



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-052

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

Appearances:

Friedman & Moses, LLP, attorneys for petitioner, Alicia Abelli, Esq., and Elisa Hyman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied, in part, the parent's request for compensatory educational services. The appeal must be dismissed.

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 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]-[l]).

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

In light of the limited scope of this appeal, the student's educational history need not be recited in detail. Briefly, however, the CSE convened on May 20, 2011, to conduct the student's annual review and to develop an IEP for the 2011-12 school year (second grade) (see Parent Ex. B at pp. 1, 10). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the May 2011 CSE recommended placement in a general education setting with the following related services: one 30-minute session per week of counseling in a small group, two 30-minute sessions per week of speech-language therapy in a small group, and two 30-minute sessions per week of occupational therapy (OT) in a small group (id. at pp. 1, 7, 10-11).

On May 4, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (third grade) (see Parent Ex. C at pp. 1, 7). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the May 2012 CSE recommended placement in a general education setting, and as a related service, one 30-minute session per week of OT in a small group (id. at pp. 1, 4, 7-8).¹

A. Due Process Complaint Notice

In an amended due process complaint notice dated June 25, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years (see generally Parent Ex. A at pp. 1-12). Relevant to this appeal, the parent requested compensatory educational services as relief (id. at p. 13). More specifically, the parent requested "1:1 tutoring using a multi-sensory approach; writing instruction; A[ssistive] T[echnology]; coaching and training to address [the student's] delays in executive functioning;" OT services; and speech-language therapy services on a "1:1 basis to address expressive written language delays; modifications to the general education program; and special education" (id.). Additionally, the parent requested "any services recommended by any independent evaluations conducted during the pendency of the hearing" (id.). Although unable to provide the "specific number of compensatory hours" required to "make [the student whole]," the parent asserted that "[a]t a minimum, [the student] should be awarded the number of hours and types of services that would have afforded him the opportunity to attempt grade level achievement with respect to the New York State Standards and the Core Curriculum" (id.). Further, the parent requested reimbursement or "direct payment" for independent educational evaluations (IEEs), "which should include but not be limited to the following:" a neuropsychological evaluation, an OT evaluation, an assistive technology evaluation, and a speech-language evaluation (id.).

B. Impartial Hearing Officer Decision

On August 6, 2013, the IHO conducted a prehearing conference, and on September 12, 2013, the parties proceeded to an impartial hearing, which concluded on January 27, 2014 after seven days of proceedings (see Tr. pp. 1-1015).² By decision dated March 10, 2014, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school

¹ The student's eligibility for special education programs and related services as a student with a speech or language impairment for the 2011-12 school year and the 2012-13 school year is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² The first two days of the impartial hearing, September 12 and 17, 2013, pertained to the parent's request for IEEs (see Tr. pp. 46-270). In an interim decision dated October 2, 2013, the IHO ordered the district to reimburse the parent for any evaluations already obtained and to directly pay for a neuropsychological evaluation, an OT evaluation, an assistive technology evaluation, and a speech-language evaluation (if completed within 60 days of the date of the order) (see Interim Order at p. 19). All of the evaluations—except for the OT evaluation—were completed in October 2013 and in accordance with the IHO's interim decision (see Parent Exs. K at p. 1; U at p. 1; V at p. 1). However, because the parent could not locate a provider to conduct the OT evaluation within the timeframe set forth in the IHO's interim decision, in the closing statement for the impartial hearing the parent sought an additional 90 days "past the final order" to obtain this evaluation (see IHO Ex. VI at pp. 2, 26). In addition, the parent also requested that the IHO "dismiss[] without prejudice . . . [the] additional compensatory OT claims subject to renewal of those claims in the event" that the parent could obtain the OT evaluation (id. at p.26).

years (see IHO Decision at pp. 21-28). With respect to relief, the IHO initially found that the student was entitled to compensatory speech-language therapy services due to the district's failure to follow "any reasonable procedure to discontinue services" and by failing to provide the student—who was eligible for special education and related services as a student with a speech or language impairment—with speech-language therapy services (id. at p. 30). However, the IHO also found that while the student's needs in this area did not go "entirely unserved" throughout the years in question, the student did not receive speech-language therapy services during the 2012-13 school year (third grade) (id.). Consequently, the IHO ordered that within 30 days from the date of the order and continuing through the 2014-15 school year, the district must provide the student with three 30-minute sessions per week of individual speech-language therapy outside of school and two 30-minute sessions per week of speech-language therapy in school in a group to address the student's needs in the areas of following directions, auditory short-term memory, word retrieval skills, and written language (id. at pp. 30, 35). In addition, the IHO found that the "other recommended services" could be addressed at future CSE meetings and were, therefore, not part of any compensatory educational services award (id. at p. 31).

With respect to the parent's request for compensatory tutoring services to address "writing, phonemic awareness, math, study skills, and organization," the IHO found that based upon testimony and a September 2013 Lindamood-Bell testing summary the student exhibited weaknesses in academics, and in particular, "phoneme awareness and symbol imagery" (IHO Decision at p. 31). In addition, the student could not "independently give 20 vowel sounds" and the student's ability to process unfamiliar words with more than one syllable was "particularly challenging" (id.). The IHO also found that the student demonstrated weakness in his ability to "hold on to multi-step oral directions" (id.). However, while additional testing conducted through Huntington Learning Center (HLC) revealed that the student performed "at or near grade level in certain areas," the IHO found that the student continued to exhibit "significant skill gaps," which prevented him from "meeting grade level expectations across the board"—including sight word recognition and writing (id. at pp. 31-32). Next, the IHO found that based upon testimony and HLC testing results, the student displayed "marked difficulty" in his ability to express his "understanding of concepts orally; weakness in his visual-motor skills and his auditory processing skills; [and] difficulty with spelling and other writing skills" (id. at p. 32). However, the IHO reiterated that despite the noted weaknesses, the student "generally function[ed] on grade level" (id.). Overall, the IHO concluded that the district failed to address the student's difficulties in the areas of "writing" and "visual perception," and as a result, the student was entitled to compensatory tutoring services to "allow the student to make progress" in these areas "left unaddressed" by the district (id.). In crafting the compensatory tutoring services award, the IHO noted that testimonial evidence revealed "overlap" among the "[p]rogram recommendations and areas of student weakness," and therefore, the IHO ordered the district to fund 100 hours of services for the student at the HLC at the rate of \$100.00 per hour, and similarly ordered the district to fund 25 hours of services for the student at the Lindamood-Bell Learning Center at the rate of \$122.00 per hour (id. at pp. 32, 35). In addition, the IHO also ordered the district to fund the services for "one calendar year from the date" of the order (id.).

Turning to the parent's request for compensatory assistive technology services—including assistive technology devices, supports, services, and the implementation of particular recommendations—the IHO ultimately concluded that although the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, the district did "address the student['s] needs to some degree and the student was evidenced to have made some progress over the course

of the school years in question" (IHO Decision at pp. 32-33). However, the IHO also indicated that the district failed to address "some areas" of need, but that "[t]hose areas [were] addressed through the services already awarded herein" (*id.* at p. 33). With regard to assistive technology, the IHO noted that the district provided the student with assistive technology—"albeit mostly low tech"—throughout the school years in question, which appeared to be "effective and necessary for the student" (*id.*). As for the parent's contention that the district failed to provide the student with organization supports in "second grade" (2011-12 school year), the IHO found that the student began working on "some writing strategies"—which continued into third grade (2012-13 school year)—including the use of graphic organizers (*id.*). Next, the IHO noted that the various "low tech" assistive technology services employed by the district included "masking for reading, decreasing visual stimuli, lined paper, adaptive paper, slant board and graphic organizers, smart boards, computers that [were] utilized, cameras, and the Elmo document camera 'to capture things digitally so that the teacher c[ould] differentiate instruction'" (*id.* at pp. 33-34). As a result, the IHO found that the student was not entitled to an award of assistive technology as compensatory educational services (*id.* at p. 34).

With regard to the parent's request for an executive functioning coach and executive functioning coaching, the IHO did not find any evidence in the hearing record indicating that the district failed to properly identify or address the student's executive functioning skills (*see* IHO Decision at p. 34). The IHO also did not find any relation between executive functioning coaching and a "lost opportunity of the student to progress in any specific area" (*id.*). Accordingly, the IHO denied the parent's request for an executive functioning coaching as compensatory educational services (*id.*).

Similarly, the IHO also denied the parent's request for an extension of time to obtain the OT evaluation, because the impartial hearing had concluded, and thus, the OT evaluation could no longer be considered during the impartial hearing or be used to devise an appropriate compensatory educational services award (*see* IHO Decision at p. 34). However, the IHO found that the student was entitled to OT as compensatory educational services due to the fact that the student did not receive OT services as mandated on the May 2012 IEP (*id.*). Consequently, the IHO ordered that the district to provide the student with one 30-minute session per week of OT in a group for a "period of five school months" (*id.* at pp. 34-35). Finally, the IHO found that the student was not entitled to an independent examination by a developmental ophthalmologist as recommended in several documents in the hearing record due to the lack of evidence of any harm to the student or lack of opportunity for the student related to this evaluation (*id.* at p. 34).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in awarding only a portion of the compensatory educational services requested in the amended due process complaint notice. The parent asserts that the IHO improperly reduced the compensatory tutoring award from the over 550 total hours requested to 125 total hours without a clear rationale or support in the hearing record. The parent seeks an award of compensatory tutoring services consistent with the hours recommended by Lindamood Bell and HLC. Additionally, the parent asserts that the IHO erred by imposing a one-year expiration date on the provision of the compensatory tutoring services, and therefore, the parent requests that the student be allowed two years to use the compensatory tutoring services awarded. With regard to the compensatory speech-language therapy awarded, the parent seeks to increase the duration of the therapy sessions from 30 minutes to 45 minutes,

for the student to receive the two sessions per week of group speech-language therapy services after school, and to either remove the time limit imposed by the IHO or to allow the student two years to complete the compensatory speech-language therapy services awarded. The parent also asserts that the IHO erred in denying the parent's request for additional speech-related supports and accommodations recommended in the October 2013 speech-language evaluation. With respect to the compensatory OT services award, the parent seeks to have the OT provided outside of school. Additionally, the parent asserts that the IHO erred in denying the request for an extension to obtain the OT evaluation. Finally, the parent asserts that the IHO erred in denying the request for assistive technology and executive functioning coaching as compensatory educational services.³

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety.^{4,5}

V. Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];⁶ 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students

³ The parent submitted additional documentary evidence for consideration on appeal. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, while the parent could not offer the additional documentary evidence at the time of the impartial hearing, it is not now necessary to render a decision in this matter; as such, the parent's request is denied.

⁴ The parent also asserts that the IHO erred in denying the request for an ophthalmological assessment of the student. However, in its answer the district agreed to either conduct or to fund an ophthalmological assessment of the student, and thus, the parent's assertion will not be addressed in this decision.

⁵ The district does not appeal the IHO's findings that it failed to offer the student a FAPE for the 2011-12 and 2012-13 school years; therefore, the IHO's determinations are final and binding on the parties and will not be further addressed in this decision (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

⁶ If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st, and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 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 [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]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding 10 months of home instruction services as compensatory services]; 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).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; 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 [D.C. 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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 [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 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; 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).

VI. Discussion

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly awarded compensatory educational services (see IHO Decision at pp. 28-35). The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the student was entitled to compensatory educational services or additional services, and applied that standard to the facts at hand (*id.* at pp. 4-35). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that he weighed the evidence and properly supported his conclusions (*id.*). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO and the compensatory educational services awarded—as explained more fully below—are hereby adopted.

On appeal, the parent contends that the IHO erred by denying the request to award the full amount of tutoring services recommended by HLC or the request to use a combination of the tutoring services recommended by Lindamood-Bell and HLC to remedy the district's failure to offer the student a FAPE for the 2011-12 and 2012-13 school years. The parent argues that the IHO provided "no clear rationale" to reduce the requested amount of compensatory tutoring services especially in light of the district's failure to rebut any of the parent's documentary evidence—that is, the student's testing results from Lindamood-Bell and HLC—and the parent's testimonial evidence presented by the directors of Lindamood-Bell and HLC. However, a review

of the evidence in the hearing record supports the IHO's determination to award a total of 125 hours of compensatory tutoring services.

In this case, the evidence in the hearing record indicates that the student required special education and related services to address his needs in the areas of writing and visual perception, which the IHO found the district, in particular, failed to address for the 2011-12 and 2012-13 school years. More specifically, the May 2011 IEP described the student's writing skills as within the "lower end of first grade," and his writing "stamina and volume" as areas of need (Parent Ex. B at p. 1). Additionally, the May 2011 IEP indicated that the student functioned "on grade level" in decoding and reading comprehension, and he performed "above grade level" in mathematics (id. at pp. 1-2).⁷ Consistent with a March 2011 OT evaluation, the May 2011 IEP indicated that the student's written expression was commensurate with his verbal expression, and noted that the cognitive planning aspect of writing affected the student's written performance (compare Dist. Ex. 1 at pp. 2-3, with Parent Ex. B at p. 2). Furthermore, consistent with the March 2011 OT evaluation, the May 2011 IEP described the student's learning and behavior concerns specific to reading and writing—as reported by his then-current teacher—noting that these concerns "may be a result of the level of difficulty he experience[d] when trying to perform these activities" (compare Dist. Ex. 1 at pp. 3, with Parent Ex. B at p. 2). Finally, the May 2011 CSE recommended a modified promotion criteria specific to both first grade reading standards and first grade mathematics standards (see Parent Ex. B at p. 11).⁸

The May 2012 IEP included the student's testing results from May 2012 evaluations, indicating that the student functioned "at or near grade level in most academic areas" and in particular, at an early second grade level in decoding and writing (see Parent Ex. C at p. 1). The May 2012 IEP also indicated that the student performed below grade level in writing and that he demonstrated difficulty with generating topics and organizing his ideas (id.). Furthermore, the May 2012 CSE described the student as "increasingly distracted when confronted with challenging tasks," such as independent writing and reading (id. at p. 2). The May 2012 IEP also provided supports for school personnel on behalf of the student by including a recommendation for collaboration between the student's regular education teacher and related services provider in order to "differentiate instruction" as needed in school (id. at pp. 4-5). Additionally, at the impartial hearing the student's third grade teacher for the 2012-13 school year testified that the student required the most support in writing and that she met most frequently with the student, individually—when compared to all of the other students in the class—especially at the beginning of a writing unit when generating ideas (see Tr. pp. 385-86). The teacher further testified that the student received extra academic assistance both before and after school and opined that the student needed continued support during the next school year (see Tr. pp. 389-93).

In crafting the compensatory tutoring services award, the IHO relied upon the student's testing results from Lindamood-Bell and HLC to identify the student's needs that the district failed to address—"writing" and "visual perception"—as well as testimonial evidence presented by the parent's witnesses (see IHO Decision at pp. 13-14, 18-21, 31-32). Generally, the total amount of

⁷ As noted in the May 2011 IEP, however, the student's first grade teacher described the student's academic performance as "on grade level in math," but below grade level in reading and expressive writing (Parent Ex. B at p. 2).

⁸ The student attended second grade during the 2011-12 school year (see Parent Ex. B at pp. 2, 11).

tutoring services recommended by both Lindamood-Bell (100 to 120 hours) and HLC (561 hours) sought to remediate the student's areas of need to grade level (see Parent Exs. Z; CC at pp. 1-4; see also Tr. pp. 785-86, 804-05, 812-17, 819, 836-37, 864, 874). According to the Lindamood-Bell testing results, the student—who was 9.0 years old and in fourth grade at that time—performed either at or above his grade level and his chronological grade equivalent in approximately 9 out of 16 areas assessed (see Parent Ex. W at pp. 1-3). In addition, in the approximately 7 areas assessed where the student performed below his grade level or below his chronological age, the student's testing results only fell more than one year below his current grade level or chronological age in approximately 2 of the areas assessed (i.e., Lindamood Auditory Conceptualization Test—3: 7.0 grade level, 2.0 grade equivalent; Symbol Imagery Test: 7.7 grade equivalent) (*id.*). Lindamood-Bell recommended services to address the student's needs in the areas of symbol imagery (focusing on the development of "phonological and orthographic awareness, word attack, word recognition, spelling, contextual reading . . . , and reading comprehension") and concept imagery (focusing on the development of "oral vocabulary, oral language comprehension, reading comprehension, written language expression, ability to follow directions, and critical/analytical thinking") (Parent Ex. Z).

According to the HLC testing results, the student required a total of 561 hours of tutoring services to address the following areas of need: mathematics, core reading, splinter skills, vocabulary development, phonics, study skills, and writing (see Parent Ex. CC at p. 4). Noting, however, that the program recommendations overlapped in some areas of the student's needs, the IHO confined the award of compensatory tutoring services to remedy the district's failure to address his needs in writing and visual perception (see IHO Decision at pp. 31-32). In this respect, the IHO properly balanced the purpose of an award of compensatory educational services or additional services with a fact-specific inquiry into the student's areas of need in order to accomplish the IDEA's purpose of providing the student with the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place (*id.*; see *Reid*, 401 F.3d at 524).⁹ Accordingly, the IHO properly awarded a total of 125 hours of compensatory tutoring services to make up for the district's failure to provide special education programs and services during the 2011-12 and 2012-13 school years to address the student's needs in writing and visual perception.

⁹ A review of the November 2013 neuropsychological evaluation of the student lends further support to the IHO's decision regarding the compensatory tutoring services awarded. According to a November 2013 neuropsychological evaluation, the student exhibited difficulties with attention, executive functioning, and working memory, and the evaluator indicated that the student presented with "specific learning disabilities in reading and writing related not only to language processing but to orthographic and phonological processing," as well as a "language based learning disability" (noting delays in written expressive language skills and the "mechanical aspects of decoding and writing") (see Parent Ex. U at p. 16). Notably, the November 2013 neuropsychological evaluation summarized the student's testing results beginning in February 2011 through the present (*id.* at pp. 5-16). Overall, the evaluator indicated that the student functioned "at or near superior level in many key cognitive areas with skills varying from the very low to superior level" (*id.* at p. 15). The evaluator also noted that the student's academic skills were "compromised by issues with attention, executive functioning, language and auditory processing skills, phonological and orthographic processing, and fine motor skills" (*id.*). At the impartial hearing, the evaluator who conducted the November 2013 neuropsychological evaluation of the student testified that a "tutor" would need to determine the "number of hours of tutoring" the student required (Tr. p. 731).

Next, a review of the evidence in the hearing record supports the IHO's determination that the student was entitled to compensatory speech-language therapy to address the student's ability to follow directions, and to address the student's auditory short-term memory, word retrieval skills, and written language skills (see IHO Decision at p. 30; Parent Exs. J at pp. 7-9; K at pp. 7-8; U at pp. 16-17). The evidence in the hearing record shows that the student exhibited difficulties in following directions, auditory short term memory, word retrieval skills, written language skills and pragmatic language skills, and that he presented with an auditory processing disorder (see Parent Exs. J at pp. 7-8; K at pp. 7-8).¹⁰ However, notwithstanding these needs, the evidence in the hearing record does not support the parent's contention that the student required 45-minute sessions of speech-language therapy—as opposed to 30-minute sessions—or that the student required speech-language therapy services to be provided outside of school. Notably, the August 2013 auditory processing evaluation and the October 2013 speech language evaluation both included recommendations for the student to receive speech-language therapy three times per week; however, these evaluations did not indicate that the student should receive these services outside of the school day and did not include a recommendation for the duration of the speech-language therapy sessions (see Tr. pp. 494-96; Parent Exs. J at p. 8; K at p. 8).¹¹ Additionally, the student received speech-language therapy services for 30 minute sessions during the 2011-12 school year (see Parent Ex. B at p. 7). Nevertheless, while this student—or any other student—might benefit from receiving longer therapy sessions or from receiving therapy sessions outside of the school day, school districts are not required to "maximize" the potential of students with disabilities (Bd. of Educ. v. Rowley, 458 U.S. 176, 189, 199 [1982]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). Consequently, there is no reason to modify the IHO's award of compensatory speech-language therapy services with respect to the duration or the location of the sessions.

In addition, the evidence in the hearing record supports the IHO's finding that "other recommended services"—meaning the additional speech-language related supports and accommodations recommended in the October 2013 speech-language evaluation—should be considered by the CSE at "any future IEP meeting." These recommendations included preferential seating, extra time for assignments and tests, tests given in a quiet area or room, test directions read and explained to ensure understanding, repetition and reduced rate of information, the use of visuals and preteaching, extra time to process information and to respond, and to utilize CD programs that focused on auditory memory and processing and phonemic awareness (see Parent Ex. K at p. 8).¹² According to the evidence in the hearing record, both the May 2011 and May 2012 CSEs recommended a variety of accommodations and modifications and that the student's third grade teacher provided the student with accommodations and modifications similar to those

¹⁰ While a comparison of the student's testing results from a February 2012 speech-language evaluation and an October 2013 speech-language evaluation indicated that his scores remained in the average range, the student's test results in the "Core Language Score" decreased from the 82nd percentile in February 2012 to the 45th percentile in October 2013 (compare Parent Ex. E at p. 1, with Parent Ex. K at p. 9).

¹¹ The same evaluator administered both the August 2013 auditory processing evaluation and the October 2013 speech-language evaluation (compare Parent Ex. J at pp. 1, 9, with Parent Ex. K at pp. 1, 8).

¹² The accommodations and modifications recommended in the October 2013 speech-language evaluation are similar to those recommended in the August 2013 auditory processing evaluation, with the exceptions of recommendations for an "FM" system and "[a]pps" for integration training (compare Parent Ex. K at p. 8, with Parent Ex. J at pp. 8-9).

recommended in the October 2013 speech-language evaluation. Specifically, the May 2011 IEP and May 2012 IEP contained the following strategies as management needs and accommodations: to provide instruction to the student both visually and orally, to use checklists and graphic organizers, provide the student with a study carrel or quiet space to reduce distractions, allow the student frequent movement and heavy work breaks, to use middle line paper, provide the student with extended time on tests, and to administer tests to the student in a separate location (see Parent Exs. B at pp. 3, 9; C at pp. 3, 6). At the impartial hearing, the student's third grade teacher testified that she provided additional modifications and accommodations to the student, and specifically described preferential seating, a "separate writing spot," differentiated strategies, graphic organizers, one-on-one support, different or modified paper to organize paragraphs and writing, extended time on tests in a separate location with fewer students, rephrasing questions, providing "extra time to think," and providing repeated practice and repeated exposure (see Tr. pp. 383-87). Based upon the evidence in the hearing record, the CSE should—if it has not already done so—consider whether the student requires the accommodations and modifications recommended in both the October 2013 speech-language evaluation and the August 2013 auditory processing evaluation in the development of the student's IEP for the 2015-16 school year (see Parent Exs. J at pp. 8-9; K at p. 8). However, the hearing record does not contain sufficient evidence upon which to modify or otherwise disturb the IHO's finding or directive.

With regard to the parent's contention that the IHO erred in denying the parent's request for assistive technology as compensatory educational services, a review of the evidence in the hearing record supports the IHO's determination that the student's needs could be addressed through the compensatory educational services awarded. The evidence in the hearing record shows that the district provided the student with a variety of assistive technology to support his needs in writing, organization, processing, and reading (see Tr. pp. 284-86; 964-65; Dist. Ex. 3 at p. 4). However, the results and recommendations of the October 2013 assistive technology evaluation indicated a variety of resources and accommodations that could benefit the student going forward (see Parent Ex. V at pp. 9-11). Therefore, in the development of the student's IEP for 2015-16 school year the CSE should—if it has not already done so—consider whether the student requires the recommendations in the October 2013 assistive technology evaluation (*id.* at pp. 9-10). As such, there is no reason to disturb the IHO's decision denying this particular relief.

With regard to the parent's contention that the IHO erred in denying the parent's request for executive functioning coaching, a review of the evidence in the hearing record shows that the already ordered compensatory educational services supported the student's needs in the areas of attention, organization, planning, and time management. Specifically, according to the October 2013 speech-language evaluation, speech-language therapy would address the student's needs, in part, in organization, memory, attention related skills, and auditory processing skills (see Parent Ex. K at p. 8). According to the March 2011 OT evaluation, OT services addressed the student's attention related skills, focus, organization, and planning (see Dist. Ex. 1 at pp. 6-7). The compensatory tutoring services awarded would also address the student's needs in the areas of attention and focus, organization and planning, and processing (see Tr. pp. 729-31, 785-87, 790-95, 865, 867-68, 906-07, 910-11). Therefore, the evidence in the hearing record does not support the parent's contention that the IHO erred in denying the request for executive functioning coaching or that the IHO's compensatory educational services award failed to address the student's needs in these areas.

With respect to the compensatory OT award, the parent seeks to have the OT services provided to the student outside of school. However, the IHO awarded compensatory OT services because the student did not receive OT as mandated in the IEP (see IHO Decision at p. 34). Nevertheless, the evidence in the hearing record does not demonstrate any reason why the student needed to receive OT services outside of school. Under the May 2011 and May 2012 IEPs, the CSEs recommended that the student receive OT services in school (see Parent Exs. B at p. 7; C at p. 4). Finally, with regard to the OT evaluation that was not completed within the time frame imposed by the IHO in the interim decision, the CSE should—if it has not already done so—consider whether an OT evaluation should be completed in order to develop the student's 2015-16 IEP.

VII. Conclusion

In summary, the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, and further, that the IHO properly directed the district to provide the student with compensatory educational services or additional services as a remedy.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 31, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**