the student's psychiatric functioning, namely the potential safety hazard to himself and others, due to his drawings and "certain things that he had said" (Tr. p. 398). She further testified that the student "definitely deteriorated" based upon information from the student's teachers during the 2007-08 school year (Tr. p. 402). That testimony, combined with testimonial and evidentiary accounts of the student's behavior, including talking to himself/inanimate objects, kicking lockers, an increasing number of verbal threats toward other students and drawings of violent images,

¹² I note that the student's fourth grade teacher from the private parochial school testified that at the end of the 2005-06 school year she was concerned that the student did not play with other students and she would have liked for him to be "evaluated" due to his lack of involvement with peers (Tr. pp. 271-73, 275, 278, 289).

supports a conclusion that further evaluation is necessary (Tr. pp. 51-52, 144, 165, 178, 363, 378-79, 386, 398, 404-05; Dist. Exs. 13-15; 21). In the past, the parent consented to a neuropsychological evaluation of the student (Tr. pp. 68-69; Dist. Ex. 9). It is my expectation that completion of a comprehensive neuropsychological evaluation, consisting of the specific components delineated below, will provide the district with information about the student's in-school functioning for educational planning purposes, without the need to override the parent's consent for a more medically-based psychiatric evaluation.

Therefore, I will modify the impartial hearing officer's order slightly, finding that an independent neuropsychological evaluation would further assist the district in determining appropriate special educational programming for the student. I note that subject to certain limitations, federal and State regulations provide that a parent has the right to an independent education evaluation 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]).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision dated August 5, 2008 is annulled to the extent it directed an independent psychiatric evaluation at public expense, and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the CSE shall arrange for an independent neuropsychological evaluation of the student and that the district convene a CSE to review such evaluation, recommend an appropriate program and secure an appropriate public school placement in the LRE for the student within 90 days of this order; and

IT IS FURTHER ORDERED that the independent neuropsychological evaluation of the student include, but is not limited to, the following components: a review of the student's available educational records; student interview; parent and teacher interviews; consultation with any outside service providers; in-school observation(s) of the student during academic instruction and non-structured activities (i.e., lunch, recess); administration of projective/social-emotional assessments including personality tests and behavior rating scales; and a recommendation if any additional evaluations, specifically a psychiatric evaluation, are warranted.

Dated: Albany, New York
November 3, 2008

PAUL F. KELLY
STATE REVIEW OFFICER