The University of the State of New York

The State Education Department
State Review Officer
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No. 11-075

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, attorneys for petitioner, John Tseng, Esq., of counsel

McDermott, Will & Emery, LLP, attorneys for respondent, Stephen J. Riccardulli, Esq. and Monica S. Asher, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to, among other relief, reimburse the parent for her son's tuition costs at the Aaron School for the 2010-11 school year. The appeal must be sustained in part.

Limited Issues on Appeal

Before turning to the merits of the appeal, I note that during the impartial hearing, the district conceded that it did not offer the student a free appropriate public education (FAPE) for the 2010-11 school year and the impartial hearing officer adopted its concession (Tr. pp. 28, 30; IHO Decision at p. 4). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Although I have conducted a thorough, independent review of the hearing record, given the limited issues remaining in this appeal, the parties' familiarity with the student's educational history and the impartial hearing officer's decision will be presumed and only those facts necessary to render a decision will be recited.

Background

At the time of the impartial hearing, the student was attending fourth grade at the Aaron School, where he has attended school since kindergarten (Tr. p. 49; Parent Ex. E at p. 2). During the 2010-11 school year at the Aaron School, the student attended a class with 12 students, one teacher, and one assistant teacher; and received one 30-minute session of speech-language therapy per week with a peer, one 30-minute session of occupational therapy (OT) per week with a peer, and one individual 30-minute session of counseling (Tr. p. 196; Parent Ex. A at p. 1). In addition, the student participated in a weekly 30-minute "social skills class" led by the school counselor and a weekly 30-minute "Alert" class led by the occupational therapist, both of which were integrated into the classroom (Tr. pp. 213-15). The student's class attended adapted physical education three times per week (Tr. p. 212). The student also received a weekly 60-minute private counseling session outside of school (Tr. pp. 30, 67-69).

The student demonstrates social deficits attributable to his difficulties with expressive and pragmatic language, emotional rigidity, and social cognition (Parent Exs. E at pp. 8-9; L at p. 4; Q at pp. 3-4). The student also demonstrates some weaknesses in fine and gross motor development, intrinsic hand strength, and motor planning (Parent Exs. E at pp. 8-9; I; N; Q at p. 5). He has recently begun to have problems with anxiety (Parent Ex. E at p. 8). The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The Committee on Special Education (CSE) convened on April 26, 2010 to develop the student's individualized education program (IEP) for the 2010-11 school year (Parent Ex. Q at pp. 1-2). After reviewing the available information, the April 2010 CSE recommended placing the student in a 12:1 special class in a community school for the 2010-11 school year with the following related services: one 30-minute session per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group of two; one 30-minute session per week of individual OT; one 30-minute session per week of OT in a group of two; one 30-minute session per week of individual physical therapy (PT); one 30-minute session per week of individual counseling; and one 30-minute session per week of counseling in a group of two (id. at pp. 1-2, 15-16). In discussing and considering other programs and services, the CSE included a notation in the student's IEP that he was exhibiting social/emotional concerns that "warrant[ed] additional support in the summer to prevent a regression of skills" (see id. at p. 14). On the first page of the IEP, the box indicating the student's need for a 12-month school year was marked "no;" however, the IEP included a notation that stated "[r]elated counseling, speech, OT and PT services for July and August 2010" (id. at p. 1; see Dist. Ex. 2).

After the April 2010 CSE meeting, the parent reported that she made several telephone calls to the district regarding obtaining related services authorizations (RSAs) for the student, and eventually went in person to the district to speak to someone regarding this request (Tr. p. 46; Parent Ex. U at p. 3). According to the parent, the district staff person told her that the student's prior settlement agreement had expired; that because the student was enrolled in the Aaron School, the parent had to go through "a different process" to obtain RSAs; that the CSE had erred in recommending the student for summer services; and that if she wanted RSAs, she had to pursue litigation against the district (Tr. pp. 46-47, 120-21). The district did not provide the student with related services for summer 2010 (Tr. p. 46). The parent reported that with the exception of counseling, which he received privately, the student did not receive services over the summer (Tr.

p. 47). She noted that the student's private counselor agreed to continue provide services to the student over the summer and wait for payment, because she was concerned about the student regressing (Tr. pp. 47-48).

By notice dated July 16, 2010, the district advised the parent of the school to which the district assigned the student for the 2010-11 school year (Parent Ex. R). By letters dated August 24, 2010, the parent rejected the district's assigned school and advised the district that she intended to enroll the student in the Aaron School beginning on September 7, 2010 (Parent Exs. S; T).

Due Process Complaint Notice

In a due process complaint notice dated September 24, 2010, the parent requested an impartial hearing alleging that the student's IEP and assigned school for the 2010-11 school year were inadequate as they did not meet the student's needs (Dist. Ex. 3 at p. 1). The parent noted that the student's physicians and therapists considered the student's continued enrollment in the Aaron School to be a "vital and necessary step in his educational development" (id.). The parent further asserted that the student should continue to be placed at the Aaron School, which would provide him with a small, structured classroom with appropriate special education support and related services (id.). The parent requested prospective payment of the student's tuition at the Aaron School and the issuance of RSAs for the 2010-11 school year, among other relief (id. at p. 2).

On the first day of school in 2010, the parent visited the assigned school, observed the proposed class, and spoke with the classroom teacher (Tr. pp. 50-51).

In an amended due process complaint notice dated November 29, 2010, the parent alleged that the assigned school was not appropriate for the student (Parent Ex. U at p. 2). The parent requested an order directing the district to, among other things, "immediately provide [the student] with a FAPE;" prospectively pay for the student's tuition to attend a 10-month program at the Aaron School; issue RSAs for the student's related services including speech-language therapy, OT, PT, and counseling for both the 10-month school year and July and August 2010; reimburse the parent for monies expended on related services for July and August 2010; and prospectively pay for a "suitable private car service" to transport the student to and from the Aaron School and his related services (id. at pp. 2-3).

Impartial Hearing Officer Decision

On February 10, 2011, the parties proceeded to an impartial hearing, which concluded on April 5, 2011, after two days of testimony (Tr. pp. 1, 9). At the impartial hearing, the parent clarified that in addition to the relief requested in the amended due process complaint notice, she also sought an award of compensatory services for "outside" services[1] that she was unable to obtain

[1] The impartial hearing officer noted that the student's Aaron School tuition and after school related services for the 2009-10 school year were funded by the district pursuant to a settlement agreement for a prior case involving the student (IHO Decision at p. 3; see IHO Ex. I at p. 8). The parent appears to refer to the after school services previously obtained through RSAs as "outside" services (see IHO Ex. I at p. 8).

during the 10-month 2010-11 school year, and for the related services that were mandated for July and August 2010 in the April 2010 IEP that the district had failed to provide (Tr. p. 30).[2]

By decision dated May 24, 2011, the impartial hearing officer adopted the district's concession that it had failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at p. 4). She noted that the parent's unilateral program consisted of the student's placement at the Aaron School for the 10-month school year with related services provided during the summer and after school, but that the parent had been unable to obtain the after school services, except for counseling (id. at p. 6). Regarding the Aaron School, the impartial hearing officer found that the school addressed the student's specific needs through accommodations such as "close proximity to the teacher, teacher facilitation of peer interactions including lunch, multisensory devices and teaching techniques, movement breaks, a structured school day, the use of a SMART board and graphic organizers, the use of manipulatives, extra time, visual tools, positive reinforcement, repetition, assistance with peers and social activities, and a method by which the student may communicate distress to the teacher privately" (id.). The impartial hearing officer found that the fact that the Aaron School did not provide PT and did not provide other related services "precisely as outlined by the CSE" did not render the placement inappropriate (id. at pp. 8-9). The impartial hearing officer also found that the parent had established the student's need for after school services, and that the need to supplement the services provided by the Aaron School did not render the placement inappropriate (id. at p. 9). The impartial hearing officer concluded that the parent's unilateral placement of the student at the Aaron School for the 10-month school year with after school related services and related services for July-August 2010, was reasonably calculated to provide educational benefits to the student (id.).

Further, the impartial hearing officer concluded that the student was entitled to "make up missed hours" of speech-language therapy, OT, PT, and counseling (IHO Decision at pp. 10-11). In reaching this determination, she found that notwithstanding any ambiguity in the student's IEP, the April 2010 CSE intended to provide the student with 1 hour per week of speech-language therapy, OT, PT, and counseling in summer 2010 (id. at p. 10). She further found that the parent had not requested the provision of all of the related service hours to which the student was entitled to since the beginning of the school year (id. at p. 11). According to the impartial hearing officer, "[a]lthough related services based on entitlement for July-August 2011 have been denied, the student is entitled to make up missed hours with one hour each week of [speech-language therapy,] OT, PT and counseling from the date of this order through August 31, 2011, to make up for missed sessions" (id.). She further noted that counseling had been privately provided to the student and therefore directed that counseling make up hours may not exceed the actual hours the student missed from July 1, 2010 through the date of her order (id.).

Addressing the equitable considerations in the case, the impartial hearing officer found that the parent cooperated with the CSE and that there was no basis to deny reimbursement (IHO Decision at p. 11).

Accordingly, the impartial hearing officer ordered the district to reimburse the parent for the portion of tuition she had already paid and directly pay the Aaron School the remaining tuition due; issue RSAs for speech-language therapy, OT and PT as of the date of the order through August

[2] The district did not object at the impartial hearing to this characterization of the relief sought by the parent, nor do they raise any such objection on appeal (see Tr. pp. 30-32).

31, 2010; directly pay for the private counseling services provided to the student from July 1, 2010 through the date of the order; and issue RSAs to be used through August 31, 2011, providing for counseling services that the student was entitled to receive from July 1, 2010 to June 30, 2011 (IHO Decision at pp. 13-14).

Appeal for State-Level Review

The district appeals, alleging that the impartial hearing officer erred in determining that the parent's unilateral placement at the Aaron School was appropriate because the Aaron School did not provide all of the student's needed related services and did not provide a 12-month school year program. The district also alleges that the hearing record does not show that the student made progress in OT and physical education at the Aaron School. The district further argues that the impartial hearing officer's order that the district provide RSAs for related services to supplement the parent's unilateral program was in error because the Aaron School was inappropriate and the district should not be required to correct the deficiencies in the parent's unilateral program. The district also contends that reimbursement for the Aaron School is not appropriate because it is a for-profit institution. The district further argues that equitable considerations bar reimbursement. The district requests an order vacating the impartial hearing officer's decision in its entirety.

It an answer, the parent argues that the impartial hearing officer correctly determined that the Aaron School was an appropriate placement because it provided educational instruction specially designed to meet the unique needs of the student, supported by such services as necessary to permit the student to benefit from instruction, and the student had demonstrated progress in the placement. The parent further argues that the student met all of the goals listed in the student's April 2010 IEP and that although the Aaron School did not provide the exact related services recommended in the IEP, the "totality of the circumstances" demonstrates that the school was appropriate and met his related services needs. The parent also argues that equitable considerations favor the parent. The parent requests an order dismissing the district's petition and affirming the decision of the impartial hearing officer.

Applicable Standards – Unilateral Placement

As noted above, in light of the district's concession at the impartial hearing and in the petition that it failed to offer the student a FAPE for the 2010-11 school year, the remaining issues before me are whether the parent established the appropriateness of the student's unilateral placement at the Aaron School and if so, whether equitable considerations favor the parent.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the Individuals with Disabilities Education Act (IDEA) (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have

paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every

> special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

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

Appropriateness of the Aaron School

The district contends that the Aaron School was inappropriate because it did not provide a 12-month program.[3] I note that although the district concedes that it failed to offer the student a FAPE, the April 2010 IEP in conjunction with other evidence contained in the hearing record, establishes that the student was entitled to receive 12-month school year services (Parent Ex. Q at pp. 1, 15; see Tr. pp. 83-84, 87, 89, 119, 126-27; IHO Decision at p. 10; see also Tr. pp. 48, 109-10).[4] Notably, the student's related services providers at the Aaron School recommended that the student receive 12-month services as did his other outside providers, who prepared 12-month services rationales in support of the parent's requested summer 2010 services from the district. The student's outside speech-language therapy provider recommended 12-month services because it was "imperative that [the student] maintain his acquired skills to an age appropriate level" (Parent Ex. B). Likewise, the student's speech-language provider at the Aaron School "strongly" recommended 12-month services because previous school breaks resulted in regression after which the student required greater prompting and support (Parent Ex. K). The student's outside OT provider "strongly" recommended 12-month services to prevent regression and so the student could "keep up" with peers (Parent Ex. G). The student's OT provider at the Aaron School recommended 12-month services because "a break in therapeutic intervention for an extended

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[3] Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see Application of the Bd. of Educ., Appeal No. 11-058; Application of a Student with a Disability, Appeal No. 09-088; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 C.F.R. § 300.106).

[4] Neither party contends that the student was not eligible for 12-month services.

amount of time would result in a significant regression of skills" (Parent Ex. H). The student's outside PT provider "strongly" recommended 12-month services to prevent regression and continue progress toward his goals (Parent Ex. M). Additionally, the parent testified that the student's private counselor recommended counseling over the summer months to prevent regression and because of the "severity and nature" of the student's counseling needs (Tr. pp. 47-48). The parent also testified that in September 2010 when the student resumed attendance at the Aaron School—after receiving only private counseling services in July and August 2010—she received reports from the student's teachers at the Aaron School indicating that the student required "a lot more assistance" in organizing his thoughts, physically keeping up with his peers, and focusing (Tr. p. 67).

The hearing record indicates that the Aaron School is a 10-month program and did not provide the student with any services during July and August 2010 (Tr. pp. 46, 169, 189; see Dist. Ex. 15). Moreover, with the exception of counseling, the parent was unable to independently obtain related services for the student during July and August 2010 (Tr. pp. 46-48, 67).

Based upon the documentary evidence and testimony by the student's related services providers at the Aaron School, his outside service providers, and the parent, the student required the provision of 12-month services in order to prevent substantial regression, which supports a finding that the parent has not sustained her burden to establish that the Aaron School was appropriate to meet the student's unique needs because as a 10-month school, the student's unilateral placement at the Aaron School was not specially designed to meet his unique needs, supported by such services as were necessary to permit him to benefit from instruction (see Gagliardo, 489 F.3d at 112; see also Application of the Dep't of Educ., Appeal No. 11-057).

In addition, the hearing record reflects that during the 10-month school year, the Aaron School provided the student with speech-language therapy once per week for 30 minutes in a group of two, OT once per week for 30 minutes in a group of two, and counseling once per week for 30 minutes individually (Parent Ex. A at p. 1). The student also attended adapted physical education and the "Alert" and "Social Skills" programs at the Aaron School, which both met weekly (Tr. p. 60; Parent Ex. A at p. 1).[5] The parent supplemented these services with one hour of private counseling once per week (Tr. pp. 67-68). Notably, the April 2010 IEP recommended individual speech-language therapy, individual OT, counseling in a small group, and individual PT (Parent Ex. Q at pp. 1-2, 15-16); all of which the Aaron school did not provide to the student during the 2010-11 school year.[6] Moreover, the impartial hearing officer determined that the parent established the need for after school services in addition to the student's placement at the Aaron School (IHO Decision at p. 9). The hearing record shows that the parent requested outside related services for the student for the entire school year and contended that due to the severity of the

[5] The student's teacher at the Aaron School described the "Alert" program as "basically OT in the classroom," taught by an occupational therapist with the whole class; and the "Social Skills" program as being facilitated by a school counselor, addressing issues inside the classroom and engaging in group problem solving of counseling needs (Tr. pp. 213-14).

[6] The April 2010 IEP recommended one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group of two; one 30-minute session per week of individual OT, and one 30-minute session per week of OT in a group of two; one 30-minute session per week of individual PT; one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a group of two (Parent Ex. Q at pp. 1-2, 15-16).

student's issues, regardless of whether he was in public school, he would require extra services outside of school (Tr. pp. 78-79; see also Tr. pp. 126-27).

Therefore, the hearing record indicates that although the student received speech-language therapy, OT, and counseling services at the Aaron School, the amount and frequency of those related services were insufficient to meet the student's needs in this case (see Application of the Dep't of Educ., Appeal No. 11-057; Application of a Student with a Disability, Appeal No. 08-119, Application of the Dep't of Educ., Appeal No. 07-018). Having reached this conclusion, along with the previous conclusion that the Aaron School did not provide 12-month services, I will annul the impartial hearing officer's finding that the Aaron School was an appropriate placement for the student for the 2010-11 school year.

Additional Services

I turn now to the impartial hearing officer's order providing compensatory "make up" services (IHO Decision at pp. 11, 13-14).

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 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

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[7] If a student with a disability 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]).

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]). 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).

Here, the district conceded at the impartial hearing that it failed to offer the student a FAPE during the 2010-11 school year and offers no evidence to rebut the parent's assertion that the district did not provide the student with related services during July and August 2010 (see IHO Decision at pp. 4-5). Accordingly, during the time period commencing July 1, 2010, when the district should have begun implementing the student's April 2010 IEP, and ending when the parent rejected the recommended placement by letters dated August 24, 2010, the student did not receive the services mandated in his IEP, and I find that this deprivation of instruction can be remedied through the provision of additional services consisting of speech-language therapy, OT, PT, and counseling as set forth in the order below (Parent Exs. S; T).[8]

Conclusion

Upon due consideration of the hearing record, I find that the impartial hearing officer erred in concluding that the parent sustained her burden to establish the appropriateness of the student's unilateral placement at the Aaron School for the 2010-11 school year; therefore, the necessary inquiry is at an end and there is no need to reach the issue of whether the equities support the parent's claims (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

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[8] I will annul the impartial hearing officer's order directing the district to reimburse the parent for the private counseling services the parent obtained during the 2010-11 school year because the hearing record contains insufficient evidence to show that such services were appropriate.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision rendered May 24, 2011 is annulled; and

IT IS FURTHER ORDERED that the district shall provide the student with once weekly 60-minute individual session each of speech-language therapy, occupational therapy, physical therapy, and counseling services as additional educational services at a time and location reasonably convenient to the parent to make up for the services the student missed during summer 2010.

Dated: **Albany, New York**
August 25, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER