



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-057

Application of a STUDENT WITH A DISABILITY for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Legal Services NYC - Bronx, attorney for petitioner, Nelson Mar, Esq., of counsel

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

DECISION

Petitioner (the student) appeals from a decision of an impartial hearing officer, which found the student's individualized education program (IEP) for the 2009-10 school year void but did not award compensatory education in the form of 360 hours of private tutoring. The appeal must be sustained in part.

At the time of the impartial hearing, the student was enrolled in eleventh grade at one of respondent's (the district's) high schools (Tr. pp. 35-36; Petitioner Exs. B at p. 1; C at p. 1).¹ Pursuant to an order arising out of a prior impartial hearing, the student received private tutoring services at a Lindamood-Bell Reading Center until July 2009 (Tr. pp. 44-45; Petitioner Ex. C at p. 5). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

¹ At some point shortly after September 2009, the student stopped attending classes at the district high school in which he was enrolled and began searching for a placement at other district high schools (Tr. pp. 35-41). At the time of the impartial hearing, the student was on the "waiting list" for one of the district high schools in which he was interested, and had been denied enrollment in at least one other school because his reading level was below the 6th grade instructional level required for admission to that school (Tr. p. 64). The hearing record reflects that from September 2009 to the end of the 2009-10 school year, the student did not attend any public school (Tr. pp. 35-41; Answer Ex. 1 at p. 3).

The hearing record contains little information about the student's early educational history. A district school psychologist conducted a psychoeducational evaluation of the student on or about December 11, 2007 (Petitioner Ex. E at p. 1). The resultant evaluation report noted that the student had earned a total of five credits since beginning to attend the district high school in December 2005 and had a cumulative grade point average of 64.74 (id.). The school psychologist reported that the student only attended and passed the classes he was "comfortable taking" and "managed to cut" other classes (id.). The evaluation report indicated that the student related to the school psychologist in a cooperative and friendly manner but became frustrated during the portions of the evaluation that tested his reading abilities (id. at pp. 1-2).

Administration of select subtests of the Stanford-Binet Intelligence Scale-Fifth Edition yielded an abbreviated battery IQ score of 70 which placed the student within the lower end of the borderline delayed or impaired range (Petitioner Ex. E. at p. 2). Administration of the Wechsler Individual Achievement Test - Second Edition (WIAT - II) yielded a composite standard (and grade equivalent) score of 60 (3.2) in reading with standard (and grade equivalent) subtest scores of 64 (4.0) in word reading, 53 (3.2) in reading comprehension, and 80 (2.7) in pseudoword decoding (id. at pp. 3-4). According to the evaluating school psychologist, these scores revealed that at the time of the December 2007 psychoeducational evaluation, the student's reading skills fell in the "lowest end of the extremely low range" (id. at p. 4). In mathematics, the student achieved a composite standard (and grade equivalent) score of 85 (7.3) with standard (and grade equivalent) subtest scores of 93 (8.3) in numerical operations and 80 (6.2) in math reasoning, placing the student's math skills in the low average range (id. at p. 5). The school psychologist noted that the student functioned at a lower level in all subtests that required abstract reasoning and that his tendency to express himself using "sophisticated" abstract words of which he did not know the meaning, were both consistent with his borderline intellectual functioning (id. at p. 7). The school psychologist also noted that the student did well in classes that required "hand-on activities" and recommended that the student remain "part-time" at the district high school in which he was enrolled and attend a specific "Tech" placement where he could learn a trade during the rest of the day (id.). The evaluation report also included a recommendation that the student continue to receive counseling and speech-language therapy (id.).

On April 3, 2009, the district's Committee on Special Education (CSE) convened for the student's annual review and to develop an IEP for the student for the 2009-10 school year (Petitioner Ex. A at p. 1). According to the conference information page of the resultant April 2009 IEP, the April 2009 CSE meeting attendees consisted of a district representative and an "IEP teacher" (id. at p. 2). According to the academic performance and learning characteristics portion of the April 2009 IEP, the student exhibited "difficulty with abstract thinking" which affected his "decoding, reading comprehension, vocabulary and math reasoning" (id. at p. 3). The IEP reflected that the student's speech skills had progressed to the point that they were within normal limits for the production of intelligible speech, his receptive language skills were at the "high end of the mildly delayed range," his expressive language skills were "well within the average range," his functional vocabulary skills were "within the low average range," and his pragmatic language skills were "within age expectations" (id.). Based upon those findings the CSE recommended that speech-language therapy be terminated for the student (id.). The IEP reflected that the student had "very poor attendance" but when in class he was "polite and respectful" and "took an active role" (id.). With respect to the student's social/emotional management needs, the CSE recommended that his class attendance be monitored by having his teachers sign attendance cards daily to be

