



The University of the State of New York

The State Education Department
State Review Officer
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No. 09-052

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied, in part, the parent's requests for accommodations, related services, and transportation for the parent to accompany her son to his related services providers. The appeal must be sustained in part.

At the time of the impartial hearing, the student was enrolled in the seventh grade in a gifted and talented program in one of respondent's (the district's) schools, where he was also receiving individual crisis management paraprofessional services (Tr. pp. 24, 144, 350, 468, 600, 603; Dist. Ex. 6 at pp. 1, 14). Pursuant to the student's March 14, 2008 individualized education program (IEP), which is the subject of this appeal, the student was also recommended to receive related services consisting of one weekly 30-minute session of individual counseling, one weekly 30-minute session of counseling in a group of three, one weekly 30-minute session of individual occupational therapy (OT) to be delivered in a separate location, one weekly 30-minute push-in session of individual OT, and two weekly 30-minute sessions of speech-language therapy in a group of three (Tr. p. 24; Dist. Ex. 6 at p. 14).¹ The student has also reportedly received diagnoses of a brain tumor, a pervasive developmental disorder (PDD), and Asperger's syndrome (Tr. pp. 296, 492, 514). He exhibits difficulty with socialization and interpersonal relations as well as eye contact, and demonstrates fine motor delays (Tr. pp. 42, 340, 515; Dist. Ex. 6 at p. 3). Additionally, the student reportedly demonstrates significant delays in processing information presented verbally (Dist. Ex. 6 at p. 3). The student's eligibility for special education services as a student

¹ According to the hearing record, the parent did not want the student to receive his related services in school (Tr. pp. 27, 29, 154, 295).

with a speech or language impairment is not in dispute in this appeal (Tr. p. 26; Dist. Ex. 6 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

With regard to the student's educational history, the hearing record reveals that the student attended an early intervention program because he was "slow in walking and speaking" (Parent Ex. E at p. 1). The student was first classified as a student with a speech or language impairment while in kindergarten (*id.*)² During the 2002-03 school year (first grade), the student reportedly began exhibiting behavioral problems (*id.*).

On November 7, 2003, while the student was in the second grade, the Committee on Special Education (CSE) held an educational planning conference (EPC) (Parent Ex. K at pp. 1-2). The November 2003 CSE deemed the student eligible for special education services as a student with a speech or language impairment and recommended placement in a general education classroom with related services (*id.* at pp. 1, 12). In addition, the November 2003 CSE noted that the student's behavior seriously interfered with instruction and that he required additional adult support (*id.* at p. 4). The November 2003 CSE developed a behavioral intervention plan (BIP) for the student and added the services of a crisis management paraprofessional to help the student remain on task and in his seat (*id.* at pp. 1-2, 14).³

On February 9, 2004, the student underwent an "intake evaluation" at the Brooklyn Center for Psychotherapy (BCP) (Parent Ex. M at p. 5).⁴ By letter dated March 19, 2004, the student's private psychiatrist from BCP reported that the student had attended weekly private individual psychotherapy sessions since February 9, 2004 (Parent Ex. C at p. 1).

On May 27, 2004, the CSE developed an interim service plan (ISP) for the student per the "request" of an impartial hearing officer (Parent Ex. G at pp. 1-2).⁵ The May 2004 ISP recommended that the student receive home and hospital instruction in conjunction with two weekly 30-minute sessions of speech-language therapy in a group of three, as well as one weekly individual 30-minute session of counseling (*id.*)⁶ Extended school year (ESY) services were also recommended for the student (*id.* at p. 1). According to the May 2004 ISP, the student was expected to return to the school-based program in September 2004 (*id.* at p. 2).

Over a four-day period in June 2004, when the student was in the second grade, a private psychologist conducted a psychoeducational evaluation of the student (Parent Ex. E at p. 1). The psychologist reported that the student demonstrated "average intelligence" as measured by the

² The hearing record does not contain a copy of the student's IEP from kindergarten.

³ The November 2003 IEP reflected that the student exhibited a tendency to hastily proceed with assignments before all directions were given and that he required frequent reminders to put away unnecessary materials and to remain seated (Parent Ex. K at p. 14).

⁴ The February 2004 evaluation report is not included in the hearing record, nor does the hearing record offer any details regarding the evaluation.

⁵ A copy of the impartial hearing officer's "request" is not incorporated into the hearing record (Parent Ex. G at p. 2).

⁶ The hearing record does not indicate why the student was recommended to receive home and hospital instruction (see Parent Ex. G).

Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) (id. at p. 7). The psychologist further reported that the student's distractibility, anxiety, and language problems all affected his cognitive abilities (id.). According to the psychologist, the student's language difficulties were a source of frustration and anger because he could not always communicate his thoughts with ease (id.). The psychologist reported that the student exhibited great difficulty controlling his anger and that the student might not always have the language available to buffer his emotions (id.). Although the psychologist found that the student was sensitive to other people's feelings, she noted that the student might act insensitively in response to provocative behavior (id.). Despite finding that the student's anger was rooted in his frustration at the limits that had to be set for him because he lacked internalized control, the psychologist recommended a neurological evaluation of the student to determine whether there was underlying seizure activity contributing to the student's outbursts (id.). Additionally, the psychologist opined that the student had enough symptoms associated with Asperger's syndrome to warrant a neurological evaluation of the student as well as a thorough psychiatric evaluation (id. at p. 8). The psychologist further recommended that the student undergo a psychiatric evaluation to determine the appropriateness of psychotropic medication to help stabilize his behavior (id.). An OT evaluation of the student was also recommended by the psychologist due to the student's difficulties with handwriting (id.). The psychologist further suggested that the student be allowed to do some writing on the computer to minimize his frustration while improving his writing skills (id.). Lastly, the psychologist opined that the student's current school setting was inappropriate to meet his needs, and accordingly, suggested placement for the student in a small, nurturing environment that could provide him with individualized attention (id.). Nevertheless, the psychologist recommended that the student be placed in an academically challenging environment, because the psychologist considered the student to be a "bright boy" (id.).

Over a two-day period in December 2004, a private occupational therapist conducted an OT evaluation of the student (Parent Ex. D at p. 1). The evaluator reported that there was not a "sensory integration disorder ... interfering with [the student's] functioning" based on the information gathered from behavioral observations during testing, parent report, and results from the Sensory Profile Caregiver Questionnaire (id. at p. 3). Administration of the Beery-Buktenica Developmental Test of Visual Motor Perception (VMI) indicated that the student's visual motor perceptual ability was in the average range (id. at pp. 3-4). The evaluator further reported that the student demonstrated a relative strength in the area of "visual figure ground" but displayed a weakness in the motor component of the VMI (id. at p. 3). The evaluator indicated that the student demonstrated a mild to moderate delay in functional fine motor skills (id. at p. 5). According to the evaluator, the student was able to cut accurately with scissors, fold paper, and place paper clips (id.). However, challenges were observed and reported with pencil control and the fine motor aspects of dressing, such as tying, buttoning, and zipping (id.).⁷ In addition, the evaluator indicated that the student's weaknesses in his fine motor ability "interfered with handwriting neatness more than handwriting speed," and accordingly, recommended two weekly sessions of OT to address such needs (id. at p. 7).

On June 27, 2005, the CSE convened for a requested review of the student's program and to make recommendations for the 2005-06 school year (third grade) (Parent Ex. L). The June 2005 CSE recommended continued eligibility for special education services as a student with a speech

⁷ The evaluator substituted an incorrect name for the name of the student in her report.

or language impairment and that the student be placed in a general education program with related services comprised of two weekly 30-minute sessions of speech-language therapy in a group of three, two weekly 30-minute sessions of individual OT, and one weekly 30-minute session of individual counseling in conjunction with full-time individual paraprofessional services to help the student focus on his work (id. at pp. 1, 3, 11). The June 2005 CSE determined that the student was not eligible for a twelve-month school year (id. at p. 1).

By letter dated October 19, 2005, the student's private physician indicated with regard to the student: "it is not to the benefit of my patient to stay on the bus for more than one hour" (Parent Ex. M at p. 6).⁸

On June 12, 2006, the CSE convened for a requested review of the student's program and to develop his IEP for the 2006-07 school year (fourth grade) (Parent Ex. J at pp. 1-2). The June 2006 CSE recommended continued eligibility for special education services as a student with a speech or language impairment and proposed placement in a regular education classroom with related services consisting of three weekly 30-minute sessions of speech-language therapy in a group of three, two weekly 30-minute sessions of individual OT, and one weekly 30-minute session of individual counseling (id. at pp. 1, 13). The June 2006 CSE determined that the student was eligible for ESY services consisting of speech-language therapy, counseling, and OT at the same frequency and duration (id. at p. 1). The June 2006 CSE also proposed that the student receive a full-time crisis management paraprofessional to help with his behavioral difficulties (id. at pp. 1, 12-13). Assistive technology devices, including a laptop computer and a printer, were also recommended for the student (id. at p. 1).

A June 14, 2006 progress report from the student's speech-language therapist revealed that the student presented with a phonology disorder characterized by final sound prolongation (Parent Ex. M at p. 3). The therapist further noted that the student exhibited delays in auditory processing, problem solving, critical thinking and vocabulary, as well as poor eye contact and inappropriate conversational skills (id.). According to the student's therapist, the student became easily frustrated when faced with a challenge (id.). The therapist further indicated that during the past few months, the student had demonstrated a consistently hoarse and breathy vocal quality (id.). The student's annual and short-term goals were also outlined in the progress report (id.). The therapist noted that the student needed reminders for all goals, but that the student continued to improve his level of frustration tolerance (id.). The therapist further indicated that the student would initiate conversation and respond appropriately six out of ten times (id.). Although the student continued to exhibit difficulty with critical thinking and predicting outcomes, the therapist stated that the student's eye contact was improving (id.). The therapist recommended that the student continue to receive three 30-minute sessions of speech-language therapy three times per week in a group of three, and that an ear, nose, and throat physician evaluate the student to determine the cause of his voice hoarseness (id.).

By letter dated June 14, 2006, the student's psychologist advised that the student was undergoing weekly 30-minute counseling sessions at a private facility under a related services authorization (RSA) (Parent Ex. M at p. 6). According to the psychologist, the student had not

⁸ It is presumed within the context of the hearing record that this letter was directed to the CSE (Parent Ex. M at p. 1). By letter dated June 12, 2006, the student's private psychiatrist reiterated this request verbatim (id.).

reached his long or short-term goals (id.). The psychologist opined that continued services over the summer months were "essential" for the student because he continued to manifest difficulty identifying and communicating his feelings (id.).

An undated counseling progress report also indicated that the student was progressing toward his IEP goals (Parent Ex. M at p. 4).⁹ The therapist also stated that the student exhibited difficulty with identifying and communicating his feelings (id.). Although the therapist did not propose any new goals, the therapist recommended that the student continue to receive weekly individual 30-minute session of counseling (id.).

On May 23, 2007, the CSE met to develop the student's IEP for the 2007-08 school year (fifth grade) (Parent Ex. I at p. 1). Attendees included the parent, the district's regular education teacher, and a school psychologist (id. at p. 2). The May 2007 CSE recommended that the student receive general education with related services and a full-time individual crisis management paraprofessional (id. at pp. 1, 13). Annual goals and short-term objectives were also developed in the areas of speech-language, social skills, and OT (id. at pp. 7-10). Related service recommendations included weekly 30-minute sessions of individual counseling in addition to two weekly 30-minute sessions of individual OT and three weekly 30-minute sessions of speech-language therapy in a group of three (id. at p. 13). The May 2007 CSE determined that the student was eligible for ESY services of speech-language therapy, counseling, and OT at the same frequency and duration (id. at p. 1). Recommended assistive technology devices included a laptop and a printer (id.). Testing accommodations were also afforded to the student including extended time (2x), tests to be administered in a separate location, a five-minute break for every 30 minutes of testing, and "answers [to be] recorded in any manner and narrative answers to be recorded by a scribe" (id. at p. 13). According to the resultant IEP, the May 2007 CSE characterized the student as "socially immature" with "deficient" interpersonal skills (id. at p. 4). Present levels of social-emotional performance also revealed that the student had difficulty expressing his needs and feelings appropriately (id.). A BIP was developed to address the student's difficulties with distractibility, organizational skills, and difficulty working in small and large groups when involved in novel tasks (id. at p. 14). The May 2007 CSE recommended counseling and a crisis behavior management paraprofessional as strategies and supports to help the student address his behaviors that interfered with learning (id.).

By letter dated September 26, 2007, the district's assistant principal advised the parent that the district would provide the student's related services during the regular school day (Dist. Ex. 8 at p. 1). The assistant principal requested that the parent advise the district in writing should the parent refuse the related services (id.). By letter to the parent dated September 27, 2007, the assistant principal set forth the student's schedule for receipt of his related services (Dist. Ex. 9 at p. 1).

By letter dated October 1, 2007, the parent advised the district that she was opposed to the student receiving services in school and indicated her desire for the student to receive his related services through a related services authorization (RSA) (Dist. Ex. 10). By letter also dated October 1, 2007, the student's private psychotherapist indicated that the student was "being treated for

⁹ It is presumed within the context of the hearing record that this progress report was generated during summer 2006.

attention deficit hyperactivity disorder (ADHD) and Asperger's disorder" (Parent Ex. B). The student's psychotherapist opined that due to the student's academic schedule, the student should attend class without any interruption (id.). According to the psychotherapist, the student's psychiatric diagnoses made it difficult for the student to handle an inconsistent schedule and the current situation was negatively affecting his academic performance and his mental stability (id.). The psychotherapist recommended that the student receive his related services after the school day, to ensure that the student would be performing optimally and to "prevent him from decompensating with regards to his emotions and his behavior" (id.).

On March 4, 2008, the district's speech-language therapist conducted an observation of the student in the student's English language arts (ELA) classroom and an art class (Tr. p. 260; Dist. Exs. 6 at p. 2; 13 at p. 1). The observation report noted that the student remained seated during most of the class, but repeatedly demonstrated self-stimulating behavior (Dist. Ex. 13 at pp. 2-3). The speech-language pathologist also reported that the student did not make eye contact during verbal interactions, but rather looked slightly down and to the left most of the time (id. at p. 3). According to the speech-language pathologist, the student's articulation was "within normal limits;" however, the student demonstrated minor distortions which did not affect his intelligibility (id.). Her observation report reflected that the student exhibited word finding difficulties which contributed to his "slow almost labored speech during every verbal exchange" (id.). The speech-language pathologist opined that the student had difficulty following verbal directions and she recommended that the student receive verbal prompts to remain on task (id.). She indicated that the student could be "distracted by something as simple as his own sneeze" (id.). Lastly, the speech-language pathologist recommended small group speech-language therapy to address the student's expressive and receptive language deficits and made suggestions for goals (id.).

On March 14, 2008, the CSE convened to develop the student's IEP for the 2008-09 school year (sixth grade) (Dist. Ex. 6 at p. 5). Attendees included an assistant principal who acted as the district representative, a regular education teacher, a school psychologist, a special education teacher, an OT supervisor, a speech-language therapist, the school principal, a parent coordinator, and a district administrator of special education (Tr. pp. 73, 140, 219, 260, 281, 477, 518, 522; Dist. Ex. 6 at p. 2).¹⁰ The March 2008 CSE recommended that the student receive general education with related services and an individual crisis management paraprofessional to aid with focusing and to provide social and academic aid when needed (Dist. Ex. 6 at pp. 1, 4). Unlike the prior two school years, the March 2008 CSE did not recommend ESY services for the student (compare Dist. Ex. 6 at p. 1, with Parent Exs. J at p. 1; I at p. 1). The present levels of social-emotional performance on the resultant March 2008 IEP revealed that the student exhibited difficulty with interpersonal relationships in school, and that while he attempted to interact appropriately with peers, the student had difficulty establishing rapport with them as well as adults (Dist. Ex. 6 at p. 4). The March 2008 CSE noted that, at times, the student felt frustrated and anxious, and concluded that the student's behavior seriously interfered with instruction and required additional adult support (id.). With respect to the student's health and physical development, the March 2008 CSE determined that the student did not have mobility limitations; however, it noted that, as per his May 2007 IEP, the student had asthma, for which he received medication on an as-needed basis (id. at pp. 5-6). Related service recommendations included one

¹⁰ By letter dated February 29, 2008, the district notified the parent in writing of the March 2008 CSE meeting, and, on March 7, 2008, the district also sent a follow-up notice to the parent (Dist. Exs. 6 at p. 2; 12).

weekly 30-minute session of individual counseling and one weekly 30-minute session of counseling in a group of three, one weekly 30-minute session of individual OT in a separate location, as well as one weekly 30-minute session of individual OT to be delivered in the classroom, in addition to two weekly 30-minute sessions of speech-language therapy in a group of three (*id.* at p. 14). The March 2008 IEP provided the student with annual goals and short-term objectives in the areas of speech-language, social-emotional functioning, and OT (*id.* at pp. 6-11). Recommended assistive technology devices included the use of a laptop/word processor (*id.* at p. 6). Testing accommodations afforded to the student included extended time (1.5x), tests to be administered in a separate location, five-minute breaks to be offered for every 30 minutes of testing, and "answers recorded in any manner – narrative answers will be recorded by a scribe for tests forty-five minutes or longer" (*id.* at p. 14). Also on March 14, 2008, the district issued a final notice of recommendation (FNR) in which placement at a specific district school was offered to the student (Dist. Ex. 2 at p. 3).

By letter dated March 17, 2008, the parent requested that the student's teachers, the district's assistant principal, and the individual crisis paraprofessional contact her by telephone (Dist. Ex. 20). The parent stated that she had recently learned that the district wanted to discontinue having the student's paraprofessional write the student's schoolwork for him or take notes for him (*id.*). The parent reminded the district in her March 2008 letter that her son exhibited fine motor difficulties for which he was prescribed a laptop computer (*id.*). According to the parent, the student never received the requisite training for his computer, and she requested that the district provide assistive technology training to her and her son, as well as to the paraprofessional (*id.*). The parent further advised that until the student, the paraprofessional, and she received assistive technology training, the paraprofessional needed to continue to write the student's schoolwork for him (*id.*).

By due process complaint notice dated April 14, 2008, the parent requested an impartial hearing (Dist. Ex. 1). The parent alleged that the student was not receiving any related services pursuant to his May 23, 2007 IEP, due to the district's unwillingness to fund transportation for the student's mother, so that she could accompany him to his related services providers (*id.* at p. 1). The parent stated that the student had told her that a March 14, 2008 CSE meeting had been held and that the parent had not yet received a copy of the resultant IEP (*id.* at p. 2). The parent made the following requests as proposed solutions to her concerns: (1) that the student's related services, which included speech-language therapy, counseling, OT and physical therapy, be provided by an outside vendor, and not during school time; (2) that the district provide paraprofessional services to the student and that the paraprofessional's duties include, among other things, assisting the student with his belongings; (3) that the parent have the opportunity to meet and participate in the hiring of the student's assigned paraprofessional; (4) that the district provide a new laptop computer with updated programs to the student; (5) that the district provide assistive technology training for the parent, the student, and the paraprofessional; (6) that the student receive ESY services; (7) that the student receive testing accommodations as they were prescribed in his May 2007 IEP; (8) that the student's travel time be limited to 45 minutes to and from school; and (9) that the district provide transportation services to the parent and student to his related services (*id.* at pp. 3-5). The parent suggested that the matter could be resolved by the district transferring her son to a different district school, closer in proximity to her home (*id.* at p. 5). In addition, the parent requested that should the student remain in his current school, his related services be provided to him after school, and that the district offer transportation (*id.* at pp. 5-6). Alternatively, the parent requested that the

district fund transportation costs for the student and the parent, so that the student may obtain his related services from an outside vendor (id. at p. 6).

In a report card dated April 18, 2008, the student earned grades ranging from 80 to 98 in the subject areas of English, social studies, math, science, Spanish, keyboarding, "PT," and art (Dist. Ex. 15).¹¹ The student obtained an overall grade point average of 90.57 for the third marking period (id.).

On April 21, 2008, the district submitted a response to the parent's due process complaint notice (Dist. Ex. 2). The district claimed, in part, that the recommended placement was reasonably calculated to enable the student to obtain meaningful educational benefits (id. at p. 3).

On May 30, 2008, the district's OT supervisor conducted an informal screening of the student (Dist. Ex. 21). The OT supervisor noted that the student's paraprofessional copied the student's classwork for him and that she also packed and carried the student's schoolbag for him (id.). As a result, the OT supervisor opined that the student was dependent on his paraprofessional because he made no attempts to participate in assigned writing activities (id.). She recommended that the student continue with his current OT mandate, and noted that by the student packing and carrying his schoolbag, and by beginning to copy notes and assignments from the blackboard himself, the student would initiate independence within the school setting (id.). In addition, the OT supervisor suggested that the student might benefit from the opportunity to change his seat to enhance optimal visual performance (id.).

An impartial hearing began on August 4, 2008 and concluded on December 23, 2008 (Tr. pp. 1-624).¹² During the impartial hearing, the impartial hearing officer clarified the parent's requests for relief as follows: (1) the provision of related services through the issuance of an RSA; (2) transportation for the parent to accompany her son to his related service providers; (3) transportation for the student to his related service providers; (4) an enhanced role of the paraprofessional; (5) a set of textbooks to be kept at home; (6) a new paraprofessional; (7) communication with the student's paraprofessional; (8) training on the student's laptop for the student and the parent; (9) no "code" on the student's laptop;¹³ (10) a new computer with internet access; (11) a bus matron to help the student when boarding and disembarking from the school bus; (12) limitation of the student's travel time to 45 minutes each way; (13) that the parent be able to meet with the individual assisting the student; (14) testing accommodations for the student; and (15) ESY services for the student (Tr. pp. 134-38, 599, 602-03, 605, 607-10, 613, 615-17).

In a decision dated March 26, 2009, the impartial hearing officer addressed the parent's requests (IHO Decision at pp. 10, 15). First, with regard to the parent's requests that the student receive his related services from an outside vendor and that the district avoid pulling him out of the classroom for related services, the impartial hearing officer noted that "the parent's hostile

¹¹ It is not clear from the hearing record what the abbreviation "PT" stands for (Dist. Ex. 15).

¹² By letter dated September 3, 2008 to the district's impartial hearing office, the parent requested "an Emergency phone Hearing" (Parent Ex. A). The parent's request to appear by telephone was granted (Tr. p. 4). I also note that no witness testimony was taken on December 1, 2008 because the parent had fallen ill (Tr. pp. 568-69).

¹³ It is not clear from the hearing record what the parent means by her request for a laptop without a "code."

reaction to all providers, and her total unwillingness to let them speak to her child, totally undermine[d] her credibility in this matter" (*id.* at p. 11). The impartial hearing officer found that there could be no legitimate reason why the parent would not permit a guidance counselor to talk to the student, nor any reason why assistive technology services could not be provided through the school; however, she determined that the student would not benefit from services provided in the school, if he were to be pulled out from his classes (*id.*). In reaching her determination with respect to the provision of the student's related services, the impartial hearing officer found that the CSE had previously allowed the student to receive his related services through the issuance of RSAs (*id.*). She further considered the parent's testimony that the student became extremely agitated when removed from the classroom, as well as a letter from the student's psychiatrist recommending that the student receive his related services after the school day (*id.*). Accordingly, the impartial hearing officer ordered the district to issue RSAs to allow the student to receive OT, speech-language therapy, and counseling from an outside provider (*id.*). Specifically, the impartial hearing officer ordered that the student receive the following related services: two weekly 30-minute individual sessions of OT, two weekly 30-minute sessions of speech-language therapy in a group of three, and two weekly 30-minute sessions of counseling per week, one session to be offered on an individual basis and the other session to be provided in a group of three students (*id.* at p. 14). Notwithstanding this award, the impartial hearing officer denied the parent's remaining claims for any other services from outside providers, finding no evidence that it was necessary for the student to receive assistive technology or assistive technology training from an outside provider, nor did she find any evidence showing that the student required physical therapy (*id.* at pp. 11-12).

Next, the impartial hearing officer considered the parent's request to assign a new paraprofessional to the student and define the paraprofessional's duties (IHO Decision at p. 12). Specifically, with regard to the parent's request that the student's paraprofessional assist the student with his belongings, the impartial hearing officer did not find any evidence in the hearing record that the student had any physical limitations necessitating such a service (*id.*). Therefore, she denied the parent's request for a new paraprofessional (*id.*). The impartial hearing officer also encouraged the district to communicate more directly with the student's paraprofessional with regard to the paraprofessional's role and duties (*id.*). Furthermore, the impartial hearing officer noted that in light of the student's need for assistive technology, the student required a paraprofessional who was trained to use the student's computer (*id.*). Accordingly, the impartial hearing officer ordered that the student's paraprofessional also participate in the student's assistive technology training (*id.* at p. 13).

Turning next to the parent's request that the student be provided with a new laptop computer in conjunction with assistive technology training for her and her son, the impartial hearing officer noted that testimony showed that while the district did not typically train parents with respect to assistive technology, they were invited to participate in the process (*id.*). The impartial hearing officer further noted that the district's efforts to accommodate the parent when attempting to schedule assistive technology training for her were unsuccessful (*id.*). As noted above, the impartial hearing officer ordered that the district provide the student with the necessary assistive technology training, and that his assigned paraprofessional also receive training, either separately or with the student (*id.*). She added that the parent should be invited to attend such sessions (*id.*). With respect to the location of the training, the impartial hearing officer noted that it was permissible for the training to be provided off school grounds, but she did not order this relief (*id.*).

The impartial hearing officer also denied the parent's request for ESY services for the student, finding no evidence to support such a claim (IHO Decision at p. 13). In addition, the impartial hearing officer concluded that there was no evidence to establish that the student required additional testing modifications, and accordingly, she denied that claim (id.).

With respect to the issues raised surrounding the parent's request for transportation, the impartial hearing officer first stated that the district agreed to the parent's request to limit the student's travel time to school to 45 minutes, and accordingly, the impartial hearing officer ordered this accommodation (IHO Decision at p. 13). The impartial hearing officer also granted the parent's request that the district provide the student with transportation to and from his related services as set forth above (id. at p. 14). However, the impartial hearing officer denied the parent's request for an ambulette service so that the parent could accompany the student, noting that she was not persuaded that it was necessary for the parent to accompany the student to services offered by an outside provider (id.).

The parent appeals and makes the following requests for relief: (1) that a new paraprofessional be assigned to the student; (2) that the district explain to the paraprofessional the extent of her duties; (3) that the paraprofessional be provided with training on the student's laptop; (4) that the parent be allowed to communicate with the new paraprofessional; (5) that the new paraprofessional help the student transport his school bag; (6) that the student be afforded a separate set of textbooks to keep at home; (7) that the student receive ESY services; (8) that the student be provided with a new laptop computer with internet access as well as updated software; (9) that the district provide the parent with transportation, so that she may accompany her son to his related services providers; (10) that the student be afforded the testing accommodations that were included in his May 2007 IEP; (11) that the student's related services be provided to him at the same frequency and duration as set forth in his May 2007 IEP; (12) that the district help the parent secure a different outside provider for the student's related services, if the place where the student previously received services was no longer affiliated with the district's program; (13) that the matron on the school bus assist the student with his belongings; (14) that the student be given two sets of ink cartridges for his computer; (15) that the parent be permitted to call the student's school and request that someone other than herself be allowed to pick up the student; and (16) that the student be afforded all of the foregoing accommodations until he enters high school. The parent also alleges that the impartial hearing officer was biased.

The district submitted an answer requesting that the petition be dismissed with prejudice. The district does not cross-appeal any portion of the impartial hearing officer's determination. As a threshold matter, the district asserts that the petition should be dismissed due to a number of procedural defects. With respect to the merits of the parent's case, the district first contends that the parent has abandoned a number of claims originally articulated in her due process complaint notice. Next, the district asserts that the hearing record fails to support the parent's claim for ESY services for the student. Regarding the parent's remaining claims for relief, the district contends that the parent's requests do not implicate the student's special education needs, and therefore, are not appropriately awarded under the Individuals with Disabilities Education Act (IDEA). The district further asserts that to the extent that any of the parent's requested relief in her petition is asserted for the first time on appeal, such claims should be dismissed. Lastly, the district asserts that equitable considerations bar the parent's request for relief.

Before discussing the merits of the instant case, I will first discuss a procedural matter arising on appeal. The district requests that the pro se petition be dismissed as a result of procedural deficiencies, which include: (1) the parent failed to number all of the allegations in numbered paragraphs; (2) the pages were not consecutively numbered; and (3) the parent failed to cite to the hearing record. Pursuant to State regulations, a petition for review shall set forth the allegations of the parties in numbered paragraphs and the pages of the petition shall be consecutively numbered and fastened together (8 NYCRR 279.8[a][3], [4]). Additionally, State regulations require that assertions in a petition be supported with references to the hearing record, that identify "the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]). Although the district asserts that the procedural defects surrounding the petition have precluded it from effectively formulating a responsive answer, I note that the district submitted an answer responding to the parent's allegations and asserting affirmative defenses. In the exercise of my discretion, I will accept the pro se petition.

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

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

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

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 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]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106 [2d Cir. Aug. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Newington, 546 F.3d at 123 [stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

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

I will first discuss the parent's allegations that the impartial hearing officer exhibited bias against her. Specifically, the parent alleges, among other things, that: (1) the impartial hearing officer excluded evidence that the parent submitted; and (2) the impartial hearing officer's conduct impeded the parent's ability to obtain the necessary services for her son. As set forth in greater detail below, the hearing record does not support her claim. Federal and State regulations provide that an impartial hearing officer shall not have a personal or professional interest that would conflict with his or her objectivity in the impartial hearing (34 C.F.R. § 300.511[c][1][i][B]; 8 NYCRR 200.1[x][3]; Application of a Child with a Disability, Appeal No. 01-046). An impartial hearing officer should avoid giving the appearance of impropriety (Application of a Child with a Disability, Appeal No. 07-008; Application of the Bd. of Educ., Appeal No. 03-015; Application of a Child with a Disability, Appeal No. 02-027; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child with a Disability, Appeal No. 99-061; Application of a Child with a Disability, Appeal No. 99-025; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-55; Application of a Child with a Disability, Appeal No. 94-32). An impartial hearing officer, like a judge, must be patient, dignified, and courteous in dealings with participants in the impartial hearing process and must perform all duties without bias or prejudice in favor or against any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021; see 8 NYCRR 200.1[x][3], [4][v]). At all stages of the impartial hearing, an impartial hearing officer may "assist an unrepresented party by providing information relating only to the hearing process" (8 NYCRR 200.5[j][3][vii]). An impartial hearing officer must render a decision that is based solely upon the hearing record (8 NYCRR 200.5[j][5][v]; see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). State regulations do not impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). An impartial hearing officer has a responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

After reviewing the entire hearing record, I find that the evidence does not support the parent's contention that the impartial hearing officer acted with bias or prejudice against her. At the commencement of the impartial hearing, the impartial hearing officer advised the parties that she had no personal or professional interest that would conflict with her ability to hear the case in an impartial manner (Tr. p. 16). In addition, she discussed her professional experience representing both school districts and parents, and informed the parties of their right to request her recusal (*id.*). The hearing record also shows that the impartial hearing officer made evidentiary rulings in the parent's favor (Tr. pp. 52-54). The impartial hearing officer also reminded the parent

of her right to seek the assistance of an attorney (Tr. p. 68). Under the circumstances, while the parent disagrees with the conclusions reached by the impartial hearing officer, her disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).

Next, the parent argues that the impartial hearing officer erred by failing to order the district to provide the student with ESY services. According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[k]; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).¹⁴ The June 2006 and May 2007 IEPs recommended ESY services for the 2006-07 and 2007-08 school years, respectively (Parent Exs. J at p. 1; I at p. 1). The March 14, 2008 CSE removed ESY services from the student's IEP for the 2008-09 school year (Dist. Ex. 6 at p. 1). Neither the March 14, 2008 IEP nor the testimony and evaluations presented at the impartial hearing demonstrated that the student's needs changed such that he was no longer at risk of substantial regression during the summer months.

Based on the above, I find that the district did not provide sufficient evidence to meet its burden to support the March 2008 CSE's determination to remove ESY services from the student's 2008-09 program proposed in the March 2008 IEP. Accordingly, the hearing record does not demonstrate that ESY services were properly removed from the student's program, thereby denying the student a FAPE. Under the circumstances, I will order the CSE to reconvene if the student did not receive ESY services during summer 2008, and determine what additional services are necessary to make up for the deprivation of educational services.¹⁵

¹⁴ In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

¹⁵ Pursuant to pendency, the student was entitled to summer 2008 ESY services for OT, speech-language and counseling, as per the May 2007 IEP, the student's last agreed-upon IEP, unless the parties agreed otherwise. It

With regard to the parent's assertion that the student be afforded the testing accommodations that were enumerated in the May 2007 IEP, as detailed herein, I am constrained to conclude that, similar to the parent's ESY claim, the district did not present sufficient evidence to support its decision to change the student's testing accommodations.

A comparison of the testing accommodations as set forth in the May 2007 and the March 2008 IEP reveals that both IEPs afforded the student extended time on tests (compare Dist. Ex. 6 at p. 14, with Parent Ex. I at p. 13). Specifically, the May 2007 CSE recommended that the student receive extended time (2x), while the March 2008 IEP afforded the student extended time (1.5x) (id.). Additionally, the May 2007 IEP indicated that the student's narrative answers were to be recorded by a scribe, while the March 2008 IEP indicated that the student's narrative answers for tests lasting 45 minutes or longer would be recorded by a scribe (id.).

Here, the hearing record does not sufficiently demonstrate why the CSE decided at the time of the March 2008 CSE meeting to reduce the student's testing accommodations. Although the hearing record contains a May 2008 OT evaluation recommending that the student begin taking his own notes and assignments rather than relying on his paraprofessional (Dist. Ex. 21), that evaluation was not before the March 2008 CSE nor did it contain recommendations regarding testing accommodations. Accordingly, I find that the March 2008 CSE lacked sufficient evaluative data to support its determination to reduce the student's testing accommodations. Thus, the district failed to meet its burden on this issue and under the circumstances, I will order the parties to reconvene, if they have not done so already, and give proper consideration to the student's need, if any, for testing accommodations.

I will now consider the parent's remaining claims for relief. Specifically, the parent requests the following: (1) input regarding the hiring of the student's paraprofessional; (2) that the paraprofessional be required to carry the student's school bag; (3) that the school bus matron assist the student with his school bag as he climbs and descends the school bus; (4) an additional set of textbooks for the student to keep at home; (5) transportation for the parent to accompany the student to sessions with his related service providers; (6) assistive technology training for the student's paraprofessional; and (7) a new laptop computer, with internet access and updated software. As for the parent's remaining claims, after having thoroughly reviewed the hearing record, I find no need to modify the impartial hearing officer's determination pertaining to them.

In light of my determination, I need not address the parties' remaining claims.

is well established that the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; see 34 C.F.R. § 300.518; 8 NYCRR 200.5[m]). In addition, during the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Furthermore, in order to comply with State and federal law pendency provisions, a district's responsibility to maintain a student's pendency placement includes funding that placement (see Murphy v. Arlington Cent Sch. Dist., 297 F.3d 195 [2d Cir. 2002]; Bd. of Educ. v. Schutz, 290 F.3d 476 [2d Cir. 2002], cert. denied, 537 U.S. 1227 [2003]; see also 20 U.S.C. § 1415[j]; 34 C.F.R. § 300.518; Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision dated March 26, 2009 is annulled to the extent that she denied the parent's requests for ESY services for the 2008-09 school year and for testing accommodations as previously provided on the student's May 2007 IEP; and

IT IS FURTHER ORDERED that, unless the parties' otherwise agree, the district shall convene a CSE within 30 days of the date of this order, to consider what, if any, ESY services should be provided to the student for summer 2009 and what, if any, ESY additional services should be provided to compensate for any deprivation of ESY services during summer 2008; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the provision of any additional services to compensate for any deprivation of ESY services during summer 2008 shall be provided to the student prior to July 1, 2010; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, at the CSE meeting to be convened within 30 days of the date of this order, the CSE shall consider what, if any, testing accommodations are appropriate for the student for the 2009-10 school year, and recommend an appropriate program consistent with this decision.

Dated: **Albany, New York**
 June 18, 2009

PAUL F. KELLY
STATE REVIEW OFFICER