The University of the State of New York

The State Education Department
State Review Officer
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No. 10-038

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for compensatory services[1] and funding for continued instruction at the Sign Language Center. The appeal must be sustained in part.

At the time of the impartial hearing, the student attended eleventh grade at a district high school (Tr. p. 130; Dist. Ex. 2 at p. 1). The student was identified by the district's hearing education teacher as having a "profound sensory neural hearing loss" in which she hears "within normal limits" with one ear and "very little" with the other ear (Tr. pp. 88-89). The student was noted to be behind schedule for a high school diploma, having earned 21.82 credits out of 44 required credits (Tr. p. 80). She was described in the hearing record by the district's assistant principal as having "great potential," being "very personable," and being "very smart" (Tr. p. 84). She was further described in the hearing record by her district hearing education teacher as being capable, smart, lovely to work with, and extremely engaging when she was "working solid" and "at her best," but as having moments that were of concern where she did not attend classes or sessions with the hearing education teacher (Tr. pp. 98-102). The student's eligibility for special education services as a student with a hearing impairment is not in dispute in this proceeding (Dist. Ex. 2 at p. 1; Parent Ex. A at p. 1; see 34 C.F.R. § 300.8[c][5]; 8 NYCRR 200.1[zz][5]).

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[1] At the impartial hearing for this matter, the impartial hearing officer construed the parent's claim as a claim for compensatory services, to which the parent did not object below and does not object on appeal (Tr. pp. 33-35).

Preliminarily, I will address several procedural issues. First, the district alleges in its answer to the petition that the parent failed to timely serve her notice of intention to seek review ten days prior to service of her petition in violation of State regulations. State regulations require, in relevant part, that a notice of intention to seek review "shall be personally served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed" (8 NYCRR 279.2[b]). The notice of intention to seek review in this matter is dated April 16, 2010. The affidavit of personal service filed by the parent does not indicate the date of service upon the district of the notice of intention to seek review (see Parent Aff. of Service). I note that the district does not allege in its answer that it did not receive the notice of intention to seek review or, if the district did receive it, the date on which service was made.

Even when a notice of intention to seek review is timely, it is the service and filing of the petition, not the notice of intention to seek review that determines whether an appeal is timely brought (see Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031 aff'd Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006 [S.D.N.Y. Jan. 24, 2006]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review. The hearing record in this matter was received by the Office of State Review in a timely manner and I decline to dismiss this appeal of the pro se petitioner on the grounds as framed by the district (see Application of a Child with a Disability, Appeal No. 07-123; Application of a Child with a Disability, Appeal No. 05-106; Application of a Child with a Disability, Appeal No. 04-018).

Second, the district alleges in its answer that the parent failed to clearly indicate her reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions and orders to which exceptions are taken, and indicate what relief should be granted. State regulations require that a "petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). Third, the district alleges in its answer that the parent failed to cite to the hearing record. State regulations require that a petition must "set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[b]).

I note that the district submitted an answer adequately responding to the parent's allegations and asserting affirmative defenses. In the exercise of my discretion, I will accept the pro se petition.

Finally, the district contends in its answer that to the extent the parent is "asserting claims that could have been raised more than two years ago," such claims are barred by the statute of limitations. The Individuals with Disabilities Education Act (IDEA) was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. §1415[f][3][C]; see also 20

U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]). Absent clear congressional intent, a newly enacted federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

In her petition, the parent references alleged occurrences that took place throughout the student's life and her years in school to date. At the impartial hearing, the district sought clarification as to the time frame at issue (Tr. pp. 34-35). Although not addressed in the decision, the impartial hearing officer stated at the impartial hearing that there was a statute of limitations relating to the parent's claims (id.). It appears that the parent's reference to prior alleged events in this matter is for the purpose of providing background information; however, to the extent that the parent is raising any claims in this matter that could have been raised more than two years ago, those claims are barred by the statute of limitations and will not be addressed.

Turning now to a review of the student's educational history, the hearing record is sparse with regard to such information. The parent indicates that the student has been enrolled in various schools within the district and that at some point the student's "cumulative records" were lost (Tr. p. 29).[2]

Prior to the 2008-09 school year, the student was reportedly recommended for a collaborative team teaching (CTT) class, but the parent gave permission for the student to attend a self-contained special class taught by a teacher with whom the student had established a rapport (Tr. pp. 56-61). After the teacher of the self-contained class was no longer teaching that class, the parent allegedly requested that the student be placed back into the CTT setting that was previously recommended for her (Tr. p. 57). The hearing record reflects, without specificity, that several meetings were held relating to the student during the 2008-09 school year (Tr. p. 71). The hearing record further reflects that the student's individualized education program (IEP) "folder" contained a March 2009 "IEP modification notification" indicating that the student would stay in self-contained classes until June 2009 and then move to a CTT class in September 2009 (Tr. pp. 71-73).[3] The hearing record reflects that the district's computer system did not contain the information that was included on the IEP modification notification in the student's folder (Tr. p. 72).

[2] The status of the student's records was uncontroverted by the district at the impartial hearing.

[3] This document was not included in the hearing record.

The Committee on Special Education (CSE) met on May 22, 2009 to conduct a triennial review of the student's educational program (Parent Ex. A). Meeting attendees included a district representative, a regular education teacher, a school psychologist, a special education teacher or related service provider,[4] and the student's hearing education teacher (id. at p. 2). The resultant IEP reflected a classification of the student's disability as a student with a hearing impairment (id. at p. 1). The CSE recommended that the student be placed in a special class with a 15:1[5] staffing ratio and related services of individual hearing education services twice per week for 45 minutes per session (id. at pp. 1, 7, 9). The IEP reflected that this recommendation was not a change from the recommendation on the student's prior IEP (id. at p. 2). The projected date of initiation of the IEP was stated to be May 22, 2009 and the duration of services was stated to be one year (id.).

The May 2009 IEP stated that the student's class attendance was "not good" (Parent Ex. A at p. 3). It referenced that three attempts had been made to have the student evaluated, but that an evaluation was not done (id.).[6] The IEP reflected that the student's prior IEP showed "scores below grade level" (id.). Teacher estimates from April 6, 2005 reflected instructional levels of beginning third grade in decoding and upper fifth grade in math computation (id.).

It was also noted on the May 2009 IEP that the student was not able to be evaluated to determine her social and emotional functioning, and that an "emotional/social functioning evaluation" should be conducted when the student became "available" (Parent Ex. A at p. 4). The IEP reflected both that the student's behavior was age appropriate and that the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher (id.). The IEP further stated that the student was in good physical condition and could participate in all school activities (id. at p. 5). It also stated that the student used "a[n] FM unit if necessary due to her hearing condition" (id.).[7]

The May 2009 IEP contained four annual goals related to the student's hearing needs (Parent Ex. A at p. 6). The IEP reflected that general education with special education teacher support services (SETSS) was considered by the CSE for the student but was rejected because the "setting would not meet all of [the student's] academic delays" (id. at p. 8). It also reflected that a special class with a 12:1+1[8] staffing ratio was considered but rejected because the "setting [was] too restrictive" (id.).

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[4] It is not clear from the hearing record whether the person who attended the May 2009 CSE meeting was attending in the capacity of a special education teacher or a related service provider.

[5] State regulations describe an 15:1 special class as consisting of no more than 15 students and one special education teacher (8 NYCRR 200.6[h][4]).

[6] The IEP did not specifically state why the attempts to evaluate the student were not successful, but did state that when the student "return[ed] to classes" an evaluation would be completed (Parent Ex. A at p. 3).

[7] The hearing record describes an FM unit as a frequency modulation unit that is "used to improve the ability to hear sound in the environment around somebody who is deaf and hard of hearing" (Tr. pp. 91-92).

[8] State regulations describe a 12:1+1 special class as consisting of no more than 12 students, one special education teacher, and one supplementary school personnel (8 NYCRR 200.6[h][4][i]).

The May 2009 IEP stated that the student was to participate in State and local assessments with accommodations and that the student was to be promoted based upon standard criteria (Parent Ex. A at p. 9).[9] The IEP also contained a transition plan for the student that included long-term adult outcomes and transition activities in the areas of instruction, community integration, post high school, and independent living (id. at pp. 10-11). In addition, the May 2009 IEP included a "summer school" "student accommodation plan" that included extended time for all examinations of over 40 minutes, a separate location (if required), visual magnification, and auditory amplification (id. at p. 12).

According to the district's assistant principal, the district received verbal notice from the parent in October 2009 that the she believed the student "was not receiving the appropriate services that she had been promised the year before" (Tr. pp. 65-66). Specifically, the parent claimed that the student was supposed to be in CTT classes rather than a self-contained class (Tr. p. 66). The parent also reported that she did not have a copy of the student's May 2009 IEP, did not understand the contents thereof, that it did not accurately describe the student, and that it was generic (Tr. pp. 72-73). The assistant principal stated that the information in the district's computer system reflected that the student was supposed to be in a self-contained class (Tr. p. 67). She further stated that upon learning of the parent's concerns regarding the services that the student was receiving, the district scheduled a CSE meeting for November 2009 to reevaluate the student's IEP (id.). The assistant principal testified that the district also reevaluated the student with a "complete reevaluation with testing" (Tr. p. 68). She stated that the district completed "a full academic testing" by the school psychologist (id.).

The hearing record illustrates that the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) were administered on November 9, 2009 (Dist. Ex. 2 at p. 3). In reading and writing, the student achieved scores in the following percentiles: 12th in broad reading; 27th in letter-word identification; 22nd in spelling; 3rd in passage comprehension; 11th in writing fluency; and 21st in reading fluency (id.). In math, the student achieved scores in the following percentiles: 23rd in applied problems; 19th in calculation; 20th in broad math; 23rd in math calculation skills; and 37th in math fluency (id.).

The CSE met again on November 13, 2009 to conduct an annual review of the student's educational program (Dist. Ex. 2). Meeting attendees included a district representative, a district school psychologist, a district special education teacher or related service provider,[10] the student's district hearing education teacher, and the parent (id. at p. 2). The resultant IEP reflected a classification of the student's disability as a student with a hearing impairment (id. at p. 1). The CSE recommended that the student's placement be changed from a self-contained special education setting to a general education setting with SETSS five times per week in a separate location[11] and related services of individual hearing education services twice per week for 45

[9] The May 2009 IEP did not specify the accommodations to be provided to the student (Parent Ex. A at p. 9).

[10] It is not clear from the hearing record whether the person who attended the November 2009 CSE meeting was attending in the capacity of a special education teacher or a related service provider.

[11] This was identified in the hearing record by the district assistant principal as a "resource room" (Tr. p. 69).

minutes per session (id. at pp. 1-2, 8, 10). The projected date of initiation of the IEP was stated to be November 13, 2009 and the duration of services was stated to be one year (id. at p. 2).

Academically, the November 2009 IEP reflected that the student continued to perform below grade level in both broad reading and math (Dist. Ex. 2 at p. 3). The IEP further reflected that although the student was not at grade level, her skills were "strong enough to pass her classes easily" (id.). It further indicated that teacher reports demonstrated that she was "very capable but [that] inconsistent attendance [was] affecting her academic progress" (id.). With respect to academic management needs, the IEP noted that the student would "benefit from adaptations in the way [that] instruction is delivered (e.g. multimodal teaching method using visual aids, hands on activities, focus on auditory learning)[,] summarize notes on margin, write summary at bottom of page, highlighted work and assignment sheets, and simplify task directions" (id.). The IEP reported scores resulting from the November 9, 2009 administration of the WJ-III ACH as detailed above (id.).

The November 2009 IEP reflected that the student "g[ot] along well most of the time with her peers" and was respectful to adults (Dist. Ex. 2 at p. 4). It was noted that her behavior did not seriously interfere with instruction and could be addressed by the student's regular education and special education teachers (id.). The IEP indicated that the student's regular education teacher, special education teacher, hearing education teacher, and counselor would be "kept abreast of [the student's] psychoeducational and hearing needs and progress" (id.). The student was noted to be in good health (id. at p. 5).

The November 2009 IEP contained six annual goals with corresponding short-term objectives related to the student "improv[ing] academic skills through hearing education," "improv[ing] her math skills," and "improv[ing] her broad reading skills" (Dist. Ex. 2 at pp. 6-7, 13-14).

The November 2009 IEP reflected that a general education program without support services was considered by the CSE for the student but was rejected "because such a program [would] not meet her academic needs" (Dist. Ex. 2 at p. 9). The November 2009 IEP also reflected that a special class with a 15:1 student-to-teacher ratio was considered but rejected "because such a program would be too restrictive at [that] time" (id.).

The November 2009 IEP indicated that the student was able to participate in all school activities (Dist. Ex. 2 at p. 10). Accommodations for State and local assessments included exams administered in a separate location, extended time (1.5), directions read and reread aloud, and visual magnification and auditory amplification (id.). Promotion of the student was to be based upon standard criteria (id.). The November 2009 IEP also contained a transition plan for the student (id. at pp. 11-12).

The student began attending the program recommended in the November 13, 2009 IEP on November 16, 2009 (Tr. p. 74).

The hearing record contains "Student Program Cards" for the first and second terms of the 2009-10 school year (Dist. Exs. 4; 6). It also contains an undated "Student Permanent Record"

relating to the student's current district school and a document identified as a "Program Insert/Delete Form" (Dist. Exs. 5; 7).[12]

A March 10, 2010 "Individual Student Attendance Report" contained in the hearing record reflected that the student was absent from school 46 days from September 2009 to March 10, 2010 (Dist. Ex. 3). The report also reflected that the student was late seven days during that time period (id.). The student testified that she believed she missed 30 days of classes "at most" (Tr. p. 131).[13] Testimony at the impartial hearing by both the student and the district's assistant principal indicates that there may have been inaccuracies in district reports on the frequency of the student's absenteeism (Tr. pp. 76, 136-37).

Although the hearing record does not contain the initial due process complaint notice filed by the parent, the impartial hearing officer stated in her decision that the initial due process complaint notice was dated November 4, 2009 (IHO Decision at p. 2). The hearing record indicates that in the initial due process complaint notice the parent alleged, among other things, that the district failed to provide the student with a free appropriate education (FAPE); that the district failed to show due diligence in providing the student with educational and resource room services to which she was entitled; that the student's May 2009 IEP contained "blatant false information;" that the district failed the student in every class without any notification to the parent; and that requested changes to the student's IEP were ignored (Tr. pp. 3-5).

The parent filed an amended due process complaint notice dated January 19, 2010 (Dist. Ex. 1). The amended due process complaint notice stated that the parent requested to amend the initial due process complaint notice to include "concern regarding the revised [and] current [November 2009] IEP" (id.). The parent alleged that the November 2009 IEP was "still not being followed" and that the student "remain[ed] [without] stated services or use of the FM unit" (id.). The parent also alleged that there "seem[ed] to also be a severe discrepancy concerning attendance [and] resource room servicing her" (id.). As for a proposed resolution, the parent stated that the student "should be offered outside tutoring services," that the student "should be given an operational/suitable FM unit," and that the student should "be permitted to receive public funds to pay for her continued instruction at the Sign Lang[uage] Center which supplements her educational instruction [and] guarantees a successful independent future" (id.). The parent also stated that "[p]arental reimbursement should also be considered" (id.).

The hearing record does not contain an answer from the district to either the parent's initial or amended due process complaint notices.

The hearing record reflects that the resolution period ended on November 16, 2009 without any agreement by the parties (IHO Decision at p. 2; see 8 NYCRR 200.5[j][2]). A second resolution period ended on February 5, 2010, during which time a partial agreement was reached

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[12] The relevance or meaning of the "Program Insert/Delete Form" is not identifiable from a review of the hearing record.

[13] As a reason for not attending classes, the student testified that sometimes she did not "feel like being bothered from teachers" and that "school is just very boring now because of [her] hearing loss" (Tr. p. 131). She also remarked that it was "annoying to constantly deal with teachers, back and forth, oh, she's a fragile little egg, we have to do this for her, we have to do that for her" and that she did not "want to be treated like that" (id.).

(id.). The hearing record does not indicate the subject matter, content, or extent of the partial agreement between the parties.

An impartial hearing convened on January 19, 2010 and concluded on March 17, 2010, after two days of testimony (Tr. pp. 1, 10). The district called two witnesses and submitted seven documents into evidence (Tr. pp. 64, 86; Dist. Exs. 1-7). The parent and the student both testified, and they submitted one document into evidence (Tr. pp. 30, 130; Parent Ex. A).

In a decision dated April 14, 2010, the impartial hearing officer determined that although the student was not properly placed from September 2009 until November 16, 2009, the district took "prompt action upon notice of the parent's concerns and rectified that error expeditiously" (IHO Decision at p. 5). She also found that there was insufficient evidence in the hearing record to establish that the educational services that the student received from September 2009 until November 16, 2009 resulted in the loss of an educational benefit to merit an award of compensatory education (id.). She determined that the district's witnesses testified credibly that the student was receiving SETSS and hearing education services as mandated on her IEP (id. at p. 6). The impartial hearing officer further found that an award of compensatory services in the form of private tutoring for two hours 2-3 times per week was not merited (id. at p. 5). Additionally, the impartial hearing officer found that the evidence failed to establish that the student required private tutoring to make progress in her educational program but, rather, the evidence suggested that the student's academic progress was affected by the student's "inconsistent attendance" (id.).[14]

The impartial hearing officer further found that the evidence failed to establish that the student was not receiving mandated services including an operational FM unit (IHO Decision at p. 6). However, she found that an annual audiogram was timely and should be completed, if it had not already been performed (id.).

The impartial hearing officer also found that there was no evidence in the hearing record to support the need for the student to receive instruction in sign language in order for the student to make progress in her educational program (IHO Decision at p. 6). She further found the concern of the student's teacher and assistant principal regarding the student's inconsistent attendance to be of "great concern" (id.).

The impartial hearing officer ordered that, within 15 days of the date of her order, the district schedule an annual audiogram for the student (IHO Decision at p. 7). She also ordered that the CSE convene and upon completion of appropriate evaluations, consider counseling as a related service for the student (id.).

This appeal ensued.[15] The parent states in her petition that she appeals the decision of the impartial hearing officer which denied the parent's request for "compensatory or make up services

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[14] The impartial hearing officer determined that even if the school's attendance report was in error, there was still sufficient credible evidence to establish that the student's inconsistent attendance was a "significant factor" and that it was "impeding her learning and progress" (IHO Decision at p. 5).

[15] I note that the petition is dated May 29, 2010. It is assumed that this is a typographical error as the notice of intention to seek review, notice with petition, and affidavit of verification in this matter are all dated April 16, 2010 and those documents, along with an affidavit of personal service were filed with the Office of State Review prior to May 29, 2010.

[in] the form of tutoring, and funding in the amount of $1000 [for the student] to continue receiving instruction at the Sign Language Center" (Pet. ¶ 2). Among other things, the parent alleges that the impartial hearing officer "did not make a fair and complete assessments [sic] when it reviewed [the student's] case since the [impartial hearing officer] totally ignored all other relevant and material facts other that [sic] corrective action of CSE staff from the period of October through November 2009" (id. ¶ 4). The parent further alleges that the district has not adequately followed the student's IEP and that the district's deviations have caused the student "educational delay." The parent also alleges that the recommendation and placement of the student in a SETSS program is "totally inappropriate" for the student. The parent further contests that the student will not have a reasonable opportunity to meet graduation standards for June 2011.

The district answered the parent's petition. In addition to the procedural allegations discussed above, the district also alleges that the parent's claim is without merit, as the district offered the student an appropriate FM unit and as the parent failed to demonstrate the appropriateness of the requested private tutoring and/or sign language instruction for the student. The district further alleges that the impartial hearing officer properly determined that the parent failed to demonstrate that the requested relief was necessary to remedy any purported prejudice to the student regarding the student's placement at the beginning of the 2009-10 school year. The district requests that if it is determined that the student is entitled to compensatory services in the form of tutoring and/or sign language instruction services, that the district be ordered to provide the student with the services by district personnel. The district does not cross-appeal the impartial hearing officer's order that the district perform an audiogram of the student or that the CSE reconvene to consider whether counseling is an appropriate related service for the student.

I will first address the parent's allegation in her petition that the recommendation and placement of the student in a SETSS program is "totally inappropriate" for the student. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-102; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065).

After a review of the hearing record including the impartial hearing officer's summary of the parent's November 4, 2009 due process complaint notice, the parent's January 19, 2010 amended due process complaint notice, and the relief requested by the parent (Tr. pp. 3-5, 12, 14-27; Dist. Ex. 1), I am not persuaded that the parent properly raised the appropriateness of the recommended placement of the student pursuant to the November 13, 2009 IEP as an issue below and, therefore, I will not address it on appeal (see Application of a Student with a Disability, Appeal No. 09-025; Application of a Student with a Disability, Appeal No. 08-102; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Student with a Disability, Appeal No. 08-020; Application of a Student with a Disability, Appeal No. 08-008; Application of a Student Suspected of Having

a Disability, Appeal No. 08-002; Application of the Bd. of Educ., Appeal No. 07-114; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

With regard to the student's FM unit, the parent's January 19, 2010 amended due process complaint notice alleged that the student remained in her district placement without the "use of the FM unit" and requested that the student be "given an operational/suitable FM unit" (Dist. Ex. 1). The parent states in her petition that the student was provided with an FM unit "within three weeks before the [impartial] hearing" (Pet. ¶ 16). Additionally, the hearing record reflects that the student has been given an operational FM unit that is of benefit to the student when she wears it and, although it can give her a headache, she has the ability to adjust the volume such that it aids in her comfort, and that her teachers use the FM unit in her classes (Tr. pp. 92-95, 131-33). Testimony at the impartial hearing also reflects that the district is aware of certain "downsides" and "frustrations" of the FM unit, as well as at least one teacher who was resistant to using the FM unit, and the district has taken steps to address these issues (Tr. pp. 107-09, 112-16).

Given that the FM unit and support therewith has been provided to the student, it is unnecessary for me to address this matter further except to note that although the FM unit was mandated on the student's prior May 2009 IEP, the FM unit is not explicitly mandated on the student's November 2009 IEP (Dist. Ex. 2; Parent Ex. A at p. 5) and the district does not dispute that the student continues to need this accommodation. I direct that the district modify the student's current IEP to reflect the mandate of an FM unit for the student along with the supports necessary for the student to utilize the device. The parent's appeal with respect to this issue is accordingly sustained in part.

I now turn to the parent's claim for compensatory education. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001];

Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]). Likewise, State Review Officers 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 to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services];[16] 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 matter, I agree with the determination of the impartial hearing officer that the evidence indicates that the student was not properly placed from September 2009 until November 16, 2009 (IHO Decision at p. 5). The hearing record demonstrates that from September until November 16, 2009, the student attended a self-contained special education class (Tr. pp. 65-66, 74). It also reflects that the student was supposed to be placed in a CTT class at the start of the 2009-10 school year (Tr. pp. 65-66, 71-74). The district's assistant principal testified that from September through the middle of November, the student did not receive SETSS but that SETSS had been in place for the student since November 16, 2009 (Tr. pp. 75-76, 78-79). She further testified that the services that were put in place for the student pursuant to the student's November

[16] Application of a Student with a Disability, Appeal No. 08-035 was upheld in Bd. of Educ. of the Hicksville Union Free Sch. Dist. v. Schafer, Index No. 18986/2008 (Nassau Co. Sup. Ct. March 24, 2009).

2009 IEP were appropriate for the student and could provide her with educational benefit (Tr. p. 83).

I also agree with the determination of the impartial hearing officer that the district took prompt action upon notice of the parent's concerns regarding the student's placement and that the district rectified the error expeditiously (IHO Decision at p. 5). I further agree with the impartial hearing officer's determination that the evidence strongly suggests that the student's inconsistent attendance affected her academic progress, and her finding that there is insufficient evidence in the hearing record to establish that the educational services the student received in the self-contained class from September 2009 until November 16, 2009 resulted in the loss of an educational benefit to the student sufficient to merit an award of compensatory education (id.). The parent's appeal with respect to this issue is denied.

Turning to the parent's request for sign language instruction services, I am not persuaded that there is evidence in the hearing record sufficient to reverse the determination of the impartial hearing officer. Rather, I find persuasive the detailed testimony of the student's hearing education teacher who meets with the student individually twice per week for 45 minutes each session, and who has known the student since she was in ninth grade, that a sign language course is "not a necessary requirement" for this individual student as she is in an oral environment and functions under oral language (Tr. pp. 87, 95-97, 103, 119-20). The student's hearing education teacher also testified that she is willing to provide the student with additional time beyond what is mandated in the student's IEP if the student needs her assistance (Tr. p. 105). I agree with the impartial hearing officer's determination that while it could provide enrichment, "there is no evidence in the [hearing] record to support the need for instruction in sign language in order for this student to make progress in her educational program" (IHO Decision at p. 6). Moreover, although not dispositive, I note that testimony from the student at the impartial hearing reflects that the student felt she was "pushed into" going to sign language classes and that she did not want to attend them (Tr. pp. 139-40). The parent's appeal with respect to this issue is denied.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, unless the parties otherwise agree, that the district modify the student's current IEP within 30 days such that it reflects the student is mandated to receive an FM unit and the supports necessary for the student to utilize the device.

Dated: **Albany, New York**
June 11, 2010

PAUL F. KELLY
STATE REVIEW OFFICER