



The University of the State of New York

The State Education Department State Review Officer

No. 07-128

Application of a CHILD WITH A DISABILITY, by her parent, for a review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Michael Best, Special Assistant Corporation Counsel, Vida Alvy, Esq., attorney for respondent

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied her request for compensatory education for her daughter. The appeal must be dismissed.

At the commencement of the impartial hearing in August 2007, petitioner's daughter was awaiting placement in an adult day program (Tr. p. 27). She had "aged out" of a specialized public school at the end of the 2006-07 school year where she had last received a 12-month school year program of a 12:1+1 special class with a full-time health services paraprofessional and related services of physical therapy (PT), occupational therapy (OT), speech-language therapy, and nursing services (Dist. Ex. 3 at pp. 1, 15). While in public school, respondent's Committee on Special Education (CSE) had found the student eligible for special education programs and services as a student with multiple disabilities (34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The hearing record is sparse regarding the student's educational history. Briefly, the student was born with a rare genetic disorder that resulted in fusion of her cranial plates, which impeded the growth of her brain and caused breathing problems (Dist. Ex. 5 at p. 2). She had numerous surgeries to correct deformities of her head and face, including a tracheotomy at age three (*id.*). The student received early intervention services at a private school and then attended respondent's public school for special education services until the sixth grade (*id.*). The student spent the next three years in a children's hospital where she had numerous surgeries and

subsequently returned to respondent's public school to attend an occupational training program (Dist. Exs. 5 at p. 2; 6 at p. 1).

Respondent's CSE convened on November 10, 2005 for the student's annual review and development of her individualized educational program (IEP) for the 2005-06 school year (Dist. Ex. 7). Meeting attendees included petitioner, the student's special education teacher, an occupational therapist, a speech-language therapist, a physical therapist, the school psychologist who also functioned as the district representative, and a related services coordinator (*id.* at p. 2). In the area of academic performance and learning characteristics, the IEP stated that the student communicated in full and complete sentences, worked well independently and in small groups, was able to read on approximately a third grade level with minimal assistance, answered simple comprehension questions and summarized short passages, added and subtracted double digit numbers, and multiplied and divided simple math problems (*id.* at p. 3). The November 2005 IEP also stated that the student was able to identify monetary value and that she understood the concept of spending money and receiving change (*id.*). The student's social/emotional performance was described as age appropriate (*id.* at p. 4). She reportedly had good friends at school and had matured a great deal during the year (*id.*). The November 2005 IEP indicated that at times, the student needed reminders about daily living skills and sanitary procedures (*id.*). In the area of health and physical development, the November 2005 IEP stated that the student received medication during the school day and required suctioning by a nurse three times a day (*id.* at p. 5). The student used a wheelchair but could ambulate short distances with a cane or walker and she required assistance with toileting (*id.* at pp. 4-5). The student could cut her solid food into small pieces independently (*id.* at p. 4). The CSE recommended a 12-month school year program of a 12:1+1 special class in a specialized public school with a full-time health services paraprofessional, related services of PT, OT, speech-language therapy, and health services (*id.* at pp. 1, 14). The November 2005 IEP contained annual goals and short-term objectives related to the student's needs in speech and social language skills, reading, writing, and functional mathematics including money, knowledge of American culture, skills to promote good health, and application of academics to the workplace (*id.* at pp. 6-11). The November 2005 IEP also contained long-term adult outcomes for the student, as well as related transition services with identified responsibility (*id.* at p. 15).

By letter dated June 6, 2006, respondent requested updated documents from petitioner and inquired as to whether the student had a Medicaid service coordinator (MSC) to assist in the transition process to adult day program services (Dist. Ex. 22).¹

The hearing record reflects that correspondence related to the student's New York State Creating Alternatives in Residential Environments and Services (NYS-CARES) application, dated June 6, 2006, was submitted to the Metro Developmental Disabilities Services Office (DDSO) and that applications were submitted to the Young Adult Institute (YAI) and the

¹ Medicaid Service Coordination is a service provided by the NYS Office of Mental Retardation and Developmental Disabilities (OMRDD), which assists persons with developmental disabilities and mental retardation in gaining access to necessary services and supports appropriate to the needs of the individual (Tr. pp. 31, 167, 238; Dist. Exs. 16; 18; Parent Ex. C).

Association for the Help of Retarded Children (AHRC) on June 29, 2006 (Parent Ex. C at p. 9).² The hearing record does not indicate who submitted the correspondence or the applications.

At a July 18, 2006 meeting of the Bronx Mental Retardation and Developmental Disabilities Council adult day services committee, respondent's transition coordinator provided the committee with the projected number of students needing adult program services in 2007 and the types of services they required, including petitioner's daughter who was described as non-ambulatory and requiring day habilitation services (Tr. pp. 255, 277-78; Parent Ex. D at pp. 2, 3).

In August 2006, respondent conducted a general meeting on transition which petitioner attended (Tr. p. 234). At that time, due to petitioner's dissatisfaction with her daughter's then current MSC provider, respondent's transition coordinator provided petitioner with a list of MSC vendors including a recommendation for an MSC that the transition coordinator was comfortable working with (Tr. pp. 234, 238).

On August 4, 2006 petitioner provided respondent with written authorization to release her daughter's educational records to all appropriate adult day service agencies (Dist. Ex. 13). On August 8, 2006, respondent referred the student to the AHRC for psychosocial and psychological evaluations to assess her eligibility for day habilitation services (Dist. Exs. 5; 6; 28 at p. 5).

Petitioner and her daughter met with the student's then current MSC on August 15, 2006 (Parent Ex. C at p. 1). The MSC documented that respondent's transition coordinator would contact the MSC to coordinate the student's transition following completion of the evaluations (*id.*). The MSC also documented the student's need for a program that provided a nurse on staff and transportation by ambulance accompanied by a nurse and that the MSC could call the transition coordinator on August 31, 2006 or after the start of the school year (*id.*). The log notes also reflect that petitioner desired a weekend program for her daughter (*id.*).

On September 6, 2006, respondent's transition coordinator and the student's special education teacher met with petitioner and the student's MSC at petitioner's home (Parent Ex. C at p. 2). The hearing record reflects that the transition coordinator reported that the AHRC offered nursing services, but that ambulance transportation was not available (*id.*). The student's special education teacher reported that she was preparing to assess the student's level of employability (*id.*). The MSC reported that effective October 5, 2006 she would no longer be the student's MSC (*id.*).

On November 8, 2006 petitioner attended a transition fair hosted by respondent that provided information on Medicaid service coordination, assisted living, and a variety of programs (Tr. p. 35; *see* Dist. Ex. 67).

² The NYS-CARES initiative was implemented in 1998 to eliminate the then current waiting list for residential services for people with developmental disabilities in New York State and to create placement opportunities for those who were expected to apply for residential placement in the future (*see* Governor Announces 'NYS-CARES' To Reduce Housing Waiting List, www.omr.state.ny.us/nyscares/hp_nycares.jsp, last updated Sept. 19, 2001).

Respondent's CSE convened on November 10, 2006 for the student's annual review and development of her IEP for her 2006-07 school year (Dist. Ex. 3). Meeting attendees included petitioner, the student, the student's special education teacher, an occupational therapist, a speech-language therapist, a district representative, and respondent's transition coordinator (id. at p. 2). In the area of academic performance and learning characteristics, the IEP stated that the student was very proficient in verbally communicating her needs and asking for clarification of assignments or definitions of words (id. at p. 3). She was reported to work well in both whole group and small group settings and although she occasionally exhibited difficulty with focus, she usually attended with verbal prompting (id.). The student read most material presented to her, decoded unfamiliar words, exhibited independent comprehension at the fifth grade level, and exhibited higher-level comprehension skills when provided with explanation (id.). The student computed simple (two entries) addition and subtraction problems, including adding money without a calculator and could type assignments using a word processing program; however, she continued to require instruction on use of the spelling and grammar functions to correct her work (id. at p. 4). In the area of social/emotional development, the IEP described the student as a friendly and pleasant young woman who had a positive outlook on life (id. at p. 5). She reportedly tended to gravitate toward staff, but also formed friendships with her peers and exhibited appropriate behavior in the classroom and the community (id.). The student's health and physical development needs required that her tracheostomy be suctioned by a nurse at least one time per day and more frequently when congested (id. at p. 6). She could cut her food into small pieces independently with supervision (id.). The student used a wheelchair in the school environment, but could ambulate short distances with a walker or canes when supervised, and required assistance with transfers and hygiene for toileting (id.).

