



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-004

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

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

Law Offices of Anton Papakhin, P.C., attorney for respondent, Anton G. Papakhin, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that respondent's (the parent's) son should be provided 12 months of compensatory education services at the Judge Rotenberg Center (JRC) for the 2010-11 school year. The appeal must be sustained.

At the time the impartial hearing convened in November, 2010, the student had been admitted to a psychiatric hospital (Tr. p. 5; Answer ¶ 38).¹ The student's classification as a student with an emotional disturbance is not in dispute in this appeal (IHO Ex. 1 at p. 1; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).² During the impartial hearing, the parties were in agreement

¹ According to the parent's answer, the student was readmitted to JRC on or about December 13, 2010 consistent with the impartial hearing officer's order (Answer ¶ 38, n.4). JRC is a nonpublic residential school that has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² According to the transcripts of the impartial hearing, no documentary evidence was entered into the hearing record; however the district submitted 19 documents that were identified in an exhibit list attached to the impartial hearing officer's decision. (Tr. pp. 2, 57; IHO Exs. 1-19). Additionally, a handwritten exhibit list was also included with the hearing record in which several of the listed exhibits were crossed out. Although I will refer to the documents as marked for identification and attached to the impartial hearing officer's decision, I remind the impartial hearing officer to clearly indicate in the hearing record which documents that have been entered into the record and considered in reaching a determination (8 NYCRR 200.5[j][5][v]).

that the student was not entitled to a pendency placement and was no longer eligible for special education and related services due to his age, but the student's entitlement to compensatory education was at issue (Tr. pp. 4, 9-15, 30-35, 42; IHO Interim Order at pp. 2, 6; Answer ¶¶ 39-40).

Background

As relevant to the instant appeal, the Committee on Special Education (CSE) met on April 28, 2010 for an annual review and to develop an individualized education plan (IEP) for the student for the 2010-2011 school year (Dist. Ex. 1 at p. 1). Meeting participants included a school psychologist who also acted as the district representative, a special education teacher, a social worker and an additional parent member (*id.* at p. 2). Attending by telephone were the parent and, from JRC, the director of education, the director of student services, the transition coordinator, a clinician, a case manager and a special education teacher (*id.*). The CSE continued the student's eligibility for special education programs and related services as a student with an emotional disturbance and recommended a 12:1+1 class in a State approved nonpublic residential school for a 12-month school year (*id.* at pp. 1-2).³ The IEP resulting from the April 2010 CSE meeting contained information regarding the student's academic performance and learning characteristics, social/emotional performance, and health and physical development (*id.* at pp. 3-7). The IEP contained annual goals and short-term objectives relating to work habit and employability skills, spelling, grammar and reading abilities, math skills, and relationship skills with peers and authority figures (*id.* at pp. 8-9). The IEP noted that the student required a special class environment and a residential program to address his academic and social/emotional needs (*id.* at p. 12). According to the April 2010 IEP, the student exhibited "significant behavioral difficulties [that] preclude[d] participation in the general education environment" (*id.*). The IEP included a behavior intervention plan to address the student's inappropriate behaviors (*id.* at p. 16). The IEP also included a transition plan with long term adult outcomes for the student including, integrating into the community, participating in his own transition planning, living in a "living" environment, and being employed; all with "maximum support" (*id.* at p. 15). According to the transition plan, the student would obtain an IEP diploma and graduate in August 2010 (*id.*). The April 2010 IEP further indicated the student would participate in alternative assessments (*id.* at p. 14).

According to stenographic minutes taken during the impartial hearing in this matter, the impartial hearing officer stated that the student reached the age of 21 on August 28, 2010 whereupon "the department discharged him by virtue of having aged out of an entitlement to special education" (Tr. p. 4). Thereafter the student returned home and because "community services were not available to support his transition" the student "wound up in a psychiatric hospital" (*id.*).

Due Process Complaint Notice

In a due process complaint notice dated November 5, 2010, the parent, through her attorney, alleged that the district failed to offer the student a free, appropriate public education

³ The April 2010 IEP reflected that the duration of services was until "until August 2010" (Dist. Ex. 1 at p. 2).

