The University of the State of New York

The State Education Department
State Review Officer
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No. 09-077

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:
Mayerson & Associates, attorneys for petitioner, Gary S. Mayerson, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2008-09 school year was appropriate and that the district was not required to reimburse the parent for the cost of the student's after school programs including speech-language services and was not required to fund any additional speech-language services for the 2008-09 school year. The district cross-appeals from that portion of the impartial hearing officer's decision which found that the district was not entitled to recoupment for the costs of the services delivered under pendency. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending an 8:1+2 special class at the Hawthorne Country Day School (Hawthorne) (Dist. Ex. 6 at p.1). Hawthorne is a nonpublic school approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student was also receiving 22 hours per week of individual applied behavioral analysis (ABA) instruction after school (for 52 weeks, including weekends), 1 hour per week of ABA supervision (for 52 weeks, including weekends), and six hours per week of individual speech-language therapy to be provided by related service authorization (RSA) after school (for 52 weeks, including weekends). The student's placement at Hawthorne and the additional services described above constitutes the student's pendency placement during the instant proceeding pursuant to an unappealed impartial hearing

officer's interim order dated July 15, 2008 (IHO Interim Order at pp. 2, 4).[1] The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record reveals that the student functions on a "late" second grade level in all academic areas (Dist. Ex. 6 at p. 3). The student demonstrates difficulty with fine and gross motor skills as well as receptive, expressive, and pragmatic language (id. at p. 18; Dist. Ex. 12 at p. 2). The hearing record reveals that the student engages in impulsive physical behaviors "when he does not get what he wants when he wants it", including "temper tantrums, tensing his extremities, fidgeting his fingers, and squeezing the top of his hands against his chin" (Dist. Ex. 12 at p. 5). The hearing record reveals that the student "requires intense levels of supervision and attention to secure his safety and to foster his independence" (id. at p. 2).

On May 13, 2008, the CSE met to conduct the student's annual review in preparation for the 2008-09 school year (Dist. Ex. 4 at pp. 1, 2). The CSE recommended that the student continue to attend Hawthorne on a 12-month basis and receive related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id. at pp. 1, 20). The CSE also recommended that the student receive special education transportation (id. at p. 1).

In a due process complaint notice dated June 3, 2008, the parent, through her attorney, challenged the May 2008 individualized education program (IEP) and requested an impartial hearing seeking reimbursement for the student's home-based services on a 12 month, 52 week basis (Parent Ex. A).

Thereafter, on June 17, 2008 the CSE met again to review the students IEP for the 2008-09 school year and developed a second IEP substantially similar to the first (compare Dist. Ex. 6, with Dist. Ex. 4).

The parent submitted an amended due process complaint notice dated June 18, 2008 (Dist. Ex. 1). According to the amended due process complaint notice, the purpose of the complaint was to adjudicate claims for pendency, prospective, declaratory, compensatory, and Burlington/Carter reimbursement relief[2] relating to the 12 month 2008-09 school year, including the summer 2008 (id. at p. 1). The parent invoked the student's pendency based upon an unappealed impartial hearing officer decision dated November 2, 2007 (id. at pp. 1-2; see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). The parent contended that the district failed to offer the student a free appropriate public education (FAPE) on both procedural and substantive grounds (id. at pp. 2-4). The procedural issues raised by the parent included, among other things, arguments regarding the composition of both the May and June 2008 CSEs, the May 2008 IEP's goals and objectives and predetermination of the student's program by both CSEs (id.). The substantive issues identified by the parent included, among other things,

[1] The impartial hearing officer's interim order dated July 15, 2008, determined that the student's pendency placement was based upon a prior unappealed impartial hearing officer's decision dated November 2, 2007 (IHO Interim Order at p. 2).

[2] Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). These two cases are typically referred to together as the "Burlington/Carter" analysis for tuition reimbursement.

arguments regarding the lack of home-based ABA services identified on both of the student's IEPs and the failure to develop a functional behavioral assessment (FBA) or a behavior intervention plan (BIP) for he student (id.).

An impartial hearing began on July 7, 2008 (Tr. p. 1). During that first day of the impartial hearing, the parties discussed the issue of the student's pendency placement, which resulted in the impartial hearing officer's interim order dated July 15, 2008 discussed above. Testimony was taken on eight other dates beginning August 27, 2008, and concluding on April 27, 2009 (Tr. pp. 19, 82, 300, 490, 687, 890, 1090, 1257).

By decision dated June 5, 2009, the impartial hearing officer first determined that while the May 2008 IEP was relevant to the case, the June 2008 IEP was the final IEP for the student (IHO Decision at p. 4). The impartial hearing officer found that the district offered the student a FAPE for the 2008-09 school year and that therefore, the parent was not entitled to reimbursement for after school ABA services not covered by pendency for the remainder of the school year and was not entitled to services for 52 weeks per year (IHO Decision at p. 7). The impartial hearing office also found that the district was not entitled to recoupment of the costs of providing services under pendency (IHO Decision at p. 22).

In her decision, the impartial hearing officer set out the relevant law and then found that although an additional parent member did not attend the CSE meeting, this procedural flaw did not rise to a denial of a FAPE (IHO Decision at pp. 7-9). The impartial hearing officer further found that the parent was not precluded from meaningfully participating in formulating the student's IEP simply because the IEP goals were drafted before the meeting and the parent disagreed with the resulting IEP (id. at p. 9). The impartial hearing officer found that the district did not discontinue the student's home-based ABA services without a supporting reason, as the parent contended, because the district had never recommended the program, as the services had resulted from a prior impartial hearing officer decision (id. at pp. 9-10). Similarly, the impartial hearing officer found that there was no need for a transition plan when the CSE did not substantially change the program it had recommended for the student (id. at p. 10). The impartial hearing officer rejected the parent's argument that the June 2008 CSE meeting was held without notice to the student's school or participation by it after finding that, based on the hearing evidence, Hawthorne did have notice of the meeting and failed to attend (id. at p. 11).

Substantively, the impartial hearing officer found that the June 2008 IEP accurately reflected the results of the evaluations and correctly identified the student's needs (IHO Decision at pp. 11-12). Based on evidence and testimony at the impartial hearing, the impartial hearing officer found that the annual goals and short-term objectives contained in the June 2008 IEP were appropriate (id. at p. 14). The impartial hearing officer found that the program and placement at Hawthorne was appropriate and found that the June 2008 CSE's decision not to recommend home-based services was appropriate because the student had been making progress "across the board" in the school (id. at pp. 15-18). The impartial hearing officer noted that there was conflicting evidence regarding the student's abilities to generalize and noted that while the home-based services were likely providing the student an educational benefit, the benefit could not easily be differentiated from the overall progress achieved by the other parts of the student's program (id. at pp. 16-20). The impartial hearing officer found that the student's recommended program was calculated for him to receive educational benefits and offered the student a FAPE (id.). The

impartial hearing officer further found that the lack of an FBA or a BIP did not deprive the student of a FAPE because the student's interfering behaviors were being adequately addressed by Hawthorne's staff and were addressed in the annual goals and short-term objectives in the June 2008 IEP (id. at pp. 21). The impartial hearing officer rejected the parent's argument regarding the failure of the IEP to provide for parent training and counseling after finding that the IEP did not need to list parent training because parent training and counseling was available at the student's school (id.). The impartial hearing officer also found that the parent's claims regarding impermissible policy, predetermination, and the lack of a school psychologist at the May 2008 CSE meeting were without merit (id. at p. 22). Lastly, she denied the district's request for recoupment of pendency payments citing prior decisions of State Review Officers (id.).

The parent appeals, asserting that the impartial hearing officer erred in denying reimbursement for the student's after school services and invoking continued pendency. In sum, the parent argues that the impartial hearing officer erroneously found that the district offered the student a FAPE for the 2008-09 school year primarily because the CSE engaged in impermissible predetermination and because the hearing record demonstrated that the student required after school services to address the student's generalization and activities of daily living (ADL). Further, the parent argues that the progress the student has made does not demonstrate that the district's recommended program of Hawthorne alone without the after school services was appropriate, but instead demonstrates that the parent's requested program of Hawthorne in addition to after school/home-based ABA and related services is appropriate. The parent also argues that the hearing record demonstrates that the parent was denied meaningful participation at the June 2008 IEP meeting by the district's choice of meeting location, which inconvenienced the parent, the student's teachers, and his therapists, preventing their attendance. The parent further argues that the impartial hearing officer should have determined that the parent's proposed program was reasonably calculated to enable the student to receive educational benefits, and notes that the same program had been found to be appropriate for the 2007-08 school year by another impartial hearing officer in an unappealed decision. Lastly, the parent seeks reimbursement for the cost of speech-language services provided at parent expense at the RSA rate during the pendency of this matter.

In an answer and cross-appeal, the district argues that the impartial hearing officer properly determined that the district offered the student a FAPE and cross-appeals the impartial hearing officer's finding that the district is not entitled to recoupment of services paid for pursuant to pendency. Specifically, the district argues that before the time to appeal the impartial hearing officer's decision had expired and before the parent filed the petition, the parent received all of the relief sought by virtue of pendency. However, the district additionally contends that the case is not moot because the district also seeks recoupment of the funds paid out pursuant to pendency.

The parent answered the district's cross-appeal and argued that the district was not entitled to recoupment for the costs of providing services under pendency both on substantive grounds and because the district's cross-appeal was moot.[3]

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

[3] Although the parent's answer to the district's cross-appeal was submitted as a "reply," the contents thereof respond to the district's cross-appeal and are accepted as such.

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i];

Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Parents are to be afforded an opportunity to participate in the IEP formulation process (34 C.F.R. § 300.322; see Cerra, 427 F.3d at 192; Gavrity v. New Lebanon Sch. Dist., 2009 WL 3164435, at *29 [N.D.N.Y. Sept. 29, 2009]). 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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Forest Grove, 129 S. Ct. at 2488; Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the Individuals with Disabilities Education Act (IDEA) (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

At the outset, I will address whether the parent's claims are now moot. I note that the parent has already received virtually all of the relief she was seeking at the impartial hearing and is seeking on appeal, under pendency. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired

may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In this case, there is no longer any live controversy relating to the parties' dispute over the services offered by the district for the 2008-09 school year. I find that even if I were to make a determination that the services requested by the parent for the 2008-09 school year were appropriate, in this instance, it would have no actual effect on the parties. The 2008-09 school year expired on June 30, 2009, and the student has received such services throughout the 2008-09 school year by virtue of pendency (Pet. ¶¶ 4-8). Accordingly, the parent's claims for the 2008-09 school year need not be further addressed here.[4] A State Review Officer is not required to make a determination that is academic or which will have no actual impact upon the parties (Application of a Student with a Disability, Appeal No. 09-065; Application of the Dep't of Educ., Appeal No. 08-044; Application of a Child with a Disability, Appeal No. 07-077; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 02-086; see also Application of the Bd. of Educ., Appeal No. 04-006; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 97-64). Additionally, the exception to the mootness doctrine does not apply here as I do not find this matter to be capable

[4] However, I do find that the district should reimburse the parent for the cost of providing six hours of speech-language therapy per week during the pendency of this matter, as provided for in the impartial hearing officer's interim order dated July 15, 2008, up to the RSA rate for such services upon submission of proof of payment by the parent.

of repetition yet evading review (see Honig, 484 U.S. at 318-23; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038).

Under the circumstances presented here, I decline to review the merits of the parent's appeal and it is not necessary to discuss the impartial hearing officer's rationale for reaching her determination on the merits of the parent's claims for the 2008-09 school year.

As to the district's cross-appeal seeking recoupment of the funds paid during the student's pendency placement, I decline to award such funds. The IDEA and the New York State Education Law require that a student remain in his or her current educational placement, unless the student's parents and the board of education 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]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). 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]).

I have considered the district's arguments favoring recoupment of funds paid under pendency and find them to be unpersuasive (see Application of a Student with a Disability, Appeal No. 09-019; Application of a Student with a Disability, Appeal Nos. 09-008 & 09-010; Application of a Student with a Disability, Appeal No. 08-134; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Child with a Disability, Appeal No. 05-091). Accordingly, I decline to order the parent to reimburse the district for costs incurred by the district in maintaining the student's pendency placement, an expense it was required to pay in order to comply with the pendency provisions of State and federal law (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. § 300.51[8]; Educ. Law § 4404[4]; 8 NYCRR 200.5[m]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the district reimburse the parent for the cost of providing six hours of speech-language therapy per week during the pendency of this matter, as provided for in the impartial hearing officer's interim order dated July 15, 2008, up to the RSA rate for such services upon submission of proof of payment by the parent.

Dated: **Albany, New York**
October 6, 2009

PAUL F. KELLY
STATE REVIEW OFFICER