The November 2006 CSE recommended a 12-month school year program of a 12:1+1 special class in a specialized public school with a full-time health services paraprofessional, related services of PT, OT, speech-language therapy, nursing, and transportation by an air conditioned ambulance with a nurse (Dist. Ex. 3 at pp. 1, 15). The November 2006 IEP contained annual goals and short-term objectives related to improving the student's independent money management skills, functional writing skills, knowledge needed to be an informed citizen, reading and comprehension skills for banking, skills needed to maintain a healthy diet, ability to independently follow a schedule, independence with fine motor skills and activities of daily living, gross motor abilities, and her expressive language and oral skills (id. at pp. 7-12). The November 2006 IEP also contained long-term adult outcomes for the student, as well as related transition services with identified responsibility (id. at p. 16). Log notes maintained by respondent's transition coordinator dated November 13, 2006, indicated that petitioner also required "independent/assisted living" for the student (Dist. Ex. 28 at p. 5).

The AHRC conducted a psychosocial evaluation of the student on December 3, 2006 (Dist. Ex. 5). The evaluator noted that the student's mother was seeking day services and residential placement for her daughter (id. at pp. 1, 4). The evaluator also reported that petitioner was not satisfied with her daughter's Medicaid service coordination from the Sick Kids (need) Involved People (SKIP) of New York agency because the coordinators changed frequently, and that petitioner had received a list of Medicaid service coordination vendors from her local DDSO (id.). The evaluator indicated in her report that the student was dependent in all areas of daily living due to cognitive delays and multiple physical disabilities (id. at p. 2). The evaluator stated

that the student had no awareness of danger, was a "choke hazard," and required supervision when eating due to her tracheal tube (id.). She reportedly displayed fixations, preoccupations and bouts of anxiety and agitation (id. at p. 3).

The AHRC conducted a psychological assessment of the student on December 8, 2006 (Dist. Ex. 6).³ Administration of the Stanford Binet Intelligence Scales - Fifth Edition yielded a full scale IQ score of 47, a verbal IQ score of 47, and a nonverbal IQ score of 52 indicating that the student's intellectual functioning was in the moderately retarded range (id. at p. 2). The student was able to complete object series and matrices, sort items into categories based upon color, perform counting tasks, perform simple addition and subtraction, solve simple word problems, assemble simple puzzles based upon a model, identify simple positions and directions, maintain three block positions in her short-term memory, and verbalize full sentences without errors (id. at p. 3). As part of the evaluation, the student's mother completed the Vineland Behavior Scales, Second Edition, which revealed adaptive levels of functioning in the low range in communication, daily living skills, and socialization; and an overall adaptive behavior composite in the low range (id.). The evaluator recommended that the student continue in her occupational training program and opined that she would benefit from placement in a day habilitation program upon graduation (id. at p. 4). The evaluator provided petitioner with information to obtain an MSC through the AHRC (id.).

A student exit summary completed by respondent and dated January 2007, indicated that the student decoded independently and with ease at approximately a sixth grade level, could tell and track time independently, counted money and change given to her in stores, understood the concepts of applying tax to purchases and tipping, and performed simple addition and subtraction word problems (Dist. Ex. 20 at p. 1). The summary indicated that although the student's math skills were at a basic level, she could perform day-to-day tasks independently (id. at p. 2). The summary also indicated that the student wrote independently, loved to write stories, and that she had created dialogue for classroom plays (id.). In the area of social development, the student was described as needing reminders at times to maintain appropriate social distance and that she should receive coaching on "accepting change with more ease" (id. at p. 3). The exit summary indicated that the student required a suctioning device to be with her at all times as well as a wheelchair and walker for mobility (id.). In reference to the student's postsecondary goals, the exit summary stated that the student read books to classmates who were unable to read and had assisted school staff with clerical paperwork (id. at p. 4). It was recommended that the student visit several day habilitation programs to determine a program with the most potential to capitalize on her strengths and interests (id.). The exit summary also indicated that the student was extremely proficient with a computer, could independently navigate the internet, as well as create, save, retrieve, and print word documents (id.). In the area of independent living, it was recommended that the student visit group homes with her family (id.).

Respondent's transition coordinator communicated with the student's new MSC from SKIP and transmitted to the new MSC by facsimile on January 24, 2007 the completed psychological evaluation report from the AHRC (Dist. Ex. 28 at p. 5). Log notes maintained by the transition coordinator dated January 24, 2007 indicated that the student was on a "residence

³ On February 19, 2007, the report of the psychological evaluation conducted by the AHRC was amended to correct certain factual errors (Dist. Ex. 6).

wait list" for the AHRC, a list maintained by the Bronx DDSO, and that petitioner had renewed MSC services with the then current vendor, SKIP of New York (id. at p. 6).

Petitioner informed the student's MSC on February 6, 2007 that the report from the psychological evaluation of the student conducted by AHRC contained several errors and she requested that a meeting be scheduled with respondent's transition coordinator (Parent Ex. C at p. 7). A meeting between respondent's transition coordinator, the student's MSC, and petitioner occurred on February 7, 2007 (Dist. Ex. 28 at p. 1; Parent Ex. C at p. 8). The hearing record reflects that the transition coordinator provided the MSC with the phone number of an agency to contact regarding the availability of residential placements in Bronx and Queens, that the student was on a waiting list for the AHRC and the YAI, and that the MSC noted that the Metro DDSO needed to be contacted (Dist. Ex. 28 at p. 1; Parent Ex. C at p. 8; see Parent Ex. E at p. 5). Log notes maintained by the MSC stated that the inaccurate psychological report had caused a delay in the student's application to the NYS-CARES list (Parent Ex. C at p. 8). The YAI subsequently rejected the student (Tr. p. 53; Dist. Ex. 18).

On March 19, 2007 petitioner rescheduled an intake appointment with Gateway Counseling Center, Inc. (Gateway), the vendor previously recommended to petitioner by respondent's transition coordinator, for Medicaid service coordination services to April 2, 2007 (Dist. Ex. 14).

On April 20, 2007 an AHRC agency representative notified respondent's transition coordinator of a vacancy in its day habilitation program (Dist. Exs. 11; 28 at p. 1). The transition coordinator notified petitioner of the vacancy and referred the student the same day, transmitting the student's IEP and current evaluations to the AHRC by facsimile (Dist. Ex. 28 at p. 1.).

Respondent's transition coordinator contacted the student's parents on April 27, 2007 and requested a meeting to discuss transition plans and service needs for the student (Dist. Ex. 28 at p. 3). On April 30, 2007, the transition coordinator was informed by the AHRC that the aforementioned vacancy was no longer available (id.). The student's parents together with the MSC from Gateway met with respondent's principal, assistant principal, and transition coordinator on May 2, 2007 (id.).

On May 3, 2007, the United Cerebral Palsy (UCP) contacted the transition coordinator regarding three potential appropriate placements for the student, including a site in the Bronx that served higher functioning individuals with medical needs (Dist. Ex. 15 at p. 1). The transition coordinator informed petitioner that petitioner would have to work with her daughter's MSC to arrange for the student's transportation to an adult program, but that respondent's transition coordinator could schedule a meeting with OMRDD for petitioner to advocate for her daughter's transportation needs (id.).

On May 8, 2007 petitioner completed an intake with Gateway for Medicaid service coordination services (Dist. Ex. 18). Subsequent to the meeting, the student's new MSC contacted respondent's transition coordinator and indicated that petitioner requested that a referral packet on the student be sent to the UCP specifically to its program located in Manhattan (id.).

On May 10, 2007 petitioner attended an event described in the hearing record as a family support conference and the "Bronx Fair" where she met several individuals associated with the Metro DDSO and the AHRC who subsequently began to assist her with a post-graduation placement for her daughter (Tr. pp. 57-62, 286, 296). The student was also placed on the NY-CARES list on May 10, 2007 which then made her eligible to be placed in an OMRDD sponsored residence (Tr. pp. 295-96). On or about May 24, 2007, respondent's principal contacted the Heart Share program on the student's behalf (Dist. Ex. 10).

By letter dated June 1, 2007, respondent invited petitioner to a meeting scheduled for June 5, 2007 (Dist. Ex. 27). Petitioner attended the June 5, 2007 meeting with representatives from the AHRC and New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) for the purposes of intake and orientation (*id.*). VESID subsequently determined that the student was not appropriate for its services (Tr. p. 195).

On June 5, 2007, respondent's transition coordinator informed petitioner by letter that she had spoken with a representative from the Institute on Applied Human Dynamics (IAHD) on June 4, 2007 who would be discussing the student's potential placement with the IAHD admissions committee and informing the committee that the DDSO would provide funding for a nurse for the student (Dist. Ex. 26 at p. 1). The representative would be in touch with the transition coordinator on June 8, 2007 with an update (*id.*). The transition coordinator forwarded updated medical information to the IAHD on June 8, 2007 (*id.* at pp. 2, 3, 5).

On June 13, 2007 respondent referred the student to the Community Action for Human Services Day Habilitation Program (Dist. Ex. 12).

By electronic mail dated June 19, 2007, petitioner requested an impartial hearing alleging that respondent failed to provide her daughter with timely and complete transition services (Dist. Ex. 1 at p. 1). Specifically, petitioner alleged that respondent did not tell her to sign her daughter up with the OMRDD, did not network on her daughter's behalf, and did not refer her daughter to a sufficient number of adult programs in a timely manner thereby leaving her without a post-graduation placement (*id.* at p. 2). Petitioner requested compensatory education for her daughter for summer and fall 2007 (*id.*).

Respondent answered and denied all allegations except that it convened the CSE on November 10, 2006 for the student (Dist. Ex. 2 at p. 1). Respondent asserted that a transition plan was created as part of the November 2006 IEP, and that the mandated members of the IEP team considered all available evaluations and reports in considering and rejecting regular education, and recommending placement in a 12:1:1 program (*id.* at pp. 2-3).

The impartial hearing began on August 6, 2007 and concluded on August 27, 2007, after two days of testimony (Tr. pp. 1, 154). By decision dated September 24, 2007, the impartial hearing officer found that although respondent's delay in contacting OMRDD was detrimental and reduced the student's chances of having a program in place for June 2007, this delay did not rise to the level of awarding compensatory education as an equitable remedy (IHO Decision at pp. 6-7).

Petitioner appeals, alleging that the impartial hearing officer incorrectly denied her request for compensatory education and that the transition services provided by respondent were inadequate and did not prepare the student for transition to adult services. As a remedy, petitioner seeks a full year of compensatory education for her daughter.

In its answer, respondent alleges that petitioner failed to serve the petition in a timely fashion. Respondent further alleges that petitioner failed to prove that the student has not been placed in an adult services program due to respondent not providing adequate transition services. Respondent also alleges that petitioner has not met her burden of proving that petitioner's claims against respondent rise to the level required to award compensatory education. Respondent requests that petitioner's appeal be dismissed in its entirety.

Before reaching the merits of petitioner's appeal, I must address a procedural issue. Respondent asserts as an affirmative defense that the notice of intention to seek review and the petition for review were served in an untimely manner and must be dismissed. In a letter to this office, petitioner requests that the delay in service of the notice of petition and petition for review be excused because of her confusion over whether the timeline for filing the petition was based upon calendar or business days.⁴ Petitioner did not file a reply to respondent's affirmative defense raised in its answer alleging that the petition for review was served in an untimely manner.

A petition for review to a State Review Officer must comply with the timelines specified in section 279.2 of the Regulations of the Commissioner of Education (8 NYCRR 279.13). The petition for review, which initiates the review (8 NYCRR 279.4), must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (*id.*). A State Review Officer may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The good cause for the failure to timely seek review must be set forth in the petition (*id.*; Application of a Child with a Disability, Appeal No. 04-103).

The impartial hearing officer's decision was issued on September 24, 2007. Petitioner served the notice of intention to seek review upon respondent on October 30, 2007. Respondent notified petitioner via telephone on November 13, 2007 that two pieces of evidence could not be located and that the materials would have to be "recreated." The impartial hearing was reopened and convened on November 19, 2007 via a telephone conference where the same impartial hearing officer determined that neither missing document was crucial to the issue decided at the first hearing (IHO Decision at p. 8). The impartial hearing officer then ordered in a November 19, 2007 supplemental decision that the compliance date for initiating an appeal should be extended for two 30-day periods to facilitate petitioner's right to appeal (*id.*). Petitioner served her petition for review on respondent on November 26, 2007 (Pet'r Aff. of Service).

⁴ I note that petitioner submitted e-mail correspondence dated November 16, 2007 with her letter to this office, where petitioner was advised by VESID that the September 24, 2007 impartial hearing decision was final and that the petitioner had to file her appeal 35 calendar days from that decision.

The November 19, 2007 supplemental decision was issued after the final date for serving a petition for review of the September 24, 2007 decision. Both federal and state regulations provide that an impartial hearing officer's decision is final, except that either party may appeal from such decision to a State Review Officer (see 34 C.F.R. § 300.510[a]; see 8 NYCRR 200.5[i][4][v]; Application of a Child with a Disability, Appeal No. 05-078). Upon the facts before me, I find that the September 24, 2007 decision is the final determination of the issues from which petitioner seeks review, and that such decision on those issues became final in the absence of a timely appeal (Application of a Child with a Disability, Appeal No. 05-078). In the circumstances of this case, the impartial hearing officer erred when she re-opened the initial hearing and extended the deadline for petitioner to file an appeal for two additional 30-day periods. I caution the impartial hearing officer to comply with the Commissioner's Regulations with regard to granting extensions and rendering a final decision in the case (8 NYCRR 200.5[j][5][i]). The record in the present case closed on August 27, 2007 (Tr. p. 326; see 8 NYCRR 200.5[j][5]). Under the applicable provisions of 8 NYCRR 279.2(b), petitioner did not timely serve the notice of intention to seek review and the petition for review upon respondent.

An untimely petition may be excused for good cause shown (see Application of the Bd. of Educ., Appeal No. 00-050; Application of a Child with a Disability, Appeal No. 97-18; Application of the Bd. of Educ., Appeal No. 91-35). I note that petitioner did not assert good cause in her petition, but offered her excuse in a letter sent to the Office of State Review. Nevertheless, I am not persuaded that the reasons for the delay set forth by petitioner amount to good cause to excuse the untimely service of the petition for review. The petition is, therefore, dismissed as untimely served (Application of a Child with a Disability, Appeal No. 05-106; Application of a Child with a Disability, Appeal No. 05-048; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-067; Application of a Child with a Disability, Appeal No. 03-109; Application of a Child with a Disability, Appeal No. 02-096).

Despite dismissing the petition as untimely, I have reviewed the hearing record and the merits of petitioner's appeal.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) 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, 546 U.S. 49, 52 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 [2d Cir. 2007]; 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). The "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 546 U.S. at 53). 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, 546 U.S. at 53; 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 seeking relief (see Schaffer, 546 U.S. at

60 [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 (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).

Compensatory education, the continuation of instruction to a student after he or she is no longer eligible for instruction because of age, 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 (see Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; see also 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. 07-005; 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]; 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).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see 34 C.F.R. § 300.43; Educ. Law § 4401[9]; 8 NYCRR 200.1[fff]).

Accordingly, pursuant to federal law and regulations an IEP for a student who is at least 16 years of age must include appropriate measurable postsecondary goals based upon age

appropriate transition assessments and the transition services needed to assist the child in reaching those goals (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b][1]). Under state regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education, vocational education, integrated competitive employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]).

Petitioner alleges that the transition services provided by respondent were inadequate and did not prepare the student for transition to adult services. The student's November 10, 2005 IEP included postsecondary goals related to community integration, postsecondary placement, independent living, and employment (Dist. Ex. 7 at p. 15). The IEP stated, "[the student] will integrate in the community with maximum supports," "[the student] will attend a vocational training program," "[the student] will live independently with maximum supports," and "[the student] will be employed with maximum supports" (*id.*). The IEP further identified the following transition services needed to assist the student in reaching those goals, "[the student] will develop basic functional reading, writing, and math skills," "participation in an inclusive program that will promote positive social interaction," "[the student] will participate in career exploration," and "[the student] will identify personal strengths and weaknesses" (*id.*). Annual goals and short-term objectives contained in the November 2005 IEP demonstrate the requisite correlation and connection to the student's identified postsecondary goals and transition services (*id.* at pp. 7-11). For example, the IEP included one goal and three corresponding short-term objectives related to the student's social language skills, two goals and six corresponding short-term objectives related to functional reading skills, two goals and six corresponding short-term objectives related to functional math skills, one goal and three corresponding short-term objectives related to activities that promote good health, and one goal and three corresponding short-term objectives related to applying academic knowledge and skills to the workplace and other settings (*id.*). The student's November 2005 IEP also stated that she would participate in lunch, assemblies, and trips with non-disabled students (*id.* at p. 14).

The student's November 10, 2006 IEP also included postsecondary goals related to community integration, postsecondary placement, independent living, and employment (Dist. Ex. 3 at p. 16). The IEP stated that "[the student] would like to go to supermarkets and eateries where she will make healthy choices about food with minimal support," "[the student] would like to explore volunteer work and or a program with vocational activities with maximum support," "[the student] would like to explore assisted living with maximum support," and "[the student] would like to participate in supported employment where she can help others" (*id.*). The transition services identified as needed to assist the student in reaching these goals included "[the student] will keep a daily log of the food she eats and make an analysis of her food choices,"

"[the student] will receive community based instruction [that] will allow her to practice the money and nutrition skills worked on in class," "[the student] will secure a recreational, prevocational, or volunteering program," "[the student] will begin procedures for entrance into an assisted living program," and "[the student] will receive therapy which will allow her to increase her independence with toileting" (*id.*). The IEP identified the Medicaid agency as the party responsible for securing the student's post high school program and preparation for assisted living (*id.*).⁵ The November 2006 IEP contained annual goals and corresponding short-term objectives that correlated to the student's identified postsecondary goals in community integration, postsecondary placement, independent living, and employment and her stated transition service needs (Dist Ex. 3 at pp. 7-12, 16). For example, the IEP contained one goal and five corresponding short-term objectives related to improving the student's independent money management skills, one goal and four corresponding short-term objectives related to functional writing skills, two goals and eight corresponding short-term objectives related to functional reading skills, one goal and four corresponding short-term objectives related to skills needed to maintain a healthy diet, and one goal and four corresponding short-term objectives related to independence with fine motor skills and activities of daily living (*id.* at pp. 7-10).

Petitioner contends that the student did not receive instruction or preparation directly related to what she would need for transition into adult services. As indicated above, both the November 2005 IEP and the November 2006 IEP contained goals and short-term objectives that demonstrate the requisite correlation and connection to the student's identified postsecondary goals. Respondent's principal testified that the student had participated in a functional vocational curriculum, which provided her with opportunities to explore vocational activities (Tr. p. 208). A student exit summary dated January 2007 indicated that the student decoded independently and with ease at approximately a sixth grade level, could tell and track time independently, counted money and change given to her in stores, understood the concepts of applying tax to purchases and tipping, and performed simple addition and subtraction word problems (Dist. Ex. 20 at p. 1). The summary indicated that although the student's math skills were at a basic level, she could perform day-to-day tasks independently (*id.* at p. 2). The summary also indicated that the student wrote independently, loved to write stories, and that she had created dialogue for classroom plays (*id.*). Related to the student's postsecondary goals, the exit summary stated that the student volunteered to read books to classmates who were unable to read and had assisted school staff with clerical paperwork (*id.* at p. 4). The student reportedly expressed desire to work assisting a librarian or nurse (*id.*). The exit summary also indicated that the student was extremely proficient with a computer, could independently navigate the internet, as well as create, save, retrieve, and print word documents (*id.*). In the area of independent living, the student had indicated through interviews that she would like to be more independent but not live alone (*id.*). She expressed a desire to be with people her age and be able to go shopping, bowling and dining out (*id.*). The exit summary included recommendations for the student to visit day habilitation programs to determine which program had the most potential to capitalize on her

⁵ I note that while the student, parent, a district representative, a special education teacher, a speech therapist, an occupational therapist, and a transition coordinator were present at the November 10, 2006 IEP meeting, there was no representative of a participating agency present who would be likely to be providing or paying for the transition services (8 NYCRR 200.4[d][4][i][c]). The Commissioner's Regulations mandate that there must be a representative of such agency present to the extent appropriate and with parental consent or consent of a student 18 years or older (*id.*). The record does not reflect why a representative was not present.

strengths and interests as well as to visit group homes with her family and create an action plan of how her needs would be met in that environment (id.).

The hearing record reflects that during the 2005-06 and 2006-07 school years, respondent provided transition-related information to petitioner in the form of meeting announcements and informational flyers regarding OMRDD, adult day program and residential services, Medicaid service coordination vendors, transition fairs, and parent training workshops (Dist. Exs. 33-36; 38-42; 45-46; 51-53; 57-59; 61; 64; 67; 69-70; 73). Respondent invited petitioner to accompany its transition coordinators to agency "open houses" during the 2006-07 school year for the purpose of gaining general information about each agency and also provided petitioner with three recommendations for specific programs to visit (Tr. pp. 243-44, 246). The hearing record reflects that the student's parents played an active role in participating in the transition process; attending meetings, fairs, and open houses, and attending IEP meetings (Tr. p. 184; Dist. Ex. 3).

After reviewing the hearing record, I find that it supports a finding that there was no gross violation of the IDEA to the extent that compensatory education is appropriate. For the 2006-07 school year, the student was provided with an IEP that included appropriate goals and objectives for both the school year and in preparation for her transition (Dist. Ex. 3). The student's IEP goals and short-term objectives related to transition are measurable and provide the requisite specificity to enable the student's teachers and petitioner to understand the CSE's expectations with respect to each goal, what the student would be working on over the course of the school year, and the relationship of the goal to the student's postsecondary goals. Additionally, the November 2005 and November 2006 IEPs provided for experiences, instruction, and skill acquisition for the student to make the transition to living, learning, and working in the community as an adult. Moreover, the student's postsecondary goals clearly identified the student's plans following graduation and provided a mechanism for measuring whether the goals were achieved.

There were procedural inadequacies in developing the transition services, however they did not rise to a gross violation of the IDEA. The impartial hearing officer concluded that respondent delayed in referring the student to OMRDD for adult services and that the delay was detrimental in that it reduced the student's chances of having an adult services program in place for June 2007 (IHO Decision at p. 6). I note that the hearing record does not reflect that respondent timely complied with the specific notification and reporting requirements of Education Law (Educ. Law §§ 4401[2], [9], 4402[1][b][5]; see also Mental Hygiene Law § 13.37; 8 NYCRR 200.4[i]).

The procedure set forth in the Education Law for referral of a student with a disability for adult services requires cooperation between the school districts and participating agencies and their designees (Educ. Law §§ 4401[2], [9], 4402[1][b][5]; 8 NYCRR 200.4[i]; Mental Hygiene Law § 13.37). However, the statute designates that the initiation of the referral procedure pertaining to transition services lies with the CSE (Educ. Law §§ 4401[2], 4402[1][b][5]; see 8 NYCRR 200.4[i]). The CSE is required to provide the commissioner of a state agency such as OMRDD, with a report, upon receipt of appropriate consent, no later than one year before the student needing adult services attains the age of 21 so that the agency, in turn, may forward a

plan for continued care to the student and student's parents (Educ. Law § 4402[1][b][5][a]-[b]; Mental Hygiene Law § 13.37[b]; 8 NYCRR 200.4[i][2][i]).⁶

The hearing record reflects that the student turned 21 years old in April 2007, however there is no evidence in the record that respondent initiated a referral to OMRDD in a manner consistent with the requirements of Education Law § 4402[1][b][5][a]-[b]; Mental Hygiene Law § 13.37[b]; and 8 NYCRR 200.4[i][2][i] (Tr. pp. 260-61, 265-66, 274-76, 280-82, 284-300; Dist. Ex. 3). I caution respondent to follow the procedures set forth in the relevant statutes and encourage its staff to review its obligations under Education Law § 4402[1][b][5][a]-[b]; Mental Hygiene Law § 13.37[b]; and 8 NYCRR 200.4[i][2][i].

As noted above, the impartial hearing officer found that respondent's delay in referring the student to OMRDD was detrimental to the student; however, the impartial hearing officer denied petitioner's request for compensatory education finding that the CSE's actions did not rise to the level of a gross violation of the IDEA (IHO Decision at pp. 6-7; see Application of a Child with a Disability, Appeal No. 02-033).

I agree with the impartial hearing officer that petitioner has not met her burden in demonstrating that compensatory education is warranted as equitable relief (see Schaffer, 546 U.S. at 59-62). The timing of respondent's notification to OMRDD of the student's needs did not result in the gross denial of, or exclusion from, educational services for a substantial period of time as transition services were provided to the student in the IEP and through meetings with the MSC (see Garo 23 F.3d at 737; Mrs. C., 916 F.2d at 75; see generally Urban v. Jefferson Co. Sch. Dist., 89 F.3d 726, 726-537 [10th Cir. 1997]; Dist. Exs. 18; 26; 27; 28; Parent Ex. C). The hearing record reflects that respondent had a process through which it projected the student's upcoming service needs and offered petitioner training regarding advocacy, the transition process, and community services and agencies. In addition, documentary evidence contained in the hearing record indicates that the student's educational experiences corresponded to long-term adult outcomes, that the November 2006 IEP contained activities to address instruction, related services, community experiences, and preparation for employment, and that prior to the student's graduation respondent developed an exit summary of the student's academic achievement and functional performance that included recommendations on how to assist the student in meeting postsecondary goals.

I find that the impartial hearing officer correctly determined that a gross violation of the IDEA had not occurred that resulted in the denial of, or exclusion from, educational services for a substantial period of time during the 2006-07 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. 07-005; 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).

⁶ I note that there is a six month discrepancy between the required reporting timeframes stated in 8 NYCRR 200.4(i)(2)(i) and Mental Hygiene Law § 13.37(b). However, I additionally note that respondent did not comply with either timeframe.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 January 17, 2008

PAUL F. KELLY
STATE REVIEW OFFICER