



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-008

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:

Legal Services NYC-Bronx, attorneys for petitioner, Oroma H. Mpi, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied the parent's request for additional tutoring services as a result of alleged deficiencies in the educational program and services recommended by respondent's (the district's) Committee on Special Education (CSE) for her daughter for the 2008-09 and 2009-10 school years. The appeal must be sustained in part.

At the time the impartial hearing convened in December 2009, the student was attending fifth grade in a general education classroom in the district's elementary school (Tr. pp. 74-75; Parent Ex. C at pp. 1-2, 11). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 1 at p. 1; Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

With regard to the student's educational history, the hearing record reflects that the student attended first grade during the 2005-06 school year in another district elementary school (Tr. p. 75; Parent Ex. H at p. 3). The student's first grade teacher referred her to the CSE due to her academic delays and "inability to stay on task" (*id.*). A school psychologist conducted a psychoeducational evaluation on or about May 26, 2006 (Parent Ex. H at p. 1). The school psychologist's evaluation report indicated that the student was tested over a period of two days and was "very fidgety much of the time" (*id.* at p. 3). The evaluation report noted that during testing, the student required redirection often, as well as questions and directions repeated (*id.*). The

evaluation report indicated that the student's speech and language patterns appeared age appropriate (id.). According to the school psychologist, the student was "generally motivated, with a positive mood," and was "personable" and "friendly" (id. at pp. 3, 5). The evaluation report further noted that the student demonstrated good eye contact and good rapport with the examiner (id.).

Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC - IV) yielded an overall score that placed the student in the average range of intellectual functioning (Parent Ex. H at pp. 1-2, 4, 6). The student's verbal comprehension and working memory scores were in the average range; perceptual reasoning score was in the low average range, and processing speed score was in the high average range (id. at pp. 2, 4). The school psychologist noted that there was "significant variability" between the subtest scores in the area of perceptual reasoning (id.).

Administration of the Wechsler Individual Achievement Test Second Edition (WIAT - II) revealed that at the time of the May 2006 psychoeducational evaluation, the student had an "average overall reading level of 1.0" (Parent Ex. H at pp. 1-3). The evaluation report indicated that the student's reading comprehension level was at the K.8 grade level and she had difficulty extracting details from longer stories and more complicated sentences (id. at pp. 2-3, 5). Additional subtest scores were recorded as follows: word reading at the 1.3 grade level; numerical operations at the K.5 grade level; math reasoning at the 1.5 grade level; and spelling at the 1.3 grade level (id.).

According to the school psychologist, the student's first grade teacher reported that the student had "great difficulty" remaining focused even when provided with the teacher's guidance, her progress was "much slower" than her peers, and at times she was "bossy" with peers (Parent Ex. H at p. 5). During the interview portion of the evaluation, the student stated that her peers did not like her and she had no friends because they thought she was "mean" (id. at pp. 5-6). The hearing record indicates that the student began receiving special education services in first grade in the form of "pull-out reading to help build up her reading" and she was enrolled in an extended day program (Tr. pp. 75-76).

During the 2006-07 school year, the parent indicated that the student transferred to her current elementary school to attend second grade (Tr. pp. 75, 90). In second grade, she continued to receive extended day program services consisting of 50 minutes of additional instruction in reading and math (Tr. p. 76). The parent indicated that while the student was in third grade during the 2007-08 school year, the student's extended day services ceased (id.); however, the district's staff was unable to explain why these services were discontinued (see Tr. p. 53).

On June 3, 2008, the CSE convened for the student's annual review and to develop an individualized education program (IEP) for the student for the 2008-09 school year (Dist. Ex. 1 at p. 1). The June 2008 CSE meeting attendees consisted of the parent, a regular education teacher, the student's special education teacher, and the student's guidance counselor (id. at p. 2). The resultant June 2008 IEP reflected that the CSE developed annual goals and short-term objectives that targeted the student's development of decoding skills for reading multi-syllabic words, literal and inferential comprehension skills, writing skills, computation and problem solving skills in mathematics, and attending skills (id. at pp. 6-8). The student's June 2008 IEP included testing

accommodations consisting of a separate location, extended time (1.5), directions read/reread aloud and explained, and questions read aloud on tests with the exception of those that measured reading comprehension (*id.* at p. 11). The IEP also reflected that the June 2008 CSE considered placing the student in a general education class with related services only or in a 12:1+1 special class, but rejected both options because the former would not have provided sufficient support to the student due to her need for specialized and structured interventions to remediate and develop skills in English language arts (ELA) and math, and the latter was too restrictive for the student at that time (*id.* at p. 10). The June 2008 CSE recommended that the student be placed in a general education classroom with direct special education teacher support services (SETSS) for five periods per week in a group of 6:1 in a separate location, and the related service of counseling one time per week for 30 minutes in a group of 3:1 (*id.* at pp. 9, 11). The June 2008 CSE also recommended modified criteria for promotion in which the student was required to meet 40 percent of the performance indicators of the fourth grade ELA curriculum and 40 percent of the performance indicators of the mathematics curriculum (*id.* at p. 11).