(FAPE) for the 2010-11 school year (Pet. Ex. I at pp. 1-3).⁴ In the due process complaint notice, the parent alleged that the April 2010 CSE was inappropriately constituted, that it failed to properly reevaluate the student and that, as a result, it failed to offer the student an appropriate transition program and transition services (*id.* at p. 2). The parent alleged that the CSE's failure to provide appropriate transition services led to his discharge from JRC in August 2010 without an appropriate placement and, thereafter, "several runaway and behavioral incidents at home" that resulted in the student's hospitalization (*id.*). As relief, the parent requested an order finding that the student required continued residential placement at JRC until an evaluation was conducted and a transition plan and program were in place, among other things, and also requested an interim order directing the district to maintain the student's "last agreed upon residential placement" at JRC during the pendency of the appeal and until the CSE could "properly evaluate the student and develop an appropriate transition program" (*id.* at pp. 1, 2, 3).

Impartial Hearing Officer Interim Order and Decision

An impartial hearing convened on November 12, 2010 (Tr. p. 1). At that hearing date the district's representative, the parent's counsel and the impartial hearing officer discussed the parent's request for an interim order and the merits of the case (Tr. pp. 1-9). The parent's counsel stated at the impartial hearing that he was prepared to call a witness from the psychiatric hospital to which the student had been admitted, who would testify that the hospital was not an appropriate place for the student at that time, but the hearing record reflects that the impartial hearing officer disallowed the testimony as irrelevant (Tr. pp. 8, 31-35). As a result of the discussions between the parties' attorneys and the impartial hearing officer, a date was set for the parties to submit briefs on the question of whether an impartial hearing officer has the equitable power to grant a preliminary injunction (Tr. pp. 29-47). During the first day of the hearing, no witnesses were examined and no documentary evidence was submitted into the hearing record (Tr. p. 2).

The impartial hearing officer rendered an interim decision dated November 18, 2010 (IHO Interim Order at p. 6). Upon considering the parties' memoranda of law, the impartial hearing officer found that administrative hearing officers have the equitable authority to order temporary injunctive relief in the form of a "temporary placement order" modifying a student's placement prior to determining the merits of a case, because hearing officers share the equity power of courts in general (*id.*). The impartial hearing officer noted that he lacked the power to modify a pendency or stay put placement once it had been determined, relying on Application of the Dep't of Educ., Appeal No. 10-083, because an impartial hearing officer's power in a pendency circumstance was limited to determining pendency in accordance with regulation (*id.* at pp. 5-6). However, the impartial hearing officer noted that in the instant case there was no pendency placement dispute, as both parties agreed that the student had aged out of special education and was not entitled to pendency (*id.* at p. 6). Instead, the impartial hearing officer concluded that the parent was seeking a traditional preliminary injunction on the merits and ordered the parties to appear to determine if the parent could demonstrate likelihood of success on the merits, irreparable injury if the injunction was not granted and that the relief sought was not unduly burdensome to the opposing party (*id.* at pp. 2, 6).

⁴ I also note that while the due process complaint notice was submitted "on behalf of the family" and lists two legal guardians, the answer in the present matter was submitted on behalf of the student's mother (*id.* at p. 1; *see* Tr. pp. 44-45; IHO Ex. 1 at pp. 1-2; Answer at p. 1).

The impartial hearing reconvened the same day that the impartial hearing officer issued the interim decision (Tr. p. 56). At that hearing date the parties' representatives and the impartial hearing officer discussed the impartial hearing officer's interim decision and what evidence would be required to show that a preliminary injunction would be appropriate (Tr. pp. 58-63). The parent's counsel made representations regarding the facts to which the parent's witnesses were prepared to testify (Tr. pp. 62-66). The district's representative discussed what in his view were disputed facts and he also made representations regarding the facts to which district witnesses were prepared to testify (Tr. pp. 68-74). The parties' representatives also engaged in a debate during the impartial hearing over the legal requirements of various entities regarding responsibility to plan and provide transition services for a student who is aging out of entitlement to services under the Individuals with Disabilities Education Act (IDEA) as well as the facts in the instant matter (Tr. pp. 69-84). The impartial hearing officer noted that the question of issuing a preliminary injunction could not be resolved without "testimony with respect to the facts" and discussed issuing subpoenas if necessary to acquire the appropriate witnesses (Tr. pp. 84-89, 98). During the second day of the impartial hearing, no witnesses were examined and no documentary evidence was submitted to the hearing record (Tr. p. 57). The impartial hearing officer directed the parties to submit briefs on the nature and extent of the district's responsibility to provide the student with transition services (Tr. pp. 87-100).

The parent's counsel submitted a memorandum of law and the district submitted a document entitled a "reply" containing factual and legal arguments signed by a non-attorney, and, thereafter the district submitted two affidavits in support of its reply (IHO Decision at p. 6).⁵ In a decision rendered November 29, 2010 the impartial hearing officer described the procedural history of the matter (*id.* at pp. 2-6). He noted that during the impartial hearing held on November 18, 2010, the factual colloquy led him to determine that there were "various disputes of both law and fact" such that he could not find that the parent had a likelihood of success on the merits and declined to order the preliminary injunction the parent sought (*id.* at p. 6). The impartial hearing officer also noted that at that hearing, at the request of the parent's counsel, he had agreed to permit further briefing of the disputed questions of law, on the theory that resolving those questions could "vitiating the need for a factual inquiry" (*id.*). The impartial hearing officer determined that he could not rely on the legal arguments in the district's reply, because it was not submitted by an attorney, but could rely on the factual assertions therein (*id.* at pp. 6-9).

According to the impartial hearing officer, the parent argued that a preliminary injunction was appropriate because she was likely to prevail on the merits (IHO Decision at p. 9). The district disagreed and further claimed that compensatory education was not appropriate (*id.*). The impartial hearing officer determined that the parties "frame[ed] the issue rather differently from the way in which I frame it" (*id.*). The impartial hearing officer concluded that the question to be resolved was whether the district as a principal adequately supervised its agent, JRC, in transitioning the student out of special education, and that this question was "directly answerable from the facts as the district averred them" (*id.* at pp. 10, 12). Consequently, the impartial hearing officer elected to treat the parent's motion as one for summary judgment, rather than as a motion seeking a temporary injunction (*id.* at p. 10). The impartial hearing officer noted that a motion for

⁵ The parent's November 23, 2010 memorandum of law was not included in the hearing record.

summary judgment may be granted if, taking the facts as alleged by the non-moving party, the movant's case has been demonstrated as a matter of law (IHO Decision at pp. 10, 12).⁶

The impartial hearing officer next determined that (1) the district had a non-delegable responsibility to engage in transition planning for the student, (2) JRC acting as an agent for the district did not relieve the district of this responsibility, and (3) the district and its agent had failed to properly manage the student's transition which led to him being "turned out" of a supportive setting at JRC back to the community with no support, which in turn, lead directly to the student being institutionalized into a psychiatric ward (IHO Decision at pp. 9-12). The impartial hearing officer determined that the district's failure was neither "an oversight or de minimus procedural lapse" and that the district severely deprived the student of a FAPE for a prolonged period (id. at p. 12).

The impartial hearing officer ordered the district to provide compensatory education in the form of returning the student to JRC for a period of 12 months or until such time as an appropriate transition to provision of services by a State agency responsible for services to adults can be accomplished (IHO Decision at pp. 12-13).

Appeal for State-Level Review

This appeal by the district ensued. The district requests that the impartial hearing officer's decision be annulled and the matter be remanded for an impartial hearing on the merits of the parent's compensatory education claim. The district argues that the impartial hearing officer erred in failing and/or refusing to hold an evidentiary hearing because there were outstanding issues of fact and that failing to give the parties an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses at the hearing violated the parties' due process rights. Specifically, the district identifies disputed facts regarding the actions of the district and JRC in relation to the CSE process, transition planning for the student and whether or not any actions or omissions resulted in a denial of a FAPE.

The district next argues that the impartial hearing officer failed to conduct a harm analysis with regard to the alleged procedural violation and failed to apply the correct legal standard in determining whether the student should be awarded compensatory education.

