



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-050

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Friedman & Moses, LLP, attorneys for petitioner, Elisa Hyman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory educational services for her daughter and reimbursement of independent educational evaluations (IEE). 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 Committee on Special Education (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]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). 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

The student is currently eligible for special education and related services but will become ineligible for services under the IDEA by reason of age at the conclusion of the 2014-15 school year (see Tr. pp. 9, 155-56, 442; Parent Ex. B at p. 1).¹

As a brief overview of the student's educational history, the hearing record indicates that during the first portion of the 2004-05 school year, the student was recommended to receive a

¹ The student's eligibility for special education and related services during all years at issue is not in dispute in this proceeding.

program consisting of placement in a 12:1+1 special class with speech-language therapy and counseling services (Parent Exs. P at pp. 1, 12; R at pp. 1, 9, 11; Q at pp. 1, 11). In December 2004, the CSE reconvened and recommended a 12:1+4 special class placement in a New York State-approved nonpublic school (the NPS) along with speech-language therapy and counseling services (Parent Ex. N. at pp. 1, 11).

For the remainder of the 2004-05 school year until approximately November 2013, the student remained in the 12:1+4 special class placement at the NPS and received speech-language therapy and counseling services (see generally Parent Exs. C; E-H; J-N; W).

On November 4, 2013, a CSE convened and recommended a 15:1 special class placement in a community school and related services consisting of speech-language therapy and counseling (Parent Ex. D at pp. 1, 7, 11). By school location letter dated November 20, 2013, the student was assigned to a community school where she has attended since November 2013 (Tr. pp. 103-104, 126; Parent Exs. LL; QQQQ at p. 3; RRRRR at p. 1). On March 4, 2014, the CSE convened after staff at the community school requested a reevaluation to determine which services would meet the student's needs (Tr. pp. 23-24; Parent Exs. B at p. 1; S at p. 1). The CSE noted that the student would not be able to earn sufficient credits toward a high school diploma prior to reaching age 21 and there was concern that a community school would not appropriately meet her educational and transition needs (id.). The CSE recommended a 12:1+1 special class placement in a special school with weekly counseling and speech-language therapy sessions (id. at pp. 10). By letter dated March 7, 2014, the district informed the parent of the public school site at which the March 2014 IEP would be implemented (Parent Ex. KK at p. 1). The student and the parent visited the assigned public school site and rejected it, choosing instead to have the student remain in her community school placement, where she received a combined academic and vocational training program (Parent Ex. RRRRR at pp. 4-5; see Tr. pp. 97-98, 149-51).

A. Due Process Complaint Notice

By due process complaint notice dated October 10, 2014, the parent asserted that the district failed to provide the student with a free appropriate public education (FAPE) from December 2004 through the 2014-15 school year (Parent Ex. A). The parent alleged that the district misdiagnosed and misclassified the student beginning in December 2004 and as a result improperly placed her in a non-credit bearing program in the NPS (id. at p. 2). The parent further alleged that the district failed to reevaluate the student from 2004 to 2013, specifically asserting that the district failed to assess the student's assistive technology, auditory processing, and speech-language needs (id. at pp. 2, 5). During this time, the parent contended that the student "was wrongly recommended for alternative assessment, thereby removing her permanently from any academic track for achievement" (id. at p. 3). Moreover, the student allegedly "languished at [the NPS] for over nine years, making virtually no progress" (id.). The parent also claimed that the district erroneously told the parent that the student was placed in a GED preparation program and was on track to receive a GED (id. at p. 5).² The parent alleged

² Although not defined in the hearing record, it appears that "GED" refers to the Tests of General Education Development, the test taken for purposes of obtaining a high school equivalency diploma in New York State prior to January 2014 (see 8 NYCRR 100.7; "Test Assessing Secondary Completion (TASC)," ACCES [Feb. 2014], available at <http://www.acces.nysed.gov/ged/home.html>).

that due to the district's failure to appropriately evaluate and place the student, the student did not earn sufficient credits to receive a high school diploma (id. at p. 8).

The parent also claimed that the every IEP developed for the student since she entered the NPS in December 2004 was procedurally and substantively flawed (Parent Ex. A at p. 9). In particular, the parent asserted that the district predetermined each of its program and placement recommendations; failed to allow the parent meaningful participation; failed to evaluate the student; based the recommendations on the incorrect assumption that the student was unable to earn a "regular" high school diploma; failed to consider the student's need for assistive technology; inaccurately described the student in the IEP; conducted CSE meetings without properly constituted CSEs; developed insufficient goals not tailored to the student's needs; failed to address the student's lack of progress from year to year; failed to include appropriate promotional standards; failed to include transitional goals; failed to place the student in the least restrictive environment (LRE); failed to provide prior written notice and sufficient legal notices understandable to the parent; and failed to offer 1:1 multisensory instruction, accessible books, books on tape, a scribe, "intensive" 1:1 speech services, vocational training, life skills training, and employment readiness training (id. at pp. 9-10).

The parent claimed that the district committed gross violations of the IDEA with respect to the student and also alleged violation of the student's civil rights and discrimination against her on the basis of her disability in violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (section 504) (Parent Ex. A at p. 11). With respect to relief, the parent sought compensatory educational services for the student, reimbursement for privately-obtained independent neuropsychological and speech-language evaluations, an order for the district to conduct an assistive technology evaluation, an extension of the student's eligibility past age 21 "for as many years as she has been denied FAPE," and an interim order for 1:1 instruction during the school day and additional home-based tutoring after school (id. at pp. 11-12).³

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded on March 4, 2015 (Tr. pp. 1-458). At the hearing, the district conceded it failed to provide a FAPE to the student from the 2004-05 school year through the 2014-15 school year (Tr. pp. 7-9).⁴ The school district also conceded that the student was entitled to at least 1,800 hours of compensatory educational services and that the parent was entitled to reimbursement for the IEEs, and further agreed to conduct an assistive technology evaluation of the student (Tr. pp. 11-14). In a decision dated March 25, 2015, the IHO found that the district had not committed a gross violation of the IDEA so as to entitle the student to compensatory services past the period of her statutory eligibility (IHO Decision at pp. 23-25). The IHO ordered that the student remain in her current public school site until the end of

³ While the privately-obtained evaluation was denominated an "Auditory and Language Processing Evaluation" (Parent Ex. HHHHHH), it was referred to on occasion as a speech-language evaluation (see Tr. p. 249).

⁴ The district also expressly declined to assert a statute of limitations defense (see Tr. pp. 11-12).

the 2014-15 school year and receive compensatory services during that time period (id. at pp. 25-26).

With respect to the parent's claims for compensatory speech-language therapy services, the IHO found that there was no evidence the student had not received the services recommended on her IEPs prior to 2010 (IHO Decision at p. 12). The IHO noted the recommendation of a private evaluator for 1035 hours of compensatory speech-language therapy services (id.). However, the IHO found the evaluator's report to be "unreliable" and "suspect" as the evaluator never spoke with the student's speech-language service providers, improperly assumed that the student had not received speech-language services from 2004 through 2015, and waited six months to prepare her report (id.). The IHO found that the student received all of the recommended speech-language services from 2004 through 2015 based on testimony from district witnesses (id. at p. 13). However, since the district conceded that the student was entitled to compensatory services, the IHO ordered that the student receive two 30-minute sessions of individual speech-language therapy services per week until the end of the 2014-15 school year (id. at pp. 13, 25).

With respect to compensatory tutoring services, the IHO acknowledged the district conceded that it failed to provide the student with a FAPE from 2004 through 2015 (IHO Decision at p. 14). Nonetheless, after examining each IEP developed for the student since March 2004, the IHO noted that there was no evidence in the hearing record indicating that the student was capable of reaching grade level or obtaining a Regents diploma (id. at pp. 15-19). The IHO found that a private neuropsychological evaluation report did not indicate that the programs provided to the student were not appropriate and did not address the fact that the student received services in a small class for her entire school career (id. at pp. 19-22). The IHO further found that the student received academic instruction at the NPS and disagreed with the parent's assertions that the student was unable to make progress due to a lack of academic instruction at the NPS (id. at p. 22). Further, the IHO found that the student's inability to read at grade level was a function of her disability (id.). However, the IHO found that the recommended 15:1 special class for English was not available in the mornings at the student's public school site, her current program included vocational training in the afternoons, and as a result, the district placed the student in an integrated English class (id.). The IHO found that the student should receive compensatory services for the English instruction she should have received according to her IEP and ordered individual tutoring in English language arts (ELA) by a special education itinerant teacher (SEIT) for 45 minutes five days per week until the end of the 2014-15 school year (id. at pp. 23, 26).

With regard to the parent's request for extended eligibility under the IDEA, the IHO found that there was no evidence that the district committed a gross violation of the IDEA and therefore denied compensatory services beyond the school year in which the student reached 21 years of age (IHO Decision at pp. 23-25). The IHO found that the parent attended every IEP meeting and there was no evidence in the hearing record that she did not comprehend her daughter's disabilities or fail to advocate for a specialized program (id. at p. 25). The IHO also found that the student was able to perform activities of daily living independently and that she may be eligible for a career development and occupational studies (CDOS) diploma through her current program (id.).

With respect to the parent's claim for reimbursement of the costs of independent evaluations, the IHO found that the parent failed to establish her entitlement to reimbursement by presenting evidence that she had disagreed with a district evaluation (IHO Decision at pp. 6-7). The IHO also denied the parent's claim for compensatory transition services after finding that transition services were provided for in each IEP developed for the student since March 2010 and that the student had both received and benefited from these services (id. at pp. 8-11).⁵

IV. Appeal for State-Level Review

The parent appeals, contending that the IHO erred both in her conduct of the impartial hearing and in not awarding the relief requested. With regard to the conduct of the impartial hearing, the parent asserts that the IHO improperly excluded numerous documents offered into evidence, issued a prehearing order improperly limiting the hearing to one day, prevented the parent from developing an adequate hearing record, failed to hold a prehearing conference, refused to issue subpoenas, and improperly denied several of the parent's motions. The parent also contends that the IHO was biased, called witnesses without notice to the parent, questioned witnesses improperly, prevented the parent from performing an effective cross-examination, and ruled that only the witnesses she had called were credible. The parent further asserts that the district failed to ensure an accurate transcript was made of the impartial hearing.

The parent next alleges that the IHO erred in failing to "So Order" relief which the district had conceded and denying such conceded relief to the parent. The parent further asserts that the relief awarded was not based on the evidence presented at the impartial hearing. The parent additionally contends that the IHO improperly shifted the burden of proof to the parent.

The parent contends that the IHO erred in failing to find there was a gross violation of the IDEA and preventing the parent from making a record on this issue. The parent also alleges that a gross violation finding is not necessary to award compensatory services to be redeemed by the student at district expense after the student is no longer eligible for special education and related services directly from the district.

The parent alleges that the IHO failed to address her allegations relating to the IEPs at issue, contending that the IHO erred in finding that the student received academic instruction and transition services during the school years at issue. Further, the parent asserts that the district failed to prove that the IEPs were implemented, and that the IHO did not allow the parent to make a record on these issues. The parent alleges that the IHO erred in finding that the student could not catch up to grade level and made inaccurate findings regarding the student's current placement.

The parent argues that the IHO erred in denying her requested relief, including reimbursement for IEEs and compensatory academic and transition services. The parent seeks establishment of a fund totaling \$1,228,500 to be used at the student's discretion to pay for compensatory services consisting of "at least" 2100 hours of 1:1 tutoring, "at least" 1035 of

⁵ The IHO also found that there was no evidence to support the parent's section 504 claims and declined to consider this "discrimination claim" as beyond the scope of her authority (IHO Decision at p. 25).

speech-language therapy, assistive technology recommended by the private auditory processing evaluator and accommodations as recommended by an assistive technology evaluation, five years' worth of transition services, vocational education, transportation, "materials and equipment" requested by compensatory providers, social work services, and "any additional special education or related services, supports, modifications or services, including but not limited to additional tutoring, that is allowable under the IDEA," along with extended eligibility for education services after obtaining the age of 21.⁶

The district responds in an answer, denying and admitting the parent's allegations, setting forth additional facts, and arguing that the IHO's decision should be upheld. The district asserts that the IHO conducted the hearing in an appropriate manner, was not required to conduct a prehearing conference, and was permitted to take direct testimony by affidavit. Further, the district argues that the IHO was within her discretion to limit the hearing to a single day, especially considering the district conceded FAPE for all school years at issue. The district contends that the IHO did not act with bias or with the appearance of impropriety or prejudice. The district also asserts that the IHO was correct in declining to order pendency for the student past the age of 21. The district argues that a student who has attained the age of 21 is generally no longer eligible for state educational services and the hearing record reflects that there was no gross violation of the IDEA such as would entitle the student to receive compensatory education after her eligibility expired. The district alleges that the IHO's order for equitable relief until the end of the 2014-15 school year was correct and should not be disturbed because the hearing record does not support a finding that the district committed a gross violation of the IDEA. The district also asserts that the student made modest progress at the NPS and has limited academic abilities due to her disability.

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 Sch. Dist. 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

⁶ The parent also appeals the IHO's denial of her section 504 claims. The State Education Law makes no provision for State-level administrative review by an SRO of IHO decisions with regard to section 504 (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of a parent's claims regarding section 504 or the IHO's findings related thereto (or lack thereof) (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

(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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [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, 361 Fed. App'x 156, 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, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see 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. Preliminary Matters

1. Conduct of Hearing/IHO Bias

The parent asserts that the IHO conducted the hearing in an improper manner and exhibited bias by preventing the parent from developing the hearing record, calling witnesses, limiting the hearing to one day, erring in her credibility determinations, and acting in a prejudicial manner towards counsel for the parent. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (see Application of a Student with a Disability, Appeal No. 12-064). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]). State Regulations also empower the IHO to ask questions of counsel and witnesses for the purpose of clarification and completeness of the record (8 NYCRR 200.5[j][3][vii]).

Furthermore, the IDEA and State and federal regulations provide that an IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. §1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

The parent alleges that the IHO abused her discretion and violated the parent's due process rights in precluding the admission of numerous documents that she now offers as additional evidence attached to the petition. A number of the documents in Exhibits C through J annexed to the petition were excluded by the IHO on the basis that they were not relevant (Tr. pp. 371, 374-80, 383-401, 410-13, 432; Pet. Exs. C; D at pp. 1-661, 663-67; E; F; G; H; I; J). Arguably, these documents could be relevant to issues concerning, for example, the appropriateness of the educational programs offered to the student and parent participation. However, the IHO did not abuse her discretion in precluding their admission in light of the district's broad concession of a denial of FAPE and waiver of the statute of limitations defense for all school years at issue (Tr. pp. 7-9, 11-12). The parent also requests consideration of documents that either were admitted into evidence during the hearing or that she withdrew from consideration at the impartial hearing (Tr. pp. 377, 406, 410-11, 432; Pet. Exs. D at p. 662; G at pp. 1-19; H; L).

The parent also argues that the IHO erred in failing to conduct a prehearing conference. However, State regulations permit, but do not require, an IHO to conduct a prehearing conference (8 NYCRR 200.5[j][3][xi]). The parent contends that the IHO demonstrated bias and violated the IDEA by calling and examining witnesses; namely, a district speech-language provider and a district math teacher (Tr. pp. 171-202, 219-241). The parent further contends that the IHO questioned witnesses with a biased agenda, denied the parent an opportunity for effective cross-examination, and made improper credibility determinations. The IHO directed that the student's current speech-language provider and math teacher be called as witnesses (Tr. pp. 133, 215). Neither party objected to these witnesses being called (see Tr. pp. 133, 171, 215, 219). Based on a review of the record, the IHO allowed counsel for the parent to ask questions of the witnesses but did in some instances limit counsel's questions on the grounds of irrelevancy and repetition (see Tr. pp. 171-202, 219-241). The IHO's rulings during the examination of these witnesses did not constitute an abuse of discretion or demonstrate a lack of impartiality.

Likewise, the IHO acted within her discretion in limiting counsel for the parent's questioning during the hearing, especially in light of the district's broad concessions of denials of a FAPE for all school years at issue (see Tr. pp. 26, 38-40, 46, 49, 58, 60, 108, 110, 114, 145, 238, 303-304). Next, to the extent that the parent disagrees with the conclusions reached by the IHO—or with the weight afforded to testimonial evidence presented at the impartial hearing—such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see Application of a Student with a Disability, Appeal No. 13-083). Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-457).

The IHO was also within her discretion in taking direct testimony by affidavit and limiting the hearing to one day (8 NYCRR 200.5[j][3][xii][f], [j][3][xiii]). Finally, to the extent counsel asserts that the IHO exhibited bias by using "a hostile, dismissive, and disparaging tone," the Supreme Court has held that "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality (Litkey v. United States, 510 U.S. 540, 555-56 [1994] [noting that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" unless "they reveal an opinion that derives from an extrajudicial source [or] such a high degree of favoritism or antagonism as to make fair judgment impossible"]). Thus, the parent's allegations of bias must be dismissed (see Withrow v. Larkin, 421 U.S. 35, 47 [1975] [holding that administrative hearing officers are entitled to "a presumption of honesty and integrity"]). However, even if the IHO was biased or conducted the hearing in an improper manner, I am required to conduct an impartial review of the hearing record and render an independent decision thereon (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]), and for the reasons discussed below have modified the IHO's determinations in the parent's favor.⁷

⁷ With regard to the allegation that the district failed to ensure that an accurate transcript was made of the impartial hearing, a review of the transcript reveals that the majority of the instances where the reporter was unable to provide a verbatim transcription of the proceedings were a result of counsel for the parent and the IHO speaking at the same time, and no argument is made that any material testimony failed to be transcribed as

2. Additional Evidence

The parent proposes additional exhibits for consideration that were not offered into evidence at the impartial hearing (Pet. Exs. A; B; K).⁸ 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 (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89[S.D.N.Y. 2013]).

Under State regulations, "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" are part of the record of an impartial hearing (8 NYCRR 200.5[j][5][vi][b]). Accordingly, Petition Exhibits A and B, the parties' closing memoranda submitted to IHO, are part of the hearing record and should have been submitted to the Office of State Review by the district. Petition Exhibit K, a copy of the envelope in which the IHO's decision was purportedly mailed to the parents, is unnecessary to render a decision in this case. The district does not contest the timeliness of the petition nor does the petition appear to be untimely on its face, and therefore I presume it to have been served in compliance with the timeframes set forth in 8 NYCRR 279.2(b). Furthermore, for the reasons stated above, the IHO did not abuse her discretion by declining to admit Petition Exhibits C through J and L into the hearing record as evidence. Moreover, I will not consider these exhibits as additional evidence on this appeal, as I find that they are not necessary (or helpful) in developing an appropriate compensatory award.

B. Relief—Compensatory Services

As the district conceded its failure to provide the student a FAPE for the 11 school years at issue, I next address the appropriateness of the relief awarded by the IHO. The IHO awarded compensatory services in the form of individual tutoring by a SEIT in ELA and individual speech-language therapy until the end of the 2014-15 school year (IHO Decision at pp. 13, 22, 25-26). The IHO denied any compensatory services after this school year because she found no gross violation of the IDEA and the student ages out of eligibility after the 2014-2015 school year concludes (see id. at pp. 23-25).

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

a result.

⁸ Although, as noted above, a large number of these exhibits were offered into evidence at the impartial hearing, the parent has submitted the exhibits here with different exhibit designations, combining up to 13 separate exhibits into one proposed exhibit (see Pet. Ex. D [consisting of Parent Exhibits BBB through NNN]).

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]), or until the conclusion of the school year in which he or she reaches age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078 [2d Cir. 1988]; vacated sub nom. Sobol v. Burr, 492 U.S. 902 [1989], reaff'd, Burr v. Sobol, 888 F.2d 258 [2d Cir.1989]; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689-90 [S.D.N.Y. 2009]).

The purpose of an award of compensatory services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, a compensatory award of services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

In this case, the IHO found that there was no "gross violation" because the student was able to cook, clean, count money, and identify her interests and abilities (see IHO Decision at p. 25). The IHO also found that that there was no evidence that the student was substantially excluded from educational services (see id.). However, the district conceded it failed to provide

the student a FAPE for 11 consecutive school years from 2004-2005 to 2014-15, and in the absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denials of a FAPE, I will in this instance presume that the district intended to admit every deficiency alleged by the parents in the due process complaint notice to the extent not contradicted by the hearing record (Tr. pp. 7-9). Due to the district's conceded failure to provide a FAPE to the student for a substantial period of time, the hearing record contains a sufficient basis on which to premise a finding of a gross violation of the IDEA and the IHO erred in concluding otherwise (Mrs. C., 916 F.2d at 75; Burr v. Ambach, 863 F.2d at 1078). Nonetheless, while the parent is entitled to a presumption as to the truth of the asserted facts underlying her IDEA claims in light of the district's concession, she is not necessarily entitled to "default" relief.⁹ The student is not eligible to receive services pursuant to the IDEA after the conclusion of the 2014-15 school year because she will have obtained the age of 21 (20 U.S.C. § 1412[a][1]; Educ. Law § 4402[5]), and the hearing record does not indicate that it is necessary to grant an extension of the student's period of eligibility to remedy the violations of the IDEA.¹⁰ In particular, the parent has requested both continued eligibility for services under the IDEA for a period of time equal to the length of the denial of a FAPE, and a "compensatory education fund" with a cash value derived from an hour-for-hour calculation of the services lost by the student. I decline the parent's invitation to award relief twice for the same denial of a FAPE, or to award a cash fund from which the student may purchase services at her own discretion, as neither would constitute a remedy equitably fashioned to "make up" for the harm caused by the district's admitted failure to provide the student with a FAPE over the course of multiple years. Nonetheless, the student is entitled to appropriate compensatory education services to remedy the district's gross violation of the IDEA, and although the services awarded by the IHO address those violations in limited part, they are inadequate to fully compensate the student in light of the substantial length of time the district denied her a FAPE.¹¹

⁹ Summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA; however, they should be used with caution and are only appropriate in instances in which the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 68 [2d Cir. 2000]). In these circumstances, any notion of default relief would be disfavored in light of the authorities requiring fact-specific inquiries when fashioning equitable relief such as compensatory education.

¹⁰ It is not entirely clear that administrative hearing officers are imbued with such authority under the IDEA. The Second Circuit has described compensatory education as "prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education" (Somoza, 538 F.3d at 109 n.2 [emphasis added]; see French, 476 Fed. App'x at 471 [noting that "A disabled student who has attained the age of 21 is generally no longer eligible to receive state educational services under the IDEA"]). In any event, even if the student were entitled to extended eligibility under the IDEA, it does not follow that she would be entitled to take credit-bearing courses in the district's public schools in furtherance of her goal to obtain a Regents diploma, since State law does not require the district to provide her with a free public education past the age of 21 (Educ. Law § 3202[1]).

¹¹ With respect to the SEIT tutoring services awarded by the IHO, modification of the award is necessary because the student is not eligible for SEIT services, which are defined by State law as services provided to preschool students with disabilities (Educ. Law § 4410[1][k]). Therefore, the IHO's order is modified, to the extent the district has not already fulfilled the tutoring award, to direct the district to provide an equivalent number of hours of 1:1 tutoring by a special education teacher in the area of ELA.

1. Speech-Language Services

Addressing first the parent's request for compensatory speech-language therapy services, a brief review of the student's history provides context for the following discussion. In April 2004, when the student was approximately 10 years old, a private evaluator conducted a speech-language evaluation of the student (Parent Ex. QQ). Through formal and informal assessment, the evaluator reported that the student exhibited poor language comprehension, which was not adequate for social communication purposes, and that the student demonstrated "significantly reduced attention to speech," which "required constant simplification and repetition" (*id.* at p. 2). Further, the evaluator noted that the student demonstrated a severely reduced ability to follow directions of increasing length and complexity, a severe weakness in auditory comprehension, and poor comprehension of questions that required analysis and interpretative skills (*id.* at pp. 2-3). The evaluator also indicated the student exhibited poor problem solving and inferencing skills (*id.* at p. 3). The evaluator opined that the student's errors indicated incomplete or slow processing skills, poor attention to detail and poor comprehension of language (*id.*). Additionally, the April 2004 speech-language evaluation report noted that the student demonstrated a severe weakness in syntactical comprehension, depressed vocabulary, language formulation difficulties, and a moderate weakness in expressive vocabulary and word retrieval skills (*id.* at p. 4-5). The evaluator opined that the student's significant expressive and receptive language impairment would have a negative impact on the student's academic success (*id.* at p. 6).

At the time of the April 2004 speech-language evaluation report, the evaluator recommended the student receive five sessions of speech-language therapy per week to address the student's significant needs relating to receptive and expressive language skills (Parent Ex. QQ at p. 6). A May 2004 CSE recommended that the student receive one individual session of speech-language therapy per week and one session per week in a small group (3:1) (Parent Ex. Q at pp. 1, 11). The same recommendation for speech-language therapy remained constant throughout the years at issue in this case, with the exception of the 2012-13 and 2013-14 school years (see Parent Exs. B at p. 10; C at p. 12; D at p. 7; E at p. 10; F at pp. 14-15; G at p. 11; H at p. 7; I at pp. 11-12; J at p. 17; K at pp. 3-4; L at p. 8; M at p. 26; N at p. 11; O at p. 15; P at p. 12; Q at p. 11; R at p. 11; W at p. 4).¹² It is unclear from the hearing record whether the student received the mandated speech-language services during all the years in question.

It appears from the hearing record that the next speech-language evaluation, conducted by the district, took place in August 2013 (Parent Ex. XXXX). The August 2013 speech-language evaluation report characterized the student's language deficits as difficulty comprehending complex language and a depressed ability to abstract and internalize the shared and non-shared meaning of words (*id.* at p. 1). Further, the August 2013 speech-language evaluation report stated that the student demonstrated a severe delay in expressing grammatically acceptable and semantically meaningful sentences and difficulty using associations required to focus or extend word meaning in spoken or written discourse (*id.*). The evaluator also noted the

¹² A February 2012 IEP recommended one individual session per week of speech-language therapy (Parent Ex. E at p. 10). A March 2014 IEP recommended two sessions per week of speech-language therapy in a group of five (Parent Ex. B at p. 10).

student showed significant difficulty recalling details of orally read paragraphs and making inferences and predictions, which compromised her ability to process, understand, and recall curricular information and directions (id. at p. 2). Formal assessment results reported in the August 2013 speech-language evaluation report confirmed the continuation of the student's significant deficits in receptive and expressive language skills related to both content and structure (compare Parent Ex. QQ at pp. 1-6, with Parent Ex. XXXX at pp. 1-3).

Subsequently, in September 2014, a private evaluator conducted an auditory and language processing evaluation, concluding that the student demonstrated difficulties with organization and attention, in addition to an auditory processing disorder in the areas of discrimination, figure-ground listening, and auditory and temporal integration (Parent Ex. HHHHHH at pp. 1, 10-11). In addition, the September 2014 auditory and language processing evaluation report indicated that the student's comprehension skills were "compromised for both auditory and written language" (id. at p. 10). Further, the evaluator concluded that the student's significant receptive and expressive speech-language disorder and language-based learning disability compromised the student's auditory processing, auditory comprehension, and working memory skills (id. at pp. 10-11). The evaluator opined that the student's severe speech-language and auditory processing deficits left the student at "a great disadvantage" without the benefit of "intense intervention and remediation" (id. at p. 11). The September 2014 auditory and language processing evaluation report recommended that the student receive "intensive" speech-language therapy consisting of two 45-minute individual sessions and one 45-minute group session per week (id. at pp. 11-12).

As discussed above, the hearing record supports the conclusion that the student demonstrated a severe speech-language disorder, as well as an auditory and language processing disorder, throughout the school years at issue. Despite the student's documented history of a severe speech-language disorder, which affected the student's ability to access the academic curriculum, the district recommended a minimal amount of speech-language therapy during the school years at issue, which was insufficient to address the severity of the student's needs. However, the parent's request for 1035 hours of speech-language therapy services is based on the private evaluator's assumption that the student received no services at all from the 2004-05 through the 2014-15 school years (Tr. pp. 289-94; Parent Ex. HHHHHH at p. 12). To the contrary, the hearing record reflects—and counsel for the parent conceded during the impartial hearing—that the student received at least some portion of the services she was mandated to receive, including some that were not reflected in district records (Tr. pp. 175-76, 179, 187-93, 195-99, 306-08, 312-15; Parent Exs. MM; NN; OOOOO at pp. 12-29). Accordingly, in order to appropriately remedy the insufficient speech-language services provided to the student, the district is directed to provide the student with or fund 300 hours of compensatory individual speech-language therapy services, to be completed within four years of the date of this decision.¹³

¹³ This award approximates the recommendation by the private evaluator that the student receive three 45-minute sessions for each week school is in session over the four year duration of the award (Parent Ex. HHHHHH at p. 12; see Tr. p. 12).

2. Tutoring Services

Turning to the student's academic needs, consistent with the previously discussed evaluative information, a February 2014 academic evaluation report from the Huntington Learning Center (HLC) reflected the student's poor performance related to listening skills, reading comprehension, and writing skills (compare Parent Exs. HHHHHH at pp. 9-10, QQ at pp. 1-6, and XXXX at pp. 1-3, with Parent Ex. QQQ at pp. 1-2, 17). The director of HLC provided a detailed description of the student's needs by way of affidavit testimony (see Parent Ex. TTTTT at pp. 4-12). The HLC director stated the student's performance demonstrated that she had "good" ability to perceive and process the visual presentation of information, "fair" ability to copy written information, and sight-word recognition skills at the third grade level, but that the student demonstrated limited mastery of phonetic skills using the visual modality (id. at pp. 4-8). The HLC director stated that the student mastered the reading readiness evaluation and did not require instruction related to basic concepts (id. at pp. 8-9). Regarding reading comprehension, the HLC director averred that the student demonstrated difficulty in all categories including the ability to answer questions related to the main idea, details, vocabulary, sequence, and inference, showing a lack of mastery of these skills at the third grade level (see id. at pp. 9-10). The HLC director also averred the student's writing sample was "poor" and reflective of skills at the first grade level (id. at p. 10).

Regarding the student's abilities in mathematics, the HLC director stated the student required review of basic subtraction before moving on to higher level mathematic concepts such as telling time, multiplication, division, fractions, algebra, and geometry, among other things (Parent Ex. TTTTT at p. 11). The HLC director stated that the student's independent mathematics skills fell at the first grade level, and a second grade instructional level (id. at p. 12).

Based on the findings of the HLC assessment, the director recommended that the student receive at least 1,931 hours of tutoring and remedial instruction focusing on skill building in the student's identified areas of weakness (Parent Ex. TTTTT at p. 13). Specifically, the recommendation indicated that the student should receive 488 hours dedicated to mathematics, 120 hours for phonics, 180 hours dedicated to core reading skills, 720 hours to address splinter skills of reading comprehension, 303 hours devoted to vocabulary development, 30 hours devoted to study skills and 90 hours dedicated to writing, which the HLC director opined would be sufficient to raise the student's academic skills to approximately a twelfth grade level (id., see Tr. pp. 344-45, 349, 354-61; Parent Exs. QQQ at p. 57; TTTTT at pp. 13-16).¹⁴ The HLC director testified that her recommendation could be completed within two to four years if the student attended between 10 and 20 hours of tutoring per week (Tr. p. 351).

¹⁴ The director's affidavit recommended 60 hours of writing instruction; however, the HLC evaluation recommended 90 hours focused on writing as opposed to the 60 hours set forth in the director's affidavit (compare Parent Ex. QQQ at p. 57, with Parent Ex. TTTTT at p. 13). As the recommended number of hours for various skill areas in the affidavit does not equal the total number of recommended tutoring hours, the number of hours devoted to writing set forth in the affidavit appears to be a typographical error.

Similarly, a February 2014 psychoeducational evaluation report indicated the student's overall reading ability fell within the low range of functioning (Parent Ex. S at p. 3). Further, the school psychologist who conducted the evaluation indicated that the student's phonetic decoding skills fell in the low range, with the student's basic reading skills falling in the very low range (*id.*). In regard to reading fluency, the school psychologist noted the student's test performance yielded skills in the average range but her reading comprehension fell in the low range (*id.*). In the area of mathematics, the February 2014 psychoeducational evaluation report noted that the student's mathematics skills fell in a below average range but that the student demonstrated better development of mathematic calculation skills than problem solving skills, which fell in the lower limits of the below average range (*id.*).

The district school psychologist testified that although the student may not reach grade level performance in reading, she opined that the student could possibly improve several grade levels with targeted tutoring (Tr. pp. 67-69). Further, the district school psychologist testified that the student required intensive reading intervention that would address word reading and phonetic decoding skills (Tr. pp. 69-70). In addition, the district school psychologist opined that with reading remediation, the student could at least reach a fourth grade reading level, which was necessary for the student to be able to "live every day and carry out everyday activities" (Tr. pp. 70, 80). Further, she indicated it was possible for the student to achieve a higher reading level with the "proper interventions" (*id.*).

The HLC evaluation report and the director's testimony demonstrate the student's need for remediation in reading, writing, and mathematics, and provides a systematic plan and a recommended number of hours required to address the student's needs (Parent Exs. QQQ at pp. 1-3, 57; TTTT at pp. 1-17). In order to remedy the denial of a FAPE to the student with respect to her academic needs, I direct the district to fund 1931 hours of 1:1 tutoring services provided by HLC, or another provider agreed upon by the parties, to be completed within four years of the date of this decision.¹⁵ As the student is no longer eligible to obtain a high school diploma, due in part to the district having denied her a FAPE for 11 consecutive school years, I further direct the district to fund up to \$2,000 toward the costs of a preparation course for the Test Assessing Secondary Completion (TASC) in which the student enrolls within four years of the date of this decision, to assist her in obtaining a high school equivalency diploma.¹⁶ While counsel for the parent expressly disclaimed any intention to seek an award for a high school equivalency diploma preparatory program as relief (Tr. pp. 114, 407-08); as the student will no longer be entitled to a free public education in the public schools of this State after the conclusion of the 2014-15 school year (Educ. Law §§ 3202[1]; 4401[1]), a high school equivalency diploma is the

¹⁵ The district will also be directed to provide the student with or fund the costs of transportation as required for the student to access the compensatory speech-language therapy and tutoring services; however, the district is permitted to determine what form the transportation shall take. In addition, although the parent requests district funding for the costs of materials and equipment ancillary to the compensatory services, such costs should be reflected in the cost of the services, and no separate provision is made for them herein.

¹⁶ The State Education Department has approved a number of TASC preparation courses that are provided free of charge (*see* "Protecting Yourself From HSE Testing Fraud," ACCES [Feb. 2014], [available at](http://www.acces.nysed.gov/ged/protect_yourself_fraud.html) http://www.acces.nysed.gov/ged/protect_yourself_fraud.html; "HSE Preparation Programs," ACCES [Feb. 2014], [available at](http://www.acces.nysed.gov/ged/nys_map/counties_tableprep) http://www.acces.nysed.gov/ged/nys_map/counties_tableprep).

only diploma option remaining to her and this relief is granted as a matter of equity under the circumstances of this case. Further, the HLC director stated that the HLC tutoring recommendation focused exclusively on academic skill remediation in reading, writing, and mathematics and did not provide an opinion on the services required for the student to obtain a high school equivalency diploma (Parent Ex. TTTT at pp. 15-16).

3. Social Work Services

Next, I turn to the parent's request for social work services for the student. The parent alleges that the student requires social work services to assist her in accessing any compensatory services awarded. The report of an October 2014 neuropsychological/psychoeducational evaluation (October 2014 neuropsychological evaluation) noted that the student presented with a language-based learning disorder; specific learning disabilities in reading, writing, and mathematics; attention difficulties; emotional concerns; and verbal memory and verbal working memory difficulties (Parent Ex. WWW at p. 25). The evaluator noted the student's ability to focus for more than two to three minutes was variable, her attentional capacity was one of her weakest areas, and her oral comprehension skills were at the very low level (*id.* at pp. 16-17). The evaluator also indicated the student required support to accommodate her needs related to working memory, including her need for repetition (*id.* at pp. 18, 25-26). Although the October 2014 neuropsychological evaluation report stated that the student's practical skills were significantly greater than her conceptual skills, the evaluator noted the student demonstrated below average performance related to health and safety skills (*id.* at p. 19). Further, the October 2014 neuropsychological evaluation report indicated that the student felt confused, worried about her future, lacked self-confidence, felt fearful and anxious, and indicated feelings regarding an inability to succeed (*id.* at p. 20).

The October 2014 neuropsychological evaluation report cited the student's difficulties related to executive functioning skills, noting that the student demonstrated marked difficulties with cognitive flexibility and response inhibition, very low verbal reasoning skills, and difficulty with attention related to planning for the future and setting priorities (Parent Ex. WWW at pp. 19-20). Through self-evaluation and teacher checklist assessments, the October 2014 neuropsychological evaluation report indicated that the student demonstrated forgetfulness, inattention, dependence on others, difficulty setting priorities, disorganization, difficulty with details, and lateness for appointments (*id.* at pp. 19-21).

As described above, the hearing record establishes the student's needs related to functional academic skills, attention, and working memory. In addition, the hearing record identifies the student's difficulty with understanding and effectively using language to communicate, organizational skills, and ability to set priorities and manage details. Further, the hearing record establishes the student's weakness in the areas of health and safety. Based on the foregoing, the evidence in the hearing record demonstrates that, in light of the student's needs, the student requires social work services to assist her in accessing and implementing the awarded compensatory education program, as well as to assist the student in connecting with appropriate agencies to provide her with adult transition, employment, and vocational services. Accordingly, the district shall fund up to 50 hours of social work services to be used by the student as needed, within four years of the date of this decision.

4. Transition Services

With regard to the parent's request for compensatory services in the area of transition and vocational services, the parent does not argue that the relief she is requesting is related to any specific deficiencies in the student's abilities in these areas resulting from the district's failure to provide the student with a FAPE; rather, she requests an hour-for-hour remedy for all services to which the student was entitled during the school years at issue. As noted above, a compensatory award should attempt to place a student in the position he or she would have occupied if not for the violations of the IDEA (Newington, 546 F.3d at 123; S.A., 2014 WL 1311761, at *7; see L.M., 478 F.3d at 316; Reid, 401 F.3d at 518; Puyallup, 31 F.3d at 1497), and the hearing record reflects that the student independently completes activities of daily living and travels on public transit (Parent Exs. T at p. 1; WWW at p. 19; RRRRR at p. 6). In addition, the student may utilize the compensatory social work services awarded above to assist her in accessing transition, employment, and vocational services provided to adults by various agencies.¹⁷ Accordingly, the parent's request for additional compensatory transition services is denied.

C. Reimbursement for IEEs

The parent contends that the IHO erred in failing to direct the district to fund the costs of privately-obtained IEEs. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]). If a parent requests an IEE at public expense, the district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

The IHO denied the parent's claim for public funding of the costs of the IEEs because there was no evidence presented at the impartial hearing that the parent disagreed with any

¹⁷ To the extent the student continues to require assistance in this area, she is encouraged to contact the State Education Department's Office of Adult Career and Continuing Education Services (ACCES) and the State Office for Persons with Developmental Disabilities (OPWDD).

district evaluations in order to satisfy the procedural requirements for reimbursement (see IHO Decision at p. 7). However, as the district conceded that the parent was entitled to public funding for the costs of the privately-obtained evaluations, it is irrelevant whether the parent disagreed with a district evaluation (Tr. pp. 14, 16). Therefore, the district is directed to reimburse the parent for these private evaluations upon presentation of invoices in accordance with its policies for IEE reimbursement.¹⁸

D. Assistive Technology Evaluation and Services

Regarding assistive technology, the parent requests that the district provide the assistive technology recommended in the September 2014 auditory and language processing evaluation report, as well as additional assistive technology as recommended by an evaluation of the student's assistive technology needs. The hearing record indicates that the district agreed to conduct an assistive technology evaluation (Tr. pp. 14-17). The auditory and language processing evaluator recommended an assistive technology evaluation to determine how technology could support the student's needs in areas such as memory, organization, and daily planning (Tr. p. 284; Parent Ex. HHHHHH at p. 13). The October 2014 neuropsychological evaluation report also recommended that the student be evaluated to obtain recommendations to "facilitate and speed up" the student's ability to improve her cognitive and educational skills (Parent Ex. WWW at p. 26).

State regulations require that assistive technology devices and services be provided to the extent necessary to permit a student to benefit from instruction (8 NYCRR 200.4[d][2][v][b][6], [d][3][v]). A recommendation for a particular assistive technology device or service as an additional support for a student does not necessarily indicate the student's need for that device or service (High v. Exeter Twp. Sch. Dist., 2010 WL 363832, at *5 [E.D. Pa. Feb. 1, 2010] [holding that "although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary"]). Accordingly, a compensatory award of assistive technology will be granted only when necessary to assist the student in accessing the instructional portions of her compensatory award (see Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-121). The recommendations for assistive technology made in the September 2014 auditory and language processing evaluation appear to be directed at the student's anticipated needs within a classroom setting, rather than constituting services required for the student to access the 1:1 tutoring award made herein (Parent Ex. HHHHHH at pp. 12-13). However, having considered the private evaluation reports, the hearing record establishes that the student's speech-language deficits and learning disability affect her ability to access her educational program. In light of such evidence, and in consideration of the district's agreement to conduct an assistive technology evaluation during the impartial hearing, the student should be evaluated to determine if she requires any particular assistive technology devices or services to assist her in accessing the compensatory program outlined in this decision. The district is directed to perform an assistive technology evaluation of the student within 20 business days of the date of this decision, to determine if the student requires assistive technology devices or services to access the compensatory program

¹⁸ The invoices for these evaluations were apparently not available at the time of the impartial hearing (Tr. pp. 13-14).

awarded to her in this decision.¹⁹ In furtherance of this determination, the district may find it useful to conduct an observation of the student in the location at which she receives tutoring, so as to more accurately identify the assistive technology, if any, that would aid her in accessing the tutoring services.

VII. Conclusion

As the district conceded, the student was denied a FAPE for 11 consecutive school years. Based on a review of the record, the IHO erred in failing to find a gross violation of the IDEA and in denying compensatory education services to the student beyond her statutory eligibility period. The IHO also erred in not awarding compensatory speech-language therapy services beyond the period of eligibility.

I have considered the parties' remaining contentions and find them to be without merit or unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 25, 2015 is modified, by reversing those portions which denied the parent's requests for compensatory services past the student's age of statutory eligibility and funding for privately-obtained evaluations; and

IT IS FURTHER ORDERED that the district is directed, to the extent it has not already satisfied the IHO's award of 1:1 tutoring services, to provide the student with 1:1 tutoring by a special education teacher in the area of ELA , in the amount ordered by the IHO; and

IT IS FURTHER ORDERED that in addition to the relief awarded by the IHO, the district shall fund: 1931 hours of 1:1 tutoring services; 300 hours of individual speech-language therapy services ; up to 50 hours of social work services; the costs of the student's transportation to and from the awarded compensatory services; and up to \$2,000 toward the cost of a TASC preparation course, all of the foregoing to be redeemed by the student within 4 years of the date of this decision; and

IT IS FURTHER ORDERED that the district shall fund the costs of the privately-obtained evaluations upon presentation of invoices therefor; and

¹⁹ The district asserts that this request is moot because it conducted an assistive technology evaluation of the student in March 2015; however, no report of such evaluation was submitted as additional evidence annexed to the district's answer. Furthermore, because a student's need for assistive technology may vary depending on the services the student is receiving and the location in which the student is receiving them, unless the parties otherwise agree the district shall conduct an evaluation as outlined above.

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall conduct an evaluation of the student's assistive technology needs within 20 business days of the date of this order to determine whether the student requires assistive technology devices or services to access the award of compensatory services.

Dated: **Albany, New York**
 June 26, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER