The University of the State of New York

The State Education Department
State Review Officer

No. 08-026

Application of the BOARD OF EDUCATION OF THE MCGRAW 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:
Hogan, Sarzynski, Lynch, Surowka & DeWind, LLP, attorneys for petitioner, Edward Sarzynski, Esq., of counsel

Law Office of Andrew K. Cuddy, attorneys for respondent, Andrew K. Cuddy, Esq., and Jason H. Sterne, Esq. of counsel

DECISION

Petitioner (the district), appeals from a decision of an impartial hearing officer which denied its motion to dismiss the case in its entirety on the basis of res judicata or collateral estoppel and which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's son for the 2007-08 school year was not appropriate. Respondent (the parent), cross-appeals from that portion of the hearing officer's decision which found that the parent "was not improperly excluded" from the June 6, 2007 CSE meeting. The appeal must be sustained in part. The cross-appeal must be dismissed.

The student's educational history is discussed in a prior decision, Application of a Child with a Disability, Appeal No. 07-123, issued on December 10, 2007, and will not be repeated in detail in this decision. The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

On October 11, 2006, the student began attending the district's schools and was placed in a program similar to the one he had received in his prior school district (Dist. Ex. 4 at pp. 13, 53). On November 8, 2006, a subcommittee of the district's CSE convened to review the student's program and to develop the student's individualized education program (IEP) (Parent Ex. E at p. 1). The student reportedly adjusted well to his new school setting but found most academic work

difficult (id. at p. 4). The CSE subcommittee recommended the student's placement in a 12:1+1 special class "integrated" for English and social studies, direct consultant teacher services in regular education math and science, and individual 30-minute biweekly counseling with program modifications of preferential seating as needed to avoid conflict with peers, individualized expectations, and modified grading and instruction (id. at p. 1). The CSE subcommittee recommended the following testing accommodations: extended time (2.0), minimal distractions, simplified language in directions, calculator use, preferential seating as needed to avoid conflict with peers, additional examples provided, tests read, directions repeated, and spelling requirements waived (id. at p. 2). The student's academic achievement, functional performance, and learning characteristics in the proposed IEP stated that the student demonstrated the ability to do math calculations mentally and to complete some written assignments without assistance; however, he frequently refused to do work even with constant reminders (id. at p. 3). In the area of social development, the proposed IEP indicated that the student understood what appropriate social behaviors were and was capable of interacting appropriately with peers and adults, but at times he became involved in conflicts with peers (id.). Management needs in the proposed IEP identified that the student needed support with organization and course assignments and that he needed to learn to monitor his own behavior without constant redirection (id.). The IEP contained goals related to the student's writing and social/emotional/behavioral deficits (id. at pp. 4-5). The parent consented to the implementation of the November 8, 2006 IEP (Dist. Ex. 4 at pp. 8, 12).

Approximately six months after the November 8, 2006 CSE subcommittee meeting, the parent requested an impartial hearing (Dist. Ex. 6 at pp. 29-33). The parent's May 7, 2007 due process complaint notice alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year and asserted procedural and substantive deficiencies with the November 8, 2006 IEP (id. at p. 30). Among other relief, the parent sought annulment of the November 8, 2006 IEP and development of an appropriate IEP; psychological, speech-language, vocational, reading and math evaluations of the student; a functional behavioral assessment (FBA); the provision of "corrective services;" and payment of the parent's attorneys' fees (id. at p. 31).

On or about May 25, 2007, the parties held a resolution session (Dist. Ex. 4 at p. 17).[1] The district agreed to provide all of the requested evaluations and educational services sought by the parent, but the district did not agree to pay the parent's attorneys' fees (id. at pp. 17-18). No written settlement agreement was signed at the resolution session.

On June 6, 2007, the CSE subcommittee convened and developed an IEP for the student, which was approved by the district's Board of Education (Dist. Ex. 3 at p. 1). Meeting participants included the CSE chairperson, a regular education teacher, a special education teacher, and a counselor (id. at p. 4). Previously, the district's CSE chairperson (who is also the district's director of special education) contacted the parent several times to request his attendance at the CSE subcommittee meeting, stating that the district would like to offer the parent "everything that he would like for his son" (Tr. p. 28). The district's CSE chairperson attempted to schedule a mutually

[1] According to federal regulations, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 C.F.R. § 300.510[a][2]; see also 8 NYCRR 200.5[j][2]).

convenient time and date for the CSE subcommittee meeting and provided the parent with written notice of the meeting (Tr. pp. 28-31, 54; Dist. Ex. 12). According to the CSE chairperson, the parent advised him the night before the scheduled meeting date that he was not available (Tr. pp. 28-29; see Dist. Ex. 4 at p. 57). The CSE chairperson suggested alternative methods to conduct the meeting that would include the parent's participation and stated that he would telephone him at the time of the meeting (Tr. pp. 28-29, 55; Dist. Ex. 4 at p. 18). At the time of the June 6, 2007 CSE subcommittee meeting, the district attempted to contact the parent by telephone, and left a message requesting that the parent contact the CSE subcommittee and repeated that the district would like to offer the parent any evaluation, program, or placement that the parent may wish for the student (Tr. p. 29). The CSE subcommittee proceeded to develop an IEP for the student and expressly agreed with the parent's requests set forth in his May 7, 2007 due process complaint notice but for the payment of attorneys' fees (Dist. Ex. 3 at pp. 1, 5). The June 6, 2007 IEP stated in all capital letters "the parent has the right to request any evaluation, program or service, and to edit this IEP in any manner" (id. at p. 5). It also stated: "The District will provide any program and services that the Parent requests immediately. . . . In any event, no programs or services will be rejected that the parent requests for [the student]" (id.). The CSE subcommittee also noted on the IEP its intention to reconvene another CSE before the start of the 2007-08 school year to develop a program for the student (id. at pp. 1, 5).

By letter dated June 19, 2007, the district provided the parent with a list of suggested evaluation sites where the parent could have an independent evaluation of the student conducted (Dist. Ex. 8 at pp. 27-28).

An impartial hearing regarding the issues in the parent's May 7, 2007 due process complaint notice took place on June 22 and 25, 2007 (Hearing 1) (Dist. Ex. 4 at p. 1). The district made a motion to the first impartial hearing officer (Hearing Officer 1) to dismiss Hearing 1 on the basis that the district agreed to provide the parent with all of his requested relief except for payment of his attorneys' fees (id. at pp. 8, 30, 42; Dist. Ex. 8 at pp. 7, 16). At Hearing 1, the district presented the June 6, 2007 IEP as evidence that it had offered to provide the parent any evaluation, program or placement sought for the student and the district argued that the parent's claims relating to the November 8, 2006 CSE meeting were moot because the district agreed to provide the parent with whatever he wanted and the 2006-07 school year had ended (Dist. Exs. 4 at p. 4; 8 at p. 16). The parent's attorney opposed the district's motion to dismiss and objected to the admission of the June 6, 2007 IEP as evidence, contending that the parent did not attend the June 6, 2007 CSE subcommittee meeting and that the resultant IEP was flawed (Dist. Ex. 4 at pp. 3-4, 7, 29). By decision dated September 21, 2007, Hearing Officer 1 denied the district's motion to dismiss and determined that the November 8, 2006 IEP was moot because it had been superseded by the June 6, 2007 IEP (Dist. Ex. 8 at pp. 7, 18). Hearing Officer 1 reached the merits of the parent's other claims relating to the student's behavior, and ordered the district to conduct an FBA of the student (id. at pp. 19, 23). The parent appealed Hearing Officer 1's decision to a State Review Officer (Application of a Child with a Disability, Appeal No. 07-123).

By due process complaint notice dated October 17, 2007, the parent requested a second impartial hearing (Hearing 2) (Dist. Ex. 1). The parent alleged that the June 6, 2007 IEP was deficient because it was developed without the parent, contained only one goal, lacked present levels of performance, offered no services to address the student's needs, and failed to address transition planning (id. at pp. 1-2). The parent sought annulment of the June 6, 2007 IEP and

development of an appropriate IEP, an independent psychological evaluation at the district's expense, and payment of the parent's attorneys' fees (id. at p. 3). A second impartial hearing officer (Hearing Officer 2) was appointed (Dist. Ex. 6).

By letter to the parent dated October 26, 2007, the district acknowledged receipt of the parent's October 17, 2007 due process complaint notice, submitted its response to the complaint, and scheduled a resolution session for November 7, 2007 (Dist. Ex. 2 at pp. 1, 7). The district's response asserted that the parent is precluded from relitigating issues that were argued or could have been raised during Hearing 1, on the basis of res judicata or collateral estoppel (id. at pp. 2-5). By e-mail to Hearing Officer 2 dated November 3, 2007, the parent's attorney sought the intervention of Hearing Officer 2 to begin the due process hearing timeline, contending that the district intentionally scheduled the resolution session beyond the 15-day regulatory timeframe (Dist. Ex. 11 at p. 3; see 20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]). The CSE chairperson responded to the parent by letter dated November 5, 2007, apologizing for miscalculating the date of the resolution session, and stating that the district would still like to hold a resolution session because "the District continues to wish to meet all of your requests and provide anything that you would like for your son," except for payment of the parent's attorneys' fees (Dist. Ex. 11 at pp. 5-6; see Tr. pp. 44-46). The parent did not respond to the district's invitation to hold a resolution session, and no resolution session was held (Dist. Ex. 11 at p. 2).[2]

On December 4, 2007, the district moved to dismiss the parent's October 17, 2007 due process complaint notice on the basis of res judicata or collateral estoppel, asserting that the parent previously raised or could have raised his claims at Hearing 1 (Dist. Ex. 8). The district also argued that the parent has failed to work cooperatively with the district to resolve his complaints (id. at p. 6).

On December 10, 2007, the decision regarding Hearing 1 in Application of a Child with a Disability, Appeal No. 07-123 (Appeal 1) was issued. In Appeal 1 it was determined that the parent's claims relating to 2006-07 school year were not moot because the parent was seeking additional services. The appropriateness of the November 8, 2006 IEP was reviewed and it was determined, in part, that the program developed by the district's CSE for the student was reasonably calculated to enable the student to receive educational benefits and did not result in a denial of a FAPE.

Meanwhile in Hearing 2, the parent opposed the district's motion to dismiss by letter dated December 13, 2007 (Dist. Ex. 10). The parent argued that the appropriateness of the June 6, 2007 IEP was not litigated during Hearing 1 and could not have been raised or litigated at Hearing 1 because the June 6, 2007 IEP did not exist at the time of the parent's May 7, 2007 due process complaint notice (id. at pp. 1-2). The parent further asserted that he was statutorily precluded from freely amending his first hearing request to include a claim challenging the student's June 6, 2006 IEP and that federal regulations do not prevent him from filing a separate due process complaint notice on an issue separate from a due process complaint notice already filed (id. at p. 2).

[2] I have carefully reviewed the hearing record, and find no evidence that the district deliberately miscalculated the date of the resolution session to delay the impartial hearing.

On December 15, 2007, the district replied to the parent's letter opposing the district's motion to dismiss (Dist. Ex. 11). The district argued that the June 6, 2007 IEP was made part of the record in Hearing 1, and denies that the parent was deprived of an opportunity to raise issues regarding the appropriateness of the June 6, 2007 IEP (id. at p. 1).

An impartial hearing was held on December 18, 2007 before Hearing Officer 2 (Tr. p. 1). At Hearing 2, the district argued that the case should be dismissed based on the doctrines of res judicata and collateral estoppel, and asserted that it was not waiving its preclusion defense by discussing the June 6, 2007 IEP (see, e.g., Tr. p. 27). The district presented the testimony of the CSE chairperson who stated that the June 6, 2007 CSE subcommittee wanted to document its agreement to provide the parent with the opportunity to request any evaluation, any program, and any placement that the parent might wish for the student (Tr. pp. 17, 29, 20, 52). According to the CSE chairperson, it was the intention of the CSE to reconvene before the start of the 2007-08 school year, after the completion of the independent evaluations sought by the parent, to review the additional evaluations and develop a program for the student (Tr. p. 20). The district was waiting for the parent to have the student independently evaluated before developing an IEP for the student's 2007-08 school year (Tr. pp. 23-24). The district had sent the parent a letter listing suggested independent evaluation sites and according to the CSE chairperson the parent never responded to the district's letter (Tr. p. 23). The CSE chairperson further testified that the student was receiving services during Hearing 2 pursuant to his November 8, 2006 IEP under pendency and the CSE chairperson did not believe the district was required to develop a new IEP for the student when he was receiving services under pendency (Tr. pp. 40, 84). The parent argued at Hearing 2 that the district failed to offer the student a FAPE (see Tr. pp. 9-11).

By decision dated February 22, 2008, Hearing Officer 2 denied the district's motion to dismiss the parent's October 17, 2007 due process complaint notice on the grounds of res judicata or collateral estoppel, finding that the parent's claims relating to the 2007-08 school year were not litigated before Hearing Officer 1 (IHO Decision at p. 8). Hearing Officer 2 determined that the district failed to offer the student a FAPE for the 2007-08 school year, finding that (1) the CSE chairperson conceded during his testimony that the June 6, 2007 IEP did not offer the student a FAPE (id. at p. 10); (2) that the failure of the parent to obtain an independent evaluation before the beginning of the 2007-08 school year did not relieve the district of its responsibility to conduct an annual review of the student's educational program and develop an appropriate program (id. at pp. 12, 13); and (3) that the district failed to develop an IEP with appropriate transition services (id. at p. 14). In light of his determination that the district failed to offer the student a FAPE, Hearing Officer 2 found it unnecessary to address the parent's various claims regarding the inappropriateness of the June 6, 2007 IEP; however, Hearing Officer 2 determined that the "parent was not improperly excluded" from the June 6, 2007 CSE subcommittee meeting (id. at p. 10). Although Hearing Officer 2 noted that an impartial hearing officer does not have the authority to award attorneys' fees, Hearing Officer 2 determined that the parent was the prevailing party (id. at p. 15). Hearing Officer 2 ordered the district to conduct a triennial evaluation of the student to assess the student's present levels of academic performance, including a psychological evaluation, and reconvene the CSE with full participation of the parent, and develop an appropriate IEP (id.). By such order, Hearing Officer 2 annulled the district's offer in the IEP to implement any evaluation, any program, and any placement that the parent might wish for the student.

The district commenced this appeal. The district argues that Hearing Officer 2 erred by failing to dismiss Hearing 2 on the grounds of res judicata and collateral estoppel. It asserts that all of the issues raised in the parent's October 17, 2007 due process complaint notice were issues that were raised or could have been raised during Hearing 1 and the parent is impermissibly attempting to relitigate issues that were previously determined. The district also argues that it was not obligated to offer the student a FAPE because the June 6, 2007 IEP offered the parent whatever he wanted and the parent failed to respond. The district further contends that Hearing Officer 2 erred when he determined that the district's failure to generate an IEP for the 2007-08 school year denied the student a FAPE, arguing that the district was not obligated to develop a new IEP for the student because he was receiving services pursuant to pendency. Finally, the district argues that Hearing Officer 2 exceeded his authority by determining that the parent was the prevailing party. The district seeks annulment of Hearing Officer 2's decision.

In his answer and cross-appeal, the parent requests that Hearing Officer 2's decision be upheld. In addition, the parent cross-appeals that portion of the decision which found no denial of a FAPE for the CSE subcommittee's failure to include the parent and a special education teacher. The parent also asserts that he was not precluded from challenging the June 6, 2007 IEP because it did not exist at the time the parent requested Hearing 1, that pendency does not excuse the district's denial of a FAPE, and that the June 6, 2007 IEP is deficient.

The district answered the parent's cross-appeal, denying the allegations and asserting that a special education teacher participated at the June 6, 2007 IEP meeting.

A threshold issue in the present appeal is the impartial hearing officer's decision to deny the district's motion to dismiss the parent's October 17, 2007 due process complaint notice on the grounds of res judicata or collateral estoppel. After reviewing the hearing record and the parties' arguments, I concur with Hearing Officer 2 for the reasons set forth below, and find that he properly determined that the matters raised in the parent's October 17, 2007 due process complaint notice were not the subject of Hearing 1 concerning the student's 2006-07 school year. Accordingly, Hearing Officer 2 properly allowed the parent to present his case relating to the student's 2007-08 school year.

The doctrine of res judicata "precludes parties from litigating issues 'that were or could have been raised' in a prior proceeding" (Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450 at *6 [N.D.N.Y. Dec. 19, 2006]; Application of a Child with a Disability, Appeal No. 07-093; Application of a Child with a Disability, Appeal No. 06-100; Application of a Child with a Disability, Appeal No. 05-072; Application of a Child with a Disability, Appeal No. 04-099).

> The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.

(In re Hunter, 4 N.Y.3d 260, 269 [2005]).

"[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] [quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]]; In re Hunter, 4 N.Y.3d at 269). Res judicata applies when (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same plaintiff or someone in privity with the plaintiff; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (Grenon, 2006 WL 3751450 at *6).

The related doctrine of collateral estoppel precludes parties from litigating "a legal or factual issue already decided in an earlier proceeding" (Perez, 347 F.3d at 426; Grenon, 2006 WL 3751450 at *6). To prove collateral estoppel, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was 'actually litigated and decided' in the previous proceeding; (3) the party had a 'full and fair opportunity' to litigate the issue; and (4) the resolution of the issue was 'necessary to support a valid and final judgment on the merits.'

(Grenon, 2006 WL 3751450 at *6 [quoting Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]]).

After carefully reviewing the instant hearing record, I am not persuaded by the district's assertions on appeal concerning the preclusive effect of the decisions rendered in Hearing 1 and Appeal 1. In the parent's October 17, 2007 due process complaint notice, the parent asserted that the district failed to offer the student a FAPE for the 2007-08 school year. Although the district asserts that the parent was free to raise the appropriateness of the June 6, 2007 IEP at Hearing 1 when such IEP was admitted into evidence, the hearing record indicates that Hearing 1 addressed the student's educational program for the 2006-07 school year and at no time did the parent request to expand the scope of Hearing 1 to include issues related to the 2007-08 school year. A review of the hearing record in Hearing 1 reveals that the district introduced the June 6, 2007 IEP into evidence at Hearing 1 over the parent's objection to support its mootness defense and to demonstrate that it had offered the parent everything that he wanted. The proceedings in Hearing 1 and Appeal 1 did not address the merits of the June 6, 2007 IEP (see Dist. Ex. 8 at pp. 7-27; Application of a Child with a Disability, Appeal No. 07-123). Under the circumstances of this case, the doctrines of res judicata and collateral estoppel do not apply. Thus, I concur with Hearing Officer 2's decision to deny the district's motion to dismiss on these grounds.

Having determined that Hearing Officer 2 correctly determined that res judicata and collateral estoppel do not preclude the parent from challenging the appropriateness of the June 6, 2007 IEP, I turn to the substantive issues raised in this appeal.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs,

provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).[3]

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the 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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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

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[3] The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the parent's due process complaint notice was dated October 17, 2007 and Hearing 2 was held on December 18, 2007. Accordingly, the burden of proof was on the district to demonstrate that it offered the student a FAPE for the 2007-08 school year.

It is undisputed that the district has not convened a CSE for the student since June 6, 2007 and by the district CSE chairperson's own admission during testimony, that the student was not offered a FAPE pursuant to the June 6, 2007 IEP (Tr. p. 99). A review of the June 6, 2007 IEP reveals that it contains only one goal, there are no present levels of performance, there are no services offered to address the student's needs, and it does not address transition planning (Dist. Ex. 3). The June 6, 2007 IEP provided that the parent could request any program or service that he desired for the student (id. at p. 5). As it is written, the June 6, 2007 IEP did not accurately reflect the results of evaluations that identified the student's needs, establish annual goals related to those needs, nor provide for appropriate special education services to address the student's needs. Instead, the June 6, 2007 IEP merely stated its intent to conduct evaluations from which an appropriate IEP might follow and provided that the parent could request any program or service that he desired for the student and it would be implemented (id.).

A FAPE must be tailored to the unique, individual needs of a student by means of an IEP (Rowley, 458 U.S. at 181; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1115 [2d Cir. 1997]). Here, it was improper for the district to abdicate its responsibility to develop an IEP based upon the unique needs of the student and instead offer to provide the parent unrestricted ability and discretion to dictate the educational program and services for the student.

I am also not persuaded by the district's arguments that it was unnecessary to reconvene the CSE and develop an IEP for the student's 2007-08 school year. The district argues that it was waiting for the parent to conduct its own independent evaluations and that it intended to reconvene the CSE upon the receipt of the additional evaluations to develop a program for the student's 2007-08 school year (see Tr. pp. 23-24). While the CSE is required to review evaluations and information provided by the parent (20 U.S.C. §§ 1414[c][1][A][i]; 1414[d][3][A][ii],[iii]), I decline to find that this provision required the district to refrain from fulfilling its obligation to develop an IEP offering the student an appropriate educational program for the 2007-08 school year. I also note that there is no evidence in the hearing record that the district sought consent from the parent to perform its own evaluations of the student. The district is reminded that it has an affirmative obligation to offer the student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer, 546 U.S. at 51; Rowley, 458 U.S. at 180-81;

Frank G., 459 F.3d at 371). With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). A school district's failure to provide a student's parents with a timely IEP may afford a basis for concluding that the school district did not offer an appropriate program to the student (Application of a Child with a Disability, Appeal No. 06-030; Applications of the Board of Educ. and a Child with a Disability, Appeal Nos. 00-091 and 01-018; Application of a Child with a Disability, Appeal No. 99-81). For the foregoing reasons, I concur with Hearing Officer 2's determination that the district has failed to offer a FAPE to the student for the 2007-08 school year.

The district's contention that it did not have to develop an IEP for the student because he was receiving services through pendency is also unpersuasive.[4] Conducting CSE meetings and formulating and offering new IEPs during the course of pending litigation is not prohibited under the IDEA provided that there is adherence to pendency requirements (Letter to Watson, 48 IDELR 284 [OSEP 2007]; see Application of a Child with a Disability, Appeal No. 07-122).

Turning to the parent's cross-appeal, I concur with the impartial hearing officer that the lack of the parent at the June 6, 2007 CSE subcommittee did not deprive the student a FAPE.[5] The hearing record reflects the district's efforts to include the parent's participation at the June 6, 2007 CSE subcommittee meeting (see Tr. pp. 28-31, 54-55). Moreover, the parent's October 17, 2007 due process complaint notice did not address or raise as an issue the absence of a special education teacher at the June 6, 2007 CSE subcommittee, and a review of the hearing record indicates that the parent did not raise this issue during Hearing 2. Accordingly, I find that the parent's assertion regarding the participation of the special education teacher raised for the first time in his cross-appeal is beyond the scope of my review because it was not raised below (34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see Application of a Child with a Disability, Appeal No. 07-008; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024). However, I note that the hearing record indicates that a special education teacher attended the June 6, 2007 CSE subcommittee meeting (Tr. p. 81; Dist. Ex. 3 at p. 4).

[4] The district, relying on C.P. v. Leon Co. Sch. Bd. Florida, 483 F.3d 1151 (11th Cir. 2007), argues that the student received a FAPE by virtue of receiving pendency services which provided educational benefit. I find this argument unpersuasive. Although there is anecdotal evidence in the record that the student received educational benefit during the 2007-08 school year through the provision of the November 6, 2006 IEP pendency services, there is insufficient documentation and testimony in the record to support a determination that a FAPE was provided, services were appropriately implemented, and educational benefits were received. The record simply was not sufficiently developed on this issue.

[5] A school district may, under certain circumstances, conduct a CSE meeting in the absence of a student's parent. A CSE is required to include the parent (34 C.F.R. § 300.321; 8 NYCRR 200.3). However, a CSE may proceed without a parent or guardian in attendance and the CSE may make decisions in the parent's or guardian's absence if a school district is unable to convince a parent or a guardian to attend, so long as the school district maintains a detailed record of its attempts to secure a parent's participation (34 C.F.R. § 300.322[d]; 8 NYCRR 200.5[d][3]&[4]; Application of a Child with a Disability, Appeal No. 05-059; Applications of a Child with a Disability and the Bd. of Educ., Appeal Nos. 04-050 and 04-052).

As a penultimate matter, I note that the very spirit of the IDEA, Article 89 of the Education Law, and applicable regulations, is one of cooperation between the school district and parents for the benefit of the student (Application of a Child with a Disability, Appeal No. 03-008). I remind both parties that formulating an IEP is a collaborative effort (Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-93) and I encourage the parties to work cooperatively in the future.

Lastly, I note that the IDEA does not authorize an administrative officer to award attorneys' fees or other costs to a prevailing party; and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; see also Application of a Student with a Disability, Appeal No. 08-008; Application of a Child with a Disability, Appeal No. 06-109). Because only a court can determine who is entitled to attorneys' fees, I concur with the district's contention that Hearing Officer 2 exceeded the scope of his review by determining that the parent was the prevailing party.

THE APPEAL MUST BE SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the Impartial Hearing Officer dated February 22, 2008 is annulled to the extent that he determined that the parent was the prevailing party.

Dated: **Albany, New York**
May 12, 2008

PAUL F. KELLY
STATE REVIEW OFFICER