The University of the State of New York

The State Education Department
State Review Officer

No. 07-118

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

Appearances:
Law Offices of Lauren A. Baum, attorney for petitioners, Lauren A. Baum, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which sua sponte determined that the educational program respondent's Committee on Special Education (CSE) recommended for their son for the 2006-07 school year was appropriate and denied their request for funding for their son's tuition costs at the Rebecca School. The appeal must be sustained in part.

As a preliminary matter, petitioners attached four exhibits to their petition, which they request be accepted as additional documentary evidence (Pet. ¶¶ 6, 14, 22-23; see Pet. ¶ 7; Pet. Exs. A-D). In its answer, respondent objected to the admission of the proposed exhibits (Answer ¶¶ 6, 14, 22-23; see Answer ¶ 7). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Child with a Disability, Appeal No. 07-117; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). A review of the proposed exhibits demonstrates that three of the exhibits were available at the time of the impartial hearing and accordingly, could have been offered into evidence at the impartial hearing (see Pet. Exs. B-D). I therefore decline to accept these three exhibits as they were available at the time of the impartial hearing and in addition, they are not necessary in order

to render a decision (id.). The fourth proposed exhibit is petitioners' response to respondent's motion to dismiss for lack of standing, dated August 31, 2007, which was not available at the time of the impartial hearing (Pet. Ex. A).[1] A review of this exhibit indicates that although it was not available to offer into evidence at the time of the impartial hearing, it is not necessary in order to render a decision in this appeal, and therefore, I decline to accept it (id.).

At the commencement of the impartial hearing on August 7, 2007, the student attended the Rebecca School and received occupational therapy (OT), speech-language therapy, and counseling from providers at the Rebecca School (Tr. pp. 30, 49-51).[2] The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services and classification as a student with an other health-impairment (OHI) are not in dispute in this appeal (34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.5[zz][10]; see Tr. pp. 28-30; 132; Parent Ex. D at p. 1).[3] Due to the nature of the issues on appeal, it is unnecessary to include a recitation of the student's educational history.

By due process complaint notice dated April 23, 2007, petitioners requested an impartial hearing asserting that respondent failed to offer their son a free appropriate public education (FAPE)[4] based upon an allegedly invalid IEP and respondent's failure to offer an appropriate placement for the 2006-07 school year (IHO Ex. 1 at p. 1). As relief, petitioners requested "[f]unding for the Rebecca School, provision of transportation and appropriate related services, as

[1] At the conclusion of the impartial hearing, the impartial hearing officer noted that he had denied respondent's motion to dismiss without receiving a response from petitioners because, at that time, it was unnecessary for his determination (Tr. pp. 205-08).

[2] On a weekly basis, the student received two 30-minute sessions of OT, two 30-minute sessions of speech-language therapy, and one 30-minute session of counseling in 1:1 settings as either push-in or pull-out services (Tr. pp. 49-51).

[3] It should be noted that respondent's CSE convened on March 15, 2007, and at that time, the CSE changed the student's classification from OHI to autism (see Tr. pp. 131-32; compare Parent Ex. D at p. 1, with Parent Ex. F at pp. 1-2). Petitioners did not raise the student's classification as an issue in their April 23, 2007 request for a due process hearing, nor did petitioners raise the student's classification as an issue during the impartial hearing (IHO Ex. 1 at pp. 1-2; see generally Tr. pp. 1-212).

[4] 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]).

well as provision of additional occupational and speech/language therapy on a twelve month basis" (id. at p. 2).

On June 22, 2007, respondent moved to dismiss petitioners' request for an impartial hearing based upon the theory that petitioners lacked standing to assert a claim for funding for the Rebecca School for the 2006-07 school year because the student never attended the Rebecca School during the 2006-07 school year, and thus, petitioners' claim could not be redressed by the remedy sought (see IHO Ex. 2 at pp. 1-5). The impartial hearing officer denied respondent's motion and in addition, denied respondent's request for a prehearing conference (IHO Ex. 3 at p. 1; see IHO Decision at p. 3).

At the impartial hearing on August 7, 2007, respondent renewed its motion to dismiss based upon petitioners' lack of standing, and the impartial hearing officer continued his previous ruling denying respondent's motion (Tr. pp. 1, 13, 20-21). Respondent then conceded that it failed to offer the student a FAPE for the 2006-07 school year and asserted that the only issue remaining before the impartial hearing officer was whether the Rebecca School was appropriate (Tr. pp. 13-14). At that time, the parties, who were both represented by attorneys, engaged in a lengthy discussion about the crux of petitioners' claim, and in particular, the remedy sought (Tr. pp. 14-23). Petitioners' attorney acknowledged that the 2006-07 school year had ended and stated that "the remedy or the relief requested was funding for the Rebecca School prospective funding" and that respondent "should be funding the Rebecca School to make up for their failure to provide him with the necessary education during the 2006-2007 school year" (Tr. p. 14). Petitioners' attorney stated that "[y]ou can call it funding for '07-'08 or you can call it funding for some year in the future" (Tr. pp. 15-16).

After the parties continued to discuss the issue, the impartial hearing officer noted that "it is clarified at least by [petitioners' counsel] that the relief sought is not funding for the '06-'07 school at Rebecca but the '07-'08 or some year in the future. I gather primarily as a combination of compensatory services and . . . ." (Tr. p. 17). Respondent's counsel disagreed with the impartial hearing officer's characterization of the remedy sought, reiterated that petitioners' request for an impartial hearing specifically sought relief related to a denial of a FAPE for the 2006-07 school year, and argued that petitioners did not raise the issue of compensatory educational services as a basis for their requested remedy (Tr. pp. 17-20). In addition, respondent's counsel noted that petitioners sought to amend their April 23, 2007 request for an impartial hearing to include allegations regarding the 2007-08 school year, but that petitioners' request to amend was denied (Tr. pp. 15-21). Petitioners' counsel advised that petitioners would seek a separate hearing for the 2007-08 school year and further noted that "[c]ompensatory damages are not restricted to the year in which the damage occurred" (Tr. pp. 18-19).[5] The impartial hearing officer then noted that petitioners' "proffer of proof in this case will only relate to the . . . 2006-07 school year" (Tr. pp.

[5] Petitioners filed a request for an impartial hearing, dated September 12, 2007, alleging that respondent failed to offer the student a FAPE for the 2007-08 school year by failing to offer a valid IEP and/or an appropriate placement (Answer Ex. 1). In the September 12, 2007 request, petitioners sought a remedy identical to the remedy sought in the instant matter: "[f]unding for the Rebecca School, provision of transportation and appropriate related services, as well as provision of additional occupational and speech/language therapy on a twelve month basis" (id.; compare IHO Ex. 1 at p. 2, with Answer Ex. 1).

19-20). Following counsels' comments, the impartial hearing officer acknowledged respondent's concession that it failed to offer the student a FAPE for the 2006-07 school year (Tr. p. 21).

The impartial hearing continued with petitioners and the Director of the Rebecca School appearing as witnesses, and both parties presenting documentary evidence (Tr. pp. 31-212; Dist. Exs. 1-2; Parent Exs. A-H; IHO Exs. 1-3). Both the Director of the Rebecca School and the student's mother testified that the student first attended the Rebecca School on July 17, 2007 (Tr. pp. 51, 140-41). The Director further testified that the Rebecca School is a 12-month program, and that based on their school calendar, the 2006-07 school year began in September 2006 and ended in August 2007 (Tr. p. 64). The student's mother testified that the student remained in respondent's district through the conclusion of the 2006-07 school year, on or about June 30, 2007 (Tr. p. 165). She also testified that although her son had attended the Rebecca School since July 2007, she had not paid any out-of-pocket expenses for her son's tuition (Tr. p. 155).

In his decision dated September 10, 2007, the impartial hearing officer recited the facts of the case and set forth the applicable legal authority for the Burlington/Carter[6] tuition reimbursement analysis, but then determined that the instant matter was neither a "reimbursement matter"—because petitioners "ha[d] not made any payment in connection with their unilateral enrollment"—nor was it a request for prospective funding—because based upon his understanding of the relevant case law, the student had not been denied access to the private placement (IHO Decision at pp. 6-7). The impartial hearing officer determined that petitioners "redirected their claim" and asserted that the student "was entitled to the equitable relief of compensatory educational services in the nature of being permitted to attend The Rebecca School for as long a period as should be determined in this proceeding" (id. at pp. 7-8). The impartial hearing officer determined that he would review petitioners' arguments as to the "appropriateness of compensatory educational services" and further, that he would "not give any consideration to the fact that [respondent] conceded Prong One of the *Burlington* prerequisites" (id. at p. 8). Based upon the foregoing discussion and the evidence presented, the impartial hearing officer went on to determine that respondent had offered the student a FAPE for the 2006-07 school year and that the student was not entitled to compensatory educational services; therefore, he dismissed petitioners' complaint (id. at pp. 8-9).

On appeal, petitioners assert that the impartial hearing officer improperly disregarded respondent's concession that it failed to offer the student a FAPE for the 2006-07 school year and exceeded his jurisdiction by sua sponte determining that respondent offered the student a FAPE during the 2006-07 school year. Petitioners contend that based upon respondent's concession, they altered the presentation of their case, and specifically, did not present evidence regarding the first prong of the Burlington/Carter analysis. Petitioners further assert that the Rebecca School was appropriate to meet the student's special education needs, and that the impartial hearing officer erred in denying petitioners' request for funding for the Rebecca School to compensate the student for respondent's failure to offer a FAPE during the 2006-07 school year. Petitioners seek to annul that portion of the impartial hearing officer's decision which sua sponte determined that respondent offered the student a FAPE for the 2006-07 school year and request an order directing respondent

[6] Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]. These two cases are typically referred to together as the "Burlington/Carter" analysis for tuition reimbursement.

to provide direct funding for the Rebecca School for one year, or in the alternative, an order directing respondent to reimburse petitioners for the costs of the student's tuition at the Rebecca School upon presentation of proper proof of payment.

In its answer, respondent asserts several defenses, which seek to uphold the impartial hearing officer's ultimate decision denying petitioners' request for funding for the Rebecca School. In part, respondent asserts that the impartial hearing officer's decision should be annulled and that petitioners' appeal should be dismissed on the grounds that the impartial hearing officer impermissibly allowed petitioners to raise the issue of compensatory educational services at the impartial hearing, which petitioners' had not raised in their request for an impartial hearing, and/or because the impartial hearing officer improperly denied respondent's motion to dismiss for lack of standing. Alternatively, respondent contends that the impartial hearing officer correctly determined that petitioners were not entitled to funding for the Rebecca School as a form of compensatory educational services relief. Respondent also argues that petitioners are precluded, at this time, from raising a Burlington/Carter request for reimbursement for the costs of the student's tuition at the Rebecca School upon presentation of proper proof of payment since that issue was not raised below at the impartial hearing. Finally, respondent asserts that petitioners' case should be dismissed based upon the theory of res judicata.

In their reply to respondent's answer, petitioners claimed that many of the alleged defenses asserted an untimely cross-appeal and reiterated the relief requested in their petition.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [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, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];[7] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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

[7] 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. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

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., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 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).

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 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates the disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Initially, I concur with petitioners' contention that the impartial hearing officer improperly disregarded respondent's concession at the impartial hearing that it failed to offer the student a FAPE for the 2006-07 school year and exceeded his jurisdiction by sua sponte determining that respondent offered the student a FAPE during the 2006-07 school year. The hearing record amply supports respondent's concession of the first prong of the Burlington/Carter analysis for tuition reimbursement, as well as the impartial hearing officer's acknowledgment of that concession (Tr. pp. 13-14, 20-23, 30). I find no reasonable basis or rationale in the hearing record to support the impartial hearing officer's determination to acknowledge respondent's concession that it failed to offer the student a FAPE for the 2006-07 school year at the impartial hearing, but then disregard respondent's concession in his decision (see Tr. pp. 13-212; Dist. Exs. 1-2; Parent Exs. A-H; IHO Exs. 1-3). By disregarding respondent's concession in his decision, the impartial hearing officer deprived both parties of the opportunity to present testimonial and/or documentary evidence during the impartial hearing to address the first prong of the Burlington/Carter analysis.

Based upon the foregoing, I agree with petitioners' contention that the impartial hearing officer also erred when he proceeded in his decision to sua sponte determine the issue of whether respondent offered the student a FAPE for the 2006-07 school year when it was no longer properly before him. In addition, I also agree with respondent's contention that the impartial hearing officer impermissibly allowed petitioners to raise the issue of compensatory educational services during the impartial hearing—which the impartial hearing officer then improperly used in his decision as the theory upon which to determine whether respondent offered the student a FAPE for the 2006-07 school year—because petitioners did not raise the issue of compensatory educational services as either an allegation or as a basis for relief in their request for an impartial hearing. 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. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]) or the original complaint 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. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139).

In the instant case, petitioners did not raise the issue of compensatory educational services in their due process complaint notice, and petitioners were specifically denied their request to amend their original due process complaint (IHO Ex. 1 at pp. 1-2; see Tr. pp. 15-21). A review of the hearing record indicates that respondent's counsel objected during the impartial hearing because the issue had not been raised in petitioners' due process complaint notice (Tr. pp. 15-21).

Therefore, I will accept respondent's concession at the impartial hearing that it failed to offer the student a FAPE for the 2006-07 school year and further, I will annul that portion of the

impartial hearing officer's decision that determined that respondent offered the student a FAPE for the 2006-07 school year.

Having established the first prong of the Burlington/Carter tuition reimbursement analysis based upon respondent's concession at the impartial hearing, I must now determine whether petitioners met their burden under the second prong of the Burlington/Carter tuition reimbursement analysis to establish the appropriateness of the services obtained for their son for the 2006-07 school year (Burlington, 471 U.S. 359). In order to meet this burden, a parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; see Burlington, 471 U.S. at 370), i.e., that the private services addressed the child's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419).

However, as the hearing record indicates, petitioners' son did not attend the Rebecca School until July 17, 2007, which, as a matter of law, falls outside the 2006-07 school year but within the 2007-08 school year (Tr. pp. 51, 140-41; see Educ. Law § 2[15]). According to State law, the school year runs from July 1 through June 30 (Educ. Law § 2[15]). This fact alone would preclude petitioners from establishing their burden under the second prong of the Burlington/Carter tuition reimbursement analysis for the 2006-07 school year because petitioners did not obtain any education services for their son during the 2006-07 upon which to predicate a finding of appropriateness of the services obtained for their son or ultimately, an entitlement to tuition reimbursement for the 2006-07 school year.

In this case, however, petitioners noted at the impartial hearing that they did not seek funding for the 2006-07 school year, but instead sought to predicate an entitlement to funding for the Rebecca School "for '07-'08 or . . . for some year in the future" based upon respondent's failure to offer a FAPE for the 2006-07 school year (Tr. pp. 14-20). Thus, as the impartial hearing officer concluded, this case represents neither a tuition reimbursement nor a prospective funding matter, but constitutes a rather thinly veiled request for "funding" in the form of monetary and/or compensatory damages. The hearing record supports this conclusion because petitioners specifically assert that respondent should fund the Rebecca School "to make up for their failure to provide him with the necessary education during the 2006-2007 school year" and that "[c]ompensatory damages are not restricted to the year in which the damage occurred (Tr. pp. 14-19).

It is well settled, however, that monetary damages, including compensatory damages, are not available to remedy violations of the IDEA (Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; see Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152-53 [N.D.N.Y. 1997]). In Polera, the Court concluded that "the purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy—as contrasted with reimbursement of expenses–is fundamentally inconsistent with this goal" (Polera, 979 F. Supp. at 485-86). In addition, the United States Supreme Court distinguished reimbursement from monetary damages noting that reimbursement "merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP" (Burlington, 471 U.S. at 370-71; Carter, 510 U.S. 7; see Muller v. Comm. on Spec. Ed. of East Islip, 145 F.3d 95, 105 [2d Cir. 1998]). Thus, petitioners are not entitled to funding for the Rebecca School for "some

year in the future," as either monetary or compensatory damages, to remedy respondent's failure to offer the student a FAPE in the 2006-07 school year.

Finally, to the extent that petitioners assert a claim for relief more appropriately related to allegations regarding the student's 2007-08 program, I note that petitioners' attempt to amend their April 23, 2007 due process complaint notice was specifically rejected, and moreover, that petitioners filed a request for an impartial hearing to address the 2007-08 school year by letter dated September 12, 2007 (Tr. pp. 15-21). Therefore, the appropriateness of the student's program for the 2007-08 school year, and any relief pertaining to the 2007-08 school year, were not raised below and are not properly before me (see Educ. Law § 4404[2]; 8 NYCRR 200.5[j][1][ii], [k]; Application of a Child with a Disability, Appeal No. 07-085; Application of a Child with a Disability, Appeal No. 05-078; Application of a Child with a Disability, Appeal No. 04-100; 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).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it determined that respondent offered the student a FAPE for the 2006-07 school year.

Dated: **Albany, New York**
December 21, 2007

PAUL F. KELLY
STATE REVIEW OFFICER