The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 09-057

Application of the BOARD OF EDUCATION OF THE NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, L.L.P., attorneys for petitioner, Jonathan Heidelberger, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2007-08 school year was not appropriate and directed the district to reimburse the parents for the cost of parentally obtained private evaluations. The appeal must be sustained in part.

At the time of the commencement of the instant appeal, the student was being home schooled.[1] The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The hearing record reveals that the student was home schooled and received private tutoring services through fourth grade, subsequently entering fifth grade in a district elementary

[1] According to correspondence received by the Office of State Review from the student's mother dated May 29, 2009, the student was being home schooled.

school in October 2003 for the 2003-04 school year (Tr. p. 582; Dist. Ex. O at p. 2).[2] Terra Nova testing administered to the student during the 2003-04 school year yielded reading scores in the 13th percentile and math scores in the 9th percentile (see Dist. Ex. O at p. 2). Subsequently, the district provided the student with academic intervention services (AIS) in reading and math (id.). The hearing record reflects that in December 2003, the student's mother referred him to the CSE for evaluations due to her concerns that her son was "dyslexic and dysgraphic" and her observation that he exhibited "visual perception problems and sensory issues" (id. at p. 1; Pro Se Ex. 40 at p. 1).

In January and February 2004, the district conducted educational and psychological evaluations of the student, and administered the Slingerland Screening Tests for Identifying Children with Specific Language Disability (Slingerland) and the Test of Written Language-Third Edition (TOWL-3) (Dist. Exs. N; O; P; Q). The evaluation results placed the student's cognitive skills in the average range of functioning, with below average reading skills (standard score of 78), written language/expression (standard score of 66), and spelling skills (standard score of 59) (Dist. Exs. N at p. 3; O at p. 6; see Dist. Ex. Q). The student's performance on the Slingerland suggested that he experienced "great difficulties with tasks involving visual-auditory-kinesthetic-memory integration" (Dist. Ex. P at p. 2). Following a February 2004 occupational therapy (OT) evaluation, the district's occupational therapist recommended that the student receive OT services focusing on his postural stability, bilateral integration, fine motor control, and visual motor abilities, and introducing cursive writing and keyboarding instruction (Joint Ex. XI).[3]

On March 10, 2004, the CSE convened and determined the student was eligible to receive special education services as a student with a learning disability (Pro Se Ex. 38 at p. 1). It recommended that he receive five 30-minute sessions per week of "direct teacher consultation" services and one individual 30-minute session of OT per week for the balance of the 2003-04 school year, in addition to one 30-minute OT consultation per week for one month (Pro Se Exs. 38 at p. 1; 40 at pp. 1, 3).

---

[2] I note that the hearing record contains multiple duplicative exhibits among the 473 exhibits (totaling over 4,000 pages) admitted by the impartial hearing officer. For simplification, I cite only to District exhibits in instances where District, Parent, "Pro Se," Joint, and "Father" exhibits were identical. During the impartial hearing, the impartial hearing officer was reminded by the district's counsel of his responsibility to exclude evidence that he determined to be irrelevant, immaterial, unreliable or unduly repetitious pursuant to 8 NYCRR 200.5(j)(3)(xii)(c) (Tr. pp. 213-15), and was furnished with a copy of Application of a Child with a Disability, Appeal No. 07-072 which contained the same reminder (Tr. pp. 213-14). While the impartial hearing officer admitted Application of a Child with a Disability, Appeal No. 07-072 into evidence as IHO Ex. 1 (Tr. pp. 214, 419), that decision was omitted from the evidence list contained in the impartial hearing officer's decision (see IHO Decision at p. 123). I note that the impartial hearing officer was also reminded of his responsibility in another State Review Officer decision (see Application of the Dep't of Educ., Appeal No. 08-062). Although the impartial hearing officer acknowledged in the case at bar that "it is the [h]earing [o]fficer's responsibility to see to it that the parties, themselves, not unnecessarily engage in duplicating the materials that they have submitted" (Tr. p. 215; see IHO Decision at p. 67; but see Tr. pp. 1496-1500, 1510, 1513 [when discussing his opinion with regard to the admission of evidence, the impartial hearing officer states "on some level, there isn't a reason, that I can think of, to exclude anything"]), the impartial hearing officer did not meet his responsibility during the impartial hearing.

[3] During the impartial hearing, the impartial hearing officer stated that the Joint exhibits were "mistakenly" marked using lower case Roman numerals (Tr. p. 2835). In this decision, I refer to the Joint exhibits using upper case Roman numerals.

On June 10, 2004, the CSE convened for the student's annual review in preparation for his entering sixth grade, with the student's mother in attendance (Pro Se Ex. 40 at pp. 1, 4). In the resultant individualized education program (IEP) developed for the student's 2004-05 school year, the CSE recommended that he receive an inclusion program in social studies and English language arts (ELA), two sessions of AIS reading instruction to be delivered before or after school, and resource room services every other day (id. at p. 5). The hearing record indicates that during the 2004-05 school year, the student received a general education program with integrated resource room services (Parent Ex. 17 at p. 7). In January 2005, the parents procured private tutoring services for him, generally twice per week for two hours per session (Pro Se Ex. 61 at p. 9). The president of the tutoring agency, who personally provided the student's services, confirmed that she assisted the student with "homework, prepar[ation] for tests, and address[ed] his learning needs and individual educational goals" through August 2006 (id. at pp. 9-20). The hearing record also demonstrates that the parents removed him from the district's elementary school for the last two months of sixth grade due to alleged abuse by other students (Dist. Ex. L at p. 1).

On June 15, 2005, the CSE convened for the student's annual review to develop a program for the student's seventh grade school year (Parent Ex. 17 at p. 1).[4] The CSE proceeded with the meeting in the parents' absence, and discussed the effect of the student's recurring absenteeism on his educational progress and his writing difficulties (id. at p. 6).[5] The CSE reiterated the student's need for an assistive technology evaluation, which it maintained had been previously refused by the student's mother, and renewed its request that she provide the CSE with a mandatory prescription in order for OT services to commence (id. at pp. 6-7). The CSE also discussed the effects of his observed avoidance, frustration, and resistance behaviors on the student's learning, and subsequently recommended conducting a functional behavioral assessment (FBA) and developing a behavioral intervention plan (BIP) (id. at p. 6). The June 15, 2005 CSE adjudged the student's current program of general education with integrated resource room services as "insufficient" to address his academic needs, avoidant behaviors and extensive goals and objectives, and recommended that for the 2005-06 school year, the student receive "a non-integrated Resource Room placement 2 times per week with an integrated Resource Room placement on opposite days" (id. at p. 7). The CSE also recommended initiating one session per week of school counseling services to address the student's avoidant behaviors and facilitate his transition to seventh grade (id.). The CSE noted that the student's mother refused to consent to "testing for annual review", and declined to agree to participate in a Level 1 vocational assessment of the student (id. at p. 6). During summer 2005, the district placed the student in a two day per week remedial summer program that provided individual reading instruction using the Wilson Reading System (Wilson) from a certified reading teacher (Tr. pp. 650-52; Dist. Ex. Z at p. 10; Pro Se Exs. 42 at pp. 3-4; 44).

On August 12, 2005, the student underwent a private educational evaluation consisting of assessments of the student's academic achievement, with a focus on his reading and writing ability, phonological awareness/processing skills, cognitive, memory, verbal, organization and attention ability, and graphomotor skills (Dist. Ex. M). The evaluator concluded that "[a]t the source of [the

[4] The hearing record indicates that the CSE notified the student's mother of this meeting in advance and confirmed her appearance; however, the student's mother neither attended the meeting nor responded to the CSE's attempt to teleconference her (Parent Ex. 17 at p. 6).

[5] According to the hearing record, during the 2004-05 school year, the student was absent approximately 74 times, late for school approximately 32 times, and left early from school approximately 13 times (id.).

student's] significant skill deficiency in reading and spelling is a serious phonological deficit" that affected his speech perception and phoneme awareness skills (id. at p. 13). Her report observed that "[s]erious decoding deficiencies are the major and large obstacle to comprehension," and that these concerns were evident in the student's "seriously below average scores for spelling" and "undermined writing" (id. at p. 14). The evaluator commented that although the student exhibited an "inadequate foundation in mathematical concepts," when the environment was carefully controlled and when his own efforts were "scaffolded," the student demonstrated cognitive abilities into the high average range (evidenced by a verbal comprehension standard score of 114); however, she added that the student's "Tourette's-like disinhibitions and obsessive-like overfocus compete for dominance over [his] cognitive resources" (id. at p. 15). The private evaluator made numerous recommendations for the student regarding his reading and math instruction, and confirmed his needs for central auditory processing disorder (CAPD), OT, and assistive technology evaluations, and classroom accommodations (id. at pp. 15-20). In particular, the evaluator recommended that the student receive at least 45-minutes daily of a 1:1 "highly systematic and intensive reading program" and suggested that specific components of the "Lindamood," "Let's Read," and Wilson programs were appropriate for the student (id. at pp. 15-17). In October 2005, at the student's mother's request, the CSE agreed to change the student's resource room program to direct consultant teacher services "on an interim basis until services are recommended and finalized by the CSE" (Dist. Ex. Z at pp. 11-12).

On November 16, 18, and 21, 2005, a neuropsychologist conducted a private neuropsychological evaluation of the student (Dist. Ex. L). The private neuropsychologist reported that the student exhibited a history of "both vocal and motor tics" and "has had some compulsive issues, associated anxiety, attention problems and issues with regard to sensory integration" (id. at p. 5). The report characterized the student as dyslexic and dysgraphic and noted behavioral concerns (id.). After administering assessments measuring the student's cognitive, executive, visuoperceptual, and constructional functions as well as his language-related, auditory processing, memory-related, and school achievement skills, the private neuropsychologist reported that the student was "a normally related and generally friendly and cooperative youngster, who was, nevertheless, behaviorally immature as well as quite impatient and easily overwhelmed," and that the student also struggled with internal control and modulation (id.). Formal cognitive testing placed the student's full scale IQ score in the bright normal range and his general abilities index score in the superior range (id.). The student exhibited difficulty with executive functions, manifested by difficulty with attention, impulsiveness, planning and organization, and the ability to inhibit and change cognitive sets on demand (id.). The private neuropsychologist surmised that the student "demonstrates variability on memory tasks due to problems with working memory" and detected "relative difficulty, as well as deficiency with regard to auditory processing tasks, specific to phoneme awareness in areas that have not been trained directly" (id.). The evaluator observed some coordination difficulty, low postural tone and poor motor control, with very poor printing skills (id. at p. 3). He concluded that the student's "overall presentation is not unusual for a youngster with multiple tic syndromes, which include attention difficulties and learning problems," opined that the student's classification as a student with a learning disability was appropriate, and suggested placement in an inclusion program due to his deficiencies in basic skill areas such as basic word reading, phonetic decoding, reading fluency, spelling and basic writing skills, reading comprehension, and math (id. at p. 5). The private neuropsychologist also offered recommendations including various classroom accommodations (such as copies of notes and access to assistive technology), homework and class work modifications, individual daily instruction using a multisensory reading program to address basic reading fluency and spelling

deficiencies, testing accommodations, and the student's participation in a social skills training program (id. at pp. 5-7).

According to the hearing record, the CSE convened on November 10, 2005 and November 21, 2005, with the student's mother in attendance at both meetings (Dist. Exs. Z at p. 10; FF at p. 1). Notations in the hearing record demonstrate that during these CSE meetings, the student's mother either disagreed with or postponed discussions addressing the conducting of further speech-language, CAPD, assistive technology, and psychological evaluations of the student that were recommended by the CSE (Dist. Exs. Z at pp. 12-14; FF at p. 1). The hearing record reflects that the student's mother requested reimbursement for the private August 2005 educational and November 2005 neuropsychological evaluations, and that the CSE provided her with a copy of the district's policy regarding reimbursement for independent evaluations (Dist. Ex. Z at pp. 13-14; see Tr. pp. 447-50).[6] The CSE also noted that it apprised the student's mother of the need for her to furnish it with a prescription allowing the district to provide the student's OT services (Dist. Ex. Z at p. 13).

On December 17, 2005, a private certified speech-language pathologist/audiologist conducted an auditory and language processing evaluation of the student (Dist. Ex. K). Following assessments measuring various aspects of the student's auditory and language processing skills, the evaluator concluded that the student exhibited "a significant auditory processing, temporal integration and language processing disorder," and specifically identified "impairments" in the areas of "auditory figure ground listening, discrimination (mishearing), temporal integration and processing (timing and sequencing), organization, phonemic awareness (decoding), reading, receptive language, ability to follow directions, short-term memory, organization and word retrieval" (id. at p. 6). The student evidenced these deficits through his observed difficulties hearing a message in less than optimal listening conditions, culling relevant from irrelevant information, and integrating sounds heard with both ears, as well as in his problems with reading accuracy, comprehension, note-taking, receptive and expressive language skills, distractibility, and attention (id.). The evaluator assessed the student's phonemic awareness skills as "several years below grade level, identifying a reading disorder (dyslexia)," and opined that his phonemic synthesis skills were "not at age level" (id.). She further commented that "[a]ttentional issues, vigilance and fidgetiness all interfered with [the student's] performance" (id.). The evaluator adduced several recommendations, including various classroom accommodations such as preferential seating, assistance with note-taking, provision of "breaks" throughout the day, testing accommodations, consideration of counseling services for "anxiety and social skills training," continuation of vision training and OT, and use of assistive technology (id. at pp. 6-7). She further recommended "specific reading and writing instruction using Lindamood-Bell programs," indicating that it "may be necessary for [the student] to miss ½ day of school to allow for this concentrated instruction" (id. at p. 7).

In January 2006, the parents obtained private counseling services for the student, which continued through December 2006 (Pro Se Ex. 61 at p. 6). On January 13, 2006, the director of a Lindamood-Bell center conducted a private "learning potential evaluation" of the student (Dist. Ex. J). The battery of tests evaluated the student's vocabulary skills, oral language comprehension

[6] The hearing record reflects that on multiple occasions during the 2005-06 and 2006-07 school years, the district informed the parents of its policy regarding the reimbursement of privately obtained independent evaluations (Dist Ex. GG at pp. 339-40; 618-19; 632).

and expression skills, ability to follow orally-presented directions, reading ability, spelling, writing and arithmetic skills, the ability to perceive speech sounds using a visual medium, and symbol imagery skills (id.). The director observed the student's strength in the area of "receptive oral vocabulary" and opined that he demonstrated adequate expressive oral vocabulary and reading comprehension skills when provided with multiple-choice questions (id. at p. 9). The evaluation revealed the student's "considerable" difficulties with reading and spelling, phonemic awareness, "symbol imagery" and "concept imagery," following directions, recalling material that he read, and math (id. at pp. 9-10). The director recommended that the student receive 240 hours of "intensive sensory-cognitive instruction" (approximately 12 weeks at 4 hours per day), after which he would be reevaluated to determine his progress and be provided with additional recommendations for further instruction as appropriate (id. at pp. 10-11).

On April 26, 2006, the parents secured a private OT evaluation for the student, resulting in the production of "sensory diet" recommendations for the student (Joint Ex. X).[7] In assessing the student's visual perception, neuromuscular development, motor development, handwriting, and sensory processing skills, the private therapist described the student as possessing "average perceptual skills" with "[s]ignificant delays in visual motor integrations skills" (id. at pp. 2-7). The private therapist further reported that the student's "[h]andwriting skills, oculomotor skills, and sensory processing skills were also observed to be immature and below age expectancy as needed for him to perform and access the curriculum" (id. at p. 7). The evaluation report posited that these deficits would contribute to the student's difficulties performing and participating in the classroom and in sports, manipulating classroom tools, developing age appropriate handwriting skills, and with "overall social behavior skills" (id.). The private therapist recommended that the student be evaluated for assistive technology, assessed by a developmental optometrist and "Neurological based Sensory Integration Clinic," and receive classroom modifications, continued counseling services, and OT services at school provided by a "sensory-based occupational therapist" (id. at pp. 7-8). She recommended that the student's sensory diet be implemented both at home and at school, and suggested that it include movement, muscle, touch, mouth, ear, eye, and nose activities enhance the student's sensory performance (id. at pp. 9-11). The report also contained information regarding the student's need for intervention to address his sensory integration needs (id. at pp. 13-43).

The hearing record chronicles numerous behavioral incidents involving the student during the 2005-06 school year, and the district's disciplinary responses thereto, including out-of-school suspension and detention (Parent Exs. 95; 112; 116-17; 119; 120; 121; 122; 124-42; 144-50; 152-54; 156-60; 162-73; 177-82; 184; 186). During the 2005-06 school year, the CSE convened on September 14, October 26, November 10 and December 21, 2005, and on January 6, February 17, May 3, May 26 and June 6, 2006, to discuss the student's special education program (Dist. Exs. W; X; Z; AA; BB). Comments contained in the resultant IEPs reflected lengthy discussions about the student's special education program, his needs, and parental and district staff concerns in attempts to reach a consensus about the student's program (Dist. Exs. W at pp. 8-10; X at p. 8; Z

[7] The hearing record describes a "sensory diet" as "how sensory experiences can enhance performance" (Joint Ex. X at p. 8).

at pp. 8-17; BB at pp. 5-6).[8]

The student achieved the following final grades during the 2005-06 school year: 55 in English; 62 in French; 49 in science; 53 in math; and 50 in social studies (Parent Ex. 92). On June 6, 2006, the CSE convened with the student's mother in attendance to develop a program for his eighth grade school year (Dist. Ex. W at pp. 1, 8). The CSE developed a BIP and FBA and recommended that the student be referred for an intra-Board of Cooperative Educational Services (BOCES) screening for placement for the upcoming 2006-07 school year, opining that the student would benefit from a "more therapeutic environment" (id. at pp. 9-10; Parent Ex. 89). The IEP noted that the CSE would reconvene after the intra-BOCES screening was completed (Dist. Ex. W at p. 9). In August 2006, the parents obtained private Lindamood-Bell services for the student, which continued until December 2006 (Pro Se Ex. 61 at p. 8).

At the start of the 2006-07 school year, at the parents' request, the CSE recommended that the student receive three sessions per week of consultant teacher (indirect) services and one session per week of individual counseling services, pending the recommendations generated after the BOCES screening (Dist. Exs. U at pp. 1-2; W at p. 1).[9] On October 5, 2006, the CSE recommended changing the student's program to daily resource room services and adding the services of a 1:1 teacher aide (TA) "due to health and safety concerns" (Dist. Ex. T at pp. 8-9).[10] The district's documentation of the student's behavior, some of which required disciplinary action including out-of-school suspension, continued throughout the 2006-07 school year (see Parent Exs. 97-111; 183; 188-90).[11]

In October 2006, the parents procured a private psychiatric evaluation of their son (Dist. Ex. S). The private psychiatrist generated his report after reviewing the student's school records,

[8] On April 18, 2006, the district convened a manifestation determination review arising out of the student's physical altercation with another student occurring on January 6, 2006, and the student's subsequent out-of-school suspension (Dist. Ex. Y at p. 8; see 8 NYCRR 201.4). The manifestation team determined that the student's behavior was a manifestation of his disability (id. at p. 9). The parties dispute the cause of the delay between the incident and the manifestation determination review (see Dist. Ex. GG at pp. 486-87; Parent Exs. 39; 112; 114-17; 176; 194; 196-97).

[9] Shortly after the 2006-07 school year began, in September 2006, the student received a four-day out-of-school suspension for his involvement in a physical altercation with another student; the manifestation team subsequently determined the student's behavior to be a manifestation of his disability (Tr. p. 316; Dist. Ex. U at p. 8; Parent Exs. 24; 106). Due partly to the parents' concern for his safety at school, and upon recommendations from the parents' private evaluators/counselors, the student did not return to the district's program until December 2006 (Tr. pp. 304, 316-17; Parent Ex. 105; see Parent Exs. 82; 210).

[10] The district's school psychologist characterized the assignment of the 1:1 TA not as "special education," but as a "building level support" for the student (Tr. p. 382).

[11] According to the hearing record, during the student's numerous absences from school caused in part by his disciplinary suspensions during the 2005-06 and 2006-07 school years, the district attempted to provide him with home instruction services (Parent Exs. 112 at pp. 3-5; 219; 221-33; 235; 241-42; 252-316).

including several private evaluation reports,[12] previous and current IEPs, and correspondence between the parties, and after interviewing the parents and the student (id. at p. 1). The private psychiatrist described the student as "a bright, intellectually curious boy who has a history of Tourette's syndrome (TS), characterized by chronic motor and vocal tics" (id.). He observed that although the student's history of tics had been "relatively mild and non-impairing," the student exhibited "many of the associated neuropsychiatric problems which often accompany Tourette's disorder: obsessive-compulsive symptoms, uneven cognitive profile with learning disabilities, anxiety proneness, and impulsivity" (id.). He explained that the student's strong verbal skills, contrasted by his weaker visuomotor, processing speed, and working memory were characteristic of many individuals with Tourette's disorder, and advised that students with this "pattern" of cognitive strengths and weaknesses may also exhibit features of a non-verbal learning disorder, with relative weaknesses in reading social cues that are non-verbal or paraverbal in nature (id.). The psychiatric report noted the "numerous evaluations" which identified the student's "marked dysgraphia and dyslexia," poor phonemic awareness skills, and associated auditory processing difficulties (id.). The private psychiatrist added that the student demonstrated "some sticky, perseverative behaviors (probably related to his [obsessive compulsive disorder] OCD) that sometimes make it difficult for him to shift frame or activities flexibly and easily" (id.). He also observed the student exhibit cognitive impulsivity and "anxiety proneness with periods of school-related anxiety" (id. at p. 2). He opined that the student was neither aggressive nor intrinsically angry, nor did he manifest symptoms of "a Conduct Disorder or Oppositional-Defiant Disorder" (ODD) (id.).

The student received diagnoses of Tourette's disorder, an OCD, a learning disability, and a "[p]ossible Non-Verbal Learning Disability" (Dist. Ex. S at p. 4). The private psychiatrist recommended the development of an IEP that accounted for the student's specific cognitive profile and deficit areas, a program consisting of "[mainstream] mid-level" math, science, social studies and special classes, 1:1 remediation for aspects of English instruction (writing, reading and composition) from teachers qualified in using multisensory, evidence-based practices such as Orton-Gillingham or Lindamood-Bell, supplemental "help in social skills/social pragmatics" with a focus on conflict resolution, classroom and testing accommodations, development of a positive behavioral support plan, staff training, and an assistive technology reevaluation (id. at pp. 2-3). The private psychiatrist surmised that the student "currently experiences his school setting as dangerous and inimical to him," and recommended that the student not return to school until the preceding recommendations were implemented, and that he receive interim home instruction (id. at p. 3). If the district was unable to provide the recommended instructional modifications and interventions, the private psychiatrist suggested a "private placement at a specialized school," but cautioned against placing the student in a program designed for students who received primary diagnoses of a conduct disorder or an ODD (id. at p. 4).

In January 2007, the parents again obtained private tutoring services for the student, which continued through April 2008 (Pro Se Ex. 61 at pp. 21-25). On March 9, 2007, the private neuropsychologist who conducted the student's November 2005 neuropsychological evaluation

[12] The private psychiatrist noted in his report that he reviewed the January 2006 Lindamood-Bell, August 2005 educational, November 2005 neuropsychological, January 2004 Slingerland, December 2005 auditory and language processing, and February and May 2004 OT evaluation reports (Dist. Ex. S at p. 1). He noted that "[a]ll of these latter evaluations have yielded very detailed recommendations for educational interventions and remediation. We agree with these major recommendations and urge their implementation" (id.).

completed an educational evaluation of the student (Dist. Ex. I). The educational evaluation report compared academic achievement assessment scores from November 2005 to those achieved in March 2007 (id.). In March 2007, the student's reading achievement subtest scores on the Woodcock Reading Mastery Test-Revised (WRMT- R) and the Gray Oral Reading Test-Fourth Edition (GORT-4) placed him in the 9th percentile in fluency and the 58th percentile in passage comprehension, with his remaining subtest scores falling in the low average to average range (id. at p. 1). On the Test of Written Spelling-Fourth Edition, the student achieved scores in the 12th percentile, while on the key math subtests, he achieved scores in the 50th percentile in addition, subtraction, and problem solving, in the 16th percentile in multiplication, and in the 9th percentile in division (id.). On the Test of Written Language, the student achieved scores in the 2nd percentile in contextual conventions and contextual language and in the 9th percentile in story construction (id. at p. 2).

On June 8, 2007, the district's school psychologist prepared an annual review summary report, including information developed from classroom observations of the student, previous evaluation reports, teacher and related service provider reports, report cards, and "other relevant data" (Dist. Ex. H at p. 1). In the area of cognitive development, the report noted the student's verbal IQ score of 93, his performance IQ score of 95, and his full scale IQ score of 93 (id.). In the realm of social/emotional development, the report revealed that the student demonstrated a "below average tolerance for frustration" within the classroom setting, and that he exhibited an attentional deficit, a below average ability to relate to his peers and adults, and difficulties with social judgment and reading social cues (id. at p. 2). Physically, the school psychologist reiterated previous observations of the student's poor postural tone and motor control, problems with eye coordination, tracking, focusing, and visual-motor integration, and his writing skills, which were characterized as "slow and immature" (id. at pp. 2-3). With regard to academic development, the report noted that in the areas of reading and writing, the student exhibited significant delays in phonemic awareness, reading rate and fluency, and written production, although reading comprehension and general academic knowledge were deemed his strengths (id. at p. 3). The report revealed that the student's inability to approach computations and problems sequentially, coupled with his reading difficulties, adversely affected his performance in math (id.). The student's teachers expressed "inconsistent" conclusions concerning his understanding of concepts and long-term information retention, but were uniformly concerned about his writing skills, "academic motivation, and follow through within the classroom setting" (id.). In language/communication, the report referenced previous assessments revealing a "significant auditory processing, temporal integration, and language processing disorder" with weaknesses in "auditory figure-ground listening, discrimination (mishearing), organization, phonemic awareness, ability to follow directions, short-term memory, and word retrieval;" however, the school psychologist characterized the student as possessing "average" general communication skills within the classroom (id.).

The student achieved the following final grades for the 2006-07 school year: 67 in social studies, 78 in science, 65 in algebra, 51 in English, and 66 in Spanish, and posted a fourth quarter cumulative grade average of 69.20 (Dist. Ex. KK at p. 17). The student's final IEP progress report for the 2006-07 school year confirmed that out of 39 annual goals, he "completed" 10,

demonstrated "some progress" toward 23, was "progressing satisfactorily" toward 2, and had not yet started 3 (id. at pp. 44-51).[13]

According to the hearing record, during the 2006-07 school year, the CSE convened on September 27 and October 5, 2006, and on March 5, March 12, March 20, March 27, April 23, May 4, May 17, May 25, June 19, and July 25, 2007 (Dist. Exs. E; F; R at pp. 9-13; T at p. 1; U at p. 1). According to comments inserted in the June 19, 2007 IEP, all CSE meetings conducted in 2007 until that point convened in order to develop the student's ninth grade special education program for the 2007-08 school year (Dist. Ex. F at p. 9).[14] The June 19, 2007 CSE meeting constituted the student's annual review, and was attended by the CSE chairperson, the administrator for special education, two school psychologists, the assistant principal, a counselor, two special education teachers, a regular education teacher, a social worker, an additional parent member, the parents, and a private psychologist (id.). According to the comments contained in the June 19, 2007 IEP, the CSE recommended placement of the student in a resource room program with inclusion support for academic subjects (Dist. Ex. F at pp. 1, 9; see Tr. pp. 365-72, 466-72, 637-38). The parents requested that the student receive consultant teacher support in "humanities," an academic class the student elected to take which did not offer inclusion support; however, the district indicated that consultant teacher support in humanities was "not possible" (Dist. Ex. F at p. 9; see Tr. pp. 373, 468-71). According to the June 19, 2007 CSE meeting comments, the CSE chairperson terminated the meeting "due to an inability to move forward with discussion concerning program options and supports available at the high school" because the parents were "agitated with the members of the CSE," and the tone of the parents' discussion was "negative and abusive to the committee membership" (Dist. Ex. F at p. 9; see Tr. pp. 372-73, 635-36).[15]

The CSE reconvened later on June 19, 2007 after the parents' departure (Dist. Exs. F at p. 9; G; LL), with the CSE audio-recording and transcribing the balance of the meeting. The remaining CSE members discussed options for the student's special education services, program modifications, testing accommodations, and related service recommendations (Dist. Exs. G; LL). According to CSE meeting comments, at prior meetings, the CSE had developed the student's "abilities and needs" with the parents, and the goals incorporated into the June 19, 2007 IEP were previously developed with parental input (Dist. Ex. F at p. 9; see Tr. pp. 365-66). After the parents' departure, the remaining June 19, 2007 CSE members unanimously recommended that during the 2007-08 school year, the student receive a daily resource room program which would provide support for his humanities class, and "specialized reading instruction" services from a State certified reading teacher, who would provide instruction through a multisensory reading program (Dist. Ex. F at pp. 1, 9; see Tr. pp. 365-72, 637-38). The recommended program also offered inclusion math and science classes, and one session per week of individual counseling services (Dist. Exs. F at pp. 1, 9; G at pp. 8-9; see Tr. pp. 367-71, 468-71, 637-38). Comments included in the June 19, 2007 IEP maintained that "the recommendations made by the CSE are consistent with

[13] One annual goal in this report did not receive a designation (see Dist. Ex. KK at p. 46).

[14] At the June 19, 2007 CSE meeting, the IEP reflects that the CSE chairperson stated that each of the previous meetings in 2007 lasted approximately one hour and fifteen minutes, which was spent discussing the student's "levels, abilities, needs, social development, physical development," as well as goals and objectives (Dist. Ex. G at p. 7).

[15] The hearing record also indicates that a prior CSE meeting conducted on May 25, 2007 was also terminated due to the student's mother's "abusive comments" (Dist. Ex. R at p. 13).

the recommendations that were discussed earlier in the meeting when the parents were present" (Dist. Ex. F at p. 10). The hearing record evidences that after the June 19, 2007 CSE meeting concluded, the CSE forwarded the audiotape of the balance of the meeting to the parents together with a copy of the resultant draft IEP (Dist. Exs. F at p. 10; GG at pp. 794-95; see Tr. pp. 373-75, 637-38).

On July 25, 2007, the CSE reconvened to complete the student's annual review (Dist. Ex. E). Attendees included the CSE chairperson, a psychologist, a guidance counselor, an additional parent member, a regular education teacher, a special education teacher, and the student's mother (id. at p. 9). The resultant IEP noted that the student's "[p]resent levels of performance and needs had been discussed and written over numerous CSE meetings throughout the spring," and that a draft IEP was presented to the parents prior to the June 19, 2007 CSE meeting, but that the student's mother disagreed with how the goals were written (id.). According to comments contained in the July 25, 2007 IEP, although the student's goals had been developed by the CSE in conjunction with the parents' input at prior CSE meetings, the student's mother disagreed with how the goals were written, and the CSE subsequently added a goal addressing the student's homework (id. at pp. 9-10). The learning support team (LST)[16] "recommended inclusion classes" for math, science, English, and social studies, but agreed to place the student in the humanities class pursuant to the parents' request (id. at pp. 1, 9; see Tr. pp. 638, 762).[17] The CSE retained the specialized reading instruction and counseling services recommendations from the June 19, 2007 CSE meeting (compare Dist. Ex. E at pp. 1-2, with Dist. Ex. F at pp. 1-2).[18] The July 25, 2007 CSE added a two-hour team meeting to the student's IEP to discuss "specific disabilities, learning styles and needs" (Dist. Ex. E at p. 3).

On July 31, 2007, the parents, through their attorney, filed a due process complaint notice alleging that the district deprived the student of a free appropriate public education (FAPE) during the 2005-06, 2006-07, and 2007-08 school years (Dist. Ex. D). From September 2007 until March 2008, the student attended the district's high school in a general education program with special education support pursuant to the July 25, 2007 IEP, which included daily reading instruction from the district's certified reading teachers (Tr. pp. 674, 1982-83, 1990-93, 2091-93, 2096-98, 2107; Dist. Exs. E at p. 2; KK at p. 29).[19] The student completed 75 hours of Lindamood-Bell instruction from January 4 through June 2, 2008 (IHO Ex. VI). He received designations of "I" in algebra,

[16] Although referencing the "LST" on several occasions (Tr. pp. 741, 743, 745, 762), the hearing record neither defines this term nor clarifies it in relation to the CSE.

[17] The July 25, 2007 CSE appeared to use the terms "inclusion" and "integrated" interchangeably in the student's July 25, 2007 IEP (Dist. Ex. E at pp. 1-2). The July 25, 2007 IEP defined "integrated classes" as "general education classes with the support of a special education teacher and teacher assistant on alternating days" (id. at p. 2).

[18] The July 25, 2007 CSE also retained the student's program modifications, assistive technology devices/services, testing accommodations, present levels of performance, needs, standardized testing results and annual goals and short-term objectives from the June 19, 2007 IEP (compare Dist. Ex. E at pp. 2-14, with Dist. Ex. F at pp. 2-15).

[19] Pursuant to an interim order issued by the impartial hearing officer issued on March 2, 2008, "beginning as soon as possible," the student was to receive daily Lindamood-Bell instruction for the first two hours of the school day, after which the student would go to the district's high school to "complete the school day normally," including being available to take tests and turn in assignments in his math, English and social studies classes (Tr. pp. 844-45; see IHO Decision at pp. 26-29).

English/humanities and social studies/humanities, "P"[20] in AIS reading,[21] and achieved final grades of 71 in earth science and 75 in Spanish, posting a fourth quarter cumulative grade average of 67.00 (Dist. Ex. KK at p. 29). On the State Regents examinations, the student achieved scores of 76 and 82 in algebra and earth science, respectively (id.).

The parents' 18-page due process complaint notice dated July 31, 2007, alleged numerous complaints pertaining to multiple IEPs spanning the 2005-06 (the student's seventh grade), 2006-07 (the student's eighth grade), and 2007-08 (the student's ninth grade) school years that they maintained deprived the student of a FAPE (Dist. Ex. D). Initially, the parents alleged that the district failed to place the student in a pendency placement as directed by a federal court order (id. at p. 1).[22] With regard to the 2005-06 school year, the parents alleged the following: (1) that the district failed to conduct necessary student evaluations, for which the parents ultimately incurred personal expense; (2) that the district failed to consistently implement the IEP;[23] (3) that the IEP failed address the identified deficits of the student; (4) that the CSE withheld services, particularly intensive reading, from the student without input from or providing notice to the parents; (5) that the CSE failed to provide OT services during the 2005-06 school year, and therefore failed to address any of the OT goals identified in the IEP; (6) that the CSE failed to provide resource room services to the student, despite the CSE's recommendation for such services on the IEP, substituting an AIS service room in lieu of a special education services resource room; (7) that the CSE provided only individual counseling services to the student; (8) that the CSE excluded the parents from meaningfully participating in the decision making process by allegedly developing the IEP at a CSE meeting conducted without the parents in attendance and allegedly modifying the same at a subsequent CSE meeting to which the parents were not invited; and (9) that the district failed to demonstrate that the student was progressing toward any of the goals and objectives contained in the IEP (id. at pp. 2-4, 8-10, 12-15).

Concerning the 2006-07 school year, the parents' allegations included the following: (1) that the CSE refused to perform appropriate evaluations; (2) that the CSE removed diagnoses,

---

[20] The hearing record does not indicate what the "I" and "P" designations stood for.

[21] According to the hearing record, "AIS reading" was a general education remedial reading class taught by a State-certified reading teacher which was designed for "students who are not reaching their academic potential, or [need] extra support in reading" (Tr. pp. 1983, 1986-87, 1989, 2018, 2020, 2040-42, 2095-96).

[22] Although the student's mother contended during the impartial hearing that she was in possession of a federal district court order triggering pendency (Tr. pp. 1863, 1865-66), this purported order was neither entered into evidence during the impartial hearing nor included in the hearing record. The student's attorney stated during the impartial hearing that he was unaware of the existence of any district court order addressing pendency (Tr. p. 1869).

[23] In their due process complaint notice, the parents alleged that the IEP at issue for the 2005-06 school year was dated June 15, 2005, that it was developed by the CSE on June 16, 2005, and that the "Learning Support Team" subsequently changed the student's placement on September 13, 2005, without parental participation in either instance (Dist. Ex. D. at pp. 1, 3). The hearing record contains two IEPs dated June 14, 2005 and September 14, 2005, respectively (Dist. Exs. CC at p. 1; BB at p. 1), and to avoid confusion, I will refer in this decision only to these dates. The hearing record also contains IEPs dated October 26, 2005 (with effective dates of September 7, 2005 to June 23, 2006) (Dist. Ex. AA), February 17, 2006 (with effective dates of February 17, 2006 to June 23, 2006) (Dist. Ex. Z), April 18, 2006 (with effective dates of April 19, 2006 to June 23, 2006) (Dist. Ex. Y), and May 3, 2006 (with effective dates of May 4, 2006 to June 23, 2006) (Dist. Ex. X) which were not directly referenced in the due process complaint notice.

specialized reading services, OT services, and counseling services from the IEP;[24] (3) that the district failed to consistently implement the IEP; (4) that the district attempted to remove the student from school by unilaterally changing his placement to an out-of-district residential placement, and when the parents disagreed, the district allegedly withheld services from and initiated disciplinary actions against the student; (5) that the CSE abridged the parents' ability to meaningfully participate in the decision making process by scheduling CSE meetings at inconvenient times and withholding student records; and (6) that the CSE failed to address the student's significant needs, insofar as it allegedly changed the student's program by assigning him a 1:1 aide without any input from the parents and isolated the student by unilaterally placing him in a 1:1 setting without informing the parents where the placement would be (Dist. Ex. D at pp. 4-10, 11-18).

With regard to the 2007-08 school year, the parents alleged: (1) that the CSE "'needled' and stonewalled the parents at the [June 19, 2007 CSE] meeting, they protested, and the parents were told to leave," after which the CSE developed an IEP in their absence without parental input; (2) that the June 19, 2007 IEP failed to provide the student with a FAPE in the least restrictive environment (LRE) because it did not identify the student's present levels of performance accurately; it did not identify appropriate services for the student, such as specialized reading services, services addressing his CAPD, resource room services, inclusion services, and transportation services; it lacked appropriate goals addressing the student's CAPD, reading deficits, fine motor skills deficits, and sensory deficits; it lacked a transition plan; and it lacked necessary accommodations and supplementary aids and services; and (3) that the district failed to conduct the student's triennial review (Dist. Ex. D at pp. 8-15).

Additionally, the parents asserted that during the 2005-06, 2006-07, and 2007-08 school years, the district "created a hostile environment for the student and the parents," repeatedly changed the student's IEPs without following proper procedure and denying the parents meaningful opportunities to participate in the decision making process, refused to allow necessary service providers (occupational therapist and speech-language pathologist) to attend CSE meetings despite parental requests, deliberately substituted special education services with AIS services, denied the parents access to student records, failed to conduct an adequate FBA or develop an adequate BIP, refused to allow the parents' independent psychologist to conduct a classroom observation of the student, failed to address the student's attendance and transportation issues, and failed to furnish the parents with copies of the student's IEPs (Dist. Ex. D at pp. 5, 9-15).

During the 2005-06 and 2006-07 school years, the parents also alleged that the district failed to reimburse them for OT, neuropsychological, central auditory processing, psychoeducational, and psychiatric evaluations that they secured; failed to provide them with written progress reports documenting the student's progress; and failed to conduct annual reviews (Dist. Ex. D at pp. 8, 13, 15). They also contended that the district failed to consider or offer extended school year (ESY) services to the student for the summers of 2006 and 2007, and failed

[24] According to the hearing record, the following IEPs related to the 2006-07 school year: June 6, 2006 (with effective dates of September 6, 2006 to June 22, 2007) (Dist. Ex. W); September 27, 2006 (with effective dates of September 6, 2006 to June 22, 2007) (Dist. Ex. U); October 5, 2006 (with effective dates of October 16, 2006 to June 22, 2007) (Dist Ex. T); and May 25, 2007 (with effective dates of May 25, 2007 to June 22, 2007) (Dist. Ex. R).

to furnish the parents with a written explanation as to why such services were not offered (id. at p. 15).

The parents requested numerous items of relief in their due process complaint notice, including an order: (1) determining that the district deprived the student of a FAPE during the 2005-06, 2006-07, and 2007-08 school years; (2) directing the district to develop an appropriate IEP for the student with the meaningful participation of the parents; (3) directing the district to reimburse the parents for OT, neuropsychological, central auditory processing, psychoeducational, psychiatric, and Lindamood-Bell reading evaluations that they had secured; and (4) directing the district to reimburse the parents for privately obtained Lindamood-Bell services, OT services, counseling and psychological services, tutoring services, ESY services (for summers 2006 and 2007), and incidental transportation expenses incurred by the parents in connection thereto (Dist. Ex. D at pp. 16-18).

On September 14, 2007, the district responded to the parents' due process complaint notice (Dist. Ex. A; see 8 NYCRR 200.5[i][4]). Its response contained a general denial of all allegations contained in the parents' due process complaint notice, and asserted a statute of limitations affirmative defense, which the district contended barred any allegations that allegedly occurred prior to August 1, 2005 (Dist. Ex. A at p. 1). The district contended that it offered the student a FAPE during each of the school years at issue, and responded specifically to six particular allegations contained in the due process complaint notice (id. at pp. 1-3). First, it contended that the parents were asked to leave the June 19, 2007 CSE meeting because the "disruptive and abusive behavior of the student's mother would not abate and rendered deliberations of the Committee impossible" (id. at p. 2). The district further contended that thereafter, the CSE continued the meeting in the parents' absence, incorporating goals and objectives which had been discussed during previous CSE meetings during the 2006-07 school year, and that a completed tape recording of the CSE discussions, as well as a draft of the June 19, 2007 IEP were subsequently forwarded to the parents together with an invitation to a subsequent July 25, 2007 CSE meeting (id.). Second, the district denied refusing to allow the parents' private psychologist to conduct a classroom observation of the student; rather, the district contended that it was the parents who refused to consent in writing to such an observation (id.). Third, the district countered that the student's attendance and transportation issues stemmed from the conduct of the parents, who, it maintained, elected to withhold him from attending school for vacations/trips, and for other personal reasons (id. at pp. 2-3). Fourth, the district maintained that it in fact conducted the student's triennial review on June 8, 2007, adding that it had also conducted annual reviews during each year that the student had been in the public school system (id. at p. 3).[25] Fifth, the district asserted that the student was ineligible to receive ESY services during the summers 2006 and 2007 (id.). Finally, the district contended that it had scheduled "transition planning" for the student during the current (2007-08) school year, but that the parents failed to return to the district a questionnaire form previously forwarded to them as a part of the transition process (id.).

[25] There is no evidence in the hearing record that the district conducted a triennial review on June 8, 2007. It is unclear whether this representation resulted from a typographical error or if the district considered the school psychologist's annual review summary report dated June 8, 2007 (Dist. Ex. H) to constitute the student's triennial review.

An impartial hearing convened on November 19, 2007 and concluded on February 6, 2009, after 15 days of testimony.[26] In a 124-page unsigned decision dated April 12, 2009, the impartial hearing officer determined that with respect to pendency, neither party submitted sufficient evidence to demonstrate that any IEP was ever agreed upon for the student; therefore, the student's pendency placement was a general education program (IHO Decision at pp. 2, 83-84).[27]

Although his decision specifically addresses only the 2007-08 school year,[28] the impartial hearing officer also concluded that the district had failed to provide the student with a FAPE "sincethe [student] was enrolled in public school" (IHO Decision at pp. 6-8, 80, 83, 87).[29] He opined that a FAPE for the student for the 2007-08 school year would have consisted of "intensive instruction in reading and writing on a daily basis utilizing a single experimentally-validated methodology.… under the administrative supervision of the district's special education staff. None of this took place or was offered" (id. at p. 83). The impartial hearing officer further determined that the district failed to adequately assess the student or to determine and define his learning disability; failed to propose or deliver an adequate program to address the student's significant reading, writing, and other disabilities; and misdirected the focus of its attention onto the student's behavior management needs (id. at pp. 6-8). While the impartial hearing officer agreed with the district's contention that "the parents' actions and behaviors have rendered it impossible for the district adequately to assess [the student] or to offer him an appropriate program," he added "that conclusion does not exonerate the district from its absolute obligation to have done such an evaluation and offered such a program"(id. at p. 7).

---

[26] The hearing record does not explain the delay in conducting the impartial hearing. While the parents' due process complaint notice is dated July 31, 2007, and the impartial hearing officer acknowledged receiving his appointment on August 1, 2007 (IHO Decision at p. 9), the impartial hearing did not convene for almost four months. The impartial hearing officer is reminded to comply with State regulations with regard to convening the impartial hearing (see 8 NYCRR 200.5[j][3][iii], [j][5][i]). State regulations further provide that "[t]he impartial hearing officer shall respond in writing to each request for an extension" and that "[t]he response shall become part of the record" (8 NYCRR 200.5[j][5][iv]). The impartial hearing officer did not indicate in the hearing record whether any extensions were requested or granted prior to the commencement of the impartial hearing.

[27] The impartial hearing officer's decision consists of 11 pages of analysis, findings of fact, and conclusions; the balance of his decision consists of narrative history of the case, photocopies of several interim orders generated during the impartial hearing, and an exhibit list (IHO Decision at pp. 1-76, 88-124).

[28] Although acknowledging that the parents' July 31, 2007 due process complaint notice alleged that the district deprived the student of a FAPE during the 2005-06, 2006-07, and 2007-08 school years (see IHO Decision at p. 14; Tr. pp. 795-99, 801; see also Dist. Ex. D at pp. 2-16, 18), during the impartial hearing, the impartial hearing officer permitted the district to elect to defend only the June 19, 2007 IEP, applicable to the 2007-08 school year, stating "whether the hearing request includes other things, it's the 2007-08 IEP. If there is only one, and if it's – it's whichever one the district thinks it wants to defend" (Tr. pp. 100-05; see Tr. pp. 1141, 1268-69, 1432-33, 1979). I note that, generally, the party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 09-027; Application of the Dep't of Educ., Appeal No. 09-024; Application of the Dep't of Educ., Appeal No. 08-131; Application of the Dep't of Educ., Appeal No. 08-097; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043).

[29] I note that this determination by the impartial hearing officer is inconsistent with his limitation of the presentation of evidence during the impartial hearing to the 2007-08 school year IEPs only, as noted above. However, the district did not appeal this aspect of the impartial hearing officer's decision in the petition.; therefore, it is final and binding upon the parties (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Addressing the issue of reimbursement, the impartial hearing officer determined that the district owed the parents reimbursement for the full cost of each of the parentally obtained evaluations that it had relied upon in developing the IEP, including audiological and speech-language (Dist. Ex. K), neuropsychological (Dist. Ex. L), educational (Dist. Ex. M), psychiatric (Dist. Ex. S), and OT (Joint Ex. X) (IHO Decision at pp. 6-8, 76-77, 86-87). However, the impartial hearing officer denied the parents' request for reimbursement of all other services they had privately procured for the student, concluding that the parents' behavior constituted a failure to cooperate with the special education process and that the equities did not favor rewarding such conduct (id. at pp. 9, 87).

The impartial hearing officer ordered the district to conduct a new set of evaluations, including psychological, educational, OT, speech-language, assistive technology, audiological, and neuropsychological evaluations; however, he stated that no psychiatric evaluation was to be conducted (IHO Decision at p. 76). He further directed the district to conduct these evaluations using "independent, non-district clinicians" that must be State-licensed in their respective disciplines (id. at p. 77). He mandated the parents to "make the [student] available and otherwise cooperate with those evaluations irrespective of the provider," and cautioned the parents that failure to do so would not only constitute a de facto parental removal of the student from special education, but would also extinguish the district's obligation to provide the student with a FAPE (id. at pp. 77-80 citing 20 U.S.C. § 1414[a][1][D]).

Initially, it should be noted that that although it is clear that the impartial hearing officer derived his factual findings from the exhibits and testimony in the hearing record, the impartial hearing officer failed to cite to any evidence in the hearing record to support the factual determinations in his decision, despite amassing a hearing record exceeding 7,000 pages in length. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is reminded to comply with State regulations and cite to relevant facts in the hearing record (see Application of a Student with a Disability, Appeal No. 08-028).[30]

The district appeals from the impartial hearing officer's decision, and adduces two principal arguments. First, the district asserts that the impartial hearing officer's determination that the July 25, 2007 IEP did not offer the student a FAPE for the 2007-08 school year was erroneous and contrary to law. The district contends that: (1) the impartial hearing officer's conclusion that the CSE failed to adequately evaluate the student was erroneous because the parents failed to provide consent for the district to evaluate the student on multiple occasions pursuant to 8 NYCRR 200.5(b)(1)(i)(b), and because the evaluations secured by the parents were considered by the CSE and provided it with sufficient data from which to ascertain the student's individual needs, educational progress and achievement, ability to participate in a general education program, and continued eligibility for special education per 8 NYCRR 200.4(b)(4); (2) the impartial hearing officer's determination that the CSE did not properly address the student's reading and writing needs was erroneous because despite the obstacles allegedly presented by the parents, the July 25, 2007 IEP accurately reflected the results of evaluations to identify the student's needs, established

[30] I note that the impartial hearing officer was previously reminded of his obligation to cite to the hearing record in Application of the Dep't of Educ., Appeal No. 08-062.

annual goals related to those needs, and provided for the use of appropriate special education services; (3) the impartial hearing officer's determination that the CSE's specially designed reading instruction was inadequate because it was not provided under the direct supervision of the district's special education staff was erroneous because it was within the district's discretion to assign specific instructional staff to implement the July 25, 2007 IEP, because these services, which were to be implemented by a State-certified reading teacher, were fully compliant with 8 NYCRR 200.6(b)(6),[31] and because although AIS are generally considered general education services, they may be utilized in providing a FAPE for a student with reading needs; (4) the impartial hearing officer's determination that the CSE's continuation with the June 19, 2007 CSE meeting in the parents' absence after their removal and subsequent continuation of the meeting on July 25, 2007 including the parents, constituted a deprivation of FAPE was erroneous because prior to their expulsion due to their alleged disruptive/abusive conduct toward staff, the parents were afforded ample opportunity to meaningfully participate in the development of the June 19, 2007 IEP, and even after their departure, the CSE provided the parents with an audiotape memorializing the balance of the CSE meeting and afforded them the opportunity to attend and participate in the subsequent July 25, 2007 CSE meeting; (5) the impartial hearing officer's determination that it was impermissible for the district to agree to adjourn a superintendent's hearing at the request of parents' counsel contingent upon the student's continued receipt of home instruction was erroneous because the impartial hearing officer failed to cite any authority supporting this conclusion;[32] (6) the impartial hearing officer's determination that the CSE focused on the student's behaviors rather than his learning disabilities was erroneous; (7) the impartial hearing officer's determination that the parents should be reimbursed for any parentally obtained private evaluations relied upon by the CSE was erroneous and contrary to equitable considerations; and (8) the impartial hearing officer's determination that the district had an absolute obligation to conduct evaluations and to offer the student a FAPE despite his concomitant finding that the parents' conduct rendered it

[31] 8 NYCRR 200.6(b)(6) provides that "When specially designed reading instruction is included in the individualized education program, such instruction may be provided by individuals qualified under section 80.7 of this Title. For purposes of this paragraph, *specially designed reading instruction* shall mean specially designed individualized or group instruction or special services programs, as defined in subdivision 2 of section 4401 of the Education Law, in the area of reading and which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (emphasis in original).

[32] The hearing record reflects that this superintendent's hearing related to an incident occurring during the student's seventh grade year in which the student was involved in a physical altercation with a classmate (Tr. pp. 485-89; Parent Ex. 105).

impossible for the district to do so, was erroneous.[33]

The district also argues that the parents are not entitled to reimbursement for either the evaluations or the services that they privately obtained for the student.[34] The district posits that federal and State regulations provide that a parent has a right, subject to certain limitations, to an independent educational evaluation (IEE)[35] at public expense if the parent disagrees with the results of an evaluation conducted by the district (see 34 C.F.R. § 300.502[b]; 8 NYCRR 200.5[g]). The district contends; however, that in this case there was no such disagreement, because it was never afforded consent from the parents to conduct its own evaluations; therefore, there is no parental entitlement to an IEE at public expense. The district seeks an order from a State Review Officer vacating those parts of the IHO decision referenced above and determining that the district, through the July 25, 2007 IEP, offered the student a FAPE for the 2007-08 school year.

The district does not appeal the impartial hearing officer's determination that it failed to provide a FAPE to the student during the 2005-06 and 2006-07 school years (IHO Decision at p. 87), nor does it appeal his order that the district conduct a new set of evaluations, including psychological, educational, related services, OT, speech-language, assistive technology,

---

[33] The district's petition contains general allegations that each of the enumerated impartial hearing officer's findings was "erroneous and contrary to law", without arguing the specific grounds for these assertions, which it ultimately includes in its accompanying memorandum of law (see Pet'r Mem. of Law at pp. 2-10). The petition for review is required to "clearly indicate the reasons for challenging the impartial hearing officer's decision" (8 NYCRR 279.4[a]). A memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). However, because the district first raised these issues in the petition, and because the respondents did not object, I will consider these arguments.

[34] The impartial hearing officer determined that the parents were not entitled to reimbursement for any private services or other out-of-pocket expenses incurred in connection with the student's 2007-08 school year (IHO Decision at pp. 9, 87). A party aggrieved by an impartial hearing officer's decision may appeal to a State Review Officer (see 34 C.F.R. § 300.514[b]; 8 NYCRR 200.5[k]; see also Mackey v. Bd. of Educ., 386 F. 3d 158, 160 [2d Cir. 2004]; Application of a Student with a Disability, Appeal No. 08-046; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of the Bd. of Educ., Appeal No. 04-016; Application of a Child with a Disability, Appeal No. 02-007; Application of a Child with a Disability, Appeal No. 99-029). "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]). Further, a State Review Officer is not required to determine issues which are no longer in controversy or to review matters which would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 07-092; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). In the instant case, the impartial hearing officer awarded the district the relief it sought at the impartial hearing; the denial of reimbursement for private services that the parents had obtained for the student. Therefore, the district is not an aggrieved party and has no right to appeal this aspect of the impartial hearing officer's decision.

[35] "Independent educational evaluation" means an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student (8 NYCRR 200.1[z]).

audiological, and neuropsychological evaluations, under the conditions specifically enumerated in his decision (id. at pp. 76-80). Additionally, as noted below, the parents did not appeal from those determinations. Therefore, those aspects of the decision are final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

Preliminarily, I will address several procedural issues presented in this appeal. First, the parents have not answered the petition or served a cross-appeal, even though their time to answer was extended at their request to July 1, 2009.[36] An answer to a petition shall be served within 10 days after the date of service of a copy of the petition (8 NYCRR 279.5). A cross-appeal shall be deemed timely if it is included in an answer which is served within the time permitted by 8 NYCRR 279.5 (8 NYCRR 279.4[b]; Application of the Bd. of Educ., Appeal No. 06-122; Application of a Child with a Disability, Appeal No. 05-078). Notwithstanding the parents' failure to properly answer and cross-appeal, I am still required to examine the entire impartial hearing record (34 C.F.R. § 300.514[b][2][i]) and to make an independent decision (20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b][2][v]) based solely on the impartial hearing record (8 NYCRR 279.3; Arlington Cent. Sch. Dist. v. State Review Officer, 293 A.D.2d 671 [2d Dep't 2002]; Application of the Bd. of Educ., Appeal No. 06-122; Application of a Child with a Disability, Appeal No. 03-082; Application of the Bd. of Educ., Appeal No. 03-028; Application of the Bd. of Educ., Appeal No. 02-039).

I note that the impartial hearing officer in the instant case placed the burden of persuasion on the district to demonstrate that it had offered the student a FAPE (IHO Decision at pp. 7, 11; Tr. pp. 93-100, 1832, 2086-87). At the time that the parents commenced this hearing, the burden of persuasion was on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the Individuals with Disabilities Education Act (IDEA) to assume that every IEP is invalid until the school district demonstrates that it is not]).[37] However, because the district does not assert on appeal that the impartial hearing officer misapplied the burden of proof, I have conducted my review of the hearing record with the burden placed on the district to show that it had offered the student a FAPE. After careful review of the totality of evidence contained

[36] By correspondence received by the Office of State Review dated May 29, 2009, the parents requested a 60-day extension of time to respond to the district's petition. By correspondence dated June 3, 2009, a State Review Officer granted the students' parents a 30 day extension of time to respond to the district's petition.

[37] On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. Here, the parents' due process complaint notice was dated July 31, 2007 (Dist. Ex. D at p. 1).

in the hearing record, I conclude that regardless of which party had the burden, the hearing record demonstrates that the district failed to offer the student a FAPE for the 2007-08 school year.

In the instant case, the hearing record evidences a contentious relationship that existed between the impartial hearing officer and the parties, particularly the student's mother, from the beginning of the impartial hearing. A careful review of the almost 3,100 pages of transcript reveals a hearing record that amply supports the impartial hearing officer's admission that "responsibility must lie with my inability to find a manner of conducting the hearing that could effectively either mitigate or work around the effects of the [student's] mother's disruptions" as well as "my own incapacity to devise a strategy to keep the hearing on track" (IHO Decision at p. 11). The resultant hearing record is replete with irrelevant, counterproductive, and, at times, antagonistic colloquy (see Tr. pp. 889, 906, 909, 911-20, 1040-42, 1049-52, 1042-47, 1070-76, 1150-55, 1807-34, 1840-41, 1847-48, 2237, 2295-98).[38] On several occasions, the impartial hearing officer engaged in hostile exchanges with the student's mother, and on still other occasions, either threatened to remove her or actually ordered her to leave the hearing room (see Tr. pp. 1308-19, 1328-43, 1871-84, 1909-10, 2389, 2615-18, 2621-22, 2650, 2659, 2797-2801, 2815-16, 2889-95, 2962-66, 2988-95, 3031).[39] In one instance, the student's mother preempted the impartial hearing officer's authority and conducted her own direct examination of the impartial hearing officer (see Tr. pp. 2290-95), and in another, the impartial hearing officer himself left the hearing room (see Tr. pp. 2281, 2289). The hearing record also contains multiple instances in which the impartial hearing officer prematurely expressed his opinion that the district failed to offer the student a FAPE for the 2007-08 school year before the district concluded presenting its evidence (see Tr. pp. 831, 1749, 1766, 1832-33, 2088).[40] The impartial hearing officer ultimately terminated witness testimony and accepted further argument via submission of written papers only (IHO Decision at pp. 68-72).

An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others

[38] I note that of the 3,096 pages of transcript in the hearing record, less than half contain actual witness testimony; over 1,800 pages consist of repetitive exchanges between the parties, their counsel, and the impartial hearing officer, and protracted discussions relative to scheduling and ministerial matters.

[39] The hearing record also reveals that on multiple occasions, the student's mother removed herself from the hearing room on her own accord (see Tr. pp. 1334, 1826, 1884, 2234, 2238).

[40] Despite stating numerous times prior to the district's resting of its case that he had determined that the district failed to provide the student with a FAPE for the 2007-08 school year, the impartial hearing officer nevertheless instructed the district's counsel as to how he should frame his closing argument that the district did in fact provide a FAPE (see Tr. pp. 2717-18).

with whom the hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).[41]

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195,

[41] The parents directed multiple accusations of bias against the impartial hearing officer and sought his recusal several times during the impartial hearing (Tr. pp. 889, 906, 909, 1040-42, 1049-52, 1073, 1213-14, 1840-41, 2237; see IHO Decision at pp. 42-48, 54-58). However, the district did not allege bias in the petition.

quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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

Turning to the instant case, as previously noted, the CSE conducted the student's annual review for the 2007-08 school year on June 19, 2007, and reconvened to continue the annual review on July 25, 2007 (Dist. Exs. E; F). A careful review of the hearing record and the July 25, 2007 IEP demonstrates that the CSE developed the student's then present levels of performance, program modifications, and testing accommodations with parental input, and that these aspects of the IEP reflected information about the student's skills and needs that was contained in the evaluative data before the CSE (see Tr. pp. 316-66; Dist. Exs. E at pp. 2-9; G at pp. 3-7; R at pp. 11-13; see also Dist. Exs. H; I). The hearing record also reflects that the CSE obtained parental input in its development of the student's annual goals at multiple CSE meetings leading up to the June 19, 2007 CSE meeting (Tr. pp. 765-68; Dist. Ex. R at pp. 9-13), and that the June 19, 2007 CSE attempted to discuss the student's annual goals at the meeting, but subsequently adopted annual goals that the student's father submitted to the CSE on the morning of the meeting (Tr. pp. 631-37, 786; Dist. Exs. F at p. 9; G at p. 7). At the parents' request, during the July 25, 2007 CSE meeting, the CSE added an additional annual goal addressing homework to the July 25, 2007 IEP, which produced annual goals addressing study skills, reading, written language, mathematics, and

social/emotional/behavioral skills, all of which were areas of need identified by the CSE based upon its consideration of available evaluative data (Dist. Ex. E at pp. 9-14; see Dist. Exs. H; I).

However, although the district made significant efforts to collaborate with the parents in arriving at a consensus regarding the student's special education program (see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253-54 [2d Cir. 2009]), based upon my review of the hearing record, as set forth more fully below, I concur with the impartial hearing officer's determination that the district did not offer the student a FAPE during the 2007-08 school year. The district's school psychologist and its assistant superintendent for pupil services (assistant superintendent) testified that both the June 19, 2007 and July 25, 2007 CSEs concurred that the student required "special education support in each of his core subject areas" and that absent parental input, the CSE would have recommended an inclusion program in English, science, social studies, and math class for the student's 2007-08 school year (Tr. pp. 223, 466-68, 581, 639-41). The school psychologist added that at the point the assistant superintendent terminated the June 19, 2007 CSE meeting, the CSE recommended that the student receive an "inclusion program with Resource Room" during the 2007-08 school year; yet, the June 19, 2007 IEP ultimately recommended only integrated math and science classes and specialized reading instruction (Tr. p. 466; Dist. Ex. F at p. 1). The hearing record reflects that the June 19, 2007 and July 25, 2007 CSEs did not recommend inclusion classes in English and social studies for the student due to the parents' request that the student participate in the district's humanities program, described in the hearing record as a combined general education English and social studies class (Tr. pp. 468-69, 637; Dist. Exs. E at pp. 2, 9; F at pp. 2, 9; G at p. 2).

Although the hearing record evidences that both the June 19, 2007 and July 25, 2007 CSEs opined that the student required special education support in English and social studies, neither the June 19, 2007 nor the July 25, 2007 IEP offered direct special education support in those classes (Tr. pp. 645-46; Dist. Exs. E at pp. 1-2, 9; F at pp. 1-2, 9; G at p. 2). According to the assistant superintendent's testimony, the CSE preferred a full inclusion program of math, science, social studies, and English for the student (Tr. p. 641). He believed that "[h]aving that second person there, working with [the student] in that setting, would be appropriate to his academic needs" (Tr. p. 641). The assistant superintendent added:

> There was some placement of classes that in regular ed we were somewhat concerned with. We didn't think that [the student] should be in that; which is Humanities, which is a double period of English and social studies. It's not the same teaching staff working together as a joint team. We felt that it might have been too difficult for [the student]. We recommended more of an inclusion English and social studies [classes]. But because the parents and the [student] apparently wanted to take this class so bad, we put that in as Humanities. The parents had appealed to us to do that. I said, "Fine, we'll do that"

(Tr. pp. 637-38).

For the 2007-08 school year, the CSE deferred to the parents' request and recommended the student participate in district's humanities program (Tr. p. 638; Dist. Ex. G at p. 2). However, the hearing record establishes that the humanities program lacked the support of any special education services other than resource room (Tr. pp. 470, 707-08; Dist. Ex. G at p. 2). The school

psychologist advised that support for the student's humanities instruction would have been provided by the resource room services that the CSE originally wanted to recommend, but ultimately did not, out of deference to the parents' request (Tr. p. 471). The school psychologist defined resource room services as "the provision of support services by a special education teacher in a grouping of no more than five students and one special education teacher" for the purpose of providing supplemental instruction (Tr. pp. 471-72). The hearing record reveals that the CSE originally intended for a certified reading teacher to deliver the student's resource room services and to provide reading instruction in a small group setting (Tr. p. 646; Dist. Ex. G at p. 2).

The assistant superintendent corroborated that the parents disagreed with the CSE's preference for resource room services because they believed that such services "would interfere with the other classes that [the student] was taking" (Tr. pp. 645-46). The June 19, 2007 and July 25, 2007 IEPs did not specifically recommend resource room services, but rather "specialized reading instruction" instead (Tr. pp. 471, 641; Dist. Exs. E at pp. 2; F at p. 1). According to the assistant superintendent, the student's daily specialized reading instruction would be provided by a certified reading teacher, who would also be responsible for keeping the student "organized with the skills, kind of doing some of the work a Resource Room teacher would do, so he's successful in some of the subject areas" (Tr. p. 646). The July 25, 2007 IEP indicated that the student required multiple testing accommodations including extended time and a flexible setting; provided program modifications addressing his organizational needs, such as using graphic organizers and breaking down long-term tasks into shorter deadlines; and offered four annual goals in the area of study skills (Dist. Ex. E at pp. 2-3, 10). One of the student's reading teachers revealed that because the student did not receive resource room services, he occasionally used the teacher's reading instruction period to complete testing and assignments for classes not specified in the hearing record (Tr. pp. 2127-31). When asked about the CSE's recommendation for specialized reading instruction in lieu of resource room services, the assistant superintendent advised "It wasn't something we wanted, [but resource room] wasn't something we could convince the parent was effective" (Tr. p. 646). The assistant superintendent explained that the CSE wanted the parents to agree to the recommended program because "[t]hey have to be happy with what's happening with their son" (Tr. p. 647).

The hearing record establishes that the June 19, 2007 and July 25, 2007 CSEs originally believed that inclusion classes in all academic subjects and the provision of resource room services were appropriate to meet the student's special education needs during the 2007-08 school year (Tr. pp. 223, 468, 641, 702-07; Dist. Exs. E at pp. 2, 9; F at pp. 2, 9; G at pp. 1-2). However, based on the hearing record, I find that the program it ultimately recommended for the student for the 2007-08 school year did not offer direct special education support in humanities, the subject that would have been affected most by the student's demonstrated reading and written language skill deficits (see Dist. Exs. E at pp. 4-5; G at pp. 1-2). Aside from demonstrating that neither of the student's two reading teachers adequately addressed his written language needs during the 2007-08 school year, the hearing record lacks any indication of how these reading teachers supported the student in the humanities class (Tr. pp. 2036-39, 2062, 2204-06). Furthermore, although the July 25, 2007 IEP provided information about the student's organizational, study skill and testing accommodation needs, the hearing record is bereft of information as to how the recommended specialized reading instruction services addressed his needs, especially in light of the CSE's original preference for resource room services.

Turning next to an examination of the student's AIS instruction, I not preliminarily that AIS are general education services, not special education services, which provide "additional instruction" that supplement regular classroom instruction (see 8 NYCRR 100.1[g]; see also Application of the Dep't of Educ., Appeal No. 08-017; Application of the Bd. of Educ., Appeal No. 07-135).[42]

The assistant superintendent testified that because the student did not receive resource room services, a special education teacher was assigned to monitor developments with the student and "outreach[ed]" to the student's teachers on a weekly basis (Tr. pp. 703-04). The assistant superintendent characterized the special education teacher's role as "almost like a consultant teacher service" (Tr. p. 703). One of the student's reading teachers testified that the student's assigned special education teacher forwarded to her progress reports "to see how each student is doing in each of his or her classes. I am to write if a student is missing work or assignments," and a general statement discussing each student's progress in her class (Tr. p. 2073). The special education teacher assigned to the student also provided the student's reading teachers with information concerning his needed modifications and accommodations (Tr. pp. 2071-74).

The hearing record reveals that the student's reading teachers completed AIS progress reports quarterly that were forwarded to the parents;however, for students with IEPs, these reports did not discuss progress toward annual goals (Tr. pp. 2078-79, 2121-23, 2200-01). One of the student's reading teachers explained that the interim progress report that she completed for the student was "a school-wide thing; where all students receive an interim progress report. And basically, it's one or two comments, based on the child's performance in that time" (Tr. pp. 2066, 2200). The hearing record reflects that neither of the student's two reading teachers documented his progress toward his annual goals as enumerated in his IEP (Tr. pp. 2063-64, 2067-68, 2120-21, 2206-07). The July 25, 2007 IEP confirmed that either a special education teacher or a reading teacher was responsible for monitoring the student's annual goals in reading, and a special education teacher was responsible for overseeing his annual goals in written language and study skills (Dist. Ex. E at pp. 10-12). However, the hearing record does not adequately explain how information concerning the student's performance toward annual goals was communicated from the reading teachers to the special education teacher responsible for reporting progress, in light of testimony that the student's reading teachers were supervised by the chairperson of the district's English department, and that they did not participate in the student's CSE reviews (Tr. pp. 2069-70, 2137, 2209). In the instant case in which the student's reading, writing, and organizational deficits were clearly documented in the July 25, 2007 IEP, and in which the subject IEP enumerated multiple annual goals in the areas of reading, writing, and study skills, I find that the hearing record lacks sufficient evidence detailing how the student's reading teachers assessed and

[42] Pursuant to State regulations, AIS means "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards as defined in subdivision (t) of this section and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance; provided that such services shall not include . . . special education services and programs as defined in Education law section 4401(1) and (2). . . Academic intervention services shall be made available to students with disabilities on the same basis as nondisabled students, provided, however, that such services shall be provided to the extent consistent with the individualized education program developed for such student pursuant to section 4402 of the Education Law" (8 NYCRR 100.1[g].

communicated to the CSE regarding precisely how the specialized reading instruction services addressed the student's unique reading, writing, and organizational needs.

Based upon the foregoing, I concur with the impartial hearing officer's determination that the evidence contained in the hearing record demonstrates that the CSE did not adequately address the student's reading, writing, and organizational needs in developing the July 25, 2007 IEP, and that the CSE failed to recommend a program that was reasonably calculated to confer educational benefit upon the student, thereby denying him a FAPE for the 2007-08 school year.

Having found that the district did not offer the student a FAPE for the 2007-08 school year, I will now address the district's argument that the impartial hearing officer erred in awarding reimbursement to the parents for the costs of parentally obtained private evaluations of the student. The private evaluations enumerated by the impartial hearing officer for reimbursement included an educational testing evaluation performed on March 9, 2007 (Dist. Ex. I);[43] an auditory and speech-language processing evaluation performed on December 17, 2005 (Dist. Ex. K); a neuropsychological evaluation performed on November 16, 18, and 21, 2005 (Dist. Ex. L); an educational evaluation performed on August 12, 2005 (Dist. Ex. M); a psychiatric examination performed on October 16 and October 30, 2006 (Dist. Ex. S); and an OT evaluation performed on April 26, 2006 (Joint Ex. X). In their due process complaint notice, the parents characterized these evaluations as IEEs (Dist. Ex. D at p. 8). The district; however, rejects this characterization and maintains that because the parents never gave the district consent to conduct its own evaluations, there is no parental entitlement to an IEE at public expense.

The impartial hearing officer noted that the privately obtained evaluations were "accepted by the district in lieu of its own evaluations, and have formed the basis of its CSE review and of the IEPs drafted for the relevant school year(s)" (IHO Decision at p. 86). He then opined that "Although the district could have chosen to reject these evaluations, or to pursue its own via impartial hearing, or to conclude that the parents had removed the [student] from special education, it did not pursue any of these paths" (id.). Although he determined that the parentally obtained private evaluations at issue were not IEEs, the impartial hearing officer nonetheless found that the district's reliance on these private evaluations in developing the 2007-08 IEPs justified an award of full reimbursement (id. at pp. 76-77, 86).

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]; Application of a Student with a Disability, Appeal No. 08-152; Application of a Student with a Disability, Appeal No. 08-087; Application of a Student with a Disability, Appeal No. 08-046). 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. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an 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 the district failed to demonstrate that its evaluation was appropriate]; Application of a Student with

[43] This evaluation was conducted by the parents' private neuropsychologist on March 9, 2007 (Dist. Ex. I at p. 1).

a Disability, Appeal No. 09-002; Application of a Student with a Disability, Appeal No. 08-101). 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]).

Consistent with federal and State regulations, the district's school psychologist explained that the district's policy with regard to IEEs provided that "when a parent has an objection to an evaluation that has already been completed, they can request an independent evaluation" (Tr. pp. 447-51). The hearing record indicates that the district forwarded a written copy of this policy to the parents on November 22, 2005 and again on October 24, 2006 (Dist. Ex. GG at pp. 339-40, 618-19; see Dist. Ex. GG at p. 632). The district's written policy "recognizes the right of parents or guardians of a student who is thought to have a disability to receive an independent evaluation at public expense if they disagree with the evaluation obtained by the … CSE" (id. at p. 619). The district further required that "parents or guardians should file a written request within ninety (90) days from the date of the CSE … evaluation" and reserved the district's right to "initiate an impartial hearing to demonstrate that its evaluation is appropriate" (id.). The policy noted that the district superintendent, at the behest of the board of education, developed "regulations establishing maximum allowable fees for specific tests …" (id.).

A student identified as eligible for services under the IDEA is entitled to have their IEP reviewed and revised as appropriate (20 U.S.C § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]). Such review is to take place periodically, but not less than annually (id.). Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an evaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008])[44] and provide adequate notice to the parent of the proposed evaluation (8

[44] "Consent" is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[*l*]).

NYCRR 200.5[a][5]). However, if the parent refuses to consent to the evaluation, the school district may, but is not required to, pursue the evaluation using consent override procedures including mediation and the filing of a due process complaint notice (34 C.F.R. § 300.300[c][1][ii]; 8 NYCRR 200.5[b][3]) (emphasis added). As part of any evaluation or reevaluation of a student with a disability, the CSE must review existing evaluation data on the student, including evaluations and information provided by the parents (34 C.F.R. § 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i]; see DuBois v. Connecticut State Bd. of Educ., 727 F.2d 44, 48-50 [before a school district becomes liable for the placement of a student in special education, it is entitled to data from up-to-date evaluations of the student]; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Dep't of Educ., Appeal No. 08-042; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Dep't of Educ., Appeal No. 07-018).

In the case at bar, the district conceded that it did not conduct any evaluations of its own since its initial evaluation of the student in 2004 (Tr. p. 385). However, the hearing record reflects that on multiple occasions throughout the 2005-06 and 2006-07 school years, the district requested the parents' consent to conduct psychiatric, educational, speech-language, OT, assistive technology, and CAPD evaluations of the student; to refer the student for a BOCES screening; to complete a vocational assessment; and to discuss the student's needs with a private psychologist (Tr. pp. 261-62, 328, 385-87, 414-16, 775-76; Dist. Exs. E at pp. 3, 9; F at pp. 3, 9; G at p. 8; R at pp. 3, 10, 13; T at pp. 2, 8-9; U at pp. 2, 8-9; W at pp. 2, 9-10; X at pp. 2, 8; Y at pp. 2, 9; Z at pp. 2, 13-14, 17; AA at pp. 2, 7; BB at pp. 2, 6; CC at pp. 2, 6-7; FF; GG at pp. 339-40; JJ; Parent Exs. 21; 26; 27; 28; 31; 51; 52; 55; 59; 68; 71; 340; Pro Se Ex. 52). Although the hearing record is devoid of any evidence establishing that the parents consented to any of these requested evaluations, it does demonstrate that the parents either withheld or refused to furnish consent on several occasions (Tr. pp. 412-13, 415-16, 634-35, 1241-42, 2414-15; Dist. Exs. E at p. 3; F at p. 3; R at pp. 3, 10; T at pp. 2, 8; U at p. 2; W at p. 2; X at p. 2; Y at p. 2; Z at pp. 2, 13-14, 17; CC at pp. 6-7; FF; but see Tr. pp. 2419-20, 2436, 2444, 2539-40).

After a careful review of the evidence contained in the hearing record, I must conclude that there is insufficient evidence present to demonstrate that the parents disagreed with an evaluation obtained by the school district, as mandated by federal and State regulations. Therefore, I concur with the impartial hearing officer's determination that the evaluations in dispute were not IEEs as provided by federal and State law and regulations. Furthermore, there is sufficient evidence establishing that the district made reasonable efforts to secure parental consent to conduct its own evaluations. The hearing record supports a conclusion that the parents impeded the district from performing the requested evaluations of the student (see Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583, 592 [3d Cir. 2000]), and then procured the private evaluations on their own initiative (see Kozak v. Hampton Township Sch. Dist., 655 A.2d 641, 647 [Pa. Commw. 1995] [declining to award reimbursement for privately obtained evaluations where parents sought those evaluations on their own initiative and not because of any disagreement with an evaluation conducted by the school district]; Application of a Child with a Disability, Appeal No. 07-139).

In consideration of the foregoing, I must disagree with the impartial hearing officer's finding that the district waived its claim to exclude or limit the cost of reimbursement (IHO Decision at p. 86). This determination is not supported by the regulations or the evidence contained in the hearing record. Nor am I persuaded by the impartial hearing officer's rationale that the district is required to reimburse the parents after he concluded that "the parents' actions and behaviors have rendered it impossible for the district adequately to assess [the student]" (id. at p.

7). Adopting such a position in these circumstances would produce an incongruous result, encouraging the parents to withhold or refuse consent as justification for selecting their own preferred evaluators, and ultimately rewarding them with full reimbursement for their refusal. Furthermore, the impartial hearing officer erred in penalizing the district for considering the parentally obtained private evaluation reports in developing the 2007-08 IEPs. Consequently, I conclude that the impartial hearing officer's determination to award the parents full reimbursement for the enumerated evaluations was erroneous, and I will annul that portion of his decision (see C.G. v. Five Town Community Sch. Dist., 513 F.3d 279, 280, 287-88 [1st Cir. 2008]).

However, while federal and State regulations do not obligate the district to fully reimburse the parents for the private evaluations as IEEs, evidence contained in the hearing record establishes that the district did assume an obligation to provide partial reimbursement for some of the evaluations. The assistant superintendent testified that the student's mother requested independent psychological and neuropsychological evaluations, and that the district agreed to them (Tr. pp. 768-71, 775-76). With regard to CAPD, OT, and assistive technology evaluations; however, he maintained that the student's mother neither consented to the district's requests to perform these evaluations, nor requested authorization to obtain independent evaluations herself (Tr. pp. 771-73, 776; but see Tr. pp. 386-87, 449).[45] The assistant superintendent recalled that with regard to the CAPD evaluation, "I believe mom went there on her own and then submitted the report to us" (Tr. p. 771); his testimony did not further address the OT and assistive technology evaluations.

On November 22, 2005, the district forwarded correspondence to the parents acknowledging receipt of their requests for independent neuropsychological and educational evaluations, advising the parents of the maximum fee allowed for each under the district's payment schedule, and requesting that "Should you choose to pursue this option, please submit the completed evaluation reports with financial cost statements" to the district (Dist. Ex. GG at p. 339).[46] On February 8, 2006, the district forwarded another letter to the parents, referencing the district's prior correspondence dated November 22, 2005, and renewing its request for copies of the privately obtained evaluation reports and their corresponding financial cost statements (id. at p. 487). On October 24, 2006, the district forwarded new correspondence to the student's father acknowledging receipt of his requests for independent psychological and educational evaluations, apprising him of the maximum fee allowed for each, and requesting the completed evaluation reports with financial cost statements (id. at p. 618).[47] On November 13, 2006, the district forwarded a letter to the student's father advising him that the district agreed to partially reimburse the parents for the cost of an independent psychiatric examination of the student, that reimbursement had been approved, and that the check would be forwarded within approximately

[45] During the impartial hearing, the student's mother also contended that the district agreed to reimburse her for an independent speech-language evaluation of the student that she had procured (Tr. pp. 2442-44).

[46] In its November 22, 2005 correspondence, the district informed the parents that, upon receipt of the evaluation report and its associated financial cost statement, pursuant to its maximum allowable fee schedule, the district would partially reimburse them for the cost of an independent neuropsychological evaluation and an independent educational evaluation, pursuant to ceiling rates set by the district for the 2005-06 school year (Dist. Ex. GG at p. 339; see IHO Decision at p. 86). During the impartial hearing, the student's mother alleged that the district originally agreed to fully reimburse the parents for the cost of the evaluation (Tr. pp. 2535-36).

[47] The district offered to partially reimburse the parents for the cost of an independent psychological evaluation and an independent educational evaluation, pursuant to ceiling rates set by the district for the 2006-07 school year (Dist. Ex. GG at p. 618).

three weeks (Dist. Ex. GG at p. 632). The hearing record contains invoices applicable to each of the privately obtained evaluations (Joint Ex. IX; Pro Se Ex. 61 at pp. 2-5, 7).

I conclude that the district's correspondence of November 22, 2005, February 8, 2006, October 24, 2006, and November 13, 2006 constitute offers by the district to partially reimburse the parents for the some of the private evaluations they obtained for the student. Because the hearing record demonstrates that the district has been provided with the evaluation reports and the financial cost statements, I direct the district to render partial reimbursement to the parents for the private neuropsychological, educational, and psychiatric evaluations they obtained, and for the amounts listed in the district's letters of November 22, 2005, October 24, 2006, and November 13, 2006.[48]

I have considered the district's remaining contentions and I find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated April 12, 2009 is hereby annulled to the extent that it determined the parents were entitled to full reimbursement for the parentally obtained private neuropsychological, educational, and psychiatric evaluations of the student; and

IT IS FURTHER ORDERED that the district partially reimburse the parents for the parentally obtained private neuropsychological, educational, and psychiatric evaluations of the student, for the amounts listed in the district's letters of November 22, 2005, October 24, 2006, and November 13, 2006; and

IT IS FURTHER ORDERED that the district conduct its own psychological, educational, OT, speech-language, assistive technology, audiological, and neuropsychological evaluations consistent with the impartial hearing officer's decision within 45 days of the date of this decision.

Dated: **Albany, New York**
August 14, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

[48] With respect to the independent educational evaluation, the district offered to reimburse the parents $450.00 in its November 22, 2005 letter, based upon the 2005-06 school year fee schedule, and $500.00 in its October 24, 2006 letter, based upon the 2006-07 school year schedule (compare Dist. Ex. GG at p. 339, with Dist. Ex. GG at p. 618). According to State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]). The independent educational evaluation was conducted on August 12, 2005 (Dist. Ex. M at p. 1). Because the evaluation was conducted during the 2006-07 school year, I direct the district to reimburse the parents in the amount enumerated in its October 24, 2006 letter.