



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-109

**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 SACHEM CENTRAL SCHOOL DISTRICT**

**Appearances:**

Cordova Law Associates, P.C., attorneys for petitioner, Doreen Cordova, Esq., of counsel

Ingerman Smith, L.L.P., attorneys for respondent, Susan E. Fine, Esq., of counsel

### DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for compensatory education services for her son (the student). Respondent (the district) cross-appeals that part of the decision which determined that the student required remediation in reading and writing. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was receiving instruction at EAC<sup>1</sup> for four hours per day (Tr. pp. 1163-64). The student was scheduled to graduate in June 2010 with a local diploma (Tr. pp. 174, 229-30, 435, 445-46, 457, 929, 954) and had been accepted at Landmark College (Landmark) (Tr. pp. 991, 1007, 1010-11, 1042, 1158). The hearing record indicates that the student performed cognitively within the average to low average range and has received diagnoses of Tourette's syndrome, an attention-deficit/hyperactivity disorder, an obsessive-compulsive disorder, and a generalized anxiety disorder (Dist. Exs. 9 at pp. 1-2, 4; 16 at p. 2). Assessment of the student's social/emotional abilities revealed that the student was pleasant, friendly, and polite, and, that at times, he had difficulty maintaining focus and attention in the

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<sup>1</sup> The hearing record indicates that "EAC" stands for Education and Assistance Corporation and its purpose is to "help junior and senior high schools students who cannot function in a regular school environment obtain the necessary education which will make it possible for them to graduate from high school" (Dist. Ex. 20). Students at EAC receive instruction during a shortened day in small groups or on a 1:1 basis, using regular, modified, or accelerated school curricula according to individualized need, and counseling is also available at EAC (Tr. pp. 423-24; 425 Dist. Ex. 20).

classroom because he spent considerable effort on suppressing tics related to the diagnosis of Tourette's syndrome (Tr. pp. 828-29, 860, 871, 935; Dist. Exs. 9 at pp. 1-2, 4; 16 at p. 2). Prior to his graduation in June 2010, the student was eligible for special education programs and services as a student with an other health impairment (OHI); his eligibility for special education programs and services was not in dispute in this matter (Dist. Ex. 34; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The parent, through her attorney, filed a due process complaint notice, dated November 13, 2009, wherein she alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 and 2008-09 school years (Parent Ex. C at pp. 234-48). The parent alleged, among other things, that for both school years, the individualized education programs (IEPs) developed by the committee on special education (CSE): (1) were substantively defective; (2) did not contain adequate descriptions of the student's present levels of performance; (3) were not properly implemented; (4) failed to provide for appropriate levels of district staff development and training; and (5) were developed by personnel not appropriately educated in dealing with the student's unique disabilities (id. at pp. 240-46). As a remedy, the parent requested compensatory education equating to (1) one year of transition services at "Westbury Tri;"<sup>2</sup> (2) one year of transition services at a post-secondary school; (3) reimbursement for tuition costs for college compensatory services; (4) a 1:1 educational consultant (college coach); and (5) reimbursement for all independent educational evaluations (id. at p. 247).

In a response to the parent's due process complaint notice, the district asserted, among other things: (1) that the parent's challenge related to the 2007-08 school year was time-barred; (2) that compensatory education was not authorized since there had been no gross denial of a FAPE; (3) that reimbursement for college tuition is not a permissible remedy under the Individuals with Disabilities Education Act (IDEA); (4) that the student would no longer be eligible for services under the IDEA because he was scheduled to graduate from high school in June 2010; (5) that reimbursement for independent evaluations was not required under the IDEA because the district's evaluations were appropriate and the parent failed to request independent evaluations from the district prior to paying for her own evaluations; and (6) that prospective relief for the 2009-10 school year was inappropriate, as that school year was not part of the due process complaint notice (Parent Ex. C at pp. 249-53).

An impartial hearing began on February 2, 2010, and concluded on April 28, 2010, after eight days (Tr. pp. 1, 155, 340, 537, 657, 805, 976, 1175; IHO Decision at p. 1).<sup>3</sup> In a decision dated October 1, 2010,<sup>4</sup> the impartial hearing officer determined that the parent was time-barred

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<sup>2</sup> The hearing record does not contain a description of "Westbury Tri" or its location.

<sup>3</sup> I note that the hearing record contains multiple duplicative exhibits. It is the responsibility of the impartial hearing officer to exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or that is unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Tr. pp. 1256-57).

<sup>4</sup> The impartial hearing officer noted on the last day of testimony, April 28, 2010, that a decision would be forthcoming (Tr. p. 1264). State regulation requires that an impartial hearing officer render a decision no later than 14 days after the record close date when "extensions of time have been granted beyond the applicable required timelines" as in the instant matter (see 8 NYCRR 200.5[j][5]). In his decision, the impartial hearing officer offered no explanation for the inordinate delay in rendering his decision on October 1, 2010, well past the 14 days after the record close date.

from asserting a claim based on the 2007-08 school year (IHO Decision at p. 9). Regarding the 2008-09 school year, the impartial hearing officer determined that the district failed "in part, relative to [the student's] home tutoring" and that the student required remediation in the areas of reading and writing (*id.* at p. 11). However, the impartial hearing officer also found that, except for the areas of reading and writing, the parent did not meet her burden to demonstrate that the district failed to offer the student a FAPE for the 2008-09 school year (*id.*).<sup>5</sup> The impartial hearing officer noted that the student had graduated from high school and had been accepted at a college (*id.* at p. 10). The impartial hearing officer also found that he would have ordered compensatory education, but that in this case he could not because the hearing record failed to demonstrate the duration or costs associated with the compensatory education (*id.*). Consequently, the impartial hearing officer denied the parent's claim for compensatory education.

On appeal, the parent asserts that the impartial hearing officer erred when he declined to award the student compensatory education services and determined that the issues relating to the 2007-08 school year were time-barred. The parent asserts that the student should be awarded compensatory education services based upon alleged violations by the district during the student's period of eligibility during his high school career prior to his graduation in June 2010.

In its answer and cross-appeal, the district asserts that the parent's petition should be dismissed because no meaningful relief was requested and the petition does not comport with State regulations. According to the district, the student does not qualify for compensatory education because there has been no finding of a denial of a FAPE and he has graduated from high school. The district cross-appeals those parts of the impartial hearing officer's decision wherein he determined that the district failed to provide the student with appropriate home tutoring and that the student required remediation in reading and writing.

The parent filed an answer to the district's cross-appeal. The district replied to the parent's answer, asserting that it should not be considered because it was untimely served and that the accompanying affidavit of service was "clearly erroneous."<sup>6</sup>

Within the Second Circuit, compensatory education for a student after he or she is no longer eligible because of age or graduation to receive IDEA services has been awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; see also Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]). In New York

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<sup>5</sup> The impartial hearing officer is reminded that under State law, the burden of production and persuasion is placed upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]). In this case, the impartial hearing officer improperly placed the burden upon the parent in demonstrating that the district failed to offer the student a FAPE (IHO Decision at p. 11).

<sup>6</sup> Although I will reject the parent's answer to the district's cross-appeal because it was untimely served (see 8 NYCRR 279.4), I note that even if it were timely served, the answer would not have altered the outcome of this decision.

State, a student with a disability is eligible for services under the IDEA until he or she receives either a local or Regents high school diploma (8 NYCRR 100.5[b][7][iii], [vi-vii]; see 34 C.F.R. § 300.102[a][3][i]; 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 twenty-one (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; see 8 NYCRR 200.1[zz]; see also 8 NYCRR 100.9[e]; Application of a Child with a Disability, Appeal No. 04-100). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]).<sup>7</sup>

Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583 [S.D.N.Y. 1998]; Application of the Bd. of Educ., Appeal No. 05-037; see also Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.28 [1982]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998] [noting that "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" under the IDEA]), the receipt of which terminates a student's entitlement to a FAPE (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]; but see, 8 NYCRR 200.4[c][5] [noting that a student may still remain eligible for special education services even though he has advanced from grade to grade]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility in order for the student to qualify for an award of compensatory education (see Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it would appear that it would be the rare case where a student graduates with a Regents or local high school diploma and yet still qualifies for an award of compensatory education (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [D. Conn. 1997] [where student apparently graduated and received diploma prior to the district establishing the appropriate graduation requirements, court decided student had established a prima facie case of likelihood of success on the merits on a possible award of continued compensatory education]; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037).

Based upon an independent review of the hearing record, the instant matter does not present that rare case wherein a student has graduated, received a local diploma, and remains eligible for compensatory education.<sup>8</sup> As more fully explained below, there is no showing that the student

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<sup>7</sup> It should be noted that State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; 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; 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).

<sup>8</sup> I note that the parent does not challenge the validity of the local diploma the student received upon graduating from high school in June 2010 (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57; but see, Application of a Student with a Disability, Appeal No. 09-056 [noting that neither an impartial hearing officer nor a State Review Officer can make a determination on the academic standards required for graduation]).

was excluded or denied special education programs and services for a substantial period of time such that a gross violation of the IDEA occurred warranting an award of compensatory education services beyond the student's period of entitlement for special education services and programs (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078; Application of a Student with a Disability, Appeal No. 09-056; Application of a Child with a Disability, Appeal No. 05-089; Application of a Child with a Disability, Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child Suspected of Having a Disability, Appeal No. 03-094).

According to the hearing record, the student attended the district's public schools since at least 1998 when he entered second grade, and he became eligible for special education services in January 2004 (seventh grade), whereby he received resource room, counseling, and nursing services, as well as testing accommodations (Dist. Exs. 6 at p. 1; 11 at p. 1). The same services continued for the 2004-05 school year (eighth grade) (Dist. Ex. 6 at p. 1). During the 2005-06 school year (ninth grade), the student attended a general education environment, received counseling as a related service, and home instruction from the district for English and math (Tr. pp. 1230-31).<sup>9</sup> The student's June 26, 2006 report card revealed that he passed all of his ninth grade classes with final averages between 68 and 90 and earned 5.5 credits toward meeting graduation requirements (Dist. Ex. 3). During the 2006-07 school year (tenth grade), the student attended collaborative classes at a district high school and received counseling, nursing services, testing accommodations, and home instruction for English and math courses (Dist. Exs. 1 at pp. 1, 4, 8; 6 at p. 1; see Dist. Ex. 10 at p. 5; Parent Ex. A at pp. 55-62).<sup>10</sup> The student began receiving private counseling in 2006 (Dist. Ex. 6 at pp. 5). The student's June 25, 2007 report card revealed that he passed all of his classes with final averages between 66 and 84 and earned six more credits toward meeting graduation requirements (Dist. Ex. 13).<sup>11</sup> The hearing record indicates that the student had a truncated school day schedule throughout middle school and high school due to an inability to remain in school for more than a few hours and that the district made adjustments to the student's arrival and departure times every year depending on the student's situation and needs, and to encourage socialization opportunities for the student during social situations such as lunch

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<sup>9</sup> I note that the parties interchangeably refer to the terms "home teaching" and "home tutoring." When necessary, school districts may be responsible for providing special educational services in the form of "home and hospital instruction" to student's with disabilities who are confined to places such as a home, hospital, or other institutions (8 NYCRR 200.1[w], 200.6[i]). For purposes of this decision, I will refer to instruction provided to the student at home as "home instruction."

<sup>10</sup> Testimony by the student revealed that in tenth grade he attended the district high school for periods three through six, upon which time he went home and received home instruction for English and math (Tr. pp. 963-64). The student stated that the home instruction was "not good" for him because he would be exhausted from sitting in the high school; he told the home instructor "the tank's on empty" and he could not do any more (*id.*).

<sup>11</sup> According to the student's guidance counselor, in spring 2007, the parent expressed concerns to the guidance counselor about the student's academic and maturity readiness to graduate with his class on time, and her concern about wanting to "slow down his pace a little bit" (Tr. p. 170).

