The University of the State of New York

The State Education Department

State Review Officer

No. 07-031

Application of the BOARD OF EDUCATION OF THE EAST SYRACUSE – MINOA CENTRAL SCHOOL DISTRICT, for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorney for petitioner, Susan T. Johns, Esq., of counsel

Law Office of Andrew K. Cuddy, attorney for respondent, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

DECISION

Petitioner, the Board of Education of the East Syracuse-Minoa Central School District, appeals from those parts of the decision of an impartial hearing officer which determined that respondent's claims were not moot, petitioner delayed the student's placement for the 2006-07 school year and its Committee on Special Education (CSE) should have convened before November 2006, and which ordered petitioner to provide "equivalent services" to the student. Respondent cross-appeals insofar as the decision does not determine whether petitioner offered the student a free appropriate public education (FAPE) for the 2006-07 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the time of the impartial hearing on January 17, 2007, the student was 14 years old and attending seventh grade at petitioner's school. In November 2006, petitioner's CSE changed the student's classification from a student with a learning disability to a student with an emotional disturbance (ED) (8 NYCRR 200.1[zz][4]). The student's classification and eligibility for special education programs and services are not in dispute on this appeal.

The student reportedly meets the criteria for diagnoses of disruptive behavior disorder not otherwise specified, pervasive developmental disorder not otherwise specified, and dysthymic disorder (Parent Ex. C[1] at pp. 1, 10). A psychological evaluation performed in May 2005 when the student was 13 years old included administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), which yielded a full scale IQ score of 88, placing the student

in the low average range of cognitive functioning (id. at pp. 1, 3-4). On the Woodcock-Johnson III Tests of Achievement administered as part of the psychological evaluation, the student achieved a broad reading standard score of 90, a spelling standard score of 105, and a broad math standard score of 72 (id. at pp. 4-5). The psychologist also assessed the student's behavior using the self-report form and parent form of the Behavior Assessment System for Children – Second Edition (BASC-2) (id. at p. 1, 7-9). On the self-report form, the student tended to rate many items the same, and the psychologist opined that the student was minimizing or denying problems that she seemed to be experiencing (id. at p. 7). The responses provided by respondent on the BASC-2 parent form indicated that the student's behavior at home is characteristic of children who have clinically significant problems with aggression, anxiety, depression and withdrawal (id. at p. 8). Respondent also reported concerns about the student's hyperactivity, conduct and attention problems (id.). The psychologist noted that the student angers easily, lacks adaptive skills, displays low self-esteem and has difficulty coping with change (id. at pp. 8, 9-10). The psychologist recommended that the student continue to receive counseling to address emotional regulation and anger management (id. at pp. 10-11). He stated that the student needed academic and social support to help her adjust to the new school that she planned to attend in fall 2005, including intensive instruction, support and accommodations to address her weaknesses in math (id. at p. 11).

For the 2005-06 school year, the student returned to petitioner's schools to attend sixth grade. The previous school year, she attended school in a different district, and has attended various public schools for her elementary and middle school education, including having spent some years at petitioner's schools (Parent Ex. C[2] at p. 1).

On or about September 16, 2005, respondent referred the student to petitioner's CSE and requested that the student be evaluated due to respondent's concerns that the student was struggling academically and was repeating the sixth grade (Tr. p. 75; Parent Ex. C[4]). In September 2005, petitioner conducted a social history of the student (Parent Ex. C[3]). In September and October 2005, petitioner performed a psychological evaluation of the student (Parent Ex. C[7]). Results of academic achievement testing were consistent with results obtained during the May 2005 psychological evaluation (Parent Exs. C[1] at pp. 3-5; C[7]). The September and October evaluation included another administration of the BASC-2 (Self Assessment and Teacher Form) (Parent Exs. C[5]; C[6]; C[7]). Results of the student's self-reporting were consistent with the May 2005 assessment (Parent Exs. C[1] at p. 7; C[6] at pp. 2-4). Ratings based upon teacher reporting yielded scores in the clinically significant range for internalizing problems, anxiety and depression (Parent Ex. C[5] at p 5). In November 2005, petitioner conducted a speech-language evaluation of the student (Parent Ex. C[8] at p. 1). Administration of the Clinical Evaluation of Language Fundamentals-Third Edition (CELF-3) yielded a receptive language standard score of 69 (2nd percentile), an expressive language standard score of 90 (25th percentile) and a total language score of 78 (7th percentile) (id. at p. 2). Administration of the Test of Word Knowledge (TOWK) yielded a receptive composite standard score of 88 (21st percentile), an expressive composite standard score of 78 (7th percentile), an expressive vocabulary standard score of 6 (9th percentile), and a receptive vocabulary standard score of 7 (16th percentile) (id. at p. 1). The evaluator noted that classroom observations of the student revealed that she has difficulty with comprehension, requires rephrasing to understand questions, has a limited vocabulary, often gives off target responses, and has difficulty explaining her thoughts and feelings (id.). The evaluator recommended that the student receive group speech-language services to improve her receptive and expressive language skills (id. at p. 3).

On November 28, 2005, petitioner's CSE found the student eligible for special education services as a student with a learning disability in math and developed an individualized education program (IEP) (Parent Ex. B at p. 1). The CSE recommended that the student receive a special education "blended math" class and the related service of speech-language therapy in a group setting (id. at pp. 1-2). During the 2005-06 school year, the student received three disciplinary referrals for inappropriate behavior on the school bus (Parent Exs. F[1]; F[2]; F[13]). She also received disciplinary referrals for refusing to attend speech-language services, was disciplined on one occasion for being truant and disciplined on another occasion for fighting and using inappropriate language (Parent Exs. F[5]; F[7]; F[9]; F[10]; F[12]). January 2006 and April 2006 progress reports indicate that the student demonstrated good behavior in class (Parent Exs. F[3]; F[15]).

The student continued to attend petitioner's schools for her seventh grade (2006-07) school year. In October 2006, the student's teachers reportedly became concerned about the student's behavior and declining academic performance (Tr. pp. 47-48). Petitioner conducted a functional behavioral assessment (FBA)[1] and developed a behavior intervention plan (BIP)[2] for the student (Parent Exs. G; I; see Tr. pp. 104-05). A meeting was held on or about October 18, 2006 to discuss the FBA (see Parent Ex. F[16]). Respondent did not attend the meeting, but her educational advocate attended the meeting on her behalf (Tr. p. 188). Following the meeting, the educational advocate sent respondent a copy of the FBA for her review, which respondent believes she signed and returned to petitioner (Tr. pp. 190-91; Parent Ex. F[16]).

By letter dated November 8, 2006, respondent submitted a "Demand for a Due Process Hearing" to challenge the November 28, 2005 IEP (Parent Ex. A). Specifically, the demand alleged that petitioner 1) failed to provide an appropriate program; 2) failed to perform an FBA or provide a BIP; 3) failed to appropriately evaluate the student in all areas of suspected disability; 4) failed to provide counseling and social worker services to the student; and 5) failed to appropriately classify the student (id. at pp. 1-3). Respondent requested, in addition to other relief, an award of "corrective" or additional services to remedy petitioner's alleged failure to offer a FAPE to the student (id. at p. 3). The demand also requested attorneys' fees and expenses (id.).

Sometime in early to mid-November 2006, the student was involved in an incident resulting in discipline. On November 17, 2006, petitioner's CSE convened for a manifestation determination and concluded that the student's behavior was a manifestation of her disability and that the services recommended in the November 2005 IEP were not sufficient to meet her needs (Tr. pp. 48-49, 165-66; Dist. Ex. 7). On November 17, 2006, the CSE developed a new IEP that changed the student's classification to a student with an emotional disturbance (Tr. p. 49; Dist. Ex.

A functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. It shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probably consequences that serve to maintain it (8 NYCRR 200.1[r]).

[2] A behavioral intervention plan means a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior (8 NYCRR 200.1[mmm], see also 8 NYCRR 201.2[a]).

5 at p. 1). The CSE also recommended changing the student's placement to an 8:1+1 Board of Cooperative Education Services (BOCES) class or a BOCES day treatment program (Tr. p. 109; Dist. Ex. 5 at p. 1). A speech-language reevaluation was further recommended (Dist. Ex. 5 at p. 1). Respondent participated at the November 17, 2006 CSE meeting (Tr. pp. 49, 135).

On November 30, 2006, the CSE met to conduct the student's annual review. Respondent did not attend the November 30, 2006 CSE meeting (Tr. p. 66). The CSE developed an IEP nearly identical to the IEP developed on November 17, 2006 (Tr. pp. 50-51; compare Dist. Ex. 5 at pp. 1-7, with Dist. Ex. 11 at pp. 3-9).

On December 15, 2006, the parties held a resolution session concerning respondent's November 2006 demand for due process, but they were unable to reach agreement (Parent Exs. H[8]; H[11]). By letter dated January 4, 2007, petitioner maintained that respondent had already been provided with all the relief requested in her proposed settlement agreement except for attorneys' fees, and petitioner requested that respondent withdraw her November 2006 hearing request (Parent Ex. H[15]).

An impartial hearing occurred on January 17, 2007 (Tr. p. 1). Acknowledging that an impartial hearing is limited to those issues that have been properly identified in a hearing request (Tr. p. 8), respondent, through her attorney, stated that she was only challenging the November 2005 IEP (Tr. pp. 11-14) In response to the impartial hearing officer's request for clarification of the issues still in dispute at the time of the impartial hearing, respondent answered that the only issue that had been resolved was the student's classification (Tr. p. 31), and requested that the impartial hearing proceed to resolve the remaining issues raised in her demand for a due process hearing (Tr. pp. 8-9, 31). Petitioner moved to dismiss the case on mootness grounds, arguing that the November 2005 IEP was superseded by the November 2006 IEP, and that respondent allegedly agrees with the educational program and services offered in the November 2006 IEP (Tr. pp. 24-25; 116-18). Respondent opposed petitioner's motion to dismiss, contending that respondent was not aware of and did not have the opportunity to participate at the November 30, 2006 CSE meeting, that the November 30, 2006 IEP had not yet been implemented, and that the matter could not be deemed moot because respondent requested additional services (Tr. pp. 22, 28, 117-18, 123). The impartial hearing officer denied petitioner's motion to dismiss and allowed respondent to present her case (Tr. pp. 27-28, 40-41). Respondent presented the testimony of petitioner's director of special education and respondent testified on her own behalf. Both parties entered exhibits into evidence.

The impartial hearing officer issued a decision dated February 22, 2007 in which he determined that the case was not moot and there was no evidence that petitioner failed to offer the student "a FAPE in 2005-06" (IHO Decision at pp. 2, 3). The impartial hearing officer also made several findings, including that 1) petitioner planned for an improved staffing ratio as requested by respondent; 2) petitioner completed a BIP for the student; 3) counseling services and additional evaluations are a part of the November 2006 IEP; 4) the student was classified as ED as requested by respondent; and 5) the parties appeared to agree on the student's placement (id. at p. 2). However, the impartial hearing officer determined that petitioner erred by not convening a CSE

meeting until November 2006 and by delaying the student's placement (id. at pp. 2-3). The impartial hearing officer ordered petitioner to provide "equivalent services."[3]

Petitioner appeals the impartial hearing officer's decision to deny its motion to dismiss the case on mootness grounds, and order to provide the student with "equivalent services." Petitioner argues that the impartial hearing officer erred in ruling that petitioner delayed placement and was remiss in waiting until November 2006 to convene the CSE meeting, and further alleges that the impartial hearing officer's ruling as to "equivalent services" lacks specificity and is incomprehensible. Petitioner also contends that the impartial hearing officer's ruling with respect to "equivalent services" is arbitrary and not supported by evidence.

Respondent submitted an answer and cross-appeal, requesting that the decision be affirmed and seeking an additional finding that petitioner failed to offer the student a FAPE for the 2006-07 school year. Although respondent's November 2006 hearing request did not concern the November 30, 2006 IEP, she asserts that petitioner effectively placed the November 30, 2006 IEP at issue by introducing such IEP into evidence at the impartial hearing. Petitioner submitted an answer to the cross-appeal, denying respondent's allegations and arguing that a State Review Officer lacks subject matter jurisdiction over respondent's cross-appeal because the appropriateness of the November 30, 2006 IEP was not raised in a hearing request or adjudicated by an impartial hearing officer.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs,

[3] The impartial hearing officer ordered that petitioner must "provide equivalent services over the next twelve months to compensate for the counseling services and the improved teacher/student attention that would have been afforded [student] in an 8:1:1 classroom" (IHO Decision at p. 3). More specifically he ordered that "placement in an 8:1:1 setting with counseling services for ED classified students must be provided" and that "for the next ten school months counseling services should be intensified by 50% and individualized instruction provided on a daily basis for 1 hour" (id.).

provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[4] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[5]

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 (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 child, 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]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]).

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 child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

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[4] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, none of the new provisions contained in the amended regulations are applicable to the issues raised in this appeal. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

[5] The term "free appropriate public education" means special education and related services that--(A) have been provided at public expense, under public supervision and direction, and without charge;

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

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

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title. (20 U.S.C. § 1401[9]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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 persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

In the instant case, I will first address petitioner's argument that the case is moot because the challenged November 2005 IEP has been superseded by a new IEP developed in November 2006. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes are moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the child's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (id.).

Petitioner alleges that the case is moot because the CSE developed an IEP in November 2006, which recommended changing the student's classification and placement, and petitioner alleges that respondent was in agreement with the CSE's November 2006 recommendations. I note that the November 2005 and November 2006 IEPs concern different time periods, and the appropriateness of the November 2006 IEP was not at issue at the impartial hearing (see Tr. pp. 11-12). In her hearing request, respondent alleged that the November 2005 IEP was deficient and sought additional services to remedy petitioner's alleged failure to offer a FAPE to the student (Parent Ex. A). The student is 14 years old and may remain eligible for services under the IDEA

until her 21st birthday (see 20 U.S.C. § 1412[a][1][A]). In the circumstances of this case, I find petitioner's mootness argument unpersuasive given respondent's claim for additional services (see Application of a Child with a Disability, Appeal No. 02-030).

Before turning to the parties' substantive claims, I note that neither party has appealed the impartial hearing officer's finding that there is no evidence that petitioner denied the student a FAPE for 2005-06. 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]; 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). Hence, the impartial hearing officer's determination that there is no evidence demonstrating a denial of FAPE for 2005-06 is final and binding on the parties and will not be reviewed.

Petitioner argues that the impartial hearing officer erred by failing to cite to any evidence in the hearing record to support his conclusions. The Regulations of the Commissioner of Education provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). Inconsistent with this regulatory requirement, the impartial hearing officer's three-page decision merely recites the parties' arguments and makes findings of fact without any citations to the hearing record. Moreover, the decision is devoid of legal reasoning and analysis, and does not explain how the impartial hearing officer reached his ultimate conclusions. The impartial hearing officer is cautioned to comply with state regulation 8 NYCRR 200.5[j][5][v] and cite to relevant facts in the hearing record and provide a reasoned analysis of those facts that support his conclusions (see 8 NYCRR 200.1[x][4][iv],[v]).

I turn next to petitioner's contentions that the impartial hearing officer erred in holding that petitioner should have convened a CSE meeting before November 2006 and ordering petitioner to provide "equivalent services." Although the impartial hearing officer found no evidence of a denial of FAPE for 2005-06, he concluded that petitioner was remiss in not convening a CSE meeting before November 2006. Without any citation to the hearing record, the impartial hearing officer found that the student's "need for a change in placement and additional services did not miraculously become evident in November, 2006" (IHO Decision at p. 2). Petitioner argues that the burden of proof was on respondent to show that the November 2005 IEP was not appropriate at the time it was developed, that respondent did not meet this burden, and that respondent did not present sufficient evidence to support a finding that the CSE should have convened before November 2006 to review the appropriateness of the November 2005 IEP. I concur with petitioner.

At the beginning of each school year, a school district is required to have an IEP in effect "for each child with a disability in [its] jurisdiction" (20 U.S.C. § 1414[d][2][A]; see also 34 C.F.R. § 300.323[a]; Cerra, 427 F.3d at 194 (". . . the District fulfilled its legal obligations by providing the IEP before the first day of school."). Federal regulations specifically direct that a school district must have an IEP in place at the beginning of the school year (34 C.F.R. § 300.323[a]). By its terms, the November 28, 2005 IEP identified November 28, 2006 as the projected date for the

student's annual review (Parent Ex. B). There is no evidence in the record showing that the November 28, 2005 IEP was not in effect at the start of the 2006-07 school year, and respondent did not sufficiently demonstrate that petitioner was required to convene a CSE to review the student's IEP prior to November 2006. As stated, the impartial hearing officer found no denial of FAPE for 2005-06 and that determination has not been challenged on appeal. The record shows that when the student's teachers first became concerned in October 2006 that the student's behavior may be interfering with her academics, petitioner conducted an FBA and prepared a BIP to assess and address the behaviors (Parent Exs. G, I). The CSE convened on November 17, 2006 and recommended a change in the student's classification and placement. The student's mother was a participant at the meeting and agreed with the recommendations (Tr. pp. 49, 135-36, 184-86). Subsequent to the November 17, 2006 CSE meeting, the student's mother's delay in signing necessary forms to effectuate the agreed upon placement delayed implementation of the placement (see Tr. pp. 25-26, 136-37; Dist. Ex. 10). Under the circumstances of this case, I do not find petitioner's actions in fall 2006 to be dilatory such that a FAPE was denied. Based on the foregoing, I find that the impartial hearing officer erred in finding petitioner remiss for not convening a CSE until November 2006.

I also find merit to petitioner's contention that the impartial hearing officer erred in awarding "equivalent services." It appears that the impartial hearing officer uses the term "equivalent services" to mean compensatory education or additional services. Compensatory education is 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 (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 (Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047).

Here, compensatory education would not be appropriate because the student was 14 years old at the time of the impartial hearing and any alleged deprivation of instruction can be remedied through the provision of additional services before the student becomes ineligible for instruction (Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 04-016; Application of the Bd. of Educ., Appeal No. 03-075; Application of a Child with a Disability, Appeal No. 01-094). However, as stated above, an award of additional educational services for a student who is still eligible for instruction requires a finding that the student has been denied a FAPE. To the extent that the impartial hearing officer may have awarded additional education services, this relief would be inappropriate because there was no finding of a denial of FAPE to support the impartial hearing officer's order of "equivalent services." Moreover, the hearing record does not support such an award.

Turning to the cross-appeal, I find that the appropriateness of the November 30, 2006 IEP was not raised at the impartial hearing or in respondent's November 2006 demand for due process.

Throughout the impartial hearing, both parties agreed that their dispute was limited to the November 2005 IEP (Tr. pp. 12, 201). In the instant case, no determination has been made regarding the appropriateness of the November 30, 2006 IEP or whether petitioner offered the student a FAPE for the 2006-07 school year (see Educ. Law § 4404[2]; 8 NYCRR 200.5[k]; 8 NYCRR 279.10[d]), nor was the issue raised below (see J.S. v. Attica Cent. Schs., 386 F.3d 107, 112 [2d Cir. 2004]). For these reasons, I find that the issue of the appropriateness of the November 30, 2006 IEP is not properly before me.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that petitioner delayed the student's placement, that petitioner was remiss in not convening its CSE until November 2006, and ordered petitioner to provide equivalent services

Dated: Albany, New York
May 25, 2007

PAUL F. KELLY
STATE REVIEW OFFICER