



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-209

**Application of a STUDENT WITH A DISABILITY, by his parents, 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:**

Cuddy Law Firm, PC, attorneys for petitioners, Andrew K. Cuddy, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined, among other things, that the evidence did not establish that the student required a 12-month program to prevent substantial regression and denied their request for additional services. The appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[i]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

At the time of the impartial hearing, the student was attending tenth grade within respondent's (the district's) general education program while receiving special education teacher support services (SETSS) (Dist. Ex. 1 at pp. 5-6; see Tr. p. 98; Dist. Ex. 1 at pp. 1, 10). The student has received diagnoses of a pervasive developmental disorder (PDD) and Asperger's Syndrome (Parent Ex. T at p. 1). Neither his eligibility for special education services nor his classification as a student with autism are in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On July 12, 2011, the CSE convened to conduct the student's annual review and develop his 2011-12 IEP (Parent Ex. A at p. 14).<sup>1</sup> The CSE recommended that the student receive SETSS with placement in a general education classroom in a community school (id. at pp. 8-9, 14). In addition, the CSE recommended the following related services: one 45-minute session of group counseling per week, one 45-minute individual counseling session per week, two 45-minute sessions of group speech-language therapy per week, two 45-minute sessions of occupational therapy (OT) per week in a group, and one 45-minute session of parent counseling and training in a group (id. at pp. 9-10). The CSE also recommended specialized transportation with an individual paraprofessional (id. at p. 10). The CSE determined that the student was eligible for a 12-month program consisting of a 15:1 special class placement (id.).<sup>2</sup> In addition, the CSE determined that the student would participate in New York State alternate assessments (id. at p. 12).

On June 20, 2012, the CSE convened to conduct the student's annual review and develop his 2012-13 IEP (Dist. Ex. 1 at p. 10). The CSE recommended that the student continue to receive a general education program in a community school with SETSS, along with group counseling once per week for a 30-minute session (id. at pp. 5-6, 9). The CSE determined that the student was no longer eligible to receive a 12-month program (compare Dist. Ex. 1 at p. 6, with Parent Ex. A at pp. 10-11). The CSE also recommended that the student participate in the same New York State assessments that are administered to general education students, which was a change from the prior year's IEP (compare Dist. Ex. 1 at p. 8, with Parent Ex. A at p. 12).

#### **A. Due Process Complaint Notice and District Response**

In a due process complaint notice dated July 12, 2012, the parents asserted that the June 2012 CSE denied the student a free appropriate public education (FAPE) by removing the student's 12-month program from his IEP without the support of evaluative data (IHO Ex. I at p. 2). The parents also asserted that the district denied the student a FAPE for the 2011-12 school year because it failed to implement the portion of the student's July 2011 IEP that required the district to provide the student with OT services, nor did the district provide the parents with a related services authorization (RSA) for those OT services (id.). As a remedy, the parents requested that the June 2012 IEP be annulled to the extent that the IEP did not include a 12-month program, and that additional services be awarded to make up for any services missed during summer 2012 (id.). In addition, the parents requested that additional related services be awarded to make up for those

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<sup>1</sup> When entering exhibits into the hearing record on the second day of the impartial hearing, the IHO did not resume the numbering he had used from the prior hearing date, resulting in two exhibits entered into the hearing record as Parent Exhibit A and two exhibits entered into the hearing record as IHO Exhibit I. There were also duplicate copies of the student's July 2011 IEP and the parents' July 2012 due process complaint notice entered into the record. As a result, reference to the July 11, 2011 IEP will be to Parent Ex. A, which was entered into the record on July 20, 2012, and reference to the July 2012 due process complaint notice will be to IHO Ex. I, which was entered into the record on July 20, 2012.

<sup>2</sup> According to the July 2011 IEP, the student's 12-month program did not include any related services (see Parent Ex. A at pp. 10-11).

OT services not provided to the student during the 2011-12 school year (id.).<sup>3</sup>

On or about July 18, 2012, the district responded to the due process complaint notice and also notified the parents that a resolution meeting was scheduled for July 26, 2012 (Parent Exs. D; E-1; see 8 NYCRR 200.5[j][2][i]). In an amended August 21, 2012 response, the district alleged that it was not able to provide OT to the student during the 2011-12 school year because the student's assigned public school site was "underserved in the area of OT" and further asserted that the student no longer required a 12-month program (Parent Ex. E at pp. 3-4). In addition, the district alleged that it offered the parents an RSA for 80 hours of OT to make up for the OT sessions that were not rendered to the student during the 2011-12 school year, but that the parents rejected the district's offer (id.; see also Dist. Ex. 14; Parent Exs. UU; VV).

## **B. Impartial Hearing Officer Decisions**

An impartial hearing convened on July 20, 2012 and concluded on September 19, 2012, after two days of proceedings (Tr. pp. 1, 9). The first day of the impartial hearing was limited to the purpose of determining the student's pendency (stay-put) placement during the course of the proceedings (Tr. p. 3; see Interim IHO Decision at p. 2; IHO Decision at p. 2). In an interim decision dated July 26, 2012, the IHO noted that both the parents and the district agreed that the student's July 2011 IEP was the last agreed upon program, and that the recommendations in that IEP would remain in effect during the course of the proceedings (Interim IHO Decision at pp. 3, 4). The IHO noted that the pendency program included the provision of a 12-month program, and he ordered the 12-month program to be reinstated immediately (id.).

In a final decision dated September 28, 2012, the IHO first addressed the parents' claim that the district failed to implement the student's July 2011 IEP which provided that the student receive two 45-minute sessions of group OT twice per week (IHO Decision at p. 3). The IHO noted that the district conceded that it had failed to provide the student with any OT services during the 2011-12 school year and at a resolution meeting had offered to provide the parents with an RSA for 80 hours of make-up OT services (id.). The IHO also noted that the parents rejected the district's offer of an RSA due to their preference that the OT services be provided at their home and because "such relief was incapable of implementation, due to the very real unavailability of occupational therapists willing to provide the services" (id. at pp. 3-4). The IHO stated that he acknowledged the difficulty the district encounters in securing services when there is a shortage of providers, and citing to a guidance document issued by the State Education Department, the IHO noted the "acknowledged practice" of the district issuing RSAs when the district is unable to provide the necessary personnel to implement a student's related services (id. at pp. 4-5). The IHO also determined that the parents' insistence that the student receive his make-up OT at home was "unreasonable" (id. at p. 5). However, because the parent rejected the district's offer of an RSA, the IHO explained that he needed to determine what remedy, if any, was appropriate to address the district's failure (id.).

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<sup>3</sup> The parents also asserted that the July 2012 due process complaint notice did not pertain to any issues involving the 2012-13 10-month school year, and instead was limited to the parents' allegations that the June 2012 IEP failed to provide a 12-month program and that the district failed to implement the student's OT services as recommended in the July 2011 IEP (IHO Ex. I at pp. 2-3).

Regarding the remedy, the IHO found that it was difficult to determine the extent of make-up OT services that would be necessary to remedy the district's failure to provide such services to the student for the 2011-12 school year because the hearing record provided little information about the extent of the student's OT needs and the effect those needs had upon his educational program (IHO Decision at p. 5). The IHO determined that there was no need to provide the student with equal hours of OT services to make up for the 80 hours he had not been provided with because there was no evidence in the hearing record that the student did not make progress without the OT services, and in fact, the "limited description" of the student's progress during the 2011-12 school year indicated that he had made "remarkable progress," both academically and socially (*id.*). The IHO also found that the June 2012 CSE did not recommend OT services for the 2012-13 school year (*id.* at pp. 5-6). To remedy the district's failure to provide the student with OT services during the 2011-12 school year, the IHO awarded the student with one 45-minute session of OT per week in a group of two for the remainder of the 2012-13 school year, if provided in school, or thirty 45-minute sessions of OT if provided through RSAs (*id.* at p. 6).

With respect to the parents' assertion that the June 2012 CSE inappropriately discontinued the student's 12-month program, the IHO found the issue to have been rendered moot as the July 26, 2012 interim order on pendency directed the district to reinstate the student's 12-month program and the district assigned the student to a public school site for the period of July 27, 2012 to August 14, 2012 (IHO Decision at pp. 6-7; *see* Parent Ex. F). Nonetheless, the IHO reviewed the merits of the parents' assertion in response to their argument that the student's 12-month program would have begun before July 27, 2012 (IHO Decision at p. 7). The IHO noted that the district's rationale for discontinuing the student's 12-month program—that the student had not failed any subjects in the 2011-12 school year—was not the correct standard for determining eligibility for a 12-month program (*id.* at p. 8). However, the IHO determined that the hearing record did not demonstrate that the student would suffer substantial regression if not offered a 12-month program, and therefore declined to award additional services to compensate the student for any services missed during July 2012 (*id.* at pp. 8-9).

#### **IV. Appeal for State-Level Review**

The parents appeal, and seek to annul the IHO's September 28, 2012 decision.

With respect to the IHO's determinations regarding the issue of OT services, the parents assert that the IHO erred in finding that they insisted on receiving the OT services at home as the evidence shows that they were willing to accept OT services at the school site. In addition, the parents allege that the IHO erred in arbitrarily ordering only 30 sessions of OT as additional services when the district conceded that it had failed to provide the student with 80 sessions of OT during the 2011-12 school year. According to the parents, the IHO should have awarded the same amount of additional services that the district failed to provide. The parents also argue that the IHO erred in allowing an RSA to be issued rather than school-based OT services because the evidence showed that the parents were unable to implement the RSA due to "logistical problems" and the inability to identify a provider who could provide the services at home. The parents further assert that the IHO erred in finding that the student had demonstrated progress despite the lack of OT during the 2011-12 school year. According to the parents, the student had not made any progress toward the OT goal identified in his 2011-12 IEP. The parents seek a finding that the district denied the student a FAPE during the 2011-12 school year by failing to provide OT services

and an order that the district provide 80 sessions of OT services in an extended school day program or provide those services at home with a provider located by the district.

With respect to the IHO's determinations regarding the June 2012 CSE's removal of a 12-month program from the student's IEP, the parents assert that the IHO erred in finding the issue was moot due to the pendency order. According to the parents, the student only received 13 out of 30 days of summer services based on the IHO's July 26, 2012 interim order on pendency and the IHO erred in failing to order additional services for the missed summer services. The parents further contend that the June 2012 CSE terminated summer services from the student's IEP without any evaluative data and failed to provide the parents with prior written notice that it would be removing summer services before the June 2012 CSE meeting. Furthermore, the parents contend that the IHO erred in finding that there was no evidence of substantial regression. The parents seek a finding that the district denied the student a FAPE by terminating the student's 12-month program and request that the district be ordered to provide 100 hours of additional academic services in the form of tutoring by a special education teacher.

In its answer, regarding the missed sessions of OT, the district asserts that the district's offer of an RSA at the resolution meeting that took place prior to the impartial hearing was an appropriate remedy in this case, and the IHO correctly determined that the parents' rejection of the RSA was unreasonable. The district further contends that the IHO did not err in awarding less than the amount of OT services recommended in the student's July 2011 IEP and that the IHO appropriately considered the entirety of the hearing record, including the student's demonstrable progress during the 2011-12 school year without any OT services, in fashioning his award of additional OT services. The district also asserts that the IHO correctly determined that the student did not require a 12-month program for the 2012-13 school year. The district asserts that the IHO properly declined to address the parents' claim regarding prior written notice as it was not raised in the due process complaint notice and even if it were, the parents misconstrue the legal requirement as it pertains to prior written notice. Moreover, the district contends that the IHO did not err in finding the issue of a 12-month program to be moot and even if he did, the error was harmless as the IHO considered and rejected the merits of the parents' argument and correctly determined that there was no evidence before the June 2012 CSE that the student exhibited any signs of substantial regression to warrant the continuation of a 12-month program. The district requests that the IHO's decision be upheld in its entirety.

## **V. Applicable Standards**

Two purposes of the 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., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v.

Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][iii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; 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]).

## **VI. Discussion**

### **A. Remedy for OT services**

It is undisputed by the parties that during the 2011-12 school year the student did not receive the OT services set forth in his July 2011 IEP; however, the parties disagree about what constitutes the appropriate relief for the district's failure.<sup>4</sup>

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case and may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (Wenger v. Canastota, 979 F. Supp. 147, 150-51 [N.D.N.Y. 1997]; 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 has been awarded to students who are ineligible for special education services 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, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078 [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

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<sup>4</sup> The IHO did not expressly determine that the district denied the student a FAPE due to its failure to implement the portion of the student's July 2011 IEP mandating OT services (see IHO Decision at pp. 3-6). While the parties disagree whether the district's failure to provide the student with OT during the 2011-12 school year constituted a denial of a FAPE, the parties agree that some form of relief is appropriate to remedy the district's failure and therefore I need not resolve the parties' dispute on this issue of FAPE in this instance (see Pet. ¶ 73; Answer ¶¶ 34, 38).

years of instruction after expiration of IDEA eligibility as compensatory education)).

Compensatory 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 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., 108 LRP 49659 [S.D.N.Y. Mar. 6, 2008], adopted by 50 IDELR 225 [S.D.N.Y. July 7, 2008]). Likewise, SROs 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, 1143-44 [4th Dep't 2005] [finding it proper for an SRO 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]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA'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"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address (the student's) educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).



Regarding the student's OT needs, the hearing record indicates that the student had been working on improving his writing skills, attention skills, and sensory processing abilities during the 2010-11 school year (Dist. Ex. 5 at p. 1). According to a June 2, 2011 OT annual review plan, the student had made progress in hand positioning when completing writing activities, but required periodic verbal prompts to correct his wrist and shoulder posture (id.). The student made significant progress in word spacing and letter sizing, but was inconsistent in writing on the line, organizing text, and maintaining quality letter formation (id.). He had also made progress in letter formation of lower case cursive writing, but continued to rely on visual cueing (id.). The report indicated that the student had difficulty discriminating differences when matching geometric forms and demonstrated decreased ability tracing geometric forms (id.). The student's visual motor integration skills were below average and he demonstrated decreased motor control (id.). With regard to the student's writing deficits, an undated progress report completed by the student's teacher indicated that he independently constructed a written response of two or three paragraphs to a question or to a prompt, and that he needed assistance for written responses of four or more paragraphs (Dist. Ex. 6 at p. 1). Further, a June 2011 psychological update described the student as being slightly below age level in his writing skills (Dist. Ex. 3 at p. 4).

The OT annual review plan further reflected that the student presented with decreased muscle tone, low arousal level, and difficulty with motor planning and maintaining focus on a task (Dist. Ex. 5 at p. 1). Teacher interview indicated that the student had difficulty in the area of "registration," which included his tendency to miss or take longer to respond to situations, appear withdrawn or self-absorbed, and complete work in a timely manner (id.). The student appeared to seek sensory input by humming, twirling objects in his hand, and moving around the room to find and touch objects (id.). According to the report, the student appeared to benefit from participating in sensory motor activities and was more energized and interactive after engaging in various movement activities (id.). Overall, the student demonstrated awareness of his response to sensory stimuli in daily life, but the report noted that he may benefit from improving his understanding of his behavioral responses to different situations (id.).

To address the student's fine motor and sensory deficits, the occupational therapist who completed the OT annual review plan recommended that the student receive two 30 minute sessions of OT per week in a group of two (Dist. Ex. 5 at p. 2). The therapist stated that the student needed to work on letter formation of upper case letters, writing the alphabet with minimal cues, and writing short words (id.). She further noted that the student needed to work on performing exercises without therapist direction and working collaboratively with a peer (id.). Moreover, the report reflected that the student would continue to work on proximal and hand stability, as well as finger dissociation, and that he needed to improve visual motor skills (id.).

A functional behavioral assessment (FBA) was conducted on May 23, 2011 and June 6, 2011 (Parent Ex. MM). The team that performed the student's FBA, which included the student's occupational therapist, believed that the student's "targeted inappropriate behavior" of picking up objects off of the floor and playing with them was related to his sensory processing needs and his resulting distractibility (id. at p. 1). According to the FBA, the student's behavior might be motivated by his desire to have his sensory needs met and to avoid doing school work (id.). The FBA further stated that verbal redirection, hand signaling, and corrective feedback helped the student to regain focus (id. at pp. 1-2). The FBA suggested that the student should be allowed to engage in the identified behavior at appropriate times to address his sensory needs (id. at p. 2).

The student's July 2011 IEP described him as a tactile learner and noted that he exhibited decreased muscle tone, low arousal level, difficulty with motor planning, and difficulty maintaining focus to complete work in the allotted time (Parent Ex. A at pp. 2, 3). The July 2011 IEP further noted that the student benefited from the use of a graphic organizer to help him organize information and to help him structure his writing (*id.* at p. 2). The July 2011 CSE recommended the provision of visual cues in the classroom, structured activities, breaking material into small chunks to accommodate the student's distractibility, and prompts and redirection to address the student's engagement of off-task behavior such as picking up objects off of the floor (*id.* at pp. 3, 17). To address the student's motor and sensory functioning, the July 2011 CSE recommended two 45-minute sessions of group OT per week (*id.* at pp. 3, 9). The July 2011 CSE also developed two annual goals and corresponding short-term objectives to target the student's OT needs relating to hand writing and attention (*id.* at pp. 5-6).

A private neuropsychological evaluation was conducted on October 26 and November 12, 2011 for the purpose of attaining a comprehensive picture of the student's strengths and weaknesses to determine his educational needs (Parent Ex. T). In the area of sensory motor functioning, the student was administered three tests to evaluate his motor and visuomotor functioning (*id.* at p. 3). According to the evaluator, the student's hand and finger movements with his dominant right, left, and both hands together were all severely impaired (*id.*). The student's visuospatial constructional ability as indicated by his performance in drawing a complex figure was impaired and his visuospatial processing deviated from expected performance limits (*id.*). Based on the information obtained, the evaluator opined that the student was "experiencing profound deficits in these areas" (*id.* at p. 5). The evaluator noted that the student was not currently receiving OT and recommended that the student receive two sessions of OT per week to address his fine motor and visual processing deficits (*id.*).

The hearing record reflects that although the student did not receive twice weekly OT sessions during the 2011-12 school year, the student still progressed from 9th to 10th grade and demonstrated academic progress. The student's 2011-12 report card indicated that the student maintained grades between 85-95 in all core subjects and he attained a passing score of 75 on the algebra Regents exam in June 2012 (Dist. Ex. 13). The hearing record also shows that while the student required some prompting and redirecting to stay on task, and continued to have academic delays, especially in math, he excelled in English language arts (ELA), and displayed strengths in reading comprehension (Dist. Ex. 1 at pp. 1, 2). The student was described as a model student who independently attended his classes and completed his assignments, and was capable of grasping, comprehending, and performing well within the ninth grade curriculum (*id.* at p. 1). The hearing record also demonstrates that the student performed at the high end of the average range in spelling, and his spelling skills were on grade expectancy when compared to his same age peers (Dist. Ex. 3 at p. 4). The student was also described as an academic role model (Dist. Ex. 1 at p. 2).

Upon an independent review of the hearing record, I find that the IHO undertook a thorough and reasoned appraisal of the hearing record and I find no reason to disturb his award of additional OT services in this case. Under the circumstances of this case, I concur with the IHO that nothing in the hearing record suggests that the student requires an hour-for-hour compensatory award to remedy the district's failure to provide OT services to the student during the 2011-12 school year (*see Reid*, 401 F.3d at 524 [rejecting an hour-for-hour compensatory education award in favor of a more flexible approach]). In fashioning an equitable remedy, the IHO considered various factors,

and found that there was no evidence in the hearing record that the student did not make progress without the provision of OT services during the 2011-12 school year and that the June 2012 CSE discontinued its recommendation for OT services for the 2012-13 school year, indicating that the "[s]tudent's dependency on Occupational Therapy appears to be little" (IHO Decision at p. 5). While the hearing record indicates the extent of the student's OT needs during the 2011-12 school year, which were primarily in the areas of writing and sensory processing (see Dist. Ex. 5; Parent Exs. A; T; MM), I concur with the IHO that there is little evidence regarding the student's current OT needs and the effect the student's existing OT needs may have on his educational program (see IHO Decision at p. 5). The IHO also noted that at a resolution meeting that took place prior to the impartial hearing, the district offered the parents an RSA to provide the student with 80 hours of OT, which the parents rejected and the IHO found that the parents' insistence on receiving OT services at home to be "unreasonable" (IHO Decision at pp. 3-5; see Puyallup Sch. Dist., 31 F.3d at 1497 [considering the conduct of both parties as a relevant factor in fashioning equitable relief]). Thus, I find the IHO considered relevant factors and appropriately applied a fact-specific analysis in determining the amount and nature of the award for the district's failure to provide OT during the 2011-12 school year. Accordingly, I find no reason to disturb the IHO's award, including the provision that the district be permitted to issue an RSA in the event the district has no occupational therapists available to provide the services at the student's school.

## **B. 12-Month Program**

### **1. Prior Written Notice**

The parents argue on appeal that the district was required by State regulation to provide prior written notice before the June 2012 CSE meeting that the CSE was considering removing the student's 12-month program from his IEP. Districts are required to provide parents with prior written notice a reasonable time prior to proposing to or refusing to initiate or change the identification, evaluation, or educational placement of the student that meet the regulatory requirements by containing a description of the action the CSE planned to take, an explanation for the action, a description of the evaluations relied on by the CSE, a description of other placements considered by the CSE and the reasons those options were rejected, and a description of other factors that were relevant to the planned action (see 34 CFR 300.503; 8 NYCRR 200.1[oo], 200.5[a]; see also Letter to Chandler, 112 LRP 27623 [OSEP 2012]). Here, the June 2012 CSE proposed a change in the educational placement of the student and therefore, consistent with regulations, prior written notice should have been sent within a reasonable time after the June 2012 CSE meeting and I find the parents' reading of the relevant regulations to require prior written notice before the CSE meeting is misplaced (see 34 CFR 300.503; 8 NYCRR 200.1[oo], 200.5[a]).

### **2. Eligibility for 12-Month Program**

Next, I will address the parents' contention that the IHO erroneously determined that the student did not require a 12-month program for the 2012-13 school year.

The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE to the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at \*11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program

provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).<sup>5</sup>

In this case, the student's mother attested in a September 2011 affidavit that the June 2012 CSE advised her that the student did not qualify for summer services because he performed well academically in the 2011-12 school year (Parent Ex. UU at ¶ 9). According to the parent, she expressed concerns to the CSE that the student would regress without summer services (id.). The district representative, who also served as the special education teacher at the June 2012 CSE meeting, testified that the CSE did not recommend a 12-month program for the student because he had not failed any of his classes (Tr. pp. 58-59). Likewise, the student's math teacher for the 2011-12 school year who participated at the June 2012 CSE meeting testified that the student was performing well academically in the general education curriculum, and she further testified that she could not recall the CSE discussing summer services or the parents raising the provision of a 12-month program as a concern (Tr. pp. 90-91, 100).

The hearing record further indicates that the student's math teacher described the student as initially shy in September 2011, but that by mid-October or November, he opened up and began to participate more (Tr. pp. 90, 96-97). In addition, the student's math teacher stated that she did not notice that the student's skills had significantly regressed when he returned from school breaks, and that although there is always some "lag," the student did not exhibit anything atypical and that he was able to "pick up and continue" after periodic recesses (Tr. p. 102). The student's science teacher for the 2011-12 school year testified that the student completed the same course work and took the same tests as the other general education students in his class, and that the student did well and earned a final grade of 92 (Tr. pp. 80-83, 86). The student's 2011-12 report card indicated that the student maintained grades between 85-95 in all core subjects (Dist. Ex. 13).

Based on the foregoing, I concur with the IHO's determination that there is no evidence in the hearing record suggesting that at the time of the June 2012 CSE meeting, the student would exhibit substantial regression in the absence of a 12-month educational program (IHO Decision at p. 8; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \* 14-\*15 [S.D.N.Y. March 28, 2013] ["While it is true that the burden remains on the District to show that the student did not exhibit a need for [extended school year] services 'in order to prevent substantial regression,' . . . a negative can often be proven only by the absence of the evidence"]; M.W. v. New York City Dep't

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<sup>5</sup> The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding 12-month services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred (<http://www.p12.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

of Educ., 869 F. Supp. 2d 320, 334 [E.D.N.Y. 2012] [describing the purpose of 12-month services, which are provided when necessary to prevent substantial regression]).

However, because pendency is invoked by a due process complaint notice (Application of a Student with a Disability, Appeal No. 11-154; Application of a Student with a Disability, Appeal No. 08-050; Application of a Child with a Disability, Appeal No. 07-136; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR § 300.518[a]; 8 NYCRR 200.5[m]; Honig v. Doe, 484 U.S. 305, 323 [1987]; Mackey v. Bd. of Educ., 386 F.3d 158, 160 [2d Cir. 2004]; Schutz v. Bd. of Educ., 290 F.3d at 481-82 [2d. Cir 2002]; Letter to Winston, 213 IDELR [OSEP 1987]), I will award additional services to cover the amount of time from when the parents filed their due process complaint notice (July 12, 2012) through the date of the IHO's interim order (July 26, 2012), which spans an additional 10 school days.

## **VII. Conclusion**

In light of my findings herein, I need not address any of the parties' remaining contentions.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated September 28, 2012 is modified by reversing those portions that concluded the student was not entitled to additional services for services missed in July 2012; and

**IT IS FURTHER ORDERED** that unless the parties otherwise agree, the district shall provide the student with an additional 10 school days of his 12-month program during summer 2013.

**Dated:** Albany, New York  
May 03, 2013

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**STEPHANIE DEYOE**  
**STATE REVIEW OFFICER**