



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-072

### **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 New York City Department of Education**

#### **Appearances:**

New York Legal Assistance Group, attorney for petitioner, Joel I. Mandelbaum Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

#### **DECISION**

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied her request that respondent (the district) provide funding for services from the Lindamood-Bell Learning Processes Center (Lindamood-Bell) for the 2007-08 school year. The parent further appeals the impartial hearing officer's decision which denied her request for compensatory relief in the form of additional services as a remedy for the denial of a free appropriate public education (FAPE) from 1999 through the 2006-07 school year. The district cross-appeals from that portion of the impartial hearing officer's decision which dismissed the parent's claim for compensatory relief without prejudice. The appeal must be sustained in part. The cross-appeal must be sustained in part.

Preliminarily, I will address two procedural issues. First, the district requests that I dismiss the parent's petition, asserting that the petition is insufficient in that it fails to specify the relief sought for the alleged denial of a FAPE from 1999 through the 2006-07 school year. The State regulations require the petition to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to briefly indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR 279.4[a]). Although a review of the petition shows that the parent failed to specify the amount of hours of Lindamood-Bell instruction being sought as additional services for the 1999 through 2006-07 school year (Pet. ¶ 93), overall, the allegations asserted by the parent are not ambiguous in that the parent seeks Lindamood-Bell services and did not preclude the district from effectively formulating a responsive answer (see Application of a Child with a Disability, Appeal

No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096). Therefore, I will not dismiss the parent's petition (see Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096).

Second, the parent submitted a verified "reply and answer" to the district's cross-appeal and answer. Pursuant to State regulations, the scope of a reply is limited to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, there was no additional documentary evidence served with the district's answer and the answer contained only one procedural defense. Accordingly, the allegations and responses contained in the parent's reply will only be considered to the extent that they are responsive to the aforementioned procedural defense raised in the district's cross-appeal (Application of a Student with a Disability, Appeal No. 08-036; Application of a Student with a Disability, Appeal No. 08-031; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002).

At the time of the impartial hearing, the student was 15 years old, enrolled in a ninth grade 12:1+1 special class in one of the district's high schools and was scheduled to receive one 30-minute group counseling session as well as two 30-minute group sessions of speech-language therapy per week (Parent Ex. A at p. 1).<sup>1</sup> The student's cognitive skills are in the low average range, with greater strength seen in nonverbal skills (average range) than language-based skills (borderline range), suggesting the presence of a language-based learning disability (Parent Ex. B at p. 2). Her academic functioning is significantly below grade expectations, with reading skills at a mid-second grade level and math skills at a third to fifth grade level (*id.* at p. 5). She also exhibits significant expressive and receptive language deficits (Parent Ex. D at p. 4). Emotionally, the student reportedly struggles with concerns with performance and achievement, which interferes with her learning as she finds it difficult to be receptive to interventions that may be productive (Parent Ex. B at p. 5). During the 2007-08 school year, the student had a significant history of school absenteeism (Dist. Exs. 11-14; 17-18; 20-21; 23-27). In addition, the student has a diagnosis of Graves' disease, described in the hearing record as a thyroid disorder (Parent Ex. B at p. 1). The student's eligibility for special education services and classification as a student with a learning disability are not in dispute in this proceeding (Tr. p. 22; Parent Ex. A at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

In January 1999, the student's first grade teacher referred her to the Committee on Special Education (CSE) due to concerns that the student exhibited academic difficulties (Tr. p. 530; Parent Ex. G).<sup>2</sup> In April 1999, the district evaluated the student and reported the presence of low average cognitive abilities and significant "language-oriented" delays (Parent Ex. J at p. 1). Initial CSE meetings were convened on April 28 and May 5, 1999 with the parent in attendance (Dist. Ex. 2 at pp. 1-2). The CSE determined that the student was eligible to receive special education

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<sup>1</sup> The hearing record indicates that the student has not attended school since March 18, 2008 (Dist. Ex. 14).

<sup>2</sup> The hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

services as a student with a speech or language impairment and recommended a general education program with daily resource room services and three sessions per week of group speech-language therapy (id. at pp. 1-2, 7).

During the 1999-2000 school year, the student repeated the first grade (Parent Ex. K at pp. 1-2). On November 23, 1999, the parent, the district's supervisor of special education and school psychologist agreed that in light of the student's failure to progress in her then current special education program, and in order to increase the student's level of academic success, it was in the best interest of the student to place her in a full-time "readiness" program (Dist. Ex. 4).

In early 2000, the district conducted psychological and educational evaluations of the student (Parent Exs. J; K). In his January 2000 psychological evaluation report, the school psychologist reported that the student exhibited low average cognitive ability with significant scatter (low average to borderline skills) and adequate visual-motor integration and visual short-term memory skills (Parent Ex. J at p. 3). He recommended placement of the student in a full time "academically-oriented program" with the continuation of "language services" (id.). In February 2000, the district conducted an educational evaluation of the student (Parent Ex. K). The evaluator concluded that the student's academic skills were in the kindergarten to early first grade range and opined that the student had not made the progress the district anticipated, despite receiving resource room and speech-language services (id. at p. 4). The CSE convened on February 9 and 16, 2000 to review the student's program with the parent in attendance (Parent Ex. L at pp. 1-2). The February 16, 2000 CSE recommended placement of the student in a 15:1 special class with one individual and one group speech-language therapy session per week (id.).

The CSE met on March 14, 2001, for the student's annual review (Parent Ex. M).<sup>3</sup> The resultant 2001-02 individualized education program (IEP) indicated that the student had made some progress, but that she had not yet mastered the first grade curriculum and that her decoding skills remained very weak (id. at p. 3). The March 2001 CSE did not recommend changes to the student's program for the upcoming school year (compare Parent Ex. L at pp. 1, 14, with Parent Ex. M at pp. 1, 10). On November 7, 2001, due to her "severe deficits in reading and writing skills," the student's special and general education teachers and the school principal modified the student's IEP to the extent that questions would be read aloud to her and recorded in any manner (Parent Ex. N).

The CSE convened on January 30, 2002, for a requested review of the student's program, which resulted in a change in the student's placement to a 12:1 collaborative team teaching (CTT) class (Parent Ex. O at p. 1).<sup>4</sup> The January 2002 CSE also changed the student's speech-language therapy services to two group sessions per week and added additional testing modifications (id. at p. 2).

On June 17, 2003, the CSE convened with the parent in attendance for her daughter's annual review and to develop her program for the 2003-04 school year (Parent Ex. P at pp. 1-2). The June 2003 CSE changed the student's eligibility for special education services as a student with a speech or language impairment to a student with a learning disability, although the hearing record does

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<sup>3</sup> The March 2001 IEP does not indicate that the parent attended this CSE meeting (Parent Ex. M at p. 2).

<sup>4</sup> The January 2002 IEP does not indicate that the parent attended this CSE meeting (Parent Ex. O at p. 2).

not indicate why the student's classification was changed (*id.* at p. 1). The resultant June 2003 IEP indicated that the student's cognitive ability, measured by an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), was reportedly in the intellectually deficient range; however, she exhibited relative strengths in the areas of verbal reasoning and visual recognition (*id.* at p. 3).<sup>5</sup> The June 2003 IEP also indicated that the student demonstrated "intellectually deficient skills in the areas of abstract thinking, fund of information, and synthesis," and that her academic skills in all areas of reading and math were significantly delayed (*id.*). Although the IEP indicated that the student made progress in her communication skills, her language formulation difficulties prohibited her from effectively elaborating on her thoughts, her phonemic awareness skills were significantly below grade level, and her syntax/grammar skills were also delayed (*id.* at p. 4). The June 2003 CSE recommended placement of the student in a 12:1 special class with twice weekly 30-minute group speech-language therapy sessions (*id.* at pp. 1-2, 11).

On May 11, 2004, the district's CSE met with the parent in attendance for the student's annual review and to develop her program for the 2004-05 school year (sixth grade) (Parent Ex. Q at p. 2). The resultant May 2004 IEP noted that the student needed a lot of attention, supports, reminders and small-group instruction, in addition to visual cues to stay focused - needs that would be best served in a 12:1 classroom (*id.* at p. 11). The May 2004 IEP stated that despite the student's struggles with decoding and multisyllabic unfamiliar words, she had made great progress in all academic areas (*id.* at p. 3). It further indicated that the student had shown good motivation as well as a positive attitude towards learning (*id.*). Although the May 2004 CSE indicated that the student tended to become angry and frustrated easily, she was also described as "sweet;" someone who thoroughly enjoyed helping others and who had good, strong relationships with her peers; and as someone who enjoyed working in small groups (*id.* at p. 4). In light of the student's disrespectful and sometimes violent behavior toward district staff and her peers, the student's social-emotional management needs included frequent check-ins with her teacher and frequent praise and rewards for hard work and good behavior (*id.*). The May 2004 CSE did not recommend changes to the student's program at that time (compare Parent Ex. P at pp. 1, 11, with Parent Ex. Q at pp. 1, 2, 12).

On June 21, 2006, the CSE convened with the parent in attendance to conduct the student's annual review and to plan her program for the 2006-07 school year (eighth grade) (Parent Ex. R at p. 2).<sup>6</sup> The resultant June 2006 IEP indicated that the student had shown "tremendous" improvement during the prior year, in that her reading improved from a pre-primer level to a late second/early third grade level and her math skills were at a third grade level (*id.* at p. 3). The June 2006 IEP stated that the student exhibited "marked improvement" in her behavior, and that she was more compliant and cooperative in class, which had a positive effect on her overall performance (*id.*). According to the June 2006 IEP, the student's social and coping skills had also improved, as she demonstrated that she could handle conflicts in a mature manner and was more confident in her ability to manage situations that were outside "her comfort zone" (*id.* at p. 4). The June 2006 CSE recommended placement of the student in a 12:1+1 special class with two group

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<sup>5</sup> The evaluation report that contains this information is not included in the hearing record.