(Tr. pp. 144-46; 163-64; 882; see Dist Exs. 5 at p. 5; 6 at pp. 1, 7; 10 at p. 5; 13; 15 at pp. 3, 10; 19).<sup>12</sup>

On April 27, 2007, a subcommittee of the CSE met to conduct the student's annual review and to develop an IEP for the student for the 2007-08 school year when he was expected to be in eleventh grade (Tr. pp. 574-75; Dist. Ex. 11 at p. 1).<sup>13</sup> The April 27, 2007 IEP indicated that the CSE subcommittee recommended a 15:1 collaborative special class for 330 minutes per session for the student and the related service of counseling (5:1) one time per week for 42 minutes per session and regular physical education (id. at pp. 4-5). The April 27, 2007 IEP indicated that the student required a multisensory instructional approach (id. at p. 5). The student was placed on home instruction for geometry due to his need for an abbreviated school day (Tr. p. 765; Dist. Exs. 11 at p. 3; 15 at p. 3). Testing accommodations on the student's IEP included extended time (50 percent), a location in the classroom with minimal distractions, and directions simplified or explained (Dist. Ex. 11 at p. 6). The April 27, 2007 IEP included post-secondary goals and a coordinated set of transition activities that included instructional and functional vocational assessment activities (id. at pp. 3, 7).

By letter dated October 3, 2007 to the district, the student's psychiatrist indicated that the student's truncated schedule at school and home instruction for math was too stressful for the student, and that she was in the process of changing the student's medication to hopefully make being in school easier for him (Tr. p. 504; Dist. Ex. 14 at p. 1). The psychiatrist recommended that the student be provided with home instruction in English and attend school only from second through fifth periods (Dist. Ex. 14 at p. 1). In another letter to the district dated October 29, 2007, the student's psychiatrist indicated that "despite an amended schedule and other accommodations" the student continued to struggle with tics and anxiety and had been unable to attend school for the past two to three weeks (id. at p. 2). The student's psychiatrist recommended that the student be placed on a "full time home [instruction] schedule" until his condition improved for him to return to school (id.). The psychiatrist indicated that she would be making changes to the student's medication regimen and she expected the student would be unable to return to school before six to eight weeks (id.).

Pursuant to the parent's request, the CSE subcommittee met on November 8, 2007 with the CSE chairperson, school psychologist, the student's history teacher for global studies (tenth grade) and U.S. history (eleventh grade), the student's special education teacher, a guidance counselor, the parent, the student's stepfather, and a "student advocate" in attendance (Parent Ex. G at p. 2). The parent discussed the student's efforts in controlling his tics in school, and commented that he learned little because he was focused on suppressing his tics (id. at p. 8). The student's teachers reviewed his progress reports and achievement test results that revealed, among other things, that

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<sup>12</sup> The student's June 25, 2007 report card reflected in part that the student continued receiving home instruction for English 10 and global history (Dist. Ex. 13 at p. 1).

<sup>13</sup> The hearing record included a November 30, 2006 social history, a March 26, 2007 transition plan amendment, a March 29, 2007 educational reevaluation, an April 20, 2007 psychological reevaluation, and an April 27, 2007 CSE meeting packet that contained status reports pertinent to in-school counseling, classroom teacher reports for global studies, health, and earth science, a March 7, 2007 progress report from the district high school, and a detailed listing of the student's attendance history for the period between September 2006 and mid-March 2007 (Dist. Exs. 6 at pp. 1-7; 7 at pp. 1-3; 8; 9 at pp. 1-4; 10 at pp. 1-6; 15 at pp. 1-11).

the student scored in the average range on cognitive and academic achievement testing, that the student had poor grades due to sporadic attendance; that when the student did attend class he was able to focus and be part of the class; that the student was capable of functioning in the collaborative class setting; and that the student had not handed in many missed assignments (Dist. Ex. 15 at pp. 5-9, 11). At the November 8, 2007 CSE subcommittee meeting, the parent indicated that she did not want the student placed in the 15:1 collaborative class that he was in at the time (Parent Ex. G at p. 7). The parent requested that the student attend a program outside of school, either the EAC program or another program that would work with the student on a 1:1 basis (*id.*). Unable to reach consensus or authorize a more restrictive placement, the CSE subcommittee adjourned and determined that a full CSE meeting would need to be scheduled (Tr. pp. 124, 477, 612, 624-25; Parent Ex. G at p. 27).

A CSE convened on November 26, 2007 with a CSE chairperson, a district psychologist, a district social worker, a regular education teacher, a special education teacher, a guidance counselor, the parent, the student's uncle, and an advocate in attendance (Dist. Ex. 18 at pp. 1, 8).<sup>14</sup> The November 26, 2007 CSE reviewed an updated evaluation conducted by the student's psychiatrist which indicated that the student required a school setting that provided "as much [1:1] teaching as possible," "a quiet milieu," and flexibility for the student to move about and leave a classroom when he felt overwhelmed (Dist. Ex. 16 at p. 2). The hearing record reflects that although several members of the CSE indicated that a 15:1 collaborative class was appropriate for the student at that time, the CSE chairperson concluded the meeting after lengthy discussion in order to consult with her supervisor about EAC, get more information about EAC's program, and to determine if there was an opening for the student at EAC (Tr. p. 480; Dist. Ex. 18 at p. 8; Parent Ex. H at pp. 47-48, 53). Documentary evidence demonstrates that at the November 26, 2007 CSE meeting, the CSE chairperson indicated that in the interim, the student would receive home instruction, and that the CSE would reconvene (*id.*).

On December 18, 2007, the district received an application for home instruction for the student (Dist. Ex. 19). The home instruction application was approved for ten days from December 17, 2007 to January 8, 2008 (Dist. Ex. 19; *see* Dist. Ex. 18 at p. 8). In addition, the hearing record indicates that by January 15, 2008, the district high school had assigned teachers to provide home instruction to the student, and that the teachers had been attempting to contact the parent for the purpose of scheduling the home instruction sessions; however, the parent did not return their phone calls (Dist. Ex. 19). As a result, home instruction was not provided to the student for the aforementioned interim period of time (Tr. pp. 43, 122-23; *see* Tr. pp. 757, 760, 763-64; Dist. Ex. 19). However, the district assistant principal testified that the student would have been provided with home instruction, even after he started a new placement, in order to make-up time owed to him due to his absences prior to attending EAC (Tr. pp. 765-67). The hearing record reflects that on or about January 16, 2008 the student began attending EAC (Tr. pp. 126, 481, 794, 1124).

On March 17, 2008, the CSE reconvened with the district CSE chairperson, a district psychologist, a district social worker, a special education teacher from EAC, the parent and stepparent, a "friend," and an unidentified "attendee" in attendance, as well as a regular education teacher from EAC, and the EAC principal participating by teleconference, (Tr. pp. 123, 1134; Dist.

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<sup>14</sup> In a letter dated November 26, 2007, the parent waived the attendance of an additional parent member (Dist. Ex. 17).

Ex. 22 at pp. 1, 8; see Dist. Ex. 26).<sup>15</sup> The March 17, 2008 IEP and testimony by both the coordinator and the assistant coordinator of student services indicate that the CSE recommended the student receive instruction at EAC for three hours and counseling as a related service provided at the district school (Tr. pp. 44, 165-66; Dist. Ex. 22 at pp. 4, 7).<sup>16</sup> Testimony by the coordinator of student services indicates that the March 17, 2008 CSE recommendation for three hours of instruction at EAC was one hour more than the November 26, 2007 CSE had recommended (Tr. p. 166).<sup>17</sup>

On May 29, 2008, a CSE subcommittee convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 23 at p. 1). Participants included the CSE chairperson, a district psychologist, and a district social worker; as well as the parent, the EAC principal and the EAC special education teacher who participated by telephone (id. at pp. 1, 8). The May 29, 2008 IEP included evaluative information and goals reflecting the student's reading, writing, social/emotional/behavioral, and study skills needs (id. at pp. 2-4, 6, 8-10).<sup>18</sup> The May 29, 2008 IEP indicated that the student had earned a total of 12 diploma credits; that the student had passed Regents examinations in earth science, global studies, living environment, and math; and that the projected time for him to graduate was in two years (id. at p. 2). The May 29, 2008 IEP reflected that upon consideration of a variety of general education and special education options on the district's continuum of services, the CSE subcommittee recommended the student continue to receive instruction at EAC with individual counseling one time per week, as the student's "emotional and educational difficulties require[d] a structured and supportive setting" (id. at pp. 4, 8, 11). According to the May 29, 2008 IEP, the CSE subcommittee determined that other options on the district's continuum of services would have been unable to meet the student's needs at that time (id. at p. 11). Testing accommodations as noted in the student's previous IEPs were continued (id. at pp. 5-6).

A June 2008 school counseling progress report written by a school counselor from EAC indicated that the student received passing grades for the quarters he attended EAC, since enrolling there in January 2008, and that the student had attended 77 of the 90 days he was enrolled (Dist. Ex. 24). The progress note further indicated that credits earned would need to be verified by the student's home school district (id.).<sup>19</sup> Teacher comments for the fourth quarter included

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<sup>15</sup> The parent indicated to the district prior to the March 17, 2008 CSE meeting that she did not wish to have an additional parent member in attendance (Dist. Ex. 21).

<sup>16</sup> The student's IEP indicates that the student would receive "home instruction @ EAC" (Dist. Ex. 22 at p. 7). For purposes of clarity, in this decision will refer to services provided to the student at EAC as "instruction at EAC."

<sup>17</sup> According to the parent, she requested a summer program at EAC for the student, which the CSE did not recommend (Tr. p. 1134-35, 1153; see Dist. Ex. 22 at p. 7).

<sup>18</sup> The May 29, 2008 IEP indicated that the student's goals were provided by EAC (Dist. Ex. 23 at p. 8).

<sup>19</sup> A November 11, 2008 memo from the EAC school counselor to the district school counselor indicated the student did not receive credit for the course work he completed at EAC between January 2008 and June 2008 because he did not complete a full year's course of study (Dist. Ex. 27 at p. 1). The EAC counselor indicated that the student would receive full credit (4 credits) for these courses upon their completion in January 2009, at which time he would begin new coursework (id. at p. 2). However, according to the guidance counselor, due to the parent's concern about the student's "preparation," he remained in the same courses through the 2008-09 school

"[a]ttentive-[i]nterested and [g]ood [e]ffort [s]hown" (id.). The EAC school counselor reported that review of the student's report card reflected he achieved academic success at EAC (id.). The progress note revealed that the student did not take any January (2008) State Regents examinations and was not scheduled to take any State examinations according to district recommendation (id.). The school counselor further reported that the student was observed interacting or socializing with other students between classes, during counseling sessions the student was pleasant and cooperative, academic and career development were discussed with the student, and that post graduation plans were not definitive but consideration was given to the student attending a local community college (id.). The student continued at EAC during the 2008-09 school year (Tr. p. 48).

According to the district guidance counselor, it was unclear how the student's course performance, prior to his transfer from the district high school to EAC in January 2008, would be reflected on his high school transcript, as those courses were deemed "incompletes" by the district but could not be documented as such on his report card (see Tr. pp. 174, 187-89, 207-08). By the end of the 2008-09 school year, the student had achieved passing grades at EAC in English 11, U.S. history & government 11, geometry, computer art, and physical education, and the district noted those courses as "transfer courses" on the student's cumulative transcript (Tr. p. 188; Dist. Exs. 26; 31 at pp. 1-4; 33; 35; see Dist. Ex. 27 at pp. 1-2).<sup>20</sup> The district guidance counselor indicated and the student's cumulative transcript from the district reflected that by the end of the 2007-08 school year, the student had earned .50 credits for each of the aforementioned courses, and that by the end of the 2008-09 school year, the student earned the remaining .50 credits for the same courses (see Tr. pp. 186-88; Tr. pp. 207-08; see Dist. Ex. 35). Review of the student's cumulative transcript reflected that by the end of the 2008-09 school year, the student had earned 16.25 credits toward graduation and had a cumulative "unweighted" average of 79.54 (Dist. Ex. 35). According to testimony by the district guidance counselor, the cumulative transcript is the formal document used by the district for "purposes of college and transition" (Tr. pp. 172-73).

In regard to the student's perception of his experience in the district and at EAC, the student testified that when he attended the district high school he tried to suppress his tics; he found the work and the pace of the classes difficult and he "just couldn't focus" because there were "a lot of kids and everything going on and a lot of work;" he became anxious and it was difficult for him to concentrate; and he became "dizzy and sweaty," at which point he needed to "get out of there" and seek help (Tr. pp. 931, 935). The student indicated that although he had a "feeling everyday," some days were more difficult than others in regard to his suppression of tics (Tr. pp. 935-36).

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year (see Tr. pp. 186-88; see Dist. Ex. 26). Furthermore, at the parent's request, the district delayed the student sitting for the U.S. history and English Regents examinations, despite that EAC felt the student was prepared to take the examinations in January 2009; the district indicated the student was eligible for the "safety net" which would allow him to take the State Regents Competency Examination(s) (RCT) in U.S. history and English if he had difficulty with the Regents examinations; the student required opportunity to sit for Regents or RCT examinations as they were offered only three times per year and were necessary to fulfill State requirements for graduation (Tr. p. 171; Dist. Exs. 28 at pp. 1-2; 29; 30).

<sup>20</sup> Teacher comments included on multiple five-week interim reports from EAC for 2008-09 consistently indicated that in all of his courses the student seemed attentive, interested, and showed good effort (Dist. Exs. 31 at pp. 1-4; 33). A teacher comment specific to physical education indicated that the student did not make up work when absent (Dist. Ex. 31 at p. 4; 33). The student's English 11 teacher at EAC indicated on the October 2008 five-week interim report that the student was consistently prepared for class (Dist. Ex. 31 at p. 1).

The student acknowledged that high school personnel tried to help him and the school psychologist attempted to use visual imagery and relaxation breathing techniques to help the student calm down, but the student claimed those efforts were unsuccessful for him and that no one helped him or was able to "cure" him (Tr. pp. 937-39, 953, see Tr. pp. 962-63, 965-66).

The student testified that in comparison to his experience at the district high school, EAC helped him (Tr. p. 940). The student noted that although he displayed some tics at EAC, he did not release verbal tics in front of anyone there because he did not need to do so (Tr. pp. 941-42). The student noted he attended EAC between three and four hours per day and that he felt more comfortable with the 1:1 environment at EAC, as well as with the pace of teaching and the manner in which he was instructed (Tr. pp. 941-42, 948). Specifically, the student indicated he better understood the "modern translation" of the Shakespearean play used at EAC, and that at EAC he learned strategies such as using flash cards to learn vocabulary, reviewing a few pages at a time, and summarizing information (Tr. pp. 943-45). In addition, the student attended gym class every day with two to three other students and received counseling (Tr. pp. 949-50). With respect to transition services, the student indicated that at the time of the hearing he was taking a class about careers and personal management and he learned about applying to college, filling out applications, college interviews, and job interviews (Tr. pp. 959-60). Moreover, the student's testimony revealed he wanted to be an environmental conservation officer and was aware of the post-secondary educational requirements necessary to earn the appropriate credentials for a forestry position (Tr. pp. 954-55). In addition, the student indicated he had a driver's license and was able to drive himself; he filled out job applications, participated in job interviews independently, and had obtained a few jobs; he taught himself to play the drums; he knew how to fish; and that he had a hunting license and went bow hunting (Tr. pp. 954-56).

The student's English teacher from EAC testified that he consistently taught the student since the student entered the program in January 2008 (Tr. p. 344). According to the English teacher, although the student displayed a "few instances" of anxiety that required referral to either a school counselor or the school psychologist, such events occurred less over time and aside from the aforementioned anxiety, there were no other difficulties that affected the student's education in his English classes at EAC (Tr. p. 345). The English teacher described the student's academic performance as "extremely consistent" in his English classes; the student's anxiety did not impede his progress in the English curriculum during the 2008-09 school year; the student had always been an "excellent student;" and that the student was considerate, displayed good work ethic, seemed to enjoy literature, participated in class, never misbehaved, and always did well in English class (Tr. pp. 345, 347). The English teacher noted that while attending EAC, the student achieved grades in the 80s and 90s in English class (Tr. p. 347).

The student's special education teacher from EAC who instructed the student in U.S. history and government indicated that during the time she knew the student he always did grade level work, was an average student, was compliant with everything, and that at the time of the impartial hearing he was a "solid 85 student" in her class (Tr. pp. 400-02). The special education teacher opined that "[she] d[id]n't believe that [the student's] disability [was] impeding on his education here at EAC" (Tr. pp. 402-03).

On June 3, 2009, the CSE subcommittee convened for the student's annual review and to develop the student's IEP for the 2009-10 school year with a CSE chairperson,<sup>21</sup> a district psychologist and a district social worker in attendance, and the parent and stepparent, as well as the EAC principal, counselor, general education teacher, and special education teacher participating by telephone (Dist. Ex. 34 at pp. 1, 7). The June 3, 2009 IEP included timely evaluation results and new goals aligned with the student's study skills, reading, writing, career/vocational, and social/emotional/behavioral needs (*id.* at pp. 2-3, 9-10). The June 3, 2009 IEP indicated that as part of the student's annual review, and based on then-current evaluations and committee discussion, the CSE determined to continue the student's instruction at EAC, individual counseling one time per week, and reviewed/continued the student's testing accommodations (*id.* at pp. 4, 8). The June 3, 2009 IEP included a coordinated set of transition activities for the student to move from school to post school that included "attend[ing] class on [R]egents level math/language skills;" "participat[ing] in counseling to develop self-advocacy skills;" "demonstrate[ing] time management skills; and "visit[ing] post-secondary education sites (*id.* at p. 6). The June 3, 2009 IEP indicated that the parent requested home services for counseling,<sup>22</sup> but the CSE did not approve the parent's request because the student's functioning at EAC at that time did not warrant additional services (*id.* at p. 8).

Based on the foregoing information in the hearing record, the weight of the evidence shows that the district was responsive to the parent's various requests regarding the student's educational needs over time, and made changes to the student's IEP as his educational needs evolved (*see* Dist. Exs. 1 at pp. 1-8; 4 at pp. 1-8; 11 at pp. 1-8; 18 at pp. 1-8; 22 at pp. 1-8; 23 at pp. 1-11; 34 at pp. 1-11; Parent Ex. G at pp. 1-39). In addition, the hearing record shows that the student earned academic credits throughout high school in various academic environments, had been accepted into college by the time of the impartial hearing, and graduated with a local diploma in June 2010 (Tr. pp. 173-74, 229-30, 410-11, 435, 445-46, 457, 929, 954, 991, 1007; Pet. ¶ 10). Therefore, with regard to the parent's claim that the student should be awarded compensatory education services, I find that the district has satisfied its burden to prove that there was no gross violation of the IDEA, and I find the student is no longer eligible for special education services and programs under the IDEA because he has now graduated with a local diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; *see Garro*, 23 F.3d at 737; *Mrs. C.*, 916 F.2d at 75; *Burr*, 863 F.2d at 1078; Application of a Student with a Disability, Appeal No. 09-056; Application of a Child with a Disability, Appeal No. 05-089; Application of a Child with a Disability, Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child Suspected of Having a Disability, Appeal No. 03-094). Accordingly, I will not disturb the impartial hearing officer's decision to deny the parent's request for compensatory education services. However, in view of my determination, I find that the hearing record does not support the impartial hearing officer's additional conclusion that, but for a lack of evidence regarding the extent and costs of remediation, the student would be eligible for

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<sup>21</sup> Although there are no claims related to the 2009-10 school year in the instant case, I note there is relevant information in the hearing record showing that the district continued to provide special education services for the student that led to the student receiving a local diploma and graduating in June 2010 (*see* Dist Ex. 34 at pp. 1-11).

<sup>22</sup> Testimony by the parent indicated she requested a home counseling component because she felt "they" were not seeing the student the same way she saw him at home (Tr. pp. 1133-34).

an award of compensatory education to address his reading and writing skills (IHO Decision at pp. 11-12).<sup>23</sup>

In light of the determination made herein, it is not necessary to address the remaining issues raised by the parties, including the parent's assertion that the impartial hearing officer erred when he determined that her claim as to the 2007-08 school year was time-barred.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portion of the impartial hearing officer's decision dated October 1, 2010, which determined that the student would be eligible for an award of compensatory education to address his reading and writing skills is annulled.

**Dated: Albany, New York  
December 30, 2010**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>23</sup> I note that the impartial hearing officer also concluded that the student "managed to go forward" and "received meaningful educational benefits through his IEPs and advanced from grade to grade" (IHO Decision at p. 11).