The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 11-096

Application of the BOARD OF EDUCATION OF THE TACONIC HILLS CENTRAL 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:

Girvin & Ferlazzo, P.C., attorneys for petitioner, Karen S. Norlander, Esq., of counsel

Law Office of Andrew K. Cuddy, attorneys for respondents, Andrew K. Cuddy, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2010-11 school year. The parents cross-appeal from that portion of the impartial hearing officer's decision which denied their request for additional services. The appeal must be sustained. The cross-appeal must be dismissed.

Background

The student's educational history is set forth in detail in Application of a Student with a Disability, Appeal No. 11-027 and the parties' familiarity with the student's educational history and prior due process hearings is assumed and will not be repeated here in detail. Briefly, the student has a diagnosis of autism and experiences difficulty communicating his needs (Dist. Ex. 5 at p. 1). Additionally, the student also has a diagnosis of craniosynastosis, engages in elopement behaviors, and reportedly exhibits a limited awareness of danger (id.).[1] During some periods while this proceeding was pending, the hearing record suggests that the student was unavailable for "formal instruction" (see, e.g., Tr. p. 759). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

---

[1] The hearing record defines craniosynastosis as uneven bone protrusions (Dist. Ex. 5 at p. 1).

As discussed in greater detail in Application of a Student with a Disability, Appeal No. 11-027, the Committee on Special Education (CSE) convened on May 19, 2010 for the student's annual review and to develop an individualized education program (IEP) for the student's 2010-11 school year (Dist. Ex. 7). On June 23, 2010, the CSE reconvened to continue the student's annual review and to discuss the provision of extended school year services (ESY) services for summer 2010 (Dist. Ex. 14). At the June 2010 CSE meeting, the student's mother requested that the district implement the student's January 2010 IEP (id. at p. 28). For summer 2010, the district recommended that the student receive three hours of instruction per day with a board certified behavioral analyst (BCBA) in addition to related services that included four 40-minute sessions of speech-language therapy and one 60-minute session to be offered once per week (Tr. pp. 70-72; Dist. Ex. 14 at pp. 42, 54). In addition, the district recommended the provision of two 45-minute sessions of occupational therapy (OT) and physical therapy (PT) to be delivered on a co-treatment basis (Dist. Ex. 14 at pp. 42, 54). The district also recommended the provision of an aide who was trained in crisis intervention and was proficient in sign language (id. at p. 42).

By letter dated June 28, 2010, the admissions chairperson of a State-approved nonpublic school (nonpublic school) advised the district that based on documentation provided by the district and a home observation, the student's educational needs could be met at the nonpublic school (Dist. Ex. 12). However, the admissions chairperson advised that the nonpublic school's admissions committee would make the final determination following receipt and review of a completed parent questionnaire and a meeting with the parents and the student to take place at the nonpublic school (id.). The admissions chairperson further indicated that, the parents advised her on June 4, 2010 that they did not intend to proceed with the nonpublic school's application process due to the distance between their home and the nonpublic school, (id.).

During summer 2010, having obtained the parents' consent to send referral packets to various day programs for the student, the CSE chairperson continued to explore different program options that could potentially deliver his IEP (Tr. pp. 74-75; Dist. Ex. 13 at pp. 2).

On July 6, 2010, while the student's mother remained with him, the student began his ESY program in the district; however, he did not return after the second day (Tr. pp. 72, 510-15, 1341; Joint Ex. 49 at p. 11). According to the student's mother, on July 7, 2010, the student's teacher withheld water from him during a "very hot day," and the district was not able to implement the student's June 2010 IEP, his behavior support plan, or his safety plan (Tr. p. 515; Joint Exs. 49 at p. 15; 53).[2]

By e-mail dated July 12, 2010 from the student's mother to the district school principal (principal), the student's mother alleged that the supervision of the student's program was inadequate, and that staff was not trained to implement the student's IEP or establish instructional control (Joint Ex. 51). She further indicated that unless the district would allow the parents to

[2] On July 14, 2010, the parents filed an incident report with the county's sheriff's office regarding the July 7, 2010 incident, in which they raised allegations of child endangerment by the teacher and teacher's assistant (Joint Ex. 53 at pp. 1-2, 5). Upon investigation of the parents' allegations, an officer determined that there was no criminal action and the matter was closed (Tr. p. 589; Joint Ex. 53 at p. 5). On or about July 23, 2010, the parents filed a State administrative complaint against the district with the New York State Education Department (NYSED) regarding the July 7, 2010 incident, which was later dismissed (Joint Ex. 52 at pp. 1, 9-10).

remain with the student during instruction or videotape the student's program, they could not return the student to the program because they deemed it unsafe (Tr. p. 515; Joint Ex. 51).

In a letter dated July 28, 2010, a county Board of Cooperative Educational Services (BOCES) informed the district that after reviewing the student's referral information and completion of an intake interview, BOCES could not offer the student a program (Dist. Ex. 10; see Dist. Ex. 11). According to BOCES, the parents had "refused" the BOCES program because it did not provide applied behavioral analysis (ABA) services (Dist. Ex. 10).

On August 13, 2010, given the parents' concerns regarding the travel time from their home to the nonpublic school, the CSE chairperson made a request to the New York State Education Department (NYSED) for a travel variance for the student to attend the nonpublic school and advised that no other program options existed for the student (Tr. pp. 87-88; see Dist. Ex. 9). By letter dated August 26, 2010, NYSED consented to the district's request for the travel variance (Tr. p. 88; Dist. Ex. 9).

On August 31, 2010, the CSE reconvened for a third time to continue the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Exs. 5; 13). The following individuals participated in the August 2010 CSE: the CSE chairperson, the CSE secretary, the student's mother, the parent's attorney, the principal, the district's attorney, and a district special education teacher (Tr. p. 108; Dist. Ex. 13 at p. 1).[3] For the 2010-11 school year, the CSE recommended the student's placement in a 6:1+3 class at the nonpublic school, contingent upon the parents' completion of the intake process (Tr. pp. 86-87, 100-01; Dist. Exs. 5 at p. 3; 13 at pp. 9-12). Related services recommendations included group and 1:1 OT, group and 1:1 PT, and 1:1 speech-language therapy (Dist. Ex. 5 at pp. 57-58). Goals and objectives contained in the resultant IEP were carried over from the January 2010 IEP (Tr. p. 107). The CSE chairperson noted that the nonpublic school was capable of implementing the student's IEP; she urged the parents to continue with the intake process before rejecting the program (Dist. Ex. 13 at p. 20). The student's mother explained that given the extensive distance between the nonpublic school and her home, she had no intention of sending the student there (id.). Notwithstanding the parent's objections to the nonpublic school based on the travel time, the CSE chairperson indicated that it was the "only viable recommendation" at that point for a day-treatment program for the student (Tr. p. 86). The principal added that at the time of the August 2010 CSE, the CSE did not have another program to which to send the student, but he further stated that "at best [they were] going to pull together pendency" for the student (Dist. Ex. 13 at p. 23). At the close of the August 2010 meeting, although the parent's attorney noted that they did not agree with the CSE's recommendation for the nonpublic school, he represented that the parents would pursue the intake process (id. at p. 48).

On August 31, 2010, the CSE chairperson sent an e-mail to the admissions chairperson at the nonpublic school and the student's mother, among others, describing the intake process at the nonpublic school as well as the contact information for the individual that the parents should telephone to schedule a visit (Dist. Ex. 23).

[3] The student's mother waived her right to the attendance of an additional parent member at the August 2010 CSE meeting (Dist. Ex. 13 at p. 2).

By e-mail to the parents dated September 4, 2010, the principal advised that the district reassembled a "team of highly qualified educators" for the student's class, including a certified special education teacher experienced with working with autistic students and ABA instruction, a speech-language teacher who briefly worked with the student during summer 2010, and an aide who was familiar with sign language (Dist. Ex. 26). Although the principal noted that he had yet to secure the services of a new behavioral consultant, in the interim, the principal assigned the district school psychologist to offer behavioral support to the team (id.). For the first three days of the school year, the principal recommended that the student attend on a half-day basis, and he further suggested that on September 13, 2010, the district would transition the student to a full-day schedule (id.). He also sought the parents' feedback regarding this proposal (id.). The principal offered to meet with the parents on September 7, 2010 to address their concerns regarding the program (id.). In addition, given the concerns that had previously arisen regarding "marks" on the student, the principal offered to implement twice daily examinations of the student by the school nurse (id.). Although the principal would not consent to the parents' request to constantly videotape instruction of the student or their request to remain with him throughout the school day, he agreed to schedule planned visits for specific purposes and videotaping for specific instructional purposes (id.). The principal also expressed his concerns that the student's educational experience had been negatively impacted by the deterioration of mutual trust between the parties, and urged the parents to work collaboratively with the district in an effort to allow the team an opportunity to get to know the student and work with him (id.). The principal stated that he was "determined that [they] not repeat mistakes of past" (id.). Toward that end, the principal explained that he was "prepared to do what [he could] to help build the trust necessary to give [the student] and his new teachers the best opportunity for success" (id.). He further requested that the parents advise him regarding his proposal to begin the student's school year with a half-day schedule (id.).

On September 7, 2010, the parents cancelled the meeting that the principal had scheduled for that date, and requested that he send them information regarding the staff by facsimile (Tr. pp. 1359-60). That same day, the principal responded to the parents in an e-mail that contained information regarding the individuals secured by the district to work with the student, as well as their backgrounds and credentials (Tr. p. 1360; Dist. Ex. 25). The principal further advised that he expected the student to attend school on September 8, 2010, and reminded the parents that he continued to await a response from them regarding his plan to start the student on a half-day schedule and transition him to a full-day schedule for the second week of school (Dist. Ex. 25).

On September 8, 2010, the student came to the district elementary school for the first day (Tr. pp. 611-12, 1360). The student rode the bus to school and the student's father travelled close behind (Tr. p. 1364). After the student got off the bus, the principal found the student with his father in the nurse's office (id.). The student's father was "agitated," and demanded to remain at school with the student (Tr. pp. 1364-65). The principal denied his request to stay at school, but asked him to consider allowing the student to try the program (Tr. p. 1365). Despite the principal's efforts to convince the parent otherwise, the parent left with the student (id.).