<sup>6</sup> The hearing record does not contain an IEP for the 2005-06 school year, as the parent indicated that it was "not accessible" (Pet. ¶ 47).

speech-language therapy sessions per week, and one group counseling session per week (id. at p. 1).

A May 2007 progress report from the student's "IEP teacher"<sup>7</sup> revealed that although the student had made significant improvement in some areas of reading, she "still ha[d] a long way to go," and that her reading skills remained below grade level (Parent Ex. C). From January 2005, when the IEP teacher began working with the student, until the date of the progress report, the student's reading skills improved from a beginning/mid-kindergarten to a second-third grade level (id.). The progress report described the student's difficulty with visualizing words, visual imagery and decoding, which affected her ability to understand the meaning of words (id.). According to her IEP teacher, the student had achieved not only academic progress, but she exhibited higher self-esteem than when she was in the sixth grade, although at times the student's "negative behavior" got in the way of her academic growth (id.). The IEP teacher recommended that the student continue with a multisensory phonetic approach to reading with a focus on word meaning and opined that the student would also benefit from a whole language approach (id.).

On May 22, 2007, due to the parent's concerns about her daughter's academic progress, the district's school psychologist conducted a psychoeducational evaluation of the student (Parent Ex. B). The psychoeducational evaluation report stated that the student had been in a 12:1+1 program for the past three years that she was in middle school and her mother wanted to determine if that placement remained appropriate (id. at p. 1). The school psychologist administered the Wechsler Individual Achievement Test, Second Edition (WIAT-II), the Bender Visual-Motor Gestalt Test (Bender-Gestalt II), selected subtests from the WISC-IV and projective assessments (id.). The school psychologist reported that the student's teachers indicated that they had observed "great strides" in the student's learning, particularly with regard to her decoding skills, since she had begun middle school (id.). Although the student made friends and socially interacted with peers, at times she exhibited a "belligerent attitude," particularly when feeling emotionally or academically vulnerable (id.). Informal administration of WISC-IV subtests yielded results commensurate with prior cognitive assessments of the student, which indicated that her nonverbal skills were in the average range and her verbal skills were in the borderline range (id. at p. 2). Administration of selected subtests of the WIAT-II yielded the following standard scores: word reading (56), reading comprehension (47), pseudoword decoding (80), numerical operations (57), math reasoning (74), spelling (56), listening comprehension (77) and oral expression (78) (id. at p. 6).<sup>8</sup> The school psychologist reported that the student's visual-perceptual skills were her greatest strength and suggested that she responded more favorably to visually loaded information and stimuli (id. at p. 5). Results of projective assessments indicated that the student struggled with "issues" of trust/mistrust and with performance and achievement, which interfered with her learning in that she frequently found it difficult to be receptive to instruction (id.). The school psychologist recommended that the student receive instruction in an educational setting that offered individualized attention and modifications, along with emotional support and reinforcement (id.).

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<sup>7</sup> The hearing record only refers to this teacher as the student's "IEP teacher" and does not provide information regarding this teacher's credentials or the frequency/duration with which the student received instruction from this teacher (Tr. pp. 550, 624; Parent Ex. A at p. 2).

<sup>8</sup> The student declined to complete assessments of her written language skills (Parent Ex. B at p. 2).

On June 8, 2007, with the parent in attendance, the CSE convened for the student's annual review and to develop her program for the 2007-08 school year (ninth grade) (Parent Ex. A at p. 2). The resultant June 2007 IEP indicated that the student's performance on the May 2007 administration of the WIAT-II revealed reading and spelling skills within a second grade instructional range (id. at p. 3). According to the June 2007 IEP, although the student had made some progress in academic areas, significant deficits remained, and she continued to require redirection and positive reinforcement in order to maintain her focus and successfully complete tasks (id.). The June 2007 CSE also noted that the student had exhibited improved social-emotional skills, and despite remaining resistant to intervention, particularly when challenged, the student's coping and conflict resolution skills had improved (id. at p. 4). Although the student was able to express her frustrations, she continued to require adult support and redirection when she became overwhelmed (id.). The June 2007 CSE developed annual goals and short-term objectives in the areas of reading, writing, math, counseling, and speech-language (id. at pp. 6-9). The June 2007 CSE did not recommend changes to the student's placement or related services for the upcoming 2007-08 school year at that time (compare Parent Ex. R at p. 1, with Parent Ex. A at pp. 1, 2).

On July 23, 2007, the parent obtained a private speech-language evaluation of her daughter that consisted of three diagnostic sessions over a two week period (Parent Ex. D at p. 1). The private speech-language pathologist reported that the student appeared to be "disinterested" by the evaluation process and more tense during reading tasks (id. at pp. 1-2). Administration of four subtests of the Clinical Evaluation of Language Fundamentals-4 (CELF-4) resulted in raw scores designated as "below expectations" (id. at p. 2). Assessment of the student's phonological awareness and decoding skills indicated that her phonemic awareness skills were an area of relative strength, and that her functional decoding skills were not grade appropriate (id. at p. 4). Her reading fluency and comprehension skills were estimated to be at a second to third grade level (id. at pp. 4-5). The private speech-language pathologist reported that the student's motivation and attitude may negatively affect her performance in an academic setting and he opined that she was in need of significant counseling and encouragement to benefit from individual instruction (id. at p. 5). The private speech-language evaluation report provided recommendations for educational counseling, three sessions per week of individual speech-language therapy, and that the student undergo auditory processing, visual-perceptual processing and comprehensive literacy evaluations (id.). He also recommended that the student receive an intensive, multi-modal and structured approach to reading instruction and that the use of programs based on an Orton-Gillingham approach, the "Wilson Program" or the Lindamood-Bell Phoneme Sequence program be considered (id.).<sup>9</sup>

At the commencement of the 2007-08 school year, the student attended ninth grade in one of the district's high schools and received instruction in French, pre-algebra, reading skills, health, global studies, biology and business communications (Dist. Ex. 16). In October 2007, the student's dean/special education teacher contacted the parent about her daughter's "cutting" classes (Dist. Ex. 22 at p. 1).

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<sup>9</sup> The parties' use of the term "Wilson" to describe a specific reading program appears to be referencing the Wilson Reading System, described as "a complete curriculum for teaching decoding and encoding (spelling), beginning with phoneme segmentation" (see Dist. Ex. 15).

On November 2, 2007, the parent obtained a "Pre-Testing Summary" assessment of her daughter at Lindamood-Bell (Parent Ex. E). Lindamood-Bell's center director recommended that the student receive intensive sensory-cognitive instruction four hours per day, five days per week, for an estimated total of 480 hours of instruction (id. at p. 4).

On November 15, 2007, the student was suspended for five days for cutting classes and for forging her teachers' names on her "probation sheet" (Dist. Ex. 27).<sup>10</sup> On November 26, 2007, the student, the parent and the student's special education teacher met for a parent conference/suspension hearing (Dist. Exs. 23; 27).

On December 10, 2007, one of the student's teachers initiated a "Deans' Office Referral," due to the student talking throughout the class and refusing to complete her class work despite requests to do so (Dist. Ex. 19). By letter also dated December 10, 2007, to the parent, the student's special education teacher advised the parent that the student was "excessively" absent in light of her absences for the entire week of December 3, 2007 through December 7, 2007 and on December 10, 2007 (Dist. Ex. 20). The student's teacher further warned the parent that the student would fail the third marking period if her absences continued (id.). According to the December 10, 2007 letter, the student's special education teacher called the parent; however, the phone was disconnected (id.). On December 13, 2007, the student's guidance counselor called the parent regarding her daughter's absences (Dist. Ex. 24).

In a January 2008 notice to the parent, the district's assistant principal advised the parent that the student was not meeting the standards for promotion to the next grade in the following areas: accumulation of credits, coursework/exams, and attendance (Dist. Ex. 11).

By due process complaint notice dated January 22, 2008, the parent contended that the June 2007 IEP was substantively deficient, thereby resulting in a denial of a FAPE (Parent Ex. i at p. 4). The parent further alleged that the district had known about her daughter's "extreme reading deficits since January 1999" and had never properly addressed them (id. at p. 5). As relief for the district's failure to provide the student with a FAPE during the 2007-08 school year and for its failure to redress her reading deficits for the eight years prior to the development of the June 2007 IEP, the parent requested payment for intensive reading instruction for the student to be provided by Lindamood-Bell (id.).

In a February 2008 letter, the assistant principal advised the parent that the student was failing six of her classes for the third marking period (Dist. Exs. 12; 13). The assistant principal further reported that although the student had met the math goals identified in her IEP, due to her absences and incomplete assignments, the student had not met her reading or writing goals (Dist. Ex. 13).

By letter dated February 5, 2008, to the parent, the student's special education teacher stated that the student's absences were excessive and that she had been absent on test dates (Dist. Ex. 21). The special education teacher requested that the parent contact her to confirm a telephone number where the parent could be reached (id.). On February 7, 2008, the student indicated to her guidance

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<sup>10</sup> A description of what a "probation sheet" entails is not contained in the hearing record.

counselor that she was not going to school on a particular day and her speech improvement teacher discussed the student's attendance with her (Dist. Exs. 23; 24).

On February 19, 2008, the parent amended her due process complaint notice to the extent that she omitted the allegation that the student's June 2007 IEP failed to incorporate the student's most recent speech-language evaluation (Parent Ex. i at p. 1).

On or about March 18, 2008, the student was assaulted outside of school by two classmates and subsequently did not return to school for the remainder of the 2007-08 school year (Tr. pp. 287-88, 296, 298; Dist. Ex. 14).<sup>11</sup> At a point after the incident not specified in the hearing record, the parent advised the district about the incident and that her daughter did not want to return to the district's school (Tr. pp. 292-93). The student's special education teacher made attempts to meet with the parent in order to request a safety transfer for the student; however, the parent cancelled several appointments and when the student's teacher made efforts to reach her by telephone, it was disconnected (Tr. pp. 287, 292-95; Dist. Ex. 22 at pp. 5-9). The parent's attempts to obtain a police report to facilitate a safety transfer were unsuccessful (Tr. pp. 292-94, 581-82).

An individual student attendance report revealed that during the first term of the 2007-08 school year, the student was absent a total of 25 out of 87 school days and as of March 25, 2008, she was absent a total of 12 out of 31 school days during the second term (Dist. Ex. 14). A cumulative class "cut" list from January 30 through March 18, 2008 indicated that the student did not attend numerous classes (Dist. Ex. 18).

An impartial hearing convened on April 2, 2008 and after four days of testimony concluded on May 27, 2008 (IHO Decision at pp. 1-2).

The impartial hearing officer rendered a decision on June 18, 2008 in which she found that the June 2007 IEP contained procedural and substantive infirmities, which in turn, resulted in a denial of a FAPE to the student during the 2007-08 school year (IHO Decision at pp. 20, 28). Despite her finding that the student did not receive a FAPE during the 2007-08 school year, the impartial hearing officer did not address the issue of whether Lindamood-Bell was appropriate to meet the student's special education needs. Rather, the impartial hearing officer went on to find that the student's failure to progress in the district's recommended program resulted from her excessive absenteeism (*id.* at pp. 22-23). She further noted that notwithstanding the district's efforts to obtain the student's and the parent's cooperation, the parent did not collaborate meaningfully with the district's efforts to improve the student's attendance (*id.* at p. 24). Accordingly, the impartial hearing officer denied the parent's request for relief (*id.* at p. 25). With respect to the parent's claim for compensatory education for the period of 1999 through the 2006-07 school year, the impartial hearing officer declined to make a finding on the issue, and dismissed the parent's request without prejudice (*id.* at pp. 28-29). The impartial hearing officer ordered that the CSE reconvene to develop a new IEP and that a "placement officer" participate in and facilitate the identification "of a small, structured non-community placement in which the student's emotional issues and absenteeism can be addressed" (*id.* at p. 28) (emphasis in original). The impartial hearing officer further ordered that the CSE develop a transition plan and that the CSE "continue to designate a specialized multi-sensory reading program for the [student] and specify

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<sup>11</sup> The parent testified that the incident took place on March 18 or 19, 2008 (Tr. p. 579).



the exact educational parameters within which this mandate shall be implemented" (*id.* at pp. 28-29).

The parent appeals, arguing that the impartial hearing officer's failure to award compensatory education was unjustified inasmuch the hearing record established a gross deprivation of a FAPE for the period of January 1999 through the 2006-07 school year. The parent further argues that their claim for the period of January 1999 through the 2006-07 school year is not time barred as the parent "relied upon the professional educators who assured her that [the student's] reading skills would improve" (Pet. ¶ 98), and that at no point prior to the 2007-08 school year did she know or should she have known that the student's IEPs were not tailored to meet the student's unique needs. Additionally, the parent contends that the impartial hearing officer erred by denying her request for funding for 480 hours of Lindamood-Bell intensive tutoring as a remedy for the denial of a FAPE for the 2007-08 school year. The parent requests an unspecified amount of compensatory education at Lindamood-Bell to remedy the district's alleged violation of FAPE requirements during the 1999 through 2006-07 school year and 480 hours of services at Lindamood-Bell to remedy the district's violation of a FAPE for the 2007-08 school year. The parent further requests that the impartial hearing officer's order that the CSE reconvene to develop a new IEP and consider a "more restrictive District 75 school" be nullified (Pet. ¶¶ 100, 101).

The district submitted an answer denying the parent's allegations and including affirmative defenses. Although the district maintains that the impartial hearing officer correctly dismissed the parent's request for compensatory relief for the period of 1999 through the 2006-07 school year, the district argues that the claim was barred by the statute of limitations. The district also cross-appeals the impartial hearing officer's ruling to the extent that she dismissed the parent's claims regarding 1999 through the 2006-07 school year "without prejudice" (Pet. ¶ 70). The district further argues that the impartial hearing officer was correct in ordering that the CSE "recommend a non-community placement in [the student's] IEP for the 2008-09 school year" (Pet. ¶ 67) and states that this portion of the decision should be affirmed. Further, the district cross-appeals the impartial hearing officer's decision regarding the parent's claim for the 2007-08 school year in so much as the impartial hearing officer applied an incorrect legal standard to this claim.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE<sup>12</sup> 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 *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

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<sup>12</sup> The term "free appropriate public education" means special education and related services that --

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

Turning first to the parent's claims with respect to the period of 1999 through the 2006-07 school year, as relief, the parent seeks additional, compensatory services in the form of an unspecified amount of Lindamood-Bell tutoring to remedy what she alleges to be a "gross violation of a FAPE" during those school years.<sup>13</sup> The impartial hearing officer made no finding regarding the parent's request for compensatory additional services for the time period of 1999 through the 2006-07 school year (IHO Decision at p. 28). As indicated below, although based on different grounds, I agree with the impartial hearing officer's conclusion that the parent is not entitled to compensatory education in the form of additional services to remedy the alleged denial of a FAPE for the period of 1999 through the 2006-07 school year.

Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the Individuals with Disabilities Education Act [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., 2008 WL 3474735, at \*1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "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 (see Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at \* 10 [2d Cir. Oct. 9, 2008][stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of the Bd. of Educ., Appeal No. 08-060; 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).

As a threshold matter, I must determine whether the parent's claims that her daughter was denied a FAPE during the years of 1999 through the 2006-2007 school year are barred by the statute of limitations, as argued by the district. In the instant case, the parent alleges on appeal that her claims for that time period did not accrue before the 2007-08 school year. The parent contends

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<sup>13</sup> It is unclear if the parent is seeking compensatory education beyond age 21, or additional services for the student during the student's statutory eligibility period.

that although she "at times questioned the education being received" by the student, she was "unsophisticated" in matters relating to her daughter's educational needs, and therefore, she had no way of knowing that the student's IEPs were not tailored to her needs prior to the 2007-08 school year (Pet. ¶¶ 98-99). Conversely, the district argues that the parent's claims arose as early as 1999 or no later than February 19, 2006 because the parent knew or should have known about her concerns about her daughter's education.

The IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]). Absent clear congressional intent, a newly enacted federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221).

In this case, the hearing record is not clearly developed as to the date that the parent's claim for compensatory education may have accrued. The district asserts that the parent knew or should have known as early as 1999 about the alleged denial of a FAPE and accordingly, her claims should be barred by either a one-year or two-year statute of limitations. Notwithstanding the district's argument, the parent testified that she "was going by the IEP," and that she also relied upon the district's CSE who advised her that the student "was doing good" (Tr. p. 550). Although she questioned the student's progress between the sixth and seventh grades after her daughter's test scores were discrepant with citywide test score results, the parent did not pursue further evaluations at that point nor does the hearing record show that she initiated any claims, because she was "depending on the student's teachers and what was going on with the IEP, because [she] did not understand too well" (Tr. pp. 549-52, 574). What the hearing record does indicate is that IEPs were developed yearly during the time period at issue and that the parent attended all of the CSE meetings at issue (Tr. pp. 548, 552).<sup>14</sup> The parent further testified that she "was discussing everything that was going on with her daughter" (Tr. p. 552). The hearing record also reveals that the parent was advised of her due process rights as well as her right to object to the content of the student's IEPs (Tr. p. 548). Based on the hearing record, the parent had an opportunity to raise concerns at the CSE meetings (id.).

However, in this case, I will not address the issue of when the parent's claims accrued because the parent has framed her request for compensatory services related to the 1999 through

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<sup>14</sup> Although two IEPs (Parent Exs. M; O) are missing the parent's signature from the attendance sheet, the parent testified that she participated in all CSEs for the time period in question (Tr. pp. 548, 552). This discrepancy is not resolved in the hearing record.

2006-07 school years as a general claim for relief and has stated that she wishes to specifically identify the relief she is seeking in the future through another hearing. Also, the parent's counsel did not want to "belabor" going through all of the student's IEPs during his examination of the parent at the impartial hearing (Tr. pp. 531-34), neither did he properly identify the factual basis supporting a compensatory award, nor did he identify the specific relief requested to remedy an identified harm. Having had the opportunity to develop the hearing record as it pertains to the relief requested for the 1999 through 2006-07 school years, and having failed to do so, the parent has not provided a basis upon which relief can be granted and her claim for relief is denied with prejudice.

Turning now to the parent's allegation that the impartial hearing officer erred by failing to award the student funding for 480 hours of Lindamood-Bell tutoring to remedy the denial of a FAPE for the 2007-08 school year, as a preliminary matter, I note that here the impartial hearing officer framed the instant dispute in terms of tuition reimbursement, but given the facts of this case, the district correctly argues that a tuition reimbursement analysis (see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]) is not the most appropriate analysis for the parent's request for compensatory or additional services. The parent's claim is one for compensatory additional services; therefore, the correct legal analysis is to determine whether the student was denied a FAPE during the 2007-08 school year and whether Lindamood-Bell instruction would serve as an appropriate remedy.

With respect to the 2007-08 school year, neither party has appealed the impartial hearing officer's conclusion that the June 2007 IEP was both procedurally invalid and substantively inappropriate (IHO Decision at p. 20). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]). Consequently, the impartial hearing officer's determination as to the appropriateness of that program is final and binding (Application of the Bd. of Educ., Appeal No. 07-120; Application of a Child with a Disability, Appeal No. 07-026). As such, I will only address whether the parent's request for additional services at Lindamood-Bell is warranted to remedy the denial of a FAPE for the 2007-08 school year.

Lindamood-Bell's center director testified that Lindamood-Bell provides research based instruction in the areas of reading, spelling, comprehension and math (Tr. pp. 119-20). All instruction is provided individually (Tr. p. 120; Parent Ex. F). Lindamood-Bell instructors undergo Lindamood-Bell specific training and although they are not required to have any teacher certification, they are asked to have either earned a bachelor's degree or to be pursuing that degree (Tr. pp. 122, 163-64).

The center director testified that many students in the Lindamood-Bell program have weaknesses in their sensory systems, which result in difficulty with reading, decoding, spelling, and recalling what they have read; difficulty explaining, summarizing, reasoning, thinking critically and making inferences or drawing conclusions about what they have read (Tr. pp. 131-32). Lindamood-Bell offers instructional programs designed to develop students' sensory cognitive processing including phonemic awareness ("Lindamood Phoneme Sequencing"), symbol imagery ("Seeing Stars") and concept imagery ("Visualizing and Verbalizing") (Tr. pp. 122-27; Parent Ex. E at p. 4). It also offers a math program designed to develop students' numeral and concept imagery ("On Cloud Nine") (Parent Ex. E at p. 4). All Lindamood-Bell programs are multisensory (Tr. pp. 127-28).

According to the center director, "ideally" students attend four hours per day during the summer and decrease the number of hours per day during the school year to approximately two hours per day, usually after school (Tr. pp. 600-01). Some students get out of school early to attend the Lindamood-Bell program (Tr. p. 601). Lindamood-Bell's attendance policy states that students are suspended from the program after three unexcused absences, until the student and parent meet with Lindamood-Bell staff to review the "demands of attendance" (Tr. pp. 597-99). Students must agree to attend daily Monday through Friday and instruction ends if they do not comply (Tr. p. 598). Occasionally, Lindamood-Bell staff requests that students sign an informal attendance contract (Tr. p. 599). Lindamood-Bell provides instruction as long as students continue to make progress (Tr. p. 154).

A Lindamood-Bell specific assessment is conducted with every student enrolled in the Lindamood-Bell program (Tr. p. 132). On November 2, 2007, the parent brought the student to Lindamood-Bell for a "pretesting" evaluation, which involved administration of various diagnostic instruments (Parent Ex. E). The center director further explained that the pretesting evaluation assessed skills similar to those that the student would need at school, including reading paragraphs, reading passages out loud, demonstrating comprehension of what she read, and completing timed reading tasks (Tr. pp. 142-43). The center director described the various pretesting evaluation assessments, the student's performance and how deficits in those areas could manifest in the classroom (Tr. pp. 142-51). The pretesting evaluation results revealed that the student had difficulty with both decoding and comprehension and that she had weaknesses in phoneme awareness, and symbol and concept imagery (Tr. p. 143). The center director opined that the student would struggle with reading until the weaknesses in her sensory system were addressed, and that she was a good candidate for Lindamood-Bell instruction (Tr. pp. 152-53).

Based on the results of the student's pretesting evaluation, the center director recommended that the student receive 480 hours of intensive sensory-cognitive instruction 4 hours daily, 5 days per week, for 24 weeks in the Seeing Stars, Lindamood Phoneme Sequencing, Visualizing and Verbalizing and On Cloud Nine programs (Tr. p. 184; *id.* at pp. 4-5). Although the initial recommendation was for six months of Lindamood-Bell instruction, the center director indicated that the student would probably need "more than that" because she did not know how quickly the student would "move through the program" (Tr. pp. 153-54). The center director expected that the student would gain two years growth in word attack, word recognition and reading fluency skills during the six months of instruction (Tr. pp. 158-59).

The hearing record reflects that from January 2005 until May 2007, the student received multisensory reading instruction using an "Orton-type program" from an "IEP teacher" (Parent Ex. C; *see* Parent Ex. R at p. 9). The IEP teacher reported that when assessed in November 2004, the student had limited letter/sound correspondence and did not have skills to "break the code" of the English language (Parent Ex. C). The IEP teacher reported that the student had difficulty with visual imagery and visualizing the shapes of whole words, which affected her ability to recall sight words (*id.*). According to the IEP teacher, these difficulties impeded the student's ability to understand the meaning of words and make more meaningful connections to literacy (*id.*). In May 2007, after receipt of reading remediation, the IEP teacher reported that the student improved from a beginning to mid-kindergarten reading level to a second to third grade reading level and was able to read and spell words such as vacation, mention, addition and division (*id.*). She also noted improvement in the student's self-esteem (*id.*). Although the student made progress, the IEP

teacher reported that her reading skills remained below grade level and recommended continuation of reading instruction using multisensory phonetic and whole language approaches (id.).

Although not contained in the June 2007 IEP, the hearing record shows that the district also offered the student 1:1 after-school Wilson tutoring sessions, four days per week for 45-minute sessions to be provided by a Wilson-certified special education teacher (Tr. pp. 52-53, 90-98). The Wilson-certified special education teacher opined that Wilson would be beneficial to the student to remediate her deficits in decoding skills (Tr. p. 238).<sup>15</sup> In addition, the private speech-language pathologist who evaluated the student in August 2007 reported that the student would benefit from multisensory reading instruction using programs based on an Orton-Gillingham approach such as Wilson or the "Lindamood Phoneme Sequence" program (Tr. pp. 455-56; Parent Ex. D at p. 5). The hearing record reflects that the student made reading progress when the district offered the student a multisensory phonetic approach (Parent Ex. C). Based on the hearing record before me, the student had demonstrated reading progress (see discussion above and IHO Decision at p. 22) in the recent past with less intensive instruction, and in a less restrictive setting, than 480 1:1 hours of specific Lindamood-Bell programming. The parent has not shown that the student must receive services at Lindamood-Bell in order to remedy the deprivation of a FAPE that occurred during the 2007-08 school year (Reid v. District of Columbia, 401 F.3d 516, 523 [D.C. Cir. 2005]).

As compensatory additional services for the denial of FAPE for the 2007-08 school year, I will order respondent to convene a CSE meeting within 21 days of this decision and amend the student's IEP by offering: 1) 1:1 after-school reading instruction using the Wilson program or another appropriate multisensory reading program four days per week for 45-minute sessions for the remainder of the 2008-09 school year; and 2) social work and counseling services in an amount that will be appropriate to address the student's attendance issues. I will also order that when the CSE reconvenes that it ensure that that the IEP has appropriate transition services and that the IEP contents are free from the infirmities identified by the impartial hearing officer that were in the 2007-08 IEP. The CSE shall also consider the student's placement in a small, structured non-community placement as directed by the impartial hearing officer, but the CSE is not required to make such a placement recommendation unless it is programmatically appropriate and in the least restrictive environment. In addition, I will order that the district arrange for and complete a new comprehensive reading evaluation conducted by a reading specialist to be completed by December 5, 2008 and that the CSE shall reconvene within 30 days after receipt of the written reading evaluation report to consider the new evaluative data along with the Lindamood-Bell evaluation report, and make any appropriate changes to the student's IEP. Lastly, I will order that when the CSE reconvenes in the spring of 2009 to develop the student's 2009-10 IEP, the IEP offer the student 1:1 reading instruction using the Wilson program or another appropriate multisensory reading program four days per week for 45-minute sessions during July and August of 2009 as a continuation of compensatory additional services for the denial of a FAPE during the 2007-08 school year.

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<sup>15</sup> The hearing record reflects that the student's attendance difficulties during the second half of the 2007-08 school year negatively affected her ability to benefit from instruction (Tr. pp. 44, 72-73, 221, 295-96, 302; Dist. Exs. 11-14; 17-18; 20-21; 23-27).

In light of my determination, it is not necessary to determine the parties' remaining contentions.

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

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

**IT IS ORDERED** that, unless the parties otherwise agree, respondent shall convene a CSE meeting within 21 days of this decision and amend the student's IEP by offering: 1) 1:1 after-school reading instruction using the Wilson program or another appropriate multisensory reading program four days per week for 45-minute sessions for the remainder of the 2008-09 school year; and 2) social work and counseling services in an amount that will be appropriate to address the student's attendance issues, and

**IT IS FURTHER ORDERED** that when the CSE reconvenes it ensures that the student's current IEP has appropriate transition services and that the IEP contents are free from the infirmities identified by the impartial hearing officer that were in the 2007-08 IEP. The CSE shall also consider the student's placement in a small, structured non-community placement as directed by the impartial hearing officer, but the CSE is not required to make such a placement recommendation unless it is programmatically appropriate and in the least restrictive environment, and

**IT IS FURTHER ORDERED** that, unless the parties otherwise agree, the district shall arrange for and complete a new comprehensive reading evaluation conducted by a reading specialist to be completed by December 5, 2008 and that the CSE shall reconvene within 30 days after receipt of the reading evaluation report to consider the new evaluative data along with the Lindamood-Bell evaluation report, and make any appropriate changes to the student's IEP, and

**IT IS FURTHER ORDERED**, that when the CSE reconvenes in the spring of 2009 to develop the student's 2009-10 IEP, the IEP offer the student 1:1 reading instruction using the Wilson program or another appropriate multisensory reading program four days per week for 45-minute sessions during July and August of 2009.

**Dated:**           **Albany, New York**  
                          **October 15, 2008**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**