Lastly, the district argues that even if the student suffered a gross and prolonged deprivation of FAPE, the award of compensatory education should have been in the form of an award of transition planning rather than placement at JRC.

In her answer, the parent contends that the impartial hearing officer's decision and order must be affirmed. The parent argues that the undisputed facts show that the district failed to develop and implement an appropriate transition plan for the student and that the district cannot delegate its responsibility to do so to other entities.

The parent argues that the impartial hearing officer properly resolved the matter through summary judgment because a prompt result was appropriate under the IDEA given the exigent circumstances of the matter and because an evidentiary hearing was not necessary. A hearing was

⁶ Neither party submitted a motion for summary judgment to the impartial hearing officer in this case.

not necessary, according to the parent, because the impartial hearing officer properly accepted all of the district's allegations as true, granted the district every favorable inference available, and found that the results of an evidentiary hearing could not put the district in a more favorable position.

Lastly, the parent argues that the impartial hearing officer properly found a gross and prolonged denial of FAPE in light of the district's admissions and that the award of placement at JRC pending a proper transition plan was appropriate and necessary given the student's needs and in light of the district's deprivation of FAPE.

Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; 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, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs

special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). 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).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];⁷ 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation 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

⁷ If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, State Review Officers have awarded compensatory "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 (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. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

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

Discussion

Summary Judgment

Turning first to the district's contention that the impartial hearing officer erred in failing to conduct an evidentiary hearing, the IDEA requires that certain procedures be in place to safeguard the right of students with disabilities to a FAPE (see 20 U.S.C. § 1415). A parent or school district

may initiate a hearing to present complaints regarding the identification, evaluation, or educational placement of a student with a disability (or a student suspected of having a disability) or the provision of a FAPE to such student (34 C.F.R. § 300.507(a); 8 NYCRR 200.5[i][1]). "The 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]). In addition, an impartial hearing officer must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). In the interest of narrowing the issues to be litigated and avoiding unnecessary delay and expense to the parties, nothing precludes an impartial hearing officer from conducting a preliminary conference to clarify the presence of undisputed material facts or the issues to be decided (8 NYCRR 200.5[j][3][xi]; see J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000]), or wherever practicable, "enter into the record a stipulation of facts and/or joint exhibits agreed to by the parties" (8 NYCRR 200.5[j][3][xii][b] [emphasis added]). While an impartial hearing officer has the discretion to limit or exclude evidence or testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]), it is also an impartial hearing officer's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92). State regulations provide that an impartial hearing officer "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]) and contain provisions stating that "[e]ach party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]).

In this case, the impartial hearing officer did not have an adequate evidentiary basis to render a final decision. As a threshold matter, the impartial hearing officer, after indicating that he would determine whether the parent was entitled to a preliminary injunction, converted the parent's motion for a preliminary injunction into a motion for summary judgment of the parent's compensatory education claim without notifying the parties or giving them an opportunity to be heard on the issue (IHO Decision at p. 10).

Although the use of summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA, they should be used with caution and are appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D., 224 F.3d at 69; Application of the Bd. of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018). Here, both in memoranda submitted to the impartial hearing officer and on appeal, the district has identified unresolved factual issues that may affect a determination on the merits (IHO Ex. 7 at pp. 8-9; see Pet. ¶¶ 17-19). For example, in its submission to the impartial hearing officer, the district acknowledged that the district did not invite participants to the April 2010 CSE meeting; however, the district also noted that there was no basis for determining whether JRC had invited participants to the CSE meeting, whether the CSE composition would have been different, or had the April 2010 CSE composition been

different, whether such a difference would have affected the district's offer of transition services in the student's IEP (IHO Ex. 7 at pp. 8-9). The impartial hearing officer's factual determinations that the district "relied on the assumption that its agent had acted properly" and "pursued a 'don't ask, don't tell' approach to [the student's] transition" are also unsupported because a hearing record was not developed. The hearing record does not contain a joint stipulation of facts agreed to by the parties. I find that these unresolved facts, as the district correctly contends, weigh upon the question of whether any acts or omissions by the district resulted in a gross violation resulting in the denial of, or exclusion from, educational services for a substantial period of time. Additionally, at numerous points during the impartial hearing the parties, as well as the impartial hearing officer, noted that there were unresolved issues of fact, leaving the parties with every reason to expect that they would have an opportunity to present witnesses and enter evidence into the record (Tr. pp. 26, 34, 38, 61, 63, 65-72, 88, 94, 98). Although the impartial hearing officer was provided with two brief affidavits, I note that an impartial hearing officer may accept direct testimony by affidavit in lieu of in-hearing testimony provided that the witness is made available for cross-examination (8 NYCRR 200.5[j][3][xii][f]).

Moreover, assuming for the sake of argument that there was a procedural failure in preparing the transition plan in the student's IEP, as such, the impartial hearing officer could only find that a student did not receive a FAPE if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]; see e.g. Application of the Dep't of Educ., Appeal No. 09-024). The impartial hearing officer did not apply this standard in his analysis and there is no evidence in the hearing record upon which to make the required findings.

Lastly, the hearing record shows that the parties were not given an opportunity to present witnesses and offer evidence into the hearing record to support a determination of the appropriate level of compensatory education services in the event that it was determined there had been a gross denial of FAPE.

In view of the forgoing, I find that the impartial hearing was not conducted in a manner that was consistent with either State regulations or the requirements of due process (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j][3][xii][b], [c], [f], 200.5[j][3][xiii]). Accordingly, the case will be remanded for an evidentiary hearing on the merits of the parent's compensatory education claim.

Preliminary Injunction

The parent alternatively requests that, in the event that I remand the matter for a hearing, I issue a preliminary injunction ordering the district to fund the student's placement at JRC during the pendency of the hearing (Pet. ¶ 20; Answer ¶ 61). After review of the arguments on appeal, the arguments put forth by the parties during the impartial hearing, and the impartial hearing officer's interim order, I find, as further described below, that administrative hearing officers such as State Review Officers and impartial hearing officers lack the plenary equitable authority necessary to grant relief in the form of a temporary restraining order or preliminary injunction.

The IDEA and its implementing regulations explicitly grant administrative hearing officers the power to resolve placement disputes, including the provision for automatic injunction in the

stay put/pendency context (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Additionally, in the context of an interim alternative educational setting wherein an impartial hearing officer may order a change in placement of a child with a disability to an "appropriate" interim alternative educational setting for not more than 45 school days if the impartial hearing officer determines that maintaining the current placement "is substantially likely to result in injury to the child or to others" (20 U.S.C. § 1415[k][3][B][i] and [ii][II]; 34 C.F.R. § 300.532[b] [2][ii]). However, these statutory and regulatory provisions do not confer broad equitable authority to impose provisional remedies such as a preliminary mandatory injunction changing a student's then-current education placement, particularly where, as here, there is an absence of documentary or testimonial evidence upon which to predicate relief. I note that the aspects of the State Administrative Procedure Act (SAPA) relating to administrative adjudicatory hearing procedures do not confer a general power to administrative hearing officers to employ provisional remedies (see SAPA §§ 301-307).⁸ Additionally, examples of the use of limited provisional remedies in the administrative context have been supported by explicit statutory or regulatory authority (see, e.g., Civ. Serv. § 209-a[4][d] [authorizing the court to provide provisional relief during administrative hearings]; 6 NYCRR 620.2, 622.10-622.14 [authorizing and setting forth procedures for summary abatement and summary suspension orders issued by the Department of Environmental Conservation]; see additionally New York State Pub. Employment Relations Bd. v. City of Troy, 164 Misc.2d 9, 12-13 [Sup. Ct. Alb. County 1995] [describing how Civ. Serv. § 209-a(4)(d) was utilized to obtain injunctive relief from the court]; Ten Mile River Holding, Ltd. v. Jorling, 150 A.D.2d 927, 928 [3rd Dep't 1989] [describing explicit regulatory procedures for seeking a summary order from an administrative law judge enjoining a mining operation]).

Although the Supreme Court's decision in Forest Grove interpreting 20 U.S.C. § 1415[i][2][C][iii] may be viewed as possible support for the proposition that an administrative officer may issue a preliminary injunction as equitable relief, I note that issue before the Forest Grove Court involved an administrative officer's authority in fashioning appropriate equitable relief after a final determination that the district failed to offer the student a FAPE (Forest Grove, 129 S.Ct. at 2494 n11). No authority has been cited for the proposition that the statute conferred upon administrative hearing officers the extraordinary powers of provisional remedies such as a temporary restraining order or a preliminary injunction, which have traditionally been the province of the judiciary (see Honig v. Doe, 484 US 305, 327 [1988] [discussing the equitable power of district courts in IDEA cases]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 384-86 [N.D.N.Y. 2001] [issuing a preliminary injunction conferring a placement for a student who was over the age of twenty-one during the pendency of an administrative hearing]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 357 [S.D.N.Y., 2000] [holding that parents seeking to invoke the stay-put provision of the IDEA need not exhaust their administrative remedies first because were exhaustion required, it would defeat the purpose behind the stay-put provision, which determines the child's interim placement during the pendency of administrative proceedings]; Mayo v. Baltimore City Pub. Schs., 40 F. Supp. 2d 331, 334 [D.Md 1999] [noting that in the absence of a viable stay put placement or an administrative hearing officer's decision, a parent who is likely to prevail may attempt to obtain a preliminary injunction from the Court]; Mediplex of Massachusetts, Inc. v. Shalala, 39 F. Supp. 2d 88, 94 [D.Mass. 1999] [explaining that the District Court considers injunctions while administrative review is pending after determining that

⁸ I also note that SAPA does not literally apply to impartial hearings; however, it has been looked upon for guidance in procedural matters (Application of a Child with a Disability, Appeal No. 01-052).

administrative law judge lacked the power to issue a stay]; Jacobsen v Dist. of Columbia Bd. of Educ., 564 F. Supp 166, 170-171 [D.C.D.C 1983][holding that a District Court has the power to prevent abuse of the administrative process with matters such as dilatory tactics] see also Cosgrove, 175 F. Supp. 2d at 384, citing Honig, 484 US at 327 [holding that the requirement to exhaust administrative remedies does not apply where the moving party demonstrates that the administrative process would be futile or inadequate]).⁹ I have also considered the reasoning in the impartial hearing officer's interim order that an impartial hearing officer may issue an equitable order provided that it does not implicate money damages; however, I find this rationale unpersuasive (IHO Interim Decision at p. 4).¹⁰

Conclusion

As a final matter, as set forth below this matter will be remanded to a different impartial hearing officer for an evidentiary hearing on the merits of the parent's compensatory education claim. While I appreciate the impartial hearing officer's candor in disclosing that he previously participated in the formation of the district's policy regarding attorney representation at impartial hearings, I note that this policy became an issue of controversy in the instant case, and accordingly, as a matter within my discretion, I find that the matter should be remanded to a new impartial hearing officer (IHO Decision at p. 7).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision rendered November 29, 2010 is annulled; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, this matter shall be remanded to a new impartial hearing officer who shall reconvene the impartial hearing within 15 days of the date of this decision, and upon submission of sufficient testimonial and documentary evidence by the parties in accordance with State regulations, render a determination regarding the parent's compensatory education claim.

Dated: **Albany, New York**
 March 4, 2011

JUSTYN. P. BATES
STATE REVIEW OFFICER

⁹ In the instant matter, the parent's counsel stated that he considered bringing the pendency and preliminary injunction question directly to a district court and noted his belief that in this instance he did not have to exhaust the administrative remedies to do so (Tr. pp. 89-92).

¹⁰ By way of example, I note that procedures for issuing provisional relief contemplate the prospect of money damages. In New York, CPLR 6312(b) requires a party receiving a preliminary injunction must give an undertaking (i.e. a bond) in an amount determined by the court in the event that the enjoined party ultimately prevails and suffers damages by reason of the preliminary injunction (see also Fed. R. Civ. P. 65[c]). However, it is well settled that monetary damages are not available under the IDEA itself (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]; Application of a Child with a Disability, Appeal No. 05-039).