



The University of the State of New York

The State Education Department State Review Officer

No. 08-104

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] Department of Education

Appearances:

Mayerson & Associates, attorneys for petitioners, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the educational program recommended by respondent's (the district's) Committee on Special Education (CSE) for the 2007-08 school year was appropriate. The district cross-appeals from that portion of the impartial hearing officer's decision which found that the district bore the burden of persuasion to establish that it had provided a free appropriate public education (FAPE).¹ The appeal must be sustained in part. The cross-appeal must be dismissed.

At the start of the impartial hearing, the student was attending the New York Center for Autism Charter School (Charter School), a State-approved charter school in New York City (Dist. Ex. 1). The student has received diagnoses of autism, a pervasive developmental disorder-not otherwise specified (PDD-NOS), and a receptive/expressive language disorder (Parent Exs. B at 3; P at pp. 1, 10; T at p. 1; X at p. 1; CC at p. 1). The student exhibits deficits in his expressive language skills, receptive language skills, play skills, social skills, muscle

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]).

development, coordination, and sensory processing (Parent Ex. B at pp. 3, 5, 6, 11, 12). The student's eligibility for special education programs and services and his classification as a student with autism are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

The student has received special education services since the age of two, initially through the Early Intervention Program (EIP) and subsequently through the Committee on Preschool Special Education (CPSE) (Parent Ex. P at p. 1). He was initially referred for evaluation to the EIP because he was not talking and did not appear to understand his parents when they spoke to him (id. at p. 2). The student was provided with speech-language therapy and special instruction five hours per week and following further evaluation, was also provided with Applied Behavioral Analysis (ABA) instruction and occupational therapy (OT) (id.; see Parent Exs. C; D). In September 2005, the student began attending a special education pre-school program at the Gramercy School (Gramercy) with related services of OT, physical therapy (PT) and speech-language therapy (Parent Exs. R at p. 1; V at p. 1). He also received home-based special education itinerant teacher (SEIT) services, ABA, OT and speech-language therapy (id.).

The student was evaluated by a pediatric neurologist in December 2005 who reported that the student exhibited echolalia and that he did not yet speak in sentences, his speech articulation was not always clear, his play was solitary, his attention span was short, and he was a finicky eater (Parent Ex. X at pp. 1-2). The evaluator determined that there was no need for further brain imaging or metabolic testing (id. at p. 3).

An educational progress report from Gramercy dated June 9, 2006 revealed that the student learned best through the use of repetition, modeling and reinforcement (Parent Ex. W at p. 3). The report noted further that the student often remained fixated on a particular activity, item, or task and that he was difficult to redirect at times (id. at p. 1). The student used language primarily for requesting wants, only responded to basic "wh" questions, inconsistently responded to his name when called and although the student was able to use a spoon and fork with minimal spillage, he ate only a limited repertoire of foods (id. at p. 2).

The student's SEIT reported in July 2006 that the student exhibited high levels of self-stimulatory behaviors such as tensing up his body, stomping his feet and jumping in place, which interfered with his learning process and daily activities (Parent Ex. V at pp. 1, 4). The student was provided with a sensory diet consisting of brushing, bouncing on a therapy ball, deep pressure, hugs and a chair pad (id.). Functional language was reported to be difficult for the student, he did not consistently communicate verbally with his family outside of a few familiar requests, and he exhibited difficulty generalizing skills across locations and people (id. at pp. 2, 4). The student was using the Edmark Reading Program and was taught sight words using the Dolch List (id. at p. 2).

