The University of the State of New York

The State Education Department
State Review Officer
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No. 12-018

Application of the BOARD OF EDUCATION OF THE ORCHARD PARK CENTRAL SCHOOL DISRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Hodgson Russ LLP, attorneys for petitioner, Ryan L. Everhart, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, H. Jeffrey Marcus, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, petitioner (the district) appeals from an interim decision of an impartial hearing officer (IHO) which, among other things, determined respondents' (the parents') son's pendency placement during an impartial hearing challenging the appropriateness of the district's recommended educational program for the 2011-12 school year. The parents cross-appeal from a portion of the IHO's decision. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). State regulations also authorize an interlocutory appeal to an SRO by a party who has been aggrieved by an IHO's interim decision regarding a student's pendency placement during the impartial hearing (8 NYCRR 279.10[d]). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As relevant to the issues in this appeal, the CSE convened on July 15 and 29, 2010 to develop the student's IEP for the 2010-11 school year (Parent Nov. 30, 2011 Aff. Ex. D at pp. 1, 8). The CSE continued the student's eligibility to receive special education and related services as a student with autism and determined that the student qualified for extended school year (ESY) services (id. at pp. 1, 4, 8). The CSE recommended, among other things, that from July 6, 2010 through August 16, 2010, the student receive "Phonemic Awareness Training" two times per week for 30 minutes per session (id. at p. 6). For the 10-month school year commencing September 7, 2010, among other things, the IEP recommended that a "reading specialist to provide training (2

sessions)" and a reading teacher "consult with outside [r]eading [t]utor every 2 weeks," then indicated the service would be provided five times per week for 30 minutes per session (id.).

On June 14, 2011, the CSE convened for an annual review to develop the student's program for the 2011-12 school year (Parent Nov. 30, 2011 Aff. Exs. A ¶ 9; E at pp. 1, 3, 14-16). The June 2011 CSE recommended that the student receive a 12-month program consisting of a 12:1+1 special class and related services; however, it did not recommend that the student continue to receive the daily reading instruction by a reading specialist or phonemic awareness training (see Parent Nov. 30, 2011 Aff. Ex. E at pp. 3, 14-16). Subsequent to the June 2011 CSE meeting, the parents sent the district's special education director a letter stating that they disagreed with the June 2011 IEP and which, among other things, sought information relating to the student's reading services (Parent Nov. 30, 2011 Aff. Ex. H). The student attended the summer program set forth in the June 2011 IEP, (Dist. Nov. 30, 2011 Affirmation ¶ 7).

A. Due Process Complaint Notice

In a due process complaint notice dated August 26, 2011 the parents requested an impartial hearing challenging certain recommendations made in the June 2011 IEP (Parent Nov. 30, 2011 Aff. Ex. C at p. 3). Among other things, the parents asserted that the district had "refuse[d] to put reading services on the IEP" and that the district was characterizing the reading services as a "'general education support service'" that need not be included in the student's IEP (id. at p. 2).

B. Impartial Hearing Officer Decision

During a November 7, 2011 prehearing conference with the IHO, the parents indicated they would submit a request regarding the student's pendency placement, which the district indicated it would oppose (Interim IHO Decision at p. 2). The IHO thereafter received written submissions from the parties (see Parent Nov. 30, 2011 Aff. with attached Exs. A-J; Dist. Notice of Mot. to Dismiss with attached Nov. 30, 2011 Affirmation; Dist. Mem. of Law; Parent Mem. of Law; Parent Response to Dist. Mot. to Dismiss).

In an interim decision dated December 20, 2011, the IHO found that the student's pendency placement was based on the student's July 29, 2010 IEP (Interim IHO Decision at p. 6). He concluded that the July 2010 IEP was the IEP in effect prior to the changes to the student's reading services reflected in the June 2011 IEP to which the parents objected, first at the June 2011 CSE meeting, then in their subsequent letter to the district, and subsequently in their August 2011 due process complaint notice (id.). The IHO found that the July 2010 IEP recommended that the student receive reading instruction by a reading specialist five times per week for 30 minutes per session, as well as phonemic awareness training two times per week for 30 minutes per session (id.). The IHO therefore concluded that the student's pendency placement included these two specified reading services (id. at p. 7). The IHO further declined to find, as the district had argued, that the instruction in reading on the IEP was "exclusively a general education service," which precluded the provision of the service from consideration at an impartial hearing regarding whether a student with a disability was provided a free appropriate public education (FAPE) (id.).

The IHO ordered that unless the parties otherwise agreed, the student's pendency placement included special education reading instruction by a reading specialist five times per week for 30 minutes per session, as well as phonemic awareness training two times per week for 30 minutes per session (Interim IHO Decision at p. 8). The IHO also ordered that the student's right to a

pendency placement with reading services arose as of the date of the parents' due process complaint notice (id.). The IHO further ordered the district to provide the student with compensatory services to remediate any lack of services that were not provided to the student since the date of the due process complaint notice (id.).

IV. Appeal for State-Level Review

The district appeals the IHO's interim decision, requests that it be reversed, and seeks a finding that the student's pendency placement is based on the June 2011 IEP. The district contends that the June 2010 IEP did not recommend "direct specialized reading services" and that instead the student received reading instruction as academic intervention services (AIS) during the 2010-11 school year, which constituted a general education service. The district asserts that it removed training by a reading specialist from the July 2011 IEP because the student had made improvements in reading and it removed phonemic awareness training because the student had completed that service. Regarding pendency, the district asserts that the student's pendency placement is based on the '"current placement"' at the time the due process complaint notice is filed, in this case, the 2011-12 IEP that the student was receiving services under at the time of the impartial hearing. The district contends that the IHO incorrectly found that the student's pendency placement is based upon the 2010-11 IEP and that he erroneously "failed to make any distinction between AIS versus CSE recommended services." It asserts that the fact the parents objected to the 2011-12 IEP has no bearing on the determination of the student's pendency placement. The district further contends that even assuming that the 2010-11 IEP was the student's pendency placement, there was "nothing in that IEP that mandates direct reading instruction." Lastly, the district asserts that the IHO acted "outside the scope of his jurisdiction" to the extent that he ordered AIS reading services.

The parents submitted an answer and cross-appeal, requesting that the IHO's interim order be affirmed except for those parts which found that: (1) the student's daily reading instruction under pendency was for 30 minutes per session; and (2) the student's pendency placement included phonemic awareness training. The parents first assert that the district did not serve the required notice along with its petition for review; therefore, its petition for review should be dismissed. The parents also contend that the district did not specifically challenge the IHO's order relating to compensatory services and, therefore that this part of the IHO's interim decision is final.[1]

The parents agree with the IHO that the student's pendency reading services should be based on the July 2010 IEP and that this IEP provided for daily reading services five times per week for 30 minutes. However, in a cross-appeal, the parents contend that the July 2010 IEP should have indicated the CSE's agreement that the student receive daily reading services for 45 minutes per session, rather than 30 minutes and that during the 2010-11 school year, the district actually provided the student with daily special education reading services 45 minutes per day. The parents deny the district's contention that the June 2011 IEP should establish the student's pendency placement. Further, they assert that they objected to the reduction in the student's reading services at and subsequent to the June 2011 CSE meeting and that they submitted their due process complaint notice prior to the beginning of the 2011-12 10-month school year. The

[1] The parents also assert in their answer that the district can not raise issues "by Reply or in its memorandum of law that have not been alleged as a basis of appeal in its Petition." However, the parents do not specify any particular allegations the district has allegedly raised improperly.

parents agree with the district that the IHO erred in finding that the student's pendency placement included phonemic awareness training. They dispute, however, the district's contention that the IHO acted outside the scope of his authority in ordering reading services. Relative to this, they deny that the reading services in the July 2010 IEP and received by the student during the 2010-11 school year were AIS services.

The district answered the parents' cross-appeal, asserting that the student received AIS services during the 2010-11 school year, but admitting that those services were provided in 45-minute sessions, by agreement of the parties. The district also asserts that AIS services were referenced on the July 2010 IEP but that they should not have been set forth on the IEP.

The district admits that a notice with petition was not served with the petition. However, the district contends that this deficiency should be excused because the parents have not been prejudiced. The district also contends that the part of the IHO's order regarding compensatory services was based on his finding that the student's pendency placement should be based on the July 2010 IEP and that the district had appealed this finding in its entirety.

V. Applicable Standards – Pendency

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

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean the current education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

The Second Circuit has described three variations on the definition of "then current educational placement:" (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP (Mackey, 386 F.3d at 163, citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 [6th Cir. 1990]; see Application of a Student with a Disability, Appeal No. 09-125; Application of the Bd. of Educ., Appeal No. 08-126; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 05-006).

VI. Discussion

A. Preliminary Matter

1. Scope of Impartial Hearing

I will turn first to the district's allegation that the IHO was referencing AIS services when he ordered five days of reading instruction per week and that he was acting outside of his jurisdiction. As explained below, I find that this contention on appeal is not within the scope of a permissible interlocutory appeal and is therefore outside the scope of my review.[2] The district's contention is essentially an appeal of the portion of the IHO's decision which denied its motion to dismiss the proceeding (see Dist. Nov. 30, 2011 Affirmation ¶¶ 3-6). However, the jurisdiction of an SRO in appeals from interim decisions of IHOs is limited to pendency placement

[2] Further, I note that the interim decision specifies that the pendency placement ordered by the IHO was for "special education reading instruction" and that the impartial hearing officer rejected the district's argument that the July 2010 IEP listed AIS services instead of special education services (Interim IHO Decision at pp. 7-8). The district presents no persuasive basis for overturning this conclusion in this case.

determinations (8 NYCRR 279.10[d]; Application of the Dep't of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 09-023; Application of a Child with a Disability, Appeal No. 07-057; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 04-064).[3] (The portion of the IHO's interim decision relating to the district's motion to dismiss the proceeding is not a pendency determination that may be appealed prior to the impartial hearing officer's final determination (see Educ. Law 4404[4]; 8 NYCRR 279.10[d]; Application of a Child with a Disability, Appeal No. 05-035; Application of a Child with a Disability, Appeal No. 99-52). While the consideration of the district's allegation on appeal is premature at this juncture, I note that State regulations provide that an IHO's interim decision may be appealed to an SRO as a part of an appeal from the IHO's final determination regarding a party's claims in a due process complaint notice (see 8 NYCRR 279.10[d]).

B. Pendency

In this case, the issues relating to the student's pendency placement are limited to the dispute over which IEP the student's pendency placement arises from, whether the pendency placement includes daily reading instruction and if so, whether the duration of such reading services is for 30 minutes or 45 minutes per session.[4] The evidence shows that at the time of the parents' August 2011 due process complaint notice the last implemented IEP was student's July 2010 IEP and that IEP included daily reading instruction as for the 2010-11 school year (see Parent Nov. 30, 2011 Aff. Ex. D at p. 6; see also id. at pp. 5, 8; Parent Nov. 30, 2011 Aff. Ex. A ¶ 4). Contrary to the district's argument, it is relevant that the parents' due process complaint notice challenged the June 2011 IEP and, in particular, the removal of the reading services from the student's IEP (see Parent Nov. 30, 2011 Aff. Ex. C at p. 3). The June 2011 IEP does not, therefore, constitute the last agreed upon placement, especially when the portion of the June 2011 IEP that eliminated the student's daily reading instruction was not yet operative at the time the parents' filed their due process complaint notice (Parent Nov. 30, 2011 Aff. Ex. A; Pet. ¶ 25). Accordingly, I will not disturb this aspect of the IHO's determination.

With regard to the dispute over the length of the daily reading instruction, I find that the IHO erred in ordering that the sessions as 30 minutes in length. While the duration of the student's daily reading instruction in the July 2010 IEP was listed as 30 minutes per day, the evidence in this particular instance shows that this was a clerical error; that the July 2010 IEP should have reflected 45 minutes per session and the parties agree that the student received this instruction for 45 minutes per day during the 2010-11 school year. Specifically, the student's mother stated that during the July 2010 CSE meeting it was agreed that the student's daily direct reading instruction

[3] Regarding this, State regulations pertaining to practice on review of hearings for students with disabilities state:

> (d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

(8 NYCRR 279.10[d]).

[4] Both parties agree that the student's pendency placement does not include phonemic awareness training (see Pet. ¶ 35; Answer ¶ 35). Therefore, I will reverse that portion of the IHO's decision.

with the reading specialist would be 45 minutes per session (Parent Nov. 30, 2011 Aff Ex. A ¶ 4). By e-mail dated September 23, 2010, the parents advised both the principal of the student's school and the student's reading specialist that the July 2010 IEP contained an error regarding the duration of the student's reading services (Parent Nov. 30, 2011 Aff. Ex. A ¶ 6, Attachment 1). The parents also advised the district that the student's mother had already spoken to the district's special education director and that the special education director had advised them that she would make the correction and send it out (Parent Nov. 30, 2011 at Attachment 1). Moreover, consistent with parents' argument that the July 2010 IEP contained an inadvertent error, the evidence reflects that the student actually received daily reading services from the district's reading specialist five times per week for 45 minutes a session throughout the 2010-11 10-month school year, which is not disputed by the parties (Parent Nov. 30, 2011 Aff. Exs. A at ¶ 7, Attachment 1; I; see Parent Nov. 30, 2011 Aff. Ex. G).[5] Based on the above, I will modify the IHO's decision to reflect that the student's pendency reading services should be received 45 minutes per day.

I now turn to the appropriateness of the IHO's interim decision relating to compensatory services (see IHO Decision at p. 8). For pendency to be invoked, a due process proceeding must be pending (Application of a Student with a Disability, Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 08-050; Application of a Child with a Disability, Appeal No. 07-136; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; Honig, 484 U.S. at 323; Mackey, 386 F.3d at 160; Schutz, 290 F.3d at 481-82; Letter to Winston, 213 IDELR [OSEP 1987]). Further, pendency has the effect of an automatic injunction (Zvi D., 694 F.2d at 906). Therefore, the IHO in this case possessed the authority to ensure that the student received the pendency placement to which he was entitled under the IDEA, including those services which should have been received by the student but which, because of the dispute between the parents and the district, had not yet been received.[6] As discussed above, the IHO's order for compensatory services needs to be modified to reflect that the student's pendency placement does not include phonemic awareness training. Second, the order needs to be modified to take into account that the student's pendency placement includes daily reading instruction for 45 minutes per session, rather than 30 minutes per session.

I do not agree with the parent's contention that the district failed to appeal the "compensatory" aspect of the IHO's pendency placement determination inasmuch as the district raises the issue by essentially denying responsibility for any reading instruction services as part of his pendency placement, whether compensatory or not. Accordingly, I will address this portion of the IHO's interim decision. I note that in this case the IHO erred in ordering that the student's

[5] Generally, if a particular IEP serves as the basis of the student's pendency placement, the Seventh Circuit has explained that "[e]ven if a school has provided a particular service in the past, it need not be provided in a stay-put situation if it was not within the governing IEP (John M. v. Board of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 715 [7th Cir. 2007]). The Court in that case further indicated that under usual circumstances it should not be necessary to go beyond the "four corners" of the IEP (id.). In this case, the reading instruction was included on the July 2010 IEP, but was not delineated as an AIS service as the district now contends (Parent Nov. 30, 2011 Aff. Ex. D at pp. 1, 6). I also note that the circumstances of this case do not appear to be the "usual circumstances" described by the Seventh Circuit and appear to present an exception inasmuch as the district did not rebut the evidence described above showing that the CSE had intended to set forth 45-minute sessions rather than 30-minute sessions on the July 2010 IEP and that it actually provided 45-minute sessions for the 2010-11 school year.

[6] The parents assert that the district has not implemented the IHO's December 20, 2011 interim order (see Pet. ¶ 28).

compensatory services be calculated from the date of the due process complaint notice (see IHO Decision at p. 8). As discussed above, the July 2010 IEP reflected that the student's daily reading instruction was a 10-month service that began in September, not during the summer and, therefore, any compensatory services in this case should be calculated from the beginning of the 10-month school year beginning in September 2011 (see Nov. 30, 2011 Aff. Ex. D at p. 6).

VII. Conclusion

In accordance with the discussion above, I will modify the IHO's order regarding the student's pendency placement. I have considered the parties' remaining contentions, including the parents' allegations that the district did not serve a notice with petition, and find that it is unnecessary to address them further under the circumstances of this case.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision dated December 20, 2011 is modified by reversing those portions which 1) ordered that the student's pendency placement include phonemic awareness training two times per week for 30 minutes per session, 2) limited reading instruction by a reading specialist to five times per week for 30 minutes per session, and 3) granted compensatory services for summer 2011; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the student's pendency placement shall include 1) reading instruction by a reading specialist, five times per week for 45 minutes per session and 2) the district shall provide the student with any reading instruction that was not provided from September 6, 2011 through the date of this decision.

Dated: **Albany, New York**
April 2, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER