The University of the State of New York

The State Education Department
State Review Officer
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No. 10-052

Application of a STUDENT WITH A DISABILITY, by his 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:
Goldman & Maurer, LLP, attorneys for petitioner, Brian S. Goldman, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for a Nickerson letter and additional educational services to remedy respondent's (the district's) failure to offer the student a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years. The district cross-appeals from that portion of the impartial hearing officer's determination that it failed to offer the student a FAPE for the 2009-10 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student attended a third grade 12:1+1 self-contained special class[1] in a district school and received counseling as a related service (Tr. p. 256; see Dist. Ex. 2 at p. 1). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

In this case, the student first attended the district's schools during the 2006-07 school year for first grade (Dist. Ex. 6 at p. 3). For second grade in the 2007-08 school year, the student attended the district for approximately one month before the parent transferred him to a private parochial school for the remainder of the school year (id. at pp. 2-3; see Tr. pp. 256-57; Parent Exs. A-B). According to the parent, she removed the student from the district's second grade classroom because the student had difficulty reading, he could not identify numbers, he could not write, and he exhibited behavioral difficulties, such as leaving the classroom, not listening to

[1] This figure denotes the number of students (12), teachers (1), and aides (1) (see 8 NYCRR 200.6[h][4][i]).

authority, frustration, and an inability to socialize appropriately with peers (Tr. pp. 258, 260). In addition, the parent received "almost" daily telephone calls from the district due to the student's behavior, requiring her to take the student home from school (Tr. p. 260). Based upon testing conducted at the private parochial school, staff suggested that the student repeat first grade and that he attend a kindergarten classroom for one hour per day to "learn[] sounds" (Dist. Ex. 6 at pp. 1-2; see Tr. pp. 257-59; Dist. Ex. 5 at p. 1; Parent Ex. A). Staff also suggested that the parent seek an evaluation from the district's Committee on Special Education (CSE), which was conducted on December 15, 2007 (Dist. Ex. 6 at p. 2; see Tr. pp. 261-63, 290; Dist. Exs. 4-9).

According to the social history report completed by a district social worker on December 15, 2007, the student exhibited distractibility, a short attention span, and had difficulty interacting and maintaining friendships with peers in the classroom (Dist. Ex. 6 at pp. 1-2). In addition, the student left the classroom "without permission" and appeared "resistant to teacher directives" (id. at p. 2). Academically, the student demonstrated difficulty with "learning sounds," handwriting skills, and understanding mathematics directions (id.). The parent described the student as a "non-reader" at that time (id.). The social worker noted in the report that the CSE would administer a speech-language evaluation to the student to address his "[e]xpressive/[r]eceptive [l]anguage [d]elays" (id.). At the impartial hearing, the parent testified that the district never conducted a speech-language evaluation of the student (Tr. pp. 262-63).

Also on December 15, 2007, a district clinician conducted a psychological evaluation of the student (Dist. Ex. 5 at pp. 1-3).[2] An administration of the "Wechsler Abbreviated Intelligence Scale (WASI)" revealed that the student's cognitive functioning fell within the borderline range, and yielded the following standard scores: verbal IQ, 70 (borderline range); performance IQ, 74 (borderline range); and full-scale IQ, 77 (borderline range) (id. at p. 3). On the Kaufman Test of Educational Achievement—Second Edition (KTEA-II), the student's scores fell within the mid-kindergarten range in the areas of decoding, reading comprehension, and mathematics (id. at pp. 2-3). The clinician reported that the student's "learning ability" and "current level of functioning" appeared to be "highly compromised" by his difficulties with focus and attention, and further, that it was necessary to rule out the presence of an attention deficit disorder (ADD) and an attention deficit hyperactivity disorder (ADHD) (id. at p. 2). The clinician opined that the student required "structure" in his learning and in his social interactions (id.).

On February 25, 2008, the CSE convened to conduct the student's initial review and to develop an individualized education program (IEP) (Parent Ex. E at pp. 1-2). At that time, the CSE found the student eligible to receive special education as a student with a learning disability and recommended placement in a 12:1 special class with two 30-minute sessions of counseling per week as a related service (id. at pp. 1-2, 11).

For the 2008-09 school year, the student returned to the district and attended second grade in a 12:1+1 self-contained special class with counseling as a related service (Parent Ex. M at p. 1; see Tr. pp. 264-65; Parent Exs. J at p. 1; K at p. 1). On October 7, 2008, the district conducted a psychiatric evaluation of the student due to the parent's concerns about the student's hyperactivity and inattentiveness (Parent Ex. F at p. 1; see Parent Ex. H). Based upon the evaluation, the student received a diagnosis of an ADHD (Parent Ex. F at p. 2). On November 6, 2008, the CSE convened at the parent's request due to her concerns about the student's current placement (Dist. Ex. 3 at pp.

[2] The hearing record also contains a bilingual psychoeducational evaluation report, dated December 15, 2007, which is a handwritten version of the December 15, 2007 psychological evaluation report (compare Dist. Ex. 7, with Dist. Ex. 5).

1-2; see Tr. pp. 264-65). The CSE prepared a November 2008 IEP, which was copied verbatim from the student's February 2008 IEP, except that the CSE added a recommendation for adapted physical education in the November 2008 IEP (compare Dist. Ex. 3 at pp. 3-13, with Parent Ex. E at pp. 3-13). At the impartial hearing, the parent testified that the November 2008 CSE meeting did not result in any changes to the student's academic program or placement (Tr. p. 270). By letter dated November 30, 2008, the parent wrote to the district to express her continued frustrations and concerns about the student's placement (Parent Ex. H; see Tr. pp. 270-71). At the impartial hearing, the parent testified that the district did not take any actions related to the student as a result of the letter (Tr. p. 273). On December 5, 2008, the parent met with a district social worker, who indicated that she would be providing the parent with weekly progress reports (see Tr. pp. 274-75; Parent Ex. H). At the impartial hearing, the parent testified that she did not receive any progress reports after the December 2008 meeting (Tr. p. 274). By letter dated January 24, 2009, the parent wrote to the CSE chairperson and requested a CSE meeting to review the student's IEP "so that a new appropriate placement" could be recommended for the student (Parent Ex. I at p. 1). At the impartial hearing, the parent testified that she did not receive any response to her January 24, 2009 letter (Tr. pp. 275-76).

On April 23, 2009, the parent privately obtained a speech-language evaluation of the student (Parent Ex. J; see Tr. pp. 263-64). The speech-language pathologist reported that during the assessment, the student exhibited "impulsive response behavior," he "lost focus," and he needed to be "constantly redirected and re-instructed to complete tasks" (Parent Ex. J at p. 1). She further indicated that the student's "poor listening, attending and focusing adversely affected his overall performance" (id.). Following the administration of a language screening test and assessments of the student's receptive and expressive vocabulary skills, the speech-language pathologist concluded that the student demonstrated "delayed language skills in the areas of listening and attention, auditory memory, vocabulary development, standard English grammar and morphology, thinking skills, and concept development" (id. at p. 2). To address the student's needs, she recommended that he receive two sessions per week of speech-language therapy in a small group to improve the following areas: listening skills, focus, and attention to structured tasks; auditory memory for detailed information; reasoning and problem solving skills; and to expand his core vocabulary (id.). The speech-language pathologist also recommended a re-evaluation in one year (id.).

Over three dates in April and May 2009, the parent privately obtained a psychological evaluation of the student (Parent Ex. K at p. 1). According to the report, the parent referred the student for an evaluation to "rule out dyslexia" (id.). The report also noted that the student had "experienced behavior problems and was diagnosed with ADHD" (id.). During the assessment, the student exhibited "oppositional, distractible, and avoidant behaviors," as well as behaviors described by the evaluators as "unusual," such as a preoccupation with objects in the testing room (id. at pp. 2-3). An administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) yielded the following standard scores: verbal comprehension, 75 (borderline range); perceptual reasoning, 61 (extremely low range); working memory, 74 (borderline range); processing speed, 59 (extremely low range); and full-scale IQ score, 60 (extremely low range) (id. at pp. 3-4). The evaluators characterized the student's ability to verbally compare two objects or ideas as an area of significant weakness and his ability to understand social norms as an area of strength (id. at p. 7). To assess the student's academic achievement in reading, mathematics, and written expression, the evaluators administered selected subtests of the Wechsler Individual Achievement Test—Second Edition (WIAT-II) (id. at pp. 1, 5, 7). The student performed within the "extremely low" range on all of the subtests administered, except for written expression, which fell within the "borderline" range (id. at p. 5). In their report, the evaluators explained that they

had generated the student's scores based upon age norms—as opposed to grade norms—because the student had been retained in both first and second grade (id.). Based upon the age norms, the evaluators characterized the student's overall scores as "generally more than three years behind" (id.).

An assessment of the student's visual-motor integration skills yielded scores in the "low" range, and the evaluators described the student's "drawing style" as "impulsive and disorganized" (Parent Ex. K at pp. 6-7). The parent's responses to the Connors' Parent Rating Scale—Revised Short Form revealed an "elevation on all scales," which indicated that the student exhibited "significant problems with ADHD symptoms" (id.). Projective assessments depicted the student's "emotional immaturity and an inability to cope independently with challenging situation[s] without [the] use of aggression" (id.). The evaluators further reported that the student appeared to have difficulty with boundaries and friendship skills (id. at p. 7). They recommended, among other things, that class placement should consider the student's cognitive impairment and behavioral/emotional difficulties, a psychiatric evaluation and medication assessment to treat ADHD symptoms, individual psychotherapy and social skills group therapy, and the administration of the Vineland Adaptive Behavior Scales—Second Edition (Vineland-II), which was completed on July 1, 2009 (id. at pp. 7-9). Based upon the parent's reported observations on the Vineland-II, the student exhibited "[m]ild" to "[m]oderate" deficits in his communication skills and daily living skills, and his socialization skills fell within the "low" range (see id.). The student's overall adaptive behavior skills fell within the "[m]ild [d]eficit range," indicating that the student performed below age expectancy in all adaptive domains (id. at p. 9).

For the 2009-10 school year, the student remained in the district and attended third grade in a 12:1+1 special class and received counseling as a related service (Tr. p. 256; see Dist. Ex. 2 at p. 1). At the impartial hearing, the parent testified that in September 2009, she brought the student's privately obtained speech-language evaluation report and privately obtained psychological evaluation report to the district's school psychologist in order for the district to implement the recommended services in those reports in a new IEP (Tr. pp. 276-80). The parent further testified that the school psychologist did not review either of the evaluation reports (Tr. pp. 279-80). At the impartial hearing, the district's school psychologist acknowledged that the parent brought the privately obtained speech-language evaluation report to her, and she testified that she reviewed the evaluation report and asked to make a copy of the report (Tr. p. 152). The school psychologist then instructed the parent that if she wanted the district to "consider services," the district's standard operating procedures manual (SOPM) required the parent to write a letter to the "building administrator" in order for the student's case to be "opened" (Tr. pp. 152-53, 184-85). The school psychologist explained that once the CSE reviewed a student's case and secured a placement, the student's case was "closed" and the CSE could not "add any services, we can't do anything until that case [was] opened again" (Tr. pp. 153-54, 161-62).[3]

On November 24, 2009, the following individuals convened to conduct the student's annual review: the parent, the student's then-current special education teacher, and a district social worker

[3] As part of a CSE's review of a student' s program, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). The SOPM referred to in testimony was not submitted into the hearing record as evidence, thus, it is unclear whether the school psychologist's misunderstanding of the State and federal regulations pertaining to the CSE's obligation to review and consider privately obtained evaluation reports was due to a lack of training, a lack of understanding of the regulatory requirements, or whether the district's SOPM was inconsistent with the State and federal regulations implementing the IDEA.

(Dist. Ex. 2 at p. 2).[4, 5] At the November 24, 2009 meeting, the parent provided the student's special education teacher with the privately obtained speech-language evaluation report and the privately obtained psychological evaluation report (Tr. p. 281). The parent testified that although the special education teacher "looked through" the reports, she returned them to the parent and instructed her to "write that letter to have the case reopened" (Tr. pp. 281-82).[6] In testimony, the special education teacher denied receiving any reports from the parent at the November 24, 2009 meeting; however, she did acknowledge that she was aware of the student's speech-language difficulties at that time, and further, that she believed the student required speech-language therapy (Tr. pp. 77-78, 133-34). In addition, the special education teacher acknowledged in her testimony that when the parent requested a speech-language evaluation at the November 24, 2009 meeting, she advised the parent that "she was supposed to give a letter to reopen [the case] and have [the student] reevaluated" (Tr. pp. 133-34). The special education teacher was also aware at the time of the November 24, 2009 meeting that the student exhibited behavioral difficulties (Tr. pp. 81-82, 87-88).

At the November 24, 2009 meeting, the parent received a copy of the November 2009 IEP, which had been developed by the student's special education teacher one week prior to the meeting (Tr. pp. 282; see Tr. pp. 62, 64, 68-71, 75-76). The special education teacher testified that she relied upon her own classroom assessments and observations of the student, information provided by the school social worker who monitored the student, and information in the student's "file" to prepare the November 2009 IEP (Tr. pp. 71-72).[7] In the academic performance and learning characteristics section of the IEP, the special education teacher described the student's reading skills as "3 grades below his grade level," and that he exhibited difficulty recognizing common

[4] At the impartial hearing, the special education teacher testified that she also served as the district representative at the November 2009 meeting (Tr. pp. 62-63; see Dist. Ex. 2 at p. 2). The special education teacher explained her understanding of the district representative's role at the IEP meeting as the following: "when I am running an IEP annual review . . . I am considered a District representative for the IEPs" (Tr. pp. 67-68; see Tr. pp. 62-64). According to her testimony, the special education teacher received that information from the district's school psychologist (Tr. pp. 67-68). At the time of the impartial hearing in February 2010, the special education teacher had been employed as a teacher for two years and was earning her Masters degree in special education under a teaching fellows program (Tr. pp. 40-41, 54).

[5] In contrast to the special education teacher's understanding of her role as the district representative at the November 2009 CSE meeting, State regulations describe the district representative member of a CSE, in part, as "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]; see 34 C.F.R. §300.321[a][4]).

[6] As part of a CSE's review of a student's program, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). The SOPM referred to in testimony was not submitted into the hearing record as evidence, thus, it is unclear whether the special education teacher's misunderstanding of the State and federal regulations pertaining to the CSE's obligation to review and consider privately obtained evaluation reports was due to a lack of training, a lack of understanding of the regulatory requirements, or whether the district's SOPM was inconsistent with the State and federal regulations implementing the IDEA.

[7] The special education teacher testified that the student's bilingual psychoeducational evaluation report, dated December 15, 2007, was not in the student's "file" at the time that she prepared the November 2009 IEP (Tr. pp. 79-80). She further testified that the information contained in the December 2007 evaluation report, notably that the student was a "nonreader," would have been an "important fact" for her to consider at the November 24, 2009 meeting and in the development of the student's annual goals in the November 2009 IEP (Tr. pp. 80-81). The special education teacher did recall that the student's November 2008 IEP had been in the student's "file" and that she reviewed it prior to developing the student's November 2009 IEP (Tr. pp. 86-87).

sight words and decoding new words (Dist. Ex. 2 at p. 3). The special education teacher described the student's mathematics skills as "emerging toward basic 1st grade level," and she noted that although the student could compute simple addition and subtraction problems, he was "unable to process word problems" due to his difficulties with reading (id.). The special education teacher characterized the student's instructional levels in reading and mathematics as "third grade" based upon "[t]eacher [a]ssessment" or "[t]est [p]rep [a]ssessment" (id.). The IEP indicated that the student needed instructions repeated, prompts to stay on task, and seating in the front of the classroom to reduce distractions (id.).

Information contained in the social/emotional performance section of the IEP indicated that the student exhibited "inappropriate behavior," such as running in the classroom and hallways, sticking his tongue out at children and adults, trying to be the focus of attention during group activities, and whining when unable to have his way (Dist. Ex. 2 at p. 4).[8] The IEP noted that the student had received a diagnosis of ADHD and took medication at home, his behavior did not seriously interfere with instruction and could be addressed by the special education teacher, and finally, that the development of a behavior plan for the student was not recommended (id. at pp. 4-5). The IEP contained one annual goal for reading, one annual goal for mathematics, and one annual goal for counseling (id. at pp. 6-7).[9] With respect to the student's special education program and placement for the 2009-10 school year, the IEP indicated that the student would continue his current placement in the 12:1+1 special class with two sessions per week of counseling as a related service (id. at pp. 1-2, 8).

On December 7, 2009, the parent privately obtained an assessment of the student at EBL Coaching in the areas of reading, spelling, mathematics, and written expression (Parent Ex. N; see Tr. pp. 229-31).[10] The results of the EBL Coaching assessments indicated that the student's reading and spelling skills fell within the "upper [k]indergarten level," his mathematics skills fell within the "mid-first grade level," and his written language skills fell within the "low [k]indergarten level" (Parent Ex. N). Based upon the evaluation results, a review of the student's November 2008 IEP, and a review of the student's privately obtained psychological evaluation report, the director of EBL Coaching concluded that the student required "specific" and "structured" multisensory instruction to address deficits in reading, spelling, mathematics, and written expression, and she recommended that the student receive 400 hours of "*intensive* one-on-one multi-sensory tutoring using the Orton-Gillingham technique as well as specific instructional tools to build his mathematics and written language skills" (Parent Ex. N [emphasis in original]; see Tr. pp. 231-32).

By due process complaint notice dated December 10, 2009, the parent alleged, among other things, that the district failed to offer the student a FAPE for the 2009-10 school year and asserted procedural and substantive violations to support her claim (Dist. Ex. 1 at pp. 1-2, 4-6). Specifically, the parent alleged the following: the district failed to recommend an appropriate placement and program for the 2009-10 school year that properly addressed the student's academic

[8] The special education teacher testified that the student's counselor prepared page four of the IEP (Tr. pp. 82-83).

[9] The special education teacher testified that she developed the student's annual goals for reading and mathematics, and the district's social worker developed the student's annual goal for counseling (Tr. pp. 89-90; see Dist. Ex. 2 at pp. 6-7).

[10] The director and founder of EBL Coaching, who testified at the impartial hearing, described EBL Coaching as a "team of specialists who specialize in providing one on one tutorial support to students with special learning needs" (Tr. pp. 225-27).

and behavioral needs, which resulted in the student failing to make meaningful progress both academically and behaviorally; the CSE failed to defer the student's case for placement in an appropriate nonpublic school; the district failed to convene a properly composed CSE to develop the student's 2009-10 IEP on November 24, 2009; the CSE denied the parent an opportunity to meaningfully participate in the development of the student's November 2009 IEP by refusing to accept the student's private evaluation reports and by failing to seek the parent's input; and the November 2009 IEP contained nonspecific, vague, and immeasurable annual goals, which failed to appropriately address all of the student's areas of need (id. at pp. 4-6). As relief, the parent requested an order directing the district to pay for the student's tuition at an appropriate nonpublic school for the 2009-10 school year through either the issuance of a Nickerson letter (issued for a 12-month period)[11] or through prospective tuition payments;[12] an order directing the district to pay for the student to receive 400 hours of additional educational services to be provided over a two-year period, at a rate not to exceed $110.00 per hour, and to be provided by EBL Coaching, in addition to the costs of transporting the student to and from the tutoring services; and, upon proof of payment, an award reimbursing the parent for the costs of the privately obtained evaluations, assessments, school application fees, and expert witness fees associated with the search for an appropriate nonpublic school for the 2009-10 school year (id. at pp. 6-7).

On February 12, 2010, the parties proceeded to an impartial hearing, which concluded on April 12, 2010, after three days of testimony and the submission of documentary evidence (Tr. pp. 1, 327; Dist. Exs. 1-9; Parent Exs. A-B; E-F; H-K; M-N; P-X). By decision dated May 5, 2010, the impartial hearing officer determined that the district failed to offer the student a FAPE for both the 2008-09 and 2009-10 school years (IHO Decision at pp. 6-10).[13] Turning to the 2009-10 school year, the impartial hearing officer noted that although the CSE had described the student's decoding skills, reading comprehension skills, listening comprehension skills, mathematical computation skills, and problem solving skills to be at a "[t]hird [g]rade [i]nstructional [l]evel" in one section of the November 2009 IEP, the CSE thereafter described the student's reading skills as "three grades below his grade level" and that his mathematical skills were "'emerging toward basic First Grade Level'" in the same November 2009 IEP (id. at p. 7). Similarly, the impartial hearing officer noted that although the CSE described the student's inappropriate behaviors and behavior difficulties in the November 2009 IEP, the IEP reflected that the student's behaviors did not

[11] A "Nickerson letter" is a letter from the New York Department of Education authorizing a parent to place a student in a New York State approved non-public school at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy of a "Nickerson letter" is intended to address the situation in which a student has not been evaluated or placed in a timely manner (see Application of a Student with a Disability, Appeal No. 10-011; Application of the Dep't of Educ., Appeal No. 09-114; Application of a Student with a Disability, Appeal No. 08-020; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

[12] In her due process complaint notice, the parent identified a specific State-approved nonpublic school that had extended an offer of admission to the student for the 2009-10 school year, and thus, the parent requested that the impartial hearing officer order the district to issue a Nickerson letter, or pay prospectively, for the student to attend the specifically identified State-approved nonpublic school for the 2009-10 school year (Dist. Ex. 1 at p. 6).

[13] Although the parent in this case challenged whether the district had offered the student a FAPE for both the 2008-09 and 2009-10 school years, the district confined its presentation of evidence at the impartial hearing to address issues related solely to the 2009-10 school year (Dist. Ex. 1 at pp. 1-7; see Tr. pp. 14-15). As such, the impartial hearing officer properly concluded that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2008-09 school year (IHO Decision at pp. 6-7, 11-12). Since neither party has challenged the impartial hearing officer's conclusion that the district denied the student a FAPE for the 2008-09 school year, that determination is final and binding upon the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

seriously interfere with his instruction and could be addressed by a special education teacher, and further, that no behavioral intervention plan (BIP) had been developed (id.).[14] As for the composition of the November 24, 2009 CSE, the impartial hearing officer concluded that it had been properly composed as a subcommittee of the CSE, and further, that the student's then-current special education teacher was qualified to serve as the district representative because she was "qualified to provide special education" and that she also satisfied the requirements of an "individual who could interpret instructional implications of evaluation results, if, indeed, there existed any to interpret" (id. at pp. 7-9). The impartial hearing officer rejected the parent's contention that the CSE engaged in impermissible predetermination by developing the November 2009 IEP one week prior to the meeting, and further, he concluded that although the annual goals "could [have] be[en] more clear and precise," the annuals goals did not invalidate the student's recommended program and services (id. at p. 9).

Next, the impartial hearing officer raised concerns regarding how the district handled the parent's attempt to provide the district with the student's private evaluation reports during the 2009-10 school year (IHO Decision at p. 9). The impartial hearing officer noted that the district witnesses' understanding of the district SOPM—requiring the parent to write a letter to reopen the student's case—constituted a "total misinterpretation of the Regulations governing the C.S.E.," and he explained that contrary to the witnesses' understanding, the regulations required the district to review and consider the results of a privately obtained evaluation (id. at p. 10).[15] Had the district accepted the evaluation reports, the impartial hearing officer opined that a school psychologist would have been a required member of the November 24, 2009 CSE, and he further opined that the student's "special education program might well have been substantially different from that enacted" by the CSE subcommittee on November 24, 2009 (id.). Thus, the impartial hearing officer concluded that the district's failure to review and consider the privately obtained evaluation reports deprived the student of a FAPE for the 2009-10 school year (id.).

The impartial hearing officer then analyzed and considered the relief requested by the parent (IHO Decision at pp. 10-12). The impartial hearing officer rejected the parent's request for a Nickerson letter to remedy the district's failure to offer a FAPE for both the 2008-09 school year and for the 2009-10 school year (id. at p. 11). The impartial hearing officer explained that a Nickerson letter had been intended as a remedy for "a large number of students for whom the New York City Board of Education could not provide immediate appropriate services;" thus, he determined that "its invocation in this proceeding" was not appropriate, and furthermore, because the 2008-09 school year had long since expired, the "immediate provision of emergency services [was] meaningless" (id at pp. 10-11). With regard to the 2009-10 school year, the impartial hearing officer concluded that the award of a Nickerson letter to allow the student to attend a State-approved nonpublic school "immediately" and for the following school year in 2010-11 was not an appropriate remedy for the denial of a FAPE for the 2009-10 school year (id. at p. 11). He explained that although testimonial evidence established that the State-approved nonpublic school identified by the parent in her due process complaint notice had determined that its program was appropriate for the student, the district's failure to "accept and consider" the privately obtained evaluation reports did not "necessarily establish that the [d]istrict [did] not have an appropriate placement" for the student (id.). Therefore, the impartial hearing officer denied the parent's request

[14] The November 2009 IEP also reflected that a functional behavioral assessment (FBA) had not been recommended (see Dist. Ex. 2 at p. 4).

[15] See 34 C.F.R. § 300.502(c)(1); 8 NYCRR 200.5(g)(1)(vi)(a).

for the issuance of a Nickerson letter to remedy the district's failure to offer a FAPE for the 2009-10 school year (id.).

Moving on to the parent's request for 400 hours of tutoring services from EBL Coaching as additional educational services, the impartial hearing officer denied the parent's request (IHO Decision at pp. 11-12). The impartial hearing officer explained that an award of compensatory educational services was only appropriate to remedy a denial of a FAPE "where it [was] clear that the denial of required services adversely affected a student's educational progress" (id. at p. 11). For the 2008-09 school year, the impartial hearing officer noted that the hearing record failed to contain any "clear evidence" that the student "would have academically progressed during the 2008-09 school year but for the District's failure to meet with [the] [p]arent in a timely fashion or to have a better-constructed IEP" (id.). He reasoned that although the district failed to defend its recommended program and placement for the 2008-09 school year at the impartial hearing, the psychiatric evaluation report completed in October 2008 indicated that the student's "then-current placement seemed to be appropriate" for the student and further, that the student "seemed to be adapting" (id.). With respect to the 2009-10 school year, the impartial hearing officer concluded that the student was not entitled to 400 hours of compensatory educational services because the student received "instruction in a small class" and "the services of a special education teacher trained in the Wilson Method, who provided one and one-half hours of instruction, twice weekly" to the student in a small group (id. at p. 12). The impartial hearing officer further explained that although the district failed to properly consider and review the privately obtained evaluation reports, the hearing record failed to contain any "evidence that such [failure] had a detrimental impact" on the student's academic progress (id.).

In conclusion, the impartial hearing officer ordered the district to convene a CSE meeting as soon as possible to "fully and completely review" both of the student's privately obtained evaluation reports and to determine "all" of the student's "special education needs and prepare an [IEP] sufficient to meet such needs" (IHO Decision at p. 12). In addition, the impartial hearing officer directed that if the CSE determined that the student required placement in a "special school, it shall give first consideration" to placing the student in the State-approved nonpublic school identified in the parent's due process complaint notice (id.).

On appeal, the parent argues that although the impartial hearing officer properly concluded that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years, he erred in failing to award any of the parent's requested relief. The parent contends that the district's failure to meet with her within 60 days of the parent's January 24, 2009 letter constitutes a violation of 8 NYCRR 200.4(d) and thus, warrants the issuance of a Nickerson letter. The parent also argues that the student's placement during the 2008-09 school year did have severe and detrimental educational effects on the student, noting that he failed to make progress in reading during the two years he attended the district's placements. In addition, the parent argues that the hearing record contains sufficient evidence that the student would have made academic progress during the 2008-09 school year if the student had been placed in an appropriate program. Turning to the 2009-10 school year, the parent asserts that the November 2009 IEP contained inappropriate and immeasurable annual goals, the student failed to make any academic progress, the annual goals failed to address all of the student's academic needs, the district failed to adequately reevaluate the student prior to developing the November 2009 IEP, the district convened an improperly composed CSE for the November 24, 2009 meeting, and thus, the impartial hearing officer erred in denying the parent's request for a Nickerson letter as a remedy because the district's failure to timely evaluate or place the student in a timely manner warranted such relief. In addition, the parent argues that the expiration of the 2008-09 and 2009-10 school years does not render the issuance

of a Nickerson letter moot. Finally, the parent contends that the student is equitably entitled to an award of 400 hours of additional educational services to remedy the district's failure to offer a FAPE for the 2008-09 and 2009-10 school years, as the student is still eligible for instruction and has been denied a FAPE. The parent seeks to vacate the impartial hearing officer's decision to the extent that he failed to award any of the parent's requested relief.

In its answer, the district asserts that the impartial hearing officer properly denied all of the parent's requested relief and objects to the parent's request to vacate that portion of the impartial hearing officer's decision. The district argues that a Nickerson letter is not an appropriate form of relief in this proceeding for the 2008-09 school year, especially since the parent failed to request an impartial hearing until six months had elapsed in the 2009-10 school year. The district also argues that in this case, the parent's disagreement with the 2009-10 school year was related to the student's placement and therefore, was not analogous to the cases in which a Nickerson letter has been awarded as relief. With regard to the parent's request for 400 hours of private tutoring services, the district asserts that the student is not entitled to such an award because the special education services delivered to the student during the 2009-10 school year already provided a remedy for the denial of a FAPE in the 2008-09 school year. Alternatively, the district contends that if an award of 400 hours of tutoring services is deemed appropriate, the district should be permitted to provide such services. As for the 2009-10 school year, the district similarly maintains that the student is not entitled to either a Nickerson letter or to 400 hours of additional educational services as a remedy for the denial of a FAPE. The district contends that a Nickerson letter would be inappropriate because the 2009-10 school year will expire prior to the issuance of a decision in the instant appeal and because the parent did not assert that the student's November 2009 IEP was untimely. The district also argues that the student is not entitled to an award of 400 hours of additional educational services for the denial of a FAPE for the 2009-10 school year because such failure has been remedied "by virtue of the significant progress" the student made during the 2009-10 school year (Answer ¶ 61). However, if deemed to be appropriate, the district asserts that it should be allowed to provide the student with the 400 hours of additional educational services. Finally, the district contends that the impartial hearing officer properly declined to award a Nickerson letter to allow the student to attend a State-approved nonpublic school for the 2010-11 school year, as such claim is premature.

In its cross-appeal, the district seeks to overturn the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year. First, the district agrees with the impartial hearing officer's finding that it failed to consider and review the student's privately obtained evaluation reports in developing the student's 2009-10 IEP. Therefore, the district does not appeal those portions of the impartial hearing officer's order directing the district to reconvene a CSE meeting to consider and review the reports, to develop a new IEP sufficient to meet the student's needs, or that the CSE should give first consideration to the State-approved nonpublic school identified in the parent's due process complaint notice if the CSE determines that the student requires placement outside the district. The district contends, however, that such failure to review and consider the privately obtained evaluation reports, as a procedural violation, does not rise to the level of a denial of a FAPE because such failure did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, cause a deprivation of educational benefits, or render the 2009-10 IEP substantively inadequate. In particular, the district argues that the hearing record fails to contain any evidence as to how the student's IEP would have differed if the district had reviewed and considered the privately obtained evaluation reports. In addition, the district argues that the November 24, 2009 CSE was properly composed, that the

hearing record indicates that neither an FBA nor a BIP was warranted at the time the 2009-10 IEP was developed, and that the annual goals were appropriate to meet the student's needs.

In her answer to the district's cross-appeal, the parent asserts that the district failed to sustain its burden to establish that the student made progress during the 2009-10 school year. The parent contends that the district's reliance upon the testimonial evidence presented by the student's then-current special education teacher and the district's school psychologist is insufficient to demonstrate that the student made progress, and further, that the district failed to submit any objective evidence—such as progress reports, classroom assignments, or classroom tests or quizzes—into the hearing record to support this claim. The parent also argues that the hearing record does not support the conclusion that the special education programs and services provided to the student during the 2009-10 school year remedied the district's failure to offer the student a FAPE for the previous school year, and further, that the parent raised her request for a Nickerson letter for the 2010-11 school year in a timely manner. The parent asserts that the impartial hearing officer properly determined that the district denied the student a FAPE for the 2009-10 school year and seeks to uphold that portion of the impartial hearing officer's decision, alleging that the November 24, 2009 CSE was improperly composed, the CSE failed to recommend an FBA and a BIP, and that the annual goals were inappropriate. The parent seeks the dismissal of the district's cross-appeal in its entirety.

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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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).

Turning first to the district's cross-appeal of the impartial hearing officer's determination that it failed to offer the student a FAPE for the 2009-10 school year, the district concedes that the district improperly failed to review and consider the student's privately obtained evaluation reports in the development of the student's 2009-10 IEP, but argues that this procedural violation of the IDEA does not constitute a denial of a FAPE. The district contends that the failure to review and consider the private evaluation reports did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, cause a deprivation of educational benefits, or render the 2009-10 IEP substantively inadequate, and therefore, the impartial hearing officer erred in his determination that the district failed to offer the student a FAPE for the 2009-10 school year.

While it is true that not all procedural errors render an IEP legally inadequate under the IDEA (A.C., 553 F.3d at 172; Grim, 346 F.3d at 381; Perricelli, 2007 WL 465211, at *10), an independent review of the hearing record in this case supports the impartial hearing officer's determination that the failure to review and consider the student's privately obtained evaluation reports denied the student a FAPE for the 2009-10 school year. Contrary to the district's

arguments, the hearing record indicates that the district's failure to review and consider, at a minimum, the student's privately obtained speech-language evaluation report impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE for the 2009-10 school year, and caused a deprivation of educational benefits to the student (see 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., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).[16]

First, the hearing record contains sufficient evidence that the student required a speech-language evaluation and speech-language therapy services. In this case, the district's social worker initially identified and raised concerns about the student's speech-language skills as early as December 15, 2007, by noting in the social history report that the CSE needed to evaluate the student to "address the student's [e]xpressive/[r]eceptive language delays" (Dist. Ex. 6 at p. 2). Given the district's failure to follow-up on its own recommendation to evaluate the student for nearly two years, the parent privately obtained a speech-language evaluation of the student in April 2009, which identified "delayed language skills in the areas of listening and attention, auditory memory, vocabulary development, standard English grammar and morphology, thinking skills, and concept development," and recommended two weekly sessions of speech-language therapy services in a small group to improve the student's listening skills, focus, and attention to structured tasks; auditory memory for detailed information; reasoning and problem solving skills; and to expand his core vocabulary (Tr. pp. 262-64; Parent Ex. J at p. 2).

At the impartial hearing, the speech-language pathologist who conducted the student's April 2009 evaluation testified that in addition to having "failed" the language screening test, the student's receptive and expressive vocabulary skills were "below expectations" for his age (Tr. pp. 334-35, 339-43). She further testified that without the provision of speech-language therapy, she would not expect the student's language functioning to improve and that his listening and attending skills may decrease, resulting in an overall decrease in communication functioning (Tr. p. 347). In addition, the student's then-current special education teacher testified at the impartial hearing that at the time of the November 24, 2009 CSE meeting, she was aware of the student's speech-language difficulties and she believed the student required speech-language therapy (Tr. pp. 39-40, 43, 133-34).

To date, however, the district has failed to evaluate, identify, or provide special education programs and services to address the student's speech-language needs despite its own recognition of the student's needs in this area as early as December 2007, and corroborated as recently as the impartial hearing through the special education teacher's testimony (Tr. pp. 77-78, 133-34, 262-64; see Dist. Exs. 2-3; Parent Ex. E). In addition, the district failed to produce any evidence to rebut the areas of need identified in the student's privately obtained speech-language evaluation report or regarding the recommendations for two sessions per week of speech-language therapy services contained in that report (see Tr. pp. 1-392; Dist. Exs. 1-9; Parent Exs. A-B; E-F; H-K; M-N; P-X). The district also failed to rebut the speech-language pathologist's testimony that the student's language functioning would not improve without the provision of speech-language therapy services, or that without services, the student's overall communication functioning would

[16] In addition, the resulting IEP was substantively inappropriate due, in part, to a failure to provide for speech-language services for the student (Rowley, 458 U.S. at 206-07). In finding that the November 24, 2009 IEP was also substantively inappropriate and not reasonably calculated to enable the student to receive educational benefits due to the failure to recommend needed speech-language services, I need not address other substantive aspects of the IEP.

decrease without the provision of services (see id.). Therefore, the hearing record contains sufficient evidence to conclude that the November 24, 2009 IEP was substantively inappropriate and that the district's failure to review the privately obtained speech-language report resulted in the district's failure to identify the student's speech-language needs and provide speech-language therapy services, which impeded the student's right to a FAPE and deprived him of educational benefits, and thus, rose to the level of a denial of a FAPE for the 2009-10 school year.

In addition, the evidence demonstrates that the parent attempted to provide the privately obtained speech-language evaluation report to the district's school psychologist in September 2009 and that she presented the evaluation report to the student's then-current special education teacher at the November 24, 2009 CSE meeting in order to implement the recommendations in the report (Tr. pp. 133-34, 276-81). The evidence further indicates that the parent requested a speech-language evaluation of the student at the November 24, 2009 meeting, which the special education teacher denied because the parent had not yet written a letter to "reopen" the student's case (Tr. pp. 133-34). However, due to the district witnesses' misunderstanding of the regulations regarding the CSE's obligation to review and consider privately obtained evaluation reports, the parent could not prevail upon the district to consider and review the evaluation report (Tr. pp. 152-53, 184-85, 281-82). Based upon the foregoing, the hearing record contains sufficient evidence that the district's conduct, which ultimately led to the district's failure to review and consider the private evaluation reports, impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE for the 2009-10 school year because the parent was prevented from raising concerns or adequately discussing the student's speech-language needs either prior to, or at, the November 24, 2009 CSE meeting. The November 2009 IEP, therefore, was developed without adequate input from the parent, without adequate consideration or discussion at the CSE meeting of the student's speech-language needs, without consideration of new or additional evaluative information created subsequent to the November 2008 IEP, and without providing any educational justification or rationale as to why the student did not require speech-language therapy services. Therefore, the hearing record contains sufficient evidence to conclude that the district's failure to review the privately obtained speech-language report also significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE for the 2009-10 school year.

Finally, I note that the district—in its cross-appeal—offers to now review and consider the evaluation report and to consider "make-up" speech-language therapy services in an effort to resolve or remedy the district's failure to previously review and consider the student's privately obtained speech-language evaluation report. Under the circumstances of this case, I find that this does not adequately remedy the district's violation; therefore, the district is ordered to complete an updated, comprehensive speech-language evaluation of the student within 30 days of the date of this decision, and in addition, to provide two 30-minute sessions per week of speech-language therapy services in a small group to the student for two consecutive school years as additional educational services, in addition to any other speech-language therapy services that are deemed appropriate upon the completion, review, and consideration of the updated, comprehensive speech-language evaluation to be conducted as a result of this decision.[17]

[17] The parties are reminded that upon completion of the ordered speech-language evaluation, federal and State regulations provide that, subject to certain limitations, a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1].

Turning now to the parent's appeal, the hearing record supports the parent's contention that the impartial hearing officer erred in failing to award any of the parent's requested relief to remedy the district's failure to offer the student a FAPE for the 2008-09 and 2009-10 school years. Although it is difficult to ascertain the legal principle upon which the impartial hearing officer denied the parent's request for additional educational services as a remedy for the district's failure to offer the student a FAPE for the 2008-09 and 2009-10 school years, it is well settled that 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 Newington, 546 F.3d at 123 [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]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). 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];[18] 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).

Thus, in this case additional educational services constitute a viable, equitable remedy for the district's failure to offer the student a FAPE for the 2008-09 and 2009-10 school years, and upon an independent review of the hearing record, the evidence supports a conclusion that the student is entitled to receive the 400 hours of tutoring services as additional educational services requested by the parent.[19]

Here, the hearing record indicates that the director of EBL Coaching, who has a Masters degree in special education and a doctorate in education, conducted an assessment of the student's academic skills in December 2009 (Tr. pp. 226, 229). The director administered the Wide Range Achievement Test, the Qualitative Reading Inventory, and the Test of Written Language to assess the student's reading, spelling, mathematics, and written language skills (Tr. pp. 229-30). Results of the assessments indicated to the director that the student's reading and spelling skills were at an "upper kindergarten" level, his mathematics skills were at a mid-first grade level, and his written language skills were at a "low kindergarten" level (Tr. p. 230). As these results were "well below the expected levels for [the student's] grade," the director testified that she felt very strongly that the student required "intensive one on one, multisensory instruction to remediate all of [the student's] core academic areas" (Tr. pp. 230-31). In addition, she recommended 400 hours of services, provided in five-hour-per-week increments over a two year period, based upon her experience with students who exhibited deficits similar to this student's areas of need (Tr. pp. 232, 252).

The director also explained how EBL Coaching would provide services to the student (Tr. pp. 231-32, 236). EBL Coaching employs New York State certified special education instructors, who receive training in the use of multisensory approaches to teaching (Tr. pp. 237-38). The director posited that the Orton-Gillingham methodology—described as a research-based, multisensory form of instruction—would be used to remediate the student's decoding and spelling deficits (Tr. p. 232). In addition, "structured multisensory approaches" would be used to address the student's needs in reading comprehension, writing, and mathematics (id.). She indicated that the Orton-Gillingham methodology was appropriate for the student because it was "very much individualized according to where a student starts and also according to how he or she responds to each level of the program" (Tr. p. 236). EBL Coaching recorded a student's progress in session notes and in weekly summary notes, which were then provided to parents (Tr. pp. 249-50).

Absent any evidence presented by the district to sufficiently rebut either the appropriateness of the type or amount of additional educational services as requested by the parent,

[18] 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). An appeal was taken to the New York State Appellate Division, Second Department, Index No. 2010/00155, where the matter is currently pending as of this date.

[19] I have taken into consideration the district's alternative request that if an award of additional services is to be made that the district be directed to provide the services as opposed to paying a private service provider to provide the service. Such an argument is at times persuasive (see e.g., Application of the Dep't of Educ., Appeal No. 06-048). However, I do not find the district's request persuasive here considering this hearing record and the identified concerns as discussed in this decision.

and noting that the hearing record reflects that the student demonstrated little, to no, academic progress during the school years in question and in the areas targeted by the EBL Coaching tutoring services, the hearing record supports the parent's request for 400 hours of tutoring services to be provided by EBL Coaching, at a rate not to exceed $110.00 per hour.[20]

Lastly, a review of the hearing record raises concerns about the training that district staff that were involved in developing the student's IEP for the 2008-09 and 2009-10 school years may or may not have received regarding the formulation of a procedurally and substantively appropriate IEP. In particular, both the special education teacher and school psychologist testified that the district's SOPM required the parent to write a letter to "reopen" the student's "case" in order to consider other services for the student, which ultimately guided their conduct in refusing to accept, review or consider the student's private evaluation reports and in denying the parent's request at the November 24, 2009 CSE meeting for a speech-language evaluation of the student (Tr. pp. 133-34, 152-54, 161-62, 184-85, 281-82; see 34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). In addition, the special education teacher's testimony reflects that she did not fully or correctly understand her role as the district representative at the November 24, 2009 CSE meeting, and further, that she did not fully or correctly understand the CSE's obligation to review and consider the student's private evaluation reports or, alternatively, that the CSE was obligated to consider the "concerns of the parents for enhancing the education of their child" when she denied the parent's request for a speech-language evaluation at the CSE meeting because she determined that the parent needed to write a letter to the district to reopen the student's case (Tr. pp. 133-34; see 8 NYCRR 200.4[f][1][ii]; 34 C.F.R. §300.324[a][1][ii]). Thus, to address these issues, I will order the district to review the school's procedure and practice for formulating IEPs and correct any inconsistencies with the requirements of the IDEA or Article 89, and provide appropriate training to staff, as needed, consistent with the tenor of this decision. Moreover, I will order the district to contact the Special Education Quality Assurance (SEQA) Regional Office for New York City to obtain assistance and or consultation services pertaining to training professional staff at the school herein regarding the development, review, and revision of IEPs. A copy of this decision will be forwarded to the same office.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED, that the impartial hearing officer's decision dated May 5, 2010, is annulled to the extent that it denied the parent's request for additional educational services in the form of 400 hours of tutoring services from EBL Coaching, at the rate not to exceed $110.00 per hour; and

IT IS FURTHER ORDERED that the parent's request for additional educational services, at district expense, in the form of 400 hours of tutoring services from EBL Coaching, at the rate not to exceed $110.00 per hour is granted;

[20] The hearing record does not contain any evidence regarding the parent's request for transportation costs associated with the EBL Coaching services; therefore, a sufficient justification does not exist upon which to predicate an award for the costs of transportation as requested.

IT IS FURTHER ORDERED that the district is to complete an updated, comprehensive speech-language evaluation of the student within 30 days of the date of this decision; and

IT IS FURTHER ORDERED that the district shall convene a fully composed CSE meeting within 30 days of the date of the completion of the updated, comprehensive speech-language evaluation to review and consider the completed evaluation; and

IT IS FURTHER ORDERED that the district shall provide the student with two 30-minute sessions per week of speech-language therapy services in a small group for two consecutive school years as additional educational services, in addition to any other speech-language therapy services that are deemed appropriate upon the completion, review, and consideration of the updated, comprehensive speech-language evaluation ordered herein; and

IT IS FURTHER ORDERED, consistent with the tenor of this decision, that within 30 days from the date of this decision, the district will both 1) review the school's procedure and practice for the development, review, and revision of IEPs and identify and correct any noncompliance with the requirements of the IDEA or Article 89 of the Education Law, and provide appropriate training to staff, as needed, and 2) contact the New York State Special Education Quality Assurance (SEQA) Regional Office for New York City for assistance and or consultation services, and arrange to obtain, in a timely manner, any such service that is reasonably available, pertaining to training professional staff at the school herein regarding the development, review, and revision of IEPs.

Dated: **Albany, New York**
July, 28 2010

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PAUL F. KELLY
STATE REVIEW OFFICER