The University of the State of New York

The State Education Department
State Review Officer
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No. 09-111

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:
Morrison & Foerster, LLP, attorneys for petitioner, Michael B. Miller, Esq., of counsel

Advocates for Children, attorneys for petitioner, Christopher J. Tan, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from that part of the decision of an impartial hearing officer which denied the parent's request for compensatory education services at the Lindamood-Bell Learning Processes Center (Lindamood-Bell) as a remedy for the failure of respondent (the district) to recommend appropriate programs for the student for the 2007-08 and 2008-09 school years. The appeal must sustained in part.

At the time of the impartial hearing, the student was enrolled in ninth grade at a district high school in a 12:1+1 special class for a 12-month school year and was receiving related services of counseling (Joint Exs. 2 at p. 1; 4 at p. 1). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

A psychological evaluation of the student was conducted by the district on April 8, 2002, following a referral from the student's special education teacher support services (SETSS) provider (Joint Ex. 3 at pp. 1, 2). At the time of the evaluation, the student was in general education,

repeating third grade, and receiving SETSS two times per day (ten hours per week), speech-language therapy, and occupational therapy (OT) (id. at pp. 1-2, 5).[1]

The April 2002 psychological evaluation report indicated that administration of the Wechsler Intelligence Scale for Children - Third Edition (WISC-III) in March 2001 yielded a verbal IQ score of 76, a performance IQ score of 77, and a full scale IQ score of 75, all in the "borderline range" of cognitive functioning (Joint Ex. 3 at p. 4). Additional formal and informal testing conducted as part of the psychological evaluation, revealed that the student had aggressive acting out tendencies and difficulty getting along with others (id.). The April 2002 psychological evaluation report indicated that the student was insecure and anxious, and was possibly experiencing "feelings of inadequacy and inferiority related to her inability to cope with the demands of the classroom" (id. at p. 5). The April 2002 evaluation report noted that at that time, the student was "in need of support" and she was "desirous of help" (id.).

A district school psychologist conducted another psychological evaluation of the student on June 19, 2007 (Joint Ex. 1 at p. 1). At the time of the evaluation, the student was classified as a student with a learning disability (id. at p. 3). The student was attending an eighth grade 12:1+1 special class at a district school, with counseling as a related service (id. at pp. 1, 3). The evaluation report indicated that the assistant principal and supervisor of special education had referred the student for the evaluation because the student was "functioning far below grade level" (id. at p. 3). In addition, the student exhibited behavioral concerns, including a very short attention span, frustration, and an inappropriate response to the frustration, such as becoming sullen, withdrawn, or very aggressive (id. at pp. 3, 8). The June 2007 psychological evaluation report indicated that the parent wanted the student to be considered for a vocational program for the student's high school placement (id. at pp. 3, 9).

The Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) was administered to the student by the school psychologist as part of the June 2007 psychological evaluation and yielded a full scale IQ score of 43, in the extremely low range (Joint Ex. 1 at p. 5). The results of the verbal comprehension, perceptual reasoning, working memory, and processing speed indices all fell within the extremely low range (id.). Administration of the Wechsler Individual Achievement Test - Second Edition (WIAT-II) yielded results in the extremely low range for reading and math (id. at p. 6). The student's reading skills were determined to be at an early first grade level, with her math reasoning skills better developed at a low fourth grade level (id. at p. 7). The student's spelling skills were determined to be at a high kindergarten level (id.). The psychological evaluation report noted that the reported scores should be viewed with caution and may be minimal estimates of the student's cognitive functioning skills as her behavior during testing reflected that she was neither motivated nor interested in the testing session (id. at pp. 6,

[1] The April 2002 psychological evaluation report indicated that the student was initially referred for evaluation in November 1997 because of speech and memory problems when she was attending a private kindergarten (Joint Ex. 3 at p. 2). Sometime after the November 1997 evaluation, the student was classified as a student with a speech or language impairment (id.). The student was evaluated again in March 2001 as part of a triennial evaluation (id.). As a result of that evaluation, the student was classified as having a learning disability (id.). Following an annual review conducted in June 2005, OT and speech-language therapy were removed from the student's educational program (Joint Ex. 1 at p. 4).

9). According to the school psychologist, the student presented as resistant and was often frustrated and annoyed during the 1:1 testing situation (id. at p. 8).

The Vineland Adaptive Behavior Scales - Second Edition - Interview Edition was conducted as part of the June 2007 psychological evaluation with the parent acting as informant (Joint Ex. 1 at p. 7). The results yielded a score of 84, indicating that the student's adaptive skills were in the moderately low range (id. at pp. 2, 7). The student's communication skills were also in the moderately low range, while her daily living skills and socialization skills were in the adequate range (id.).

In the area of social/emotional functioning, the psychological evaluation report reflected that the student reportedly had friends and engaged in age appropriate activities with them; however, the student also often had disputes with her friends (Joint Ex. 1 at p. 8). In addition, the student's teacher reported to the school psychologist that the student was easily frustrated and vented her frustration in a violent manner (id.).

The Committee on Special Education (CSE) convened for a review of the student's program on June 26, 2007, and developed an individualized education program (IEP) for the 2007-08 school year (Parent Ex. F at pp. 1-2). In attendance were the school psychologist who had performed the June 2007 psychological evaluation and who functioned as the district representative, a regular education teacher, a special education teacher or related service provider, the assistant principal, the parent, and the student (id. at p. 2). According to the IEP, participation in the meeting by an additional parent member was "declined" (id.). The CSE continued the student's classification as a student with a learning disability, and recommended placement in a 15:1 special class in a "District 75" special school for 12 months, with small group (3:1) counseling one time per week for 30 minutes as a related service (id. at pp. 1, 10, 12).

The CSE next convened for an annual review regarding the student on January 23, 2009 and developed her IEP for the 2009-10 school year (Joint Ex. 4 at pp. 1-2). In attendance were the district representative, the special education teacher or related service provider, the assistant principal, the school social worker, and the transition coordinator (id. at p. 2). The parent neither attended nor was invited to attend the January 23, 2009 CSE meeting (Tr. p. 19). The CSE determined that the student continued to be eligible for special education services as a student with a learning disability (id. at p. 1). The CSE recommended placement in a 12:1+1 special class in a District 75 special school for 12 months, with small group (3:1) counseling one time per week for 40 minutes (id. at pp. 1, 9, 11). The resultant IEP indicated that the student had the ability to read and write, although her skills in both areas were "far below grade level" and were hindered by the student's behavior (id. at p. 3).

The hearing record reflects that a private psychoeducational evaluation of the student was conducted on April 20, 2009, at which time the student was attending the district's recommended high school program, reportedly without making any progress (Joint Ex. 2 at p. 1). The April 2009 psychoeducational evaluation report indicated that the student was referred "to re-evaluate her cognitive and academic functioning [in order] to make recommendations for improvement in

academic functioning" (id.).[2] According to the private evaluation report, the student was cooperative during the evaluation and she tried to "do her best for the most part" (id. at p. 2). Difficulty with attention and concentration was noted during testing, but the student could be directed to respond to tasks (id.). When faced with frustrating questions or tasks, the student tended to "give up pretty easily" (id.). The evaluation report noted that the student's affect and mood were within "normal range" and she displayed no unusual behaviors (id.).

In regard to the student's behavior at school, the private psychological evaluation report indicated that the student had difficulty sitting in her seat and raising her hand (Joint Ex. 2 at p. 2). The student displayed a tendency to run out of the classroom when frustrated and at times, exhibited verbally abusive conduct when frustrated in the classroom (id.). The private evaluator indicated that the student's inability to regulate her behavior contributed to her low frustration tolerance and impulsivity, and may be due in large part to the student's history of lead poisoning (id.).

Administration of the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) yielded a verbal comprehension composite score (percentile rank) of 74 (4), a perceptual reasoning composite score of 67 (1), a working memory composite score of 74 (4), a processing speed composite score of 76 (5), and a full scale composite score of 67 (1) (Joint Ex. 2 at p. 3). Administration of the Wide Range Achievement Test - Fourth Edition (WRAT-IV) yielded the following grade equivalent scores: K.9 in word reading, K.0 in sentence comprehension, 1.2 in spelling, and 2.4 in math computation; all at the 0.1 percentile (id.).

Overall, the private evaluator indicated that the student's cognitive functioning was within a "borderline to minimal mentally deficient level," which the evaluator indicated was "better" than previous testing in June 2007 had revealed (Joint Ex. 2 at p. 3). The evaluator further indicated that the improvement in the student's full scale IQ score from the 2007 testing was likely due to the student's increased motivation and was a better indication of the student's actual cognitive potential (id.). The private evaluator described the student as "basically a non-reader" with "no reading skills," and indicated that the student displayed very limited spelling skills, no decoding skills, and severely limited word recognition skills (id.). The private evaluator further indicated that the student required "a great deal of individual remediation to improve her reading level" (id.).

The private evaluator recommended "intensive individualized instruction" in reading to improve the student's reading skills (Joint Ex. 2 at p. 4). In addition, the evaluator recommended a vocational evaluation to help the student think about possible job opportunities, as well as individual and group counseling to address the student's poor self-concept and ability to express her feelings in a socially appropriate way (id.).

On May 13, 2009, the student participated in a "diagnostic learning evaluation" at Lindamood-Bell (Parent Ex. G at pp. 1-2). According to the testing summary report written by the director, it was determined that the student would benefit from intervention to develop her

[2] Testimony by the evaluating private psychologist indicated that he worked two days per week for the advocacy office representing the parent and student, and that he was compensated on an hourly basis pursuant to a grant (Tr. p. 101).

language and literacy skills (id. at p. 4). Intensive instruction for four hours per day, five days per week was recommended for an initial period of 24 weeks (id.).

In a due process complaint notice dated June 9, 2009, the parent, through her attorney, requested an impartial hearing (Parent Ex. A). The parent asserted that the student had made "little to no progress during her entire academic career," yet the district had not provided her with additional assistance or found a more appropriate placement for her (id. at p. 1). The parent further asserted that the student had not received appropriate special education services "for at least the last several years" (id.). As a remedy, the parent requested a "procedurally and substantively valid" IEP; a Nickerson letter;[3] "immediate placement" at Lindamood-Bell for education lost during the last two school years; or in the alternative, immediate placement at Lindamood-Bell for the 2008-09 school year as the student's free appropriate public education (FAPE);[4] home instruction; a related service authorization (RSA) for counseling; and any other relief deemed appropriate (id. at pp. 1-2).

An impartial hearing was conducted on August 4, 2009. Early in the hearing the impartial hearing officer noted "some concessions and some points of agreement" between the parties (Tr. p. 13). The concessions were: 1) no IEP existed for the student for the 2008-09 school year; 2) the IEP for the 2007-08 school year was based, in part, upon a psychoeducational evaluation (Joint Ex. 1) which identified a significant drop in the student's I.Q. scores, yet the district did not conduct retesting or appropriately reconsider placement; and 3) a FAPE was not offered for the 2007-08 and 2008-09 school years (Tr. pp. 13-17). The noted agreements were as follows: the district would conduct a speech and language evaluation of the student and reconvene a CSE, within thirty days, to develop a "substantively and procedurally" sound IEP, which would include, among other things, "research based reading and research based math," a transition plan based upon vocational assessments, a

[3] A Nickerson letter is a letter from the New York City Department of Education to a parent authorizing the parent to place the child in an appropriate special education program in any State-approved private school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a Nickerson letter is intended to address the situation in which a child has not been evaluated or placed in a timely manner (see Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 06-088; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

[4] 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]; see 34 C.F.R. § 300.17).

behavioral intervention plan (BIP) based upon a functional behavioral assessment (FBA),[5] and counseling services (id.). The impartial hearing officer further concluded that the January 23, 2009 IEP did not offer the student a FAPE because 1) it was formulated without parent invitation to, and participation in, the January 23, 2009 CSE meeting, and 2) the IEP was based upon inadequate evaluative data (Tr. pp. 20-21).

In her decision dated August 17, 2009, the impartial hearing officer noted that the parties agreed that there were "gross violations" of the Individuals with Disabilities Education Act (IDEA) that should be remedied with compensatory "additional services" (IHO Decision at p. 2). The impartial hearing officer further determined that the sole issue for consideration was determining the appropriate remedy for the denial of a FAPE for the 2007-08 and 2008-09 school years (id. at pp. 3, 6). The impartial hearing officer found that the student was entitled to the services improperly denied to her during the two year violation period; that the student was denied appropriate instruction in all academic subjects, not just in reading; and that the remedy proposed by the parent (services at the Lindamood-Bell program) was inappropriate (id. at p. 7). In deciding that the remedy proposed by the parent was inappropriate, the impartial hearing officer noted that "receipt of additional services does not mean that the student is isolated from other students in a full day one-to-one tutoring program outside of a school environment for most of a school year in order to remediate one area of lost academic opportunity" (id. at p. 6). In addition, the impartial hearing officer found the testimony of the parent's private psychologist and the parent that the student could not learn outside of a 1:1 environment "unconvincing" and not supported by documentary evidence (id. at pp. 6-7).

The impartial hearing officer awarded compensatory additional services spanning a two year period of time. The impartial hearing officer ordered that: (1) the district issue a Nickerson letter immediately for placement in an approved private special education school in September 2009; (2) that the district "take all steps possible" to assist the parent in finding an appropriate private placement for the student for the 2009-10 and 2010-2011 school years; (3) that the district provide two periods per day of "individual reading instruction using a research-based reading program" during the 2009-10 and 2010-11 school years; and (4) that the district provide the student with computer based reading and math programs for home use (IHO Decision at p. 7). The impartial hearing officer also ordered the district to conduct the following evaluations: speech-language, psychiatric, a vocational evaluation "levels one and two," and a functional behavioral assessment (FBA), and develop a behavioral intervention plan (BIP) (id. at p. 8). The impartial hearing officer further ordered that after the evaluations were conducted, the CSE reconvene to develop an appropriate IEP that includes a transition plan, BIP, and counseling (id.). The impartial hearing officer declined to award Lindamood-Bell services or home instruction as requested by the parent.

[5] Under State regulations a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; 8 NYCRR 201.2[a]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

On appeal, the parent seeks an order reversing that part of the impartial hearing officer's decision which denied her request for placement at the Lindamood-Bell program as an appropriate remedy. The parent asserts that the impartial hearing officer ignored the factual record by finding that the requested placement at Lindamood-Bell was inappropriate. Specifically, the parent notes that the district did not submit any documents or present testimony by any witnesses that contradicted the conclusions testified to by the parent and the private psychologist that the student's instruction must be part of a 1:1 program and that the proposed 24-week program at Lindamood-Bell was appropriate. The parent further asserts that the impartial hearing officer erred in finding that the testimony of the parent and the private psychologist was not supported by documentary evidence and that the impartial hearing officer provided no explanation as to why she did not find the testimony convincing. The parent further alleges that the impartial hearing officer erred by remanding the case to the CSE. The parent contends that Lindamood-Bell is the least restrictive environment (LRE) for the student, noting that the district provided no alternative placement and that the hearing record provides no evidence that an alternative placement exists.

The district submitted an answer to the parent's petition, asserting that the remedy ordered by the impartial hearing officer was appropriate and that the Lindamood-Bell program is overly restrictive for the student. The district contends that the parent's testimony regarding the student's social skills, along with the student's psychological reports, reflect that the student was able to participate in a school environment. The district notes that the April 2009 private psychoeducational evaluation report indicated that the student would benefit from intensive individualized instruction in reading to improve her reading skills, but that the report did not indicate that the student was unable to participate in a school environment while receiving such individualized instruction; and that the district can provide individual reading instruction. The district does not cross-appeal from any portion of the impartial hearing officer's decision.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 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]; 8 NYCRR 200.5[j][4][ii]; 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 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 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 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; 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 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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087). An IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals are being achieved and to make appropriate revisions (20 U.S.C. §§ 1414[d][4][A]; 34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]). An eligible student's IEP must be in place at the beginning of each school year (20 U.S.C. § 1414[d][2][A]; 34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; see Cerra,427 F.3d at 194).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and

persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

As noted above, the impartial hearing officer determined that the sole issue for consideration was whether the parent's requested remedy of "additional services" from the Lindamood-Bell program was appropriate to remedy the district's denial of a FAPE ("gross violations") for the 2007-08 and 2008-09 school years. I will now consider the parent's assertion that the impartial hearing officer erred in denying her request for compensatory additional services in the form of the Lindamood-Bell program. The parent seeks immediate placement in the Lindamood-Bell program consisting of four hours per day of 1:1 multi-sensory reading instruction for a total of 480 hours (Pet. ¶¶ 6, 7, 15).

The Second Circuit Court of Appeals has viewed compensatory education 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 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]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]; but see Newington, 546 F.3d 111, 123 [upholding an award of compensatory education for a school aged student without finding a gross violation of the IDEA]). 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]). Generally, 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 Newington, 546 F.3d at 123 [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"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; 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 a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; see also Application of the Bd. of Educ., Appeal No. 09-054; Application of a Student with a Disability, Appeal No. 09-025;

Application of the Bd. of Educ., Appeal No. 08-060; Application of the Dept. of Educ., Appeal no. 08-017; 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)

Initially, I note that on appeal, the parent does not seek to annul the specific relief ordered by the impartial hearing officer, including the evaluations, reconvening of a CSE, tutoring services, and issuance of a Nickerson letter for placement in an approved private school, but rather objects to the impartial hearing officer's failure to grant the parent's request for the Lindamood-Bell program consisting of four hours a day for a twenty-four week period of time.[6] I will first address the parent's contention that the impartial hearing officer erred in finding that the testimony of the parent and private psychologist that the student was only able to learn in a 1:1 setting, was "unconvincing" and was not supported by documentary evidence (IHO Decision at p. 7). After review of the hearing record, I will defer to the impartial hearing officer's conclusion about the testimony she heard and found unconvincing. I note that the hearing record suggests that the student is "social" and able to participate with peers in an educational environment that provides for access to mainstreaming opportunities beyond more than 1:1 instruction (Tr. pp.124-25, 129, 130-31). I also note that the private psychologist's report indicated that the student would benefit from intensive individualized instruction in reading to improve her reading skills, but that the report did not indicate that the student was unable to participate in a school environment while receiving such individualized instruction (Joint Ex. 2 at p. 4). Accordingly, I will not disturb the impartial hearing officer's finding on this issue. Moreover, I concur with both parties' assertion that the restrictiveness of the placement is a consideration in determining appropriate compensatory relief. Based on the hearing record before me, I share the concerns of the impartial hearing officer regarding the restrictiveness of the Lindamood-Bell program as the student's only educational program (see IHO Decision at p. 7). As discussed above, the hearing record supports the assertion that the student can learn in a school environment.

The impartial hearing officer's award covers both the 2009-10 and 2010-11 school years. Under the circumstances, I will supplement the impartial hearing officer's award. I will order the district, unless the parties otherwise agree, to provide the student with additional services consisting of 1:1 tutorial services in reading, by a certified teacher who is qualified to teach reading, for summer 2010 and summer 2011. Unless the parties otherwise agree, such instruction shall be offered for four hours per day, five days per week for eight weeks of each summer. If the district is unable to provide the summer tutorial services through a district provider, the district must use a private provider, who may or may not be a certified teacher, but who is qualified to provide instruction in reading.[7] [8]

[6] The district did not cross-appeal from the impartial hearing officer's decision, nor was a reply filed by the parent to the district's answer.

[7] The district is not required to utilize Lindamood-Bell for this summer service, nor is it precluded from doing so.

[8] These services are to be in addition to those ordered by the impartial hearing officer.

Accordingly, I will modify the impartial hearing officer's order to be consistent with this decision.

In light of my determination herein, the parties' remaining contentions need not be addressed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's order of additional services be modified by adding to her order the following: the district, unless the parties otherwise agree, shall provide the student with 1:1 tutorial services in reading, by a certified teacher who is qualified to teach reading, for summer 2010 and summer 2011. Unless the parties otherwise agree, such instruction shall be offered for four hours per day, five days per week for eight weeks each summer. If the district is unable to provide the summer tutorial services through a district provider, the district must use a private provider who may or may not be a certified teacher, but who is qualified to provide instruction in reading.

Dated: **Albany, New York**
November 20, 2009

PAUL F. KELLY
STATE REVIEW OFFICER