The University of the State of New York

The State Education Department
State Review Officer
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No. 11-112

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Neha Dewan, of counsel

Brown & Gropper, LLP, attorneys for respondent, James A. Brown, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at York Preparatory School (York Prep) for the 2010-11 school year. The appeal must be sustained.

Limited Issue on Appeal

In this case, the impartial hearing officer's determination that the district failed to offer the student a free appropriate public education (FAPE) rested solely on the rationale that the particular classroom to which the district assigned the student would not have provided an appropriate functional group academically for the student (IHO Decision at pp. 3, 7-13). To the extent that the impartial hearing officer concluded that the district's program set forth in the student's June 2010 individualized educational program (IEP) otherwise offered the student a FAPE for the 2010-11 school year, and neither party has appealed this conclusion, that portion of the impartial hearing officer's decision is therefore final and binding upon the parties and will not be discussed in detail or reviewed in this appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Pet. ¶¶ 4-5, 45-46; Answer ¶¶ 4-5; 45-46). Given the limited issue on appeal, this decision will only include those facts relevant to address the impartial hearing officer's conclusion that the functional grouping of the assigned classroom failed to offer the student a FAPE for the 2010-11 school year.

Background

At the time of the impartial hearing, the student was attending eighth grade at York Prep (see Tr. pp. 735-36, 743-44; see Dist. Ex. 6 at pp. 1-2; Parent Ex. O at p. 1).[1] The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1, 200.7[d]). 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[10]; 8 NYCRR 200.1[zz][6]).

On June 1, 2010, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop his 2010-11 IEP for eighth grade (Dist. Ex. 3 at pp. 1-2; see Tr. pp. 31, 41-42; Dist. Ex. 4 at pp. 1-2). Prior to and during the CSE meeting, the CSE members had access to several documents reporting information about the student, including: a 2009 psychological evaluation report,[2] and a March 2010 letter from the psychologist who conducted the 2009 evaluation;[3] a 2009-10 progress report from the nonpublic school the student attended at that time; a March 2010 letter from the student's then-current occupational therapist; a March 2010 letter from the student's treating psychiatrist; a March 2010 letter from the student's then-current speech-language pathologist; and a 2009 vocational assessment (Tr. pp. 36-43; Dist. Exs. 4 at p. 1; 6-11). According to the 2009-10 progress report, the student demonstrated a 6.5 instructional grade level and a 6.0 independent grade level in reading fluency and comprehension; the 2009-10 progress report also indicated that the student demonstrated a 7.5 approximate grade

[1] The student last attended public school in kindergarten (see Tr. pp. 735-36). The student has continuously attended nonpublic schools since third grade, and he transitioned to York Prep for eighth grade in the 2010-11 school year because he had aged out of the nonpublic school he previously attended from third grade (2005-06 school year) through seventh grade (2009-10 school year) (id.; see Tr. pp. 743-44; Dist. Exs. 2 at pp. 1-2; 6 at pp. 1-2).

[2] The 2009 psychological evaluation report included results from the administration of, among other things, the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV), the Wechsler Individual Achievement Test, Second Edition (WIAT-II), and the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2), which were used, respectively, to measure the student's cognitive abilities; academic achievement; and attention, organization, and memory skills (Dist. Ex. 6 at pp. 1-10, 20-23). At the time of the 2009 psychological evaluation, the student was in sixth grade (see Tr. pp. 738-39). According to the evaluator, the results of the WISC-IV indicated that the student's overall cognitive ability fell within the average range with a verbal comprehension composite score in the superior range and a working memory composite score in the low average range (Dist. Ex. 6 at pp. 3-6). The results of the WIAT-II indicated that the student's academic achievement generally fell within the average range (id. at pp. 6-8). In addition, the results of the WRAML-2 demonstrated that the student exhibited difficulties with areas of "vigilance and attention," and in particular, with processing lengthy verbal information (id. at pp. 9-10). The evaluator opined that the student's academic skills were "mostly at or above grade level in key areas of language and math" (id. at p. 11).

[3] In the March 2010 letter, the psychologist confirmed that although he had shown "growth in his academic skills," the student's "core skills" remained within the average range, but continued to remain "well below what would be predicted based upon his very superior verbal I.Q.," noting specifically the student's "basic reading skills," "[r]eading [c]omprehension skills," "spelling" skills, and "written expression skills" (Dist. Ex. 8 at p. 1; compare Dist. Ex. 6 at p. 19, with Dist. Ex. 8 at p. 2). In the March 2010 letter, the psychologist reiterated the results of the 2009 psychological evaluation of the student's cognitive abilities (WISC-IV); academic achievement (WIAT-II); and attention, organization, and memory skills (WRAML-2) (compare Dist. Ex. 8 at pp. 1-2, with Dist. Ex. 6 at pp. 20-23).

level in mathematics (Dist. Ex. 7 at pp. 1-2).[4] The CSE recorded this information in the student's IEP to describe the student's present levels of academic performance and learning characteristics, and further indicated within this section of the IEP, among other things, that the student exhibited "average cognitive ability" and that "some of his abilities [were] in the superior range" (Dist. Ex. 3 at p. 2; see Dist. Exs. 6; 8).

After reviewing and discussing the available information, the CSE recommended placing the student in a 12:1 integrated co-teaching classroom (ICT) for the 2010-11 school year and discontinuing recommendations for related services of counseling and occupational therapy (Dist. Ex. 3 at pp. 1-2, 7-9; see Tr. pp. 44-45, 52-57).[5] The CSE recommended various environmental modifications and human/material resources to address the student's academic and social/emotional management needs (Dist. Ex. 3 at pp. 3-4). In addition, the CSE developed and incorporated two annual goals in the student's IEP to address his identified needs in the areas of reading comprehension and writing (id. at p. 6). According to the CSE meeting minutes, the CSE reviewed and discussed the annual goals and noted that "all agreed" with the goals (Dist. Ex. 4 at p. 2). The CSE also recommended testing accommodations and a transition plan, and provided the parent with information to request an assistive technology evaluation (Dist. Exs. 3 at pp. 9-10; 4 at p. 2).

By notice to the parent dated June 24, 2010, the district summarized the student's recommended special education program for the 2010-11 school year, and advised the parent of the school to which the district had assigned the student (Dist. Ex. 5). By letter dated July 13, 2010, the parent notified the district that she visited the assigned school on June 28, 2010 and determined that it was not appropriate (Parent Ex. C at pp. 1-2). She explained that because it was the last half-day of school on the date of her visit, she could not observe an ICT classroom similar to the student's recommended classroom, and therefore, she could not "get a proper sense of the accommodations" for students with attention difficulties (id. at p. 1). The parent indicated that with 25 to 30 students in the classroom, it would be "too large" for her son's distractibility concerns, and he would not receive the "individualized attention" required (id.). In addition, due to the timing of her visit, the parent expressed concerns about the other potential students in the recommended classroom, noting that it was "impossible to know now whether the other students with IEPs in the class would have different special education needs," and therefore, she could not determine whether the recommended classroom could accommodate her son's "unique mix of learning disabilities" or support his "intellectual and achievement levels" (id. at pp. 1-2). Finally, the parent indicated that she received "no information about the curriculum and the instructional method" in the recommended classroom, and therefore, she could not determine whether it would be appropriate for her son's needs (id. at p. 2). Although the parent rejected the assigned school, she indicated her willingness to consider another program or placement offer; however, the parent

[4] It appears that the student's then-current nonpublic school teacher who attended the June 2010 CSE meeting via telephone had completed the student's 2009-10 progress report (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at pp. 1-9; see Tr. pp. 41-42).

[5] Consistent with State regulation, a district "may include integrated co-teaching services in its continuum of services" (8 NYCRR 200.6[g]). State regulation defines integrated co-teaching services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (id.). Federal regulations implementing the Individuals with Disabilities Education Act (IDEA), however, do not require integrated co-teaching services to be included on the continuum of alternative placements (see 34 C.F.R. § 300.115; see also 34 C.F.R. § 300.29 [defining "special education"]).

also indicated that if the district could not offer an appropriate program or placement, she intended to place her son at York Prep for the 2010-11 school year and seek reimbursement for the costs of the student's tuition from the district (id.).[6]

Due Process Complaint Notice

By due process complaint notice dated September 17, 2010, the parent asserted that the district failed to offer the student a FAPE for the 2010-11 school year, alleging both procedural and substantive violations (Dist. Ex. 1 at pp. 1-4; see Tr. pp. 23-24; Dist. Ex. 2 at p. 1). Relevant to this appeal, the parent alleged that based upon her limited visit of the assigned school, she had "no opportunity to observe the [ICT] class that would be similar to the one into which [the student] could be placed;" she only had "four minutes while walking quickly in the hallway" to speak with the special education teacher; she had "no opportunity to see the class profile to determine if the classmate's (sic) skills were appropriately matched" to the student's or "if they had similar disabilities;" and finally, she disagreed with the recommended program because the "class size" was "too large" for the student and his distractibility concerns (id. at p. 4). As relief, the parent requested reimbursement for the costs of the student's tuition at York Prep for the 2010-11 school year (id. at pp. 4-5).

Impartial Hearing Officer Decision

In a decision dated August 8, 2011, the impartial hearing officer concluded that the district failed to offer the student a FAPE (IHO Decision at pp. 3-13). Specifically, the impartial hearing officer determined that even though the student exhibited "significant distractibility in large class instruction," the district's recommended ICT classroom with up to 28 students offered the student a FAPE (id. at pp. 3, 6-7). However, the impartial hearing officer determined that the assigned classroom offered by the district failed to provide an "appropriate setting" for the student because the other students in the classroom did not constitute an appropriate functional group academically for the student—which would not "permit the teachers to provide an appropriate educational setting"—and therefore, he concluded that the district failed to offer the student a FAPE for the 2010-11 school year (id. at pp. 7-13). The impartial hearing officer also concluded that the parent sustained her burden to establish the appropriateness of the unilateral placement of the student at York Prep for the 2010-11 school year and that equitable considerations did not preclude an award of tuition reimbursement, and therefore, he directed that the district reimburse the parent for the costs of the student's tuition at York Prep for the 2010-11 school year (id. at pp. 3-6).

Appeal for State-Level Review

The district appeals, and asserts that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2010-11 school year on the sole basis of the functional grouping of the assigned classroom. Specifically, the district argues that since the student did not attend the assigned classroom for the 2010-11 school year, the district was not obligated to establish that the assigned classroom offered an appropriate functional group within

[6] Later during summer 2010, the district reiterated its offer to place the student in the same assigned school identified in the June 24, 2010 notice (see Parent Ex. E). However, by letter dated August 31, 2010, the parent rejected the district's second recommendation offering the same assigned school, and indicated that the student would be attending York Prep for the 2010-11 school year and that she would seek tuition reimbursement from the district (id.).

which to implement the student's 2010-11 IEP. The district contends that even if the student had attended the assigned classroom, State regulations do not require functional grouping within ICT classrooms as compared to the functional grouping requirements applicable to special classes. Alternatively, the district asserts that if the functional grouping requirements do apply to ICT classrooms, the impartial hearing officer's decision ignored the evidence in the hearing record establishing that the student would have been suitably grouped for instruction within the ICT classroom. In addition, the district argues that the impartial hearing officer improperly relied upon a 2011 updated psychological evaluation report—which was not available to the June 2010 CSE in developing the student's 2010-11 IEP—to support his conclusion that the assigned classroom would not provide an appropriate functional group for the student. The district also contends that the impartial hearing officer misinterpreted evidence describing the functional levels of the other students in the assigned classroom.

Next, the district argues that the impartial hearing officer's decision failed to conform to State regulations, noting that the impartial hearing officer failed to provide a legal basis for his decision and failed to cite to applicable legal standards. In addition, the district contends that the impartial hearing officer's decision contained minimal citations to the hearing record.

Finally, the district argues that the impartial hearing officer erred in finding that the parent sustained her burden to establish the appropriateness of the student's unilateral placement at York Prep for the 2010-11 school year, and further, that he erred in concluding that equitable considerations did not preclude an award of tuition reimbursement. As relief, the district seeks to annul that portion of the impartial hearing officer's decision concluding that the district failed to offer the student a FAPE for the 2010-11 school year because the assigned classroom failed to provide an appropriate functional group for the student, or alternatively, to annul those portions of the impartial hearing officer's decision finding York Prep appropriate to meet the student's unique special education needs and directing the district to reimburse the parent for the costs of the student's tuition at York Prep for the 2010-11 school year.

In an answer, the parent responds to the district's allegations with general admissions and denials. In addition, the parent includes a statement of material facts that generally assert the appropriateness of York Prep and how York Prep met the student's unique special education needs during the 2010-11 school year. The parent seeks to uphold the impartial hearing officer's decision in its entirety.

Discussion

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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]).

Functional Grouping

Turning to the merits of the appeal, the district asserts several alternative arguments challenging the impartial hearing officer's decision regarding the functional grouping of the students within the ICT classroom. Although all of the arguments are persuasive, I find that as a matter of law the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE for the 2010-11 school year based solely upon his finding that the assigned classroom did not provide an appropriate functional group academically for the student because, as discussed more fully below, the student did not attend the assigned classroom for the 2010-11 school year and the district was not obligated to establish that it successfully implemented the student's 2010-11 IEP in conformity with State regulations regarding functional grouping.[7]

Initially, I note in this case that the parents expressed their intent to unilaterally place the student at York Prep in letters to the district dated July 13, and August 31, 2010—prior to the time that the district was required to implement the student's IEP in September 2010 (compare Parent Exs. C at p. 1 and E, with Dist. Ex. 3 at pp. 1-2). Therefore, a meaningful analysis of the functional grouping of the district's assigned classroom would require determining what might have happened had the district been required to implement the student's IEP (see Application of the Dep't of Educ., Appeal No. 11-050; Application of a Student with a Disability, Appeal No. 11-032). However, I note that while parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on an IEP, as it would be neither practical nor

[7] Although not necessary in order to render a decision in this case, I note that the district, through its alternative arguments, appears to seek clarification regarding whether State regulations pertaining to functional grouping of students in special classes also apply to ICT classrooms (see Pet. ¶¶ 46-49). While not addressing this question directly, a district court recently extended its previous holding in M.P.G. v New York City Dep't of Educ., 2010 WL 3398256, at *10-11 (S.D.N.Y. Aug. 27, 2010)—which determined that a district's failure to adhere to State regulations regarding functional grouping of students in a special class did not constitute a substantive defect that denied the student a FAPE—to a case involving a district's recommended placement of a student in an ICT classroom (see D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *12 [S.D.N.Y. Oct. 12, 2011] [applying 8 NYCRR 200.6[a][3], but not 8 NYCRR 200.6[h][2] or 8 NYCRR 200.6[h][5], to the analysis).

appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 189-90, 194 [finding that the district did not violate its procedural obligations under the IDEA when it did not provide the parents with requested class profiles of the student's proposed reading class and resource room sessions, "which would identify the other students in the classes" and the student did not attend the district's recommended public school placement]). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP by, for instance, personally viewing and approving the classroom or classmates of their own choosing (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]; C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at * 8 [S.D.N.Y. Oct. 28, 2011]).[8] A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 2011 WL 924895, at *10 [S.D.N.Y. Mar. 15, 2011]), and it is not asserted on appeal that the student's IEP is not appropriate (see IHO Decision at pp. 3, 6-7; Pet. ¶¶ 4-5, 45-46; Answer ¶¶ 4-5; 45-46). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case, the issue of the functional levels of the students in the assigned classroom is in part speculative because the parent did not enroll the student in the public school and the district, therefore, was not required to establish that the student had been grouped appropriately upon the implementation of his IEP in the proposed classroom. The impartial hearing officer's conclusion that the district failed to offer the student a FAPE because the assigned classroom did not provide an appropriate functional grouping academically for the student must be annulled.

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1 ICT classroom at the assigned school was prepared to provide the student with suitable grouping for instructional purposes that was designed to meet his needs. In this case, the hearing record indicates that the assigned classroom had a seat available for the student at the start of the 2010-11 school year (see Tr. p. 243). The special education teacher of the assigned classroom testified that there were currently nine special education students in his ICT classroom; five students were eligible for special education services as students with learning disabilities, three students were eligible for special education services as students with speech or language impairments, and one student was eligible for special education services as a student with an other health impairment (see Tr. pp. 239-41, 243). The students ranged in age from 13 years to 15 years old (Tr. pp. 263-64). A class profile created by the special education teacher indicates that the students in the

[8] Nothing in this decision, however, is intended to discourage districts from offering parents the opportunity to view school or classroom placements as such opportunities can only foster the collaborative process between parents and districts. If parents visit a particular classroom and at that point have new concerns, the IDEA and the Education Law contemplate that the collaborative process will continue—that the parents will ask to return to the CSE and share those concerns with the objective of improving the student's IEP.

assigned classroom exhibited the following reading comprehension functional/grade levels: two students at a sixth grade level; two students at a fifth grade level; two students at a fourth grade level; two students at a third grade level; and one student at a second grade level (see Parent Ex. I at p. 1).[9] The students in the assigned classroom also exhibited the following decoding functional/grade levels: third grade (one student), fourth grade (three students), fifth grade (one student), sixth grade (two students), and ninth grade (one student) (id.). Notably, the evidence indicates that at the time of the June 2010 CSE meeting, the student demonstrated a 6.0 independent grade level and a 6.5 instructional grade level in reading fluency and comprehension, which fell within the reading comprehension and decoding functional/grade levels of the other special education students in the recommended ICT classroom (Dist. Exs. 3 at p. 3; 4; 7 at pp. 1-2). In addition, insofar as the parent did not accept the CSE's recommended placement, I note that the hearing record, in its entirety, does not support the conclusion that, had the student attended the assigned classroom, the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Impartial Hearing Officer Misconduct/ Incompetence

As a final matter, I note that 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]). I am compelled to address the district's arguments that the impartial hearing officer's decision in this case did not conform to State regulations by failing to cite to applicable law, failing to provide a legal basis for his decision, and citing only minimally to the hearing record in his decision. Furthermore, upon review, I note that it is evident from the hearing record that the impartial hearing officer failed to comply with regulations governing the granting of extensions. These allegations are particularly troubling since the same impartial hearing officer has been the subject of specific warnings in past State Review Officer decisions on similar issues of noncompliance (see Application of a Student with a Disability, Appeal No. 11-042 [noting that the impartial hearing officer was "strongly cautioned to comply with State regulations by addressing the issues set forth in a party's due process complaint notice and citing to relevant facts in the hearing record"]; Application of the Dep't of Educ., Appeal No. 11-037 [warning the impartial hearing officer to comply with 45-day timelines for issuing a decision and cautioning that a "repeated refusal to apply appropriate legal analysis when awarding tuition costs may constitute a basis for findings pursuant to 8 NYCRR 200.21(b)(4)(iii)"]; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 08-064; Application of the Bd. of Educ., Appeal No. 08-061).

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

[9] The special education teacher created the class profile in direct response to a subpoena by the parent, and listed the reading and mathematics functional/grade levels of the students with IEPs in the assigned classroom (Tr. pp. 200-01, 222-28, 239-40, 242-43, 327-30, 508-09; see Parent Ex. I at pp. 1-2).

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 documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In particular, an extension "shall be for no more than 30 days" and absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting form the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]). Moreover, an "[a]greement of the parties is not a sufficient basis for granting an extension" (id.). Additionally, impartial hearing officers are not permitted to accept appointment unless they are available to conduct a 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]).

In this case, the parent initiated the instant due process proceedings by due process complaint notice dated September 17, 2010 (Dist. Ex. 1 at p. 1). However, the parties did not appear for the first date of the impartial hearing until November 1, 2010, and the hearing record does not indicate or otherwise document that any extensions were granted prior to that first date. At the conclusion of the first hearing date, the parties scheduled the next hearing date for December 8, 2010, because as noted by the impartial hearing officer on the record, "there's not a lot of very good days" (Tr. pp. 192-94). Counsel for both parties did, however, reconvene on November 30, 2010, without their clients to present arguments regarding subpoena issues (Tr. pp. 198-233). After presenting one witness on December 8, 2010, the district rested its case in chief (see Tr. p. 389). At the conclusion of testimony on December 8, 2010, the impartial hearing officer asked whether "anyone wish[ed] to seek an extension" to the compliance date; counsel for the parent responded affirmatively (Tr. pp. 389-90). The impartial hearing officer then noted that the district wanted to "come back and hear the rest of this hearing" and officially noted the request for an extension as "joint" (Tr. p. 390). He granted the request for an extension "on the basis of extensive testimony and issues" (id.). The parties then went "off the record" to discuss the next date to reconvene, and upon returning to the record, the impartial hearing officer stated that since "the parents' attorney's time is tight, and his first available week is the week of February 7th," "we came up with the dates of the 8th and 9th of February" (Tr. pp. 390-91).

However, when the parties reconvened on February 8, 2011, both counsel appeared without their clients and instead of continuing with testimony, presented further arguments regarding subpoena issues (Tr. pp. 393-435). Moreover, with no indication on the record of having obtained consent from the parties or that the due process proceedings were open, the impartial hearing officer allowed counsel for both parties to present arguments regarding two different students (id.). At the conclusion of arguments, the impartial hearing officer rescheduled the impartial hearing to continue on March 8, 2011 (Tr. pp. 424-35). He also asked that "in the event that we need extensions in either of these two cases are we—is anybody requesting one;" and the parent's attorney responded affirmatively" (Tr. p. 430).

The parties next convened on April 27, 2011 to present testimony, and the hearing record does not indicate or otherwise document that any further extensions were granted since February 8, 2011 (see Tr. pp. 435, 438). The last day of testimony prior to April 27, 2011, was December 8, 2010 (Tr. p. 438). Prior to testimony on April 27th, the impartial hearing officer noted that the impartial hearing would be concluded on the next hearing date, May 13, 2011 (id.; see Tr. p. 702). At the conclusion of testimony on May 13, 2011, the impartial hearing officer again asked if either

party was requesting an extension to the compliance date; the parent's attorney responded affirmatively and the district joined in the request (Tr. pp. 938-39).

Therefore, in this case, I find that the impartial hearing officer granted multiple extensions contrary to the regulations and failed to conduct the matter expeditiously, undermining the policy of quickly and efficiently resolving disputes between parents and school districts underlying the IDEA's administrative hearing process. In addition, although the district submitted a post-hearing brief dated June 20, 2011, the impartial hearing officer failed to indicate the record close date (see 8 NYCRR 200.5[j][5[[v]; Dist. Ex. 14 at p. 26). A guidance document issued by the Office of Special Education in August 2011 reminds impartial hearing officers that "[a] record is closed when all post-hearing submissions are received by the IHO . . . Once a record is closed, there may be no further extensions to the hearing timelines [and] the written decision of the IHO must be rendered and mailed within 14 days" of the record close date ("Changes in the Impartial Hearing Reporting System," available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). In this case, the impartial hearing officer rendered his decision on August 8, 2011, ignoring the guidance document and relevant State regulations (see IHO Decision at p. 13). Furthermore, the hearing record does not reflect the reasons for the granted extensions, that the impartial hearing officer fully considered the relevant factors, or that the impartial hearing officer responded in writing to the extension requests (8 NYCRR 200.5[j][5][i], [ii], [iv]). Rather, the hearing record indicates that the impartial hearing officer improperly granted extensions based solely on agreement of the parties in violation of State regulation (8 NYCRR 200.5[j][5][iii]). Lastly, although the impartial hearing officer rendered oral decisions regarding many of the extension requests, he failed to respond in writing to each one as required to by the State regulations (8 NYCRR 200.5[j][5][iv]).

Reviewing the impartial officer's decision, I agree with the district that he failed to cite applicable legal standards in rendering his determinations and cited only minimally to the hearing record, which violates State regulation (see 8 NYCRR 200.5[j][v]; IHO Decision at pp. 1-13). The impartial hearing officer has been previously admonished to comply with State regulations in this regard as well (Application of the Bd. of Educ., Appeal No. 11-004; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 08-064; Application of the Bd. of Educ., Appeal No. 08-062; Application of a Student with a Disability, Appeal No. 08-043).

For the foregoing reasons, I find that the impartial hearing officer disregarded the regulations governing the granting of extensions and rendering his decision, and has, therefore, engaged in misconduct (8 NYCRR 200.21[b][4][iii]). 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]).

Conclusion

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer decision dated August 8, 2011 that determined that the district failed to offer the student a FAPE is annulled.

Dated: **Albany, New York**
November 4, 2011

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JUSTYN P. BATES
STATE REVIEW OFFICER