According to the parent, she attended an "open school night" while the student was attending fourth grade (2008-09) during which the parent saw the student's report card and realized that the student's promotion to fifth grade was in doubt (Tr. p. 80). On February 7, 2009, the parent took the student to the Huntington Learning Center (HLC) for testing (Tr. pp. 80, 99; Parent Ex. F at p. 1). Various tests were administered to the student during a three-hour session (Tr. p. 113; Parent Ex. F at pp. 1-3). The hearing record reflects that the student was able to interact with the examiner and sustain her attention during the testing situation (Tr. p. 113). According to the managing director of HLC, testing results revealed that there was a "large gap" between what the student was successful with and comfortable doing, and what the student needed to be able to do in order to be successful in school (Tr. p. 113; *see* Tr. pp. 101-09; Parent Ex. F at pp. 1-3).

In a letter to the parent dated May 8, 2009, the district school principal indicated that the student's performance level results for the State ELA test administered in January 2009 were at a performance level "1" (Parent Ex. E).¹ A May 20, 2009 teacher report indicated that the student received SETSS between three and five times per week (Parent Ex. D at p. 1). According to the teacher, the student demonstrated limited comprehension, had difficulty with recalling details, struggled with decoding, and at that time was at a second grade level in reading (*id.* at p. 1). The teacher report indicated that in writing, the student was a "creative thinker" (*id.*). Spelling and grammar were described as "very poor," writing conventions were "weak," and the student required help with organization (*id.*). According to the teacher, mathematics was easier for the student than reading and writing (*id.*). The teacher report also noted that the student needed support with computation because of careless mistakes, and word problems were a challenge for the student because reading comprehension was involved (*id.*). Fine and gross motor skills were reportedly age appropriate (*id.* at p. 2). The teacher report indicated that the student was cooperative when she wanted to be, and that she needed to show more respect and follow directions "without an attitude" (*id.*). Socially, the student was described as abrasive toward peers and as having a negative attitude and vocabulary toward them, but could be cooperative when she "trie[d]

¹ The hearing record indicates that a score of "1" on the ELA test for a fourth grade student was equivalent to "not meeting learning standards," and that a score of "2" meant that "student performance does not demonstrate an understanding of the English language arts knowledge and skills expected at this grade level" (Dist. Ex. 3).

hard" (id.). The report indicated that the student responded to frustration or failure with temper tantrums, rolling her eyes, and foul language (id.). According to the teacher, taking away class privileges/events was a successful strategy to address the student's behavior (id.). The teacher noted that the student needed "much more support [with] ELA" (id.).

On May 27, 2009, the CSE convened for a triennial review and to develop the student's fifth grade IEP for the 2009-10 school year (Parent Ex. C at pp. 1-2). The May 2009 CSE meeting attendees consisted of the district representative, a regular education teacher, a school psychologist, the student's special education teacher, a guidance counselor, and the parent who participated by telephone (id. at p. 2). The resultant May 2009 IEP contained annual goals and short-term objectives for the student specific to reading strategies for decoding and word recognition, sight vocabulary, reading comprehension, writing and spelling, math, completing assignments and attending, and her social skills deficits (id. at pp. 6-8). For reasons similar to those described above with respect to the June 2008 IEP, the May 2009 CSE considered placing the student in a general education class without SETSS or in a 12:1+1 special class and rejected both options (compare Dist. Ex. 1 at p. 10, with Parent Ex. C at p. 10). The May 2009 CSE recommended increasing the student's SETSS from five periods per week to ten periods per week, and all other recommendations for program, related services, and testing accommodations were carried over without change from the June 2008 IEP (compare Dist. Ex. 1 at pp. 1-2, 11, with Parent Ex. C at pp. 1-2, 11). The May 2009 IEP adjusted the student's modified promotional criteria to 40 percent of the fifth grade math and ELA performance indicators (Parent Ex. C at p. 11).

The student's final report card for the 2008-09 school year indicated that on a level 1 through level 4 scale, the student performed at a level 2 overall for the entire school year in reading, particularly in the sub areas of "reads independently for sustained periods of time" and "shows evidence of understanding text" (Parent Ex. B at p. 2).² The student demonstrated some improvement from level 1 to level 2 for "reads aloud fluently with expression" (id.). According to the 2008-09 report card, in writing, overall the student performed at level 1, particularly for the sub areas of "uses correct grammar and spelling," and "uses a wide range of vocabulary" (id.). Inconsistent progress was noted for "writes independently on a variety of topics," as the student performed at level 2 in the first marking period, decreased to level 1 in the second marking period, and rebounded to level 2 by the end of the school year (id.). In listening and speaking, overall the student decreased from level 3 in the first marking period to level 2 for the remainder of the school year (id.). The student performed at level 4 throughout the entire school year for "shares information and opinions in class discussions" (id.). She performed consistently at level 2 for

² The 2008-09 report card included a rubric describing the student's progress toward achieving "standards" at the end of the school year (Parent Ex. B at p. 1). A "4" reflected that the student's performance "exceed[ed] grade-level standards;" a "3" reflected that the student's performance "me[t] grade-level standards;" a "2" reflected that the student's performance "approach[ed] grade-level standards;" and a "1" reflected that the student's performance was "far below grade-level standards" (id.). The 2008-09 report card included a second rubric that purportedly described student's performance levels for science, social studies, arts, physical education, technology, music, and dance, as well as the area of "personal and social growth" (id. at p. 2). The additional rubric indicated: "4 = always;" "3 = usually;" "2 = sometimes;" and "1 = rarely" (id.). A comparison of the format of the 2008-09 report card with that of the 2009-10 report card reflects that the second rubric was only used to describe the student's progress in the area of "personal and social growth" (compare Parent Ex. B, with Parent Ex. G).

"listens respectfully and takes turns speaking," and "builds on the ideas of others in conversation" (id.).

The 2008-09 report card reflected that in mathematics, the student performed overall at level 2, particularly in the area of "computes with accuracy and efficiency" (Parent Ex. B at p. 2). Improvement from level 2 in the first marking period to level 3 in the second and final marking periods was noted in "demonstrates an understanding of content" (id.). The report card further reflected progress from level 1 at the end of the first marking period to level 2 at the end of the second and final marking periods in "solves problems and explains solutions and strategies" (id.). In science, the report card reflected that the student performed at level 2 overall by the end of the first marking period of the 2008-09 school year, and performed at level 3 for the remaining two marking periods (id. at p. 3). In social studies, the student performed at level 3 throughout the school year, except for a decrease to level 2 in "applies social studies skills" at the time of the second marking period (id.). In arts, physical education, music, and dance the student received a rating of 3 and in technology, the student received a rating of 4 by the end of the school year (id. at p. 2). The report card further reflected that the student "always" demonstrated effort and completed homework, "rarely" worked cooperatively with others, and "sometimes" respected class and school rules (id. at p. 3).

Teacher comments in the report card for the first marking period of the 2008-09 school year reflected that the student was an eager participant in the classroom, but that she tended to be talkative during lessons and lacked focus at times (Parent Ex. B at p. 4). It was also noted that the student's attitude was at times "negative" and affected her ability to work effectively (id.). Additional teacher comments requested that the parent speak to the student about "the importance of following rules and working with classmates rather than seeking out conflict," (id.). Additionally, in order to provide continuous reinforcement in math and literacy skills, the parent was asked to encourage the student to practice math at home and to read independently to increase vocabulary and comprehension (id.).

At the end of the second marking period of the 2008-09 school year, the teacher comments indicated that the student was helpful in the classroom and was always willing to volunteer during discussions (Parent Ex. B at p. 4). The report card comments also noted that the student still needed to work on her sense of self-control in the classroom and to find a more respectful way to speak with classmates and teachers (id.). According to the report card, the student continued to display a "negative attitude," which affected her ability to work to her full potential (id.). Literacy skills and reading were described as "below grade level" (id.). The report card reflected that although the student's math skills were much stronger than her literacy and reading skills, she continued to require reinforcement at home for both reading and math (id.). The report card noted that the student was at risk of not meeting standards for promotion during the second marking period (id.).

At the end of the 2008-09 school year, teacher comments on the student's report card indicated that although efforts to make progress had been consistent, the student continued to require much reinforcement in her subjects, particularly in literacy skills (Parent Ex. B at p. 4). In addition, the student still exhibited difficulty with self-control (id.). At the end of the school year, the report card noted that the student was at risk of not meeting standards for promotion and that "pending-summer school," the student would be promoted to fifth grade for the 2009-10 school

year (id.). The hearing record reflects that the student attended summer school between fourth grade and fifth grade, earned a level 2 for ELA, and was promoted to fifth grade "on her own merit" (Tr. p. 53).

The hearing record also contains a report card for the 2009-10 school year (Parent Ex. G). During the first marking period of the 2009-10 school year, the student performed at level 2 overall in reading, and this was consistent in the sub areas of the student "reads independently for sustained periods of time," "reads aloud fluently with expression," and "shows evidence of understanding text" (id. at p. 2). In writing, the 2009-10 report card indicated that overall, and in the sub areas of "uses correct grammar and spelling" and "uses a wide range of vocabulary," the student performed at level 2 (id.). In the sub area of "writes independently on a variety of topics," the student performed at level 3 (id.).

The 2009-10 report card reflected that in listening and speaking, overall, and in the sub areas of "shares information and opinions in class discussions" and "builds on the ideas of others in conversation," the student performed at level 3 (Parent Ex. G at p. 2). She performed at level 2 in "listens respectfully and takes turns speaking" (id.). The 2009-10 report card further noted that in mathematics, overall, and in the area of "computes with accuracy and efficiency" and "demonstrates an understanding of content," the student performed at level 2 (id.). The report card further reflected that the student performed at level 3 in the sub area of "solves problems and explains solutions and strategies" (id.). In science, the 2009-10 report card indicated that the student "usually" demonstrated an understanding of content, and that she demonstrated science skills and scientific thinking by the end of the school year (id.). In arts and music, the student received a level 4 rating, and in physical education and technology, the student received a level 2 rating (id.).

The 2009-10 report card noted that the student "always" demonstrated effort and completed homework, "usually" worked cooperatively with others, and "sometimes" respected class and school rules (Parent Ex. G at p. 2). Teacher comments for the first marking period of the 2009-10 school year, indicated that the student was a "dynamic presence" in the classroom and that she was helpful and motivated to learn (id.). In addition, teacher comments indicated that the student's responses in class discussions were insightful and creative (id. at p. 1). It was further noted that at times, the student became distracted by "chatting" during class time (id.).

In a due process complaint notice dated September 9, 2009, the parent, through her attorney, alleged that the student failed to make meaningful progress during the 2008-09 school year and that consequently, her promotion was at risk (Parent Ex. A at p. 1). The parent further asserted that the student "failed" her fourth grade ELA exam and performed at a second grade level (id. at p. 2). According to the parent, the student exhibited regression in reading comprehension skills that was shown by comparing her June 2008 and May 2009 IEPs (id.). The parent further alleged that the student was removed from the "[e]xtended [s]chool [d]ay program list" and that in May 2009, the parent, through counsel, had requested academic intervention services (AIS), but the district did not provide the student with those services (id. at pp. 1-2). The parent asserted that the student's June 2008 IEP listed an after school program among the services to be provided, but that the district did not provide the student with such a program (id. at p. 2). The parent also alleged that the student did not receive the counseling services listed on the June 2008 IEP (id.). The parent further argued that the CSE's recommendation of ten SETSS periods for the 2009-10

school year was inadequate for the student (id.). For relief, the parent requested that the district be required to pay for 300 hours of individual tutoring services for the student at HLC (id.).

An impartial hearing convened on December 9, 2009. In a decision dated December 21, 2009, the impartial hearing officer determined that there were deficiencies in the student's educational program insofar as the student "would benefit from more effective AIS to improve her classroom focusing and learning" (IHO Decision at p. 6). The impartial hearing officer found that the student should not miss academic instruction because the student is pulled out of the general education classroom to receive SETSS instruction and that the student would benefit from integration of the SETSS services into her classroom instruction (id.). The impartial hearing officer denied the parent's request for 300 hours of tutoring services at HLC upon concluding that the evidence did not support the parent's claim (id. at pp. 6-7). Specifically, the impartial hearing officer determined that the witness from HLC "did not in any way substantiate her assertion that [the student] required 300 hours of tutoring" (id. at p. 6). The impartial hearing officer directed the district to reconvene the CSE before January 23, 2010, to consider improvements to the student's AIS and to consider integration of the student's SETSS, including the provision of push-in SETSS, so as to minimize disruptions to the student's classroom instruction (id. at p. 7).

The parent appeals, arguing that the district failed to provide the student with an opportunity for more than trivial advancement during the 2008-09 school year and that the district denied the student a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years. The parent alleges that the student failed to regularly advance from fourth to fifth grade, needed to attend summer school, and continued to fail to achieve grade level standards after attending summer school. The parent further asserts that the district failed to provide the student with after school services as set forth in the June 2008 IEP. The parent contends that the impartial hearing officer would not have directed the CSE to reconvene and review the student's educational program if the district had proven that it had offered an appropriate program. The parent also alleges that the impartial hearing officer did not make a finding regarding whether the district offered the student a FAPE and that there was no basis in the hearing record for the impartial hearing officer's decision that the student should have push-in SETSS. According to the parent, the impartial hearing officer's decision to deny the parent's request for 300 hours of tutoring at HLC was not supported by the hearing record. For relief, the parent requests an order determining that the district failed to offer the student a FAPE, that the parent demonstrated the appropriateness of tutoring services at HLC, and directing the district to pay for 300 hours of tutoring services at HLC.

In its answer, the district denies the parent's allegations that the impartial hearing officer erred and asserts that the deficiencies in the student's program found by the impartial hearing officer did not constitute a denial of a FAPE. The district asserts that it offered the student a FAPE for the 2008-09 and 2009-10 school years and that the impartial hearing officer correctly found that the parent failed to meet her burden to prove that 300 hours of tutoring at HLC was appropriate. If, in the alternative, it is determined that the student requires compensatory tutoring services, the district argues that the district should provide the tutoring services rather than HLC.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare

them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). 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 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 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).

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

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).

Turning first to the parties' dispute over whether the district offered the student a FAPE for the 2008-09 school year, I note that the impartial hearing officer determined that there were "deficiencies" with the district's recommended program, but did not expressly determine whether the district failed to offer the student a FAPE for the 2008-09 school year (IHO Decision at p. 6).³ The June 2008 IEP contained a description of the student's present levels of academic performance and learning characteristics, which indicated that the student had "shown progress" during the 2007-08 school year in her cognitive development and academic achievement, but did not provide any specific details regarding the student's academic growth since the previous school year's IEP, which is not included in the hearing record (Dist. Ex. 1 at p. 3). The June 2008 IEP reflected that the student made "significant progress" in reading and reading comprehension, and "gained skills" in computation and problem solving, and included test results from June 2, 2008 as follows: decoding per administration of the "Slosson Oral Reading" (3.6 grade equivalent); reading comprehension per administration of the "Brigance Comprehensive" (upper third grade); writing

³ The district did not cross-appeal any aspect of the impartial hearing officer's order.

per administration of the "KTEA spelling" (2.9 grade equivalent, upper second grade); math computation per administration of the "KTEA" (2.7 grade equivalent, upper second grade); and problem solving per administration of the "Brigance Comprehensive" (mid-third grade equivalent) (id.).⁴ The June 2008 IEP delineated specific information regarding the strengths and weaknesses of the student's academic skills (see id. at pp. 3-4). The CSE identified additional academic management needs for preferential seating, cueing and monitoring, and for "participation in a structured after-school program which offers [the student] academic assistance, as well as a variety of recreational activities" (id.).

The June 2008 IEP also indicated that the student showed improvement in her peer relationships as she acquired a few close friends with whom she shared and socialized during lunch and recess (Dist. Ex. 1 at p. 4). The June 2008 IEP described the student as "energetic" and indicated that at the time of the CSE meeting, distractibility continued to be a concern for her (id.). The June 2008 IEP noted that the student continued to require "constant" adult reminders to stay focused in order to complete assigned tasks in a timely manner (id.). Behaviorally, the June 2008 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the regular education teacher, as well as by support from service providers (id.). In the academic management section of the student's June 2008 IEP, the CSE noted the need for a reward system with consequences to help her "adjust her behavior issues" as well as her "focus/attention(al) issues" (id. at pp. 3-4). The June 2008 IEP also reflected the student's need for continued counseling in a small group at school (id. at p. 4).

As noted above, the June 2008 IEP indicated that the student would benefit from "participation in a structured after-school program which offers [the student] academic assistance, as well as a variety of recreational activities" (Dist. Ex. 1 at pp. 3-4). However, the hearing record indicates that the district discontinued the student's after school program without contacting the parent or providing an explanation, and the hearing record further reflects that if the program had been provided as set forth on the June 2008 IEP, the student would have been offered an additional 50 minutes of reading and math instruction during the 2008-09 school year (Tr. pp. 76, 78-79, 90-91).⁵ The parent also testified that since third grade, the student had been placed on a waiting list for an after school program at a local college that works individually with students in reading, writing, and math for approximately 90 minutes per session (Tr. pp. 81-82).⁶ In view of the foregoing, I find that the district failed to implement the services listed on the student's IEP for the 2008-09 school year.

⁴ The June 2008 IEP does not contain complete test battery titles or indicate the versions of the tests, and further details that describe the district's evaluation of the student are not contained in the hearing record (see Dist. Ex. 1 at p. 3).

⁵ At the impartial hearing, the district did not dispute that the after school program was included in the student's June 2008 IEP or that it was not implemented during the 2008-09 school year (see Tr. p. 53; Dist. Ex. 1 at p. 4).

⁶ The hearing record does not clearly indicate if the tutoring program at the college is an initiative arranged in whole or in part by the district or if it is a community-based program that is made available to district students by the college. The parent testified that the local college tutors students from "other schools," not just the student's school (Tr. p. 88).

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

Turning to the effect of the district's failure in this case to provide the student's after school reading and math instruction during the 2008-09 school year, as noted above, the student's fourth grade report card reflected that during the school year, the student performed overall at performance level 2 which was described as "approaches grade level standards" in reading, listening, speaking, and mathematics, and that the student was at performance level 1 in writing which indicated that she was "far below grade-level standards" (Parent Ex. B at pp. 1-2). At the end of the 2008-09 school year, the student's promotion to fifth grade was in jeopardy pending summer school, and after attending summer school, the student performed at level 2 in ELA and was subsequently promoted to fifth grade for the 2009-10 school year (Tr. p. 53; Parent Ex. B at p. 4). In addition, the student's fourth grade report card noted that she "rarely" worked cooperatively with others and "sometimes" respected class and school rules (Parent Ex. B at p. 3). I note that the results of the January 2009 administration of the ELA examination show that the student's performance was at level 1 (not meeting learning standards), which shows a decrease from her performance at level 2 (partially meeting learning standards) achieved one year earlier, as shown in results of the student's January 2008 ELA examination (Dist. Exs. 3; 4; 7 at p. 1).

The special education teacher who attended the May 2009 CSE meeting compared the June 2008 IEP and the May 2009 IEP and testified that the student had made almost one year of progress in oral reading and spelling, as well as more than approximately two years of progress in math computation (Tr. p. 32).⁷ With regard to reading comprehension, the special education teacher testified that in June 2008, the student was tested with the "BIED" and in May 2009, the student was tested with the Qualitative Reading Inventory IV (QRI – IV) (Tr. p. 31; Dist. Ex. 1 at p. 3; Parent Ex. C at p. 3). Although the student scored at a third grade level on both tests, the special

⁷ Other than being listed as attending the May 2009 CSE meeting, the hearing record does not contain any other information regarding the special education teacher or whether she was familiar with the student or the elementary school that the student attended for the 2009-10 school year (see Parent Ex. C at p. 2).

education teacher testified that it was "very hard to compare" the BIED and QRI - IV because "they are two different tests" that measure different things, and it was difficult to "gauge or to measure the gains" in the student's problem solving abilities (Tr. pp. 31-33). Furthermore, the special education teacher opined that the BIED was a simpler test than the QRI- IV, in which the student was required have more background knowledge of the text (Tr. p. 33). According to the student's school principal, efforts to determine the student's growth required the use of the same type of assessment because each test "is designed differently and they are not always correlated" (Tr. pp. 61-62).

In view of the evidence showing the decline in the student's performance in reading and writing, as well as district's difficulty in assessing the student's progress in reading comprehension over the 2008-09 school year — a primary area of difficulty for her — I find that, under the circumstances of this case, the district's failure to provide the student with the 50-minute after school sessions in reading and math during the 2008-09 school year was more than a de minimus failure to implement the student's IEP and was a material deviation from the IEP developed at the June 2008 CSE meeting and, therefore, the district failed to provide the student a FAPE for the 2008-09 school year.⁸

With regard to the parties' dispute over the services recommended by the May 2009 CSE for the 2009-10 school year, the May 2009 IEP reflected the information contained in the May 20, 2009 teacher report (Parent Exs. C at pp. 3-4; D at pp. 1-2). The May 2009 IEP further reflected the student's present levels of academic performance and learning characteristics, indicating that the student made academic gains in word recognition skills, oral reading ability, spelling, and computation (Parent Ex. C at p. 3). The May 2009 CSE noted in the IEP that the student struggled academically in some areas of the language arts and required continued development in recognition and application of structural analysis skills for decoding and encoding (*id.* at pp. 3-4). The May 2009 CSE described the student as having stronger implicit comprehension skills than explicit comprehension skills, as well as difficulty recalling facts and details (*id.* at p. 3). According to the May 2009 IEP, the student improved in her ability to organize her writing with the use of graphic organizers and rubrics, but needed to improve writing mechanics (*id.*). The present levels of academic performance in the May 2009 IEP stated that the student presented a relative strength in computation skills and weaknesses in numerical reasoning and problem solving skills (*id.*). The May 2009 IEP also reflected that the student exhibited difficulty attending to tasks and tended to work in a rushed manner, which affected her academic performance (*id.*). The May 2009 CSE recommended incentives and a rewards system to promote good work habits, and the availability of graphic organizers, overhead projectors and processing charts to assist with visual attention to tasks, hold interest, and assist with organization (*id.*). In addition, the May 2009 CSE recommended a cueing system and continuous monitoring of her work (*id.*).

⁸ The hearing record also shows that the student's deficits in reading deterred the student's performance in subjects such as math when reading comprehension was involved (Tr. p. 59). The school principal testified that the student's performance on the math pre-assessment conducted during summer school 2009 was not aligned with her performance on the State assessment, as demonstrated by the student attaining a performance level 3 in math on the March 2008 and March 2009 State math examinations, and struggling with the pre-assessment in the summer (Tr. p. 62; Dist. Exs. 4; 7 at p. 1; Parent Ex. B at p. 4).

In regard to the student's present levels of social/emotional performance, the May 2009 IEP indicated that the student achieved most successfully when working individually with her teachers or in very small groups (Parent Ex. C at p. 4). The May 2009 IEP indicated that when asked to work independently, especially in the larger, general classroom environments, the student was still "highly distractible" (id.). The student continued to require adult prompts to begin, stay on task, and complete assignments in a timely fashion (id.). The May 2009 IEP indicated that the student had many classmate friends and demonstrated strong leadership potential, but she often attempted to exercise control over those friends (id.). Similar to the June 2008 IEP, the May 2009 IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by classroom and SETSS teachers and other related service providers (id.). The May 2009 CSE identified in the IEP the continued need for an after school program that offered individual tutoring to strengthen the student's academic skills, as well as a number of cooperative learning and recreational activities that fostered positive peer relationships (id.). The May 2009 CSE also recommended that the student continue group counseling (id.).

As discussed above, the May 2009 CSE recommended increasing the student's pull-out SETSS to ten periods per week and continuation of the student's group counseling services one time per week (Tr. pp. 16, 21, 52, 65; Parent Ex. C at p. 11). According to the hearing record, the student is pulled out of her regular class for SETSS during class lessons (Tr. p. 77). The student complained that she was pulled out for SETSS while engaged in lessons in the general education class (Tr. pp. 77, 85). The parent testified that she had difficulty explaining homework assignments to the student because the student is pulled out of the general education class (id.). According to the parent, at times it took the student two or three hours to complete a typical 20-minute homework assignment, even with help provided by family members (Tr. pp. 77-78). The parent testified that the student stays up late attempting to complete her homework and that the student becomes unmotivated and tired when she goes to school the following day (Tr. p. 77). The parent further testified that she did not request double the amount of SETSS at the May 2009 CSE meeting,⁹ and that she had believed the May 2009 CSE was offering the student individual pull-out instruction and did not realize that the SETSS would consist of group instruction with four to six children (Tr. pp. 25, 95-96).

The hearing record reflects that the student has consistently struggled academically and socially during the 2008-09 and 2009-10 school years (Tr. pp. 54-56, 75-80, 83). During the 2008-09 school year, the student attended five periods of SETSS per week and failed to meet the criteria set for promotion to fifth grade during the 10-month school year and therefore, she was required to attend summer school (Parent Ex. B at p. 4). I find that the increase in SETSS from five times per week in the 2008-09 school year to ten times per week for the 2009-10 school year resulted in the student leaving the classroom for even greater periods of time, and that the student reported to her mother gaps in her understanding and she struggled with completing assignments because she was leaving the classroom (Tr. pp. 77, 85). The district does not point to any evidence in the hearing record showing that the district assisted the student with the instruction she missed when she was pulled out of the classroom for SETSS and counseling (Tr. p. 65).

⁹ It appears that the district representative at the impartial hearing inadvertently referred to the June 2008 CSE meeting when discussing increasing the student's SETSS services, which were events that occurred at the May 2009 CSE (Tr. pp. 95-96).

During the impartial hearing, the school principal testified that based on the results of a predictive assessment, she projected that there was a "fair chance" the student would score once again at a level 1 on State assessments or the student might score at a level 2 with "intensity put into her academics" (Tr. pp. 57, 68; Dist. Ex. 5). Although, the May 2009 CSE determined that a 12:1+1 special class with related services was too restrictive for the student in light of her cognitive and academic functioning at that time (Parent Ex. C at p. 10), the May 2009 IEP indicates that the student achieves success when working in smaller groups or individually (*id.* at p. 4).

In light of the foregoing evidence regarding the student's failure to pass from fourth to fifth grade during the 10-month 2008-09 school year,¹⁰ the increased removal of the student from her regular instruction without evidence of remediation for the missed instruction, and the principal's prediction that the student would likely perform similarly for the 2009-10 school year, I find that the district did not meet its burden to prove that the special education services recommended in the May 2009 IEP were tailored to meet the student's needs and the IEP was likely to confer educational benefits on the student. Consequently, I find that the district has not established that it offered the student a FAPE for the 2009-10 school year.¹¹

I will next address the parent's request for tutoring services. 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 has been 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., 538 F.3d 106, 109 [2d Cir. 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]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure

¹⁰ There is no evidence in the hearing record that suggests that the student required a 12-month school year due to substantial regression (see 8 NYCRR 200.6[k]).

¹¹ Although it has no effect upon my determination that the student was denied a FAPE for the 2008-09 and 2009-10 school years, I have examined the entire hearing record and note that with regard to both the June 2008 and May 2009 IEPs, many of the student's annual goals and short-term objectives were vague insofar as they were not clearly aligned to the student's present levels of performance, nor did they specifically describe any expected change in the student's performance over the course of each school year (Dist. Ex. 1 at pp. 6-8; Parent Ex. C at pp. 6-8). I note that the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) has recently promulgated updated guidance in a document entitled "Guide to Quality Individualized Education Program (IEP) Development and Implementation" located at <http://www.vesid.nysed.gov/specialed/publications/iepguidance/IEPguideFeb2010.pdf>. I encourage the parties, if they have not done so already, to reconsider the student's goals at the next CSE meeting.

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]; 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).

In this case the, parent submitted into evidence HLC's February 2009 evaluation report with regard to the student (Parent Ex. F). Administration of a variety of formal and HLC specific tests showed that that the student was not able to meet her age and grade expectations for tasks involving copying geometric figures in increasing complexity and breaking words down into their discrete phonemes (Tr. pp. 99, 101-103; see Parent Ex. F at pp. 1-3). In addition, the student did not demonstrate mastery of consonants in isolation, short vowels in isolation, short vowels used in a dictation setting, and multi-syllable words (Tr. p. 104). The managing director at HLC indicated that the evaluation results reflected that the student did not have a well-developed understanding of the basic rules of phonics, particularly as it related to dictation and applied to spelling and writing (Tr. pp. 104-05). The managing director further noted that test results reflected that the student would likely "struggle tremendously" just to decode text at grade level, "much less to understand it well" (Tr. p. 106). When asked to read aloud three passages followed by 10 questions specific to each passage, the student read without expression and displayed significant decoding errors as she was reading (Tr. pp. 106-07). According to the managing director, during testing, the task of decoding the text was all that the student had time and attention to do, because the student was unable to answer many questions correctly about the passages (Tr. p. 107). The managing director testified that the student was "working so hard simply to read it that it didn't mean anything to her" (id.). During silent reading tasks, the student required more time to silently read third and fourth grade level passages than would be the norm for a student her age (Tr. pp. 107-08), and although the student received time and a half to read the passages, the student was unable to correctly answer any of the questions about any of the passages (Tr. p. 108). Achievement testing in vocabulary yielded a grade equivalency of 2.5, equivalent to the 15th percentile when compared to students her age (id.; Parent Ex. F at p. 2). In response to a given topic, the managing director described the student's 15-line writing sample, which contained no punctuation except for a period at the end, spelling errors throughout, and capitalization in the middle, as comparable to a late second or early third grade effort (Tr. p. 109).

With regard to the math placement examination administered at HLC, the student could perform some computation correctly, but she did not achieve mastery of any of the skills tested (Tr. pp. 110-11). The managing director noted that in addition to the student's difficulty with math, when she has to read a word problem the student struggles to read the problem, and then may not know what math to apply to the problem because she doesn't understand what she is being asked to do (Tr. p. 111).

Toward the conclusion of the impartial hearing, the district representative stated on the record that the district concurred with the results of HLC's evaluation of the student and that the district also recognized reading as a "comprehensive problem" for the student (Tr. p 126).

As discussed previously, the June 2008 IEP shows that the student should have received 50 minutes of extended day after school services and the evidence shows that the district operated the extended day program three days per week (Tr. pp. 76, 88, 90). Thus, it appears that the student

would have been scheduled for approximately 36 weeks of after school services based upon a 10-month school year. Although the student also missed some of the content from her regular classroom instruction when she was pulled out of class to receive SETSS for 10 periods per week during the 2009-10 school year, I find that the impact was offset to a degree because the student was receiving the benefit of instruction from her SETSS teacher in ELA and math skills (Tr. p. 16). During the impartial hearing, the managing director at HLC indicated that in order to prepare the student for promotion to sixth grade, 300 hours of individual instruction would be required (Tr. p. 113). Testimony by the managing director further indicated that at HLC the student would work on phonics, vocabulary acquisition, reading fluency and comprehension, writing, and math (Tr. p. 114). The managing director at HLC testified that multisensory techniques and manipulatives should be used with the student, particularly in math, in order to engage the student's kinesthetic channel (Tr. p. 115). To address phonics, the managing director indicated that an Orton-Gillingham based multisensory curriculum should be used so that the student could master and apply the rules of phonics (*id.*). After reviewing the entire hearing record in this case, I find that the evidence supports a finding that 300 hours of additional tutorial services in reading and math, using a multisensory curriculum such as one based on the Orton-Gillingham methodology, is appropriate to remedy the district's failure to offer the student a FAPE for the 2008-09 and 2009-10 school years, and I will direct the district to provide these additional tutorial services to the student.¹² The additional tutorial services should be based upon the student's current level of instruction and proceed from her functional level of success in reading and math.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated December 21, 2009 that denied the parent's claim for 300 hours of tutoring services is annulled;

IT IS FURTHER ORDERED that, if the parties have not done so already, in accordance with the impartial hearing officer's decision, this case is remanded to the CSE with the direction to make an appropriate program and placement recommendation for the balance of the 2009-10 school year within 15 days of the date of this decision;

IT IS FURTHER ORDERED that the district shall, unless the parties otherwise agree, provide the student with 300 hours of individual multisensory tutorial services in reading and math;

¹² While the district may utilize HLC to provide the student with the additional tutorial services, the district is not required to do so, provided it commences the additional tutorial services within 30 days from the date of this decision.

IT IS FURTHER ORDERED that the district shall, unless the parties otherwise agree, initiate the individual multisensory tutorial services within 30 days from the date of this decision and complete the services by January 2011, provided however, that if the district fails to initiate the individual multisensory tutorial services within 30 days, the district shall be required to obtain the individual multisensory tutorial services for the student at the Huntington Learning Center.

Dated: **Albany, New York**
 March 16, 2010

PAUL F. KELLY
STATE REVIEW OFFICER