



The University of the State of New York

The State Education Department State Review Officer

No. 07-005

Application of the BOARD OF EDUCATION OF THE SPRINGVILLE GRIFFITH INSTITUTE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Hodgson Russ LLP, attorney for petitioner, Ryan L. Everhart, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Springville Griffith Institute Central School District, appeals from the decision of an impartial hearing officer which found that it failed to offer respondent's daughter a free appropriate public education (FAPE)¹ between October 2005 and June 2006 and ordered petitioner to provide three months of compensatory education services to the student past the age of 21, including counseling services, in accord with her 2005-06 individualized education program (IEP). The appeal must be sustained.

At the commencement of the impartial hearing on May 11, 2006, the student was 21 years old and attended petitioner's high school for a half day and the Board of Cooperative Educational Services' (BOCES) Culinary Arts Program for a half day (see Tr. pp. 61-62, 72-73, 78, 82-83). The student's classification and eligibility for special education services as a student with multiple disabilities are not in dispute in this appeal (see 8 NYCRR 200.1[zz][8]). The student's educational history is set forth in past appeals and will not be repeated here in detail

¹ The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

(Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-011; Applications of a Child with a Disability and the Bd. of Educ., Appeal Nos. 04-050 and 04-052).²

Respondent enrolled her daughter in petitioner's district on September 6, 2005, the first day of classes of the 2005-06 school year (Tr. p. 475; Dist. Ex. 10 at p. 1). On the registration form, respondent indicated that the student participated in the following special education programs and services: resource room, IEP counseling, speech-language therapy, physical therapy (PT), occupational therapy (OT), direct consultant teacher services, and support services of counseling and social work (Dist. Ex. 10 at p. 2). At that time, respondent did not provide consent for petitioner to obtain the student's records from her previous school district (Tr. p. 476).³ Instead on that same day, respondent brought copies of the student's records for petitioner to copy (Tr. p. 477; Parent Ex. B61). Petitioner's director of special education and student services (director) testified that respondent wanted her daughter to start school "the next day" (Tr. p. 477). The director communicated to respondent that she would review the student's records and develop a "comparable program" so that the student could start as soon as possible (Tr. p. 477).

Between September 7 and 21, 2005, petitioner's director and respondent exchanged numerous telephone calls, letters, and facsimiles in an attempt to mutually agree upon the educational services to provide to respondent's daughter until petitioner's Committee on Special Education (CSE) could convene to develop the student's 2005-06 IEP (Dist. Ex. 11, 13, 14, 17-20; Parent Ex. B60; see also Tr. pp. 480-83). They were unable to agree upon a program for services, and the student did not attend school prior to the CSE meeting on September 30, 2005 (Tr. pp. 486, 500-01; Dist. Exs. 26 at p. 1; 27).

By notices dated September 21, 2005, petitioner's director invited both the student and respondent to attend a CSE meeting for an "Initial Review for District Re-entry" scheduled for September 30, 2005, to develop the student's 2005-06 IEP (Dist. Exs. 15, 16).

On September 30, 2005, the CSE meeting convened with the following individuals in attendance: the student and respondent via conference call; a parent representative; the CSE chairperson; the school psychologist; two special education teachers; a regular education teacher; a speech therapist; an occupational therapist; a physical therapist; a Career Services representative from the BOCES Ellicottville Program; and the principal from the BOCES Ormsby Center (Tr. pp. 487-88; Dist. Ex. 21; Parent Ex. E11 at p. 1). The CSE reviewed reports from the student's most recent evaluations, including a psychoeducational evaluation completed in June 2004 (Parent Ex. E11 at pp. 2-4); a speech-language evaluation completed in May 2005 (Parent Ex. E11 at pp. 4-5); and a vocational assessment completed in April 2005 (Parent Ex.

² Briefly, Applications of a Child with a Disability and the Bd. of Educ., Appeal Nos. 04-050 and 04-052, decided on September 13, 2004, upheld an impartial hearing officer's determination that the student's 2003-04 IEP did not offer the student a FAPE, ordered the administration of additional evaluations, and ordered a committee on special education (CSE) to reconvene to revise the 2003-04 IEP. Application of the Bd. of Educ., Appeal No. 05-011, decided March 4, 2005, dismissed the appeal of an impartial hearing officer's decision dated December 11, 2004, which found that the student's placement during the pendency of the due process hearing relating to the appeal in Application of the Bd. of Educ., Appeal No. 05-084, was determined by the 2003-04 IEP.

³ See 34 C.F.R. § 300.622[a]; Consent, 71 Fed. Reg. 46736-37 [Aug. 14, 2006]; see also 34 C.F.R. § 99.31[a][2].

E11 at pp. 10-21). Using the student's last implemented IEP from 2003-04 as a starting point, the CSE discussed, updated, revised, and developed the student's academic, management, physical, and social needs, her present levels of performance, modifications, accommodations, long-term adult outcomes, and goals and objectives (Tr. p. 489; Parent Ex. E11 at pp. 25-175). Respondent noted at the beginning of the CSE meeting that she did not have any more recent evaluation reports to share with the CSE (Parent Ex. E11 at p. 2).

The CSE meeting continued for approximately six hours before the committee made the decision to table the meeting due to outside obligations of some CSE members (Tr. p. 490; Parent Ex. E11 at p. 166). Unable to finalize the student's 2005-06 IEP, respondent and the CSE discussed and agreed to a proposed schedule of interim services for the student, which would begin the following week (Tr. pp. 491, 500; Parent Ex. E11 at pp. 167-83). The CSE agreed to conduct several evaluations (Tr. pp. 494-95; Parent Ex. E11 at pp. 5-10). The CSE also discussed several potential dates to reconvene to finalize the student's IEP (Parent Ex. E11 at pp. 183-85).

Respondent memorialized her understanding of the student's interim services and her agreement to the provision of the interim services in a letter dated September 30, 2005, and facsimiled the letter to petitioner's director on October 3, 2005 (Dist. Ex. 26 at pp. 1-3). Petitioner's director responded by letter dated October 3, 2005, acknowledging the interim services in place for the student, and updated respondent as to progress made regarding the student's transportation, direct consultant teacher services for her regular education courses, the scheduling of the student's physical education, speech-language therapy, and a culinary arts program with direct consultant teacher services at BOCES (Dist. Ex. 27 at p. 1). At that time, counseling was the only service remaining to be scheduled (id.). Finally, the letter indicated a tentative CSE meeting scheduled to reconvene on October 20, 2005 (id.).

On October 13, 2005, respondent indicated that she was not available for the October 20, 2005 CSE meeting (Dist. Ex. 34).

By notices dated October 17, 2005, petitioner's director invited both the student and respondent to attend a CSE meeting for an "Initial Review for District Re-entry Continuation from 9/30/05" scheduled for October 28, 2005, to finalize the student's 2005-06 IEP (Dist. Exs. 35, 36). Respondent requested that additional individuals attend the CSE meeting (Dist. Ex. 31). Petitioner's director testified that she understood that if the CSE tabled a meeting and reconvened to complete the discussions on an IEP, the CSE members at the follow-up meeting must be the same CSE members who attended the prior CSE meeting, with no new or additional members (Tr. p. 513).⁴ Petitioner's director also testified that because the parent representative who participated in the September 30, 2005 CSE meeting could only attend meetings on Fridays; it limited the available dates to reconvene (Tr. pp. 499-500). She wrote to respondent, by letter of October 20, 2005, regarding the membership of the upcoming CSE meeting (Dist. Ex. 37). Respondent denied receiving this letter (Tr. p. 1271).

⁴ Although I need not address whether the director's understanding was consistent with federal and state regulations in effect at the time, I do note that the amended Part 300 regulations provide that a member of an IEP team may be excused from attending an "IEP meeting" under certain circumstances (see 34 C.F.R. § 300.321[e]; see also IEP Team, 71 Fed. Reg. 46669-71 [Aug. 14, 2006]).

On October 28, 2005, the CSE convened with the following individuals in attendance: respondent via conference call; a parent representative; the CSE chairperson; the school psychologist; a special education teacher; a regular education teacher; a speech therapist; an occupational therapist; a physical therapist; the principal of the BOCES Ellicottville Program; and the principal of the BOCES Ormsby Center (Dist. Ex. 39; Parent Ex. E12 at p. 1). With the exception of the principal of the BOCES Ellicottville Program, who replaced the Career Services representative from the BOCES Ellicottville Program on the CSE, and the absence of the student and one of the special education teachers, the October 28, 2005 CSE contained the same members as the September 30, 2005 CSE (compare Parent Ex. E11 at p. 1, with Parent Ex. E12 at p. 1). Respondent refused, however, to continue with the CSE meeting because the CSE members in attendance did not "match" the people listed on petitioner's October 17, 2005 Notice of CSE meeting (Parent Ex. E12 at pp. 3-5; see also Tr. pp. 514-15, 1270). Although the meeting did not go forward, respondent inquired about the provision of the student's counseling services during her first period advisement time (Parent Ex. E12 at pp. 7-9). Petitioner's director advised respondent that the student received counseling from her special education teacher, who was a certified school counselor, because she was the only staff member available to provide counseling services during the student's first period advisement time, as respondent had requested (Parent Ex. E12 at pp. 7-9). Prior to concluding the meeting, the parties discussed possible dates for the continued CSE meeting and determined that due to various scheduling conflicts, the next mutually available date was December 9, 2005 (Parent Ex. E12 at pp. 5-7).

By notices dated November 14, 2005, petitioner's director invited both the student and respondent to attend a CSE meeting for an "Initial Review for District Re-entry Continuation from 9/30/05" scheduled for December 9, 2005, to finalize the student's 2005-06 IEP (Dist. Exs. 49, 50). On December 9, 2005, the CSE reconvened with the following individuals in attendance: respondent via conference call; respondent's parent advocate via conference call; a parent representative; the CSE chairperson; the school psychologist; two special education teachers; a regular education teacher; a speech therapist; an occupational therapist; a physical therapist; a Career Services representative from the BOCES Ellicottville Program; and the principal from the BOCES Ormsby Center via conference call (Dist. Exs. 62 at p. 9; 63).

The CSE reviewed the results of the student's performance on the Woodcock-Johnson III Tests of Achievement (WJ-R) and the Woodcock Reading Mastery Test (WRMT), administered on November 23 and 30, 2005, respectively (Tr. p. 515; Dist. Exs. 55; 59; 62 at p. 6). The CSE recommended daily, 1:1 direct consultant teacher services for two hours per day in the student's regular education classes; 1:1 counseling services two times per week for 20 minutes per session; and 1:1 speech-language therapy two times per week for 30 minutes per session (Dist. Ex. 62 at p. 1). The CSE recommended the following modifications, accommodations, and supplementary aids and services: daily direct consultant teacher services for 2 1/2 hours per day in the student's regular education classes at BOCES; extended time for written assignments; modified regular education curriculum for length and content, including tests, quizzes, and coursework; spell check device; textbooks on audio CD; reinforcement of math facts, money, and time concepts; a bus aide for BOCES transportation; allowing the student a quiet place when overwhelmed; and accommodations for left-hand dominance (Dist. Ex. 62 at pp. 1-2). The CSE also recommended various testing accommodations (Dist. Ex. 62 at p. 2). Petitioner's director testified that the CSE completed its discussions regarding the student's goals and objectives (Tr. pp. 515-16). She also

testified that the CSE's final recommendations were very similar to the interim services already in place for the student (Tr. pp. 516-17).

On December 15, 2005, petitioner's director sent respondent the CSE's notice of recommendation for continuation of services (Dist. Ex. 68 at pp. 1-2). On January 1, 2006, respondent requested an impartial hearing, alleging that petitioner failed to offer her daughter a FAPE for the 2005-06 school year and alleging approximately 55 procedural and/or substantive violations (Dist. Ex. 71 at pp. 2-8). Petitioner assigned an impartial hearing officer on January 4, 2006, and the parties scheduled a resolution session for January 17, 2006 (Dist. Exs. 72, 73). By letter dated January 24, 2006, petitioner advised the impartial hearing officer that the parties were unable to resolve their dispute at the resolution session (Dist. Ex. 76).

By notices dated January 12, 2006, petitioner's director invited both the student and respondent to attend a CSE meeting for a "Program Review" scheduled for January 27, 2006, to review the student's educational program (Dist. Exs. 114, 115). On January 27, 2006, the CSE convened with the following individuals in attendance: the student, respondent, and respondent's parent advocate via conference call; a parent representative; the CSE chairperson; the school counselor; the school psychologist; a special education teacher; a regular education teacher; and a speech therapist (Parent Ex. N2; Dist. Exs. 112 at pp. 1-10; 116 at p. 11). The CSE discussed the results of the student's comprehensive reading evaluation by a private psychologist dated December 28, 2005, a counseling report dated December 19, 2005, and the results of the student's psychological evaluation dated December 29, 2005 (Parent Ex. N1 at pp. 1-2; Dist. Exs. 57; 116 at pp. 6-7, 11). The CSE recommended specialized reading instruction three times per week for 20 minutes per session in a special location, access to a computer text reading program, and access to a word processor, and updated the student's counseling goals and objectives (Dist. Ex. 116 at pp. 1-2, 13).

On February 7, 2006, petitioner's director sent respondent the CSE's notice of recommendation for continuation of services (Dist. Ex. 118 at pp. 1-2). On March 27, 2006, respondent requested a second impartial hearing alleging that petitioner failed to implement the student's December 9, 2005 IEP as her pendency placement (Dist. Ex. 89 at pp. 1-5). On March 28, 2006, respondent requested a third impartial hearing, alleging that petitioner's recommendations contained in the January 27, 2006 IEP failed to offer the student a FAPE, and alleging approximately 31 procedural and/or substantive violations (Dist. Ex. 123 at pp. 1-6).

Upon agreement of the parties, the impartial hearing officer consolidated the three separate impartial hearing requests, which cumulatively alleged approximately 84 procedural and/or substantive violations to support respondent's contention that petitioner failed to offer the student a FAPE during the 2005-06 school year (Dist. Exs. 71; 89; 123; 150). The parties attended a resolution session on April 25, 2006, but were not able to fully resolve their dispute (Dist. Ex. 151). The impartial hearing in this case commenced on May 11, 2006, and concluded after eight days of testimony on September 8, 2006 (Tr. pp. 1, 1180).

In his decision, the impartial hearing officer made legal findings and determinations for approximately 24 enumerated issues (IHO Decision, pp. 29-56). Based upon these findings, the impartial hearing officer concluded that from "October [2005] through the end of 2006" the student "was engaged in something approximating home instruction (until she attended BOCES

classes) without an IEP in effect" (IHO Decision, p. 57). He noted that during this time period, the student did not receive books on tape or assistive technology, she failed a class and received instruction from two different substitute teachers, and her program was not provided in the least restrictive environment (LRE) (*id.*). The impartial hearing officer concluded that "compensatory education should be awarded for this period, where there has been a concomitant FAPE denial" (IHO Decision, pp. 57-58).

The impartial hearing officer also concluded that although petitioner denied the student a FAPE from "January [2006] through June, 2006," the "violations during this time did not rise to the level necessary to establish a legal mandate for compensatory education" (IHO Decision, pp. 58-59). He noted that during this time period, the student was more fully integrated into her general education classes, maintained "adequate grades, made educational progress, and gained credits in her courses" (IHO Decision, p. 58).

Finally, the impartial hearing officer determined that because petitioner failed to present any evidence to "rebut the parent's concerns" regarding the special education teacher who provided counseling to the student between October and December 2005, and because "there [was] too much of a potential for conflict where a student's primary teacher is also to be her counselor"--that this "arrangement is clearly inappropriate and meets the "gross violation" standard," warranting an award of three months of compensatory counseling services (IHO Decision, pp. 59-60). Based upon his findings, the impartial hearing officer awarded "compensatory education amounting to three months, including appropriate modifications and accommodations as per the IEPs from 2005-2006, and including counseling as per the 2005-2006 IEPs" (IHO Decision, p. 60).

On appeal, petitioner contends that the impartial hearing officer erred in his decision to award three months of compensatory education services, including counseling, because the evidence presented did not meet the legal standard of a "gross violation of the IDEA." In addition, petitioner asserts that the impartial hearing officer erred when he found that petitioner failed to provide sufficient notices of CSE meetings and prior notice letters of December 15, 2005 and January 7, 2006; failed to finalize the student's 2005-06 IEP in a timely manner; failed to convene a properly composed CSE for the 2005 meetings; failed to provide the student's regular education courses in the LRE during fall 2005; failed to persuade the student to attend classes during fall 2005 when she refused to attend classes; and failed to provide appropriate counseling services during fall 2005 because the special education teacher provided the counseling services to the student. Petitioner attaches additional evidence of the special education teacher's qualifications as a certified school counselor to the petition and requests consideration of the same on appeal. Alternatively, petitioner argues that even assuming the impartial hearing officer correctly determined the above issues, the alleged violations do not meet the legal standard required to award compensatory educational services and, therefore, the award must be annulled.⁵

⁵ Petitioner's appeal requests that the impartial hearing officer's decision be reversed insofar as it directed petitioner to provide three months of compensatory education services, including counseling, and seeks review of a portion of the impartial hearing officer's determinations. Respondent does not cross-appeal from the impartial hearing officer's decision. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child Suspected of Having a Disability, Appeal No. 05-071;

Respondent asserts in her answer that the impartial hearing officer's decision and award of three months of compensatory education services, including counseling, should be upheld. Respondent objects to the additional evidence annexed to the petition noting that such documentation was available at the time of the impartial hearing and was not entered into evidence.

Preliminarily, I will address petitioner's request to consider additional evidence regarding the special education teacher's qualifications to provide school counseling. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Child with a Disability, Appeal No. 06-081). Petitioner contends that respondent failed to raise the special education teacher's credentials at the impartial hearing and that the impartial hearing officer *sua sponte* raised the issue, thereby depriving petitioner of the opportunity to rebut his conclusions. After reviewing the record, I agree with petitioner's assertions but decline to consider it because I find the document is not necessary for my decision.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)⁶ is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a comprehensive written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).⁷ The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 126 S. Ct. at 532). The federal and state statutes and regulations concerning the education of children with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer, 126 S.Ct. at 532; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]). The burden of persuasion in an administrative hearing challenging an IEP is on the party

Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 04-018; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Hence, the findings and determinations not appealed are final and binding on the parties and shall not be reviewed (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]).

⁶ Congress recently amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004]). The relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, therefore, citations in this decision are to the IDEA 2004, unless otherwise specified.

⁷ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

seeking relief (see Schaffer, 126 S.Ct. at 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

The IDEA applies to children between the ages of 3 and 21, subject to the limitation that it does not apply to children ages 18 through 21 where it is inconsistent with State law or practice on the provision of a public education (20 U.S.C. § 1412[a][1][A], [B][i]; see St. Johnsburry Academy v. D.H., 240 F.3d 163, 169 [2d Cir. 2001]). In New York State, a student with a disability is eligible for services under the IDEA until he or she receives a local or Regents high school diploma, or until the conclusion of the school year in which he or she turns 21 (N.Y. Educ. Law § 4402[1][b][3][c], [5][b]; see 8 NYCRR 100.5[b][7][iii], 100.9[e]; see also 34 C.F.R. § 102[a][3][i]; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 04-100; Application of a Child with a Disability, Appeal No. 02-016; Application of a Child with a Disability, Appeal No. 00-024). Generally, under the IDEA, "a [child with a disability] does not have a right to demand a public education beyond the age of twenty-one" (Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990] [internal citation omitted]). Once a student ages out of the IDEA, he or she is "no longer entitled to the protections and benefits of the [IDEA]" (Honig v. Doe, 484 U.S. 305, 318 [1988]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 04-100).

Respondent's daughter turned 21 years of age during the 2005-06 school year (Tr. p. 213; see Dist. Ex. 10 at p. 1). Therefore, respondent's daughter is now beyond the age covered by the IDEA and is no longer entitled to the protections and benefits of the IDEA (20 U.S.C. § 1412[a][1][A]; N.Y. Educ. Law § 4402[5][b]; Honig, 484 U.S. at 318; Cosgrove, 175 F. Supp. 2d at 388). Moreover, petitioner's obligations to respondent's daughter under the IDEA ceased at the end of the 2005-06 school year, which was the school year in which she turned 21 (see N.Y. Educ. Law § 4402[5][b]).

Compensatory education, the continuation of instruction to a student after he or she is no longer eligible for instruction because of age or graduation, may be awarded if there has been a gross violation of the IDEA, resulting in the denial of, or exclusion from, educational services for a substantial period of time during the student's period of eligibility for special education (Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75; Burr v. Ambach, 863 F.2d 1071, 1078 [2d Cir. 1988]; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child Suspected of having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 03-078; Application of a Child with a Disability, Appeal No. 01-094; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-65).

Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 151 [N.D.N.Y. 1997], aff'd, 208 F.3d 204 [2000], cert. denied 531 U.S. 1019 [2000]; Application of the Bd. of Educ., Appeal No. 02-033; Application of a Child with a Disability, Appeal No. 02-019). It is not an extension of the protections and benefits of the IDEA itself (see Cosgrove, 175 F. Supp. 2d at 388 ["the relief arises from equity and is not a legislative authorization to extend the reaches of the statute"]; see also Burr, 863 F.2d at 1078).

After reviewing the voluminous record, which consisted of over 200 exhibits (totaling over 800 pages) and more than 1300 pages of testimony, and the impartial hearing officer's 60-page decision, I find that the impartial hearing officer applied the proper legal analysis in determining whether the student was offered a FAPE during her period of eligibility in the 2005-06 school year (see Rowley, 458 U.S. at 206-07). However, the impartial hearing officer misapplied the legal standard as to whether a gross violation of the IDEA occurred, resulting in the denial of, or exclusion from, educational services for a substantial period of time during the 2005-06 school year such as to warrant an award of compensatory education (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child Suspected of Having a Disability, Appeal No. 03-094).

In particular, the impartial hearing officer's decision notes that although procedural and/or substantive deficiencies deprived the student of a FAPE during the 2005-06 school year, he explicitly found that the deficiencies between January 2006 and June 2006 did not rise to the legal standard necessary to award compensatory education services for that period of time (IHO Decision, pp. 58-59). Thus, it appears that the impartial hearing officer based his award of three months of compensatory education services, including counseling services, upon the procedural and/or substantive deficiencies that occurred between October and December 2005. However, he does not state how such deficiencies, either individually or cumulatively, constituted a gross violation of the IDEA or how such deficiencies denied or excluded the student from educational services for a substantial period of time. Moreover, it appears that the impartial hearing officer based the award of compensatory education services solely upon his conclusion that the special education teacher who provided counseling to the student from October through December 2005 was "clearly inappropriate," meeting the legal standard of a gross violation of the IDEA (see IHO Decision, pp. 59-60).

A review of the record reveals that respondent did not raise the special education teacher's qualifications to provide counseling services to the student between October and December 2005 as an issue in any of her three impartial hearing requests and thus, the impartial hearing officer erred when he *sua sponte* raised and addressed that issue after the close of the hearing and then used it as a basis for his determination that a "gross violation of the IDEA" had occurred (IHO Decision, p. 59). For these reasons, the portion of the impartial hearing officer's decision awarding three months of compensatory education services, including counseling services, must be annulled (IHO Decision, pp. 56-60). Even had the issue been appropriately raised by respondent below, I would not have found that the delivery of counseling services amounted to a gross violation of the IDEA. The record does not reflect whether the student received educational benefit from the counseling services, or more significantly, it does not demonstrate that the student did not receive benefit. In the absence of a factual basis from which one can determine what benefit or deprivation accrued as a result of the counseling services provided, the record does not support a conclusion that a gross violation occurred. In addition, the record reflects that the student, at times, refused to attend the counseling services offered. Thus, if the record supported an award of compensatory education services in the form of counseling, the award must be tailored to meet the individual circumstances of the case. I remind both the student and respondent that other agencies, such as VESID, provide adult services.

Succinctly stated, the evidence in the record does not support the contention that the student was denied or excluded from educational services for a substantial period of time between October and December 2005. Contrary to the impartial hearing officer's decision, the evidence in the record sufficiently supports the contention that although the student's 2005-06 IEP had not been finalized until December 9, 2005, the student received special education programs, services, and related services through an interim service plan that met her documented needs between October and December 2005. The record indicates that she received direct consultant teacher services in conjunction with all of her general education courses, physical education, counseling, and speech-language therapy, and that she attended the half-day Culinary Arts Program at BOCES with the services of a direct consultant teacher. The student began receiving interim services immediately after the CSE meeting on September 30, 2005, and continued to receive educational services throughout her attendance in petitioner's district. Thus, despite the procedural and/or substantive deficiencies discussed by the impartial hearing officer in his decision, I cannot find support in the record for his decision to award compensatory education services for the time period between October and December 2005.

With respect to the other contentions raised on appeal, I find that the evidence in the record supports petitioner's contentions that the Notices of CSE Meetings were sufficient to apprise respondent, who is an experienced advocate, that transition services would be discussed at the meeting and that petitioner's Prior Notice letters of December 15, 2005 and January 7, 2006, were also sufficient to describe the student's proposed programs and services (see 8 NYCRR 200.5[a][3], [c][2][i], [vii]). In addition, I find that the evidence in the record supports petitioner's contention that the impartial hearing officer failed to consider respondent's contributory fault in finalizing the student's 2005-06 IEP in a timely manner. The record indicates that both parties' schedules made it extremely difficult to schedule a mutually agreeable date in a timely manner. Moreover, based on the record, I cannot conclude that the failure to finalize the student's 2005-06 IEP resulted in a denial of or exclusion from educational services for a substantial period of time between October and December 2005.⁸

I also find that the evidence in the record supports petitioner's contention that the 2005 CSEs were properly composed. In particular, the impartial hearing officer questioned the participation of the regular education teacher at the CSE meetings and whether she "could have been [the student's] teacher" (IHO Decision, p. 33). The petitioner's director testified that she specifically chose the regular education teacher as a participant because she taught both ninth and eleventh grade coursework and anticipated that the student would be in her class during the 2005-06 school year (Tr. pp. 487-88). The regular education teacher testified that during the meetings the CSE discussed the student's accommodations and program modifications (Tr. pp. 918-19). She also testified that although she did not offer her own recommendations, she listened to the recommendations made by her fellow CSE members and relied upon their expertise, as well as her own experiences, with special education students (Tr. pp. 920-21). The regular education teacher also testified that if she disagreed with the recommendations, she would "speak up and say something" (Tr. p. 921). Based upon the evidence in the record, I find that the impartial hearing officer erred when he primarily relied upon the deficiencies noted in his decision regarding the regular education teacher to conclude that petitioner's 2005 CSEs were

⁸ See 20 U.S.C. § 1414[d][2][c][i][I]; 34 C.F.R. 300.323[e], [f]; 8 NYCRR 200.5[e][8][i].

improperly composed. Moreover, based upon the record, I cannot find that even if the 2005 CSEs were improperly composed that it resulted in a denial of or exclusion from educational services for a substantial period of time between October and December 2005.

Petitioner also contends that the impartial hearing officer erred when he concluded that petitioner failed to provide the student's regular education courses in the LRE during fall 2005 and faulted petitioner for the student's refusal to attend her regular education classes during fall 2005. The record indicates that between October and December 2005, the student refused to attend her regular education classes, and thus, she received her regular education instruction from her direct consultant teacher in room 309. I find that the record supports petitioner's contention that the student refused to attend the regular education classes and opted on her own to remain in room 309--and I find that the impartial hearing officer improperly faulted petitioner for not attempting to "overcome any resistance to going to class" (IHO Decision, pp. 38, 51). The record supports petitioner's assertion that the student was neither confined to room 309, nor was she prevented from attending her regular education classes from October through December 2005. The record reflects that on some days the student chose to attend classes and sometimes chose to attend alone, rather than with the assistance of her direct consultant teacher. In this instance, I find that petitioner did not violate the IDEA's LRE requirement, but instead, worked with the student to continue to meet her needs on a daily basis within a supportive environment while the student acclimated to her new environment.

Having concluded that the procedural and/or substantive deficiencies in the 2005-06 IEPs discussed by the impartial hearing officer in his decision do not rise to the level of a gross violation of the IDEA which resulted in a denial or exclusion of the student from educational services for a substantial period of time, I find that the impartial hearing officer's award of three months of compensatory education, including counseling services, to the student is not appropriate and therefore annul that portion of his decision.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it directed petitioner to provide three months of compensatory education services to the student past the age of 21, including counseling services, in accord with her 2005-06 IEP.

**Dated: Albany, New York
February 27, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**