Also on September 8, 2010, around noon, the student's mother e-mailed the CSE chairperson that on September 3, 2010, the student had been given a diagnosis of Lyme disease for which he was taking antibiotics (Dist. Ex. 24 at p. 1). According to the student's mother, late that morning, the student had developed a fever, although he did not have one earlier in the day (id.). The student's mother further advised that in keeping with school policy, the parents planned

to keep the student home until his fever broke (Tr. p. 1365; Dist. Ex. 24 at p. 1). The student's mother notified the CSE chairperson that the student had a doctor's appointment scheduled for the next day at which time they planned to discuss the student's symptoms, and that they would share any information that "might impact school" (Dist. Ex. 24 at p. 1). According to the parent, the student's father planned to discuss the student's diagnosis with the principal that morning and provide him with a report, but he did not get the chance (id.).

In an e-mail to the student's mother dated September 16, 2010, the CSE chairperson re-sent the August 31, 2010 e-mail outlining the nonpublic school's intake process (Dist. Ex. 23). Although the CSE chairperson acknowledged that the parents did not agree to the placement, she reminded the parent that her attorney had represented at the August 2010 CSE meeting that they would schedule the intake interview (id.). The CSE chairperson urged the parents to schedule the intake, in order to answer any questions that remained regarding the nonpublic school (id.).

On September 21, 2010, the CSE chairperson e-mailed the student's mother and advised her that it was reported to her that the parents were interested in the provision of a home-based program for the student in lieu of the school-based pendency (stay-put) placement (Dist. Ex. 22a at pp. 1-2). She requested confirmation of the parents' wishes for their son's educational program, in order to reengage the student in an educational program (id. at p. 2). In the meantime, the CSE chairperson indicated that she hoped to continue to work with the parents in an effort to identify an appropriate change of placement for the student (id.). The CSE chairperson further explained that if the parents remained interested in pursuing a day-treatment program for the student, the CSE continued to recommend that the parents complete the intake process at the nonpublic school (id.). Additionally, the CSE chairperson asked the parents to confirm whether they were considering residential placement for the student, and if so, she offered to forward a referral packet to a potential residential placement immediately (id.). The CSE chairperson attached a "consent to release records" form to the e-mail, and requested that the parents complete it and return it to her as soon as possible (id.). Later that day, the student's mother responded to the CSE chairperson's e-mail and confirmed that in light of the July 2010 incident, the parents believed that an interim home-based program was the best way to ensure the student's safety and enable him to receive educational services as soon as possible (id. at p. 1). She further advised that the parents wanted the student's home-based program to be as comprehensive as possible (id.). The student's mother concluded by thanking the CSE chairperson for her efforts to expedite the process, and added that she would advise her regarding residential placement the next day (id.).

By e-mail dated September 23, 2010, the CSE chairperson advised the student's mother that after "thoughtful consideration of [her] request to relocate [the student's] program to [her] home, [the district] decided that it would not be appropriate to do so" (Dist. Ex. 22a at p. 1). The district continued to offer the student's school-based pendency placement (id.). Assuming that the student was feeling better and ready to resume instruction, the CSE chairperson asked the student's mother to contact the principal to make the necessary arrangements for his return (id.).

Due Process Complaint Notice

By due process complaint notice dated September 28, 2010, the parents requested an impartial hearing, alleging that the August 2010 IEP denied the student a free appropriate public education (FAPE) for the 2010-11 school year (Dist. Ex. 1). Among other things, the parents

raised the following assertions: (1) the student's placement recommendation at the nonpublic school was predetermined; (2) the district failed to provide the parents with information about the nonpublic school, which in turn, deprived them of the opportunity to participate in the decision making process of the CSE; (3) the August 2010 CSE was not properly composed, because a representative from the nonpublic school did not participate in the meeting; (4) the district did not have an IEP in place for the student at the beginning of the school year; and (5) the district was unwilling or unable to implement the student's pendency placement at the beginning of the 2010-11 school year (id. at pp. 6-7).

As relief, the parents sought among other things, an award of "corrective/additional services" (id. at pp. 8-9). Additionally, the parents requested that the impartial hearing officer issue the following orders, which included among other things: (1) directing the district to implement the services contained in the student's pendency placement with appropriate supervisory services; (2) directing the district to provide extended school day services, parent training and counseling; (3) directing the district to employ a teacher who was experienced working with students who had a diagnosis of autism; (4) directing the district to employ teaching and related services staff for the student who were competent in sign language; (5) directing the district to record the student's educational and related services programming for the entirety of the school day and allowing the parents access to these videos at their discretion; (6) directing the district to provide two hours per week of home-based parent training, including ABA instruction and sign language to continue through 2012; and (7) directing the district to enter into a contract with the Carbone Clinic for weekly review of program data during the first four months of programming, and monthly review thereafter for the first year (id.).

In an e-mail dated September 29, 2010 to the principal, per an inquiry from the school nurse, the student's mother advised that the student continued to suffer from symptoms of Lyme disease (Dist. Ex. 29 at p. 1). According to the parent, the student's physician had described the symptoms of Lyme disease as serious, and he advised that the student's inability to speak compromised the physician's ability to promptly identify and treat him (id.).

By e-mail dated October 4, 2010 to the student's mother, the principal requested information regarding the student's condition (Dist. Ex. 29 at pp. 1-2). He further advised that if the student continued to remain absent from school due to illness, that they should discuss the provision of homebound instruction, and he explained the nature of homebound instruction and that a doctor's note was required in order to verify the student's absence from school (id. at p. 2). The principal also requested the parents' consent to allow the school nurse to speak with the student's physician (id.).

