The University of the State of New York

The State Education Department
State Review Officer
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No. 11-027

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 Board of Education of the Taconic Hills Central School District

Appearances:
Law Office of Andrew K. Cuddy, attorneys for petitioners, Andrew K. Cuddy, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which, among other things, denied their request for additional services consistent with a January 2010 individualized education program (IEP). The district cross-appeals and seeks to modify portions of the relief ordered by the impartial hearing officer. The appeal must be sustained in part. The cross-appeal must be dismissed.

Background

At the time of the impartial hearing, the student was not receiving special education programs or related services (see Tr. pp. 1-4196; Dist. Exs. 1 at p. 1; 2 at p. 10). The student received a diagnosis of autism at 11 months of age, and he exhibits global developmental delays in the areas of cognition, academic skills, fine-motor skills, and communication ability (Dist. Exs. 6; 7; 152). Assessments of the student's verbal behavior yielded scores in the 0-month to 18-month range (Dist. Ex. 6 at pp. 64-76; 152 at p. 725).[1] The student communicates through the use of sign language (approximately 60 signs) in conjunction with verbal approximations (Tr. p. 2031; Dist. Ex. 152 at pp. 1-2). At times, the student exhibits "maladaptive behaviors," such as mouthing items, leaving the instructional area/classroom ("bolting"), and throwing himself on the floor ("flopping") (Tr. pp. 1623-27, 1723; Dist. Ex. 6 at pp. 62, 76-77). The district's speech-language pathologist—who worked with the student for approximately five years—testified that the student

[1] Verbal behaviors, according to the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), include manding/requesting, visual performance/matching to sample, listener behavior/receptive language, motor imitation, echoic/vocal imitation, tact/labeling, independent play, social behavior and social play, and spontaneous vocal behavior (Dist. Ex. 6 at pp. 64-76).

possessed "unbelievable potential," and further described him as a "real quick learner" (Tr. pp. 1243, 1247-50, 1261, 1279, 1302, 1332). Despite the student's communication and behavioral deficits, the student's 1:1 aide testified that when using applied behavior analysis (ABA) approaches with the student, he could learn skills after one trial and would sometimes master new material on the day it was introduced (Tr. pp. 321, 409-11; see IHO Ex. iii at p. 11a). The student's eligibility for special education programs and related services as a student with autism is not in dispute (34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Background and Procedural History

In this case, the parties' dispute regarding the student's 2009-10 school year initially arose by due process complaint notice dated July 2, 2009 (Dist. Ex. 4A at p. 1). On September 20, 2009, the parties executed—and the impartial hearing officer "so ordered" on October 8, 2009—a Consent Decree to resolve the issues raised in the July 2009 due process complaint notice (Dist. Ex. 4 at pp. 48-49, 54). In the Consent Decree, the district stipulated that it had deprived the student of a free appropriate public education (FAPE) for the 2007-08 and 2008-09 school years, and further, that it could not implement the student's IEP developed at the June 2, 2009 Committee on Special Education (CSE) meeting for the 2009-10 school year (id. at p. 48). Noting, at that time, the "absence of an existing appropriate and available program or school" for the student within the geographical area, the Consent Decree indicated that upon agreement of the parties, the district would "create a program in its elementary school to address [the student's] educational needs" (id. at p. 49).[2]

Pursuant to the Consent Decree, the parents, the student, and district personnel (a special education teacher and a 1:1 aide) attended a three-day training session at the Carbone Clinic in early January 2010, at which time the Carbone Clinic also conducted a comprehensive evaluation of the student (Dist. Exs. 4 at p. 50; 6 at pp. 60-101; 19-20; see Tr. pp. 321-33, 1599, 1615).[3] Both the special education teacher and the 1:1 aide had been providing special education services to the student in his home since approximately October 2009 pursuant to the pendency agreement set forth in the Consent Decree (Tr. pp. 321, 1605-06; see Dist. Exs. 4 at p. 53; 12; 14-17; see generally Dist. Exs. 8-10).[4] At the Carbone Clinic, the special education teacher and the 1:1 aide worked

[2] The Consent Decree also addressed the following: district evaluations of the student (psychoeducational, speech-language therapy, functional behavioral assessment, occupational therapy, physical therapy, vision, and an independent neuropsychological), an evaluation of the student by the Carbone Clinic, parental requests for independent educational evaluations, behavioral consultant services for the 2009-10 school year, the development of an IEP, components of the student's IEP, a behavior intervention plan, prohibition of the use of aversive techniques, the use of physical restraints or emergency interventions, parent observations of the student's program, pendency, make-up services for the 2007-08 and 2008-09 school years (speech-language therapy, occupational therapy, and physical therapy), educational records, authorization, modifications to the agreement, and resolution of issues (Dist. Ex. 4 at pp. 50-54). As part of the district evaluations, the parties agreed to postpone an assistive technology evaluation and an audiological evaluation of the student until later during the 2009-10 school year upon the parents' consent (id. at p. 50).

[3] Dr. Vincent J. Carbone, Ed.D, is the Director of the Carbone Clinic (Dist. Ex. 6 at p. 60). He is a Board Certified Behavior Analyst-Doctoral (id.).

[4] At that time, the student had also been receiving five sessions per week of individual speech-language therapy at home since September 2009 (see Dist. Exs. 8-9; 12; 14). In September 2009, the district also attempted to implement physical therapy and occupational therapy at home for the student, but delayed providing those services based upon the parents' request (see Dist. Exs. 8-11; see also Dist. Ex. 7).

directly with a Board Certified Assistant Behavior Analyst (BCaBA),[5] who provided instruction, "hands on" training, and guidance with respect to data collection and the direct instruction of the student; in addition, the BCaBA demonstrated strategies for the teachers to address the student's behaviors that he exhibited at the Carbone Clinic (compare Tr. pp. 325-31, with Dist. Ex. 6 at p. 60). The Carbone Clinic trained district personnel to implement a specific ABA protocol, which required detailed daily and weekly data collection (see Tr. p. 322; Dist. Exs. 1-2; 3 at pp. 14, 19-21, 28-37; 6; 167; see generally Dist. Exs. 95-116).

Relying exclusively on the Carbone Clinic training, ABA methodology and protocols, and the Carbone Clinic evaluation of the student, the parties developed the student's January 27, 2010 IEP (Dist. Exs. 3 at pp. 14-47; 21-22; 97 at pp. 292-98).[6] According to the IEP, the CSE recommended the following for the student: placement in a 6:1+1 classroom (200 minutes per day, five days per week); individual speech-language therapy (five 40-minute session per week); individual speech-language therapy consultation (one 30-minute session per week); group physical therapy (PT) (one 30-minute session per week); individual PT (one 30-minute session per week); group occupational therapy (OT) (one 30-minute session per week); individual OT (one 30-minute session per week); an individual OT consultation (one 30-minute session per week); an individual, daily bus attendant; a 1:1 aide (360 minutes per day, five days per week); daily outdoor recess, weather permitting; art, music, and adapted physical education (three 40-minute sessions per week) with his peers; and parent training (two 30-minute sessions per month) (Dist. Ex. 3 at pp. 14-15, 38-45).[7]

Upon transitioning to the district's program, the student attended the recommended placement for approximately 22 days, until March 9, 2010 (see Dist. Exs. 3 at p. 43; 49 at p. 175).[8] When the student arrived home from school on March 9, 2010, the parents observed a scratch on the student's neck and attempted to contact the district for an explanation (see Dist. Ex. 93 at p.

[5] The BCaBA was also the Supervisor of Education & Therapy at the Carbone Clinic (Dist. Ex. 6 at p. 60).

[6] At the impartial hearing, the parents' attorney indicated that the January 27, 2010 IEP did not "carry over into the next school year" and therefore, expired on "June 30th, 2010" (Tr. pp. 3616-21). It should be noted that the district did develop an IEP for the student's 2010-11 school year, which the parents challenged in a due process complaint notice, dated September 29, 2010 (see IHO Ex. xiv at p. 1). In a letter dated October 21, 2010, and on the final day of the impartial hearing in this matter on October 22, 2010, the district's attorney strongly urged the parents and the impartial hearing officer to consolidate the parents' challenge to the student's 2010-11 IEP into the pending impartial hearing (id. at pp. 1-3; see Tr. pp. 3975-87).

[7] Prior to developing and implementing the student's IEP in the classroom, the district's principal asked Dr. Carbone whether the student's speech-language pathologist, occupational therapist, and physical therapist should receive "formal training in the Carbone methodology" (Dist. Ex. 24 at p. 135). The principal explained to Dr. Carbone that the speech-language pathologist, who was currently providing services to the student at home, had the opportunity to observe the student working with his special education teacher and teacher's aide (both trained at the Carbone Clinic in January), and further, that she had the opportunity to learn about the "Carbone methodology" from the special education teacher and teacher's aide before she provided speech-language therapy services to the student (id.). The principal wondered if the same "plan" could be used to familiarize the student's occupational therapist and physical therapist with the "Carbone methodology" prior to providing their services to the student (id.). In response, Dr. Carbone stated that "no formal training was needed beyond what [the district] was already doing for any of these individuals" (id.). The principal advised the parents about this conversation with Dr. Carbone (id.).

[8] Although the district advertised the availability of this newly created classroom to several local counties, no other students enrolled in the 6:1+1 classroom, and thus, this student was the only student in the class taught by the special education teacher and the 1:1 aide (see Tr. pp. 1486-90).

261). Unable to reach the district, the parents enlisted the assistance of law enforcement at approximately 4:00 p.m. on March 9, 2010 (id. at pp. 260-63; see Dist. Exs. 91 at pp. 256-57; 92 at pp. 258-59; 134; see also Dist. Exs. 90 at p. 255; 94). In an electronic mail to the district's superintendent (superintendent) at approximately 4:35 p.m. on March 9, 2010, the parents advised him of their call to law enforcement, and in addition, attached photographs of the student's alleged "injuries" (Dist. Ex. 26). The parents wrote the following to the superintendent: "I hope whoever hurt [the student] will be arrested. [The student] will not be back at your school until you explain what happened and fire whoever did this to him" (id.). Later that same evening, the parents notified the district's transportation office that the student would not require "transportation until further notice" (Dist. Ex. 27 at p. 140).

On the evening of March 10, 2010, the district's elementary school principal (principal) advised the parents by electronic mail about the outcome of his investigation into the matter (Dist. Ex. 28; see Tr. pp. 4, 2311). The principal noted in his electronic mail to the parents that based upon conversations with both the special education teacher and the 1:1 aide, the principal learned that they had employed "lifts, blocks, and physical interventions to prevent [the student] from harming himself" and the teachers on March 9, 2010 (Dist. Ex. 28). The teachers had described the student's behavior on March 9, 2010, as "uncharacteristically agitated, repeatedly 'flopping', making attempts to bolt, and removing his clothes" (id.). The principal advised that the special education teacher's failure to notify the parents about the physical intervention used with the student "contributed to the District's decision to immediately replace her as [the student's] teacher" (id.).[9, 10] The principal further indicated that he "would work diligently to put a new teacher in place so that [the student] c[ould] return to school ASAP," and further, that the district would "make up any missed educational services" while the district identified and transitioned a "new teacher" into the student's program (id.; see Tr. p. 66).[11]

On March 11, 2010, the principal and superintendent immediately contacted Dr. Carbone to seek his recommendations to "re-start the educational program" and "continue the program that [Carbone] helped design" for the student (see Tr. pp. 3493-95; Dist. Ex. 173). On that same day, the parents contacted the principal mid-afternoon by electronic mail (Dist. Ex. 29 at pp. 142-43). In their electronic mail, the parents expressed disbelief upon learning that the student's special education teacher, in their opinion, had not been "appropriately terminated" (see id. at p. 143). Therefore, due to their understanding of the situation, the parents indicated that "it [was] not possible for [them] to continue to entrust [the student] to [the district's] care" (see id.).

By electronic mail dated March 12, 2010, Dr. Carbone followed-up with the superintendent and principal regarding their telephone conversation the previous day, and he outlined the following as his recommendations for the district to continue the student's educational program:

> 1. [H]ire a new energetic teacher who [was] committed to this approach and if not skilled in the approach at least willing to receive

[9] The student's mother testified that she agreed with the district's "decision to remove the [special education] teacher from [the student's] classroom" after the March 9, 2010 incident (Tr. pp. 51-54).

[10] The special education teacher resigned from her position with the district on March 10, 2010 (Tr. pp. 1784-85).

[11] The student's mother testified that during a telephone conversation with the principal on March 10, 2010, she was told that the newly identified special education teacher for the student's program would be "subject to [her] approval of the teacher" (Tr. pp. 67-68).

> and accept training in the methods recommended in [the Carbone] report.
>
> 2. Assess [the 1:1 aide's] ability to continue to work with [the student]. The most favorable outcome would be to maintain her role if possible based upon [the district's] assessment of the recent events.
>
> 3. Send [the student], the parents and the new teacher and [the 1:1 aide] to the Carbone Clinic for 3 days of training and to assess [the student's] current level of performance and needs.
>
> 4. Carbone Clinic staff follow up in the school one month after [the student] returns to the school program to adjust and refine implementation of methods.

(Dist. Ex. 173).

After receiving the electronic mail from Dr. Carbone, the principal responded on March 12, 2010 to the parents' March 11, 2010 electronic mail (compare Dist. Ex. 29 at pp. 142-43, with Dist. Ex. 173). The principal confirmed to the parents that the student's special education teacher was "no longer employed by [the] school district" and that the 1:1 aide would be "reassigned to another position" (Dist. Ex. 29 at p. 142). The principal further indicated that he hoped to identify another special education teacher and teacher's aide by "next week," and further, that the district's "plan, supported by Dr. Carbone, [was] to have the new teacher and aide trained ASAP at the Carbone Clinic" (id.; see Tr. p. 3495; Dist. Ex. 173).[12] He also noted that the district was prepared to "work out arrangements and pay for [the family's] expenses" so they could also attend the anticipated Carbone Clinic training (Dist. Ex. 29 at p. 142). The parents acknowledged receipt of this information in an early evening electronic mail to the principal on March 12, 2010 (see id.). The parents admitted that they thought "this was the only way to proceed, especially after seeing [the student's] behaviors yesterday and today, and talking to Dr. Carbone" (id.; see Tr. pp. 3493-94). The parents also thanked the principal for his continued efforts and noted that they were "personally grateful" for his "integrity and support," and that they wished to "move forward and that the district [would] still welcome [the student]" (Dist. Ex. 29 at p. 142). The parents sent a similar electronic mail to the superintendent on March 12, 2010 (Dist. Ex. 30).

On March 16, 2010, the principal notified the parents that the district had "identified both a new teacher and aide" for the student, and that he would contact the Carbone Clinic "to set up training for these individuals," the parents, and the student (Dist. Ex. 31 at p. 146; see Tr. p. 86).[13] The principal asked the parents to provide available dates for the Carbone training (Dist. Ex. 31 at

[12] The principal testified that since the parents had enlisted law enforcement and made "complaints . . . against staff," "there was certainly the feeling on the staff's part that they were being accused of, . . ., purposefully abusing and hurting" the student, which created "a very large obstacle moving forward" and working with the parents (Tr. pp. 3494-95; see Tr. pp. 202-03; 537-39; Dist. Exs. 90-94).

[13] The principal testified that when the student's program "fell apart," he immediately approached several staff members to replace the special education teacher (Tr. pp. 201-02). The principal testified that at least three individuals—who were "on the docket to lose" their jobs due to the district's impending staff cuts—declined the position "even at the risk of losing employment" (Tr. p. 203).

p. 146). While noting "how strongly" the parents felt "about the need for the new teaching team to be trained in the Carbone [Clinic m]ethodology prior to implementing [the student's] full instructional program," the principal urged the parents to "work out arrangements" with the district so that the student could receive his "related services on campus" during the transitioning of the new teacher and aide (id.; see Tr. pp. 3500-01).

In an effort to answer the parents' lingering questions regarding the events on March 9, 2010, the principal, the 1:1 aide, the parents, and the student met at the school on March 19, 2010 (Tr. pp. 3496-3500; see Tr. pp. 533-37; Dist. Ex. 33 at p. 150). Initially, everyone met in the student's classroom, and then moved outside so the student could access the playground equipment (Tr. p. 3497; see Tr. pp. 55-56). The principal testified at the impartial hearing that the student did not appear to be "distressed" at school or resistant to returning to the classroom (Tr. pp. 3498-3500). During the meeting, the parents expressed their interest in having the 1:1 aide resume her role in the student's program (Tr. pp. 3501-02; see Tr. pp. 534-35).[14] The principal also testified that "we talked a lot about" the newly identified special education teacher at the meeting (id.). The 1:1 aide testified that after the March 19th meeting, she "thought [the student] was coming back to school," and she was "excited" to resume her work with the student (Tr. pp. 533-35). However, the student did not return to school (Tr. p. 536).[15]

At the impartial hearing, the student's mother testified that at the March 19, 2010 meeting, the district offered "to return [the student] to school the following Monday with [the 1:1 aide] as the aide and related service providers and with me to accompany [the student] in order to assure his safety" (Tr. pp. 55-56). The student's mother understood at the meeting that the district was offering, at that time, to provide five sessions per week of speech-language therapy, continued OT and PT pursuant to the student's IEP, that the 1:1 aide would be "the second adult" in the classroom during the provision of the student's related services, and that she would be invited to attend those services with the student (Tr. pp. 59-62). She also testified that the March 19, 2010 meeting represented the first attempt to return the student to school since March 9 or 10, 2010 (Tr. p. 55). However, after the meeting, the parents indicated that the student's "behaviors at home started escalating to a point where, . . . , it seemed clear to [the parents] that he had negative associations with the classroom and that he wouldn't be safe in the classroom," and therefore, the parents sought help from the district (Tr. p. 56). The student's mother also testified that she asked for home services at the March 19th meeting, as well as "several times subsequently" (Tr. pp. 56-57).[16]

By electronic mail dated March 20, 2010, the parents' attorney provided the district's attorney with a "brief run-down on what ha[d] transpired" since the events of March 9, 2010 (IHO

[14] The student's mother testified that after speaking with Dr. Carbone, she believed that it would be "possible for [them] to repair the relationship with appropriate training and supervision" (Tr. pp. 64-66).

[15] The 1:1 aide testified on July 1 and 2, 2010 (Tr. pp. 271, 317-741). At that time, the principal had recently asked her if she would be willing to resume "any role" in the student's classroom (Tr. pp. 537-38). The 1:1 aide acknowledged that she would "be more than happy to come in and interpret [the student's] signs and model signs and take data and model how the data has been taken and what the [data] book consist[ed] of and how to insert data into the book and just oversee everything" (id.). However, after law enforcement had been contacted regarding the events of March 9th she no longer felt "comfortable" working with the student because she did not want to "face these criminal accusations again" (Tr. pp. 538-39).

[16] The student's mother testified that she "wasn't sure what [home services] to ask for" at that time (Tr. p. 57). She further testified that "[w]hat [she] mainly asked for [was], can you just please implement his IEP" and that she did not understand how "anything short of that was going to work" (id.).

Ex. iii at pp. 12-12a). Among other things, the parents' attorney opined that the parents were "extremely concerned about appearing adversarial—although in [the attorney's] opinion, that [was] what the situation call[ed] for" (id. at p. 12). The parents' attorney believed it was "clear" that the district needed to "fully invest in the Carbone Clinic methodology and philosophy," which he admitted would take "some time and expense" (id. [emphasis in original]). In addition, the parents' attorney noted that it was "not safe for [the student] to receive services from people who [were] unable, or unwilling, to implement the appropriate program" and that the parents were "rightly . . . reluctant to place [the student] at risk" of further "abuse" or "negative experience[s]" (id. at pp. 12-12a). The parents' attorney asked for the district's attorney to provide to him "in writing, each of the things that the District intend[ed] to do to remedy this situation within the next seven days" (id. at p. 12a).[17]

By electronic mail dated March 29, 2010, the principal advised the parents that after a conversation with both Dr. Carbone and the newly identified special education teacher, the district proposed April 13, 14, and 15, 2010, as the training dates for the newly identified staff, as well as the parents and student (Dist. Ex. 32 at p. 148).[18] He also noted that the next available training dates would fall "near the end of May" (id.). Early the next morning, the parents responded to the principal, but could not confirm their availability for the proposed dates in April for training (id.). Later that same afternoon, the parents did confirm that they could not attend the training dates in April because the student's father could not "reschedule" prearranged work responsibilities (Dist. Ex. 34 at p. 152; see Dist. Ex. 35 at pp. 153-54; see also Tr. p. 3500).

In a separate electronic mail dated March 30, 2010, the parents indicated to the superintendent that after the March 19th visit, the student's symptoms and behaviors, as described in the electronic mail, had escalated and "got[ten] much worse" (Dist. Ex. 33 at p. 150). The parents requested assistance from the district to "fund an evaluation" of the student to "address what appear[ed] to be trauma based problems" that the student had exhibited "since March 9th" (id.). The parents noted that they "look[ed] forward to continuing the Carbone methodology but also recognize[d] that there [were] issues at play now that require[d] additional specialized attention" (id. at p. 151).[19]

On March 31, 2010, Dr. Carbone wrote an electronic mail to the principal to follow up on their conversation earlier that same day (Dist. Ex. 35 at p. 154). Dr. Carbone—while noting the family's unavailability to attend the proposed dates in April for Carbone training—recommended urging the "family to make [the student] available for the consultation and training" in April given that the student was not in school, the student was not receiving "instructional services," and the likelihood that the parents "may not return him to school until his educational team receive[d]

[17] The parents' attorney provided the parents with a copy of the electronic mail he sent to the district's attorney (see IHO Ex. iii at p. 12). The parents' attorney provided the parents with copies of many of the electronic mails he sent to the district's attorney (IHO Ex. iii at pp. 4, 9, 12, 14-16, 18-22; ix).

[18] The principal testified that "[u]nfortunately, dates fell through originally because the first dates available at the Carbone Clinic w[ere] during our vacation and the staff that I had identified were not available at that time" in early April (Tr. p. 3500; see Dist. Ex. 35 at p. 153).

[19] The principal testified that during the time following the March 19, 2010 meeting with the parents, he did not believe that the parents were "on board with anything [he] had offered" to arrange with respect to the student returning to the school to receive related services from the January 2010 IEP due to their "concern over safety" and the parents' belief that the student "was not himself" and that the student had been "traumatized by the events of the 9th" (see Tr. pp. 3500-03).

training at [the Carbone Clinic]" (id.). Dr. Carbone believed it was in the student's "interest to return to school as soon as possible with a properly trained team," and further, that the Carbone Clinic could "accomplish all of our training objectives with one of the parents in attendance during the consultation" (id.).

After the principal forwarded Dr. Carbone's electronic mail to the parents early in the morning on April 1, 2010, the student's mother responded to the principal within an hour and explained, among other things, that it would be "impossible" for her to manage the student alone for three days at the Carbone Clinic (Dist. Ex. 35 at p. 153). Shortly thereafter, in a separate electronic mail to the principal, the parents stated that they had "no idea why [the student was] not receiving home services from the staff" as they had "asked" for at the March 19, 2010 meeting (Dist. Ex. 36). The parents noted that although it was "clear [the student was] unsafe at the school . . . there [was] no reason why [the student] c[ould not] get services [at home]" and that, "[m]aybe that [was] the best thing to start doing now" (id.).

On the evening of April 1, 2010, the principal offered to provide the student's mother with a full-time aide to assist her with the student's "care and supervision" so that they could attend the proposed April training dates at the Carbone Clinic (Dist. Ex. 38 at p. 159; see Dist. Ex. 35 at p. 153). He also thanked the student's mother for "speaking with [him] earlier . . . and explaining how severe [the student's] behaviors ha[d] become at home" (Dist. Ex. 38 at p. 159). The principal suggested that he "would like to visit [the parents'] home with [the 1:1 aide and/or the student's speech-language pathologist] on Friday, April 9th to assess [the student's] instructional readiness" (id.).[20]

In the early evening on April 7, 2010, the parents confirmed with the Carbone Clinic their availability to attend training at the "next available dates for the three day consultation" on June 2nd, 3rd, and 4th, 2010 (see Dist. Ex. 37). In a separate electronic mail later that same night, the parents responded to the principal's April 1, 2010 electronic mail, and declined the principal's offer to provide an aide to the student's mother to attend the April Carbone training, noting their desire for "both" of the parents to participate in the training and their availability to attend Carbone training on June 2, 3, and 4, 2010 (Dist. Ex. 38 at pp. 157-58).[21, 22] In addition, the parents explained that they were not available on the date suggested by the principal to visit the student at home to assess his instructional readiness, and further, that they believed the student was "fully ready to accept instruction consistent with his IEP" (id. at p. 158). The parents also noted that they would "really like to see [the student] receive services as soon as possible, ultimately returning to campus" (id.). Finally, the parents indicated that the student—during the "past couple of days"—

[20] The student's mother testified that she recalled, after requesting home services, that the principal had asked for two opportunities to visit the student at home (Tr. pp. 86-87).

[21] Although she understood in April 2010 that the next available dates for training at the Carbone Clinic did not exist until June 2, 3, and 4, 2010, the student's mother testified that she did not agree to allow the district to place the newly identified special education teacher in the student's classroom "without that training" (Tr. pp. 79-80). She also testified that at that time, she asked the district to "find an appropriate teacher rather than the proposed teacher" and to "implement" the student's IEP because they wanted the student "back on campus as soon as possible" (Tr. p. 80). The student's mother then acknowledged that at that time, she requested home services, as set forth in her electronic mail dated April 1, 2010 (Tr. p. 80; see Dist. Ex. 36).

[22] On the second day of training at the Carbone Clinic in January 2010, the student's father was present for approximately three hours; during those three hours, the student's father sat with his other son at a small table while the special education teacher and the 1:1 aide learned to work with the student (see Tr. pp. 1617-19).

had "finally started to do better at home," and they were "confident that proper delivery of [the student's] IEP by qualified providers w[ould] help maintain his sense of security" (id.). On April 8, 2010, the principal sought guidance from the superintendent regarding the June training dates at the Carbone Clinic (see Dist. Ex. 37 at p. 156).[23]

Remaining in communication with the parents, the principal, on April 9, 2010, offered to reschedule the previously suggested April 9, 2010 home visit to April 12, 2010, in order to "address some of the issues . . . mentioned" in the parents' April 7, 2010 electronic mail (Dist. Ex. 38 at p. 157). The parents responded on April 11, 2010, and noted that if the principal wanted to meet with them, then "please schedule an emergency CSE meeting at the district's earliest convenience" with dates to accommodate their attorney's availability and Dr. Carbone's availability (id.).

On April 12, 2010, the district's school psychologist and CSE chairperson (school psychologist) contacted the parents regarding their request for an "updated evaluation" of the student and to schedule the requested CSE meeting (Dist. Ex. 39; see Tr. pp. 752-53). In response, the parents clarified, among other things, that they did not seek a "re-evaluation" of the student—but rather, sought to locate a qualified psychologist to assess the student "for trauma" or possibly use the independent neuropsychological evaluation included in the Consent Decree—and further, that they had "lost confidence" in the evaluators suggested by the school psychologist (Dist. Ex. 40 at p. 161).[24] The parents noted that although it was "important to pursue appropriate psychological help" for the student, they did not "see this as something that would delay educational services or hold up the CSE meeting" (id.). Moreover, the parents asserted that the student was "'instructionally ready' to receive appropriately delivered IEP services by qualified staff and that he need[ed] them as soon as possible" (id.). The parents then requested confirmation of the June training dates at the Carbone Clinic (id.).

The school psychologist tentatively scheduled the CSE meeting for April 30, 2010 (Dist. Ex. 41 at p. 163). On April 14, 2010, the parents, among other things, advised the principal that they were "going to go ahead at this point to proceed to hearing" (Dist. Ex. 43 at pp. 165-66). In the electronic mail, the parents expressed that they could not "believe [the principal] [was] threatening [them] with C[hild] P[rotective] S[ervices (CPS)] for educational neglect" when, among other things, the district did not have "ANY legal educational services to offer [the student] since March 9th," and further noted that the district did not "have a teacher to deliver [the student's] IEP," the district "refused to answer [their] concerns about the misleading data or [their] questions

[23] At the impartial hearing, the principal testified as follows: although the district "wanted to get the team trained at Carbone . . . when we missed the dates in April and the next available dates were in June, it made no sense for me to continue to say let's send [the new special education teacher identified by March 16, 2010] down because I knew that [the new special education teacher] was not going to be around for the 2010-2011 school year" (Tr. pp. 3511-12). "[W]e frankly had no one available to send to that training" because any teachers available at that point in time would "no longer be working for the district as of June 30th" (Tr. p. 3513; see IHO Ex. iii at p. 15). He also noted that the parents' "reservations" about the newly identified special education teacher, and further, Dr. Carbone's uncertainty about whether the new special education teacher was the "right fit" had also factored into his decision not to send the newly identified special education teacher to the June training dates at the Carbone Clinic (Tr. p. 3512).

[24] The school psychologist responded, via electronic mail dated April 13, 2010, suggesting another district evaluator for the student's evaluation, and in addition, she attached a list of district evaluators "experienced in autism" for their further consideration (Dist. Ex. 42 at pp. 164-65). In response, the parents notified the school psychologist on April 19, 2010, that they had scheduled an evaluation of the student with a "licensed physician and psychiatrist who specialize[d] in autism" and further, that they would share the evaluation report with the district (Dist. Ex. 45 at p. 168).

about why staff was not supervised and not aware of the consent decree requirements" (id. at p. 165 [emphasis in original]). The parents then advised the principal that if the district "accuse[d] [them] of educational neglect when [the district has] offered no legal educational services we will sue the district in federal court" (id. at p. 166).[25]

On April 15, 2010, the parents canceled the April 30, 2010 CSE meeting "since we're going to go to a due process hearing instead" (Dist. Ex. 44). In response to the parents' April 15, 2010 electronic mail, the school psychologist noted that although the parents had the right to decline to attend a scheduled CSE meeting, a meeting was needed "at this time . . . to review [the student's] program and to make whatever adjustments [were] necessary for the interim or otherwise" (Dist. Ex. 45 at p. 169). She also indicated that the CSE meeting would be a time to discuss "arrangements for [the student's] return to school as well as whether "additional formal assessments" were needed for the student's annual review (id.).

By electronic mail dated April 19, 2010, the principal reached out to the parents to respond to and to clarify the issues raised in the parents' April 14, 2010 electronic mail (compare Dist. Ex. 137, with Dist. Ex. 43 at pp. 165-66). The principal apologized and noted that it was not his intention to make the parents think that he was "threatening [them] with a CPS call last week" (Dist. Ex. 137). He further explained that as he had told the student's father, he had a "reporting responsibility, barring a legal absence excuse" regarding the student's failure to attend school (id.). The principal also explained that he had not called CPS "because [the parents] ha[d] said that [the student] was not behaving safely enough to be in school" (id.). In addition, the principal noted that although he had "attempted to make a home visit" on two separate occasions to "assess" the student's "instructional readiness," he now understood from the parents that the student's "behavior ha[d] improved to the point that he c[ould] safely be in school for support services (Speech, OT & PT)" (id.). He indicated that if this was not correct, then the parents should provide a "written legal absence excuse" for the student (id.).

The principal also indicated that according to the student's father, "Dr. Carbone felt that [the student] should not receive support services in school at this time" (Dist. Ex. 137). The principal had called Dr. Carbone to "get a clarification on this point," and he noted that Dr. Carbone "said that it would be fine for [the student] to receive support services in school as an interim measure with [the 1:1 aide] acting as his aide," and further, that Dr. Carbone was "willing to have a phone conference with us to discuss interim measures and next steps" (id.). The principal asked about the parents' availability to schedule this conference call with Dr. Carbone (id.).

On the morning of April 20, 2010, the parents' attorney wrote to the district's attorney (IHO Ex. iii at p. 13). In the electronic mail, the parents' attorney stated that on behalf of his clients, he was informing the district that the student would "not be attending school until the District ha[d] appropriate services in place, with qualified, trained services providers" (id.). The parents' attorney opined that "[i]n the meantime, [he] would suggest the District work with the parents to put some services in place until [the student was] returned to school," and further, that the district "should not expect the parents to send their child to an unsafe setting that has no trained teaching staff to work with [the student]" (id.).

[25] By Notice of Claim, dated April 28, 2010, the parents initiated a lawsuit against the district seeking $5 million dollars in damages related to the March 9, 2010 incident (see Dist. Ex. 121 at pp. 594-96).

Without responding directly to the principal's April 19, 2010 electronic mail, the parents—on the afternoon of April 20, 2010—indicated to the school psychologist their unavailability to attend the April 30, 2010 CSE meeting and requested new dates for a CSE meeting because they "wish[ed] to participate" (Dist. Ex. 46). The parents noted that the student would be evaluated by a psychiatrist "this weekend" and they would share "her recommendations as soon as available" (id.). In addition, the parents noted that the principal had "advise[d] [them] that Dr. Carbone [was] now recommending [the student] attend a part-time program on campus with [the teacher's aide] and related services staff" (id.). As such, they requested "Dr. Carbone's updated written evaluation with modified IEP goals as soon as possible" so they could "review his recommendations" (id.).

On April 21, 2010, the school psychologist canceled the April 30, 2010 CSE meeting at the parents' request, and indicated that she would await new dates of availability from the parents and their attorney to reschedule the meeting (Dist. Ex. 46).

By due process complaint notice, dated April 22, 2010, the parents alleged that the district failed to offer the student a FAPE for the 2009-10 school year based primarily upon the district's failure to implement the student's January 27, 2010 IEP (Dist. Ex. 1 at pp. 1, 5-6; see Tr. pp. 313-17). In particular, the parents asserted that the "implementation of specific methodologies" constituted a "key component" of the IEP, which the district failed to appropriately implement—and could not "currently" implement—to address the student's needs (Dist. Ex. 1 at pp. 1-2). As relief, the parents requested, among other things, "specific corrective and additional services to address [the] failure to implement" the student's IEP (id. at pp. 6-9).[26]

In an electronic mail dated April 30, 2010, the school psychologist acknowledged receipt of the parents' due process complaint notice and agreed to waive the resolution session in order to proceed directly to an impartial hearing (Dist. Ex. 47 at p. 171). The school psychologist noted that having reviewed the parents' requested relief, and due to the "District's fiscal crisis, which ha[d] resulted in multiple layoffs, the Board of Education [was] prohibited by law from hiring any new teachers" (id.). At that time, the school psychologist proposed locating a "new program" designed to meet the student's needs, and she identified three potential placements for the student (id.). The school psychologist sought the parents' consent to initiate the intake process at these placements, noting that "time [was] of the essence . . . to secure a placement for the 2010-2011 school year" (id.).

After confirming the receipt of the school psychologist's electronic mail on April 30, 2010, and having referred the electronic mail to their attorney, the parents—later in the evening on April 30, 2010—wrote to the superintendent (compare Dist. Ex. 49, with Dist. Ex. 48 at p. 173). In the electronic mail, the parents indicated that "distance issues aside, the proposed schools cannot deliver [the student's] IEP and two [of the potential placements] were ruled out just this past fall, during our last hearing" (Dist. Ex. 49). The parents further indicated that the third school was "an hour commute each way and [did] not provide ABA" (id.). The school psychologist replied to the parents' electronic mail sent to the superintendent on May 3, 2010, in which she explained further about the potential placements identified in her earlier electronic mail (Dist. Ex. 51 at pp. 180-81). The parents refused, however, to allow the school psychologist to send referral packets to these placements because the parents "maintain[ed] that the district [was] legally responsible to uphold

[26] In their petition for review, the parents note that due to the passage of time and the expiration of the January 27, 2010 IEP, the "relief originally sought would no longer benefit the student," and appear to confine the relief requested in the petition to additional services in order to remedy the denial of a FAPE (Pet. ¶¶ 52-55, 76).

the Consent Decree and all relevant education law" and that they would "take whatever legal action [was] required to enforce the decree" (id. at pp. 179-80; Dist. Exs. 52-53). The parents and the district, however, continued to attempt to schedule the student's annual review for the 2010-11 school year (Dist. Ex. 51 at pp. 178-80).

In a letter dated May 4, 2010, the district simultaneously responded to the parents' due process complaint notice and provided prior written notice to the parents (District Ex. 2 at p. 10). In pertinent part, the district admitted that it had failed to implement the student's January 27, 2010 IEP since March 9, 2010, and further, that the district agreed to provide the student with "compensatory services which shall remain available" to the student "as long as he remain[ed] eligible to receive a [FAPE] to make up for those services which the District ha[d] been unable to provide since March 10, 2010, due to its removal of the Student's assigned teacher and the District's inability to arrange for [a] replacement" (id. at pp. 12-13).

On May 5, 2010, Dr. Carbone responded to an electronic mail from the parents, which carried the subject line of "re: [the student's] "program (urgent)" (Dist. Ex. 167).[27] In his electronic mail, Dr. Carbone remained firm in his "assessment findings that determined [the student's] educational needs and the goals and objectives w[ritten] to meet those needs" (id.). He also remained firm in his "recommendations regarding the teaching procedures that should be used to bring about educational progress" (id.). Dr. Carbone explained that the program he "helped to design for [the student] [was] not however, based upon '[his] methodology' . . . [but rather had] its foundation in the evidenced based science of applied behavior analysis" (id.). He also noted that "another behavior analyst with slightly different training might emphasize slightly different issues and recommend slightly different objectives and methods" and therefore, his recommended procedures represented "some difference in training among behavior analysts" (id.). Finally, Dr. Carbone noted that if called upon to discuss "why [he] chose these objectives and methods as opposed to others, [he] would do so" (id.). He then wished the parents "all the best" in their "efforts to build an effective educational program for [the student]" (id.).

On May 11, 2010, the parents wrote to the superintendent (Dist. Ex. 168). In the electronic mail, the parents requested "documentation regarding [the district's] negotiations" with the impartial hearing officer who declined to accept the pending matter (id.; see IHO Ex. iii at pp. 15-16). The parents noted that the student had been "sitting here with nothing for two months and we at least counted on some kind of pendency being determined next week" (Dist. Ex. 168). The parents opined that "this ha[d] risen to the level of criminal neglect," and they planned "to seek charges through the district attorney's office for neglect and abuse of a disabled person" (id.). In addition, the parents noted that they might "consider contacting the Board of Education to request them to intervene and order home services for [the student]" (id.).

On May 17, 2010, the impartial hearing was convened during which the issue of the student's pendency (stay put) placement was addressed (Tr. pp. 1-270). After submitting documentary evidence into the hearing record, which included an affidavit from the student's mother in lieu of her direct testimony at the pendency hearing, the parents' attorney asserted that the student's pendency arose from the last agreed upon IEP—namely, the January 27, 2010 IEP (Tr. pp. 12-14, 32-44). The district's attorney, who learned of the parents' position on pendency immediately before the pendency hearing started, disagreed with the parents' attorney, contending

[27] The hearing record does not include the electronic mail originally sent by the parents to Dr. Carbone, which elicited this response.

that "further agreements" had been made (Tr. pp. 10-11, 29-32). The district's attorney cross-examined the student's mother based upon her affidavit, and presented the principal as a witness, in order to establish the district's position (Tr. pp. 46-265). In particular during cross-examination, the student's mother agreed that she had requested home-based services from the district on April 1, 2010 (Tr. pp. 80-89; see Dist. Ex. 36). The student's mother also acknowledged that pursuant to the pendency clause in the Consent Decree, if a "question of safety in the school" arose, then "the issue of home services would be determined" by an impartial hearing officer (Tr. pp. 91-92).

Next, the district's attorney questioned the student's mother regarding whether she was aware of the district's offer—made just prior to the pendency hearing—to provide home-based services to the student (Tr. p. 92). Although the student's mother initially testified that she was not aware of that offer, she then clarified that she had received "something" from her attorney indicating that the district was "either considering it or preparing it and would be sending further details," but that she "never received anything further" (Tr. pp. 92-93). The student's mother thereafter clarified that she had received a "proposed in home program" forwarded to her from her attorney, but "there were many events between the time that [they were] talking about on Friday that changed our understanding of [the student's] needs," and therefore, they now wanted the district to implement the January 27, 2010 IEP "immediately" at the district (Tr. p. 93). At the conclusion of the pendency hearing, the parties agreed to submit briefs on the issue of the student's pendency placement to the impartial hearing officer for her consideration by June 4, 2010 (Tr. pp. 265-67).

On May 19, 2010, the CSE convened for the student's annual review (IHO Ex. i at pp. 1-120; see Dist. Exs. 53-54; 66-69; 148). At the beginning of the meeting, the CSE updated the student's present levels of educational performance, reviewed recommendations for speech-language therapy during summer 2010, and reviewed speech-language goals and short-term objectives for summer 2010 (IHO Ex. i at pp. 1-22). Next, the CSE turned its attention to Dr. Carbone, who participated in the meeting via telephone (id. at pp. 1, 22-68). Initially, Dr. Carbone commented that "I'm of the opinion and I voiced this recently in a phone call, that I don't think the district has the capacity given it's resources to deliver, and given recent experience, to deliver an appropriate educational program for [the student]" (id. at p. 23). When asked to elaborate, Dr. Carbone stated that he believed the student required a program "very similar to" the program—and recommendations—described in the psychiatrist's evaluation report (id.; see Dist. Exs. 54; 120 at pp. 588-93). Specifically, Dr. Carbone agreed with the psychiatrist's recommended "level of supervision necessary," noting that any program for the student would necessarily require full-time, on-site, direct supervision by a Board Certified Behavior Analyst (BCBA) (IHO Ex. i at pp. 23-28; see Dist. Ex. 120 at pp. 592-93). Dr. Carbone did not believe that the district could provide that level of supervision, and further, that it "would [not] be of any real use, for [Carbone]" to train someone to provide those services for the district (see IHO Ex. i at pp. 23-24). The student's mother asked Dr. Carbone if the student's program could be reconstructed at the district if the district had finances to provide the BCBA and qualified staff; Dr. Carbone replied, "I think they've demonstrated that they don't have the qualified staff, at least from my point of view, . . . they don't

have a [BCBA] on staff, . . . and I don't need to be a consultant . . . [a]nd I don't think [the district] has the resources to do that" (id. at pp. 25-26; see Tr. pp. 939-41).[28]

Continuing to discuss Dr. Carbone's thoughts, it was noted that the program Dr. Carbone was now recommending was "not the program that the district put together" because the original program did not incorporate supervision by a BCBA or a "full-time certified behavior specialist" (IHO Ex. i at pp. 28-30). Dr. Carbone agreed with that characterization, and noted that his opinion changed because he believed the district's program "drifted and the implementation of the procedures drifted," which resulted in the "kind of extreme sort of problem behavior" observed by the district (id. at p. 30). Dr. Carbone indicated that, in addition, he could "now see how serious [the student's] problem behavior was," and that the student had not exhibited that type of behavior at the clinic (id.). Later in the meeting, the CSE raised the issue of safety, and when asked if the district could safely resume the program for the student, Dr. Carbone responded "[n]o I don't think so" (id. at pp. 60-65). In discussing how to provide services in the interim, Dr. Carbone agreed with the suggestion that the services be provided "in the home" (id. at pp. 61-65; see Tr. pp. 939-40).

Shortly after a brief discussion regarding home-based services, Dr. Carbone ceased his participation at the CSE meeting (IHO Ex. i at pp. 65-68). The CSE then focused its discussion on information provided by a representative of a State-approved nonpublic school who was attending the meeting (id. at pp. 76-86).[29] The representative opined that based upon her review of the student's IEP, she believed that the "description of [the student's] needs and the goals [were] similar to many students" in the State-approved nonpublic school program (id. at p. 76). At the conclusion of that discussion, the CSE decided to continue the meeting to "brainstorm" further ideas and solutions for the student—including potential nonpublic school placements, contacts, summer placements/services, emergency interim placements, the involvement of the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), and other resources—in order to provide the student with some services (id. at pp. 86-118; see Tr. pp. 941-44, 948-49). During these discussions, the student's mother noted that although she "100% agree[d] with Dr. Carbone, . . . when it c[ame] to pendency [she] ha[d] to depart from him" and further, that she had to "decide that something [was] better than nothing" (IHO Ex. i at p. 99). Near the end of the CSE meeting, the student's mother expressed her desire to speak to her attorney about the CSE's discussions (id. at pp. 107-10; see Tr. p. 3552). The school psychologist testified that at the end of the meeting, there was no dispute about resuming services for the student at home (Tr. pp. 943-44).

After the May 19, 2010 CSE meeting, and in the continuing spirit of cooperation evidenced at the meeting, the student's mother forwarded the names and telephone numbers of contacts she mentioned at the CSE meeting to the school psychologist (Dist. Ex. 70 at pp. 216-17; see Tr. pp. 944-46; IHO Ex. i at pp. 88-112, 117). The school psychologist thanked the parents for the

[28] Dr. Carbone also advised the CSE that the BCaBA/Supervisor of Education & Therapy at the Carbone Clinic—who had trained both the special education teacher and the 1:1 aide—would no longer be working at the Carbone Clinic, and therefore, his "capacity to help out [was] greatly reduced" (IHO Ex. i at pp. 66-68; see Dist. Ex. 6 at p. 60).

[29] The State-approved nonpublic school representative was familiar with the student because she had conducted a speech-language evaluation of the student in August 2009 (see Dist. Ex. 152 at pp. 722-26). The representative was also the Admissions Chairperson at the State-approved nonpublic school (see Dist. Ex. 123).

information and provided additional information about another potential placement (Dist. Ex. 70 at pp. 215-16).

Also following the May CSE meeting, the district's attorney sent an electronic mail to the parents' attorney on May 19, 2010, indicating that Dr. Carbone "made it clear to everyone at the table that returning [the student] to school, in an interim program with the services recommended on his IEP would be unsafe" (Dist. Ex. 158 at pp. 738-39). The district's attorney also noted that upon further questioning, Dr. Carbone opined that "it would not be safe for [the student's] previous program to resume in the District's building, even if the District had a Carbone trained, certified special education teacher or a teacher with a background and experience working with children with autism" (id. at p. 739). In an attempt to "resume services to the extent possible in the interim," the district "reissue[d] its offer to begin [ASAP], speech language services with [the student's speech-language pathologist] and an aide with a knowledge of sign [language], along with co-taught OT/ PT services for the amount of time provided for on [the student's] IEP, as necessary and parent training" (id.). The district's attorney offered such services through the conclusion of the school year, and in addition, affirmed that the district would "not abandon its search for a certified special education teacher experienced in working with children with autism and the use of ABA" (id.).

Responding to the district's attorney that same evening, the parents' attorney challenged the district's characterization of Dr. Carbone's statements at the May CSE meeting as completely erroneous (compare Dist. Ex. 158 at pp. 737-38, with Dist. Ex. 158 at pp. 738-39).[30] The parents' attorney advised, among other things, that he had explained his viewpoint to the parents that "an agreement to different services in the middle of this hearing w[ould] change pendency" (Dist. Ex. 158 at pp. 737-38). In addition, the parents' attorney noted that although the parents were concerned about the student receiving services, they would "not agree to an abandonment of the 1/27/10 IEP" (id. at p. 738).

In an early morning electronic mail on May 20, 2010, the parents wrote to the school psychologist (Dist. Ex. 70 at p. 215). In the electronic mail, the parents apologized and noted that it "was inappropriate for [the student's mother] to discuss these exploratory options [at the CSE meeting] because we understand now from discussion with [our attorney] that taking these kinds of actions could be harmful to [the student], including discussion of [potential placements] as I know they cannot implement the ABA IEP" (id.).[31] The school psychologist responded, indicating that she looked forward to "working with [the parents] to set up interim services for [the student] as soon as possible" (Dist. Ex. 71).[32] However, the school psychologist testified that the parents did not contact her about resuming services for the student at home after the May 20, 2010 electronic mail (Tr. pp. 945-46).

In a late morning electronic mail on May 20, 2010, the district's attorney responded to the parents' attorney's May 19, 2010 electronic mail, indicating that "[r]egardless of your legal

[30] The parents' attorney also sent this electronic mail response to the parents and to the parents' attorney who had filed the Notice of Claim (see Dist. Ex. 158 at p. 737).

[31] A paralegal from the parents' attorney's office participated in the May CSE meeting via telephone throughout the entire CSE meeting (IHO Ex. i at pp. 1-120).

[32] The school psychologist testified that at that time—given Dr. Carbone's statements at the May 2010 CSE meeting—providing services to the student at home was the "last option" (Tr. pp. 938-40).

position, [the student] should not be without services" (see Dist. Ex. 158 at p. 737). The district's attorney urged the parents' attorney to speak with the parents and inform them that the district was "prepared to offer the home based services" in the interim "without prejudice to your clients' legal position on pendency" (id.). The district's attorney indicated that she would seek a conference call with the impartial hearing officer to introduce Dr. Carbone's opinions regarding the safety issues involved in resuming the student's "program, under pendency, in the school" (id.). The parents' attorney opposed the conference call, but noted that he would "get back" to the district's attorney "regarding interim services" (id. at p. 736).

The district's attorney responded to the parents' attorney within approximately one hour on May 20, 2010 (see Dist. Ex. 158 at p. 736). In the electronic mail, the district's attorney asserted that until the first day of the impartial hearing, the district "was under the impression that [the parents] w[ere] seeking services for [the student] in their home, as they had last requested" (id.). Thus, given the parents' position and her interpretation of Dr. Carbone's statements at the May CSE meeting, the district's attorney intended to reopen the issue of pendency "to address the issue of safety" (id.).

The parents' attorney then responded to the district's attorney within one hour (compare Dist. Ex. 158 at p. 735, with Dist. Ex. 158 at p. 736). Among other things, the parents' attorney accused the district and the district's attorney of "playing a delay game at [the student's] expense and to [the district's] benefit" and noted his intention to oppose her efforts to re-open the pendency hearing (see Dist. Ex. 158 at p. 735). He requested that the district's attorney make her application in writing with respect to the pendency hearing (id. at pp. 735-36; see IHO Exs. vii-ix; Dist. Exs. 159-161; 163-164).[33]

By letter dated May 28, 2010, the superintendent sought assistance from VESID in identifying an appropriate program for the student (Dist. Ex. 122 at p. 597-99). Unable to provide an appropriate program or provide pendency services to the student–either in his home or at school—the superintendent requested that the "Department assume direct responsibility for the child's program and placement" (id. at p. 597). The superintendent noted that the district currently faced "serious budgetary constraints" and could not "bring in a full-time board certified behavior analyst" or "hire a certified special education teacher with experience working with children with autism" due to recent layoffs and a recall list of special education teachers (id. at p. 598). The letter included efforts taken by the district to resume services to the student, as well as a list of nonpublic school placements explored by the district (id. at pp. 597-99). In a letter dated June 22, 2010, VESID declined to comment on the "specifics raised" in the district's May 28th letter due to the pending impartial hearing in the matter (Dist. Ex. 122 at p. 599a).

The school psychologist testified that when she learned that the district had agreed that the student's January 27, 2010 IEP constituted the student's pendency placement, she began "reaching out to agencies and people" in order to locate a new teacher for the program and in order to resume the student's pendency services (Tr. pp. 950-51; see Tr. pp. 3552-53). Through these efforts, she

[33] On June 2, 2010, the parties held a teleconference with the impartial hearing officer to address the issues raised regarding pendency (see Dist. Ex. 161 at p. 756). In a letter summarizing the teleconference, the impartial hearing officer indicated that the parents' attorney had had the "opportunity to review the CSE record" of the May 19, 2010 CSE meeting, and "in particular, Dr. Carbone's remarks" (id. at p. 757). The impartial hearing officer noted that since the parents' attorney "reiterated [his] lack of concern regarding the safety of the school environment" for the student, she did not need to review the "CSE tape" (id. at p. 758).

located—and the district eventually hired—a certified special education teacher who was also a BCBA (new BCBA teacher) (Tr. pp. 951-56, 3553).

On June 3, 2010, the parents contacted the school psychologist (Dist. Ex. 73). In this electronic mail, the parents requested a copy of the student's 2010-11 IEP referenced during a recent telephone conference between the parties (id.). According to the electronic mail, the parents understood that the district's attorney had represented that an IEP existed for the 2010-11 school year and that "the only outstanding question [was] where it w[ould] be delivered" (id.). The parents also noted that the district's attorney indicated that the district had identified an "ABA trained teacher" (id.). Finally, the parents inquired about utilizing the "banked hours" for services set forth in the Consent Decree (id.).

In response, the school psychologist explained that the IEP referenced was "essentially the IEP we had on January 27th and the pink draft from the [May 19, 2010] meeting (Dist. Ex. 72 at p. 221). The school psychologist indicated that they needed to meet again "to add a few updates and the related services recommendations" and that they were "still looking for providers for the long term" (id.). The school psychologist asked if the parents had scheduled an appointment at the State-approved nonpublic school discussed at the May CSE meeting, and further indicated that she had been in touch with the new BCBA/special education teacher "trained in ABA" (id.). Although the new BCBA/special education teacher was on vacation at that time, the school psychologist planned to speak with her the following week (id.). Finally, the school psychologist notified the parents that at the "next meeting," they would discuss the student's "6 week summer program" since the student was entitled to extended school year (ESY) services, and therefore, she did not understand why the parents had requested the use of the "banked services" at that time (id.). She then asked the parents for dates to schedule a CSE meeting to "finish the annual review" (id.). In a follow-up electronic mail, the school psychologist advised the parents that the new BCBA/special education teacher could be available as soon as she returned from vacation "next week and [the district could] complete the paper work" (Dist. Ex. 73).[34]

In a brief interim decision, dated June 6, 2010, the impartial hearing officer declared that the parties agreed that the "program outlined in the student's individualized education program dated January 27, 2010" constituted the student's pendency placement (IHO Ex. x). On June 7, 2010, the parents sent an electronic mail confirming their conversation with the school psychologist that morning (Dist. Ex. 75). In the electronic mail, the parents forwarded a copy of the interim decision since the school psychologist had not yet reviewed it (id.). In addition, the electronic mail noted the view of the student's father that the district was "unable to implement [the student's] January 27, 2010 IEP at this time and d[id] not know when [the district] will be able to as [the district was] still putting together staff" (id.). According to the student's father, the district also could not identify the proposed teacher (id.). The school psychologist responded and noted that an administrator would respond to the parents' inquiries (id.; see Tr. pp. 955-56).

On the morning of June 9, 2010, the district's attorney contacted the parents' attorney by electronic mail (Dist. Ex. 55 at p. 191). She advised that the district "may have" the student's new BCBA/special education teacher "ready to begin as early as tomorrow" (id.). The district's attorney

[34] The parents and school psychologist continued to exchange electronic mails regarding the scheduling of the CSE meeting to finish the student's annual review, the parents' concerns about safety, the proposed ESY services, the student's daily schedule, and questions regarding the new BCBA/special education teacher's qualifications (Dist. Exs. 74; 76-80; 82-84). The parents received the invitation to the June 23, 2010 CSE meeting on June 16, 2010 (Dist. Ex. 82).

noted that the teacher was "both BCBA certified and a certified special education teacher with experience working with children with autism" (id.). Shortly thereafter, the principal sent an electronic mail to the parents, indicating that the district could offer the student "instruction here on campus as early as Thursday, 6/10" (id.; see Tr. p. 957). The principal noted that there were "several details" to work out with the parents and that he wanted the parents to have an opportunity to meet the new BCBA/special education teacher and the new aide (Dist. Ex. 55 at p. 191). The principal proposed meeting at 9:00 a.m. on June 10, 2010 to accomplish these tasks and to discuss the student's transition plan (id.). He further noted that the student's related services providers would also be "on hand" (id.).

The parents could not avail themselves of the opportunity presented on June 10, 2010, to meet the new BCBA/special education teacher due to other commitments (see Dist. Ex. 55 at p. 190). However, the parents proposed a meeting on Friday, June 11, 2010, and the principal arranged for the student's new BCBA/special education teacher to be available for that meeting (id.). The parents then requested that the principal share with them, if possible, the new BCBA/special education teacher's "recommendations" and "resume, including experience teaching ABA IEP's to autistic children" (Dist. Ex. 56). In addition, the parents requested that the principal send a "list in advance of the meeting which would include names and credentials of the staff, proposed schedule and duration of [the] program" (id.).

The principal testified that at the June 11th meeting, the parents inappropriately questioned the new BCBA/special education teacher, and thereafter, the parents "took exception" to the district hiring her (Tr. pp. 3556-57). In the early morning on June 14, 2010, the parents sent an electronic mail to the principal with a list of questions and concerns regarding the new BCBA/special education teacher's qualifications and experience, as well as the district's inability to implement the student's IEP (Dist. Ex. 57 at pp. 193-94; see Tr. pp. 3556-62). The parents also expressed their utmost concerns about the student's safety, noting that although the district "ha[d] been told that safety [was] no longer a consideration," they did not "know the source of that rumor as neither [they] nor [their] attorney h[ad] ever conveyed this idea to anyone" (Dist. Ex. 57 at p. 194). Thus, the parents indicated that they "c[ould not] bring [the student] to school until these issues [were] resolved" (id.).

In the early evening on June 14, 2010, the principal briefly responded to the parents' questions and concerns (compare Dist. Ex. 58, with Dist. Ex. 57 at p. 194). The principal noted his understanding about the parents' safety concerns, as well as their questions about the new BCBA/special education teacher; therefore, on June 17, 2010, the principal scheduled a second appointment that afternoon for the parents to, again, meet with the new BCBA/special education teacher to address their concerns (Tr. pp. 3556-62; Dist. Exs. 57-65). Shortly thereafter on June 17, 2010, the parents responded to the principal's electronic mail, and invoked their "right to counsel" in order to assure the student's "safety and legality of pendency" (compare Dist. Ex. 60, with Dist. Ex. 59). The parents asked the principal to have the district's attorney contact their attorney so that the student could "hopefully begin his mandated pendency program" (Dist. Ex. 60). The principal advised that he had forwarded the parents' electronic mail to the district's attorney (Dist. Ex. 61 at p. 199). He also noted his regrets that the parents could not meet with the new BCBA/special education teacher earlier that afternoon to address the parents' concerns (id.). In addition, the principal indicated that based upon the parents' electronic mail, he "assume[d] that [they] were not prepared to return [the student] to school" (id.). He noted, however, if this information was not correct, to please contact him so that he could "make the necessary arrangements to receive and instruct" the student tomorrow (id.).

The parents responded to the principal's electronic mail almost immediately on June 17th, noting that due to illness, they could not attend the June 17th meeting with the new BCBA/special education teacher (compare Dist. Ex. 61 at p. 198, with Dist. Ex. 61 at p. 199). The parents indicated, however, that they were "very willing and eager to return" the student to school "the moment" they learned that the district would "fully implement" the student's IEP (Dist. Ex. 61 at pp. 198-99). The principal quickly responded and noted his willingness to set up a telephone conference the next morning with the parents and the new BCBA/special education teacher (Dist. Ex. 61 at p. 198). The principal expressed in the electronic mail that both he and the district's attorney had attempted to "address all" of the parents' concerns, and that he believed the district could "implement [the student's] IEP with the exception of having [the new BCBA/special education teacher] available for more than 3 hours per day" (id.; see Dist. Ex. 64). The principal explained that it would not "be wise to expect [the student] to be in school for a full day after not having been in school for such a long period of time," and further, that the new BCBA/special education teacher could appropriately toilet the student (Dist. Ex. 61 at p. 198).

Later in the evening on June 17, 2010, the parents wrote to the principal (compare Dist. Ex. 62, with Dist. Ex. 61 at p. 198). The parents indicated that they could not "reconcile" the information provided by the district regarding the new BCBA/special education teacher's ability to appropriately toilet the student (Dist. Ex. 62). In addition, the parents did not "understand why [they] need[ed] a conference call" with the new BCBA/special education teacher (id.). The parents further noted that according to Dr. Carbone, the student required "6 hours of ABA a day," and the district was not offering the student his January 27, 2010 IEP (id.; see Dist. Ex. 65). In response, the principal noted that although he had made "every effort to address [the parents'] questions and concerns" regarding the new BCBA/special education teacher's qualifications and the student's proposed educational program, he did not believe that the parents were "satisfied" (Dist. Ex. 63). He then advised the parents that after consulting with the Department of Social Services, he had been advised that the district was "required to report the status of the situation to CPS" and that the district had "indeed, made a hotline call earlier th[at] afternoon" (Dist. Ex. 63 at p. 201; see Tr. pp. 3568-74).

According to the principal's testimony, the parents arrived approximately one hour prior to the scheduled June 23, 2010 CSE meeting with the student and asked "where is your program," which the principal believed occurred in direct response to the hotline call to CPS on June 17th (Tr. pp. 3571-74).[35] The principal testified that they did not have staff on hand that day to engage the student in a program because the parents had not notified him of their intention to send the student to school, as the principal had asked them to do in a previous electronic mail (id.; Dist. Exs. 61 at pp. 198-99; 63).

Despite the foregoing, the June 23, 2010 CSE meeting proceeded to continue the student's annual review and to discuss the proposed ESY services for summer 2010 (IHO Ex. ii at pp. 1-62; see Tr. pp. 3572-74). The new BCBA/special education teacher, who would be responsible for implementing the student's ESY services, was in attendance at the CSE meeting; the parents posed questions to the new BCBA/special education teacher that the principal had previously offered to answer for the parents (IHO Ex. ii at pp. 1, 35-38, 41; see Tr. pp. 3576-78).

[35] On that day, the principal discovered the parents and the student in the student's classroom (Tr. p. 3573). He described in testimony that, much to his dismay, the exchange with the parents that day in the classroom was "very contentious," "[v]ery inappropriate," and "[v]ery disrespectful" (Tr. pp. 3573-74).

Following the June 23, 2010 CSE meeting, the principal quickly arranged for staff to be present the following day at school—which was the last day of school for the 2009-10 school year—just in case the parents, again, appeared unannounced with the expectation that the student would receive services (Tr. pp. 3577-78). The principal had provided the parents with a copy of the student's anticipated schedule for June 24th following the conclusion of the June 23, 2010 CSE meeting (id.). On June 24, 2010, the student did not attend school due to illness (Tr. p. 3578).

In a letter dated June 28, 2010, the Admissions Chairperson of the State-approved nonpublic school, who had attended the May 19, 2010 CSE meeting, advised the district that based upon her observation of the student at home in August 2009 and her review of documentation, she believed that the "[student's] needs [were] within the scope of the mission" of the school; however, the parents needed to fill out a questionnaire and set up a meeting to complete the intake process (Dist. Ex. 123). The Admissions Chairperson indicated, however, that the parents—who had called her on June 4, 2010—declined to further pursue the student's potential admission to the State-approved nonpublic school because they believed it was "too far" away from their home (id.).

In a letter dated June 29, 2010, the district sent the parents prior written notice regarding the proposed summer 2010 ESY services (Dist. Ex. 124). The ESY services included the following: a daily, three-hour ABA instructional program in a 6:1+1 classroom; two 45-minute sessions of co-taught OT and PT; four 40-minute sessions per week of speech-language therapy; one 60-minute session per week of speech-language therapy; all of the student's instructors would be familiar with the sign language used by the student to facilitate communication; one 60-minute session per week of parent training with the BCBA/special education teacher and/or the speech-language pathologist; all staff would receive de-escalation and restraint training; an aide would be available all day and would be responsible for data collection; and the BCBA/special education teacher would serve as consultant to other staff regarding data collection and assessment (id.). In the letter, the district indicated that the CSE had rejected the parents' request for a full-day ESY program, as recommended on the student's most recent IEP, because a full-day program was not necessary to prevent severe regression (id.; see Dist. Ex. 126 at pp. 633-34).

Although the parents executed and returned the consent form for the provision of summer 2010 ESY services, they also wrote the following: "we consent to implementation of the program but we do not believe it to be appropriate, nor do we believe the district has the staff to implement what is recommended" (Dist. Ex. 150 at pp. 711-13). The student attended ESY services for two days in July 2010, whereupon his parents removed him from the program amidst further allegations of "child endangerment" (Dist. Ex. 151 at p. 717; see Tr. pp. 3581-87; Joint Exs. I1-I3).

Impartial Hearing Officer Decision

After the impartial hearing convened on May 17, 2010, the parties reconvened on July 1, 2010, to continue the impartial hearing, which concluded on October 22, 2010, after 14 nonconsecutive days of testimony (Tr. pp. 1, 271, 3975). In a 77-page decision dated January 31, 2010, the impartial hearing officer recounted the testimony provided by each witness (IHO Decision at pp. 1-46). She then identified the legal standards for analysis, and addressed the issues raised (id. at pp. 46-72). Based upon the evidence, the impartial hearing officer concluded that the district offered the student a FAPE during the implementation of the January 27, 2010 IEP from January 28, 2010 through March 9, 2010; the district failed to offer the student a FAPE from March 9, 2010 through June 30, 2010; the January 27, 2010 IEP did not constitute a viable pendency placement; and that the parents could not appropriately manage the student's education (id.).

With respect to the district's failure to offer the student a FAPE from March 9, 2010 through June 30, 2010, the impartial hearing officer stated that the "regulations [were] clear regarding the District's liability where parental consent ha[d] not been provided" (IHO Decision at pp. 58-59, citing 8 NYCRR 200.5[b][4][i]). She concluded that the parents "did not provide consent" to the district's programming "after March 9, 2010," and further, that the parents' "repeated assertions that [the student] could return to school upon 'safe and appropriate delivery of [the student's] IEP services' [was] little more than an illusory effort to appear cooperative" (id. at p. 59). In addition, the impartial hearing officer also concluded that the parents' "intrusive behavior, their hostile and accusatory approach to personnel as well as their preference for keeping [the student] home without services ha[d] contributed synergistically to the District's inability to provide FAPE," and that equitable considerations, therefore, precluded an award of additional services as relief (id. at pp. 58-67).

As relief, the impartial hearing officer ordered the following: the immediate appointment of a guardian ad litem for the student who would remain in place over "all educational matters relating to [the student], both past and future;" for the student's pendency placement to "revert to the provisions as set forth at the impartial hearing of August 5, 2009 and articulated in the Consent Decree;" that the district "shall have no liability for the absence of FAPE from January 28, 2010 through the end of the 2010 school year," and further, that the district "shall have no continuing liability for the absence of FAPE until the date upon which the [student was] placed in a 6:1:1 program as set forth below;" the district "shall make immediate efforts, consistent with the [student's] IEP," to place the student in "a 6:1:1 classroom, accompanied by a full-time 1:1 paraprofessional," and further, that the student "shall be placed in the first accepting facility which maintains a full-time BCBA" (including the provision of transportation); that the district "shall provide 'suitable transportation' and shall extend its search of placements to those requiring a one and one half hour trip each way;" and finally, that the district was the "prevailing party" (IHO Decision at p. 73 [emphasis in original]).

Appeal for State-Level Review

On appeal, the parents assert that the impartial hearing officer exceeded her authority with regard to the relief ordered in the decision. First, the parents contend that the impartial hearing officer abused her authority in ordering the district to appoint a guardian ad litem to represent the student's interests after the impartial hearing concluded, and seek to annul this relief. Second, the parents allege that the impartial hearing officer impermissibly changed the student's pendency placement and improperly ordered this relief as requested by the district in its closing brief, which denied the parents an opportunity to be heard on the issue, and they seek to vacate this relief. Third, the parents argue that the impartial hearing officer exceeded her authority by improperly holding the district harmless for any future denials of a FAPE, and seek to vacate this relief. Fourth, the parents assert that the impartial hearing officer improperly ordered the district to place the student in a specifically described placement with a full-time 1:1 paraprofessional because the relief was not requested by the parents, and they seek to annul this relief. Fifth, the parents contend that the impartial hearing officer improperly deemed the district as the prevailing party, and they seek to vacate this relief. Finally, the parents argue that the impartial hearing officer's pervasive factual errors "on the whole, paints a remarkably inaccurate picture of the parents and their conduct" and serves as an additional basis upon which to vacate the impartial hearing officer's decision. In addition to vacating or annulling the relief ordered by the impartial hearing officer, the parents also seek an award of "one-for-one" additional services to compensate the student for the district's failure to offer him a FAPE from March 9, 2010 through June 30, 2010.

In its answer and cross-appeal, the district asserts that the parents failed to timely serve the petition for review and that the petition for review fails to comply with the practice regulations pertaining to page length, font size, and spacing. The district further asserts that the impartial hearing officer's finding that the district offered the student a FAPE from January 28, 2010 through March 9, 2010, is final and binding upon the parties; that through their actions, the parents constructively abandoned the January 27, 2010 IEP as the student's pendency placement; that the district took all appropriate steps to reconstruct the student's program following the removal of the special education teacher; that after the pendency hearing on May 17, 2010, the district took all reasonable steps to provide the student's pendency placement as ordered by the impartial hearing officer; and that the district offered to provide the student with compensatory educational services to compensate for the services the student missed due to the district's actions or inactions.

In its cross-appeal, the district seeks to modify portions of the relief ordered by the impartial hearing officer. Specifically, the district seeks to expand its search for an appropriate placement for the student to include other placements on the continuum, which are not confined to the 6:1:1 classroom, as described by the impartial hearing officer. In addition, the district seeks to expand its search for an appropriate placement for the student to include those placements that may exceed the 50 mile radius set forth in the Education Law.

As relief, the district seeks a dismissal of the petition in its entirety, or in the alternative, the following determinations upon review: the impartial hearing officer's decision "dismissing all claims involving a denial" of a FAPE from January 28, 2010 through March 9, 2010, is final and binding upon the parties; unless otherwise agreed to by the parties, the impartial hearing officer's pendency determination—subject to any further order on appeal—is final and binding upon the parties; that the district took all reasonable steps to offer the student a FAPE "following March 9, 2010;" that the parents abandoned the last agreed upon placement by declining to participate in the proposed Carbone Clinic training, which was necessary to rebuild the student's program, and further, that the parents refused to allow the student to "participate in a substantially similar program offered by the District on June 9, 2010;" that any "interruption" of the district's offer of a FAPE was addressed by the district's offer to provide compensatory educational services, and as such, the parents' request for additional services is now moot; that the district complied with the Consent Decree; and finally, that the district is entitled to the relief requested in its cross-appeal.

In a combined answer to the district's cross-appeal and reply to the district's answer, the parents assert that the petition was timely served; and if it was not timely, they assert the reasons for the delay in service. In addition, the parents contend that the district's arguments regarding font size, page length, and line spacing are without merit. With regard to the district's request to modify the impartial hearing officer's orders, the parents argue that those orders should be vacated in their entirety, and further allege that any request for a variance to the 50-mile radius is beyond the scope of the instant appeal. The parents further object to the relief requested by the district—such as the mootness of the parents' request for additional services and whether the district complied with the Consent Decree—as beyond a State Review Officer's jurisdiction. The parents also address arguments raised in the district's Memorandum of Law regarding additional services. The parents further object to the consideration of additional evidence submitted with the district's answer and cross-appeal. Finally, with respect to pendency, the parents assert that the district's arguments are without merit.

Applicable Standards

Procedural Matters

Initially, three procedural matters must be addressed. First, the district asserts in its cross-appeal that the parents failed to timely serve the petition for review. As discussed below, this argument is without merit.

An appeal to a State Review Officer is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-119; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082).

As to the time period for initiating an appeal, a petition must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]).[36] The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11).

State regulations provide a State Review Officer with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.). All pleadings shall be verified (8 NYCRR 279.7). Service of all pleadings subsequent to a petition shall be made by mail, by private express delivery service, or by personal service (8 NYCRR 275.8[b], 279.5, 279.6, 279.11).[37]

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[36] As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the next day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065).

[37] In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by a State Review Officer (8 NYCRR 279.8[a], 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing

Here, the impartial hearing officer's decision, dated January 31, 2011, was issued by both electronic mail and regular mail; thus, the parents had until March 14, 2011 to timely serve the petition for review.[38] Therefore, the parents' personal service of the petition upon the district on March 10, 2011, effectuated timely service pursuant to the regulations.

Second, the district attached two affidavits to its answer and cross-appeal for consideration as additional evidence. The parents object to the consideration of the additional evidence on the basis that, pursuant to State regulations, the parents are entitled to cross-examine the affiants, and as such, they request that a State Review Officer either convene a hearing for the purpose of conducting the cross-examination or reject the affidavits (see 8 NYCRR 279.10[b], 200.5[j][3][xii]). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In light of the parents' objections, I decline to accept the additional documentary evidence as it is not necessary in order to render a decision in this case.

Third, since neither party appealed the impartial hearing officer's determination that the district offered the student a FAPE from January 28, 2010 through March 9, 2010, or the impartial hearing officer's determination that the district failed to offer the student a FAPE from March 10, 2010 through June 30, 2010, those determinations are final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v].

Discussion: Merits of the Appeal

The Parents' Request for Compensatory Additional Services

In the decision, the impartial hearing officer denied the parents' request for additional services to address the district's failure implement the student's IEP from March 10, 2010 through June 30, 2010 (see IHO Decision at pp. 58-67; Dist. Ex. 1 at pp. 6-9). The impartial hearing officer, in part, declined to award additional services for the district's failure to offer the student a FAPE because she determined that the parents failed to consent to the provision of special education services, and thus, State regulation precluded holding the district liable for the failure to provide services (IHO Decision at pp. 58-60, citing 8 NYCRR 200.5[b][4][i]). However, as the parents correctly assert in their appeal, the impartial hearing officer improperly relied upon the cited State regulation to deny the parents' request for additional services because the special

a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]). In addition, a State Review Officer may reject a pleading or memorandum of law that does not comply with the regulations governing practice before the Office of State Review (8 NYCRR 279.8[a]). In this instance, I decline to dismiss the petition for the failure to comply with the practice regulations (Application of a Child with a Disability, Appeal No. 04-033; see Application of a Child with a Disability, Appeal No. 04-001).

[38] The final day to serve the petition fell on March 12, 2011, a Saturday; therefore, the parents had until the following Monday, March 14, 2011, to timely serve the petition (see 8 NYCRR 279.11).

education programs and services declined by the parents in this matter did not involve the "initial provision of special education programs and services" as contemplated by the regulation (8 NYCRR 200.5[b][4][i]; see 34 C.F.R. § 300.300[b][4][i]). Therefore, I agree with the parents' arguments that the impartial hearing officer erred in denying their request for additional services, in part, based upon this rationale.

The impartial hearing officer also relied, in part, upon an analysis of equitable considerations—focusing primarily on the parents' conduct—as a basis to deny the parents' request for additional services as a remedy for the district's failure to implement the student's IEP from March 10, 2010 through June 30, 2010 (IHO Decision at pp. 58-67). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he [Individuals with Disabilities Education Act] IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]).[39]

Likewise, State Review Officers have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Notably, it has been determined that compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147

[39] If the student has become ineligible for special education by reason of age or graduation, compensatory education has been 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, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

[N.D.N.Y. 1997]).[40] Recently, a United States District Court reexamined the role of equitable considerations in analyzing a parental request for compensatory educational services to remedy the "delay [a student] experienced in his related therapy sessions" under pendency (J.G. v. Kiryas Joel Union Free Sch. Dist., 2011 WL 1346845, at *25 [S.D.N.Y. Mar. 31, 2011] [noting that although compensatory education "may be an appropriate and available remedy for a violation" of pendency, . . . , the Supreme Court has emphasized that IDEA relief depends on 'equitable considerations'"] [internal citations omitted]). The district court further noted that "'[a]s with any entitlement that arises in equity . . . if the evidence demonstrates that the parents caused or contributed to the delay, a court could find that they are wholly or partly disentitled to pendency reimbursement'" (J.G., 2011 WL 1346845, at *25 [citing Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 701 [S.D.N.Y. 2006]).

In J.G., the court denied the parents' request for compensatory services, noting that while the school district consistently, promptly, and professionally replied to the parents' requests for pendency services, the district "consistently met with inaction by the family" (J.G., 2011 WL 1346845, at *25; but see Penn Trafford Sch. Dist. v. C.F., No. Civ. A. 04-1395, 2006 WL 840334, at * 6 [W.D.Pa. Mar. 28, 2006] [holding that the "'right to compensatory education belongs to the disabled child and should not be deprived based upon the parents' inaction"']). The court in J.G. also found that the parents in that case "failed to exercise the appropriate degree of urgency and responsiveness necessary to ensure that [the student] did not experience a gap in services" (J.G., 2011 WL 1346845, at *25). Moreover, the J.G. court noted that the parents' attorney, who had represented them "from at least the time they filed their due process demand notice," should have "explained to [the parents] the potential legal ramifications of their delayed acceptance of district-provided therapy sessions" (id.).

Here, similar to the facts in J.G., the district promptly and professionally responded to the March 9, 2010 incident, and thereafter, consistently offered to provide the student with the services of a 1:1 aide, as well as speech-language therapy, OT, and PT, pursuant to the student's January 27, 2010 IEP from March 10, 2010 through June 30, 2010—either at school or at home, according to the parents' preferences—and to provide make up services for any missed educational services while the district identified a new special education teacher (Dist. Exs. 2; 28-29; 31; 36; 38 at pp. 157-59; 45 at p. 169; 71; 137; 158 at pp. 737-39; see Tr. pp. 55-57, 66, 86, 533-35, 943-44, 2311, 3500-03, 3495). In addition, Dr. Carbone initially supported the district's efforts to return the student to school to receive these services, and after time, supported the district's efforts to provide these services at the student's home (Dist. Exs. 29 at pp. 142-43; 32 at p. 148; 35 at p. 154; 137; 173; see Tr. pp. 939-40, 3493-95; IHO Ex. i at pp. 61-65). By June 10, 2010, the district had replaced the student's special education teacher and was ready to resume the student's IEP services at the district (Dist. Ex. 55; see Tr. pp. 957, 3556-62; Dist. Exs. 57-65). However, the efforts extended by the district continually met with resistance, inaction, altered demands by the parents, and the parents' continued refusal to accept any educational services for the student from March 10, 2010 through June 30, 2010 (see Dist. Exs. 26-27; 29 at p. 143; 33-36; 38; 40; 43-44; 46; 49; 51-53; 55-57; 60-62; 65; 70; 168; see also Tr. pp. 55-57, 79-80, 1617-19, 3571-74, 3578). While the district, with the support of Dr. Carbone, continued to make earnest efforts under challenging

[40] In addition, neither party disputes that compensatory educational services—or additional services—constitute an appropriate and available remedy under the circumstances of this case since the student remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]; but see Streck v. Bd. of Educ., 2010 WL 4847481 [2d Cir. Nov. 30, 2010] [ordering the district to establish an escrow account for the value of two years of compensatory educational services for a college student no longer eligible for instruction under the IDEA]).

circumstances to accommodate the parents' concerns and to provide at least some of the student's special education services, the parents were prepared to accept nothing short of flawless implementation of the student's entire IEP, even when the district had already acknowledged its shortcomings and had offered to provide make up services to redress them. While I can appreciate the parents' sincere concerns for the safety of their child in a school environment, based on the evidence in the hearing record, I find that the parents' conduct in this case was unreasonable and, in part, contributed to the failure of the delivery of a portion of the special education services from March 10, 2010 through June 30, 2010.

I also note that there is a tension in this instance between the rights of the student and those of the parents, and that the student has been without services for a substantial period of time through no fault of his own and despite the conduct of his parents. Therefore, I am constrained to disagree with the portion of the impartial hearing officer's decision that denied compensatory additional services altogether. Consequently, based upon the consistent availability of the district's 1:1 aide's services, as well as the student's related services from March 10, 2010 through June 30, 2010; and in light of the equitable nature of the compensatory additional services requested on behalf of the student, I find that the student should be provided with "one-for-one" compensatory additional services in the form of special education teacher services to make up for the district's failure to provide special education teacher services from March 10, 2010 through June 10, 2010, when the district had a new BCBA/special education teacher in place and was ready to resume the student's IEP services. Here, as in J.G., the parents failed to exercise the appropriate degree of responsiveness to ensure that the student did not experience a gap in the services that remained available, and as a result, I decline to hold the district responsible to provide further compensatory additional services beyond those of the special education teacher. Furthermore, I will condition this award of additional services upon good faith efforts of the parents to work with cooperatively with the district in returning the student to a school-based placement. Should the parents fail to work cooperatively with the district to obtain the compensatory additional services described above, nothing in this decision shall preclude the district from seeking a determination in a new due process proceeding that it should be relieved of its obligation to provide them.

Guardian Ad Litem

In her decision, the impartial hearing officer ordered the district to immediately appoint a guardian ad litem for the student, who would remain in place over "all educational matters relating to [the student], both past and future" (IHO Decision at p. 73 [emphasis in original]). For the reasons detailed below, I agree with the parents' argument that the impartial hearing officer exceeded her authority in ordering the appointment of a guardian ad litem, and that aspect of the decision must be annulled.

State regulations provide that

> [i]n the event the impartial hearing officer determines that the interests of the parent are opposed to or are inconsistent with those of the student, or that for any other reason the interests of the student would best be protected by appointment of a guardian ad litem, the impartial hearing officer shall appoint a guardian ad litem to protect the interests of such student, unless a surrogate parent shall have previously been assigned

(8 NYCRR 200.5[j][3][ix]).

State regulations define a guardian ad litem as "a person familiar with the provisions of this Part who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing" . . . "who shall have the right to fully participate in the impartial hearing to the extent indicated in section 200.5(j)(3)(xii) of this Part" (8 NYCRR 200.1[s] [emphasis added]). Thus, State regulation expressly contemplates that the impartial hearing officer has the authority to appoint a guardian ad litem to protect the interests of the student during the impartial hearing. While this provision supports the objective of ensuring that a student's rights are adequately represented during an administrative due process proceeding, it does not confer upon the impartial hearing officer the plenary authority to suspend or terminate a parent's educational decision making rights respect with respect to all educational matters outside of the proceeding and vest it in another individual (see id.).

Pendency

In her final decision, the impartial hearing officer reassessed the "viability" of the January 27, 2010 IEP as the student's pendency placement, and determined that the student's pendency placement should "revert to the provisions as set forth at the impartial hearing of August 5, 2009 and articulated in the Consent Decree" (IHO Decision at pp. 67-70, 73). The parents argue that the impartial hearing officer's sua sponte decision to alter the student's pendency placement from her earlier interim decision on pendency, dated June 6, 2010—which found the January 27, 2010 IEP constituted the student's pendency placement upon agreement of the parties—based upon the district's request in its closing brief deprived the parents of due process by denying them the opportunity to be heard on that issue (see Tr. p. 4194; IHO Exs. xiii at pp. 39-40; xi).

I find that the impartial hearing officer's decision to render a new determination at the conclusion of the proceeding regarding the student's pendency placement should be vacated because she lacked the authority to retain jurisdiction of the pendency matter and establish the student's pendency placement on a going forward basis. Impartial hearing officers must be appointed by the board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1][c]; 8 NYCRR 200.2[e], 200.5[j]). An impartial hearing officer's jurisdiction is limited by statute and regulation and there is no express or implied authority for an impartial hearing officer to reopen a hearing once the record has been closed or the case has been otherwise dismissed (20 U.S.C. § 1415[f]; 34 C.F.R. § 300.511; 8 NYCRR 200.5[j]). There is no authority for an impartial hearing officer to generally assume jurisdiction with respect to all matters reportedly arising from the implementation of the impartial hearing officer's decision, or with respect to any future dispute between the parties (Application of the Bd. of Educ., Appeal No. 05-007; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 03-105).

Additionally, with regard to pendency determinations made by administrative hearing officers, the Second Circuit has proffered three variations describing the "then current educational placement": (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004]). In this case, although the feasibility of effectively implementing all of the provisions of the January 27, 2010 IEP became one of the hotly debated issues in this case and, as discussed above, the parents impeded the provision of a portion of those services when the district attempted to provide them pursuant to the June 2010 interim order, this does not alter the fact that the CSE developed a new IEP for the student pursuant to the procedures under the IDEA and State regulation. Furthermore that IEP was then actually put into effect

between January 2010 and March 2010 such that it became the educational placement in effect and became the student's most recently implemented IEP prior to instituting the impartial hearing (Mackey, 386 F.3d at 163). Moreover, assuming for the sake of argument that the September 2009 Consent Decree continued to have relevance once a new IEP was put into effect (see Dist. Ex. 4), to the extent that it can be construed as an agreement of the parties regarding the student's educational placement for anticipated legal proceedings, by the terms of such agreement, the parents refused to declare for purposes of pendency that the student was actually unsafe and that his educational placement should be changed to home-based instruction in accordance with the terms of the agreement. Although the impartial hearing officer clearly believed that the parents' counsel provided poor representation on behalf of his clients (IHO Decision at pp. 69-70), such opinion did not form a permissible basis for the impartial hearing officer to substitute her judgment for that of the parents. Under the circumstances of this case, the parents remained free to accept or reject the advice of their counsel in deciding whether to agree to modify the student's pendency placement, regardless of how sound or unsound that advice may have been. Accordingly, for the reasons described above, the impartial hearing officer's determination in her final decision that the student's educational placement pursuant to the pendency provisions of the IDEA should be changed and "revert to the provisions as set forth at the impartial hearing of August 5, 2009 and articulated in the Consent Decree" must be vacated.

Immunity from Future Liability and Future Educational Placement Directives

In addition to rendering a determination in favor of the district regarding the parents' claim for compensatory additional services, the impartial hearing officer ordered that the district "shall have no liability for the absence of [a] FAPE from January 28, 2010 through the end of the 2010 school year," and further, that the district "shall have no continuing liability for the absence of [a] FAPE until the date upon which the [student was] placed in a 6:1:1 program as set forth below" (IHO Decision at p. 73). In addition, the impartial hearing officer ordered that the district "shall make immediate efforts, consistent with the [student's] IEP," to place the student in "a 6:1:1 classroom, accompanied by a full-time 1:1 paraprofessional;" the student "shall be placed in the first accepting facility which maintains a full-time BCBA" (including the provision of transportation); and that district "shall provide 'suitable transportation' and shall extend its search of placements to those requiring a one and one half hour trip each way" (id.). The parents argue that the impartial hearing officer exceeded the scope of her jurisdiction by ordering this relief. To the extent that the ordered relief prematurely addresses future events regarding the offer or provision of a FAPE to the student for school years not at issue in the parents' due process complaint notice, I find that the impartial hearing officer exceeded the scope of the impartial hearing in awarding the abovementioned relief and that that portion of her decision must be annulled (see 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][ii]).

Prevailing Party

Finally, the impartial hearing officer deemed the district as the "prevailing party" in the decision (IHO Decision at p. 73). I agree with the parents' argument that the impartial hearing officer was not required to make this determination insofar as the IDEA does not authorize an administrative officer to award attorneys' fees or other costs to the prevailing party; and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; see also B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009]; Application of the Bd. of Educ., Appeal No. 09-081).

Conclusion

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision, dated January 31, 2011, is annulled to the extent that it denied the parents' request for additional educational services; and

IT IS FURTHER ORDERED that, upon developing or obtaining a school-based placement for the student, the district shall make arrangement for the provision of compensatory additional services to the student in an amount equal to the 200 minutes per school day of instruction from a special education teacher that the student missed during the period ranging from March 10, 2010 to June 30, 2010; and

IT IS FURTHER ORDERED that the impartial hearing officer's directives regarding the appointment of a guardian ad litem, the student's pendency placement, and declaration of prevailing party status set forth in her decision, dated January 31, 2011, are hereby annulled.

Dated: **Albany, New York**
April 29, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER