



The University of the State of New York

The State Education Department
State Review Officer
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No. 09-025

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

Appearances:

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her requests to be reimbursed for her son's tuition costs at the Staten Island Montessori School (Montessori) for the 2008-09 school year, and that her son be provided compensatory education services due to a denial of a free appropriate public education (FAPE) during the 2006-07, 2007-08 and 2008-09 school years. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending respondent's (the district's) 12:1 collaborative team teaching (CTT) program and was recommended to receive one individual 30-minute session of counseling and two individual 30-minute sessions of occupational therapy (OT) per week (Tr. pp. 12-14, 17, 29, 33; Parent Ex. S at pp. 1, 9). The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), and a pervasive developmental disorder (PDD) (Parent Ex. AA at p. 5). Academically, the student's reading and math skills are on a third grade level (Tr. pp. 92-93). The student has significant difficulty in the area of socialization, and exhibits difficulty with transitions and frustration management (Tr. pp. 105-06; Parent Ex. Z). The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (Tr. p. 20; see 34 C.F.R. § 300.8 [c][1]; 8 NYCRR 200.1[zz][1]).

On September 26, 2006, the district's Committee on Special Education (CSE) prepared an individualized education program (IEP) for the student (Tr. p. 245; Parent Ex. C). The September 2006 CSE determined that the student was eligible for special education services as a student with autism and recommended placement in a 6:1+1 special class in a special school

program with a "behavioral intervention" component, OT, and counseling services (Tr. p. 245; Parent Ex. C at pp. 1, 4). According to the parent, the student attended the 6:1+1 program for seven months, after which time he "deteriorated" and the parent contacted the CSE to recommend a different placement (Tr. pp. 245-46). On April 18, 2007, the parent removed the student from the district's program (Parent Ex. B at p. 3). On April 26, 2007, the parent requested an impartial hearing alleging that the district's program was inappropriate for the student because she believed that her son was not progressing (Parent Ex. I at p. 4). On May 1, 2007, the district developed an interim service plan (ISP) that recommended placement in an 8:1+1 special class in a special school (Tr. p. 246; Parent Ex. M). The parent rejected this placement and enrolled her son in a 12-month program at Montessori, which he began attending on May 14, 2007 (Tr. p. 246; Parent Ex. P at p. 3; see Parent Ex. Z at p. 1). In June 2007, the parent amended her due process complaint notice, requesting tuition reimbursement for Montessori for the 2006-07 school year, reimbursement for private counseling and transportation services, and "compensatory" OT services (Parent Ex. I at p. 4).

On September 20, 2007, the CSE convened and recommended that for the 2007-08 school year, the student attend a 6:1+1 special class in a special school with related services consisting of two 30-minute sessions of individual OT per week and one 30-minute session of counseling services in a group of three per week (Parent Ex. K at pp. 1, 8). The parent rejected the placement offer and during the 2007-08 school year, the student attended Montessori in a class composed of six students with diagnoses of a PDD or autism, one teacher, an assistant teacher, an applied behavioral analysis (ABA) specialist, and a "special ed consultant" (Tr. p. 247; Parent Exs. B at pp. 3-4; Z at p. 1; see Parent Ex. E).

On October 31, 2007, an impartial hearing officer determined that during the 2006-07 school year, the district had failed to offer the student a FAPE and that the student's placement at Montessori was appropriate (Parent Ex. I at p. 12). The impartial hearing officer awarded the parent district-funded transportation services to Montessori, tuition reimbursement for the 2006-07 school year and summer 2007, and up to twenty-seven 30-minute sessions of "compensatory" OT services (id. at p. 14). Notwithstanding this award, the impartial hearing officer denied the parent's request for reimbursement of private counseling and transportation services (id.).¹

On November 27, 2007, the parent requested an impartial hearing regarding the district's program recommendations for 2007-08 school year (Parent Ex. P at p. 3). As relief, the parent requested, among other things, tuition reimbursement and transportation for her son's placement at Montessori (id.). In a January 16, 2008 decision/order on pendency, an impartial hearing officer determined that Montessori constituted the student's pendency placement and he ordered the district to "immediately commence funding the services that [the student] receives at the Montessori School until this matter is resolved" (id. at p. 8).²

¹ On August 23, 2007, the district filed a due process complaint notice seeking to conduct a psychoeducational evaluation of the student (Parent Exs. B at p. 2; J). On March 7, 2008, an impartial hearing officer denied the district's request to conduct the evaluation (Parent Ex. B at p. 5).

² The parent testified that the student did not receive any district-funded related services during the 2007-08 school year (Tr. p. 248), however the hearing record contains Related Services Authorizations (RSAs) for the student's counseling services issued by the district in March and August 2008 (Parent Exs. X; X1).

On April 2, 2008, the CSE convened to consider the student's program for the 2008-09 school year and recommended placement in a 12-month 6:1+1 special class in a special school with two 30-minute individual sessions of OT per week and one 30-minute session of individual counseling services per week (Parent Exs. N; O at pp. 1, 10). According to the parent, the student did not attend Montessori's 2008 summer program and on or about August 4, 2008, an impartial hearing officer dismissed her claims regarding the appropriateness of the CSE's recommendations for the 2007-08 school year (Tr. p. 249).³ On August 29, 2008, the parent visited the CSE office to inquire about transportation services (Tr. p. 296; Parent Ex. DD). The parent stated that the district failed to provide transportation for the student to Montessori at the commencement of the 2008-09 school year; therefore, he did not attend the Montessori program (Tr. pp. 249-50). By letter dated September 15, 2008, the district provided the parent with a final notice of recommendation (FNR), based upon recommendations from the April 2008 CSE meeting, which included the student's program, placement, and location information (Parent Ex. V).

In late September 2008, the student was privately assessed for "seizures, aneurysms and mini stroke" (Tr. p. 251). On two occasions shortly thereafter, the parent requested that the district provide the student with home instruction services (Tr. p. 251; Parent Exs. W; W2; W3).⁴ The district denied the parent's requests for home instruction services, which were based in part upon a recommendation from a May 2007 psychiatric evaluation report, citing the need for an updated recommendation for home instruction services (Tr. pp. 251, 298; Parent Ex. W; see Parent Ex. AA at pp. 1, 5).⁵

By due process complaint notice dated November 7, 2008, the parent commenced the impartial hearing which is the subject of this appeal (Dist. Ex. 1). According to the due process complaint notice, the parent sought to "enforce" compliance with the January 2008 impartial hearing officer's decision pertaining to pendency (id. at p. 2). The parent further alleged that the student was denied a FAPE during the 2006-07, 2007-08, and 2008-09 school years (id. at p. 6). As a remedy, the parent requested compensatory educational services in the form of OT and counseling (id. at p. 7). The parent also requested that the district directly pay tuition and services "upfront" to Montessori in addition to transportation (id.).

By letter dated November 20, 2008 to the parent, a district representative described the assistance she had provided to the parent in an attempt to secure the parent's requested medical home instruction services for the student (Tr. pp. 277, 293-94; Parent Ex. W). The letter indicated that the parent informed the district representative that the student was undergoing a private neuropsychological evaluation and that the parent would provide the results of the evaluation to the CSE (Tr. pp. 293-94; Parent Ex. W).

³ The decision of the impartial hearing officer on the merits in this matter is not included in the hearing record.

⁴ During this time, the student was not attending Montessori or the district's recommended program (Tr. pp. 114-15, 128, 250-52).

⁵ An October 16, 2008 "Medical Request For Home Instruction" form, completed by one of the student's physicians, requested home instruction services for the student for "8 weeks or until school placement," and also indicated that there were "no limitations" on the student's attendance at school (Parent Ex. W3).

After multiple unsuccessful attempts to contact the parent by telephone and mail, on November 21, 2008, a district social worker and a district school psychologist visited the parent at her home and offered the student a placement in a 6:1+1 special class (Tr. pp. 113-17, 144-46, 148-49; see Tr. pp. 194-95). The parent rejected the 6:1+1 program, stated that she would consider placement in a CTT, and requested a "reconference" (Tr. pp. 117-19, 148-49). According to the social worker, the parent indicated that she had minutes available on her telephone and that she could participate in a CSE meeting (Tr. pp. 118-19, 129). The CSE meeting was held later that day, but multiple attempts to contact the parent were unsuccessful (Tr. pp. 149-50, 196-97). Members of the November 2008 CSE included the school psychologist who also acted as the district representative; the district's social worker; and a special education teacher who, after reviewing the student's "file," recommended placement in a 12:1 CTT program with related services comprised of two 30-minute individual sessions of OT per week and one 30-minute individual session of counseling per week (Tr. pp. 119, 149-50, 192, 224; Parent Ex. S at pp. 1-2, 9).

On November 21, 2008, subsequent to the CSE meeting, the school psychologist and special education teacher delivered the student's November 2008 IEP to the parent at her house and discussed it with her (Tr. pp. 150-51, 197; Parent Ex. S). During the home visit, district staff also provided the parent with a letter authorizing the student to attend the recommended placement and location starting on November 24, 2008 (Tr. pp. 150-51, 197-98; Parent Ex. U). The district's special education teacher described this meeting with the parent as "collegial" (Tr. pp. 197-98).

On December 3, 2008, the student began attending the district's CTT program pursuant to the November 21, 2008 IEP (Tr. p. 90). On December 10, 2008, the parent provided the district with consent to provide the student with counseling services (Dist. Ex. 2).

The impartial hearing began on January 6, 2009 and concluded on February 2, 2009, after three days of testimony (Tr. pp. 1-316; IHO Decision at p. 1). During the first day of the impartial hearing, the impartial hearing officer narrowed the issues related to this proceeding to those concerning the provision of a FAPE to the student, as well as the parent's request for compensatory relief in the form of additional services of OT and counseling (Tr. pp. 12-13). On February 13, 2009, the impartial hearing officer rendered her decision (IHO Decision at p. 9). First, with respect to the parent's claims relating to the 2006-07 school year, noting that the parent had already been awarded tuition reimbursement for that school year and summer 2007, the impartial hearing officer found that her current claims were barred by the statute of limitations and on the grounds of *res judicata* (id. at pp. 2-3). The impartial hearing officer further found that any of the parent's current claims related to the 2007-08 school year were also barred by *res judicata*, noting that an impartial hearing officer previously had, under pendency, directed the district to pay the student's private school tuition at Montessori for the 2007-08 school year until the matter was resolved in August 2008 (id. at p. 3).

Turning to the parent's claims related to the 2008-09 school year, the impartial hearing officer determined that the November 2008 IEP did not offer the student a FAPE (IHO Decision at p. 8). Notwithstanding this finding, the impartial hearing officer also found that the district's efforts to offer the student a FAPE were hampered by the parent's actions (id.). She noted that the parent did not make herself available to the CSE to work with its personnel to fashion an

appropriate IEP for the student, and she encouraged the parent to bring her concerns to future CSE meetings and to participate in the process of formulating an appropriate IEP for the student (id. at pp. 8-9). The impartial hearing officer did not make any findings with respect to the parent's request for payment of the student's tuition at Montessori for the 2008-09 school year, having reasoned that the parent's claim regarding the appropriateness of the private program was not ripe for adjudication at that time, because the student was not enrolled at Montessori for the 2008-09 school year and evidence further indicated that Montessori might not have a class for the student (id. at p. 9). In light of her finding that the student was not offered a FAPE during the 2008-09 school year, the impartial hearing officer ordered the CSE to conduct an updated psychiatric evaluation of the student and reconvene by March 30, 2009 to consider the results of evaluation and the appropriateness of the current placement with input from teachers and the parent (id. at p. 12).

On appeal, the parent seeks an annulment of the impartial hearing officer's determination. The parent maintains that the evidence gathered at the impartial hearing showed that the district failed to provide the student a FAPE since the 2006-07 school year. Although the parent does not appeal the impartial hearing officer's finding that the district failed to offer the student a FAPE during the 2008-09 school year, the parent disputes the impartial hearing officer's conclusion that the parent's actions hindered the district's efforts in offering a FAPE to the student. For relief, the parent seeks annulment of the impartial hearing officer's order that a psychiatric evaluation of the student be conducted. As additional relief, the parent requests: (1) an independent educational evaluation (IEE) for OT; (2) counseling as recommended by a school assessment team (SAT) social worker or psychologist experienced in the field of autism; (3) paraprofessional services; (4) compensatory relief in the form of counseling and OT; (5) an audiological evaluation; (6) preparation of a behavioral intervention plan (BIP); (7) the appointment of an independent party to review the student's records, IEPs and current placement; (8) that the matter be referred to the district's Central Based Support Team (CBST); and (9) a Nickerson letter.

The district submitted an answer, requesting that the petition be dismissed in its entirety. First, the district claims that the petition is procedurally defective. Next, the district asserts that most of the relief that is requested by the parent in her petition should be denied on the basis that the parent is making such requests for relief for the first time on appeal. With respect to the parent's claims for compensatory relief in the form of OT and counseling as additional services, the district argues that the impartial hearing officer properly concluded that with respect to the 2006-07 school year, the parent's claims were not timely and was barred by *res judicata*. Regarding the parent's claims surrounding the 2007-08 school year, the district contends that the impartial hearing officer also correctly determined that the parent is precluded from pursuing her request for relief on the grounds of *res judicata*. Alternatively, the district maintains that any claims asserted by the parent for compensatory relief should be dismissed because the parent has failed to present sufficient evidence of any missed services, or what, if any services would be appropriate as compensation. Notwithstanding the district's request that the petition be dismissed, in its answer, the district acknowledges that the student's 2008-09 FNR was not timely.

Also on appeal, the district asserts that it is seeking consent from the parent to evaluate the student to develop an IEP as ordered by the impartial hearing officer's decision below.

Moreover, the district concedes that upon reconvening a CSE meeting, it should consider what additional services would be necessary to meet the student's needs, in light of the missed services during the 2008-09 school year.

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the student 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 least restrictive environment (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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

As a preliminary matter, I will first examine the district's argument that several claims for relief enumerated in the parent's petition should be dismissed because the parent neither included such claims in her due process complaint notice nor did she request such remedies during the impartial hearing. As set forth in greater detail below, I agree with the district's argument.

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-102; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065).

In the instant case, a review of the parent's due process complaint notice reveals that the district is correct in asserting that the parent did not raise several claims below. Therefore, the parent's claims for an IEE for OT; paraprofessional services; an audiological exam; a BIP; the appointment of an independent party to review the student's records, IEPs and current placement; a referral to the district's CBST; and a Nickerson letter are dismissed because they were not first

properly raised below (see Application of a Student with a Disability, Appeal No. 08-102; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student with a Disability, Appeal No. 08-008; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

As such, I will address in this decision the parent's remaining claims concerning her requests for compensatory relief as additional services to remedy an alleged denial of a FAPE for the 2006-07, 2007-08 and 2008-09 school years. Upon due consideration and an independent review of the hearing record, I affirm the impartial hearing officer's denial of compensatory services for the 2006-07 and 2007-08 school years for the reasons stated in her decision, including dismissal on the basis of res judicata.

The doctrine of res judicata "precludes parties from litigating issues 'that were or could have been raised' in a prior proceeding" (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]; Application of a Student with a Disability, Appeal No. 08-076; Application of a Child with a Disability, Appeal No. 07-093; Application of a Child with a Disability, Appeal No. 06-100; Application of a Child with a Disability, Appeal No. 05-072; Application of a Child with a Disability, Appeal No. 04-099). The rule applies not only to claims actually litigated, but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (In re Hunter, 4 N.Y.3d 260, 269 [2005]). "[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]; In re Hunter, 4 N.Y.3d at 269). Res judicata applies when (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (Grenon, 2006 WL 3751450, at *6).

Here, the parent has previously litigated her claims pertaining to the appropriateness of the CSE's recommendations for the 2006-07 and 2007-08 school years (Tr. pp. 5, 7, 9, 287, 313; Parent Ex. I). The hearing record further reflects that her claims involving an alleged denial of a FAPE with respect to the 2006-07 and 2007-08 school years have been adjudicated on the merits (Tr. pp. 7, 248; see Tr. p. 313; Parent Ex. I). Under the circumstances, the hearing record reflects that the parent has been afforded a full and fair opportunity to litigate any and all claims with respect to those claims, and I find that the impartial hearing officer correctly found that her claims should be barred on the grounds of res judicata.

Turning next to the parent's claims arising out of the 2008-09 school year, as a preliminary matter, I note that neither party has appealed the impartial hearing officer's finding that the district did not offer the student a FAPE for the 2008-09 school year. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; see Application of a Child with a Disability, Appeal No. 07-133; Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 04-018; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Consequently, the impartial hearing officer's decision is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

I will now consider the parent's request for compensatory relief for additional services in the form of counseling and OT to remedy a denial of a FAPE for the 2008-09 school year.

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 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 (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]). 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]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "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 (see Newington, 546 F.3d at 123 [stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; 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 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).

The district contends that the parent's claims for compensatory relief in the form of additional services should be dismissed because the parent has failed to present sufficient evidence during the impartial hearing of any missed services or what, if any, services would be appropriate to remedy a denial of a FAPE. The district's contention has merit to the extent that

the hearing record is sparsely developed as it pertains to the student's needs or how additional services would meet such needs. For example, the hearing record indicates that the student was receiving counseling services (Tr. pp. 306-07, 313); however, the hearing record is inconsistent regarding the specific amount of counseling the student was receiving (compare Tr. p. 307, with Tr. p. 314; see Parent Ex. S at p. 11) and does not indicate when it commenced or who provided the student's counseling services.⁶ The hearing record also indicates that at the time of the impartial hearing, the student was receiving twice weekly individual OT services that commenced on or about January 16, 2009 (Tr. pp. 107-08, 307, 314; see Parent Ex. S at p. 11); however, the amount or level of deprivation is not established in the hearing record.

The district's argument that the level of additional services needed to remedy the deprivation is not sufficiently identified by the parent is persuasive. Moreover, the district has acknowledged its interest in reevaluating the student and considering what additional services would be necessary to meet the student's needs. I will, therefore, direct that the CSE, upon reconvening, shall consider what additional services are appropriate (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 26 [1st Cir. 2007]; see also Newington, 546 F.3d at 111; Application of the Bd. of Educ., Appeal No. 08-060).

The hearing record contains one evaluation report pertaining to the student's educational needs and services - a May 2007 psychiatric evaluation (Parent Ex. AA). At that time, the student had just begun attending Montessori in a 6:1+1 program (id. at p. 2). The May 2007 evaluating psychiatrist recommended that the student be referred for psychiatric services, and that "updated psychological-educational testing" be conducted (id. at p. 6). The hearing record does not indicate that the recommended updated psychoeducational testing has been conducted, and since the May 2007 psychiatric evaluation, the student spent the entire 2007-08 school year at Montessori, was without educational services from July 2008 until December 2008, and from December 2008 until the conclusion of the impartial hearing attended one of the district's CTT classes (Tr. pp. 90-91, 247, 249-52; Parent Exs. B at pp. 3-4; Z at p. 1; see Parent Ex. E). Given the passage of time from the May 2007 psychiatric evaluation, the lack of updated evaluative information in the hearing record, and the variety of educational settings the student has been placed in since then, additional evaluation of the student's current needs is appropriate. Because an updated psychoeducational evaluation as recommended by the May 2007 psychiatric evaluation has not been conducted, one should be conducted now.⁷ The psychoeducational evaluation of the student should include, but not necessarily be limited to, the following components: a review of the student's available educational records and existing data; student interview; parent and teacher interviews; in-school observation(s) of the student during academic instruction and non-structured activities (i.e., lunch, recess); administration of academic and projective/social-emotional assessments including behavior rating scales; an assessment of the student's behavioral needs with, if appropriate, the development of a corresponding plan of

⁶ Notwithstanding the parent's failure to establish during the impartial hearing that the student required counseling services provided by a professional with specific credentials, State regulations provide that where a student is receiving related services pursuant to an IEP, such services shall be provided by individuals with appropriate certification or license in each area of related service (8 NYCRR 200.6[b][3]; see Tr. p. 282).

⁷ I note that in her petition, the parent indicated that she would be amenable to "Social-Emotional" evaluations of the student.

positive behavioral interventions; and a recommendation if any additional evaluations, specifically a psychiatric evaluation, are warranted.

Therefore, I will modify the impartial hearing officer's order only to the extent that I find that a psychoeducational evaluation, as opposed to a psychiatric evaluation, should first be conducted.

As explained above, the parent's request for an independent OT evaluation of her son was not properly raised in this appeal. However, I note that the hearing record does not contain an OT evaluation report, nor does it suggest that an OT evaluation of the student has recently been conducted. I will therefore order, with the parent's consent, that the district conduct an OT evaluation of the student.⁸ I note that subject to certain limitations, federal and State regulations provide that a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). In addition, upon reconvening, the CSE should also consider the parent's request for an audiological examination of the student.

All of the parties' arguments have been given consideration. In light of my determination, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision dated February 13, 2009 is annulled to the extent it ordered a psychiatric evaluation of the student; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the CSE shall arrange for an OT evaluation of the student within 15 days of this decision; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the CSE shall arrange for a psychoeducational evaluation of the student within 15 days of this decision; and

IT IS FURTHER ORDERED that the psychoeducational evaluation of the student include, but is not limited to, the following components: a review of the student's available educational records and existing data; student interview; parent and teacher interviews; in-school observation(s) of the student during academic instruction and non-structured activities (i.e., lunch, recess); administration of academic and projective/social-emotional assessments including behavior rating scales; an assessment of the student's behavioral needs with, if appropriate, the development of corresponding plan of positive behavioral interventions; and a recommendation if any additional evaluations, specifically a psychiatric evaluation, are warranted; and

IT IS FURTHER ORDERED that the district convene a CSE to review such evaluations, consider what, if any, additional services are appropriate, recommend an appropriate

⁸ I remind the parties that in the event that the parent refuses to consent to the evaluations, the district may, but is not required to, continue to pursue the evaluations using the due process procedures as set forth in 8 NYCRR 200.5 (8 NYCRR 200.5[b][3]; see 34 C.F.R. §§ 300.300[a][3], [c][1][ii]).

program and secure an appropriate public school placement in the LRE for the student within 30 days of this order; and

IT IS FURTHER ORDERED that upon convening, the CSE shall consider whether an audiological examination of the student is appropriate.

Dated: **Albany, New York**
 April 20, 2009



PAUL F. KELLY
STATE REVIEW OFFICER