An OT progress note dated July 6, 2006 reflected that that the student was easily over-stimulated with sensory-based movement activities and needed to be monitored to avoid self-stimulatory behaviors (Parent Ex. U at p. 1). The student reportedly exhibited poor muscle endurance for motor activities, decreased muscle tone and strength, tired easily and was unable to participate in physical exercise for prolonged periods of time (id. at p. 2). The student required assistance with putting on socks and in manipulating zippers and buttons (id.; see Parent Ex. R at p. 1). Although the student required only minimal prompting and assistance to engage

in the bathroom routine of pulling his pants down/up, flushing, washing and drying his hands, he was not toilet trained (Parent Ex. U at p. 2). The student's OT sessions focused on improving the student's ability to modulate or organize his arousal level in order to be more successful in an educational environment, on facilitation of age appropriate social skills, play skills, fine motor skills, self-help skills, and on generalized core/trunk strengthening and bilateral upper extremity strengthening (id. at p. 1).

A speech-language progress report dated July 9, 2006, indicated that the student presented with moderately reduced social-relatedness skills and related better to familiar adults than to peers (Parent Ex. T at p. 1). The student relied heavily on cues and verbal prompts to use any type of social language/greeting and when directives or commands became more complex or novel (id. at pp. 1-2). He demonstrated a reduced ability to engage in symbolic or pretend play and required adult cueing to expand play schemas (id. at p. 2). The student also exhibited self-stimulatory behaviors of hand flapping/flicking, covering his ears, banging his head with his hands, jumping up and down, which appeared to increase when he was engaged in undesirable activities and decrease when he was engaged in activities he desired (id. at p. 1).

A PT progress report dated July 12, 2006 noted that the student engaged in self-stimulatory behavior, had decreased muscle tone, decreased postural control and decreased proximal stability (Parent Ex. S at p. 1). The student was also noted to ascend stairs using one handrail for balance and had a tendency to place two hands on the handrail while descending (id. at p. 2).

The parents obtained an educational/behavioral evaluation of the student (Parent Ex. Q). In an evaluation report dated August 12, 2006, the evaluator reported that she observed the student in his home for approximately two hours, observed his interaction with toys and family members, and performed an informal skill assessment (id. at p. 1). She reported that the student's eye contact was fleeting, that he vocalized to himself, tapped his head and legs, tensed his muscles, jumped and engaged in eye gazing (id.). The student did not readily answer questions, ignored directives and was noncompliant during teaching interactions (id. at pp. 1, 2). The evaluator made educational recommendations including: a full day of instruction; a 12-month program; a one-to-one teaching ratio; a behaviorally-based teaching curriculum; a data-based approach to instruction in order to validate the effects of the teaching; the use of discrete trial teaching and incidental teaching procedures; the use of errorless teaching procedures to reduce his frustration; a family training program with weekly home visitations to train the parents and address deficits displayed at home; procedures to increase participation in small group instruction and observational learning from peers; regularly scheduled meetings between parents, teachers and supervisors; procedures to promote generalization; and procedures to foster social and educational opportunities with typical peers (id. at pp. 3-4). The evaluator opined that the student required ABA-based intervention as his primary method of learning and recommended an increase of ABA services to at least 20 hours per week (id. at p. 4). The evaluator also recommended that the student's educational program focus more on functional language skills, utilize a skills assessment, employ functional reinforcers, shape the student's eye contact and attending skills, focus on teaching age-appropriate leisure skills, and teach the student how to follow directions from a distance (id. at pp. 4-5).

The student underwent a psychological evaluation which occurred over several dates between October 2006 and January 2007 (Parent Ex. P at p.1). The psychologist noted that the

student had difficulty remaining seated, tensed his body, beat his feet on the floor, jumped, and exhibited echolalia (id. at p. 3). The psychologist administered a battery of tests (id. at pp. 5-8, 12). She was unable to fully administer the Wechsler Pre-School Primary Scale of Intelligence – Third Edition (WPPSI-III) and the Developmental Neuropsychological Assessment Test (NEPSY) because the student had difficulty following the directions, understanding the verbally-based questions and remaining attentive (id. at pp. 5-7, 12). However, she was able to administer several subtests from both which yielded mostly below average scores (id.). Administration of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) revealed that the student's written language skills were above age level (id. at pp. 8, 12). The student's play skills were assessed through the administration of the Lowe Symbolic Play Test (Lowe) which resulted in a score that placed the student at an age equivalent of 21 months, approximately two and one half years below his chronological age (id. at pp. 9, 12). The psychologist opined that the student had significant deficits in his understanding of the social world, in his ability to engage in interpersonal relationships, in his ability to adapt to novelty, in his play skills, and in his language skills (id. at pp. 9, 10). The psychologist recommended that the student be placed in a structured special education classroom with an emphasis on visual learning, language development and social skills development with speech-language therapy, OT, ABA and counseling to support development of his play skills (id. at pp. 10-11).

