The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-091

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

Appearances:
Friedman & Moses, LLP, attorneys for petitioner, Alicia Abelli, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, John Tseng, Esq., of counsel

DECISION

Petitioner (the parent) appeals from those portions of the decision of an impartial hearing officer which denied her request for, among other things, 1:1 multisensory instruction, assistive technology, and speech-language therapy as compensatory education services for her daughter for the 2008-09, 2009-10, and 2010-11 school years and remanded the case to respondent's (the district's) Committee on Special Education (CSE). The appeal must be sustained in part.

At the time the impartial hearing convened in November 2010, the student was 19 years old and was not attending school or receiving any special education programs or services privately or through the district (Tr. pp. 444-45). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][10]; 8 NYCRR 200.1[zz][6]).

Background

As more fully discussed below, the district has not appealed the impartial hearing's determination that it did not offer the student a free appropriate public education (FAPE) for the 2008-09, 2009-10, and 2010-11 school years (IHO Decision at pp. 20, 22). Therefore, the scope of this decision is limited and the student's educational history will only be briefly recited as relevant to the case. The student has received a diagnosis of a cognitive disorder, not otherwise specified, and functions in the extremely low range of intelligence, with relative strengths in the areas of basic auditory attention and concentration, vocabulary, verbal reasoning, visual scanning, and memory skills (Parent Exs. N at pp. 6-7; V at p. 3). The student's academic achievement skills

are "largely consistent" with her cognitive abilities, with specific weaknesses in reading comprehension and mathematics skills (Parent Exs. N at p. 6; V at p. 3). However, when provided with repetition, the student is able to learn and retain new information (Parent Exs. N at p. 6; V at p. 4). Measures of adaptive behavior have not identified functional impairments in the areas of communication, daily living skills, and socialization (Parent Ex. N at p. 6).

On May 1, 2009, during the student's twelfth grade year, the CSE convened to develop a program to begin on that same date and span three years (Parent Ex. C at pp. 1, 2). In attendance were the district representative, special education teacher, speech-language therapist, school psychologist, the parent, and the student (id. at p. 2). The CSE recommended that the student attend a 15:1 special class in a community school and receive related services of speech-language therapy two times per week for 45-minutes per session in a group of five (id at pp. 1, 11). The CSE terminated the student's counseling services (id. at p. 11). The individualized education program (IEP) reflected that the student would participate in State and local assessments with accommodations, that she was to be promoted using "standard criteria," and the IEP included a transition plan that noted her expected high school completion date as June 30, 2009 (id. at pp. 11, 12-13). At the end of the 2009-10 school year, in June 2009, the student graduated with an IEP diploma and was discharged from the district (Tr. pp. 444-445).

On October 29, 2007, the parent requested an impartial hearing, seeking compensatory education services for the 2006-07 and 2007-08 school years (Parent Ex. B at pp. 2, 13).[1] On January 29, 2009, an impartial hearing officer issued a decision that found that the district had failed to provide the student with a FAPE for the school years in question, invalidated the IEPs for both school years, and ordered compensatory education in form of up to 480 hours of 1:1 Lindamood-Bell instruction, "which instruction may be provided at any time until [the student] turns 21" in August 2012 (id. at pp. 13-17). The impartial hearing officer also denied the parent's requested relief for instruction at another tutoring agency (Huntington Learning Center), stating that the evidence showed that the student was not yet ready for such instruction and that she needed to complete the Lindamood-Bell instruction first (id. at pp. 10, 13, 17). However, the impartial hearing officer dismissed this claim "without prejudice to [the student's] right to request a future hearing for such relief" (id. at p. 17). The impartial hearing officer's January 2009 decision was not appealed by either party.

In March 2010, the student completed the hours at Lindamood-Bell that she had been awarded under the prior impartial hearing officer's order (Tr. pp. 324, 432, 463; Parent Ex. L at p. 1; see Parent Ex. K).

Due Process Complaint Notice

The parent filed a due process complaint notice on September 15, 2010, alleging that the district failed to offer the student a FAPE for the 2008-09, 2009-10, and 2010-11 school years (Parent Ex. A at p. 1). The parent stated that she was making a "request for additional compensatory services, pursuant to claims that were tolled by a previous impartial hearing officer" (id.).[2] The parent further asserted that the 2008-09 school year had not been litigated at the prior

[1] The October 2007 due process complaint notice is not part of the hearing record.

[2] I note that all allegations in the parent's due process complaint notice were made "upon information and belief" (Parent Ex. A at p. 1).

impartial hearing; however, the student's February 26, 2008 IEP, which was in place for a portion of both the 2007-08 and 2008-09 school years, had been invalidated by the previous impartial hearing officer (id.). The parent also alleged that the February 2008 IEP was not fully implemented and the student did not receive appropriate services for the 2008-09 school year (id. at p. 3).

Regarding the student's May 1, 2009 IEP, the parent alleged, without further specification, that the CSE was "not duly constituted" and that the IEP was "untimely" (Parent Ex. A at p. 3). The parent further alleged that the transition plan and services in the May 2009 IEP were "legally insufficient;" that the IEP failed to include diploma objectives; that the CSE failed to consider assistive technology; and that the CSE failed to offer 1:1 multisensory instruction, transitional services, and life skills services (id. at pp. 3-4). The parent also alleged, without further specification, that the CSE used "illegal, blanket policies" and that the May 2009 IEP was not fully implemented (id. at p. 4). With regard to the student's June 2009 graduation, the parent claimed that there was no sufficient basis for the district to award her an IEP diploma and that the procedures for doing so were not followed (id.).

The parent stated that the student completed the Lindamood-Bell hours awarded to her by the prior impartial hearing officer by March 2010 and alleged that she required additional services to "reach her academic potential" and "obtain a legitimate diploma" (Parent Ex. A at p. 5). She further argued that claims for additional make-up services were not barred by the statute of limitations, collateral estoppel, res judicata "or any other equitable defenses" because, among other things, the prior impartial hearing officer's decision stated that these claims were not yet ripe and the prior impartial hearing did not address the school years at issue in the present case (id.).

For relief, the parent sought, among other things: (1) compensatory education services "including but not limited to" 1:1 services using multisensory instruction; (2) "immediate funding of a program" that would allow the student to earn a "legitimate diploma;" (3) compensatory speech-language therapy; (4) transportation expenses; and (5) assistive technology (Parent Ex. A at pp. 5-6).

Impartial Hearing Officer Decisions

An impartial hearing to determine the student's pendency placement and whether the parent's claims were barred by res judicata or the statute of limitations convened on November 10, 2010, and concluded on January 28, 2011, after four days of proceedings (Tr. pp. 1-314). In an interim order on pendency dated January 31, 2011, the impartial hearing officer found that the prior unappealed impartial hearing officer's decision dated January 2009 did not create the student's pendency placement because it granted compensation for services the district failed to provide the student "in the past" (Interim IHO Decision at p. 5). The impartial hearing officer further found that the prior decision "neither created or established an educational program" for the student and that the order had been "fully executed," therefore, it could not be the basis for continuing services under pendency (id. at pp. 5-6). The impartial hearing officer determined that the district was incorrect, however, that the student's pendency placement was "nothing" (id. at p. 6). She found that because the prior impartial hearing officer had nullified the February 2008 IEP, the recommendations in the student's June 10, 2005 IEP constituted pendency (id.). Therefore, the impartial hearing officer ordered that the student's pendency placement was a district 15:1 special

class with speech-language therapy two times per week for 30-minute sessions in a group of 5, as reflected in the June 2005 IEP (id.).[3]

The impartial hearing reconvened on February 2, 2011 and concluded on May 25, 2011, after six additional days of proceedings (Tr. pp. 315-873). By decision dated June 15, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE for the three school years in question (IHO Decision at pp. 20, 22). Regarding the district's argument that the parent's claims concerning the 2008-09 school year were barred by the statute of limitations, the impartial hearing officer determined that since the parent requested the impartial hearing on September 15, 2010, only her claims "arising after September 15, 2008" could be determined and any remaining claims were barred (id. at p. 19). Regarding the district's assertions that some of the parent's claims were barred by res judicata/collateral estoppel, the impartial hearing officer determined that claims arising during the 2008-09 school year were not barred because the 2008-09 school year had not been before the prior impartial hearing officer and therefore, he did not determine whether the student had been offered a FAPE for that school year (id. at pp. 19-20). However, the impartial hearing officer determined that the prior impartial hearing officer's finding that the February 2008 IEP was invalid was binding upon the district and the CSE could have reconvened in January 2009 when the prior decision was rendered to create a new IEP for the student, but it did not (id. at p. 20). Therefore, she found that the district failed to provide a FAPE to the student for the 2008-09 school year (id.).

Regarding the 2009-10 and 2010-11 school years, the impartial hearing officer noted that the district did not present any direct witnesses at the impartial hearing and did not provide evidence that the May 2009 IEP was appropriate or that it offered the student a FAPE for those school years (IHO Decision at p. 22). Moreover, the impartial hearing officer found that the district failed to follow the required procedures when it awarded the student an IEP diploma in June 2009, impeding the student's right to a FAPE, significantly impeding the parent's opportunity to participate in the decision-making process, and causing a deprivation of educational benefits (id. at p. 23).

However, the impartial hearing officer denied the parent's request for compensatory education in the form of 1:1 instruction finding that the evidence did not establish that the student "can learn or benefit from instruction in only a 1:1 environment" (IHO Decision at pp. 23-24). She stated that she was "called upon to formulate a remedial plan" for the student and noted, without further specificity, that she was adopting "several useful suggestions" that the district made in its closing brief (id. at p. 24). The impartial hearing officer then addressed equitable considerations finding that they did not favor the district; however, she also had to consider the parent's "apparent unwillingness" to accept any program except 1:1 instruction through a private tutoring service (id. at p. 25). She further noted that the parent should engage in a "'collaborative process'" going forward (id.). Lastly, the impartial hearing officer denied the parent's request for assistive technology, finding that the hearing record did not establish that the student required assistive technology to benefit from special education instruction (id.).

[3] The impartial hearing officer also issued a separate interim decision also dated January 31, 2011, which stated that she had determined on the record at the November 10, 2010 hearing date that the parent was entitled to receive independent evaluations at district expense consisting of a speech-language update and an updated psychological (Interim IHO Decision 2 at pp. 2-3; see Parent Exs. L; V).

The impartial hearing officer ordered the following remedies: (1) that the CSE reconvene to create an IEP for the student and recommend a program that shall include a class size of 12 or fewer students, multisensory instruction, individualized instruction, and daily speech-language therapy; and (2) that the district shall provide the student with one 10-month school year of compensatory education beyond age 21 following the guidelines set out above (IHO Decision at pp. 25-26).

Appeal for State-Level Review

The parent appeals those portions of the impartial hearing officer's decision which remanded the matter to the CSE and denied the parent's request for 1:1 private instruction as compensatory education for the denial of a FAPE for the 2008-09, 2009-10, and 2010-11 school years. Initially, the parent states that she is not appealing the impartial hearing officer's findings with respect to res judicata, the district's failure to provide a FAPE for the three school years at issue, and that the student was entitled to compensatory education. Specifically, the parent argues that it was inappropriate for the impartial hearing officer to remand the matter to the CSE because the district is a party to the case. The parent further alleges that the impartial hearing officer exceeded her authority in ordering an IEP to be developed for the 2011-12 school year because it was not at issue before her. She also contends that the relief ordered by the impartial hearing officer—a class of 12 students and speech-language therapy at the district—was not based on any evidence showing that such a program would be appropriate for the student. The parent also argues that there is no evidence that the district could implement the program ordered. The parent next alleges that the amount of compensatory education ordered by the impartial hearing officer is not enough to make up for three years of the district denying the student a FAPE. Further, the parent contends that the impartial hearing officer erred by applying a least restrictive environment (LRE) analysis to her compensatory education claim.

Next, the parent appeals the impartial hearing officer's denial of assistive technology and her finding that claims prior to September 15, 2008 were barred by the statute of limitations, asserting that the prior impartial hearing officer decision tolled such claims. The parent also appeals the impartial hearing officer's failure to rule on her request for life skills/transition services and seeks an award of 2 years of 12-month services, two times per week for 90 minutes per session. The parent asserts that the impartial hearing officer's finding against the parent regarding the equities was erroneous, arguing that the impartial hearing officer erred in considering the equities on a compensatory education claim. The parent further appeals the impartial hearing officer's determination on pendency; however, she also claims that the district has not implemented the pendency order and requests reversal of the impartial hearing officer's ruling on pendency and a ruling that the district failed to implement pendency. The parent also argues that the impartial hearing officer failed to rule on all her claims raised in the due process complaint notice, including the claim that the district applied "illegal blanket policies." The parent additionally seeks an award of transportation costs and compensatory 1:1 speech-language therapy in the amount of five hours per week on a 12-month basis. The parent also seeks an award of "intensive 1:1 multisensory instruction" as compensatory education services. The parent attaches additional evidence to her petition for consideration on appeal.

The district answers the parent's petition and does not cross-appeal any portion of the impartial hearing officer's decision. The district alleges that it "mostly" complied with the pendency order and attaches additional evidence to its answer which it maintains supports its

position. The district further argues that the impartial hearing officer's determination to remand to the CSE to ascertain a compensatory education award was appropriate and that her finding that the student did not require 1:1 services was also appropriate because the student made limited progress at Lindamood-Bell and 1:1 services are too restrictive for her. The district also contends that contrary to the parent's assertion, the impartial hearing officer did not make a determination regarding the provision of a FAPE to the student for the 2011-12 school year. The district alleges that the impartial hearing officer's consideration of the student's LRE was appropriate and that she properly denied the parent's assistive technology request. The district further argues that the parent's "catch-all claims" that were not addressed by the impartial hearing officer should be dismissed because the parent did not provide evidence to support those claims. The district also contends that the claims in the parent's petition lacked specificity and that the impartial hearing officer properly applied the statute of limitations and appropriately found that the prior impartial hearing officer's decision did not toll any of the parent's claims. Lastly, the district alleges that the impartial hearing officer properly decided the student's pendency placement.

In a reply, the parent objects to the additional evidence submitted by the district with its answer arguing that it was available at the time of the impartial hearing and that regardless, the evidence does not demonstrate compliance with the pendency order. The parent attaches additional evidence to her reply.[4]

Discussion

Procedural Matters

Impartial Hearing Officer Misconduct

Initially, I will address several irregularities pertaining to the timeliness of the impartial hearing and the impartial hearing officer's conduct throughout the proceedings. The Commissioner of the State Education Department may suspend or revoke the certification of an impartial hearing officer upon a finding that a State Review Officer has determined that an impartial hearing officer engaged in conduct which constitutes misconduct or incompetence (see 8 NYCRR 200.21[b][4][iii]). For the reasons set forth below, I find that the impartial hearing officer engaged in conduct which constituted misconduct in this case.

The hearing record establishes that the impartial hearing officer did not comply with State regulations regarding the granting of extensions in this matter. Both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes

[4] The parent also includes numerous other assertions in her reply, however, pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). The other allegations in the parent's reply do not respond to the district's additional evidence submitted with the answer or to any procedural defenses asserted by the district. Accordingly, such additional allegations in the reply are beyond the scope of the State regulations and will not be considered on appeal (see 8 NYCRR279.6; Application of a Student with a Disability, Appeal No. 10-118; Application of the Bd. of Educ., Appeal No. 10-036; Application of a Student with a Disability, Appeal No. 09-145).

documentation setting forth the reason for each extension (8 NYCRR200.5[j][5][i]). Moreover, impartial hearing officers are not permitted to accept appointment unless they are available to conduct an impartial hearing in a timely manner (8 NYCRR 200.5[j][3][i][b]). State regulations further set forth that each party shall have "up to one day" to present its case and additional hearing days shall be scheduled on consecutive days to the extent practical (8 NYCRR 200.5[j][3][xiii]).

Here, the parent filed her due process complaint notice on September 15, 2010, yet the impartial hearing officer did not render her decision until June 15, 2011 – 9 months later (IHO Decision at p. 26; Parent Ex. A). Despite the fact that the student was not receiving any services, the first hearing date, which the parties deemed a prehearing conference (8 NYCRR 200.5[j][3][xi]), did not take place until November 10, 2010 – nearly two months after the parent filed her due process complaint notice (Tr. pp. 1-77; Parent Ex. A). The impartial hearing then continued for nine more nonconsecutive impartial hearing dates (IHO Decision; Tr. pp. 78-873), during which multiple extensions were granted in a manner that was not consistent with the regulatory requirements.[5] On at least four occasions, the impartial hearing officer requested the parties to ask for an extension to the compliance date by which her decision was due in direct contravention of the regulations (8 NYCRR 200.5[j][5][iii]; Tr. pp. 67, 114, 439, 757; see Tr. p. 782). On at least one occasion, the impartial hearing officer unilaterally extended the compliance date without undergoing the procedural steps required in the regulations (Tr. pp. 869-70; see 8 NYCRR 200.5[j][5][ii],[iii]). Furthermore, there appear to have been other extensions of the compliance date that were not made part of the hearing record (see Tr. p. 782 [impartial hearing officer states that the compliance date had been extended six times up to that date]). Based on the foregoing, I find that the impartial hearing officer failed to comply with the regulatory requirements for granting and documenting all extension requests in the hearing record (8 NYCRR 200.5[j][5][i], [ii]).

Moreover, this misconduct is acute insofar as hearing record indicates that the impartial hearing officer knew of her obligations under the law. On the ninth day of hearing (April 26, 2010), the impartial hearing officer denied the district's request to further adjourn the hearing date to enable the district to obtain a rebuttal witness (Tr. pp. 769-99; see Dist. Ex. 11 at p. 1). In doing so, the impartial hearing officer referenced her obligation under the regulations stating that "what really matters, in terms of federal and state law, is the compliance date" and that "[a]ll cases have to come to an end" (Tr. p. 782). However, the impartial hearing officer erred in repeatedly granting extension dates throughout the prior eight days of hearing—many of them for reasons such as a lack of availability of the parties' representatives due to scheduling conflicts—which the regulations expressly state shall not be granted "absent a compelling reason or a specific showing of substantial hardship" (8 NYCRR 200.5[j][5][iii]; Tr. pp. 84-85, 86, 88-89, 577). There is no indication in the hearing record of such compelling reasons or substantial hardship, especially where the student was receiving no services and was not attending a school program. Likewise, the impartial hearing officer failed to explain how she "fully consider[ed] the cumulative impact" of the factors listed in the regulations with regard to each extension request (8 NYCRR 200.5[j][5][ii]). Lastly, although the impartial hearing officer rendered oral decisions regarding many of the extension requests, she failed to respond in writing to each one as required to by the State regulations (8 NYCRR 200.5[j][5][iv]).

[5] I note that the final day of hearing, May 25, 2011, was held to reconstruct a portion of a witness' testimony due to a transcription error (Tr. pp. 819-20).

There were other irregularities in the impartial hearing process. For instance, although the impartial hearing officer conducted a prehearing conference, which is laudable, she refused to allow clarification of several the issues raised and the remedies sought in the parent's due process complaint notice, despite the district's requests to do so (8 NYCRR 200.5[j][3][xi][a]; Tr. pp. 34-38).[6] Although the impartial hearing officer advised the parent's counsel that it would be "helpful" to her if the parent would clarify the amount of compensatory education being sought, she did not request that the parent do so (Tr. pp. 40-41). The parent's due process complaint notice did not specify the amount and type of compensatory education services being sought and who the parent wanted to provide the services (Parent Ex. A). Matters only became worse thereafter because these issues were never clarified, the vagueness of the parent's requests continued for the duration of the impartial hearing and were carried over into the appeal level. Also concerning is the impartial hearing officer's admission on the second hearing date that she had not yet read the parent's due process complaint notice (Tr. pp. 136-37). Here, I find that the impartial hearing officer's failure to understand the parties' issues to be decided prior to receiving testimony and her failure to effectively use the prehearing conference procedures at her disposal to simply or clarify the issues in dispute constituted misconduct. Moreover, if the impartial hearing officer had made efforts to simplify or clarify the issues at the prehearing conference, it is likely the impartial hearing would not have taken so long to complete and that the four days of hearings discussing procedural matters such as res judicata, the statute of limitations, and pendency would have been unnecessary.[7]

Moreover, the impartial hearing officer stated multiple times in the hearing record that she was allowing testimony to occur over the objection of the parties' counsel because she wanted a complete record and did not want a "remand" (Tr. pp. 423, 454, 749-50). This resulted in an overly long hearing record of almost 900 pages and a lengthy impartial hearing in a case where the district did not present any witnesses. I remind the impartial hearing officer that she "may limit the examination of a witness . . . whose testimony [she] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]). While an impartial hearing officer has discretion in rendering admissibility determinations, in this case the impartial hearing officer abused that discretion by abdicating her responsibility to balance the need for an adequate hearing record with the need to complete the hearing in a timely fashion by eliminating irrelevant, immaterial or unduly repetitious testimony.

---

[6] Often times in New York, the circumstances in impartial hearings are unlike the typical situation in which the complaining party has the burden of proof (Schaffer v. Weast, 546 U.S. 49, 62 [2005]). Consequently, as a matter of due process and fundamental fairness, an impartial hearing officer's directive to a complaining party to clarify the facts related to its claims is necessary at times, especially if the noncomplaining party ultimately bears the burden of proof (Educ. Law § 4404[1][c]). Such a requirement is unlike a request for a sufficiency determination, the result of which, if granted, is to require a new due process complaint be filed and recommencement of the timelines for conducting an impartial hearing. Nor is such a requirement to clarify the claims "giving away" the merits of the case as the counsel for the parents suggested (Tr. p. 35). Proverbial games of "gotcha" are generally disfavored under the IDEA (Winkelman v. Parma City School Dist. Bd. of Educ., 2009 WL 4456297, at *2 [N.D.Ohio Nov. 30, 2009]; School for the Arts in Learning Pub. Charter Sch. v. Johnson, 2006 WL 1000337, at *5 [D.D.C. Apr. 13, 2006]). In this case, the due process complaint met the sufficiency requirements, but it was nevertheless inappropriate, for example, to leave the district guessing as to which members of the CSE the parent claimed were missing or whether they were present but somehow failed to meet the statutory requirements, especially when its request for clarification was reasonable, the hearing had already been delayed, and the impartial hearing officer was aware of the need to complete the hearing in an expeditious fashion (Tr. p. 73).

[7] I note that the impartial hearing officer did not render a decision on pendency until January 31, 2011 –more than four months after the parent's due process complaint notice was filed.

For the foregoing reasons, I find that the impartial hearing officer disregarded the regulations for conducting impartial hearings and engaged in conducted which constituted misconduct, and these findings shall be forwarded to the Office of Special Education which has been designated by the Commissioner of Education to address matters regarding impartial hearing officer misconduct and incompetence (8 NYCRR 200.21[b][4][iii]).

Additional Evidence

Both parties submitted additional evidence on appeal. 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).

The parent submitted additional evidence with her petition consisting of the parties' closing briefs to the impartial hearing officer and a district document entitled "Special Education Services Review." The district did not object to this evidence in its answer; therefore, I will accept it on appeal. The district attached to its answer additional evidence consisting of a final notice of recommendation (FNR) dated April 14, 2011. For the reasons discussed above, the parent objects to the consideration of this evidence. Likewise, the parent attaches to her reply another FNR dated February 4, 2011. Although both documents were available at the time of the impartial hearing, I will accept them as they are necessary to render a determination regarding the impartial hearing officer's pendency ruling in this case.

Statute of Limitations

The parent appeals the impartial hearing officer's determination that the statute of limitations barred any claims regarding the 2008-09 school year prior to September 15, 2008, which was two years before the parent filed her September 15, 2010 due process complaint notice in this matter, and asserts that the prior impartial hearing officer tolled the statute of limitations for her claims in this case. The Individuals with Disabilities Education Act (IDEA) requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. §1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). The parent does not assert any of the exceptions to the statute of limitations on appeal and did not assert them below. I find that the parent's assertion that the prior impartial hearing officer "tolled" the statute of limitations for her claims is incorrect and she cites no legal authority to support this assertion. However, I further find that the impartial hearing officer in this case did not apply the legal standard and render factual findings regarding when the parent's claims actually accrued or arose (IHO Decision at p. 19). Instead she decided that "all claims" that arose

two years prior to the date of her due process complaint notice were barred and did not actually conduct the required factual analysis of determining when the parent knew or should have known of the actions forming the basis of her complaint.

Despite the above findings, the parent is in essence disputing whether she could raise claims regarding events that took place from the beginning of September 2008 until September 15, 2008, when the impartial hearing officer found her claims accrued – a matter of a few school days. In this case, even assuming that the parent could properly raise claims regarding events that occurred prior to September 15, 2008, it would have no effect on the outcome of this case. The impartial hearing officer's determination regarding the statute of limitations appears to have had no affect on her determination that the student was entitled to compensatory education services or the amount of services she awarded to the parent to remedy the denial of a FAPE for the three school years at issue and the parent does not assert that her statute of limitations determination affected the relief granted by the impartial hearing officer. I also note that although she disagrees with the impartial hearing officer's conclusion, the parent also does not even allege when she believes her claims accrued. Even if I were to find evidence in the hearing record that the statute of limitations accrued earlier, the parent was not aggrieved by this finding and the district has not appealed the denial of a FAPE for the 2008-09 school year. Therefore, I decline to make a finding regarding this issue.

Scope of Review

As discussed above, the district does not appeal any portion of the impartial hearing officer's decision, including her finding that it failed to provide a FAPE for the 2008-09, 2009-10, and 2010-11 school years, and the parent does not appeal the findings with respect to res judicata, the district's failure to provide a FAPE for the three school years at issue, and that the student was entitled to compensatory education based on that denial. Therefore, those aspects of the impartial hearing officer's decision are final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). As the district has not appealed the finding that it did not provide a FAPE for the school years at issue, the crux of the matter before me is whether the impartial hearing officer's award was appropriate to remedy the deprivation of a FAPE. For the reasons discussed below, I find that it was not and order additional services.

I further note that on appeal, the parent alleges that the impartial hearing officer failed to address all of the claims raised in her due process complaint notice. The parent specifies in the petition several of these claims, which this decision addresses below. However, I need not address the parent's claim that that the CSE "employed illegal, blanket policies" with respect to its recommendations (Parent Ex. A at p. 4; Pet. ¶ 19) because the district has not appealed the impartial hearing officer's finding that it denied a FAPE for the school years in question. Nevertheless, no provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency to sit in review of alleged systemic violations (Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson (436 F.3d 52 [2d Cir. 2006]]). Therefore, I lack jurisdiction over the parent's claim that that the district "employed illegal, blanket policies." As the parent's petition did not appeal any further specific claims that it alleges the impartial hearing officer did not address, I will not address any other claims that may have been raised in her due process complaint notice, deeming those claims waived on appeal.

Applicable Standards – Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[8] 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation 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]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who 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]). 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 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]). 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];

[8] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

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). When devising an award of compensatory education, the award need not be a day-for-day award—"the inquiry must be fact-specific" and to accomplish the purposes of the IDEA, "the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005]).

Compensatory Educational Services

1:1 Services

In her due process compliant notice, the parent sought "1:1 services using multi-sensory instruction or other similar effective peer research-tested methodology," the total amount equaling what the student would need to "bring her to an appropriate level and allow her to earn a GED" (Parent Ex. A at p. 5).[9] The parent's petition does not further specify the number of hours sought or who should provide the services. In a letter dated December 1, 2010, the director of EBL Coaching indicated that on November 29, 2010 the agency assessed the student's reading, spelling, mathematics, and written expression skills to "determine her academic areas of strength and weaknesses and her specific instructional needs" (Parent Ex. G). Following the administration of standardized tests to the student and consideration of the results, EBL Coaching determined that the student was in "critical need of specific multi-sensory instruction in reading and spelling, particularly using the Orton-Gillingham approach" (id.). A structured, multisensory instruction was also recommended to improve the student's mathematics and written language skills (id.). EBL Coaching recommended 800 hours of 1:1 multisensory tutoring using the Orton-Gillingham technique, as well as specific instructional tools to improve the student's mathematics and written language skills (id.).

While the district asserts in its answer that the impartial hearing officer was correct in finding that 1:1 educational programming was "overly restrictive" for the student, and that the evidence did not establish that the student could "learn or benefit from instruction only in a one-to-one environment," a review of the hearing record does not support the impartial hearing officer's finding that 1:1 instruction was inappropriate as an award of compensatory or additional services (IHO Decision at p. 24). It is troubling that the district was willing to find fault with parent's attempt to identify an appropriate compensatory education remedy but failed to offer any evidence

[9] Although not defined in the hearing record, it appears that GED refers to the "Tests of General Educational Development."

regarding an appropriate remedy itself.[10] Rather, the hearing record in this case demonstrates that the student exhibited progress when Lindamood-Bell provided her with 1:1 multisensory instruction and that she could benefit from additional 1:1 instruction (Tr. pp. 248-29, 260, 265, 329-56, 647, 650; Parent Ex. K). Based on the evidence in the hearing record, I will therefore order that the student receive 800 hours of 1:1 multisensory tutoring to address the student's reading, spelling, mathematics, and written language needs as a remedy for the denial of a FAPE for the 2008-09, 2009-10, and 2010-11 school years (see Parent Ex. G). As reflected in the order below, unless the parties otherwise agree, the additional services shall be provided to the student five days per week, for four hours per day at EBL Coaching (see Tr. pp. 254-55, 357).

Speech-language therapy

Additionally, in her due process complaint notice, the parent sought compensatory speech-language services "equal to what [the student] should have received throughout the years in question" had she been provided appropriate services (Parent Ex. A at p. 6).[11] The parent's petition does not further specify the number of hours sought or who should provide the services. The hearing record shows that in April 2009, a private speech-language pathologist conducted a speech-language evaluation of the student (Parent Ex. P). At that time, the student exhibited weaknesses in "auditory language processing, short-term memory, basic math, [and] writing skills, and fundamental knowledge" (id. at p. 10). According to the speech-language pathologist, the student's expressive language and grammatical skills (both oral and written) were significantly below age and grade level (id.). The speech-language pathologist recommended that the student receive five individual 60-minute sessions of speech-language therapy per week (id.).[12]

The speech-language pathologist conducted an "update" of the student on December 10, 2010 as a result of the impartial hearing officer's interim order in this case (Parent Ex. L; see Interim IHO Decision 2). In the resultant report, the parent indicated to the speech-language pathologist that the student had not received any of the "services" recommended in April 2009 (Parent Ex. L at p. 4). The speech-language pathologist concluded that the student continued to exhibit a severe language learning disability and required individualized speech-language therapy "in a mandate consistent with the original April 2009 evaluation" (id.). She further recommended "a minimum of two years (based on a 12-month year)" of five 60-minute sessions per week of individual speech-language therapy as additional services (id.). Therefore, to remedy the denial

[10] The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]). In this case, there was no unilateral placement by the parent or request for reimbursement. The parent requested that the district be directed to provide compensatory education services and it is the district, not the parent, who has the burden of production and persuasion. Accordingly, it is not persuasive for the district to simply fault the parent's request for relief without also explaining its own view what type of compensatory education relief would be the student's LRE.

[11] I note that the district's answer did not specifically address the parent's request for speech-language therapy as additional services, nor did it comment on the impartial hearing officer's award of speech-language therapy as part of the program she ordered.

[12] To the extent that the speech-language pathologist recommended that all services be provided for "12 months," and the parties do not plead otherwise, for the purposes of calculating the additional services to be awarded, I will construe "12 months" to mean services provided during a 12-month school year (Parent Ex. P at p. 10).

of a FAPE for the 2008-09, 2009-10 and 2010-11 school years, I will order the district to fund 630 hours of individual speech-language therapy services.[13]

Life Skills/Transition Services

The parent also alleged in her due process complaint notice that the student was not provided with appropriate transition services, and that her IEP transition plans were not implemented (Parent Ex. A at p. 4). On appeal, the parent specifically seeks two years of compensatory life skills/transition services (Pet. ¶ 83). The impartial hearing officer failed to address this claim. In April 2009, the parent reported to the speech-language pathologist that the student was unable to complete activities such as calculating basic money exchanges, telling time, reading travel maps, and functioning independently in the community (Parent Ex. P at pp. 1-3; see Parent Ex. P at pp. 4-10). To improve the student's vocational skills in order to gain employment, the speech-language pathologist recommended that the student receive two 90-minute sessions per week of "[i]ndividualized life skills training," focusing on skills such as banking, money skills, telling time, travel skills, and vocational coaching (Parent Ex. P at p. 10; see Tr. pp. 506-07).

In the December 2010 speech-language "update" report, the speech-language pathologist indicated that because the student had not received the services recommended in April 2009, that she receive as additional services, a "minimum of two years (based on a 12-month year)" of individual life skills training with the support of a social worker or life coach to "'go out in the field'" with the student to focus on the community-based skills identified in April 2009 (Parent Ex. L at pp. 4-5). Testimony at the impartial hearing by the speech-language pathologist and neuropsychologist who evaluated the student further supports an award of transition services in this case (Tr. pp. 506-07, 647-49, 678, 736-37; see Parent Exs. L; P; N; V). Therefore, to remedy the denial of a FAPE for the 2008-09, 2009-10 and 2010-11 school years, I will order the district to fund 168 90-minute sessions of individual life skills training.[14]

Assistive Technology

The parent also sought in her due process complaint notice "[s]upplementary aids and services," including a variety of assistive technology devices and supports recommended by "assistive technology professionals" (Parent Ex. A at p. 6). The parent appeals the impartial hearing officer's denial of this request. In April 2009, an assistive technology consultant evaluated the student "to identify technology supports that [would] enable her to achieve her educational goals" (Tr. p. 285; Parent Ex. M at p. 1). The evaluator noted in his report that due to the student's interest in attending college, the focus of the evaluation would be on supports for the student's math, reading, and writing skills (Parent Ex. M at p. 1). At the conclusion of the assessment, the evaluator recommended multiple technology supports for the student's reading, writing, and math skills, and a laptop computer for general use at school and home (id. at p. 6).

Overall, a review of the assistive technology evaluation report supports a finding that the technology recommended was designed to help the student achieve her educational goals and could be used within a classroom setting (Parent Ex. M; see Tr. pp. 287-96, 304-05, 311). However, the

[13] Based upon 210 school days in a 12-month school year, at one hour per day for three years.

[14] This determination is based upon 42 weeks of school in a 12-month school year, at two sessions per week for two years.

evaluator testified that the student's needs may have changed since April 2009, and that her need for some of the supports may need to be revisited (Tr. p. 297). Moreover, although the neuropsychologist who evaluated the student also recommended that the student receive assistive technology, she testified that she did not read the assistive technology evaluation before doing so and that she made the recommendation because she does so for "everyone" (Tr. pp. 706-07, 724).

Based on the above, I decline to find that separate assistive technology services are appropriate as compensatory education in this case. However, it is appropriate to direct that the CSE consider the results of the assistive technology evaluation and its recommendations when the CSE reconvenes to develop the student's special education program for the remainder of the 2011-12 school year. Specifically, the CSE should consider if the recommended assistive technology supports would be appropriate in conjunction with the special education program and placement it recommends (see Tr. p. 311). I note that some of the evaluator's recommendations include supports for use in the community; however, the additional services of life skills training are designed to improve the student's functional independence skills in that environment, and I therefore decline to award assistive technology devices and services for that purpose.

Transportation

In her due process complaint notice, the parent requested "funding for transportation expenses necessary to utilize" the requested compensatory education services (Parent Ex. A at p. 6). On appeal, the parent correctly asserts that the impartial hearing officer again failed address this issue in her decision. However, a review of the record does not show why the student required transportation as a related service or what, if any, kind of special transportation services she required. No witnesses testified to this issue. The student's IEPs included in the hearing record show that she was not recommended to receive special education transportation (Parent Exs. C; D; E; Q; R). Therefore, this request seems to be more akin to a request for damages, which is not permitted under the IDEA (Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Application of the Dep't of Educ., Appeal No. 11-004; Application of a Child with a Disability, Appeal No. 05-039). Therefore, there is no basis to support the parent's request.[15]

Remand to CSE

The parent seeks reversal of the impartial hearing officer's order remanding this matter to the CSE to develop a new IEP. The parent alleges that the amount of compensatory education ordered by the impartial hearing officer is not enough to make up for three years of a denial of a FAPE and that the impartial hearing officer had no basis upon which to order the CSE to recommend a program of 12 students. I do not agree with the parent's claim in general, that an order directing the CSE to comply with the act and develop an IEP was inappropriate; however, I do agree that directing the CSE to reconvene and develop an IEP on a going-forward basis is not sufficient to remedy a past denial of a FAPE for three school years and make the student whole. I further agree with the parent that the impartial hearing officer had no basis upon which she predicated her "guidelines" for both the new IEP and the one year of compensatory education beyond 21. Both parties agree that the student continues to be eligible for special education

[15] To the extent that the district otherwise has an obligation to provide transportation services to any program or services the student may receive in the public school, this decision does not relieve the district of its obligation.

programs and services and yet no IEP has been developed for the student since May 2009. Therefore, it was appropriate for the impartial hearing officer to direct the CSE to reconvene, develop a new IEP and offer an appropriate program to the student, and I will uphold that portion of the order.[16] However, I will annul the guidelines set forth in the impartial hearing officer's orders and her order that the CSE develop an IEP for the student for one year beyond her 21st birthday.[17]

Pendency

Lastly, I will address the parent's allegation that the impartial hearing officer erred in not finding that the prior impartial hearing officer's January 2009 award of compensatory education was the student's pendency placement. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D.,

[16] Nothing in this decision precludes the parent from challenging the new IEP developed in accordance with this order if she believes it does not offer the student a FAPE.

[17] Although I find that an award of an IEP for one year beyond the student's 21st birthday does not remedy the denial of a FAPE, under the circumstances of this case where the student is now 20 years old, an award of compensatory education services beyond the age of 21 is appropriate and I will tailor my award accordingly.

694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

Here, the impartial hearing officer was correct that the prior unappealed impartial hearing officer's decision did not constitute pendency because such award was to remedy missed services for the 2006-07, 2007-08 school years, the amount awarded was finite, and it included a date by which the student had to complete the hours (Parent Ex. B at p. 17). Moreover, the hearing record reflects that the student finished the number of hours ordered under that decision in March 2010 (Tr. pp. 324, 432, 463; Parent Ex. L at p. 1; see Parent Ex. K). As the student's February 2008 IEP was invalidated at the prior impartial hearing, the impartial hearing officer in this case chose the program recommended in the June 2005 IEP as the student's pendency placement, presumably because it was the last IEP that had not been challenged at an impartial hearing (Interim IHO Decision). A review of the student's prior IEPs in the hearing record reveal that she was repeatedly recommended to attend a 15:1 special class program with speech-language therapy –the placement ordered as pendency for this student in the current matter (Parent Exs. Q; R; see Parent Exs. D; E; see also Parent Ex. C). The parent argues that the impartial hearing officer's decision regarding pendency was incorrect, but paradoxically argues that the district failed to implement that program under the pendency order. The student testified that she would not go back to a district program because she had "graduated" and no longer needed additional credits (Tr. p. 473). Further, the parent asserts on appeal that it would be "discriminatory" to require the student to attend a credit-bearing district program in this instance (Pet. ¶ 43).

The parent asks that I annul the impartial hearing officer's decision regarding pendency; however, based on the reasons stated above, I decline to do so. Additionally, although the parent asks that I "issue a ruling regarding the [district's] failure to implement pendency," it is apparent during the impartial hearing that she was not willing to accept those services (see e.g., Tr. p. 601) and she does not seek any further redress regarding this issue. As both parties have submitted FNRs generated by the district during the impartial hearing and after the impartial hearing officer's ruling on pendency which show that the district offered a program to the student in accordance with the pendency order, I decline to find that the district should be held liable for a failure to implement the student's pendency placement (Answer Ex. 1; Reply Ex. 1). The student was free

to avail herself of the district programs offered during the impartial hearing, but she did not, likely for the reasons she testified to at the impartial hearing and that are asserted by the parent on appeal.

Conclusion

In summary, I find that the student is entitled to compensatory services in the form of 1:1 instruction, speech-language therapy, and life skills/transition services in accordance with this decision and as specified in the orders below. I further find that the impartial hearing officer correctly remanded the matter to the CSE; however, I will annul the "guidelines" contained in her decision. Moreover, I deny the parent's request for assistive technology.

I have considered the parties' remaining contentions and find that I need not address them in light of my decisions herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's June 15, 2011 decision directing that a new IEP include a class size of 12 or fewer students, multisensory instruction, individualized instruction, and daily speech-language therapy, and that the one year of compensatory education to be provided to the student beyond age 21 follow the same guidelines, is annulled; and

IT IS FURTHER ORDERED that the CSE reconvene within 15 days of this decision, consider the student's need for assistive technology, and develop an appropriate IEP; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district fund 800 hours of 1:1 instruction at EBL Coaching or any other agreed upon private provider, five days per week, for four hours per day as compensatory education services to be completed not later than the student's 22nd birthday; and

IT IS FURTHER ORDERED that the district fund 630 hours of 1:1 speech-language therapy on a 12-month school year basis to be provided by a private provider of the parent's choosing and to be completed not later than the student's 22nd birthday; and

IT IS FURTHER ORDERED that the district fund 168 hours of life skills/transition services on a 12-month school year basis to be provided by a private provider of the parent's choosing and to be completed not later than the student's 22nd birthday.

Dated: **Albany, New York**
November 2, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER