The University of the State of New York

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

No. 10-013

Application of the BOARD OF EDUCATION OF THE [redacted] 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:
Keane & Beane, P.C., attorneys for petitioner, Stephanie L. Burns, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that respondents' (the parents') son should be provided compensatory education services as a result of an alleged failure to implement the educational program recommended by the district's Committee on Special Education (CSE) for the 2008-09 school year. The appeal must be sustained in part.

At the time the impartial hearing convened in September 2009, the student was attending fifth grade in a general education classroom in one of the district's elementary schools (Dist. Ex. 11 at p. 1). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 11 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

With regard to the student's educational history, the hearing record reflects that the student had received reading support provided by the district and private tutoring services obtained by the parents since first grade; however, he continued to have difficulty acquiring age appropriate reading skills (Dist. Exs. 1 at pp. 4-5; 4 at p. 1). In November 2007 (third grade), the district's instructional support team (IST) referred the student to the CSE for an initial evaluation because he demonstrated weak phonological awareness skills that were affecting his ability to

decode words and were causing poor fluency and comprehension (Tr. pp. 273-74, 311; Dist. Ex. 5 at p. 1).[1]

After the IST's referral, the district's school psychologist conducted a psychological evaluation of the student on December 4 and 5, 2007, which revealed that the student's cognitive potential was within the average range and at the 63rd percentile with a full scale IQ score of 105 (Dist. Ex. 4 at p. 2). The school psychologist noted that the student's relative weakness on the digit span subtest, which measures short term verbal memory, may explain the difficulties the student experienced in decoding and that aside from his difficulty with reading, the student was a hardworking and well adjusted child (id. at pp. 2-3). On December 11, 2007, an educational evaluator for the district conducted an assessment of the student's academic achievement (Dist. Ex. 5 at p. 1). The resultant evaluation report reflected that the student was functioning primarily between the low average and the average range in all academic areas, and that the student's "reading behavior had many of the characteristics attributed to students with a reading disability" (id. at pp. 1-5).

On December 19, 2007, the school psychologist conducted a classroom observation of the student during a writing activity, during which she reported that the student participated without difficulty when seated in the front of the group, but his spelling errors indicated poor phonological awareness (Dist. Ex. 6). In a report dated January 2, 2008, the student's third grade teacher confirmed that the student had acquired basic academic skills in math, social studies and science, but exhibited significant difficulties in reading, decoding, and comprehension skills that affected his ability to work independently (Dist. Ex. 7).

The CSE convened on January 9, 2008, and determined that the student was eligible for special education programs and related services as a student with a learning disability (Dist. Ex. 3 at p. 1). The January 2008 CSE meeting was attended by the CSE chairperson, the school psychologist who had conducted the psychological evaluation and classroom observation of the student, the educational evaluator who was also a special education teacher and had conducted the educational evaluation of the student, a regular education teacher, the parents, and an additional parent member (id. at p. 4). The January 2008 CSE developed an individualized education program (IEP) for the student for the remainder of the 2007-08 school year and recommended five 40-minute resource room sessions per week in a group of 5:1 and testing accommodations including extended time (1.5) and flexible setting (id. at pp. 1-2, 4). The January 2008 IEP further addressed the student's needs with annual goals in the areas of reading and spelling (id. at pp. 5-6).

A report of the student's performance on the third grade New York State English language arts (ELA) test, dated January 2008, reflected that the student scored at Level 2, which indicated that the student's performance demonstrated a partial understanding of the ELA

[1] The instructional support team is also referred to in the hearing record as the "instructional study team" (Dist. Ex. 5 at p. 1).

knowledge and skills expected at the third grade level (Parent Ex. L).[2]

The hearing record further reflects that on February 11, 2008, the student's resource room teacher administered the Wide Range Achievement Test-Fourth Edition (WRAT-4) to assess the student's progress (Tr. p. 204). The student's scores indicated performance within the above average range in math computation and within the average range in his word reading, sentence comprehension, spelling and reading composite scores (see Dist. Ex. 8 at p. 3).

On April 29, 2008, a subcommittee of the CSE convened for the student's annual review and to develop an IEP for the student for the 2008-09 school year (Dist. Ex. 8 at p. 1). The April 2008 CSE subcommittee meeting attendees included the same school psychologist who had attended the January 2008 CSE meeting and who also acted as the CSE chairperson, the student's special education teacher, his regular education teacher, the principal, and the parents (id. at p. 4). The April 2008 CSE subcommittee considered the February 2008 WRAT-4 scores, a teacher report dated April 17, 2008,[3] as well as information considered at the January 2008 CSE meeting (id. at pp. 3-4). The April 2008 CSE subcommittee continued the recommendation for five 40-minute resource room sessions per week in a group of 5:1 and testing accommodations that included extended time (1.5) and flexible setting (id. at pp. 1-4). The April 2008 IEP included annual goals in the areas of reading, spelling, and writing (id. at pp. 5-6).

During summer 2008, the student participated in the district's "Summer Stars" program and attended private tutoring obtained by the parents (Tr. pp. 377, 385; Parent Ex. Q at p. 4). The district's Summer Stars program was described as a building level, academic intervention service (AIS) program for both general education and special education students that met for half days for four weeks (Tr. pp. 65, 68, 377).

During fall 2008, the student's mother and his teachers exchanged e-mails regarding the student's progress at home and school. On October 2, 2008, the student's mother indicated that she was "very happy" that the student was making progress in reading (Dist. Ex. 13). The student's mother reported that over the previous two weeks, the student had willingly done his 20 minutes of reading, was excited about finishing the book he was reading at school, and wanted to try to finish the book he was reading at home (id.). The student's resource room teacher responded by e-mail the next day, indicating that in addition to the student's steady progress, she was happy that the student's confidence was "soaring" (id.). In e-mails dated November 21 and 24, 2008, the resource room teacher contacted the student's mother regarding difficulty the student had with a multiplication assessment (Dist. Ex. 14 at pp. 1, 2). The teacher indicated the quiz could be retaken, but wanted to make sure the student's mother was aware of the difficulty as math had been an area of strength for him (id. at p. 1). The teacher further stated that "overall, he [was] doing very well" (id.).

[2] The hearing record indicates that a score of "1" on the ELA test for a third grade student was equivalent to "not meeting learning standards," a score of "2" meant "partially meeting learning standards," a score of "3" meant "meeting learning standards," and a score of "4" meant "meeting learning standards with distinction" (Parent Ex. L).

[3] The hearing record does not include the April 17, 2008 teacher report referenced in the April 2008 IEP.

On February 5, 2009, the student was reassessed using the WRAT-4 (see Tr. p. 204; Dist. Ex. 9 at p. 3). The student's scores indicated performance at the high end of the low average range in word reading and in the average range in sentence comprehension, spelling, math computation, and on the reading composite score (see Dist. Ex. 9 at p. 3).

On April 14, 2009, the CSE subcommittee met for an annual review and to develop an IEP for the student for the 2009-10 school year (Dist. Ex. 9 at p. 1). The April 2009 CSE subcommittee was attended by the same school psychologist who had attended the January and April 2008 CSE meetings and who also acted as the CSE chairperson, three special education teachers, including the student's then current special education teacher, his regular education teacher, and the parents (id. at p. 4). The April 2009 CSE subcommittee considered the student's updated February 2009 WRAT-4 scores, an April 13, 2009 teacher report,[4] and the evaluations conducted in 2007 (id. at pp. 3-4). The April 2009 CSE subcommittee recommended continuation of the student's five 40-minute resource room sessions per week in a group of 5:1 (id. at p. 1). The April 2009 CSE subcommittee also recommended adding push-in consultant teacher services for language arts for four individual 30-minute sessions in a six-day cycle and one 30-minute monthly team meeting (id.). The April 2009 IEP included program modifications and accommodations including rephrasing directions, preview/review subject area material, preferential seating, directions read/clarified, and directions repeated/clarified (id. at pp. 1-2). The April 2009 IEP reflected that the student would be provided with books on tape and indicated increased testing accommodations that included extended time (1.5), flexible setting, tests read, and directions read/explained (id. at p. 2). The April 2009 IEP also included annual goals in the areas of reading, writing, spelling, and mathematics (id. at pp. 5-7). Comments in the April 2009 IEP noted that the student's special education program would be reviewed in the new school year after 30 days (id. at p. 4).

On May 28, 2009, the student's mother e-mailed the district's assistant superintendent for pupil personnel services and requested another CSE meeting to discuss additional concerns regarding her son's program for the 2009-10 school year (Dist. Ex. 10 at pp. 1-2). The assistant superintendent for pupil personnel services responded by e-mail on June 3, 2009, and indicated that she would set up a CSE meeting to discuss the student's needs and they could revise the student's IEP if needed (id. at p. 1).

On June 15, 2009, the CSE subcommittee met to review the student's April 2009 IEP (Dist. 11 at p. 1). The June 2009 CSE subcommittee was attended by a CSE chairperson, the same school psychologist who had attended the student's three prior CSE meetings, the student's special education teacher, his regular education teacher, and the parents (id. at p. 4). After reviewing the student's present levels of performance and further discussion, particularly in the area of reading, the June 2009 CSE subcommittee recommended modifying the student's IEP by increasing the resource room daily sessions from 40 to 60 minutes (id. at pp. 1, 4). The June 2009 CSE subcommittee also recommended changing the frequency of the student's direct consultant teacher services from four days to one day in a six-day cycle and added indirect consultant teacher services of three 30-minute sessions per six-day cycle (id.). The hearing record reflects that the modifications to the student's IEP were made due to concerns that the

[4] The teacher report referenced in the April 2009 IEP is not included in the hearing record.

student would feel stigmatized by receiving direct instruction from the consultant teacher (Tr. pp. 146, 230, 326-27). The June 2009 IEP indicated that the student's special education program would be reviewed in the new school year after 60 days (Dist. Ex. 11 at p. 4).

The hearing record reflects that the student attended the district's Summer Stars program during summer 2009 (Tr. pp. 65, 386).

In a due process complaint notice dated June 16, 2009, the student's mother alleged, among other things, that the district improperly used the student's instructional time in the resource room to provide extended testing time (Dist. Ex. 1 at pp. 3, 5). The student's mother also alleged that the district inappropriately relied on a substitute teacher to provide the student's resource room instruction while the student's regular resource room teacher was on leave (id. at p. 5). The student's mother further contended that the student had not made progress and was "two grade levels behind where he need[ed] to be" (id.). For relief, the student's mother requested that the student receive an "intensive summer remediation" program in reading and "suggest[ed]" the Lindamood-Bell program (id. at pp. 3, 5).

An impartial hearing convened on September 17, 2009 and concluded on November 3, 2009, after four days of proceedings (Tr. pp. 1, 538). On the final day of the impartial hearing, the parents offered a new private evaluation of the student into evidence, which was dated October 23, 2009 (Parent Ex. S). The evaluation report showed that on October 5 and 7, 2009, the student underwent a private neuropsychological evaluation by a clinical neuropsychologist (id. at p. 1). The evaluator administered a battery of tests that measured the student's intellectual, academic, language, visual motor integration, memory and attention/organizational abilities (id. at pp. 1, 4-10). In accordance with her findings, the evaluator recommended a review of the student's special education services, including the frequency and intensity of his services and their coordination with his classroom instruction (id. at p. 3). She further recommended a structured, multisensory, sequential approach to reading that emphasizes phonemic awareness and the development of the alphabetic principle, such as the Orton-Gillingham and the Wilson programs (id.). The evaluator also suggested that the student be provided with modifications and accommodations that would focus on the quality and not the quantity of his work for both school work and homework (id.).

In a decision dated January 4, 2010, the impartial hearing officer rejected the parents' claim regarding the substitute resource room teacher,[5] noting that the substitute had been teaching in the classroom as a student teacher for the 2008-09 school year, and that the evidence showed that the instruction in the resource room remained consistent during the 2008-09 school year under both teachers (IHO Decision at p. 16). The impartial hearing officer also denied the parents' request for reimbursement for the private neuropsychological evaluation they had obtained in October 2009, because the claim was raised for the first time in their closing brief submitted to the impartial hearing officer and was not raised in their due process complaint notice (id. at p. 13).

[5] Although the student's mother signed the due process complaint notice, both of the parents attended the impartial the hearing and the impartial hearing officer referred to both parents in his decision (Tr. pp. 365, 540; IHO Decision at pp. 7-9).

With regard to the student's resource room services provided during the 2008-09 school year, the impartial hearing officer determined that the district inappropriately used time allotted for the student's resource room instruction to provide the student with extended time for test taking related to his other subjects (IHO Decision at p. 15). The impartial hearing officer found that the use of resource room time for extended time for test taking was "particularly inappropriate" because the student had "substantial deficits" in reading, as well as writing difficulties, and the student did not meet the ELA learning standards for third and fourth grade (id. at pp. 15-16). The impartial hearing officer described the hearing record as "mixed" with regard to the amount of the student's progress made during the 2008-09 school year, but noted that the results of a private assessment obtained by the parent in October 2009 showed that the student did not progress over a two year period and contained recommendations to increase the frequency and intensity of the student's services (id. at pp. 16-17). The impartial hearing officer also determined that the April 2008 IEP failed to include services or modifications to address the student's attention concerns (id. at pp. 17-18). The impartial hearing officer concluded that the student would have made substantially more progress if the district had provided all of the recommended resource room services to the student for the 2008-09 school year and that the district denied the student a free appropriate public education (FAPE) due to the inappropriate resource room services (id. at pp. 15, 18).

The impartial hearing officer further found that the student was not entitled to extended school year (ESY) services during the summer because the evidence did not show that the student would experience substantial regression over the summer or during vacations from school (IHO Decision at p. 19). However, the impartial hearing officer determined that due to the failure of the district to provide the full recommendation for resource room instruction during the 2008-09 school year, the student was entitled to compensatory education (id. at pp. 19-20). For relief the impartial hearing officer directed the district to provide compensatory resource room instruction from a Wilson trained reading instructor either from within the district or from a provider agreed to by the parties in the amount of 20 percent of the services recommended in the April 2008 IEP (id. at pp. 19-21).

The district appeals, contending that the impartial hearing officer erred in concluding that the district failed to offer the student a FAPE because the district demonstrated that the student's resource room services for the 2008-09 school year were properly implemented. The district also argues that if the instances in which the student's resource room time was used for the provision of the student's testing accommodations were improper, they did not constitute a substantial or material deprivation of resource room services. The district argues that the impartial hearing officer placed undue weight on the October 2009 private evaluation of the student obtained by the parents. According to the district, the impartial hearing officer also improperly criticized the lack of supports in the April 2008 IEP to address the student's attention deficits, and asserts that the formulation of the April 2008 IEP was not an issue raised by the parents in the impartial hearing. The district asserts that the evidence in the hearing record does not support the nature or the amount of the compensatory education award insofar as there is no justification for requiring reading instruction by a Wilson trained reading instructor and the evidence shows that only eight to ten percent of the student's resource room time was used for his testing accommodations. For relief, the district seeks a finding that the district provided a FAPE for the 2008-09 school year, annulment of the impartial hearing officer's order awarding

compensatory services or, in the alternative, a reduction in the amount of compensatory education services required for the student and elimination of the requirement for a Wilson trained reading instructor.

In their response to the petition for review,[6] the parents request that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2008-09 school year and order directing compensatory education be upheld. The parents also seek reconsideration of their request to be reimbursed for the October 2009 private evaluation.

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]).

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,

[6] The parents' educational advocate, who also represented them at the impartial hearing, did not submit an answer to the petition for review and instead submitted a document styled as a verified "memorandum of law" in response to the petition for review. Although not specifically a pleading, as a matter within my discretion, I will under the circumstances in this case treat the memorandum of law as an answer filed in accordance with State regulations (8 NYCRR 279.5). I encourage the educational advocate to review the practice procedures before the Office of State Review, the sample forms, and the description of the appeals process located at http://www.sro.nysed.gov.

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 New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

At the outset, a procedural matter must be addressed. I note that the parents did not cross-appeal from the impartial hearing officer's decision and set forth the reasons why they disagree with the impartial hearing officer's analysis (Answer ¶ 9; see 8 NYCRR 279.4[b]). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, those aspects of the impartial hearing officer's decision that were not decided in favor of the parents, including his decision to deny the parents' request for reimbursement for the privately obtained October 2009 neuropsychological evaluation, have become final and binding upon the parties and, therefore, I decline to consider them.

Turning next to the parties' dispute over the implementation of the resource room services during the 2008-09 school year as set forth in the student's April 2008 IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In this case, the district admits that no more than 20 minutes, or 1/2 of a resource room period, were used approximately once in a six day cycle to complete the student's extended test time accommodations (Pet. ¶¶ 79-80), which is supported by the evidence in the hearing record

(Tr. pp. 37, 111-12, 151-52, 209).[7] With regard to whether use of the student's resource room time for extended testing purposes constituted a material failure to implement the student's IEP, I note that the student's progress over the 2008-09 school year is well documented in the hearing record. A progress report dated June 21, 2009 showed the student's progress on his 2008-09 IEP annual goals (Parent Ex. D at pp. 2-4). Both the testimony of the student's resource room teacher and the June 2009 progress report reflected that by the end of the 2008-09 school year, the student had achieved all but one of his IEP annual goals and had "progressed satisfactorily" on the remaining goal which addressed the student's ability to state the main idea (Tr. pp. 217-18; Parent Ex. D at pp. 2-4). The student's resource room teacher testified that "typically main idea is a skill that usually has to be carried over because most of the students have difficulty with that" (Tr. p. 205). In addition to receiving seven out of eight ratings of "achieved," the report included teacher comments that indicated that the student had made significant and consistent progress on his annual goals (Parent Ex. D at pp. 2-4). For example, the resource room teacher reported that the student's performance on Preventing Academic Failure (PAF) spelling dictations, his ability to state and use rules for decoding, and his ability to use context to explain the meaning of unfamiliar words remained constant; that he showed "new growth consistently" in the reading group; that he had "realized the importance of looking back in the story to check his work;" and that the student's writing had "improved tremendously" during that school year (id. at pp. 2-3).[8]

According to the student's 2008-09 resource room teacher, each day she monitored the students' progress when reading and working on skills in class, and every Friday the students were also given a spelling dictation that showed the teacher how the students were doing on the words they had worked on each week (Tr. p. 210). She further testified that during fourth grade, the student's scores on the spelling dictations were between 90 and 100 percent and explained that these dictations consisted of vocabulary words or sight words that the student was required to spell and put into a sentence, which helped the resource room teacher determine whether the skills were being maintained and absorbed by him (Tr. p. 210). The resource room teacher testified that the student had made progress in fundamentals such as identifying the main idea and decoding, and was also much more confident, willing to read in the group with his peers, and answer questions relating to the story (Tr. p. 215). She described the student's progress in writing inasmuch as he initially lacked the confidence to start and finish an essay on his own, but by the end of the year, he was working well independently (Tr. p. 216). This progress was corroborated in an e-mail from the student's mother to the resource room teacher on October 2, 2008, in which she confirmed that student was progressing with his reading and that his effort and interest in reading had improved at home as well as at school (see Dist. Ex. 13).

---

[7] Although the district disagreed with the impartial hearing officer's analysis and conclusion that it was inappropriate to use the student's time in the resource room to provide extended testing time for other subjects, upon review of the hearing record, I find that the district did not establish that it was appropriate to use the student's instructional time in resource room to provide his testing accommodations.

[8] The hearing record reflects that the "Preventing Academic Failure" reading program is an Orton-Gillingham based, multisensory, direct instruction program that is diagnostic in nature (Tr. pp. 198, 200, 623). The program utilizes a weekly sight word list for spelling and definitions, exercise skill books, and leveled Merrill readers to reinforce skills (Tr. p. 200).

The parent testified that the student's scores "went down" between 6 and 40 percent in some categories on the February 2009 administration of the WRAT-4 when compared to his February 2008 WRAT-4 scores (Tr. p. 391). However, the hearing record reveals that the student scored within the average range on the sentence comprehension, spelling, and math computation subtests (Dist. Ex. 9 at p. 3). The student scored in the upper end of the low average range on the word reading subtest where he was required to decode words in isolation (id.). Similar to the overall reading composite standard score of 98 that the student received in 2008, the student scored within the average range with an overall reading composite standard score of 96 on the 2009 WRAT-4 (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 9 at p. 3).

The student's final report card for the 2008-09 school year showed that the student had maintained a minimum grade of "2" (partially meets standards) during the course of the school year in all academic areas (Parent Ex. R at p. 1). Specifically with regard to reading, the report card reflected that the student had earned a grade of "2" in decoding strategies and comprehension and a grade of "3" (meets standards) in fluency, vocabulary development, and reading engagement (id.).

The student's regular education classroom teacher testified that to assess a student's progress, in addition to test scores, she looked at what the student did each day and kept portfolios of students' work (Tr. p. 502). She testified that while engaged in different types of reading, the student was able to keep up with and read with the class for most of the year (Tr. p. 501). The student's teacher noted that the student participated in classroom discussions and was able to read out loud when asked (id.). During guided reading groups, the student was able to read and answer questions about books (id.). The classroom teacher indicated that during shared reading, the books that the student read were a mix of "third or fourth grade, sometimes a little bit higher" and that she supplied modification and support for the higher level books (id.).

The impartial hearing officer relied upon the private evaluation of the student obtained by the parents in October 2009 to conclude that the district failed to offer the student a FAPE during the 2008-09 school year (IHO Decision at p. 17; see Parent Ex. S).[9] However,, this evaluation was conducted after the commencement of the impartial hearing, it was disclosed to the district on the last day of the impartial hearing, the authoring neuropsychologist who prepared the evaluation report was unavailable to testify, and the evaluation report was written nearly 18 months after the CSE met to develop the April 2008 IEP (Tr. pp. 567-72; Parent Ex. S), therefore, I do not find it persuasive for purposes of determining the issues presented in this proceeding. Furthermore, there is no evidence in the hearing record that the parents disagreed with the district's evaluation of the student.

I also note that in reaching his conclusion that the district failed to offer the student a FAPE for the 2008-09 school year, the impartial hearing officer found additional fault with the

[9] Although the impartial hearing officer concluded that "substantially more progress would have been realized" by the student if he had received the additional 20 minutes of resource room services in each six day cycle, the impartial hearing officer did not provide any analysis or citation to the hearing record to support this conclusion (IHO Decision at p. 18). After reviewing the totality of the circumstances in this case, I find this conclusion is not supported by the evidence in the hearing record.

district for failing to include services in the April 2008 IEP that were subsequently added to the student's 2009-10 IEP (IHO Decision at pp. 17-18). Pursuant to the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see Application of the Bd. of Educ., Appeal No. 09-054; Application of the Dep't of Educ., Appeal No. 08-131; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). In this case, the parents did not challenge the adequacy of the April 2008 IEP in the due process complaint notice (see Dist. Ex. 1). Moreover, the student's mother testified during the impartial hearing that she was challenging how the April 2008 IEP had been put into practice (Tr. p. 593).

In view of the forgoing evidence regarding the student's progress during the 2008-09 school year in achieving nearly all of the goals in his April 2008 IEP, as well as the student's successes as shown through achievement testing, grades, and classroom performance; I find that although the student continued to struggle with his deficits in reading and writing, the district's occasional use of the student's resource room period for testing accommodations did not constitute a material or substantial failure to implement the student's April 2008 IEP. Accordingly, I find that the hearing record does not support the impartial hearing officer's conclusion that the district denied the student a FAPE for the 2008-09 school year and, therefore, that portion of his decision as well as the resulting award of compensatory education services must be annulled.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated January 4, 2010, which: (1) determined that the district's failure to implement all of the resource room services set forth on the student's April 2008 IEP constituted a denial of a FAPE, and (2) awarded compensatory education services to the student, is annulled.

Dated: **Albany, New York**
March 31, 2010

PAUL F. KELLY
STATE REVIEW OFFICER