In an OT progress report dated December 2, 2006 the student's occupational therapist reported that the student was still significantly challenged with verbal communication and with relatedness, continued to exhibit difficulty with certain stimuli (especially gustatory), and continued to require assistance with clothing fasteners, was not independently indicating the need to use the toilet, and fed himself independently using utensils only with prompting or cueing (Parent Ex. N at pp. 1, 2-3). The student did not consistently initiate play with peers or familiar adults and his play was primarily parallel (id. at p. 3). The report also noted that the student was working with a home-based occupational therapist to focus on his handwriting and graphomotor skills utilizing the Handwriting Without Tears program (id.).

An educational progress report dated December 5, 2006 noted that the student learned new information quickly when it was presented in a visual context and that his learning was affected by a lack of motivation, a lack of attention as well as by inappropriate behaviors that consisted of non-contextual vocalizations and sensory seeking behaviors such as tensing and jumping (Parent Ex. M at p. 1). The student reportedly continued to make steady progress in the language and cognitive domains however he also continued to exhibit difficulty attending and generalizing learned skills into different environments (id. at pp. 2-3, 4). The student was successfully using a timed toilet schedule, was working on fine motor skills to assist with his writing and cutting, and was using the Edmark reading program/curriculum (id.).

Educational and related service progress reports from the Gramercy School and the student's home-based therapists were developed in December 2006 (Parent Exs. H, I, J, K, L). The student was described by his classroom teacher as a passive child who exhibited limited interest in a variety of play items (Parent Ex. L at p. 1). Her report noted that the student often became distracted and engaged in self-stimulatory behaviors such as flapping or mouthing his fingers, which required his instructors to use physical and verbal prompts to encourage him to return to the activity at hand (id.). The student reportedly labeled and identified colors and simple shapes, pointed to body parts on himself and others, matched objects and letters/words,

recognized the names of all his classmates in print, and demonstrated 1:1 correspondence up to 30 (id.).

In the physical domain, the student exhibited increased flexibility at most joints in his extremities, but decreased muscle tone, decreased postural control and decreased proximal stability (Parent Ex. H at p. 1). He demonstrated difficulty walking along a balance beam in a sideways manner; difficulty with grading muscle control in his legs; difficulty with playing in the squat position; difficulty with his timing, coordination and motor planning; and difficulty with his ball play skills (id. at p. 2). The student's decreased muscle tone, coordination and balance as well as moderate deficits in trunk stability secondary to low muscle tone, reportedly impaired his ability to fully and independently engage in certain developmental and play skills such as kneeling to standing, a single leg stance, single leg hopping, and broad jumping (Parent Ex. K).

Results from administration of the Receptive One Word Picture Vocabulary Test (ROWPVT), the Expressive One Word Picture Vocabulary Test (EOWPVT), and the Bracken School Readiness Assessment revealed that the student's language function was consistent with that of a 2.6 to 2.11 year old with emerging skills at the three-year old level (Parent Exs. I at pp. 1-2; J at p. 3). The student exhibited significant delays in spontaneous functional language, delayed and immediate echolalia, and high levels of self-stimulatory behaviors which interfered with his ability to focus on joint-attention tasks at school (Parent Ex. I at pp. 1-2).

By letter dated May 4, 2007, the parents were notified by the Charter School that their son was accepted to the school via a lottery process and could begin attending classes in September 2007 (Parent Ex. G). The letter requested that the parents complete a form which was attached to the letter to indicate whether the student would enroll at the Charter School (id.).

On May 8, 2007, the CSE convened for the purposes of an annual review and to develop the student's individualized education program (IEP) for the 2007-08 school year (Parent Ex. B). The parents informed the district during this CSE meeting that their son had been accepted into the Charter School (Tr. p. 253). Despite this information, the district informed the parents that due to an administrative issue, the CSE could not recommend the Charter School on the student's IEP at that time (Parent Ex. F at p. 1; see also Answer ¶ 21). The CSE recommended that the student attend a 6:1+1 class in a special school (Parent Ex. B at pp. 1, 2). The CSE also recommended the student receive 1:1 occupational therapy (OT) five days per week for 30 minutes per session, 1:1 speech-language therapy for five days per week for 30 minutes per session, and one session of 1:1 physical therapy (PT) for 30 minutes per week (id.).² The student was recommended to receive extended school year (ESY) services (id. at p. 1).

On May 16, 2007, the student's father completed the form attached to the Charter School's May 4, 2007 placement letter and returned it to the Charter School indicating that the student would enroll at the Charter School for the 2007-08 school year (Parent Ex. G).

² Although the parents accepted the Charter School's placement offer on May 16, 2007, it is unclear from the hearing record whether, at the time of the May 8, 2007 CSE meeting, the parents had definitively decided to send the student to the Charter School (Parent Ex. G). The district asserts that they were not required to specify any particular school seat for the student on the May 8, 2007 IEP (Answer ¶ 70).

By letter dated June 10, 2007, the parents notified the district that they were placing their son in the Charter School as of September 2007 (Parent Ex. F). The letter also stated that the parents would privately contract for related services of PT, OT, speech-language therapy, socialization therapy, and additional ABA therapy to supplement the Charter School placement (id.). The letter further advised the district that the parents would seek reimbursement for these contracted related services (id.).³

By due process complaint notice dated July 27, 2007, the parents, through their attorney, requested an impartial hearing to obtain relief pertaining to the 2007-2008 school year (Parent Ex. A at p. 1). The parents asserted that the student was entitled under pendency to receive the services recommended on the student's last agreed upon IEP, which the parents contended was the IEP dated September 19, 2006 (id. at p. 2). The parents asserted that the September 19, 2006 IEP provided for 12 hours of SEIT services per week, three 60-minute sessions of 1:1 speech-language "intervention" per week, two 60-minute sessions of 1:1 OT per week, and one 60-minute session of PT per week (id.). The parents asserted that unless the district agreed to continue the student's pendency entitlements, they would secure the related services privately and seek reimbursement for such services at the impartial hearing (id.). The parents also asserted that the district's May 8, 2007 IEP was both procedurally and substantively flawed.

An impartial hearing began on September 26, 2007 (Tr. p. 1). On this first day of the hearing, the parties stipulated that under pendency the student was entitled to services in accordance with what had previously been provided to the student in the prior IEP dated September 19, 2006 (Tr. pp. 7-8; see Parent Ex. D at pp. 1, 2, 20, 22). The parties agreed to adjourn the proceedings to address the merits of the parents' due process complaint notice on another day (Tr. p. 9).⁴

In the interim, on October 10, 2007, the impartial hearing officer issued a pendency order directing that the student receive his related services and SEIT services pursuant to pendency (IHO Decision at p. 3; see IHO Order on Pendency at p. 3). The order provided that the student receive 12 hours per week of SEIT services, three hours per week of speech-language services,

³ The parents also noted that as of the date of the letter, the district had failed to recommend a specific 6:1+1 class site for the student (Parent Ex. F).

⁴ The hearing record reveals that after the impartial hearing was adjourned, over six months passed before it resumed (Tr. p. 15). Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30 day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such written documentation as part of the hearing record on appeal (see 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, there is no written documentation in the hearing record or the impartial hearing officer's decision about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing and the date of the decision suggests that multiple extensions were granted. I remind the impartial hearing officer to ensure that the impartial hearings over which she presides comply with federal and State regulations.

two hours per week of OT and one hour per week of PT under pendency (IHO Order on Pendency at p. 3).⁵

On January 31, 2008, the CSE reconvened (Dist. Ex. 1). The resulting IEP changed the student's program recommendation from a 6:1+1 program at an unspecified specialized school to a program at the Charter School (compare Dist. Ex. 1 at pp. 1, 2, with Parent Ex. B at pp. 1, 2). The January 31, 2008 IEP also reflected that the Charter School's educational program occurred in classrooms that had a 4:1+3 ratio (id.). The new IEP did not provide for any related services or SEIT services (Dist. Ex. 1 at p. 30). The January 31, 2008 continued the recommendation that the student receive ESY services (id. at p. 1).

The impartial hearing resumed on April 8, 2008 and concluded on July 21, 2008, after three additional days of testimony (Tr. pp. 12, 104, 220). The impartial hearing officer rendered her decision on the merits of the parents' claims on August 14, 2008 (IHO Decision at p. 10). The impartial hearing officer determined that the district met its burden in proving that the student had derived an educational benefit from the recommended placement (id. at p. 8). The impartial hearing officer also found that the district was not required to continue to provide additional after-school services and that the reduction in related service levels was not arbitrary because in lieu of the related services, the January 31, 2008 IEP offered a different educational model which provided intensive individualized instruction by four teachers (id. at p. 9).⁶ The impartial hearing officer found that services to meet the student's speech-language, PT and OT needs were embedded in the student's curriculum at the Charter School and were addressed within the context of his program (id.). The impartial hearing officer also found that the Charter School offered a "comprehensive parent training component" through its clinic, home visits and school visits, which negated the need to provide for parent training and counseling on the student's IEP (id.). The impartial hearing officer determined that the after-school component of SEIT services and OT were not required, and ordered that the district's speech consultant evaluate the student during the next monthly visit to the Charter School to determine if it was necessary for the student to receive speech-language therapy in addition to his current program (id. at pp. 9-10). She further ordered that if speech-language therapy was deemed necessary, then the student's IEP was to be amended to add the related service of speech-language therapy (id.).

The parents appeal, contending that the impartial hearing officer erred in finding that the district's program and placement at the Charter School without after-school services had provided the student with a FAPE. The parents assert that the impartial hearing officer erred in finding that the student no longer required related services and SEIT services. The parents seek a determination that the student's 2007-08 pendency program (the Charter School plus the related

⁵ Testimony from the Charter School's Director and the Charter School's Educational Director reveal that the Charter School does not provide its students with any direct OT or speech-language therapy (Tr. pp. 73-75, 230-31, 234). However, the hearing record reveals that more than one-half of the Charter School's students receive speech-language therapy after school and approximately one-half of the students receive OT after school (Tr. pp. 228-29; see also Tr. pp. 73-74). Additionally, according to the Charter School's Educational Director, other Charter School students from the district have IEPs which specifically provide for after-school related services (Tr. p. 235, see also Tr. p. 51).

⁶ I note that the impartial hearing officer failed to draw a distinction between the related services of OT, PT and speech-language therapy and SEIT services.

services and SEIT services award ordered by the impartial hearing officer in her October 10, 2007 pendency order) constitutes a FAPE.⁷ The parents do not seek any compensatory educational services for any deprivation of services during the 2007-08 school year. They do seek reimbursement for private expenditures related to the provision of related services and SEIT services during pendency for which they have not yet been reimbursed.

The district asserts in its answer that the parents' petition is moot because the 2007-08 school year has ended and the parents have received all of the relief that they seek by virtue of the Charter School placement and the impartial hearing officer's pendency order. The district also asserts that the petition was defective because the attached memorandum of law failed to include a table of contents, there was no notice contained with the petition, the pages of the petition were not numbered sequentially, the parents failed to cite to the page numbers of the exhibits they referred to in their petition, the parents failed to cite to the hearing record in their petition, and the petition failed to specifically identify the parents' reasons for challenging the impartial hearing officer's decision. The district asserts that the student was offered a FAPE, that the process followed by the May 8, 2007 CSE complied with the procedural requirements of the IDEA, and that the May 8, 2007 IEP offered an educational program that was reasonably calculated to provide the student with educational benefits in the least restrictive environment (LRE). The district further asserts that they were not required to indicate a specific school site in the May 8, 2007 IEP and that the student did not need additional related services and SEIT services because he received 1:1 instruction and the related services and SEIT services were embedded within the curriculum at the Charter School. The district asserts further that the parents waived any claim with respect to their son's need for PT. The district also cross-appeals from the impartial hearing officer's decision insofar as she determined that the district bore the burden of persuasion to establish that it had provided a FAPE.

In their answer to the district's cross-appeal, the parents concede that they have waived any claim to PT services. The parents also concede that the impartial hearing officer improperly placed the burden of persuasion for the first criterion of the Burlington/Carter analysis on the district, but assert that the parents had assumed and met that burden and therefore, the burden issue is moot and the district was not prejudiced by the improper placement of the burden by the impartial hearing officer.

Two purposes of the Individuals with Disabilities Education Act (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

⁷ The hearing record reveals that the SEIT services that the student received through pendency were terminated by the district on June 30, 2008 (Tr. pp. 247, 264-65). The hearing record also reveals that during the 2007-08 school year, the student received SEIT services but did not receive any OT, PT or speech-language therapy (Tr. pp. 258, 264-65).

(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 (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]; 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, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; Walczak, 142 F.3d at 132).

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 Bd. of Educ., Appeal No. 08-070; 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).

An IEP must include a statement of the special education and related services and supplementary aids and services to be provided to or on behalf of the student, as well as a

statement of the program modifications or supports for school personnel that will be provided to the student (34 C.F.R. § 300.320[a][4]; see 8 NYCRR 200.4[d][2][v]). Such education, services and aids must be sufficient to allow the student to advance appropriately toward attaining his or her annual goals (34 C.F.R. § 300.320[a][4][i]; see 8 NYCRR 200.4[d][2][v][a][1]). "[S]pecial education and related services must be provided in the least restrictive setting consistent with a [student's] needs" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 [2d Cir. 1998]).

"Special education" means "specially designed instruction which includes special services or programs...and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability" (N.Y. Educ. Law § 4401[1], [2]; 8 NYCRR 200.1[ww]); see 20 U.S.C. § 1401[25][A], [B]; 34 C.F.R. § 300.39).

The term "related services"

means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, school social work, assistive technology services, other appropriate developmental or corrective support services, appropriate access to recreation and other appropriate support services.

(8 NYCRR 200.1[qq]; see 20 U.S.C. § 1401[22]; N.Y. Educ. Law § 4401[2][k]; 34 C.F.R. § 300.34).

A determination of whether related services are appropriate for a particular student must be made based upon the unique needs of the student (Cedar Rapids Community Sch. Dist. v. Garrett F., 526 US 66, 73 [1999]).

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the Individuals with

Disabilities Education Act (IDEA) resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at *1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at * 10 [2d. Cir. Oct. 9, 2008] [upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

With respect to respondents' cross-appeal, "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination" (Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). 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][1]; see 8 NYCRR 200.5[k][1]; Mackey v. Bd. of Educ., 386 F. 3d 158, 160 [2d Cir. 2004]; 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]). In this case, the cross-appeal is dismissed because, despite the district's concern that it improperly was assigned the burden of persuasion, the impartial hearing officer ultimately decided in its favor. The district suffered no harm as a result of the impartial hearing officer's determination; hence, the district is not aggrieved by the impartial hearing officer's determination

Next, the district's contention that the parents' claims are moot must be addressed. The hearing record reveals that on September 26, 2007, the parties stipulated to the student's receipt of SEIT services, speech-language therapy, OT and PT services (Tr. pp. 7-8). Thereafter, on October 10, 2007, the impartial hearing officer ordered the district to provide these services to the student via a pendency order (IHO Decision at p. 3; IHO Order on Pendency; see Parent Ex. D at pp. 1, 2, 20, 22). The student's mother testified at the impartial hearing that during the 2007-08 school year, the student received his SEIT services, but did not receive any OT, PT or speech-language therapy (Tr. pp. 258, 264-65). Despite this apparent denial of services, the parents' attorney specifically stated and the student's mother testified at the hearing that the parents were not requesting any "compensatory education" (i.e., additional services) to make up for the failure of the student to receive OT, PT, or speech-language services during the 2007-08

school year (Tr. pp. 257-58). The parents have also conceded at the impartial hearing and on appeal that the student no longer needs PT and therefore they are not seeking any PT services (Tr. pp. 261-62; see Parents Reply ¶ 39; Answer ¶ 81).

The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). In general, cases dealing with issues such as appropriateness of related services, desired changes in IEPs, specific placements, and implementation disputes are moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, a claim may not be moot despite the end of a school year for which the child's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (id.; see Application of a Child with a Disability Appeal, No. 07-139; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 07-077).

I find that this appeal has been rendered moot and I decline to review the merits of the parents' claims. The parents request that a State Review Officer determine that in order to receive a FAPE for the 2007-08 school year, the student's 2007-08 educational program should have included not only the Charter School placement (a component of the student's education plan about which the parties are in agreement), but also should have included the additional related services and SEIT services provided pursuant to the pendency order (Tr. pp. 251, 259; Pet. ¶¶ 12, 16). In this instance, if such a determination were made, it would have no actual effect on the parties because the 2007-08 school year has already ended. Moreover, the student has either received the requested services under pendency (as was the case for the Charter School placement and the SEIT services until June 30, 2008), or if he has not received the educational services under pendency (as was the case for OT, PT and speech-language therapy), the parents have either waived the student's right to receive additional services to make up for the loss of such educational services (as was the case for OT and speech-language therapy), or they have indicated that the student doesn't need the educational service (as was the case for PT) (Tr. pp.

257-58, 261). The 2007-08 school year has concluded and the hearing record reveals that the student's educational needs were changing (e.g., his PT needs) and therefore, any future dispute over the educational plan for the student in subsequent school years would most likely be different from the dispute which occurred herein. A State Review Officer is not required to make a determination which will have no actual impact upon the parties (Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

The only remaining issue that needs be addressed is the district's termination of the SEIT services during the pendency of the underlying proceeding and the proceeding on appeal and the district's failure to provide the related services of OT, PT and speech-language that it was ordered to provide under pendency. As noted above, the parents' attorney and the student's mother stated at the hearing that the parents are not seeking relief for the related services that were not provided to the student under pendency during the 2007-08 school year. However, I note that the hearing record does not show that the district provided any of the services contained in the pendency order from July 1, 2008 forward. To the extent that the related services and SEIT services were not provided at public expense during pendency, and were obtained at the parents' expense, the district must reimburse the parents for such costs.

Lastly, the hearing record reveals that the district did not comply with its pendency obligations under 20 USC 1415 [j] and Education Law § 4404(4). I caution the district to ensure compliance with its pendency obligations.

In light of the determinations made herein, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that respondent shall reimburse petitioners for the cost of any SEIT services or any related services to which the child was entitled under pendency, but did not receive during the pendency of this appeal, upon the submission of proof of payment for such services.

Dated: Albany, New York
November 26, 2008

PAUL F. KELLY
STATE REVIEW OFFICER