The University of the State of New York

The State Education Department
State Review Officer
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No. 11-129

Application of the BOARD OF EDUCATION OF THE ITHACA CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Bond, Schoeneck & King, PLLC, attorneys for petitioner, Jonathan B. Fellows, Esq., of counsel

Nina C. Aasen, Esq., attorney for respondent, Nina C. Aasen, Esq., and Jason H. Sterne, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2010-11 school year was not appropriate. The appeal must be sustained in part.

Background

At the time of the impartial hearing, the student had completed fifth grade at a district elementary school and was preparing to enter sixth grade in a district middle school (Tr. pp. 74-76, 143, 153). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (Tr. p. 75; Dist. Ex. 48 at p. 4; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

As the issues in this appeal are limited, this decision will only briefly recite the student's educational background as it relates to this case. In first grade while attending a district elementary school, the student was referred to the CSE for an evaluation to determine if he was eligible for special education and related services (Tr. pp. 337-41; Dist. Ex. 7 at p. 1). The evaluation took place in September 2006 and the resultant report reflected that a behavioral observation, interview, and several diagnostic tests were administered to the student and the parent (Dist. Ex. 7). After that evaluation, the CSE met on September 22, 2006, determined that the student was eligible for special education programs and services as a student with an emotional disturbance, and developed an individualized education program (IEP) (Dist. Ex. 9 at p. 1). The student attended the

Elementary Transition Program (ETP) at a district elementary school from first through fifth grade (Tr. pp. 194-95).[1] For fourth grade (2009-10), the student's program included ETP as well as direct and indirect consultant teacher services, weekly group and individual counseling, and a full-time 1:1 aide in the classroom (Parent Ex. 4 at p. 1).

On September 14, 2010, the CSE met for an annual review to develop an IEP for the student's fifth grade (2010-11) school year (Parent Ex. 3 at p. 1). The CSE continued to find the student eligible for special education as a student with an emotional disturbance and recommended that he continue in the ETP at the district elementary school for the 10-month school year (id. at p. 1; see Tr. p. 137). The CSE recommended, among other things, that the student also receive one group (5:1) and one individual 30-minute counseling session per week, and two 30-minute team meetings monthly (Parent Ex. 3 at p. 1). Additionally, the CSE removed direct and indirect consultant teacher services and the full-time 1:1 aide from the student's IEP, and noted that the student was to be provided with "adult support in the classroom for academics and specials" (Tr. pp. 88-90; compare Parent Ex. 4 at pp. 1-2, with Parent Ex. 3 at pp. 1-2).[2] The CSE considered a placement in a general education setting with support services such as related services and consultation services, but rejected that option as overly restrictive based upon the student's level of academic skill (Parent Ex. 3 at p. 5).

On May 6, 2011, the CSE met to plan for the student's transition into middle school and update the student's 2010-11 IEP (Tr. pp. 74-75, 143).[3] The meeting was attended by the district CSE chairperson, a district school psychologist, an additional parent member, a district social worker, a social worker from the district's ETP, two special education teachers from the district middle school that the student was anticipated to attend for the 2011-12 school year, and the parent (Tr. pp. 144, 178; Dist. Ex. 48 at pp. 1, 11). The CSE recommended, among other things, that for the reminder of the student's fifth grade school year (2010-11), the student receive resource room and a full-time 1:1 aide in the classroom, and that his classification be changed from a student with an emotional disturbance to a student with autism (Tr. pp. 75, 372). The May 2011 CSE also recommended that at the commencement of the 2011-12 school year and until the student's annual review scheduled to occur in September 2011, the student be placed in a general education setting

[1] A district school social worker described ETP as an "integrated" and "interdisciplinary" program consisting of a full-time social worker and a full-time special education teacher who work as a team in collaboration with other service providers, teachers, parents, and administrators (Tr. p. 193). Students in the program attend mainstream general education classes, but have access to a "de-escalation room" to assist with social and behavioral difficulties (Tr. pp. 193-94).

[2] The district social worker in the ETP described the role of a 1:1 aide assigned to a student as being responsible to serve the academic and behavioral needs of that student directly, and "adult supervision in the classroom" as a person who is available in the classroom to support the student if needed, but also having the flexibility to serve and support other students in the class (Tr. pp. 241-42).

[3] The IEP developed at the May 6, 2011 CSE meeting is not part of the hearing record. The hearing record reflects that both parties intended to submit a copy of the May 6, 2011 IEP into evidence (see Tr. pp. 7-8 [listing the May 6, 2011 IEP as Parent Ex. 2 and Dist. Ex. 49 in the index of exhibits]), but neither party's copy of the May 6, 2011 IEP was received into evidence (Tr. pp. 7-8, 12-13; see Tr. p. 78). In light of the detailed testimony concerning the content of the May 6, 2011 IEP, the May 6, 2011 CSE meeting minutes that are part of the hearing record, the limited issues present in this appeal, and the district's admissions asserted in its petition, the May 6, 2011 IEP is not required to render a decision (see Tr. pp. 72-76, 148-49, 155, 163, 170-173, 180, 237, 364, 372-74, 395-98; Dist Ex. 48).

in the district's "Social Emotional Academic Transition Services" (SEATS) program and receive counseling and a 1:1 aide (Tr. pp. 72-76, 148-49, 163, 173, 395).[4]

Due Process Complaint Notice

In a due process complaint notice dated June 23, 2011, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) as a result of "issues stemming from" the 2009-10 and 2010-11 school years (Dist. Ex. 50 at p. 2). Specifically, the parent contended, among other things, that: (1) the district failed to conduct a timely triennial evaluation and failed to conduct necessary evaluations including an assistive technology evaluation, speech-language evaluation, physical therapy (PT) evaluation, adapted physical education evaluation, and an occupational therapy (OT) evaluation; (2) the district failed to conduct a new functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP); (3) the district failed to conduct progress monitoring and reporting as set forth in the student's last BIP dated 2009 and in his IEP; (4) the district failed to offer appropriate transportation to the student which led to disciplinary action and a suspension; (5) the CSE erred at the September 2010 CSE meeting in removing the 1:1 aide from the student's IEP and substituting "adult support;" (6) the May 2011 CSE was improperly composed because it did not include a regular education teacher; (7) the CSE failed to develop "appropriate, meaningful and measurable" annual goals; (8) the district failed to offer parent counseling and training; (9) the district failed to provide appropriate modifications in the student's music class and physical education class, resulting in the student missing a significant number of classes during the 2010-11 school year; and (10) the district failed to have an IEP in place for the start of the student's sixth grade school year (2011-12) (id. at pp. 2-4). The parent requested annulment of the student's current IEP, corrective orders for procedural violations, additional services, and the student's placement in a specific district middle school (id. at pp. 3, 4).

Impartial Hearing Officer Decision

An impartial hearing was conducted on August 18 and 19, 2011 (Tr. pp. 1, 186).[5] In a decision dated September 12, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 29-32, 41).[6] In addressing the district's contention that the matter had been rendered moot because the district had agreed to all of the parent's requested relief, the impartial hearing officer found that the parent's claims were not moot because she requested compensatory education and the evaluations that the

[4] The CSE chairperson described the SEATS program as an "enhanced resource room" providing supplemental instruction from a special education teacher and a place for the student to go to "process an incident" or to calm down (Tr. pp. 126, 148).

[5] The impartial hearing officer and the parties are commended for conducting a prompt and efficient impartial hearing that comports with the timelines set forth in federal and State regulations (see 34 C.F.R. § 300.515; 8 NYCRR 200.5[j][3], [5]).

[6] Although the due process complaint notice alleged a denial of a FAPE for both the 2009-10 and 2010-11 school years, the impartial hearing officer found that the district denied the student a FAPE for the 2010-11 school year and he made no specific findings regarding the 2009-10 school year (IHO Decision at pp. 29-32, 37; District Ex. 50 at p. 2). Likewise, on appeal, neither party sets forth arguments relating to the 2009-10 school year and the parent does not cross-appeal the impartial hearing officer's lack of a determination regarding any claims pertaining to the 2009-10 school year. Therefore, I will not address the 2009-10 school year in this decision.

district agreed to conduct after the parent filed her due process complaint notice did not address every area of the student's disabilities as the student required a sensory evaluation (id. at pp. 32-35). The impartial hearing officer determined that the district failed to offer the student a FAPE because it failed to timely evaluate the student and the May 2011 CSE lacked a required regular education teacher, which resulted in the parent being denied the opportunity to meaningfully participate in planning for the student's transition into middle school (id. at pp. 29-32). The impartial hearing officer also found that the district did not appropriately address the supports the student required to transition into the district's middle school (id. at p. 35). He further found that the student was entitled to compensatory education services for missed music classes and counseling sessions, and directed the CSE to reconvene to determine an appropriate remedy (id. at pp. 36-39). The impartial hearing officer also ordered the CSE to reconvene and determine if adapted physical education was appropriate for the student and if parent training and counseling was required (id.). The impartial hearing officer also found that the student required a 1:1 aide and ordered the CSE to reconvene to review the student's program and annual goals based upon updated evaluations, and complete an updated FBA and BIP (id. at pp. 36-37). Lastly, the impartial hearing officer ordered the district to have the student evaluated within 30 days of the date of the decision at a specific private evaluation center (id. at pp. 38-39).

Appeal for State-Level Review

On appeal, the district asserts that after the parent filed her June 2011 due process complaint notice, the district agreed to all of the relief requested in the complaint and therefore, the impartial hearing officer erred in conducting the impartial hearing and rendering a decision. Specifically, the district contends that it agreed to conduct updated evaluations, conduct a new FBA and develop a BIP, enroll the student at the specific middle school requested by the parent, and convene a CSE to prepare a new IEP and consider, among other things, the student's need for adapted physical education and parent training and counseling. According to the district, it agreed to conduct an OT evaluation which would typically include a "sensory evaluation," therefore, the impartial hearing officer erred in finding that the district failed to meet the parent's request for updated evaluations because the district did not specifically enumerate a sensory evaluation. The district further contends that with the exception of the impartial hearing officer's order for compensatory music classes and that the student be evaluated at a private evaluation center, all of the relief ordered by the impartial hearing officer had already been agreed to by the district prior to the impartial hearing. With respect to the impartial hearing officer's finding of a denial of a FAPE for the 2010-11 school year, the district admits that there was no regular education teacher at the May 2011 CSE meeting and updated evaluations of the student were required; however, argues that it had agreed to conduct the evaluations and reconvene a properly constituted CSE. The district also argues that the impartial hearing officer had no jurisdiction to order it to have the student evaluated at the specific private center within 30 days because the district has no control over the private center, the district had conducted comprehensive evaluations during summer 2011, the parent did not request an evaluation at the private center in her due process complaint notice, and nothing in the hearing record shows that the private center was appropriate. The district lastly contends that the impartial hearing officer's order of compensatory music classes was erroneous because such an award was not specifically requested in the due process complaint notice, there was no proof at the impartial hearing that the services were required, and in any event, regular education music classes were not a part of the student's IEP and would therefore not be an appropriate area for an award of compensatory education. The district requests that the decision of the impartial hearing officer be annulled, including the orders directing the district to have the student evaluated at the private center within 30 days and provide the student with compensatory education for music classes.

In her answer, the parent alleges three procedural defenses: (1) the petition should be dismissed for improper service because the district served the petition by mail in violation of State regulations and although the parent's attorney agreed to accept service, there was no agreement to waive personal service; (2) the petition should be dismissed for failure to comply with State regulations because the petition makes numerous factual allegations on disputed matters without citations to the hearing record; and (3) the petition should be dismissed as moot because the district has complied with the impartial hearing officer's orders and as such, a State Review Officer cannot grant meaningful relief to the district. On the merits, the parent contends that the impartial hearing officer properly determined that there was a need for an impartial hearing because the parent's claims were "real and live." The parent further contends that the CSE failed to timely evaluate the student, the May 2011 CSE was not properly composed, the goals contained in the May 2011 IEP were not appropriate, the student required a full-time 1:1 aide, and the transition support services proposed by the CSE were inappropriate. The parent also contends that the student required adapted physical education and a special music program adapted to his needs, that the impartial hearing officer properly ordered the CSE to consider parent training and counseling, and that he properly ordered additional services. The parent requests that the petition be dismissed.

In a reply, the district addresses the parent's procedural defenses and contends that: (1) the petition was properly served because the parent's attorney agreed to accept service; (2) the district's appeal is not moot because the impartial hearing officer's order created ongoing obligations for the district, such as the need to deliver compensatory education, which the district has not yet fulfilled; and (3) the district's petition and memorandum of law contain sufficient citations to the hearing record to satisfy the requirements set forth in State regulations.

Discussion

Procedural Defenses

Service of the Petition on Appeal

The parent asserts that the petition should be dismissed because the district did not personally serve it. An appeal from an impartial hearing officer's decision to a State Review Officer is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 10-119; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082). A petition must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service of the petition for review include the following: (1) if a respondent cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by a State Review Officer (8

NYCRR 275.8[a], 279.1[a];[7] Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission may be obtained from a State Review Officer for an alternate method of service (8 NYCRR 275.8[a], 279.1[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048). The failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition for review by a State Review Officer (8 NYCRR 279.8[a], 279.13).

According to the district's affidavit of service, on October 13, 2011 the petition for review was served by mail upon the attorney who represented the parent at the impartial hearing and who represents her on appeal (Dist. Aff. of Service). The parent's answer does not contend that the service was untimely or that the initiating papers were not received (Answer ¶¶ 21-25). There is also no dispute that the attorney for the district sought and obtained consent from the parent's attorney to accept service on behalf of her client, and that the parent's attorney agreed to accept service of the petition (Answer ¶ 22; see Reply Ex. B). Under the circumstances of this case where the parent's attorney agreed to accept service on behalf of the parent, the petition was timely served, and the parent was able to file a timely and responsive answer to the petition, I decline to dismiss the petition for the failure to personally serve the parent (see Application of the Bd. of Educ., Appeal No. 10-079; Application of the Bd. of Educ., Appeal No. 07-087; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-073).

Citations to the Hearing Record in the Petition

State regulations direct in relevant part that "[t]he petition, answer, reply and memorandum of law shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]; see Application of a Student with a Disability, Appeal No. 09-110 [dismissing a petition which, inter alia, failed to contain adequate citations to the hearing record]). Here, the district's petition contains numerous citations to exhibits in the hearing record and the impartial hearing officer's decision (Pet. ¶¶ 5-9, 15-16, 19-20, 24-25). The district's memorandum of law also contains numerous citations to exhibits in the hearing record, the impartial hearing officer's decision, and the transcripts of the impartial hearing with specific page numbers (Dist. Mem. of Law at pp. 2-7, 9-12, 14-16). I also note that as discussed above, the parent submitted an answer that responded to the district's allegations in the petition and asserted procedural defenses. Under the circumstances of this case, I find that the district's petition and memorandum of law comply with the practice requirements of Part 279 and I decline to dismiss the petition (see Application of the Bd. of Educ., Appeal No. 11-083 [declining

[7] As applied to State-level reviews conducted pursuant to Part 279 of State regulations, "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department" (8 NYCRR 279.1[a]).

to dismiss an answer that was legally sufficient]; Application of a Student with a Disability, Appeal No. 10-038 [declining to dismiss a petition as a matter of discretion]).

Mootness on Appeal

In administrative reviews of impartial hearing officer decisions, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, an exception provides that a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

In the present matter, the parent contends that the district's appeal is moot because the district has already complied, or agreed to comply, with the impartial hearing officer's orders set forth in his decision (Answer ¶¶ 30-33; IHO Decision at pp. 38-39). The district contends in its reply that its appeal is not moot because there are ongoing, live controversies concerning the district's obligation to deliver compensatory education services, that it has not yet provided the student with all the compensatory education services awarded by the impartial hearing officer, and that it has no means to guarantee that an evaluation by a private entity not under its control complete an evaluation by a certain date. The district further argues that the fact that it conducted evaluations, convened a CSE in September 2011, and developed an IEP for the student for the current school year which was not in dispute did not render the district's appeal moot. Here, I concur with the district that the parties continue to have a live controversy. A determination by a State Review Officer regarding the district's arguments asserted in its petition that the impartial hearing officer erred in ordering the district to have the student evaluated by a private entity and provide the student with compensatory education in the form of music instruction are not academic and will impact the parties. Therefore, under the circumstances of this case, I find that the district's appeal has not been rendered moot (see Application of a Student Suspected of Having a Disability, Appeal No. 11-044; Application of a Student with a Disability, Appeal No. 09-122 Application of a Student with a Disability, Appeal No. 08-076).[8]

Applicable Standards

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,

[8] Moreover, regarding the district's contention that the impartial hearing officer erred by not dismissing the case as moot, I concur with the impartial hearing officer's finding that the matter was not moot at the time of the impartial hearing given the parent's request for compensatory education services (IHO Decision at p. 32; see, e.g., Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 02-030).

2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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).

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]).

District's Recommendation – 2010-11 School Year

In this case, the impartial hearing officer found that the district failed to offer a FAPE to the student for the 2010-11 school year because it did not timely evaluate the student and because the May 2011 CSE lacked the participation of a regular education teacher, resulting in the parent being unable to meaningfully participate in the CSE meeting (IHO Decision at pp. 30-32, 34-35). The district admits on appeal that it had not completed updated evaluations of the student at the time of the May 2011 CSE meeting and that the May 2011 CSE lacked a regular education teacher; however, the district alleges that these violations did not deny the student a FAPE because it has agreed to conduct a series of updated evaluations, including a sensory evaluation, and to reconvene the CSE to consider these evaluations with a regular education teacher present at the meeting.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

Here, the district has admitted that it did not complete updated evaluations of the student at the time of the May 2011 CSE meeting. The hearing record reflects that the student's sensory deficits are an identified need, that the CSE's outdated evaluations did not properly identify this need, and that the May 2011 CSE did not have proper updated evaluative data to recommend an appropriate program to address the student's needs.[9] The district admits on appeal and admitted at the time of the parent's due process complaint notice that additional information was needed

[9] Specifically, I note that the CSE had previously identified the student's sensory needs (Tr. pp. 199-200, 248, 372-73; 357-58), but had failed to conduct evaluations to determine the extent of the student's sensory needs or how his sensory needs impacted his ability to function in the classroom (Tr. pp. 26, 217, 236-239). The hearing record indicates that the CSE could have made additional recommendations regarding the student's sensory needs had it had the evaluative information required to do so (Tr. pp. 180-82, 373).

regarding the student's needs and that it was undertaking completing updated evaluations.[10] Because the district lacked updated evaluations at the time of the May 2011 CSE meeting, the present levels of performance contained in the IEP were based upon outdated and incomplete information (see 34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]; see also Student with a Disability, Appeal No. 08-119, Application of a Student with a Disability, Appeal No. 08-056).

Moreover, the district admits that the there was no regular education teacher at the May 2011 CSE meeting. The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 USC § 1414[d][1][B][ii]; see 34 C.F.R. § 300.321[a][2]; see also 8 NYCRR 200.3[a][1][ii]). The student was recommended to attend a general education program in his May 2011 IEP (Tr. pp. 75, 372; Dist. Ex. 48). The district does not argue that a regular education teacher was not required; rather, it asserts that one will be present at a reconvened CSE meeting to review the updated evaluations when they are completed.

Given the district's admissions, under the circumstances of this case, I find no reason to disturb the impartial hearing officer's finding that together, the lack of updated evaluations and a regular education teacher at the May 2011 CSE meeting impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, and 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] see Application of a Student with a Disability, Appeal No. 08-035).

Compensatory Education

The district contends that the impartial hearing officer's order of compensatory music classes was erroneous because the hearing record did not provide a basis to make such an award, and in any event, general education music classes were not a part of the student's IEP, nor did the parent request a modified music program for the student; therefore, those classes do not constitute an appropriate award of compensatory education.[11]

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

[10] Specifically, the district had proposed to conduct a social history, a psychological evaluation, an FBA, an educational assessment, a physical examination, a classroom observation and, if needed, a speech and language evaluation and an assessment of motor abilities (Dist. Ex. 51 at p. 1).

[11] The district does not appeal the impartial hearing officer's determination that it was required to provide the student with compensatory education group counseling services (IHO Decision at p. 38); therefore, that determination is final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[12] 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 French v. New York State Dep't of Educ., 2011 WL 5222856, at *2 [2d Cir. Nov. 3, 2011]; 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 Newington, 546 F.3d at 123 [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]; 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).

[12] 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]).

Here, as discussed above, the district did not offer the student a FAPE for the 2010-11 school year. The purpose of a compensatory education award, and by extension an award of additional services, is to remedy a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is an available option to "make up for" a denial of a FAPE and finding that the compensatory services ordered by the hearing officer therein "appropriately addressed the problems with the IEP"]; see also Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). In this case, the impartial hearing officer's award of additional general education music classes bore little relationship to the deficiencies in the provision of special education services to the student (see IHO Decision at pp. 36-37). Accordingly, I cannot conclude on the basis of this hearing record that the award was designed to compensate the student for the district's failure to offer the student a FAPE (see Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding with regard to compensatory education awards that "the inquiry must be fact-specific, and to accomplish IDEA's purposes, 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"]). Moreover, I find that other portions of the impartial hearing officer's decision and orders appropriately remedied the denial of a FAPE to the student that occurred during the 2010-11 school year—specifically, the impartial hearing officer's orders that the district conduct updated evaluations and convene an appropriately constituted CSE (id. at pp. 37-39). Accordingly, I will annul the portion of the impartial hearing officer's decision providing for general education music classes as compensatory education.

Order to Conduct A Private Evaluation

The district contends that the impartial hearing officer erred in ordering it to conduct a private evaluation at a specific center within 30 days. As discussed below, I agree with this contention.

State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of the Bd. of Educ., Appeal No. 11-096; Application of a Student with a Disability, Appeal No. 11-042; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140).

In this case, although the parent's due process complaint notice alleged that the district had failed to adequately evaluate the student, it did not request a private evaluation at public expense (Dist. Ex. 50). Accordingly, the issue was not properly before the impartial hearing officer, and he should have confined his determination to only those claims that were raised in the parent's due process complaint notice (see IHO Decision at pp. 38-39; see also 20 U.S.C. § 1415[c][1],[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[b],[d][3], 300.511[d]; 8 NYCRR 200.5 [i][1][iv],[i][7],[j][1][ii]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-7 [S.D.N.Y. Sept. 16, 2011]; M.H. v. New York City Dep't of Educ., 712 F. Supp. 2d 125, 159 [S.D.N.Y. 2010];

Application of the Bd. of Educ., Appeal No. 11-096; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 99-060). Therefore, I will annul this portion of the impartial hearing officer's decision.

Conclusion

Based on the above, I agree with the impartial hearing officer that the district did not offer the student a FAPE for the 2010-11 school year and I will modify his orders consistent with this decision and as set forth below.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated September 12, 2011 that ordered the district to provide the student with compensatory general education music classes is annulled; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's decision dated September 12, 2011 that ordered the district to have the student evaluated within 30 days of the date of the decision at a named private evaluation center is annulled.

Dated: **Albany, New York**
November 14, 2011

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STEPHANIE DEYOE
STATE REVIEW OFFICER