The University of the State of New York

The State Education Department
State Review Officer
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No. 09-129

Application of a STUDENT WITH A DISABILITY, by his parents, 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, Emily R. Goldman, Esq., of counsel

DECISION

Petitioners (the parents) appeal from an October 14, 2009 decision of an impartial hearing officer which ordered respondent (the district) to convene a meeting of the Committee on Special Education (CSE) in order to formulate an appropriate individualized education program (IEP) for the student for the 2009-10 school year and which also concluded that the student's current program was determined by the student's May 2008 IEP. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending a district school (Tr. pp. 22, 40). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1 [zz][11]).

This appeal involves a dispute over the student's 2009-10 educational program as recommended in the student's July 17, 2009 IEP (Parent Exs. 1 at pp. 7-10; 6). A dispute concerning the same school year, but involving a different IEP dated February 13, 2009, was the subject of a prior appeal and a prior State Review Officer decision dated August 19, 2009 (see Application of a Student with a Disability, Appeal No. 09-070). Some of the student's educational history was previously discussed in that prior decision and will be repeated in this decision only briefly.

The hearing record reveals that the student received a diagnosis of an autism spectrum disorder at age four (Parent Exs. 2 at p. 3; 3 at p. 3; 4 at p. 3). On June 20, 2008, the CSE convened and developed an IEP for the student for the 2008-09 school year (third grade) that recommended

a collaborative team teaching (CTT) class, five individual 60-minute sessions of special education tutoring per week, five individual 180-minute sessions of applied behavioral analysis (ABA) therapy per week, two 30-minute group (3:1) sessions of occupational therapy (OT) per week, one individual 30-minute session of OT per week, three individual 45-minute sessions of speech-language therapy per week, three 30-minute sessions of group (3:1) counseling per week, and a full-time crisis management paraprofessional for the classroom (Parent Ex. 4 at pp. 1, 2, 16). The parents agreed to this program (Tr. p. 193; Parent Ex. 1 at p. 10).

On February 13, 2009, the CSE convened to develop an IEP for the period between February 13, 2009 and February 13, 2010 (Parent Exs. 5; 30). The CSE recommended a 12:1 integrated co-teaching class, a full-time behavior management paraprofessional, three 30-minute sessions of group (3:1) counseling services per week, three 30-minute sessions of group (2:1) OT per week, and three 45-minute sessions of individual speech-language therapy per week (Parent Ex. 5 at pp. 1, 16). The ABA services and special education tutoring that had been recommended on the prior June 2008 IEP were not included in the program recommended at the February 13, 2009 CSE meeting (id.). As such, the parents commenced an impartial hearing by due process complaint notice dated February 16, 2009, alleging that the district had predetermined the level and type of related services prior to the February 13, 2009 CSE meeting, and that this predetermination had denied them the opportunity to meaningfully participate in the IEP process (Parent Exs. 19 at p. 3; 34 at p. 3). The parents alleged further that the student would regress if any of the services provided for in the June 2008 IEP were terminated or if the student did not receive ABA services from qualified ABA providers (Parent Exs. 19 at p. 4; 34 at p. 4). The parents requested that the student continue to receive the educational program and related services that had been outlined in the prior IEP dated June 20, 2008 (Parent Ex. 19 at pp. 1, 5, 16).

On May 19, 2009, an impartial hearing officer (Hearing Officer 1) rendered a decision regarding the parents' February 16, 2009 due process complaint notice (Parent Ex. 35 at p. 27). Hearing Officer 1 found, among other things, that: (1) the district's decision not to include ABA services on the IEP was made in advance of the February 13, 2009 CSE meeting and without the input of the parents; (2) the hearing record did not provide a complete picture of the student's current needs and levels of functioning; (3) the current evaluations were outdated; and (4) a triennial evaluation was due (id. at pp. 17-18, 23). She remanded the matter back to the CSE and ordered the CSE to determine which assessments were needed in order to make appropriate recommendations for the student (id. at p. 26). She further ordered the CSE to arrange for observations and assessments, including a functional behavioral assessment (FBA); at least two classroom observations, including observations of the interactions with the paraprofessional and the ABA therapist; and at least one observation of a special education tutoring session (referred to as a special education teacher support service [SETSS] session) (id.). She also ordered the district to obtain: (1) teacher reports from the student's special education teacher and regular education teacher; (2) updated reports from all related service providers; (3) an updated report from the SETSS teacher; (4) a psychoeducational evaluation (or a psychological and an educational assessment); (5) a speech-language evaluation; and (6) any other assessment deemed necessary by the CSE (id.). She further ordered the CSE to reconvene within 60 days from the date of her decision to consider all of the educational reports, evaluations, and input from the CSE participants, and to make appropriate recommendations for the student's educational program and services for the 2009-10 school year (id. at p. 27). As the student's pendency placement, the impartial hearing officer ordered the district to provide the student with the educational program

and services as outlined in the June 20, 2008 IEP and further ordered that this program and the accompanying services be provided until such time as the CSE reconvened to review the newly ordered evaluations and made new recommendations (id. at pp. 19, 25-26).

The parents appealed Hearing Officer 1's decision, and their appeal was dismissed on August 19, 2009 (Application of a Student with a Disability, Appeal No. 09-070).

Prior to the issuance of Application of a Student with a Disability, Appeal No. 09-070, the CSE reconvened on June 12, 2009 to discuss the educational needs of the student (Parent Exs. 43; 44; see Parent Ex. 1 at p. 5). In accordance with Hearing Officer 1's decision, several appointments were scheduled to evaluate the student (compare Parent Ex. 35, with Parent Ex. 44 at pp. 2-4; see Parent Ex. 1 at pp. 5-6).

Consistent with Hearing Officer 1's order, the hearing record reflects that during June 2009, the district conducted psychoeducational and speech-language evaluations of the student; observed the student working with his SETSS provider, classroom paraprofessional, and classroom ABA provider; conducted an FBA of the student's aggression, noncompliance, noncontextual vocalizations, and disruptive behaviors; and developed a behavioral intervention plan (BIP) for the student that included use of a token economy (Tr. pp. 16, 150-51; Dist. Ex. A; Parent Exs. 58; 59; 60; 61; 62).

The psychoeducational evaluation results corroborated conclusions from a private evaluation conducted in February 2009 that the student presented with the behavioral characteristics of a child on the autism spectrum, and also revealed that the student exhibited cognitive skills in the "low range" (Parent Ex. 58 at pp. 4, 6). The evaluation report further indicated that the student's academic skills were "both low for his age and for his grade placement," and that despite the level of support provided to the student throughout the school day, he presented with significant deficits in math and difficulties in the areas of reading and writing (id.). Results of formal testing administered during the speech-language evaluation, indicated that the student exhibited a "severe degree of impairment" with "a number of relative strengths" and elicited recommendations to address the student's needs in the areas of articulation, semantics, syntax, discourse, and pragmatics (Parent Ex. 62 at pp. 2-4).

Observations of the student working with his SETSS provider, classroom paraprofessional, and classroom ABA provider reflected that the student was responsive to the paraprofessional and the teachers, stayed on task, responded to directions, asked questions of the teacher, and appeared to be using the strategies he had learned (Tr. pp. 16, 150-51; Parent Exs. 59; 60; 61).

Progress reports were also developed during June 2009 by the student's special education teacher, regular education teacher, SETSS provider, guidance counselor, speech-language pathologist, and occupational therapist (Parent Exs. 42; 45; 46; 50; 51; 53).

The student's SETSS provider reported that the student demonstrated "progression[s]" ranging from three to five months when she compared his results on a May 2009 administration of the Slosson Diagnostic Math Screener to his results from a January 2009 administration of the test and that the student was able to read a "Level J book," which she indicated correlated to a second grade reading level, with 98 percent accuracy (Parent Ex. 52 at pp. 1-3). Consistent with

the SETSS provider's observations, the student's regular education and special education teachers indicated that the student required prompts, reminders, and encouragement to remain focused and engaged (Parent Exs. 52 at p. 1; 45 at p. 1; 46 at p. 1).

Although the progress reports reflected a minimal delay in language comprehension and language production skills, a moderate delay in pragmatic skills, and that the student had started to demonstrate improvement in his conversational and socialization skills; the reports also indicated that his performance was often dependent upon his emotional state and that he continued to require assistance to maintain a conversation for more than a few exchanges (Parent Exs. 45 at p. 1; 46 at p. 1; 50 at p. 1; 51; 53 at pp. 1, 2).[1]

On July 17, 2009, the CSE reconvened to develop an IEP for the student (Parent Ex. 6; see Parent Exs. 54; 63). The CSE recommended a 12:1 integrated CTT class with 12 months of speech-language services (Tr. p. 24; Parent Ex. 6 at p. 1). The CSE also recommended the following related services: three 30-minute sessions of 3:1 counseling per week, three 30-minute sessions of 2:1 OT per week, two 30-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of 3:1 speech-language therapy per week (Tr. p. 24; Parent Ex. 6 at p. 12). The CSE also developed a BIP to address the student's disruptive behavior, inappropriate noise making, laughing, noncontextual vocalizations, and noncompliant behavior (Parent Ex. 6 at pp. 14-16).

By due process complaint notice dated July 22, 2009, the parents requested an impartial hearing (Parent Ex. 1). In the due process complaint notice, the parents asserted that none of the members of the July 2009 CSE team had previously had contact with the student or had sufficient knowledge of the student's educational issues (id. at pp. 7, 9). The parents also alleged that the district had predetermined the type of services that it would recommend prior to the July 2009 CSE meeting and that its decision was guided by budgetary concerns (id. at pp. 7, 9, 10). The parents alleged further that the recommended related service of speech-language therapy was inappropriate because it would pull the student out of the classroom, which would impact on his social and emotional progress because it would reduce the benefit the student derived from in-class peer role models (id. at p. 7). The parents asserted that the student continued to require the services of the special education tutor and that the district's removal of this component of the student's program would result in a significant regression (id. at p. 8). The parents also asserted that the student continued to require the services of the ABA therapist and that the district's removal of this component of the student's program was improper (id. at pp. 9-10). The parents requested that the student continue to receive the educational program and related services that had previously been provided under the June 20, 2008 IEP (id. at p. 10).

The impartial hearing below began on September 18, 2009 and concluded on October 2, 2009, after two days of testimony (Tr. pp. 1, 114, 229). On October 6, 2009, the impartial hearing officer (Hearing Officer 2) issued an interim order which directed the district to ensure that the student's limited travel time for his district provided bus transportation would be "respected" and further that, after the student was picked up at school, there was no scheduled waiting time in

[1] The speech-language pathologist who developed the student's June 25, 2009 progress report was not the same speech-language pathologist who conducted the June 22, 2009 evaluation of the student (compare Parent Ex. 53 at p. 1, with Parent Ex. 62 at p. 1).

excess of ten minutes on the bus route (IHO Interim Order at p. 2). On October 14, 2009, Hearing Officer 2 rendered his decision on the parents' claims raised in their July 22, 2009 due process complaint notice (IHO Decision at p. 6). Hearing Officer 2 determined that the hearing record did not support the conclusion that the July 2009 IEP provided an appropriate education for the student and therefore, the IEP was "invalid" (id. at p. 3). He found that the information in the hearing record was incomplete and therefore, he could not determine whether the student was progressing or whether the district's proposal to diminish the student's services by removing special education tutoring (SETSS) and ABA therapy was appropriate (id. at pp. 3-4). Hearing Officer 2 ordered that the student's "May 2008" IEP remain as the student's then current IEP, and further, that the CSE reconvene to develop a new IEP for the student for the 2009-10 school year (id. at p. 6).

The parents appeal, and assert that repetitive remands of this case to the CSE have denied the student a free appropriate public education (FAPE). The parents assert further that the July 2009 CSE meeting was procedurally defective because many of the participants had never met the student, there was no draft IEP written during the meeting, and the parents received an incomplete copy of the IEP. The parents also assert that Hearing Officer 2 erred in ordering that the student's May 20, 2008 IEP was to remain in effect. Regarding pendency, the parents argue that the June 20, 2008 IEP is the pendency IEP as ordered by Hearing Officer 1, that the June 20, 2008 IEP is the program that is being currently implemented, and that the June 2008 IEP should remain in effect. On appeal, the parents seek a determination that the student's program for the 2009-10 school year should include "all of the service recommendations and modifications listed in [the student's] June 20, 2008 IEP" (Pet. ¶ 24).

The district answers, and asserts that the parents' petition fails to comply with the procedural requirements of Part 279 of the State regulations. The district asserts that the parents failed to: (1) submit a document which is identified as a petition; (2) number all of the paragraphs in their pleadings; (3) number the pages of their pleadings; (4) cite to the hearing record; and (5) verify their pleadings appropriately. The district also asserts that the parents' pleadings are vague in contravention of 8 NYCRR 279.4. Substantively, the district asserts that the impartial hearing officer was correct to remand the case back to the CSE. The district also asserts that the parents' concern that repetitive remand to the CSE will deprive the student of an appropriate educational program is speculative and unfounded.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d

Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; 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). 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; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

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 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). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the

parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

Initially I note that neither party has appealed the Hearing Officer 2's interim order regarding the student's limited transportation time (IHO Interim Order at p. 2). Moreover, the district has not cross-appealed Hearing Officer 2's determination that the July 2009 IEP did not offer the student a FAPE (IHO Decision at pp. 3-6). Therefore, those determinations of Hearing Officer 2 are final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-095; Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

Turning to the merits of the parents' appeal, the hearing record shows that the impartial hearing was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[f]; 34 C.F.R. §§ 300.511-13; N.Y. Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). Under the facts of this case, I concur with Hearing Officer 2 that an appropriate remedy is to reconvene the CSE to devise and ensure implementation of an appropriate IEP that reflects the results of evaluations that identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education programs and services (34 C.F.R. § 300.320[a][1],[2],[4]; 8 NYCRR 200.4[d][2][i],[iii],[v],[e][7]; see Application of a Student with a Disability, 08-154). Upon reconvening, the CSE should give due consideration to the suggestions contained within Hearing Officer 2's decision pertaining to the student's program. I see no persuasive reason in the hearing record to modify Hearing Officer 2's order that the parties reconvene a CSE to devise a new IEP for the 2009-10 school year (IHO Decision at pp. 3-6). I will, however, modify the order by delineating a time by which the CSE should reconvene.

Lastly, the hearing record supports the parents' argument that the program provided in the June 20, 2008 IEP should be the student's pendency placement. Despite finding that the May 2008 IEP established the student's pendency placement, Hearing Officer 2 noted during the impartial hearing that the student should receive the same June 20, 2008 program pursuant to Hearing Officer 1's prior pendency order (Tr. pp. 10-11; Parent Ex. 35 at pp. 18, 25). Moreover, the hearing record shows that the June 20, 2008 IEP was the last agreed upon placement, a placement which

both superseded the May 2008 IEP and was being implemented during the course of the due process proceedings below (Ans. ¶¶ 4, 29 n. 3). As such, I find that the June 20, 2008 IEP is the student's program for purposes of pendency and I will modify Hearing Officer 2's order regarding that finding. I have considered the parties' other contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the Hearing Officer 2's October 14, 2009 order is hereby modified to order that, unless the parties otherwise agree, the student's pendency program is the June 20, 2008 IEP; and

IT IS FURTHER ORDERED, that Hearing Officer 2's October 14, 2009 order is modified to order the CSE to reconvene within 15 calendar days after the date of this decision, unless the parties otherwise agree, to develop a new IEP for the 2009-10 school year.

Dated: **Albany, New York**
January 15, 2010

PAUL F. KELLY
STATE REVIEW OFFICER