In a letter dated October 5, 2010, the student's physician indicated that the student had "increased symptoms" of Lyme disease (Tr. p. 1368; Dist. Ex. 29 at p. 4). According to the physician, it was his professional opinion that in light of the student's condition and history of autism, that the student should receive "home studies" (Dist. Ex. 29 at p. 4). The physician advised that the student's condition would be aggravated in a public facility (id.). He added that there was no way of knowing how long the student's symptoms would persist, therefore, "home studies" would be in his best interest (id.).

In an e-mail dated October 8, 2010, the CSE chairperson informed the student's mother that the principal was assembling staff to provide homebound instruction to the student, which would include five one-hour sessions per week with a special education teacher and five 40-minute sessions per week of speech-language therapy (Dist. Ex. 29 at p. 6). According to the CSE chairperson, the teacher and speech-language therapist would come to the student's house together, so that one person would be able to collect data while the other person instructed the student (id.). The CSE chairperson informed the student's mother that the principal would contact her shortly to confirm when the services would begin (id.).

District Response to Due Process Complaint Notice

On or about October 12, 2010, the district submitted a response to the parents' due process complaint notice in which they admitted and denied the parents' allegations (Dist. Ex. 2). The district asserted that since the first day of the 2010-11 school year, it had contracted professional staff to implement the student's IEP (id. at p. 3). The district further asserted that it was unable to finalize its recommendation and implement the student's 2010-11 IEP, until the parents pursued the nonpublic school's intake process (id.).

By e-mail dated October 12, 2010, the principal advised the student's mother that he planned to accompany the staff assigned to provide the student with home instruction to the parents' home on October 13, 2010 for a meeting to address the parents' questions regarding programming (Dist. Ex. 29 at p. 9). The student's mother responded by an e-mail dated October 13, 2010 requesting that the meeting occur at the school (id. at pp. 9-10). Later that morning, the principal advised the parent that per the physician's October 5, 2010 instructions and concerns that a public facility could aggravate the student's condition, the meeting would have to take place at their home (id. at p. 10). Subsequently, the parents notified the principal that the meeting at their home was cancelled and the district unsuccessfully attempted to schedule a meeting at the parents' home for the following day (id. at pp. 11-13).

On October 18, 2010, the district began to provide the student with home instruction (Tr. pp. 1375, 1380, 1385). On October 20, 2010, the student's father videotaped the student's instructional session with his teachers without their consent (Tr. pp. 1052, 1385-86). The principal subsequently advised the parents that surreptitious videotaping of the student's instructional sessions was not acceptable (Tr. pp. 1386-87).

On November 4, 2010, the student's father stopped the student's session while the student was reportedly agitated (Dist. Ex. 29 at p. 21).[4] Although the parent believed that the student's behaviors were becoming worse, and suggested that the home-based services should cease until the providers obtained training in verbal behavior instruction, the student's teacher wanted to continue the sessions with the student (Tr. p. 1044). Also on that date, the student's father came to the principal's office and requested a meeting (Tr. p. 1399). Although the parent did not have a scheduled appointment, the principal arranged to meet with him to discuss his concerns (id.). According to the parent, the student's home instruction teachers lacked the necessary training to effectively teach the student (id.). The parent further stated that it was not safe for staff to be in their home, and that home-based services needed to be suspended (id.). In addition, the parent

[4] This was the final date that the district provided the student with home-based services (Tr. pp. 672, 1404).

represented that the student's providers were in complete agreement with him to suspend the home-based services and that they were not adequately prepared or trained for the assignment (Tr. pp. 1399-1400). Following this meeting, the principal contacted the student's home-based providers (Tr. pp. 1051-52, 1400). The student's home-based providers advised the principal that the parent unilaterally suspended the student's home-based services (Tr. pp. 1400-01).

In an e-mail dated November 9, 2010, the student's mother maintained that the student's home-based providers advised the parents that they could not implement the student's IEP and that they needed additional training to be able to do so (Dist. Ex. 29 at p. 27). According to the student's mother, the home-based providers could not "establish instructional control," and consequently, the student continued to engage in elopement behaviors and throw objects and furniture (id.). The parent further explained that without instructional control, the student was physically unsafe, and that he anticipated the providers' arrival "with great anxiety" (id.). She added that if the student's behaviors continued they could not continue with the home-based program and threatened to hold the district liable for any damages incurred during provision of the home-based program, because they had put the district on notice of their safety concerns (id. at p. 29). The student's mother concluded her e-mail by stating that she wanted her son's IEP implemented (id.).

Impartial Hearing Officer's Interim Order

The parties proceeded to an impartial hearing on December 13, 2010 and after eight nonconsecutive days of testimony concluded on April 15, 2011 (IHO Decision at p. 1; Tr. pp. 1-1844). During the impartial hearing, on April 12, 2011, the impartial hearing officer issued an interim order and decision on pendency, in which he concluded that the January 2010 IEP constituted the student's pendency placement (Interim IHO Decision at pp. 5, 8). Furthermore, the impartial hearing officer found that claims pertaining to the 2010-11 school year were ripe for review, and noted that there was "no dispute that there was no seat available for the student in the [nonpublic school] placement at the start of the 2010-11 school year" (id. at p. 5). Next, the impartial hearing officer declined to give collateral estoppel effect to a previous impartial hearing officer's decision to the extent that it addressed issues regarding the 2010-11 school year that the prior impartial hearing officer refused to hear (id. at p. 6). Similarly, the impartial hearing officer rejected the district's contention that the parents' claims regarding the 2010-11 school year were barred on the basis of res judicata, because he determined that the district did not give the parents appropriate notice of such claims (id. at pp. 6-7). Lastly, the impartial hearing officer declined to appoint a guardian ad litem for the student, noting that the issue of the appointment of a guardian ad litem had not been raised during the previous impartial hearing and was not actually litigated (id. at pp. 7-8).

