The University of the State of New York

The State Education Department
State Review Officer
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No. 09-054

Application of the BOARD OF EDUCATION OF THE FLORIDA UNION FREE 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:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Bonacic, Krahulik, Cuddeback, McMahon & Brady, LLP, attorneys for respondents, Robert E. Krahulik, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2008-09 school year were not appropriate and that the offered program was not properly implemented. The appeal must be sustained in part.

At the time of the impartial hearing, the student was in tenth grade and receiving home instruction[1] and related services because of a medical condition (Tr. pp. 35, 38; Dist. Ex. 2).[2] The student has received a diagnosis of spinal muscular atrophy (Tr. p. 178; Dist. Ex. 11 at p. 1). The hearing record reveals that the student exhibits severe muscle weakness throughout his trunk and extremities with subsequent limitations in joint mobility, and that he relies on a caretaker for all position changes and transfers (Dist. Ex. 11 at p. 3). According to the student's nurse, the student's physical limitations only allow him to access a computer and verbally communicate (Tr. p. 178). The student's eligibility for special education services as a student with multiple disabilities is not

[1] See 8 NYCRR 200.6(i).

[2] The hearing record indicates that the student was receiving a combination of 12-month home instruction and, when his health permitted, instruction in school (Dist. Ex. 4 at p. 1).

in dispute in this proceeding (Tr. pp. 19-20; see 34 CFR 300.8[c][7]; 8 NYCRR 200.1 [zz][8]). The main issues in dispute are the adequacy and implementation of the student's May 14, 2008 individualized education program (IEP).

A district special education teacher conducted a "Triennial Evaluation" of the student on September 28, 2007, which included administration of the Wechsler Individual Achievement Test – Second Edition (WIAT-II) (Dist. Ex. 5). The WIAT-II testing results indicated that the student achieved standard scores of 125 in reading, 96 in arithmetic, and 81 in spelling (id.). The evaluator reported that the Wide Range Achievement Test – Third Edition (WRAT-III) was administered to the student in 2005 and that the student had achieved standard scores of 115 in reading, 107 in arithmetic, and 95 in spelling (id.). The evaluator reported that the student's reading score demonstrated an increase of 10 points, while the student's math and spelling scores decreased by 11 and 14 points, respectively (id.). The evaluator also reported that the student "did very well in reading and demonstrate[d] a higher than average reading vocabulary" (id.).

A physical therapy (PT) evaluation was completed by the district on January 30, 2008 (Dist. Ex. 11). The physical therapist reported that the student had a diagnosis of "Spinal Muscular Atrophy, Type I" (id. at p. 1). The physical therapist further reported that the student demonstrated severe muscle weakness throughout his trunk and extremities with subsequent limitations in joint mobility (id. at p. 3). The physical therapist indicated that the student was reliant upon a caretaker for all position changes and transfers (id.). The physical therapist recommended that the student continue to receive PT three times per week for 45 minutes per session (id.).

The parents and district communicated through e-mail on multiple occasions from February 2008 through August 2008 (Parent Exs. A; B). The e-mails related to issues including the student's home tutoring schedule, missed tutoring sessions due to the unavailability of teachers, and the hiring of new home instructors (id.).

A district speech-language pathologist conducted a speech-language evaluation of the student on February 25, 2008 (Dist. Ex. 9). Administration of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) yielded a receptive language index score of 119, an expressive language index score of 114, and a language memory index score of 108 (id. at p. 1). Administration of the Goldman Fristoe Test of Articulation, Second Edition yielded a "sounds in words" standard score of 80, indicating that the student's articulation abilities were characterized by sound distortions resulting from oral motor weakness and control (id.). The speech-language pathologist recommended that the student continue to receive individual speech-language therapy two times per week for 45 minutes per session (id. at p. 5).

In a speech-language progress report dated March 14, 2008, the student's private speech-language pathologist reported that the student demonstrated age-appropriate language skills (Dist. Ex. 10 at p. 3). The private speech-language pathologist also reported that the focus of the student's therapy continued to be maintenance of oral motor skills needed to maintain speech clarity and effective swallowing (id.). Moreover, the private speech-language pathologist indicated that the student's speech intelligibility in conversation was most affected by his ability to control his salvia (id.). The private speech-language pathologist referred the student back to the district to determine eligibility for speech-language services for the 2008-09 school year (id.).

In an undated report when the student was in the ninth grade, a district school psychologist indicated that she had conducted a review of the student's records as part of a "triennial review" (Dist. Ex. 3 at p. 1). She noted that although the student's IEP stated that he should attend school for two and one-half hours per day, three times per week, "due to medical reasons he is home tutored" (id.). The psychologist reported that formal testing of the student had been completed several times in the past, including evaluations conducted in the years 1996, 2002, and 2005, all of which indicated that the student demonstrated average to above average cognitive abilities (id. at p. 1). Specifically, a 2005 administration of the Kaufman Brief Intelligence Test (K-BIT) yielded a standard score (percentile rank) of 114 (82) on the vocabulary subtest, which measured verbal ability, and a standard score (percentile rank) of 98 (45) on the matrix subtest, which measured nonverbal reasoning ability (id.; see Dist. Ex. 4 at pp. 1-2). K-BIT testing results also yielded an intelligence quotient (IQ) composite score of 106 (66) (Dist. Ex. 3 at p. 1; see Dist. Ex. 4 at pp. 1-2). The district school psychologist reported that the student was "polite and friendly" and got "along well with adults who work with him" (Dist. Ex. 3 at p. 2). She indicated that the student's "contact with peers in school [wa]s limited as he d[id] not attend school for the most part," but that he was "encouraged to maintain contact with peers and school staff via e-mail" (id.).

On April 11, 2005, the parents completed a health and social history update (Dist. Ex. 6). The parents described the student's relationships as "excellent" with both his peers and his teachers and that he was involved with a community group activity (id.). The parents reported that they had no concerns regarding the student's school progress (id.).

By letter dated May 1, 2008, the student's physician recommended to the district that the student receive his tutoring sessions between nine o'clock in the morning and five o'clock in the afternoon due to the student's medical condition (Dist. Ex. 19 at p. 1).

A subcommittee of the CSE convened on May 14, 2008 to develop the student's IEP for the 2008-09 school year (Dist. Ex. 2 at pp. 4-11). In addition to being an annual review of the student's program, the CSE convened to review new evaluations conducted as a result of the triennial evaluation of the student (Tr. p. 37). Meeting attendees included the CSE chairperson who also participated as a psychologist, a special education teacher, a regular education teacher, a district speech therapist, a guidance counselor, the principal, the student's private physical therapist and speech pathologist, the parents, and an advocate for the parents (Dist. Ex. 2 at p. 8). The CSE recommended that the student receive home instruction for twenty hours per week and indirect consultant teacher services for thirty minutes per week (id. at p. 4). The CSE also recommended that the student attend tenth grade for approximately two and one half hours per day three days per week, but that his schedule remain flexible due to his medical condition (id. at p. 5). The resultant IEP provided the student with annual goals and short-term objectives in the areas of speech-language and fine and gross motor skills (id. at pp. 9-11). Related service recommendations included speech-language therapy twice per week individually for 45 minutes and PT five times per week individually for 45 minutes (id. at p. 5). The IEP reflected that the student was eligible to receive extended school year services at home with the same related services and ten total hours of music/art instruction during the summer (id. at pp. 4-5). The IEP also reflected that the student was to be provided with special transportation to accommodate an electric wheelchair, a modified curriculum, daily use of a home tutor to manipulate objects, daily assistive technology consisting of a wheelchair and computer, monthly progress reports (biweekly to assist in communication between the home program and school), a liaison between home and school, and multiple testing

accommodations including a scribe (id. at pp. 4-6). The IEP further reflected that the student was to participate in the same State or local assessments that are administered to general education students and that he would not participate in a general education physical education program because the CSE determined that the student's PT fulfilled his physical education requirement (id. at p. 6). The IEP addressed assistive technology needs by recommending a wheelchair and computer for the student to use (id. at p. 5) and recommending an assistive technology update evaluation be conducted (Tr. pp. 38-39). There is no evidence in the hearing record demonstrating that the evaluations, identification of areas of need, statement of annual learning goals and objectives, assistive technology recommendations, and services offered were disputed at the CSE meeting.[3]

The hearing record reflects that the district provided the parents with a medical evaluation form during the student's tenth grade year (2008-09) (Dist. Ex. 7 at p. 4). It further reflects that the parents did not return a completed form to the district as of January 6, 2009 (id. at p. 1).

The parents, through their attorneys, filed a due process complaint notice dated July 30, 2008, alleging that the student's 2008-09 IEP did not "ensure that [the student] will be provided appropriately qualified home instructors, d[id] not provide for the implementation of assistive technology and d[id] not adequately provide for [the student's] social development" (Dist. Ex. 1). The parents suggested that an appropriate solution should include: (1) "the assignment of highly qualified home instructors whose schedule permits regular instruction while allowing for the flexibility [the student's] schedule requires due to his medical condition;" (2) "mandatory training for instructors as well as classroom teachers in the use of adaptive technology and video conferencing specifically, so that [the student] may participate, to a degree, in regular classroom training;" (3) "additional home instruction on a regular basis in order to compensate for instructor absences and cancellations due to [the student's] medical condition;" and (4) "notification of and inclusion of [the student] in classroom special activities, class and school wide events, field trips, etc, including the implementation of measures to ensure accessibility" (id. at p. 1).

Subsequent to the May 14, 2008 IEP meeting, an assistive technology evaluation was completed on August 9, 2008 and included a student interview, observation, and the review of a previous assistive technology evaluation (Dist. Ex. 8 at p. 1). The evaluator indicated that the student had "very little gross motor control and very weak musculature throughout extremities and neck" (id.). The evaluator further reported that the student had "enough shoulder and elbow control to position his hand on a computer trackpad" in order to manipulate objects on his computer screen and select alphanumeric characters (id. at pp. 1, 3). The evaluator indicated that the student's "many assistive technology needs" could be grouped into three areas including computer and classroom material access, environmental control, and power mobility (id. at p. 3).

The district responded to the parents' July 30, 2008 due process complaint notice in a letter dated October 1, 2008 and addressed each of the three specific allegations raised by the parents (Dist. Ex. 2; see 8 NYCRR 200.5[i][4]). With regard to the allegation that the 2008-09 IEP "d[id] not ensure that [the student] will be provided appropriately qualified home instructors," the district responded that the "IEP recommends 20 hours of 1-1 instruction in a flexible setting, which was

[3] The hearing record does indicate that an "assistive technology update" was requested at the CSE meeting, although the hearing record is unclear as to who made the request (Tr. p. 39).

further described as being either at home or in the tenth grade classroom as his current medical condition permits" and that the "IEP need not specify the qualifications of the teachers who would implement this education program, and certainly need not 'ensure' that such staff possess any minimum qualifications" (Dist. Ex. 2 at p. 2). With regard to the allegation that the 2008-09 IEP "d[id] not provide for the implementation of assistive technology," the district responded that the "IEP recommends several pieces of assistive technology" and that the recommended "assistive technology was provided in accordance with the IEP" (id.). Finally, with regard to the last allegation in the due process complaint notice that the 2008-09 IEP "d[id] not adequately provide for [the student's] social development," the district responded that the "IEP calls for a combination of home instruction and in-school instruction, the exact mix of which will be determined by [the student's] current medical condition," that it is "unclear as to what the factual basis is for the allegation that the IEP is somehow deficient with respect to [the student's] social development," and that the district agrees that the student "should be notified of school activities with a view towards determining whether he can participate in the same with or without accommodations" although this "is not an IEP issue" (id.).

An academic transcript dated January 6, 2009 indicated that at the time, the student had achieved a grade point average (GPA) of 92.7 for his tenth grade year (Tr. p. 55; Dist. Ex. 12 at p. 1).[4] At the January 23, 2009 hearing date, the student's mother agreed in testimony with the statement that "regardless of any scheduling issues or inconsistencies with respect to the delivery of [instruction during 2008-09], [the student] is once again receiving instruction that is allowing him to master at a very high level the curriculum of this regents level set of courses that he is taking" (Tr. pp. 315-16).

An impartial hearing convened for two days on January 16, 2009 and January 23, 2009 (Tr. pp. 1, 173). The district called two witnesses and submitted 19 documents into evidence (Tr. pp. 30, 123; Dist. Exs. 1-19). The parents called four witnesses, including the student's nurse and his parents, and submitted two documents into evidence (Tr. pp. 176, 224, 285, 335; Parent Exs. A-B). The impartial hearing officer submitted two documents into evidence (IHO Exs. I-II). The student attended the impartial hearing on both days (Tr. pp. 2, 174).

In a decision dated March 30, 2009, the impartial hearing officer found that the district did not sustain its burden of proving that it offered the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2008-09 school year, stating that the student's IEP should have included specified hours of instruction, should have included an appropriate assistive technology recommendation, and should have appropriately addressed the student's social-emotional goals (IHO Decision at p. 23). She also found that the district failed to implement the existing IEP (id.). The impartial hearing officer ordered that: (1) the district "immediately conduct whatever evaluations are necessary to determine the social and emotional levels and needs of the student;" (2) within three weeks of the date of her order, the CSE "develop an IEP that addresses [the student's] social and emotional needs, including appropriate goals and objectives," considering "ways in which the student can engage with the outside world," and that the district "shall develop a program and implement it in as assertive a manner as the student's medical condition and health will permit;" (3) within three weeks of the date of her order, the

[4] The student achieved a GPA of 92.54 for his ninth grade year (Tr. pp. 54-55).

district "revise the [student's] IEP to reflect all of the assistive technology equipment and software provided or to be provided to the student," the district regularly maintain and update the provided computers and software on an as needed basis but at least annually, the district inform the classroom teachers and home instructors about what assistive technology the student has available to him and provide training on those components that require training to use, the district "research the availability of an appropriately sized screen that can be used," and, if available, the district provide books and materials that can be accessed through a computer; (4) the district provide 20 hours of home instruction to the student "between the hours of 10:00 am to 5:00 pm on Mondays, Wednesdays and Fridays, and 10 am to 4 pm on Thursdays" and that the CSE shall consider any medical documentation provided by the parents that "recommends alternative hours of instruction" for the student and "modify the hours of instruction as appropriate;" (5) within two weeks of the student's new IEP being developed, the district "hire one or more qualified teachers who can commit to provide [the student's] home instruction in a coherent and consistent fashion during the hours ordered," the district "expand its recruitment sources," the district "modify inducements for the positions including increasing the salary or other benefits of the position" if the district is unable to find an instructor or instructors to fill the position within two weeks, and the district "consider hiring any qualified applicants identified by the Parent;" (6) the "May 14, 2008, IEP is the student's pendency IEP until the new IEP is developed and the home instructors are hired;" and (7) the district "provide video conferencing to the student between his home and in as many of the classrooms at [the district school] as is feasible and practical" (id. at pp. 34-35).

This appeal ensued. The district alleges that the impartial hearing officer improperly decided issues not contained in the parents' due process complaint notice, improperly found that the district denied the student a FAPE, erred in directing that the district implement some unspecified portion of the student's IEP through video conferencing, exceeded her authority in directing how the district was to locate home instructors and how they should be compensated, and that her decision is unsupported by the hearing record. More specifically, the district contends that the impartial hearing officer improperly rendered a determination on the following issues because they were not raised in the parents' due process complaint notice: (1) the appropriateness of the evaluative data upon which the district determined the student's social-emotional functioning; (2) the appropriateness of the goals contained in the IEP; (3) the appropriateness of the recommended assistive technology, excluding her determination regarding the absence of video conferencing; (4) the appropriateness of the recommendations of the CSE made in November 2008 which were based on an evaluation received by the district on September 15, 2008;[5] (5) whether an educational program consisting of home instruction was consistent with the requirement that students with educational disabilities be educated in the LRE; and (6) what constitutes the student's pendency program.

The district further alleges that the impartial hearing officer erred in finding that the IEP denied the student a FAPE by failing to specify the precise hours of home instruction and failing to contain an appropriate assistive technology recommendation. The district also contends that the

[5] Neither the September 15, 2008 evaluation nor the CSE's November 2008 recommendations are contained in the hearing record.

impartial hearing officer erred in finding that the district failed to implement the 2008-09 IEP in a manner that denied the student a FAPE.

In their answer, the parents deny many of the district's allegations, request that the decision of the impartial hearing officer be upheld in its entirety, and request that the parents be awarded attorneys fees, expenses, and disbursements in connection with the impartial hearing.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

A district has an affirmative obligation to offer an eligible student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]; see Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137). An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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

Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at *1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Newington, 546 F.3d at 123 [stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review

Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-025; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

I will first address the district's contention that the impartial hearing officer exceeded her jurisdiction in rendering determinations on matters other than those raised by the parents in the due process complaint notice. Pursuant to the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see Application of the Dep't of Educ., Appeal No. 08-131; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]).

As noted above, the parents raised three specific allegations in their due process complaint notice, namely, that the student's 2008-09 IEP "d[id] not ensure that [the student] will be provided appropriately qualified home instructors, d[id] not provide for the implementation of assistive technology and d[id] not adequately provide for [the student's] social development" (Dist. Ex. 1). At the impartial hearing, the district's attorney outlined these three issues as part of his opening statement and stated to the impartial hearing officer that "it's the district's position that there are three narrow issues that are before you" and that the "district's presentation of evidence is going to be narrowly tailored to respond specifically to those issues" (Tr. pp. 22-28). The parents' attorney did not oppose this statement. Additionally, the district's attorney objected multiple times during the course of the impartial hearing to the parents' attorney questioning witnesses and introducing evidence related to matters beyond the scope of the issues in the due process complaint notice (see, e.g., Tr. pp. 60-62, 65-69, 71-72, 103, 151-52, 154-57, 227-29, 241-43, 265-74, 279-81, 287-89). Based on these circumstances, I find that only the three issues specified in the parents' due process complaint notice were properly before the impartial hearing officer.

I will now review the three issues that were raised in the parents' due process complaint notice regarding the 2008-09 IEP and were properly before the impartial hearing officer.

The parents allege in their due process complaint notice that the student's 2008-09 IEP did not ensure that the student would be provided appropriately qualified home instructors (Dist. Ex. 1 at p. 1). For a solution to their concerns, in their due process complaint notice, the parents requested "the assignment of highly qualified home instructors whose schedule permits regular instruction while allowing for the flexibility [the student's] schedule requires due to his medical condition" and "additional home instruction on a regular basis in order to compensate for instructor

absences and cancellations due to [the student's] medical condition" (Dist. Ex. 1). As to the former, the hearing record demonstrates that the May 14, 2008 IEP identified appropriate instruction. As to the latter, the hearing record demonstrates that instructor absences did occur and that the district has agreed to make up for any gap in services that have occurred and are willing, in the future, to provide additional services needed if instruction is interrupted due to the student's medical needs or unanticipated availability of instructors.

As to the identification of 20 hours of home instruction and additional in-school instruction on the student's May 14, 2008 IEP, the hearing record shows that CSE, including the parents and the parents' advocate, collaboratively formulated the level and location of services based upon the student's existing needs as identified by then existing evaluations. As noted above, the hearing record does not show any dispute over the level or location of instructional services at the time of the CSE meeting. Nor is there any indication in the hearing record that a new CSE meeting was requested to revise that portion of the IEP statement. Based upon an independent review of the hearing record, I find that the hearing record supports a determination that the services as identified on the IEP were appropriately designed to meet the student's needs at the time the IEP was formulated.

I do find; however, that the IEP was not properly implemented. It is undisputed in the hearing record that there were gaps in the delivery of the student's home instruction for various reasons, including the student's medical needs (Tr. pp. 45-46, 201-06, 217, 235-36), the parents' requested time frame for instruction (Tr. pp. 32, 43-44, 47), and the unavailability at times of qualified instructors (Tr. pp. 43-44, 129, 131-34).

At the impartial hearing, the district's principal described the hiring process for the instructors who provided the student's home instruction (Tr. pp. 126-28). He testified that an on-line application system (OLAS) was used to identify potential instructors (Tr. p. 126). He also testified that he attempted to locate instructors though e-mail communications with local principals (Tr. p. 127). Additionally, the principal communicated with the director of personnel at the local board of cooperative educational services (BOCES) to receive assistance in identifying potential instructors for the student, as well as "canvassing" the district staff (Tr. pp. 128, 143). The district did not attempt to arrange home instruction through a special education teacher, rather they sought teachers certified in the content areas for which instruction would be provided (Tr. pp. 44, 129-31, 239-40). The CSE chairperson testified that the search for potential instructors was limited by the parents' direction that the only time the student could receive instruction was between ten o'clock in the morning and four o'clock in the afternoon (Tr. pp. 32, 43-44) and that some instructors had declined the district's offer of employment because of the time frame (Tr. pp 43-44, 129, 131-34). The principal testified that the time constraints made it difficult to find home instructors because many of the instructors had full-time teaching positions (Tr. p. 129). Despite the time constraints, the hearing record supports that all of the student's home instructors obtained by the district had New York State certification in their content area (Tr. pp. 43-44, 130, 135).

In reviewing the hours of instruction the student received from his home instructors, I note that the student's academic program during the 2008-09 school year was a combination of home instruction and in-school instruction when appropriate based on "medical reasons" and that the CSE recommended that the student receive home instruction for twenty hours per week (Tr. pp. 37-38; Dist. Ex. 2 at pp. 4-5). According to his nurse, the student had not attended a school

classroom during the 2008-09 school year as of the date of the impartial hearing because of this medical condition (Tr. p. 38). Additionally, the student's nurse reported a concern about the student's health when the student enters a classroom environment because another child or the teacher may have a respiratory infection or a virus (Tr. p. 207).

According to receipts entered into evidence by the district at the impartial hearing, the student received sixty-five hours and fifteen minutes of home instruction from September 2008 through December 23, 2008 (Dist. Ex. 14 at pp. 6-27). The student's mother testified that the student's science, math, history, English, and Spanish classes were all Regents level courses and that since the beginning of the 2008-09 school year, approximately eight weeks of course instruction in the five core areas were "missed" (Tr. pp. 315, 329). She testified that the district offered to "makeup" the missed sessions, but that none of the sessions were actually "made up" (Tr. pp. 329-30). The parent testified that the district offered to schedule make-up sessions on weekends, evenings and during school vacations for instructional time that was missed (Tr. pp. 333-34). She further testified that approximately three weeks of the eight weeks of missed sessions were due to the student's hospitalizations (Tr. p. 332). The CSE chairperson testified that it was her understanding that the student should receive two hours of instruction five days a week for each day he was hospitalized (Tr. p. 100).[6]

I find that the failure of the district to provide the student with 20 hours of home instruction per week as indicated on his 2008-09 IEP, but for reasons directly related to the student's medical needs, caused a deprivation of recommended instructional services and resulted in the denial of a FAPE. However, as noted by the impartial hearing officer and supported by the hearing record, the district, in "good faith," offered home instruction. Moreover, the district has offered to make up for any lost home instruction, regardless of the reason the instruction was missed (Tr. pp. 58, 316-17). I will therefore order that the CSE reconvene and in collaboration with the parents determine the hours of IEP recommended home instructional services missed between the period of September 2008 to January 2009, inclusive, and offer to make up those hours over the course of summer 2009 and the 2009-10 school year in addition to the student's regularly scheduled academic schedule. I encourage the parties, upon reconvening, to take into consideration the student's medical needs and any medical constraints limiting instruction, but I also encourage the parties to consider appropriate before or after school hours, vacation days, and days between the beginning and end of the summer 2009 school schedule in determining appropriate time for instruction of the compensatory additional services ordered herein. I also remind the district that it has an affirmative obligation to offer the student a FAPE and that it must make good faith efforts to implement the student's program (8 NYCRR 200.4[e][7]). I encourage both parties to continue to work collaboratively in ensuring that an appropriate program is delivered.

The parents further allege that the student's 2008-09 IEP did not "provide for the implementation of assistive technology" (Dist. Ex. 1 at p. 1). The student's IEP recommends, among other things, that the student have a computer available to him (Dist. Ex. 2 at p. 5). The hearing record reflects that the student was provided with both a desktop computer and a laptop computer (Tr. pp. 38, 49). The CSE chairperson testified that the desktop computer has the

[6] State regulatory provisions pertaining to hospital instruction are found at 8 NYCRR 200.6[i].

program "Dragon Naturally Speaking" installed on it (Tr. p. 49).[7] She also testified that the district had a private assistive technology trainer provide "over a year's worth of training on the Dragon Naturally Speaking software" to the student at his home (Tr. pp. 50, 199). The student's father testified that the student had "a difficult time" utilizing the software and that it had not been used in "a little while" (Tr. pp. 198-99). The student's father further testified that the program was "very frustrating" for the student because it took time "for the computer to get used to his voice" and that the student was unable to use the software to create a written product because the "computer . . . would pick up his voice and say different words" (Tr. p. 199). With regard to the laptop computer, the CSE chairperson testified that at one point it was not functioning properly because it had "many viruses on it" as a result of games unassociated with the student's instruction or the intended use of the laptop being downloaded onto it after it was provided to the student (Tr. pp. 51-52). She further testified that it was the district's plan to "see if we could clean it up" and "try to get it to work," but that "if it wasn't going to work, get a new laptop" for the student (Tr. p. 48).

The hearing record indicates that the assistive technology services identified by the district per the May 14, 2008 IEP were appropriately designed to meet the student's needs. I am also not persuaded by the hearing record that the district denied the student a FAPE relating to the implementation of the assistive technology services identified on the IEP and I find that the district met its burden to show that the student was provided a FAPE with respect to this issue.

Moreover, as stated above, an assistive technology evaluation was completed on August 9, 2008 and included a student interview, observation, and a review of a previous assistive technology evaluation (Dist. Ex. 8 at p. 1). The evaluator recommended the use of the software from "interactive whiteboards" and a wireless printer that would allow the student to independently produce his homework assignments (id. at p. 3). Although the IEP indicated that the student was to be provided with only a wheelchair and computer, the CSE chairperson testified that the assistive technology evaluator recommended a wireless printer "so that was going to be purchased [by] the district" (Tr. p. 48). The CSE chairperson also testified that the recommendation regarding a "smart board" was forwarded to the district's technology specialist who recommended that software be provided to the student that would allow the teacher to use different types of instructional methods on the student's computer (Tr. p. 49). The assistive technology evaluator reported that "it is technically possible to have a two way video, audio, and whiteboard communication between a classroom and [the student] at home" (Dist. Ex. 8 at p. 2).[8] The August 9, 2008 assistive technology evaluation (Dist. Ex. 8) was considered at a November 2008 CSE meeting, along with parental concerns regarding the functioning of the already provided assistive technology (Tr. pp. 47-48, 76). The actions of the CSE related to the November 2008 CSE meeting are not in dispute in the instant case. However, I encourage the CSE, upon reconvening as ordered

[7] "Dragon Naturally Speaking" is described in the hearing record as "a voice recognition program" (Tr. pp. 38, 79, 115).

[8] I note that the use of videoconferencing between the school and the student's home may enhance the student's academic program, eliminate the need for the district to maintain home instructors for the student in each academic content area, and allow the student and his classmates to share a common learning environment. Therefore, I encourage the district to consider providing this form of assistive technology to the student when the CSE next convenes.

herein, to consider any assistive technology concerns of the parents including any need for additional training with respect to assistive technology.

Lastly, the parents allege that the student's 2008-09 IEP did not "adequately provide for [the student's] social development" (Dist. Ex. 1 at p. 1) and ask for "notification of and inclusion of [the student] in classroom special activities, class and school wide events, field trips, etc, including the implementation of measures to ensure accessibility" (id. at p. 1). The district in turn agrees that the parents "should be notified of school activities with a view towards determining whether he can participate in the same with or without accommodations" (Dist. Ex. 2 at p. 2). The CSE recommended that the student attend tenth grade for approximately two and one half hours per day three days per week, but that his schedule should remain flexible due to his medical condition (id. at p. 5). The district school psychologist, as part of her evaluation of the student when he was fourteen, reported that the student was "polite and friendly" and got "along well with adults who work with him" (Dist. Ex. 3 at p. 2). She indicated that the student's "contact with peers in school [wa]s limited as he d[id] not attend school for the most part," but that he was "encouraged to maintain contact with peers and school staff via e-mail" (id.). The district speech-language pathologist reported, as part of her speech-language evaluation of the student on February 25, 2008, that during testing the student "was polite and social" (Dist. Ex. 9 at pp. 1, 5).

The student's mother testified that she had concerns with respect to the student's socialization relating to the student being "excluded from a lot of things" (Tr. p. 263). She testified that she did not know "how many events happened throughout the year," "if there are assemblies that [the student] needs to go to," and that "[a]t one point [the student] was not invited to a class trip" (id.).[9] I note that the hearing record reflects that the student was included in certain school-based activities during the 2008-09 school year. For example, the student was inducted into the National Honor Society as an honorary member after the district principal personally drove the application to the student's home in order for the student to receive it on the same day every other student received it (Tr. pp. 139-40). The district also took steps to notify the student of "picture day" for the yearbook during the 2008-09 school year after he had been omitted from the yearbook in previous years, and then made arrangements for the parents to submit their own picture of the student since he could not be there on the day pictures were being taken (Tr. pp. 263-64).

I am not persuaded that the student's social-emotional needs as identified in the hearing record have not been adequately provided for such that the student has been denied a FAPE, and I find that the district met its burden to show that the student was provided a FAPE in the LRE with respect to this issue. However, given the student's current situation of not being able to attend school on a regular basis, I strongly encourage the parties to collaboratively reconsider his social needs when the CSE next reconvenes and to explore opportunities and supports for the student to facilitate access to his school peers. In doing so, the CSE should obtain input from the student either directly or through the parents.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein. Based on the foregoing, I find that the May 14, 2008 IEP offered the student a FAPE consistent with LRE requirements. However, the provision of the

[9] The hearing record is unclear as to whether the referenced class trip occurred during the 2008-09 school year.

recommended home instruction services did not comport with the level of services as stated on the IEP resulting in a denial of a FAPE.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the impartial hearing officer dated March 30, 2009 is modified to the extent consistent with this decision and that her orders are annulled in their entirety, and

IT IS FURTHER ORDERED, that within 30 days of the date of this decision, unless the parties otherwise agree, a CSE shall convene and determine the appropriate level of instructional services to be provided as additional services for the deprivation of instruction during the 2008-09 school year from September 2008 to January 2009, and the CSE shall offer to provide such services during summer 2009 and the 2009-10 school year, and upon consent of the parents the district shall provide such services.

Dated: **Albany, New York**
June 4, 2009

PAUL F. KELLY
STATE REVIEW OFFICER