returned to the student's parent (id. at p. 5). The IEP reflected that the CSE developed goals that targeted the student's need to improve his attendance and targeted the student's development of skills for decoding unfamiliar words, for reading and vocabulary, and for applying mathematical operations in a variety of contexts (id. at p. 7). The April 2009 IEP included testing accommodations consisting of extended time (extra 30 minutes), questions read aloud on tests except for reading tests, directions read/reread aloud, and the use of a calculator (id. at p. 13). The transition portion of the April 2009 IEP reflected that the student's long term adult outcomes included integrating into the community with minimum support, attending a vocational training program, living independently with minimum support, and being employed with minimum support (id. at p. 14). The IEP outlined transition services related to preparing for taking "Regent/RCA" exams, participating in community service, exploring realistic career options, managing time, attending school and work regularly, and expressing anger in an appropriate manner (id. at pp. 14-15). The IEP also reflected that the April 2009 CSE considered placing the student in a general education class but rejected that option because the student continued to need full-time special education services to succeed academically (id. at p. 12). The April 2009 CSE recommended that the student be placed in a 12:1+1 special class in a community high school with related services of speech-language therapy (twice per week) and group counseling (once per week) for the 2009-10 school year (id. at pp. 1, 13).

On January 11, 2010, through his attorney, the student filed a due process complaint notice with the district and alleged that the district failed to provide him with a free appropriate public education (FAPE) for the 2009-10 school year (Petitioner Ex. I).² In the due process complaint notice the student asserted that the April 2009 IEP was procedurally flawed in that it lacked "required team members" including the parent, the student, and a special education teacher and lacked an adequate transition statement (id. at p. 1). The student also claimed that a copy of the completed IEP was never sent to the parent and that the April IEP failed to address the student's "severe academic delays" and school avoidance behaviors (id.). Additionally, the student claimed that the IEP failed to include appropriate reading and math goals (id.). The student asserted that he required the assistance of a 1:1 tutor trained in a multisensory approach to reading and math in order to make progress toward graduating with a Regents or local diploma (id.). For relief the student requested a re-evaluation that included a vocational assessment, reconvening of the CSE for the creation of a new IEP that included a vocational transition plan, and placement in an academic program with opportunities to gain vocational skills (id. at p. 2). In addition, the student requested compensatory education including 1:1 "remediation services" through "EBL Coaching," a private provider, for 2 hours per academic day for a total of 360 hours and transportation in the form of a metro card (id.).

In a January 26, 2010 letter addressed "to whom it may concern", the director of EBL Coaching summarized a battery of assessments that had been administered to the student by EBL

² The term "free appropriate public education" means special education and related services that-
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

Coaching and concluded that the student was in "critical" need of "intensive" multisensory instruction in reading, spelling, and math and noted that the Orton-Gillingham "technique" would be appropriate for the student and would help the student "tremendously" (Petitioner Ex. G).

A district school psychologist conducted an educational evaluation of the student and a social history update on or about February 5, 2010 (Petitioner Exs. C at p. 1; D at p. 1). The evaluation report noted that the evaluation was conducted at the request of the student's attorney in order to develop an IEP that included a transition plan and an academic program that would allow the student to develop vocational skills (Petitioner Ex. C at p. 1). The evaluation report also noted that the student had earned 24.2 credits toward graduation, had "not attended school this year at all," and had either been absent or failed all of his standardized tests (id.). The school psychologist further reported that the student related in a friendly, cooperative manner, was polite and relaxed, found the test interesting, and was motivated (id. at pp. 1-2).

Administration of the WIAT - II yielded a composite standard score (and grade equivalent) of 70 (4.1) in reading with standard subtest scores of 63 (4.5) in word reading, 74 (5.0) in reading comprehension, and 79 (2.9) in pseudoword decoding (Petitioner Ex. C at pp. 2-3). According to the school psychologist, these scores revealed that from the time of the December 2007 psychoeducational evaluation the student's overall reading skills had improved one grade level, with the greatest improvement in reading comprehension (id. at p. 4). The student's math skills "came out to be at the 7.0 grade level which [was] in agreement with previous testing" (id.). The district school psychologist also conducted a vocational assessment that revealed that the student was interested in studying computer repair, and that he scored highest in two career areas: social and crafts (id. at p. 5). The evaluation report included a recommendation that the student attend the school of his choice, "City High School" where he could study computer repair while continuing to work two days per week (id. at p. 6).³ Additional recommendations were to change the student's then-current program from a 12:1+1 placement to a 15:1 placement "so he can attend [the City High School] program," that the student's counseling and speech-language therapy services be terminated, and that the student not "[attend] another reading center to improve his reading, since [he] has not shown much interest in the past, nor now, to attend such a program" (id. at pp. 6-7).

On February 23, 2010, the district's CSE convened for an educational planning conference to update the student's IEP for the 2009-10 school year (Petitioner Ex. B at p. 1). The resulting February 2010 IEP reflected the information and recommendations contained in the aforementioned educational evaluation report and social history update conducted on February 5, 2010 (Petitioner Exs. B-D). The February 2010 CSE recommended that the student be placed in a 15:1 special class in a community high school, terminated speech-language therapy, and modified the counseling related services from one 40-minute session per week in a group of three to one 40-minute session per week individually (Petitioner Ex. B at pp. 2, 9).

An impartial hearing was conducted on May 4, 2010 (Tr. p. 1). At the impartial hearing, the district called no witnesses and entered three exhibits into the hearing record (Dist Exs. 1-3). The student called three witnesses and entered nine exhibits into the hearing record (Tr. pp. 18,

³ The school referred to in the hearing record as "City High School" is actually called "City-As-School" according to the district's Answer (Answer ¶ 60).

35, 57; Petitioner Exs. A-I). The hearing record shows that although the student's reading skills were below age and grade expectations, the student exhibited some improvement in his overall reading ability during the time he received 1:1 tutoring at two private tutoring centers (compare Petitioner Ex. C at pp. 2-4 with Petitioner Ex. E at pp. 3-5; see Petitioner Ex. C at 5). The student testified that the 1:1 tutoring made him "more confident in reading ... more comfortable" and that he felt he could "do a lot more work" (Tr. pp. 43-44). The director of the private tutoring service requested by the student testified that she had evaluated the student, had successfully provided services to similar students in the past, and was confident that with "one-on-one intensive multisensory instruction" the student has the potential to pass the GED⁴ (Tr. pp. 24-25, 28).

By decision dated May 17, 2010 the impartial hearing officer found that the April 3, 2009 IEP was "defective on its face" because only two people signed the attendance portion of the IEP (id. at p. 4). He concluded that the student's "current" IEP was void and ordered the CSE to meet as soon as possible to formulate a new IEP "aimed at vocational transition preparation and transition to a vocational school" and to provide "additional" reading and counseling services including special education teacher support services (SETSS), or its equivalent (i.e. consultant teacher services) (IHO Decision at pp. 4-5). Although the impartial hearing officer denied the request for compensatory education in the form of 1:1 private tutoring (id. at p. 5), he directed that the SETSS, or consultant teacher service, be provided as 1:1 instruction for one period every school day as part of a "viable transition program," provided the student attends classes at his designated high school (id. at p. 4). The impartial hearing officer directed the district to employ a private provider to deliver the service if required (id.). In addition the impartial hearing officer directed that the student be "given one on one counseling sessions for at least three times per week instead of the one 1:1 session indicated in his IEP." (id.). The impartial hearing officer noted that the student had not taken full advantage of the private tutoring that he had been awarded in previous impartial hearings, that he had a record of attendance problems at both the private tutoring sessions and public school, and that there was no basis to provide him with private remediation outside of school and that "he was not deprived of the opportunity to learn" (id. at pp. 3-5).

The student appeals and states that his educational goals are to graduate from high school, go to college and secure employment working with computers. The student argues that it is unclear from the decision what legal basis the impartial hearing officer relied upon in denying the student's request for compensatory education. The student argues that the impartial hearing officer properly found that the district failed to offer the student a FAPE, but erred in remanding the matter to the CSE to develop a new IEP because the district had already had such an opportunity, when the CSE met on February 23, 2010, and had not succeeded in improving the offered program. The student argues that the impartial hearing officer erred in finding that the private tutoring that the student requested was inappropriate and that the impartial hearing officer used the wrong standard for determining whether a private program was appropriate. The student contends that the private tutoring program he sought was appropriate because, among other reasons, the student's reading needs would be met by the Orton-Gillingham methodology. The student also contends that equitable considerations weigh in his favor. The student further contends that the impartial hearing officer erred in "shifting the burden" to the student to explain his attendance problems rather than

⁴ Although defined in the hearing record as a "general equivalency diploma," GED is presumed to refer to the General Education Development diploma (Tr. p. 28).

requiring the district to explain its own lack of action in dealing with the student's attendance. The student argues that the impartial hearing officer erred in denying him compensatory education because there was a denial of a FAPE during the 2009-10 school year in that the public high school placement was not providing the student with a setting where he was grouped with students of his own age and ability which affected the student's self-esteem and that the student's proposed private 1:1 tutoring would compensate him for the denial of a FAPE. As a remedy the student requested a finding that he was entitled to compensatory education and an order awarding him with 360 hours of tutoring at a named private provider.

In its answer the district does not assert that it offered the student a FAPE for 2009-10 school year and argues that the student has failed to show that the private tutoring he requests as compensatory education is necessary or appropriate to remedy the alleged denial of a FAPE. The district also argues that the record did not show that the district could not itself provide instruction and counseling services to the student in the school setting to compensate the student for any denial of services in the past. The district further argues that the impartial hearing officer properly ordered that upon remand to the CSE the student's new IEP should provide for, among other things, five periods per week of 1:1 SETSS and three sessions per week of 1:1 counseling. As additional evidence, the district attached to its answer an IEP dated June 28, 2010 that the district contends complies with the impartial hearing officer's post hearing order and provides the programs, goals, and services required (Answer Ex. A).

The student did not submit a reply to the district's answer and therefore, has not objected to the district's additional evidence attached to its answer (8 NYCRR 279.6).

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];⁵ 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).

Turning to the issues presented, as to whether a FAPE was offered, I note that the impartial hearing officer's determinations that the April 2009 IEP was "defective on its face" and "void" are unappealed (IHO Decision at p. 4). These determinations of the impartial hearing officer are therefore final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-129; Application of a Student with a Disability, Appeal No. 09-095).

The impartial hearing officer's order that the CSE create a new IEP addressing transition to a vocational school and increased reading and counseling services is supported by the record (Tr. pp. 48-49; IHO Decision at pp. 4-5). The order to formulate a new IEP that took into consideration the student's vocational goals and his ability to access certain vocational programs is consistent with the student's request for relief in his due process complaint notice. The impartial hearing officer's order also appropriately directed that the new IEP offer increased special education instruction to the student by providing for five one hour periods of 1:1 SETSS instruction (or an equivalent service) per week to address the student's reading needs and ability to attend the

⁵ 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.

vocational programs that are of interest to him. This 1:1 instruction was not offered to the student previously through the April 3, 2009 IEP and it represents an increase in services offered to the student. Moreover, the impartial hearing officer ordered that the SETSS provider must be given additional administrative time to consult with the student's classroom teachers to assist and guide the student in his studies and homework (IHO Decision at pp. 4-5). In addition, I note that the record does not reflect that the student objects to the increase in 1:1 counseling services. The provisions of the impartial hearing officer's order providing for increased services are supported by the record and appear to be designed in part by the impartial hearing officer to address the allegation of educational deprivation during the 2009-10 school year and the student's request for 1:1 instruction and a program that addresses transition services and planning. Additionally, the hearing record does not demonstrate that the district could not itself provide the additional special education services to the student to compensate for the denial of FAPE during the 2009-10 school year (see Application of a Student with a Disability, Appeal No. 08-072; Application of the New York City Dept. of Educ., Appeal No. 06-048). Also, the hearing record does not adequately demonstrate that the compensatory services as requested by the student are designed to address a specific deprivation of services during the 2009-10 school year (Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding regarding compensatory awards that "the inquiry must be fact-specific and, to accomplish the I[n]dividuals with D[isabilities] E[ducation] A[ct's] purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]). As an additional factor, I note that the student reported that he found it difficult to attend 1:1 tutoring sessions after school at the same time he attended the district high school, because it was "a little too much" and "stressful" (Tr. p. 45). The hearing record as a whole also shows that the student's vocational needs are more likely to be met by the student attending the public school rather than at a separate tutorial site. In light of the above I will modify the impartial hearing officer's decision only to the extent to order that the reading instruction provided though the SETSS or the consultant teacher be provided using a multisensory approach and that the district additionally offer the student two hours of 1:1 multisensory reading instruction daily, five days a week during summer 2011, those summer services to be obtained by the district via a private provider if necessary. The summer services are awarded, in part, based upon the hearing record which reflects (1) that the student was not offered a FAPE for the 2009-10 school year, (2) the student's testimony that the offer of an inappropriate program contributed to his absenteeism (Tr. pp. 35-38), (3) evidence demonstrating that 1:1 instruction had previously provided educational benefit (Tr. p. 44; Petitioner Ex. C pp. 4-5), and (4) evidence suggesting that ordering tutorial services during the school year during school days, in addition to the services ordered by the impartial hearing officer, would be too difficult for the student (Tr. p. 45).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is modified to the extent that the SETSS (or equivalent) instruction ordered by the impartial hearing officer must be provided utilizing 1:1 multisensory reading instruction, and that the district shall offer the student ten hours per week of 1:1 multisensory reading instruction for eight weeks during July and August 2011 at a reasonably convenient time and location. The district may provide the 2010 school year services and 2011 summer services itself or by contracting with a private provider at the district's option.

Dated: **Albany, New York**
 August 19, 2010

PAUL F. KELLY
STATE REVIEW OFFICER