



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-088

**Application of the BOARD OF EDUCATION OF THE
[REDACTED] SCHOOL DISTRICT for
review of a determination of a hearing officer relating to the
provision of educational services to a student with a disability**

Appearances:

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for petitioner, Kenneth S. Ritzenberg, Esq., of counsel

Law Office of Andrew K. Cuddy, attorneys for respondents, Andrew K. Cuddy, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer, which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter for the 2010-11 school year and failed to implement the student's programs for the 2008-09 and 2009-10 school years. The parents cross-appeal the impartial hearing officer's decision to the extent that he failed to award additional services comprised of 360 hours of reading instruction. The appeal must be sustained to the extent indicated. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending ninth grade in a district school (Tr. p. 913; Dist. Ex. 55 at p. 1). The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute in this proceeding (Tr. pp. 924, 1065; Dist. Ex 50 at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

Background

Due to the nature of the issues presented in this appeal, a detailed recitation of the student's early educational history is unnecessary. Briefly, the hearing record reflects that the student has received diagnoses of Down syndrome and a ventricular septal heart defect (Tr. p. 889; Dist. Ex. 55 at p. 1; see Dist. Ex. 44 at p. 1). The student also has a diagnosis of a thyroid

condition, in addition to a reported diagnosis of depression (Dist. Exs. 44 at p. 1; 55 at p. 1). She demonstrates difficulties with cognition, sensory regulation, adaptive behavior, attention, language skills, and fine motor skills (Dist. Ex. 55; Parent Ex. EEEE). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Revised (WPPSI-R) to the student during her kindergarten year in May 2002 yielded a full scale IQ of 60, a verbal IQ of 68, and a performance IQ of 58 (Dist. Ex. 8 at p. 8).

The hearing record indicates that during the student's 2007-08 (sixth grade) school year, the student received two hours per day of direct consultant teacher services in science, social studies, reading, and writing; two hours of indirect consultant teacher services per week; and related services consisting of speech-language therapy and aide support, in addition to weekly consultations for speech-language therapy and occupational therapy (OT) (Dist. Exs. 16; 17 at pp. 1-2). A report of the student's performance on the sixth grade New York State English language arts (ELA) examination dated January 2008, revealed that the student scored at Level 1, indicating that the student did not demonstrate an understanding of the ELA knowledge and skills expected of students at that grade level (Dist. Ex. 2 at p. 6). A March 2008 report on the student's performance on the sixth grade New York State mathematics examination also reflected that the student scored at Level 1, indicating that she did not demonstrate an understanding of the mathematics content expected of students at that grade level (id. at p. 7).

By letter to the district's then-assistant director of pupil services (the director) dated March 27, 2008, the parents denied consent for the district to reevaluate the student (Dist. Ex. 20).¹ The parents requested a meeting with the district's school psychologist, the student's special education teacher, and her speech-language pathologist to discuss how the student would "benefit by further testing" (id.). The parents further stated that after the requested meeting, they would "consider giving permission for each test and subtest we agree to use" to assess the student (id.).

Results of a May 2008 administration of the Iowa Test of Basic Skills reflected that the student's reading and math scores fell at the first percentile both nationally and locally (Dist. Ex. 2 at p. 3).

On May 27, 2008, the Committee on Special Education (CSE) convened for the student's annual review and to develop her individualized education program (IEP) for the 2008-09 (seventh grade) school year (Dist. Exs. 21; 22). The June 2008 CSE recommended the provision of direct consultant teacher services daily in English, science, and social studies, and indirect consultant teacher services that consisted of a weekly team meeting of the student's teachers and paraprofessionals in those classes (Dist. Exs. 21; 22 at pp. 1-2). The June 2008 CSE also recommended that the student attend an academic skills class (ASC) every other day, in addition to one daily 40-minute session of special reading instruction in a group of 12 (Dist. Exs. 21; 22 at p. 2).² The June 2008 IEP also recommended that the student attend a special class for math

¹ According to the district's director of pupil services, during the period of July 17, 2006 through 2009, he was employed as the district's assistant director of pupil services (Tr. pp. 26-27, 33). In 2009, he assumed the position of director of pupil services for the district, a position he held at the time of the impartial hearing (Tr. pp. 26-27). For purposes of this decision, he will hereinafter be referred to as "director."

² The hearing record describes ASC support as a class where the student would receive organizational strategies

(Dist. Exs. 21; 22 at p. 1). The CSE recommended the following related services: (1) two group sessions of speech-language therapy per week; (2) aide support; and (3) a monthly OT consultation (Dist. Exs. 21; 22 at p. 2). Additionally, the June 2008 CSE determined that the student was eligible for extended school year (ESY) services in the form of three hours per week of special education itinerant teacher (SEIT) services (id.). On November 17, 2008, pursuant to discussions between the student's teacher and parents, the CSE convened to amend the student's IEP to include two additional ASC classes for reading per week (Tr. pp. 68-69; Dist. Exs. 24; 25 at p. 1).

An undated report of the student's performance on the seventh grade New York State ELA examination revealed that the student achieved a score of Level 2, indicating that she demonstrated a partial understanding of the ELA knowledge and skills expected at that grade level (Dist. Ex. 2 at p. 5). A report of the student's achievement on the seventh grade New York State mathematics examination reflected that the student attained a score of Level 1, indicating that she did not demonstrate an understanding of the math content expected at that grade level (id. at p. 6).

On June 23, 2009, the CSE convened for the student's annual review and to develop her IEP for the 2009-10 (eighth grade) school year (Tr. p. 76; Dist. Exs. 30; 31). For the 2009-10 school year, the June 2009 CSE proposed a program that was similar to the previous school year's IEP consisting of five periods per week of special instruction reading; five weekly sessions of ASC in a group of five; direct consultant teacher services to be provided daily in English, science, and social studies; and indirect consultant teacher services to be provided on a weekly basis in those classes (Tr. p. 77; Dist. Exs. 31; 32 at p. 1). The June 2009 CSE also recommended that the student attend a special class for math in a group of five, five periods per week (Tr. p. 77; Dist. Exs. 31; 32 at pp. 1-2). Related services recommendations consisted of two sessions per week of speech-language therapy in a group of two, aide support, and a monthly OT consultation (Tr. p. 77; Dist. Exs. 31; 32 at p. 2). The June 2009 CSE also recommended that the student receive ESY services in the form of three weekly sessions of service from a SEIT on a 1:1 basis (id.). Annual goals were developed with regard to the student's needs in reading, writing, mathematics, and speech-language (Dist. Ex. 32 at pp. 9-13). The parent agreed with the June 2009 CSE's recommendations (Tr. pp. 77-78).

Over three nonconsecutive days in October 2009, the district's school psychologist conducted classroom observations of the student in both her general education and special education classes (Tr. p. 586; Dist. Ex. 35). The observation report reflected that during English class, the student was on task for 56 percent of class time and on task 75 percent of the time during her ASC period while she worked on a science exam with the teacher (id.). With regard to her math class, the student was on task 81 percent of the time while working 1:1 with the teacher, and on task 27 percent of the allotted time during independent work and teacher directed lessons (id.). During reading class, the student was on task 40 to 42 percent of the allotted time while engaging in independent work and during 1:1 teacher instruction (id.). In ASC and social studies classes, the student was on task 31 percent of the time when provided with cues and redirection (id.). The school psychologist reported that the student's off-task behaviors included putting her head on the desk, rubbing her eyes, looking around the room, glancing at papers,

and support for the general education classes in which she was enrolled (Tr. p. 107).

observing other students, playing, getting a tissue/drink, going to the bathroom, crying, asking to call her mother, and closing her eyes (id.).

On November 16, 2009, per the parents' request, the CSE convened to discuss the parents' concerns that the student was not progressing in reading and to consider a request that the student receive 1:1 reading instruction from a reading specialist (Tr. p. 93; Dist. Exs. 36 at p. 2; 37; 38). Committee meeting information reflected the concern of CSE members regarding the level of academic rigor the student was experiencing and the effect it had on the student's well-being (Dist. Ex. 37). The November 2009 CSE offered the student an additional period of "self-contain[ed] reading instruction" during the day (id.).³ However, in order to make an informed decision regarding the student's educational program, the CSE also recommended conducting a complete psychoeducational evaluation of the student and recommended that a private evaluator conduct a reading evaluation of the student to determine if she needed 1:1 reading instruction (Tr. pp. 94, 99; Dist. Ex. 37 at p. 1). The parents declined the November 2009 CSE's offer to conduct an independent reading evaluation and a psychological evaluation of the student (Tr. pp. 95, 100).

In an e-mail to the director dated June 10, 2010, the parents submitted changes to a draft IEP for the student for the upcoming 2010-11 school year (Tr. p. 103; Dist. Ex. 44; see Dist. Ex. 49). On June 22, 2010, the CSE convened for the student's annual review and to develop her IEP for the 2010-11 (ninth grade) school year (Tr. pp. 102, 104; Dist. Exs. 44; 45). According to the committee meeting information from the June 2010 meeting, the CSE advised that the student's educational program should focus on basic reading, math, writing, and daily living skills that were functional and would lead to independence (Dist. Ex. 44 at p. 1). The June 2010 CSE further recommended that the student read books written at her independent reading level and that she should become more adept at using the computer (id.). Regarding social development, the June 2010 CSE described the student as "very friendly and kind;" however, the CSE also advised that the student needed to develop appropriate interaction skills with her peers and maintain personal space (id.).

The student's present levels of performance as described in the academic performance and learning characteristics portion of the 2010-11 IEP reflected elements of results from classroom observation reports, as well as the discussion that took place at the June 2010 CSE meeting (Dist. Exs. 35; 45 at pp. 5-7). The 2010-11 IEP also included updated testing results of the student (Dist. Ex. 45 at pp. 6-7). In particular, a March 2010 administration of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) yielded standard scores of 44 in core language, 45 in expressive language, and 50 in receptive language (id. at p. 6). A February 2010 administration of the Wechsler Individual Achievement Test-II (WIAT-II) yielded standard scores of 55 in spelling, 61 in written expression, 77 in word reading, 40 in reading comprehension, 82 in pseudoword decoding, 40 in numerical operations, and 53 in math reasoning (id. at pp. 6-7). In addition, with respect to the WIAT-II, the student's reading composite of 61, math composite of 49, and written language composite of 49 all fell well below

³ The director could not recall if the student's mother agreed to the additional period of daily reading instruction, and the resultant IEP did not reflect whether she agreed to accept the November 2009 CSE's recommendation (Tr. p. 95; see Dist. Ex. 38).

average (id.). With respect to the Peabody Picture Vocabulary Test-4 (PPVT-4), in receptive vocabulary the student achieved a standard score of 71 (id. at p. 6).

According to the June 2010 IEP, the student exhibited significant delays in her ability to understand math concepts, in reading comprehension, and in written expression skills (Dist. Ex. 45 at p. 5). The IEP further revealed that the student also had significant delays with respect to receptive and expressive language and vocabulary (id.). In addition, the IEP reflected that the student required a program that would continue to remediate her areas of deficit in reading, math, writing, and higher level thinking skills, as well as enable the student to be successful in "the real world" by teaching her practical life skills at her ability level (id. at p. 6). The assistant director of pupil services explained that with respect to reading, this involved increasing the student's ability to comprehend the language to which she was exposed (Tr. p. 212). In math, the assistant director of pupil services added that the district's intent was to increase the student's ability to understand and utilize math concepts to not only move forward in academics, but to become a successful member of the community (Tr. p. 213).

With regard to social development, the June 2010 IEP characterized the student as "very social" but that the student's difficulties with attention and language negatively affected her interactions with peers (Dist. Ex. 45 at p. 7). The student's academic and social/emotional present levels of performance also indicated several strategies to address the student's areas of need, such as maintaining focus on the tasks at hand and developing language-based problem solving skills, to assist her with appropriately interacting with peers and adults in the social and academic environments (id.).

For the 2010-11 school year, the CSE recommended (1) a special class in math in a group of five; (2) a 12:1+4 (special class) ASC support class; (3) a special class in social studies/ASC in a group of five; and (4) a special instruction reading class in a group of five (Dist. Exs. 44 at p. 2; 45 at p. 1). Related services recommendations consisted of aide support in English, science, and her special classes, in addition to a quarterly OT consultation and twice weekly speech-language therapy in a group of two (id.). The June 2010 IEP also reflected that the student's special education teacher would meet with her regular education teachers on a weekly basis to collaborate on curriculum and test/quiz modifications (Dist. Ex. 45 at p. 2). The CSE further recommended that the student receive ESY services consisting of a special class in math and reading (id.). Annual goals were developed with respect to the student's needs in study skills, reading, writing, mathematics, and speech-language skills (id. at pp. 10-14).

The parents did not agree with the proposed June 2010 IEP (Tr. p. 110; Dist. Ex. 44 at p. 2). According to the meeting minutes, the parents did not want the student enrolled in any ASC classes; rather, they wanted the student to take Regents level courses that would earn the student a Regents or local diploma (Dist. Ex. 44 at p. 2). In addition, the parents did not want the student provided with program or testing modifications, aide support, life skills instruction, or speech-language therapy if it required the student to be removed from the general education setting (id.). The director also requested the parents' consent for updated psychoeducational testing of the student in order to provide the district with complete and current data to guide in program planning for the student; however, the parents denied consent for the district to perform cognitive testing of the student (id.). As a result, the director asked the parents to consent to an independent evaluation and reevaluation, which they agreed to consider (id.).

Due Process Complaint Notice

By due process complaint notice dated September 7, 2010, the parents requested an impartial hearing, alleging that the June 2010 IEP denied the student a free appropriate public education (FAPE) for the 2010-11 school year (Dist. Ex. 50). The parents raised the following challenges with regard to the June 2010 IEP: (1) the IEP did not include short-term objectives; (2) the recommended program did not constitute the student's least restrictive environment (LRE); (3) the IEP did not address the student's social, emotional, academic, and management needs; (4) the IEP did not accurately state the student's present levels of performance; and (5) the CSE denied the student the opportunity to work toward a "regular diploma" (*id.* at pp. 2-3). Next, the parents argued that the district failed to implement the student's 2008-09 and 2009-10 IEPs, "which required the [student] to be afforded the grade level curriculum" during both school years (*id.*). Lastly, the parents asserted claims pursuant to section 504 of the Rehabilitation Act of 1973 (section 504) (*id.*).⁴

As relief, the parents requested, among other things, an order requiring the CSE to develop an appropriate IEP for the student for the 2010-11 school year that included accurate present levels of performance, appropriate goals and short-term objectives, appropriate supplemental aids and services to allow the student access to a program in the LRE, provision of appropriate classroom support, appropriate reading support by a reading specialist, and the opportunity to pursue a regular high school diploma (Dist. Ex. 50 at p. 3). The parents further requested an award of "corrective/additional services" pursuant to their claim that the district failed to implement the student's 2008-09 and 2009-10 IEPs (*id.*).

Impartial Hearing Officer Decision

On November 15, 2010, the parties proceeded to an impartial hearing, which concluded on March 1, 2011, after seven nonconsecutive days of hearings (Tr. pp. 1-1488).⁵ By decision dated June 13, 2011, the impartial hearing officer initially rejected the district's contention that the parents' failure to consent to certain evaluations precluded them from asserting a claim that the district denied the student a FAPE (IHO Decision at pp. 44-45). Next, the impartial hearing officer reviewed the parties' dispute regarding whether the district's program for the 2010-11 school year was in the LRE and determined that the district offered the student significant mainstreaming opportunities and its placement allowed her access to nondisabled students to the maximum extent appropriate (*id.* at pp. 45-49). However, despite finding that the district met its obligation to educate the student in the LRE, he determined that the district failed to provide a FAPE to the student because its program did not address the student's social, emotional, academic, and management needs (*id.* at pp. 49-50). Specifically, he found that the district failed to conduct an FBA and the behavioral strategies set forth on the student's IEP had not managed

⁴ 29 U.S.C. §§ 701-796(l) (1998).

⁵ I remind the impartial hearing officer and parties that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]) and further, that each party shall have up to one day to present its case and that additional hearing dates, if required, should be scheduled on consecutive days, when practicable (8 NYCRR 200.5[j][3][xiii]).

her behavior (id. at p. 50). He further found that the June 2010 IEP was inappropriate because it did not provide individualized instruction in reading or 1:1 direct consultant teacher services in the student's general education classes (id. at pp. 52-54).

With respect to the other claims raised by the parents regarding the June 2010 IEP, the impartial hearing officer did not find that the present levels of performance contained in the June 2010 were defective (IHO Decision at pp. 50-51). He found that the June 2010 IEP incorporated teacher reports and provided meaningful detail about the student's academic achievement, functional performance, and a description of how the student's disability affected her in the classroom (id.). He further found that the student did not require short-term objectives in her IEP because there was no evidence in the record to indicate that she required alternate assessment (id. at pp. 51-52). Additionally, the impartial hearing officer found no evidence to suggest that the district exempted the student from State standards, despite the parents' claim to the contrary (id. at p. 52). Regarding the parents' claim that the district had denied the student the opportunity to earn a regular diploma, the impartial hearing officer noted that he did not have the jurisdiction to review issues relating to how course credits, diploma, or graduation requirements are calculated (id. at p.55).

Turning next to the parents' assertions that the district did not properly implement the student's 2009-10 IEP, although he found that "the [d]istrict did not implement the IEP perfectly," he concluded that its failure to do so did not rise to the level of a denial of a FAPE to the student (IHO Decision at p. 58). In pertinent part, the impartial hearing officer determined that the district did not appropriately implement the 2009-10 IEP with regard to the student's "special class reading" (id. at p. 57). Next, although the student's 2009-10 IEP called for the provision of a calculator, the impartial hearing officer determined that the district did not demonstrate that it provided the student a calculator for the 2009-10 school year (id.). In addition, the impartial hearing officer concluded that the district failed to show that it afforded the student the requisite homework modifications as prescribed by the student's 2009-10 IEP (id. at p. 58).

Likewise, the impartial hearing officer found that the district failed to implement portions of the student's 2008-09 IEP; however, he concluded that this did not deny the student a FAPE during the 2008-09 school year (IHO Decision at p. 60). Specifically, the impartial hearing officer found that some of the math goals contained in the 2008-09 IEP were not implemented and that the student's consultant teacher was not appropriately certified to teach seventh grade, and therefore, not properly certified to work with the student for the 2008-09 school year (id. at p. 59). In reaching his conclusion that the student received a FAPE during the 2008-09 school year, the impartial hearing officer noted that while the district did not implement all of the student's goals during the 2008-09 school year, the student received a substantial amount of math instruction and progressed satisfactorily in certain areas (id. at p. 60). Additionally, with regard to the parents' concerns surrounding the consultant teacher's qualifications, the impartial hearing officer determined that the student benefitted from working with the consultant teacher and that the parents sought to have the student reconnect with her after the district assigned a different consultant teacher to the student (id.).

Next, the impartial hearing officer dismissed the parents' section 504 claims, upon a finding that the parents' allegations more properly constituted claims relating to the Individuals

with Disabilities Education Act (IDEA) and that the parents failed to demonstrate that the district engaged in "bad faith" or exercised "gross misjudgment" (IHO Decision at p. 61).

Lastly, the impartial hearing officer noted that the impartial hearing "took virtually the entirety of the 2010-2011 school year" so he determined that it was appropriate to grant relief in connection with the 2011-12 school year (IHO Decision at p. 61). In his ordering clause, he stated that the district failed to provide a FAPE to the student for the 2010-11 school year, and that the district failed to implement both the 2008-09 and 2009-10 IEPs (*id.* at pp. 61-62). As relief, he ordered the CSE to reconvene and provide the student with general education classes in English and science for the 2011-12 school year, combined with the provision of individual consultant teacher services (*id.*). He further ordered that for the upcoming 2011-12 school year, the CSE provide the student with individualized 1:1 reading instruction with a qualified instructor (*id.* at p. 62). He further ordered the district to develop an FBA and BIP for the student and directed the CSE to discuss whether the student required a consultant teacher for elective classes and whether she should attend homeroom with typically developing peers during the 2011-12 school year (*id.*).

Appeal for State-level Review

The district appeals, and requests a reversal of the impartial hearing officer's decision. The district maintains that the parents' refusal for the past "nine years" to allow the district to evaluate the student should preclude them from challenging the appropriateness of the June 2010 IEP. Alternatively, the district maintains that it provided the student with a FAPE in the LRE during the 2010-11 school year. Specifically, the district asserts that it was not required to create an FBA and BIP for the student because in part, the student's behaviors did not require an FBA or BIP. The district further alleges that the student's small group reading instruction was reasonably calculated to confer an educational benefit to the student and contrary to the impartial hearing officer's conclusion, the hearing record does not demonstrate that the student required 1:1 reading instruction in order to obtain educational benefits. The district also argues that the student did not require the provision of consultant teacher services in 2010-11 in her general education classes in order to receive a FAPE and that the impartial hearing officer erred in sua sponte determining that the student should be in a homeroom with general education students.

The district further asserts that the impartial hearing officer's decision is unclear with respect to his determination regarding the implementation of the 2008-09 and 2009-10 IEPs because he found that the district did not fail to provide a FAPE for both years (IHO Decision at pp. 58, 60), but "ordered" that the district failed to implement the 2008-09 and 2009-10 IEPs (*id.* at p. 62). The district asserts that the impartial hearing officer correctly concluded that the student received a FAPE during the 2008-09 and 2009-10 school years, but challenges the impartial hearing officer's decision to the extent that he found that the district failed to implement the student's IEPs for those school years. Specifically, the district asserts that the impartial hearing officer erred in finding that the district failed to properly implement the student's reading program for the 2009-10 school year. Further, the district claims that it provided the student with a calculator and the requisite homework modifications in accordance with the student's 2009-10 IEP. The district also argues that the impartial hearing officer erred to the extent that he found that some of the student's math goals were not implemented during the 2008-09 school year and

in finding that the student's 2008-09 consultant teacher was not properly certified to teach the student.

The parents submitted an answer admitting and denying the allegations raised in the petition, and requesting that the petition be dismissed. The parents assert that the student can work and make progress toward her IEP goals in a general education setting. Additionally, the parents claim that the district's failure to conduct an FBA and BIP resulted in a denial of a FAPE to the student. The parents also assert that the June 2010 IEP did not accurately reflect the student's present levels of performance. Next, although the parents acknowledge that the student did not participate in alternate assessment, they maintain that the June 2010 CSE failed to include short-term objectives in the resultant IEP. The parents further assert that because the district has denied the student access to grade-level curricula, it has in turn, denied her the opportunity to obtain a local or Regents diploma.

Next, the parents assert as a cross-appeal that the impartial hearing officer "correctly found that [the student] was denied FAPE for 2008/09, 2009/10 and 2010/11" (Answer ¶ 93). The parents further assert that if a State Review Officer determines that the relief granted by the impartial hearing officer was unwarranted, then they request an award of additional services in the form of 360 hours of 1:1 reading instruction.

The district submitted an answer to the parents' cross-appeal in which it denies all of the parents' allegations asserted in their cross-appeal. The district further contends that the cross-appeal should be dismissed because it does not contain a clear and concise statement showing they are entitled to relief and is not sufficiently clear regarding the nature of the parents' claim.

Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes,

special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Implementation of the 2008-09 and 2009-10 IEPs

Regarding the parties' dispute about the implementation of the 2008-09 and 2009-10 IEPs, I note that the district correctly asserts in its petition that the impartial hearing officer's determination is unclear because he found that the district offered the student a FAPE for the 2008-09 and 2009-10 school years (IHO Decision at pp. 58, 60), but then "ordered" that the district failed to implement the 2008-09 and 2009-10 IEPs (id. at p. 62). Absent a determination by an impartial hearing officer that there was a denial of a FAPE, no basis exists upon which to predicate an award of relief (see 34 C.F.R. § 300.148[a]; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). However, based on the ambiguities between the conclusions and the orders issued by the impartial hearing officer, I will review the district's contention raised in its petition that the impartial hearing officer erred in ordering relief to the extent that he found a failure to implement the 2008-09 and 2009-10 IEPs.

In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held

that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, the hearing record does not reflect that material or substantial aspects of the student's 2008-09 and 2009-10 IEPs were not implemented, such that the student was denied a FAPE. Although the hearing record reveals that four of the student's math goals were not started during the 2008-09 school year, the special class math teacher's decision to not begin working on these goals constituted an instructional decision, and did not amount to a material failure to implement the student's 2008-09 IEP (see Tr. pp. 280-84, 290, 319-23, 340; Dist. Ex. 28 at p. 4).. Likewise, there is insufficient evidence in the hearing record to support a finding that the district materially failed to implement the student's 2008-09 IEP by failing to provide a certified teacher to serve as the student's consultant teacher in her general education classes where the hearing record reflects that the student's mother understood that the consultant teacher was a teacher assistant and provided consultant teaching services to the student under the direction of the student's ASC teacher (see Tr. pp. 430, 1299).⁶

Regarding the 2009-10 school year, the hearing record indicates that the student's special education reading teacher was also responsible for supervising a teacher assistant assigned to an ASC class during the same time period as the student's special class reading instruction (Tr. pp. 314-15). However, the hearing record demonstrates that the student's reading instruction was implemented in accordance with the 2009-10 IEP, that the student's mother conceded that she had no reason to believe that the student was not receiving small group instruction in reading as prescribed by her 2009-10 IEP, and that the student made progress with respect to her reading over the course of the school year (see Tr. pp. 294-96, 299-300, 314-15, 1182-83; Dist. Ex. 31 at p. 1). In addition, the hearing record does not support the impartial hearing's officer finding that the student was not provided with a calculator during the 2009-10 school year such that it constituted a material failure to implement the student's 2009-10 IEP (see Tr. p. 312). Lastly, although the hearing record does not expressly describe the homework modifications provided to the student in science, it reflects that the student received homework modifications in her other general education subjects, and therefore the hearing record does not support a finding of a material failure to implement this provision of the 2009-10 IEP (see Tr. pp. 364-65, 369-70, 443, 450-51, 457).

⁶ Under the general supervision of a certified teacher, a teaching assistant may provide direct instructional service to students (8 NYCRR 80-5.6[b][1][i]). Further, teaching assistants assist teachers by performing duties such as working with individual students or groups of students on special instructional projects and may also provide the teacher with information about student that assist the teacher in the development of instructional materials (8 NYCRR 80-5.6[b][1][a][1-2]).

Based on the foregoing, there is insufficient evidence in the hearing record to support a finding that the district deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits for the 2008-09 and 2009-10 school years.

Cross-Appeal

With respect to the parents' cross-appeal, the district requests that it should be dismissed because they failed to plead their entitlement to relief with particularity, nor did they fully apprise the district of the nature of their claim. State regulations provide that a party must clearly indicate the reasons for challenging an impartial hearing officer's decision, identifying the findings, conclusions, and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by a State Review Officer (8 NYCRR 279.4[a]). As a cross-appeal, the parents assert that the impartial hearing officer "correctly found that [the student] was denied FAPE for 2008/09, 2009/10 and 2010/11" (Answer ¶ 93). The parents in this matter are represented by counsel and I find that the purported cross-appeal is unduly vague and ambiguous, and provides no particulars as to the reasons why they challenge the impartial hearing officer's decision, which precludes meaningful review (see Application of the Dep't of Educ., Appeal No. 11-035; Application of a Child with a Disability, Appeal No. 07-112). Under the circumstances, I find that the parents have not set forth with sufficient particularity their claim that the impartial hearing officer correctly found that the student was denied a FAPE during the 2008-09, 2009-10, and 2010-11 school years and that they are entitled to an award of additional services.

Moreover, to the extent that the parents request for the first time in their cross-appeal, additional services in the form of 360 hours of reading instruction, it is well-settled that 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. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the 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. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). A review of the parents' due process complaint notice shows that without further specificity, the parents requested an award of "corrective/additional services," for the alleged failure to expose the student to grade level curriculum during the 2008-09 and 2009-10 school years (Dist. Ex. 50 at p. 3). There is no evidence that the scope of issues was expanded beyond those in the original due process complaint notice through an amended due process complaint notice or by the agreement of the district. Accordingly, the cross-appeal must be dismissed.

2010-11 IEP

Next, I will consider the district's argument that the impartial hearing officer erred in finding that it failed to provide a FAPE to the student for the 2010-11 school year. It is well settled that 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]; Patskin, 583 F. Supp. 2d at 428; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82

N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of the Dep't of Educ., Appeal No. 10-066; Application of a Student with a Disability, Appeal No. 10-064; Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; 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). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become 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 concerning such issues arising out of school years that have since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; M.S. v. New York City Dept. of Educ., 2010 WL 3377667, at *9 [E.D.N.Y. Aug. 25, 2010]; Application of a Child with a Disability, Appeal No. 07-139; 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, an exception provides that a claim may not be moot, despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; 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]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, 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]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). 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 (Russman, 260 F.3d at 120; M.S., 2010 WL 3377667, at *9 [noting that each year a new determination is made based on a student's continuing development]; J.N. v. Depew Union Free School Dist., 2008 WL 4501940, at *4 [W.D.N.Y. Sept. 30, 2008]; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, the 2010-11 school year has expired and the parents did not seek additional services to remedy a denial of a FAPE for the 2010-11 school year. I find that even if I were to make a determination that the district did not offer the student a FAPE for the 2010-11 school

year, in this instance, it would have no actual effect on the parties because the 2010-11 school year expired on June 30, 2011 (see Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; 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 further note that in their due process complaint notice, the parents requested a new IEP as a remedy for a denial of a FAPE for the 2010-11 school year (Dist. Ex. 50 at p. 4), and the expiration of the 2010-11 school year has effectively extinguished these claims such that a decision on the underlying merits would have no actual effect on the parties and no meaningful relief can be granted. Accordingly, the parties' dispute relating to the 2010-11 school year need not be further addressed here. A State Review Officer is not required to make a determination that is academic or will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-077; Application of a Student with a Disability, Appeal No. 09-065; Application of a Student with a Disability, Appeal No. 08-104; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-086; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64).

Further, the hearing record does not reflect that the exception to the mootness doctrine applies to this case. There is no evidence in the hearing record or an offer of additional evidence to support that this matter, particularly the parties' dispute with regard to the extent of mainstreaming the student, is capable of repetition yet evading review. First, I note that in November 2010, the district's school psychologist conducted updated psychoeducational testing of the student, and in January 2011, the parents obtained a psychological evaluation of the student to "assist in the educational planning" of the student which the CSE presumably has used to develop the student's program for the 2011-12 school year (Dist. Ex. 55; Parent Ex. EEEE at p. 1). Additionally, there is no indication in the hearing record or in the pleadings that the parents have challenged the appropriateness of the 2011-12 IEP based on their dissatisfaction with the amount of mainstreaming for the student. Accordingly, I decline to find that the exception to the mootness doctrine applies to this case.

Premature Relief

Additionally, regardless of the above determinations, the relief ordered by the impartial hearing officer is premature as it pertained to the 2011-12 school year. The hearing record reflects that the 2008-09, 2009-10, and 2010-11 school years were at issue at the impartial hearing (Dist. Ex. 50). Under the IDEA and State regulations, the "CSE must review each child's educational program at least once each year to determine its adequacy and recommend an educational program for the next school year" (34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]). Accordingly, a request for an order directing services beyond the 2010-11 school year is premature (see Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 32 [1st Cir. 2006]; see also Application of a Student with a Disability, Appeal No. 09-066; Application of a Student with a Disability, Appeal No. 08-138; Application of Student with a Disability, Appeal No. 08-043; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Bd. of Educ., Appeal No. 04-034; Application of a Child with a Disability, Appeal No. 00-039).

Conclusion

In conclusion, having found that the district did not fail to implement substantial or significant provisions of the student's IEP in a material way and thereby deny the student a FAPE for the 2008-09 and 2009-10 school years; that all claims pertaining to the 2010-11 IEP are moot; and that any relief awarded by the impartial hearing officer was premature; I will annul the impartial hearing officer's June 13, 2011 decision to the extent indicated.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that those portions of the impartial hearing officer's decision dated June 13, 2011 finding that the district failed to implement the 2008-09 and 2009-10 IEPs are hereby annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's orders directing the district to reconvene the CSE and to provide the student with general education classes with an individual consultant teacher in English and science for the 2011-12 school year are annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's orders directing that the district provide the student with individualized 1:1 reading instruction with a qualified instructor, an FBA and a BIP, and consultant teacher services for the student's elective classes for the 2011-12 school year is annulled.

Dated: Albany, New York
August 22, 2011


STEPHANIE DEYOE
STATE REVIEW OFFICER