Impartial Hearing Officer Decision

By decision dated July 5, 2011, the impartial hearing officer found that the August 2010 IEP was inappropriate and resulted in a denial of a FAPE to the student (IHO Decision at p. 12). Specifically, he found that the district failed to offer the student a FAPE in a timely manner, because there was no seat available to the student at the beginning of the 2010-11 school year at the nonpublic school (id. at pp. 12-13). In addition, the impartial hearing officer rejected the district's contention that because the August 2010 IEP was similar to the January 2010 IEP, the last agreed-upon IEP, the placement where the program would be implemented was immaterial,

finding in part that "such a view would undermine federal regulations providing parents the right to participate in placement (as well as IEP) decisions" (id.). The impartial hearing officer also rejected the district's assertion that the parents understood that the CSE was recommending a district program instead of the nonpublic school (id. at p. 13). Next, the impartial hearing officer determined that the absence of a staff member from the nonpublic school at the August 2010 CSE did not deprive the parents of an opportunity to meaningfully participate in the development of the student's IEP because they were afforded an opportunity to participate in the May 2010 CSE meeting and a representative from the nonpublic school attended the May CSE meeting (id. at p. 14).

Regarding the parents' claims that the district denied them of a meaningful opportunity to participate in the development of the student's IEP, the impartial hearing officer characterized such claims as "baseless" (IHO Decision at p. 14). To the contrary, the impartial hearing officer found that the district inappropriately acquiesced to the parents' demands regarding the student's program for the 2010-11 school year and such acquiescence did not result in providing the student with a FAPE during the school year, as the student remained almost exclusively without instruction (id. at pp. 15-16). The impartial hearing officer concluded that the parents were provided with ample opportunity to participate in making recommendations for the student during the 2010-11 school year and they misused those opportunities (id. at p. 16).

Next, the impartial hearing officer found that the implementation of the January 2010 IEP with staff comparably trained to the staff who underwent the Carbone Clinic training in January 2010 was sufficient to provide the student with a FAPE (IHO Decision at p. 16). Further, the impartial hearing officer determined that the Carbone-specific form of ABA instruction was not necessary in order to ensure that the student would make meaningful progress (id. at p. 17). However, the impartial hearing officer concluded that the student's IEP required the addition of a BCBA to oversee the student's behavior management needs and ensure the safe provision of instruction (id.). He further found that in order to receive a FAPE, the student required a functional behavioral analysis (FBA) performed in the school environment and a behavioral intervention plan (BIP) that addressed the student's social/emotional and behavior needs, that included a number of inappropriate and dangerous behaviors (id.). The impartial hearing officer went on to find that the January 2010 IEP failed to provide for specific interventions when the student engaged in dangerous or inappropriate behaviors that were documented in the IEP (id. at p. 18). In addition, the impartial hearing officer described the Carbone Clinic's recommendations to address the student's behaviors as "woefully inadequate" and "wholly insufficient" to address behaviors, such as flopping, kicking, and spitting (id.). The impartial hearing opined that the student required a "more intensive program of physical restraint" to ensure his safety and that of others (id.). Under the circumstances, the impartial hearing officer concluded that the January 2010 IEP was deficient and inappropriate absent a behavior reduction plan that acknowledged the student's dangerous and aggressive behaviors and created a plan to reduce those behaviors (id. at p. 19). Lastly, although he deferred to the "expertise" of district staff, the impartial hearing officer suggested that, given the student's prolonged absence from school, additional testing of the student may be necessary to determine the student's present levels of performance and appropriate goals (id.).

Next, the impartial hearing officer determined that sign language was "an integral part of providing appropriate instruction" to the student and recommended that it should be specifically added to the student's IEP (IHO Decision at p. 19). With regard to the parents' request for parent

training, the impartial hearing officer determined that appropriately trained district staff who were knowledgeable in providing ABA instruction emphasizing language development, and experienced in using sign language and were capable of providing parent training would result in the student making meaningful progress in the home setting (id. at p. 20). Lastly, although he declined to order that the student's IEP provide for unscheduled parent visits to the student's school or that the district videotape the student's instruction, the impartial hearing officer agreed with the recommendation that videotaping the student's instruction as part of staff training was appropriate as well as to assist in the development of an FBA and a BIP (id.).

With respect to the parents' request for an award of additional services, the impartial hearing officer agreed with the State Review Officer's decision in Application of a Student with a Disability, Appeal No. 11-027 that any request for additional services should be conditioned on the district's failure to have appropriately trained staff in place to deliver the services, and the parents' good faith efforts to work cooperatively with the district in returning the student to a district placement (IHO Decision at p. 21). The impartial hearing officer concluded that in July 2010, although the district had appropriately trained staff to provide special education services to the student, the parents acted uncooperatively with respect to returning him to a school-based placement and failed to allow instruction in their home without substantial and inappropriate interference (id. at pp. 22, 25). As a result, the impartial hearing officer denied the parents' request for additional services (id.).[5]

Lastly, the impartial hearing officer ordered the CSE to reconvene and modify the student's IEP in accordance with his decision (IHO Decision at pp. 26-27). He further indicated that until an appropriate district program was secured for the student, the student's IEP shall reflect the recommendations contained in the January 2010 and August 2010 IEPs, regarding the student present levels of performance, annual goals and short-term objectives, program and services, unless the CSE determined that additional testing was necessary prior to making program recommendations for the student (id. at p. 27). The impartial hearing officer also ordered that the district conduct an FBA within 30 days of the student's return to school (id.). Next, the impartial hearing officer afforded the district "a reasonable time," not to exceed 60 days, to assemble providers to implement the student's IEP in the district (id.). Lastly, he granted the parents a "reasonable opportunity" to observe the student in school, consistent with the district's policy affording parents that opportunity (id.).

Appeal for State-level Review

The district appeals and requests an annulment of the impartial hearing officer's orders, including his pendency order, in addition to a finding that the student was offered a FAPE during the 2010-11 school year. The district alleges that the impartial hearing officer exceeded his authority when he ordered the CSE to reconvene to modify the student's IEP to include a BCBA, sign language, and the development of an FBA and a BIP. Likewise, to the extent that the impartial hearing officer's orders were intended to pertain to the 2010-11 school year, the district asserts that such claims are moot because the school year has ended and the relief awarded by the impartial

[5] Furthermore, in denying the parents' request for relief, the impartial hearing officer accepted the prior impartial hearing officer's findings with regard to the parents' lack of credibility, noting that her findings were consistent with the instant case (IHO Decision at pp. 23-24).

hearing officer would have no actual effect on the parties. In the alternative, the district argues that if the impartial hearing officer's intention was to modify the student's pendency placement by directing retroactive changes to the January 2010 IEP, the impartial hearing officer lacked the authority to retain jurisdiction in the matter. Lastly, to the extent that the impartial hearing officer's orders were directed toward the 2011-12 year, the district argues that such relief was premature and in excess of his authority.

Next, the district alleges that during the 2010-11 school year, it offered the student a FAPE and it afforded the parents a meaningful opportunity to participate in the development of the student's program. While the district concedes that at the time of the August 2010 CSE meeting, it knew that the nonpublic school did not have a seat for the student, the district submits that by refusing to follow through with the intake procedures of the nonpublic school, the parents effectively guaranteed that no seat would be available for the student in fall 2010. The district further maintains that the parents understood the nature of the August 2010 CSE's recommendations for the student, and that in the event that there was no program to send the student at the nonpublic school, the district would "at best … pull together pendency." The district further maintains that while the August 2010 IEP may have contained a procedural error identifying the nonpublic school as the student's assigned school, in light of the circumstances of this case, such error did not rise to the level of a denial of a FAPE because the recommendation was contingent upon the intake interview and it included a "backup" program, which the impartial hearing officer deemed sufficient to offer the student a FAPE.

With regard to the impartial hearing officer's April 2011 interim order on pendency, the district requests that it must be dismissed as moot. Further, the district alleges that the interim order on pendency was improper for the following reasons: (1) neither party requested a ruling on pendency, and it was therefore issued without proper notice to the parties; (2) the prior impartial hearing officer had previously addressed the issue of the student's pendency placement; and (3) the impartial hearing officer and State Review Officer had previously issued decisions regarding the student's pendency placement.

The parents submitted an answer in which they admitted and denied the district's allegations. The parents assert that the impartial hearing officer correctly found that the district denied the student a FAPE during the 2010-11 school year. The parents further allege that the nonpublic school was not an appropriate placement for the student, because it was incapable of implementing the student's IEP and that the CSE had no basis to recommend the nonpublic school as a placement for the student. Moreover, the parents argue that the hearing record fails to indicate that staff at the nonpublic school were trained in the methods recommended by the Carbone Clinic. Additionally, the parents seek an annulment of the impartial hearing officer's decision to the extent that he found that Lovaas ABA was sufficient to meet the student's educational needs.

Next, the parents contend that the district denied them the opportunity to meaningfully participate in the development of the student's August 2010 IEP, because the CSE could not address their concerns regarding the nonpublic school at the meeting. The parents further argue that no representative of the nonpublic school attended the August 2010 CSE and the district's special education teacher left the meeting early, which in turn deprived them of the opportunity to meaningfully participate in the development of the student's IEP. Next, the parents maintain that the district did not have a program in place for the student at the beginning of the 2010-11 school

year, and that its obligation to offer the student a FAPE was not relieved by pendency. Moreover, to the extent that the district submits that it was offering the student pendency for the 2010-11 school year, the parents contend that this allegation constitutes bad faith.

The parents seek an order that the district immediately implement the January 2010 IEP with the following modifications: (1) staff training in verbal behavior ABA at the Carbone Clinic; (2) staff training in American Sign Language (ASL); (3) parent counseling and training in verbal behavior ABA and sign language; (4) extended school day services; (5) a teacher who is experienced working with students on the autism spectrum; (6) trained substitute staff; (7) appropriate supervision of staff by a BCBA; and (8) further enhancements to the student's IEP to ensure the student's safety and that of others. Lastly, they cross-appeal the impartial hearing officer's decision to the extent that he denied their request for an award of additional services in accordance with the relief sought in their due process complaint notice.

The district submitted an answer to the cross-appeal admitting and denying the parents' allegations. The district requests dismissal of the parents' cross-appeal. Specifically, the district asserts that the parents are requesting the same relief, based on the same hearing record and the same circumstances upon which their previous request for relief have been denied. While the district admits that the recommended nonpublic school later rejected the student, it further asserts that the nonpublic school might have offered the student a placement, had the parents pursued the intake procedures necessary for admission. Additionally, the district contends that while the parents do not challenge the impartial hearing officer's findings in favor of the district, they seek an award of relief for which there is no basis. Moreover, the district maintains that the impartial hearing officer correctly denied the parents' request for an award of additional services, given their continuing failure to cooperate with the district's efforts to develop an appropriate program for the student. Lastly, the district seeks dismissal of the cross-appeal to the extent that the parents failed to raise their reasons for challenging the impartial hearing officer's decision in their cross-appeal; rather, they raised their arguments in their memorandum of law, which the district asserts is not a substitute for a properly drafted pleading.

Applicable Standards

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 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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]).

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).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Piazza v. Florida Union Free Sch. Dist., 777 F.Supp.2d 669, 675 n.4 [S.D.N.Y. 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 643 n.30 [S.D.N.Y. 2011]; Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation only 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 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

Additional Evidence

Initially, I will address a procedural matter. On appeal, the district requests consideration of five exhibits as additional evidence (Pet. Exs. A-E). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 10-096; Application of a Student with a Disability, Appeal No. 09-098; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I this case, although unavailable at the time of the impartial hearing I will accept the Exhibits A, D and E, because they are relevant and necessary to the decision in this matter. Regarding the remaining exhibits, while they could not have been entered at the time of the impartial hearing as they were created subsequent to that time, they are not necessary in order to render a decision in this appeal; therefore, I decline to consider them.

Scope of the Impartial Hearing

I will first address the claim that the impartial hearing officer erred by addressing and determining issues that were not raised in the parents' due process complaint notice. State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 11-042; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

In this case, review of the hearing record reflects that the parents did not raise any challenges to the January 2010 IEP (Dist. Ex. 1).[6] Accordingly, the impartial hearing officer should not have relied upon the adequacy of the January 2010 IEP as a basis for determining whether the district offered the student a FAPE in this proceeding. With respect to the August 2010 IEP, although the parents alleged several procedural violations in the process that the CSE followed to develop the content of the IEP, they did not otherwise allege how the content of the August 2010 IEP was inappropriate to address the student's needs, and therefore, to the extent that the impartial hearing officer's decision may be read to direct the district to modify the student's

[6] I further note that the parents argue on appeal that neither party disputed the appropriateness of the January 2010 IEP.

IEP for the 2010-11 school year, such directives determine issues that were outside of the scope of the impartial hearing.[7] Lastly, notwithstanding the impartial hearing officer's conclusion that the January 2010 and August 2010 IEPs were inappropriate, the district correctly argues that to the extent that he ordered relief directed toward the 2011-12 school year, the parents did not request such relief and it is premature (id.).[8] I also note that the parties have convened to conduct the annual review called for by the IDEA in order develop the student's program for the 2011-12 school year and a new recommendation was developed by the CSE (Pet. Exs. D; E), which are matters that were not before the impartial hearing officer and the merits of which will not be reviewed in this proceeding. Therefore, the aforementioned issues, were not properly before the impartial hearing officer, and he should have confined his determination to only those claims that were raised in the parents' due process complaint notice, and even more so when it became apparent that collateral proceedings regarding other school years were being conducted (see IHO Decision at p. 26; see also 20 U.S.C. § 1415[c][1],[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5 [i][1][iv],[i][7],[j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060). Accordingly, I will annul those portions of the impartial hearing officer's decision that exceeded the scope of the due process complaint notice.

August 2010 CSE Meeting

Turning to an analysis of the parties' claims regarding the composition of the August 2010 CSE, the parents argue that the failure to include a representative from the nonpublic school at the August 2010 CSE meeting deprived them of an opportunity to meaningfully participate in the development of the student's IEP. It is undisputed that no representative from the nonpublic school participated in the August 2010 CSE meeting; however, the absence of a representative at that particular meeting date did not deprive the student of a FAPE (Dist. Ex. 13; see 34 C.F.R.

[7] Furthermore, there was little point in directing the district to provide orders to the CSE to modify the student's 2010-11 school year IEP after both the school year and IEP expired on its own terms. It was the impartial hearing officer's obligation to ensure that the impartial hearing was conducted expeditiously and that a decision would be reached within the 45-day timeline. There are no bases in the hearing record for the extensions granted in this proceeding and none of the extensions were granted in compliance with State regulations. Failure to adhere to the procedures for conducting the hearing within the 45-day timeline may result in a finding of misconduct (see 8 NYCRR 200.21[4][iii]). The impartial hearing officer is strongly cautioned and reminded to adhere to the requirement that the impartial hearings be completed within the 45-day timeline.

[8] Although parties in due process proceedings occasionally disagree regarding the application of the pendent placement provisions of the IDEA in a particular case and seek assistance from an administrative hearing officer, this was not such a case. In this case, the district moved to dismiss the case on res judicata grounds, and neither party asked the impartial hearing officer to render a determination regarding the student's the student's pendency placement for purposes of this proceeding. Accordingly, the impartial hearing officer's interim decision regarding the student's pendency placement was unnecessary and will be vacated (Tr. p. 3).

§ 300.325[a][2]; 8 NYCRR 200.4[d][4][i][a]).[9] Here, the hearing record reflects that the student's 2010-11 IEP was developed over the course of three CSE meeting dates (Dist. Exs. 13; 14; 15). The hearing record further demonstrates that a representative from the nonpublic school had previously participated in the May 2010 CSE meeting at which time she described the program in detail and answered questions posed by other members of the CSE (Tr. pp. 51-53; Dist. Ex. 15 at pp. 39-42, 81). The hearing record further suggests that staff at the nonpublic school had indicated at the time of the May 2010 CSE meeting that they could appropriately provide the student with IEP services and that the student's needs appeared to be very similar to other students who were enrolled there at that time (Dist. Ex. 15 at p. 50). In light of the foregoing, the evidence in the hearing record does not support the conclusion that absence of the representative from the nonpublic school at the August 2010 CSE impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of the Dep't of Educ., Appeal No. 10-070).

2010-11 School Year IEP

With regard to the August 2010 IEP, as noted previously, a review of the due process complaint notice reflect that the substantive content was not placed in issue in this proceeding (Dist. Ex. 1). Accordingly, as noted above, the reasons that the impartial hearing officer cited as inadequacies in the August 2010 IEP 2010-11 school year do not afford a basis for finding that the district denied the student a FAPE. For the reasons set forth above, I will annul those portions of the impartial hearing officer's decision that found that the content of the August 2010 IEP was inappropriate. However, I will, as further set forth below, address impartial hearing officer's determination that the student would not be able to attend the nonpublic school placement as set forth in the IEP.

Nonpublic School

The hearing record is equivocal whether there was a seat available for the student at the nonpublic school at the beginning of the 2010-11 school year (Tr. pp. 820-21, 1594). Although it is not clear whether there was an opening at the commencement of the school year, the hearing record further reflects that pending completion of the student's intake interview, the representative of the nonpublic school opined that the school could deliver the services in student's IEP (Tr. pp. 66-67). However, as detailed above, despite repeated requests from the district for the parents to

[9] On appeal, the parents also allege that the special education teacher in attendance at the August 2010 CSE departed early from the meeting and that no regular education teacher participated in the meeting, further invalidating the composition of the CSE and resulting in a denial of a FAPE; however, such claims were not raised in the parents' September 2010 due process complaint notice and the hearing record does not show that the district agreed to expand the scope of the impartial hearing to include this issue. Therefore, they are not properly before me and I decline to address them (see Dist. Ex. 1; see also 20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

complete the intake process, they failed to cooperate (Tr. pp. 48, 50, 54, 56, 64-65, 67-68, 212; Dist. Exs. 22 at p. 2; 23).[10]

Additionally, it cannot be overlooked that the district's obligation in September 2010 was to implement the student's pendency placement due to the proceedings involving the 2009-10 school year, which it was prepared to do on the first day of school; however, as detailed above, the hearing record reflects that the parents thwarted the district's efforts to complete the process for placing the student in the nonpublic school (Tr. pp. 153-54, 197, 214, 611-12, 1360, 1360-65; Dist. Exs. 22a at p. 1; 25; 26).[11] Where, as here, the district was precluded from placing the student in the nonpublic school due to both its obligation to implement the student's pendency placement and the parents' noncooperation, I find the impartial hearing officer's conclusion that the district failed to offer the student a FAPE was incorrect. Moreover, the hearing record illustrates that the parents also continued to frustrate the district's efforts to provide the student with special education services through home instruction when he was ill (Tr. pp. 1044, 1052, 1399-1401; Dist. Ex. 29 at pp. 4-6, 9-13, 21).

In summary, according to the hearing record, although the district did not provide the student with an IEP that identifying an immediately available placement, the district pursuant to the parents' request, was prepared to provide the student's pendency placement. Based on the circumstances described above, there is no evidence that the district's offer of the nonpublic school impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused a deprivation of educational benefits in this case (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; A.H., 2010 WL 3242234, at *2; Application of the Dep't of Educ., Appeal No. 10-070). Under these circumstances, I will annul the impartial hearing officer's determination that the impartial hearing officer denied the student a FAPE.

Compensatory Additional Services

Assuming, for the sake of argument, that the district had denied the student a FAPE during the 2010-11 school year, I would not disturb the impartial hearing officer's conclusion to deny an award of compensatory additional services to the parents on equitable grounds, in light of their conduct and continued failure to cooperate with the district in fashioning an appropriate educational program for the student.

Conclusion

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

---

[10] The student's mother testified that in January 2011, she had scheduled the intake interview within the last ten days (Tr. p. 486).

[11] Notwithstanding the parents' failure to cooperate, the district must provide the student's pendency placement (see New York City Dept. of Educ. v. S.S., 2010 WL 983719, at *6 [S.D.N.Y. Mar. 17, 2010] [noting that "[s]tay put" is mandatory, not discretionary]; Application of the Dep't of Educ., Appeal No. 10-112; Application of the Dep't of Educ., Appeal No. 10-107; Application of a Student with a Disability, Appeal No. 10-064).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated July 5, 2011 that determined that the district failed to offer the student a FAPE for the 2010-11 school year is annulled.

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's interim decision dated April 12, 2011 that addressed the student's pendency placement is annulled.

Dated: **Albany, New York**
September 12, 2011

____
JUSTYN P. BATES
STATE REVIEW OFFICER