



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-056

Application of the [REDACTED]  
[REDACTED] for review of a  
determination of a hearing officer relating to the provision of  
educational services to a student with a disability

### Appearances:

Nathaniel J. Kuzma, Esq., Assistant Legal Counsel, attorney for petitioner

Watson Bennett Colligan & Schechter, LLP, attorneys for respondent, Carolyn Nugent  
Gorczynski, Esq. and William J. Casey, 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. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Preschool Special Education (CPSE) for respondent's (the parent's) daughter for the 2010-11 school year commenced in an untimely manner and failed to provide a free educational setting for provision of the recommended program and services; that its Committee on Special Education (CSE) improperly declassified the student for the 2011-12 school year; and that the educational program and services recommended by its CSE for the student for the 2012-13 school years were not appropriate. The appeal must be sustained in part.

### 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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[i]).

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). 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

At the time of the impartial hearing, the student was six years old and was classified as a student with a learning disability who was attending a charter school in the district (Dist. Ex. 33). In January 2011, the student was referred to the district's CPSE (Parent Ex. S). After the completion of multiple evaluations, which included a speech/language evaluation (Dist. Ex. 19),

a psychological evaluation (Dist. Ex. 24), an education evaluation (Dist. Ex. 18), a social history (Dist. Ex. 20), an occupational therapy (OT) evaluation (Dist. Ex. 23), and a physical therapy evaluation (Dist. Ex. 22), the CPSE convened on March 14, 2011 and found the student eligible for special education itinerant teacher (SEIT) services and OT for the remainder of the 2010-11 extended school year (Dist. Ex. 15).

The psychological evaluation conducted on January 28, 2011 determined the student's intellectual ability in the average range, but reported low scores in all domains on the Vineland-II Adaptive Behavior Scales, Teacher Rating Form (Vineland-II TRF) (Dist. Ex. 24). The student obtained a full-scale cognitive score of 94 on the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III), which fell in the average range (id. at p. 2). The student's verbal composite score of 98 fell within the average range, while her performance composite score of 86 fell in the low average range (id.). The student's scores on the Vineland-II TRF reflected low adaptive levels for the student for communication, daily living skills, socialization, and motor skills, and the student's adaptive behavior composite score of 66 reflected an overall low adaptive level (id. at p. 3). The examiner noted the student's average intellectual ability, demonstrated deficits in attention, and adaptive functioning in the low range, and concluded that the student met the guidelines for classification as a Preschool Student with a Disability based upon her adaptive functioning scores (id. at p. 4).

The OT evaluation conducted on February 7, 2011 included clinical observations of the student and tested the student's fine motor skills, sensorimotor processing, and visual motor skills (Dist. Ex. 23). The student's overall fine motor development was reported to be mildly delayed based on her scores on the fine motor component of the Peabody Development Motor Scales-2 (PDMS-2) (id. at p. 3). The student's scores on the Sensory Profile long form reflected a definite difference from typical performance in 14 of the 22 sections on the sensory profiles, as well as a probable difference from typical performance in 4 of the 22 sections (id. at pp. 3-4). The evaluator noted that the student's behaviors were reflective of sensory processing delays in the area of sensory modulation and the evaluator also noted sensory-based motor concerns (id. at p. 4). The evaluator reported that the student's sensory processing delays contributed to her inability to make consistent progress in her learning environment (id. at p. 5). The evaluator found that the student suffered from severe delays in sensory processing and would benefit from OT services (id. at p. 7).

For the 2010-11 school year, the student was attending a nonpublic parochial preschool through February 2011, when she was moved to a private daycare (Tr. pp. 660, 838-40).

On May 9, 2011, the student was referred by the CPSE to the CSE (Parent Ex. O). The parent's consent to reevaluate the student was requested on June 24, 2011 and consent was granted in July 2011 (Dist. Exs. 13, 30). Reevaluations were conducted in September 2011, which included a psycho-educational evaluation and a speech/language evaluation (Dist. Exs. 40, 41). The district provided the student with OT services in the month of September 2011 (Tr. pp. 92-94).

For the 2011-12 school year, the student attended kindergarten at a nonpublic parochial school (Tr. pp. 691-92).

According to the September 19, 2011 Psycho-Educational Report, the student's cognitive abilities, as reflected by her scores on the verbal knowledge and nonverbal fluid reasoning subtests of the Stanford-Binet Intelligence Scales – Fifth Edition (SB-V), were in the average range based on her abbreviated intelligence quotient of 109 (Dist. Ex. 40, at pp. 2-3). The Woodcock Johnson Tests of Achievement III was administered and the student's scores on the Brief Reading test were in the low average range, and her scores on the Brief Writing test were in the average range (id. at p. 3). The student's visual motor integration skills were tested with the Bender Gestalt-II test and her score of 89 was in the low average range (id. at p. 4). The student's school readiness skills were tested with the Bracken Basic Concept Scale – Third Edition and her composite score of 89 was in the average range (id.). The student's behaviors were assessed with the Behavior Assessment Scale for Children, Teacher Report Form, Preschool (BASC) and the student's scores were in either the average or high range (id.). The student's adaptive functioning was tested with the Adaptive Behavior Assessment System, Second Edition (ABAS-II) and her general adaptive composite score of 90 placed her in the average range (id. at p. 5). The evaluator's recommendation was that the student was not in need of special education services based upon age appropriate academic and behavior skills in the classroom setting (id. at p. 6).

According to the September 22, 2011 Speech/Language Evaluation Report, the student's overall speech and language skills were reported to be within normal limits (Dist. Ex. 41). The report noted that the student could benefit from prompting and chunking information to assist with focused attention to information presented orally (id. at p. 1). The report noted no academic implications and did not recommend speech language services for the student (id. at p. 2).

On September 30, 2011, a CSE meeting was convened and determined that the student did not qualify as a student with a disability (Dist. Ex. 16). The evaluations considered by the CSE were the September 2011 psychological and speech/language evaluations (Dist. Exs. 40, 41) and the February 2011 OT evaluation (Dist. Ex. 23).

On January 10, 2012, the parent filed a due process complaint notice asserting that the district was untimely in its implementation of the student's preschool services and also that it improperly declassified her on September 30, 2011 (Dist. Ex. 1). Following a resolution session, independent educational evaluations (IEEs) were conducted, which included a psychological evaluation, and an OT evaluation (Dist. Exs. 25, 26). The parent obtained a central auditory processing evaluation (CAP) (Dist. Ex. 42). The parent obtained a speech/language evaluation that was recommended following the CAP (Dist. Ex. 43).

On April 26, 2012, the parent filed an amended due process complaint notice (Dist. Ex. 4).

On May 24, 2012, a CSE meeting was held, but the CSE determined that it needed additional information and the parent consented to additional testing (Dist. Ex. 37).

On May 31, 2012, the district's psychologist evaluated the student (Dist. Ex. 17). He administered the Woodcock Johnson Tests of Achievement (WJ-III) and found that the student's

test results were consistent with academic levels at an early kindergarten level (id. at p. 5). He noted delayed rates of academic achievement and significant emotional and behavioral issues which were interfering with the student's school functioning (id. at p. 6). He recommended that the student be classified as a student with a learning disability (id. at p. 7).

On June 12, 2012, the district convened a CSE meeting and classified the student as a student with a learning disability (Dist. Ex. 33). The CSE recommended consultant teacher services and OT (id.). At the meeting, the parent informed the district for the first time that she would be placing the student at a charter school for the 2012-13 school year.

On June 27, 2012, the parent filed a second amended due process complaint notice (Dist. Ex. 6).

For the 2012-13 school year, the student attended a charter school in the district and repeated her kindergarten year (Tr. p. 333; Dist. Ex. 49).

### **A. Due Process Complaint Notice**

By due process complaint notice dated January 10, 2012 (Dist. Ex. 1), and subsequently amended on April 26, 2012 (Dist. Ex. 4) and June 27, 2012 (Dist. Ex. 6) with consent of the district, the parent requested an impartial hearing asserting that during the 2010-11 school year, the student was not appropriately referred and evaluated and did not receive services within the time frames required by law; that during the 2011-12 school year, the student was improperly declassified; and that during the 2012-13 school year the student was denied a FAPE due to multiple procedural and substantive violations (Dist. Ex. 6 at pp. 2-14). The alleged violations relating to the 2012-13 school year include a failure of the CSE to consider all relevant evaluative information, a failure to appropriately state the student's present levels of performance, a failure to develop appropriate goals and objectives to address the student's specific delays and needs, and a failure to recommend appropriate programming and services tailored to the student's needs. (id. at pp. 9-14).

The parent requested that the student's IEP be amended to provide: 1) direct consultant teacher support services daily; 2) speech language services twice a week; 3) occupational therapy three times a week and with additional time for staff training and support; 4) 1:1 aide daily; 5) counseling services; 6) provision for a behavior intervention plan (BIP); 7) a sensory diet; and 8) properly drafted present levels of performance, goals and objectives and supplemental aids and accommodations (Dist. Ex. 6 at pp. 15-16). In addition, the parent sought compensatory educational services and reimbursement for day care for the student during summer 2011 (id. at p. 16).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on September 11, 2012 and was completed on September 26, 2012 after five hearing dates (Tr. pp. 1-1190). By decision dated March 6, 2013, the IHO found that the district had failed to timely evaluate and provide services to the student for the

2010-11 school year, that the district improperly declassified the student for the 2011-12 school year and that the district failed to provide a FAPE to the student for the 2012-13 school year.

Regarding the 2010-11 school year, the IHO recognized that some delay was attributable to the fact that the district accommodated the parent's choice of evaluator and that six separate evaluations were conducted by an outside agency, but found that the district was late in implementing the student's program (IHO Decision at pp. 37-39). The IHO noted that the parent signed consent forms for the student's evaluation on January 7, 2011, that evaluative materials were provided to the district on February 25, 2011, a CPSE meeting was held on March 14, 2011, and the student's IEP was implemented on May 9, 2011 (*id.* at pp. 37-38). The IHO held that implementation was approximately one month late and awarded "15 days of make-up services" (*id.* at p. 39). The IHO also awarded 75% reimbursement of the student's summer 2011 daycare costs after finding that the district failed to provide a placement (*id.* at p. 40). The IHO found that the private daycare constituted a unilateral placement that the district was aware of, despite the lack of notice from the parent, and that equitable considerations warranted partial reimbursement of the total daycare costs for summer 2011 (*id.* at pp. 40-41).

Regarding the 2011-12 school year, the IHO found that the district impeded the student's right to a FAPE because it failed to recognize that additional evaluative data was needed with respect to its classification determination, and it also failed to inform the parent that she could request an assessment to determine if the student continued to be a child with a disability (IHO Decision at p. 48). The IHO awarded unspecified additional services to be determined between the parties at a future CSE meeting to be held after additional evaluative testing is performed (*id.* at p. 49).

Regarding the 2012-13 school year, the IHO found that the student's IEP failed to provide for sufficient consultant teacher services and that this denied the student a FAPE. The IHO found that while the lack of speech and language services did not deny the student a FAPE, retesting was necessary and was directed by the IHO (IHO Decision at p. 51). The IHO also directed the district to determine if an aide and sensory diet would help the student (*id.* at p. 52).

For relief, the IHO ordered the district to provide the following: 1) place the student in a full time co-teaching program with consultant teacher services; 2) convene a CSE meeting to determine appropriate speech language testing, update the present levels of performance, goals and objectives and testing accommodations, discuss provision of a sensory diet, initiate a functional behavioral assessment, consider compensatory services for a portion of 2010-11 school year, the full 2011-12 school year, and a portion of the 2012-13 school year; 3) convene a second CSE meeting to consider results of the speech language testing and determine a plan to implement compensatory services; 4) convene a third CSE meeting to review the compensatory education services and designate a subcommittee to meet at least once every six months to monitor the provision of the compensatory education services; and 5) reimbursement for 75% of the parent's daycare costs during summer 2011 (IHO Decision at pp. 53-54).

#### **IV. Appeal for State-Level Review**

The district appeals, asserting that the IHO erred in finding that the parent was entitled to compensatory services for a delay in implementing the student's 2010-11 school year's program, as well as reimbursement for summer 2011 daycare costs for failure of the district to provide a free educational placement for the student's extended year services. Regarding the 2011-12 school year, the district asserts that the IHO erred in finding that the district failed to classify the student and by awarding compensatory educational services. Regarding the 2012-13 school year, the district argues that the IHO erred in finding that the district failed to provide the student with a FAPE and awarding compensatory educational services.

Specifically with reference to the 2010-11 school year, the district asserts that the IHO erred in finding that the district was late in implementing the student's program, and in concluding that the student was properly awarded 15 days of "make up services." The district also argues that the IHO erred in awarding the parent reimbursement for a portion of summer 2011 private daycare costs on multiple grounds, including: the lack of evidence in the record relating to notice to the district that the parent would seek such reimbursement, and the lack of proof as to the appropriateness and cost of the placement.

Regarding the 2011-12 school year, the district asserts that the IHO erred in finding that the September 2011 CSE failed to include all appropriate members, that the CSE failed to consider adequate evaluative material, that the parent was not informed of her right to request another evaluation, and also by improperly considering the May 31, 2012 evaluation of the district psychologist in support of his determination that the student was improperly declassified. The district argues that the student was appropriately determined not eligible for special education services and therefore the IHO's award of compensatory services was in error.

Regarding the 2012-13 school year, the district alleges that the district offered the student a FAPE and offered appropriate consultant teacher services. The district argues that the parent had not requested the relief awarded by the IHO of placement in a full time, co-teaching program, and objects to the additional consultant teacher services awarded. The district also objects to the additional relief awarded by the IHO, arguing that it was either not requested by the parent or not supported in the record: a speech and language evaluation, and provision of a sensory diet. The district also argues that the IHO failed to consider the equities in awarding relief, specifically that the parent had not advised the district that she was sending the student to nonpublic parochial school until the June 12, 2012 CSE meeting, that the parent failed to work with the district regarding the June 12, 2012 IEP, and that the parent refused to attend a CSE meeting in July 2012.

The parent provides a detailed statement of facts, and answers the petition, denying that the IHO erred as alleged by the district. The parent also attaches, as Exhibit A to her Answer, a letter from the United States Department of Education's Office of Special Education Programs (OSEP), relating to the proper purpose and discussion at a resolution session.

In reply, the district argues that additional evidence submitted with the parent's answer is not properly considered because it is not necessary to issue to a decision.

## V. Applicable Standards

Two purposes of the 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., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 CFR 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], *aff'd*, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4 [d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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 R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Procedural Matter**

First, I must address a procedural matter. The parent attached additional evidence to her answer, namely a letter from the United States Department of Education's Office of Special

Education Programs (OSEP) requested by the parent's counsel on an issue relating to the proper purpose and discussion at a resolution session. In its reply, the district objects to the additional evidence on the ground that it is not necessary in order to render a decision in this matter. Further, the district argues that the facts discussed in the letter were only presented by the parent's counsel and therefore the letter is prejudicial to the district.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I find that the additional evidence submitted by the parent is not necessary in order to render a decision and therefore is not properly considered on this appeal.

## **B. 2010-11 School Year**

Relating to the 2010-11 school year, the district appeals the relief awarded by the IHO, specifically disputing that any compensatory or equitable educational services or private daycare reimbursement is appropriate under the applicable law or the circumstances of this case. The IHO awarded "15 days of make up services" in addition to reimbursement to the parent of 75% of the cost of summer 2011 private daycare services, up to \$405 of the total \$540 cost that was referenced by the parent in her testimony (IHO Decision pp. 37-41). The basis for the relief was that the recommended services commenced 15 days late for the student, the parent was informed that SEIT services could only be received in an educational setting, such as the daycare where she placed the student, and the district otherwise never offered a free educational placement to the student for the extended school year.

### **1. Delay in Implementation of Services**

The district concedes that the CPSE recommendation to the Board of Education occurred 39 school days after the parental consent to evaluate the student, which constitutes a procedural violation. See 8 NYCRR 200.16(e)(1) [2012]; Dist. Exs. 12, 44. The parent returned the consent form to the District on January 10, 2011 (Dist. Ex. 12, Tr. p. 664). Evaluations were then scheduled and conducted by the Cantalician Center (Dist. Exs. 18, 19, 20, 22, 23, 24). A CPSE meeting was convened on March 14, 2011 and the student was classified as a preschool student with a disability (Dist. Ex. 15). The recommendation was required to be within 30 school days of the parental consent. See 8 NYCRR 200.16(e)(1) [2012]. The student's SEIT and OT services were planned to begin on April 18, 2011 but did not in fact commence until the end of April or beginning of May 2011 (Dist. Ex. 15; Tr. pp. 495-96, 811). The provider testified that she was aware of this delay, which was in part due to a holiday, and made up all services that the student would have received going back to April 18, 2011 (Tr. pp. 495-96, 811-12). Based upon the foregoing, I find that this delay in implementation of the services did not deprive the student

of educational benefit under all the circumstances. I note that the delay was occasioned at least in part due to a holiday, and that the services missed were promptly voluntarily provided following the initial delay. I also note the overall length of the delay in combination with these other factors. I find that the IHO erred in awarding 15 days of “makeup services” to the student under all the circumstances.

## **2. Summer 2011 Daycare Reimbursement**

The IHO applied a tuition reimbursement analysis to the parent’s request for reimbursement of summer 2011 daycare expenses. Notably, the parent did not seek the reimbursement under a theory of tuition reimbursement and did not set forth proof of a denial of FAPE or the appropriateness of the placement at the hearing. There was also no prior notice to the district regarding a unilateral placement and request for tuition reimbursement by the parent. The first time that the district was on notice that the parent was seeking reimbursement of summer 2011 daycare expenses was in January 2012 when the first due process complaint notice was served (Dist. Ex. 1, Tr. p. 870). Based upon the parent’s lack of notice to the district that she would be seeking reimbursement under any theory of recovery until after the daycare expenses were incurred, I find that reimbursement to the parent of these charges is not appropriate based upon equitable grounds. In addition, the parent was in agreement with the services provided and there is no evidence that FAPE was denied to the student based upon the services provided. There was also no evidence of the appropriateness of the private daycare placement.

The parent asserted in her due process complaint notice that she did not receive information regarding her due process notice rights from the district (Dist. Ex. 6). However, at the impartial hearing, the parent testified that she believed she had in fact received procedural safeguards information from the district when she had initially referred the student to the CPSE (Tr. p. 851). The district’s CPSE Chairperson testified at the impartial hearing that it is her office’s routine practice to mail a packet of information to parents, including the procedural safeguards notice (Tr. pp. 481-82). The IHO relied upon testimony of the parent that she had not received notice of due process rights that the district was required to provide in finding that the parent was entitled to reimbursement (IHO Decision at p. 41). In fact, although the parent testified that she did not receive a procedural safeguards notice at the March 2011 CPSE meeting, she acknowledged that she believed she had received such information prior to that time from the CPSE (Tr. p. 851), which was consistent with the practice of the district, as testified to by the CPSE Chairperson (Tr. pp. 481-82).

The parent testified that she was required to sign up her daughter for daycare in order to obtain the SEIT services because the district had informed her that the SEIT services could not be provided at home (Tr. pp. 668-72). The district’s CPSE Chairperson testified that SEIT services must take place in the school setting, although related services such as OT can take place anywhere (Tr. p. 499). The student received OT at home and SEIT in the daycare setting during summer 2011 (Tr. p. 673). It appears that there was misinformation provided to the parent regarding the ability for SEIT services to be provided in settings other than a school setting (Tr. p. 499). However, I find that the parent’s prior receipt of information regarding procedural safeguards put her on notice of her rights (Tr. p. 851).

I note that no daycare bills or proof of charges incurred were submitted into evidence and the total cost of the daycare services was unclear considering all of the parent's testimony. The student was to receive SEIT services twice a week and she received these services in the daycare setting (Tr. pp. 673, 835-36). The parent testified that the student received SEIT services twice a week and OT three times a week commencing on May 9, 2011 (Tr. p. 673). The parent testified that the student attended daycare twice a week (Tr. p. 842), and also that she attended daycare three times a week (Tr. p. 677). The IHO's decision reflects an award of 75% of the cost of daycare that would have been incurred if the student had attended daycare three times a week. These inconsistencies in the parent's testimony, combined with the absence of relevant documentary evidence in the record concerning the costs of daycare, also preclude reimbursement to the parent.

For all the foregoing reasons, I find that the IHO erred in awarding reimbursement to the parent for daycare costs for summer 2011.

### **C. 2011-12 School Year**

The IHO found that the student's declassification was inappropriate, as determined at the September 30, 2011 CSE meeting (IHO Decision at pp. 41-49). The basis for the IHO's decision was because 1) the district had notice that the student was to be attending parochial school; 2) the proper participants were not at the CSE meeting on September 30, 2011, specifically a special education teacher or occupational therapist who had worked with the student were missing; 3) the evaluative information before the CSE was inadequate, at least in part due to the failure of the CSE to consider a recent SEIT progress report. The IHO noted that the CSE failed to recognize that additional evaluative information was needed and also failed to advise the parent of her right to an evaluation of the student to determine if the student continued to have a disability. The IHO held that the student was entitled to additional services, to be determined after additional testing.

The district appeals and disputes the IHO's findings, arguing that CSE subcommittee was properly composed, evaluative information before the CSE was updated and was appropriate, and that the district's September 30, 2011 decision that the student was not entitled to services was appropriate. The parent concurs with the IHO's decision.

As set forth in more detail below, I concur with the IHO's finding that the district improperly declassified the student based upon the fact that additional evaluative information should have been considered to determine if the student continued to be in need of services as a student with a disability (IHO Decision at p. 48).

#### **1. CSE Composition**

I find that the IHO erred in finding that the CSE subcommittee on September 30, 2011 was not comprised of all required participants (8 NYCRR 200.3[c]). I concur with the district that the CSE subcommittee on September 30, 2011 was validly composed (Dist. Ex. 16, Parent Ex. H). The required members, comprised of the parent, present regular education teacher of the student, present special education teacher of the student, district representative and school

psychologist who had evaluated the student in the weeks prior to the meeting, were all present (see id.). The IHO acknowledged that the district had complied with “the requirements surrounding mandatory members of an IEP team” but nevertheless found that the composition of the CSE subcommittee was improper (IHO Decision at p. 45). I concur with the district that the IHO was creating a legal standard beyond what the law requires and therefore his decision on this issue was in error. I concur with his finding however that the members of the CSE subcommittee failed to consider sufficient evaluative information concerning the student, as detailed below.

## 2. Sufficiency of Evaluative Information

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 CFR 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 CFR 300.303[b][1]-[2]). A reevaluation in all areas related to the student's suspected disability is required prior to declassifying a student (8 NYCRR §§200.2[b][8][ii], 200.4[c][3], 200.4[b][6][vii]).

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]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). 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 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The September 2011 CSE relied upon an updated Psycho-Educational Evaluation and Speech/Language Evaluation Report (Dist. Ex. 40, 41), along with a prior Occupational Therapy Evaluation (Dist. Ex. 23). Contrary to the assertions of the district, the information considered by the CSE did include information that the student's academic performance was impacted by her disability. Specifically, the Occupational Therapy Evaluation dated February 7, 2011 was considered by the CSE and it concluded, regarding sensorimotor processing, that the student's “sensory processing delays are contributing or creating barriers to her ability to engage

in and make consistent progress in her structured learning environment” (Dist. Ex. 23 at p. 5). The evaluator’s recommendation was that the student “would benefit from occupational therapy services due to severe delays in sensory processing/modulation” (*id.* at p. 7).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (*J.D. v. Pawlett Sch. Dist.*, 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., *Mr. I. v. Maine Sch. Adm. in Dist. No. 55*, 480 F.3d 1, 11 [1st Cir. 2007]; *J.D.*, 224 F.3d at 66-67; *Johnson v. Metro Davidson County Sch. Sys.*, 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (*R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 944 [9th Cir. 2007]; see, e.g., *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; *Greenland Sch. Dist. v. Amy N.*, 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (*Corchado v. Bd. of Educ. Rochester City Sch. Dist.*, 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; *Application of the Dep't of Educ.*, Appeal No. 08-042; *Application of a Student Suspected of Having a Disability*, Appeal No. 08-023; *Application of a Child Suspected of Having a Disability*, Appeal No. 07-086; see *Muller v. E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 103-04 [2d Cir. 1998]; *N.C. v. Bedford Cent. Sch. Dist.*, 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], *aff'd* 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; *New Paltz*, 307 F. Supp. 2d at 399). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 CFR 300.101[c]; 8 NYCRR 200.4[c][5]; see *Corchado*, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (*N.C.*, 473 F. Supp. 2d at 546). Moreover, as noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (*Letter to Clarke*, 48 IDELR 77).

Based upon the information considered by the September 30, 2011 CSE in the student's February 7, 2011 Occupational Therapy Evaluation, the district failed to conduct a required reevaluation of the student prior to its decision to declassify her (8 NYCRR §§200.2[b][8][ii], 200.4[c][3], 200.4[b][6][vii]). The evaluation, which referenced severe delays in sensory processing that impacted the student's progress in the classroom, indicated a need for an OT reevaluation prior to declassification of the student (see *id.*). If the district determined that additional data was not needed, despite the information in the prior OT evaluation and the parent's expressed concerns at the meeting regarding the student's need for OT (Tr. pp. 701-03), the district was required to notify the parent of that determination, the reasons for it, and that the parent had the right to request an assessment to determine if the student continued to be a student with a disability (8 NYCRR §200.4[b][5][iv]), all of which did not occur at the meeting according to the parent's unchallenged testimony (Tr. p. 707).

Additionally, the information considered by the CSE on September 30, 2011 did not include the majority of the evaluations performed when the student was first referred to the CPSE earlier in the year (Dist. Exs. 18, 19, 20, 22, 23, 24). Those numerous evaluations were the basis for the CPSE finding that the student was entitled to extended school year services (Dist. Ex. 15). The fact that this student had been classified by the CPSE in March 2011, found appropriate for extended school year services, and had only received those services for less than five months prior to the September 2011 CSE meeting, made it incumbent upon the CSE to consult with the student's prior service providers or review the evaluative information considered by the CPSE prior to finalizing a decision to declassify the student based upon the facts of this case.

However, the student's prior two service providers did not attend the CSE meeting and were not consulted prior to the CSE meeting (Tr. pp. 628-29, 815). While I do not find that the two providers were required to be present at the September 30, 2011 meeting, the CSE's failure to review information from or consult with the student's only two service providers since being classified was significant based upon the circumstances of this case (Dist. Ex. 16; Parent Exs. Z, AA). Those providers testified at the impartial hearing and affirmed their beliefs that the student should have qualified as a student with a disability in September 2011 based upon their work with the student just prior to that time (Tr. pp. 628-29, 815).

I also note the parent's argument that if the meeting had been held prior to commencement of the school year, the CSE would have been required to include at least one of the student's preschool service providers. However, due to the timing of the CSE meeting in September, the meeting participants included the student's present kindergarten teacher, who had only taught the student for a matter of weeks (Dist. Ex. 16).

I do concur with the district that the student's classification was classified as a student with a disability for the 2012-13 school has no relevance to the analysis of whether the student was appropriately declassified for the 2011-12 school year. Accordingly, I decline to consider the report of the district's psychologist's evaluation that was conducted subsequent to the September 30, 2011 meeting (Dist. Ex. 17).

In summary, I concur with the IHO's determination that the CSE was required to consider appropriate evaluative information prior to making the final decision to declassify the student, and failed to do so for the reasons set forth herein. The student's right to a FAPE was impeded by these failures. Based upon the foregoing, I find that the CSE improperly declassified the student on September 30, 2011 and the student is entitled to compensatory educational services related to the 2011-12 school year. I therefore concur with the IHO's Decision to award compensatory educational services to the student relating to the 2011-12 school year for the reasons set forth above.

### **3. Compensatory Educational Services**

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 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];<sup>1</sup> 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see 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, SROs 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 an SRO 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

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<sup>1</sup> 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]).

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).

Regarding the relief to be awarded, I modify the IHO's decision. I note that the district provided the student with some occupational therapy services for the month of September 2011 prior to the CSE meeting. I find that the student is entitled to compensatory services and I find that an appropriate award is related to the hours of SEIT and OT that the student would have received under her preschool IEP, the IEP most recently in effect prior to her declassification, namely one hour of individual SEIT services twice a week and thirty minutes of OT three times a week, for the 36 week school year, as well as 6 weeks of extended school year services at the same frequency. I find that these hours of recommended services provide an equitable framework for determining the type and extent of services that would presently benefit the student and compensate her for the lack of services during the 2011-12 school year. Therefore, I order that the student is entitled to compensatory education services in an amount to be determined at the student's next CSE meeting or at a CSE meeting to be convened in the next 60 days from the date of this order, whichever is sooner. The CSE is directed to take into account the above considerations. Next, the CSE is directed to consider the student's present needs and the best manner in which to compensate the student for the fact that she did not receive special education services during the 2011-12 school year. The parties are encouraged to discuss their positions and provide evaluative or evidentiary support at the CSE meeting.

#### **D. 2012-13 School Year**

On June 12, 2012, the CSE convened and determined that the student was eligible for special education programs and services as a student with a learning disability and the IEP provided to the parent following that meeting recommended that the student receive consultant teacher services for an hour and a half per day, five days per week, along with individual occupational therapy three times a week for 30 minutes (Dist. Ex. 33; Tr. p. 113).

The IHO determined that the amount of consultant teacher services offered to the student resulted in the denial of FAPE to the student (IHO Decision at pp. 51-53). He ordered the CSE to reconvene, to offer the student a program that included a full time co-teaching program with consultant teacher services, in addition to granting other relief as set forth herein (*id.*).

The district appeals the IHO's decision that it denied the student a FAPE based upon the recommended one and one half hours of consultant teacher services per day. The district also appeals the IHO's order placing the student into a full time co-teaching program, ordering the district to administer a speech and language evaluation after failing to address the appropriateness of the district's decision that speech and language therapy was not required to be provided, and requiring the district to provide the student with a sensory diet. The district disputes the relief awarded, which includes compensatory services for the extended school year.

## 1. Consultant Teacher Services

The IHO found that there was no evidence as to the extent of the student's need for consultant teacher services other than the district psychologist who opined that she should receive as many minutes as possible per school day (IHO Decision at p. 51; Tr. p. 181). The IHO ordered that the student be placed in a full time co-teaching program with consultant teacher services within 20 days of his order (IHO Decision at p. 53).

The district appeals and asserts that the amount of consultant teaching in the proposed IEP was appropriate and that the parent consented to the IEP (Dist. Ex. 32). The parent asserts that the IHO properly found that the consultant teacher services failed to offer the student a FAPE and that she only consented to services commencing so that the student would at least receive some services. She also, through counsel, simultaneously filed an Amended Due Process Complaint Notice, objecting to the alleged inappropriate consultant teacher services (Dist. Ex. 6).

I concur with the IHO's determination that the amount of consultant teacher services listed on the IEP developed as a result of the June 12, 2012 CSE meeting failed to have an adequate basis in the record as an amount of services tailored to the student's individual needs (IHO Decision at p. 51). The testimony of the district psychologist who attended the June 12, 2012 CSE meeting clarified that everyone present at the meeting was in agreement that the student should receive as many minutes of consultant teacher services per day as the newly formed charter school's schedule would allow (Tr. pp. 181, 212-17). This is consistent with the parent's testimony that she was in agreement with the student receiving the maximum amount of consultant teacher services (Tr. p. 909). The exact amount of appropriate minutes for consultant teacher services was unknown since the parent advised at the June 12, 2012 meeting for the first time that the student would be attending that school (Tr. pp. 216-17, 899). The parent advises that she was unsure if the student would attend there until shortly before that time, in part because it was unknown if the school would be open by the start of the school year (Tr. pp. 899-903). The testimony of the district psychologist notes his belief that a "generic" amount of consultant teacher services may have been listed on the IEP initially, with the thought that the amount would be amended upon discussion with the charter school (Tr. p. 217). The district psychologist opined that a full day of consultant teacher services would likely be in the range of four and one half hours per day normally in a district school (Tr. pp. 212, 216-17). While it appears from testimony at the impartial hearing that the IEP forwarded to the parent immediately following the June 12, 2012 CSE meeting was in draft form as to the amount of consultant teacher services and that the amount may have changed at an anticipated upcoming CSE meeting in July, which was not agreed to by the parent and therefore never occurred, the written documentation forwarded to the parent with the IEP did not so indicate (Dist. Exs. 31, 33; Tr. pp. 113, 122, 216-17, 278). The parent received the IEP and then agreed to the services commencing as indicated in the IEP, while also filing an Amended Due Process Complaint Notice (Dist. Exs. 6, 32).

I also concur with the IHO's determination that the amount of consultant teacher services on the student's IEP was a significant part of the services needed to address the student's individual needs based on all the evidence in the record (IHO Decision at p. 51). Based upon this, I concur with the IHO and find that the amount of consultant teacher services offered to the

student in the June 12, 2012 IEP failed to offer the student a FAPE. As a result, I find that the student is entitled to compensatory educational services on this basis, however I modify the award of the IHO as set forth herein.

## **2. Speech and Language Therapy**

The district asserts in its petition that the IHO failed to address the issue of speech and language therapy. The district asserts that it was not required to provide the student with speech and language therapy services based upon the information before the CSE, and also that the IHO's relief ordering the district to have the student evaluated in speech and language therapy was therefore inappropriate.

I have reviewed the record and note that based upon the information before the CSE, the student was not denied a FAPE by the failure of the CSE to recommend speech and language services. Notably, a March 8, 2012 Auditory Processing Evaluation recommended further testing of the student's processing skills, as well as receptive and expressive language (Dist. Ex. 42 at p. 2). An April 6, 2012 Speech-Language Evaluation Report was provided to the district by the parent at the June 12, 2012 CSE meeting (Dist. Ex. 43). The evaluator testified that this report was prepared for the purpose of assessing the student for a private summer speech program (Tr. pp. 1088, 1110-111, 1116, 1131). It reported that, based upon the student's scores on the Phonological Awareness Test (PAT), the student's phonological skills were within normal limits (id. at p. 3). The student's scores on the Comprehensive Test of Phonological Processing (CTOPP) were within normal limits for phonological awareness, phonological memory and rapid naming (id.). The Spadafore Diagnostic Reading Test (SDRT) was administered and the student's scores were within normal limits for word decoding but were below grade level expectations in silent reading comprehension and listening comprehension (id. at p. 4). The evaluator found the student's expressive language skills to be within normal limits although formal testing was not performed (id. at p. 5). The student's pragmatic language skills were found to be mildly delayed, while her speech production, voice, fluency were within normal limits (id.). The report concluded that the student's receptive language skills were moderately impaired and her pragmatic language skills were mildly impaired (id. at p. 6). The recommendations at the end of the report include a recommendation for the private speech program (id.).

I find that the record establishes that the reports were properly considered and weighed by the CSE, including a speech and language therapist who was present at the CSE meeting (Tr. pp. 143, 437-40, Dist. Ex. 33). The district's speech and language therapist testified as to her belief that the student did not meet the guidelines for receiving speech and language therapy based on the evaluations, including a private evaluation noting mild to moderate delays for the student (Tr. pp. 436-52). The therapist also noted that she questioned the validity of the finding that the student had a moderate delay with receptive language, based on her dispute with the use of reading tests to determine the student's receptive language skills, which was not the manner in which the district would determine receptive language skills (id.). I find that it was not inappropriate for the district to conclude that the student did not require speech and language services at that time based upon the information available and considered. The CSE determined, based on multiple evaluations, that the student did not qualify for speech and language services,

and noted that the district was not bound by a private evaluation's recommendations, particularly those developed with the purpose of assessing the student for a specific private speech program (Tr. pp. 143, 437-40). In summary, I decline to find that the absence of speech and language therapy on the June 12, 2012 IEP had the effect of denying the student a FAPE based on the facts of this case.

Regarding the IHO's direction to the district to retest the student (IHO Decision at p. 52), I find that the IHO's order for the district to administer a speech and language evaluation was in error (id.). First, the parent did not request a speech and language evaluation in her requested relief (Dist. Ex. 6). Further, while the IHO notes that the denial of speech and language services did not constitute a denial of FAPE, he ordered a speech and language evaluation for the stated reason of concern for the future (IHO Decision at p. 51). I do not find that there was a valid basis for the IHO to order the speech and language evaluation. For these reasons, the IHO's order directing a speech and language evaluation is annulled.

### **3. Compensatory Education Services**

Based upon the fact that the amount of consultant teacher services offered on the student's June 12, 2012 IEP was listed initially as a generic number, as opposed to the maximum number of consultant teacher hours actually available at the charter school, it is unclear how many hours of consultant teaching the student received during the 2012-13 school year. To the extent the student did not receive the maximum possible consultant teacher minutes during the 2012-13 school year, she is entitled to compensatory education services to remedy that deficiency.

In light of this, the student is entitled to compensatory education services in an amount to be determined at the student's next CSE meeting or at a CSE meeting to be convened in the next 60 days from the date of this order, whichever is sooner. The CSE is directed to take into account the total number of consultant teacher minutes the student could have received for the 2012-13 school year, versus the minutes she actually received. Next, the CSE is directed to consider the student's present needs and the best manner in which to compensate the student for any deficiency in consultant teacher services during the 2012-13 school year. The parties are encouraged to discuss their positions and provide evaluative or evidentiary support at the CSE meeting.

### **4. Other Relief Awarded by the IHO**

The district appeals the IHO's decision concerning matters that were beyond the scope of the hearing request, or otherwise not supported by the record, but for which the IHO issued directions and orders to the district. I concur with the district that certain relief awarded by the IHO lacked a proper basis for its award.

Regarding the program ordered by the IHO, it was ordered that the student be placed in a full time co-teaching program (IHO Decision at p. 52). The IHO held that the district should investigate the need for a functional behavioral assessment (FBA) and behavior intervention plan (BIP) (IHO Decision at p. 52). The IHO made a reference that although the district was not

ordered to implement a sensory diet for the student, that it may be appropriate (IHO Decision at p. 52). The IHO made reference that the district was required to update the present levels of performance, as well as the goals and objectives on the student's IEP (IHO Decision at p. 53).

The provision of placement into a full time co-teaching program was beyond the scope of the parent's hearing request and therefore should not have been granted by the IHO (Dist. Ex. 6). The district's psychologist testified that a FBA/BIP was not required for the student and there was no evidence that contradicted that testimony and therefore the IHO erred in ordering the district to investigate the need for a FBA/BIP (Tr. pp. 112, 210-11). The district established that it addressed the student's sensory needs with provisions on the IEP for a tactile wedge, chair ball, raised line paper, large graph paper and a cold water bottle, and there was no evidence that the student required a sensory diet other than what was provided on the proposed IEP, although the district had been willing to attempt to accommodate the parent's request for a sensory diet at an additional CSE meeting (Tr. pp. 278, 313-14). Therefore, the IHO's reference that a sensory diet may be appropriate was in error. The IHO's direction to update the present levels of performance and goals and objectives was made in light of the speech and language evaluation that he had ordered, which is annulled as set forth above. The IHO's direction regarding updating the present levels of performance and goals and objectives is therefore similarly annulled. In light of my modifications to the IHO's decision as set forth above, I do not find a basis for requiring amendment of the present levels of performance and goals and objectives and I annul this relief.

Based upon the foregoing, the above referenced portions of the IHO's decision and related awarded relief are annulled.

## **VII. Conclusion**

Based upon the foregoing, I concur with the IHO's determinations that the implementation of special education services for the student was delayed during the 2010-11 school year, that the student was improperly declassified at the start of the 2011-12 school year and that the student was denied a FAPE for the 2012-13 school year. I also concur with the IHO's Decision that compensatory education services are appropriately awarded to the student relating to the 2011-12 and 2012-13 school years. As set forth in more detail above, I modify the relief granted by the IHO for each of the school years in question and annul the IHO's Decision to the extent it is inconsistent with this decision.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's Decision and Order dated March 6, 2013 is annulled to the extent it awarded the parent relief for the 2010-11 school year: specifically, the second paragraph 4 of the awarded relief on page 54 of the IHO Decision is annulled; and

**IT IS FURTHER ORDERED** that the IHO's Decision and Order dated March 6, 2013 is modified relating to the relief awarded the parent for the 2011-12 and 2012-13 school years; and

**IT IS FURTHER ORDERED** that the relief awarded to the parent relating to the 2011-12 and 2012-13 school years is as follows, and to the extent the IHO Decision is inconsistent at paragraphs 1 through 4 (first paragraph 4) on pages 53 and 54, it is annulled; and

**IT IS FURTHER ORDERED THAT** , having determined in this Decision that the student is entitled to compensatory education services, I direct that the appropriate amount of these services shall be determined at the student's next CSE meeting or at a CSE meeting to be convened in the next 60 days from the date of this order, whichever is sooner. In determining the appropriate amount of compensatory education services due to the student, the CSE is also directed to take into account the relevant considerations for each school year consistent with the directives of this Decision.

**Dated:** Albany, New York  
January 13, 2015

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**