The University of the State of New York

The State Education Department
State Review Officer
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No. 14-172

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Office of Erika L. Hartley, attorney for petitioner, Erika L. Hartley, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 a portion of a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2012-13 school year was appropriate. The parent also appeals from the IHO's denial of her request for an order directing the district to fund or conduct various evaluations of the student, her request for compensatory additional services relative to multiple school years, and other relief. 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 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

The student in this case demonstrates difficulties in the areas of cognition, academics, language processing, attention, and social/emotional/behavioral functioning (see Parent Exs. E; H; M; N; O). After an initial referral for special education in November 2011 and pursuant to an IEP dated January 3, 2012, the student received special education teacher support services (SETSS) and related services; subsequently, during the 2012-13 and 2013-14 school years, pursuant to IEPs dated June 5, 2012, December 11, 2012, and December, 9, 2013, respectively, the student received integrated co-teaching (ICT) and related services (Parent Exs. B at pp. 1-2; E at p. 1; Q at p. 1; see

Parent Exs. W at pp. 6, 9; Y at pp. 8, 12; Z at pp. 6, 9; DD at pp. 6, 9).[1, 2] During the 2011-12, 2012-13, and 2013-14 school years, the student attended a Success Academy charter school (Success Academy) (Parent Exs. B at p. 1; E at p. 1).

On June 9, 2014, the CSE convened to conduct the student's annual review and to develop her IEP for the 2014-15 school year (Parent Ex. H at p. 1). Finding that the student remained eligible for special education as a student with a speech or language impairment, the June 2014 CSE recommended a general education class placement in a charter school with ICT services in mathematics, English language arts (ELA), social studies, and science (id. at pp. 7, 10).[3] The June 2014 CSE also recommended the following related services: two 30-minute sessions per week of speech-language therapy in a small group (3:1), one 30-minute session per week of individual speech-language therapy, two 30-minute sessions of occupational therapy (OT) in a small group (2:1), and two sessions per week of counseling in a small group (3:1) (id. at p. 7).

At the June 2014 CSE meeting, the parent provided the CSE with a letter, dated June 9, 2014, which she prepared in response to information she received from a district school psychologist that the student would be retained in second grade due to her academic performance or, alternatively, could be placed in the third grade in a 12:1+1 special class at a particular school (Parent Exs. B at p. 3; D at p. 1). In the letter, the parent informed the district that she did not want the student to be retained for a second time and stated her understanding that the referenced 12:1+1 special class "program currently d[id] not exist" (Parent Ex. D at p. 1). The parent requested consideration of a nonpublic school placement for the student (id.). The parent also expressed her disagreement with the June 2014 psychoeducational evaluation conducted by Success Academy and requested a comprehensive neuropsychological evaluation at district expense (id.; see generally Parent Ex. E).[4] The parent also stated that she believed that "additional testing" was needed (Parent Ex. D at p. 1). The parent requested that the district conduct an assistive technology evaluation and a central auditory processing evaluation of the student (id. at p. 2).

By prior written notice dated June 17, 2014, the district summarized the ICT and related services recommended in the June 2014 IEP (see Parent Ex. J at p. 1-3). The district generated an "assessment planning" record, dated June 17, 2014, which documented the parent's request for a nonpublic school placement and for a neuropsychological, an assistive technology, and a central

[1] While not defined in the hearing record, SETSS usually refer to services consistent with the regulatory version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also 8 NYCRR 200.6[f]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *2-*3 [S.D.N.Y. Mar. 31, 2014]; B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 [S.D.N.Y. 2010]; Valtchev v. City of New York, 2009 WL 2850689, at *2 [S.D.N.Y. Aug. 31, 2009]). ICT services "means the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a class staffed minimally by a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

[2] For the 2012-13 school year, the student repeated the first grade (Parent Exs. B at p. 1; E at p. 1).

[3] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[4] The psychoeducational evaluation was conducted on May 28, 2014 but signed by the school psychologist on June 4, 2014 (Parent Ex. E at pp. 1, 4).

auditory processing evaluation (see Dist. Ex. 2 at pp. 1-2; Parent Ex. K at p. 1). By letter, dated June 17, 2014, the district requested the parent's consent to conduct additional assessments of the student and informed the parent to contact the district if the parent wanted "specific assessments to be conducted" (Dist. Ex. 2 at p. 3).[5]

A. Due Process Complaint Notice

By due process complaint notice dated August 14, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, and 2014-15 school years (Parent Ex. A at pp. 1-4). With regard to the 2012-13 and 2013-14 school years, the parent principally alleged that the June 2012, December 2012, and December 2013 IEPs were not reasonably calculated to provide the student with educational benefit, in that they were not based on sufficient evaluative information, the annual goals were inappropriate and lacked grade-appropriate benchmarks, the ICT services failed to provide an appropriate level of support for the student given her deficits, and the related services mandates were not appropriate or "not issued" (id. at pp. 2-3). The parent also alleged the student failed to make appropriate educational gains and progress during the 2012-13 and 2013-14 school years (id. at p. 1).

Relative to the June 2014 IEP, the parent reiterated the claims set forth with respect to the previous IEPs and argued that CSE failed to respond to the parent's request for a neuropsychological evaluation, a central auditory processing evaluation, and an assistive technology evaluation (Parent Ex. A at p. 2).

As relief, the parent requested: (1) deferment of the matter to the district's central based support team (CBST) to identify a State-approved nonpublic school placement for the student to attend to remedy the alleged denial of a FAPE for the 2014-15 school year; (2) a "Nickerson Letter"; (3) compensatory additional services in the form of tutoring at the "enhanced rate" to remedy the denial of a FAPE for the 2012-13 and 2013-14 school years; and (4) an order requiring the district to conduct a neuropsychological evaluation, a hearing test, an assistive technology evaluation, and a central auditory processing evaluation (Parent Ex. A at pp. 3-4).[6]

[5] There is no evidence in the hearing record regarding whether or not the parent received this letter but, in her affidavit, the parent testified that the CSE never contacted her about the evaluations after her June 9, 2014 letter (Parent Ex. B at p. 4).

[6] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

B. Impartial Hearing Officer Decision

An impartial hearing was conducted on September 24, 2014 (Tr. pp. 1-121).[7] By decision, dated October 7, 2014, the IHO determined that the educational programs recommended for the student in the December 2012, December 2013, and June 2014 IEPs were not appropriate (IHO Decision at pp. 9-11).[8] Initially, the IHO found that the June 2012 IEP and ICT services recommended by the CSE were substantively appropriate for the student because the students' reading and writing skills remained "stable" and because her mathematics skills "improved considerably over the course of the [2011-12] school year" (id. at p. 9). However, due to the student having made "remarkably little academic progress" in mathematics and literacy during the first half of the 2012-13 school year, the IHO determined that the ICT services recommended for the student in the December 2012 IEP were inappropriate (id. at pp. 9-10). Similarly, because the student did not meet second grade benchmarks, functioned in the borderline range, and produced "extremely low scores" in mathematics and oral language, the IHO found that the student's December 2013 IEP, which again recommended ICT services, was also inappropriate for the student (id. at 10). Relative to the 2014-15 school year, the IHO found that, based on the student's "functioning and testing," including the student having failed to meet second grade benchmarks and performed below grade-level expectations, the June 2014 IEP and recommended ICT services were inappropriate for the student (id. at p. 10-11).

With regard to the parent's request for an IEE, the IHO found that, although the parent expressed her disagreement with the psychoeducational evaluation, she requested a "different test"; namely, a neuropsychological evaluation, which "she never gave the district an opportunity" to conduct (IHO Decision at p. 12). In addition, because there was no evidence in the hearing record to suggest that the student was hearing impaired and because the parent failed to submit any information about a central auditory processing or an assistive technology evaluation, the IHO denied the parent's request for these additional evaluations (id.).[9]

As to relief for the district's denial of a FAPE for the 2012-13 and 2013-14 school years, the IHO denied the parent's request for "500 hours" of compensatory tutoring services at the "enhanced rate" because the parent failed to submit any "evidence or testimony about tutoring" (IHO Decision at p. 13). As to the relief requested by the parent to remedy the denial of FAPE for the 2014-15 school year, the IHO denied the parent's request for a Nickerson letter, as well as her request for a deferral to the CBST for a more "restrictive placement" because the parent had already

[7] Pursuant to an August 20, 2014 pre-hearing order, all witnesses were required to submit direct testimony by affidavit (IHO Pre-Hearing Order at p. 1). State regulations permit an IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination" (8 NYCRR 200.5[j][3][xii][f]).

[8] Because the parent's due process complaint notice was filed on August 13, 2014, the IHO found that any challenge to the student's January 3, 2012, IEP was time-barred by the applicable two-year statute of limitations period (see IHO Decision at p. 9). This finding is not challenged by either party on appeal and is therefore final and binding (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[9] The hearing record reflects that, at the time of the impartial hearing, the district agreed to conduct all of the evaluations requested by the parent; however, the parent, through her attorney, declined, asserting that, given the district's delay in conducting the evaluations since the parent's request therefor, the parent was entitled to procure private evaluations at an enhanced rate at district expense (see Tr. pp. 112-16).

refused to accept a more restrictive placement (i.e., a 12:1+1 special class placement) at the June 2014 CSE meeting (see id. at p. 14).[10] However, the IHO ordered the CSE to reconvene within 30 days of the IHO's decision to develop an appropriate IEP for the student for the 2014-15 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the June 2012 IEP developed by the CSE offered the student a FAPE for the 2012-13 school year. The parent also appeals from the IHO's denial of various relief requested to remedy the deprivation of a FAPE for the 2012-13, 2013-14, and 2014-15 school years.

With regard to the IHO's finding that the June 2012 IEP was appropriate, the parent argues that the district failed to present any evidence to support this determination and that the IHO erred in relying on a June 2014 psychoeducational evaluation to conclude that the June 2012 IEP was appropriate for the student (see IHO Decision at p. 9, citing Parent Ex. E at p. 2).[11] With regard to the December 2012, December 2013, and June 2014 IEPs, the parent argues that the IHO correctly found that the district failed to offer the student a FAPE with each of the recommended IEPs and that the district offered insufficient evidence to contest the parent's claims with respect to the 2012-13, 2013-14, and 2014-15 school years.

Next, the parent argues that the IHO erred in denying her request for an IEE and for the additional evaluations specified in her letter of June 9, 2014. Specifically, the parent argues that the IHO should have granted her request that the district fund or conduct a neuropsychological evaluation, a central auditory processing evaluation, and an assistive technology evaluation. To remedy the denial of a FAPE for the 2012-13 and 2013-14 school years, the parent contends that the IHO erred in denying her request for 500 hours of compensatory tutoring services at district expense. To remedy the district's failure to recommend an appropriate educational program for the student for the 2014-15 school year, the parent requests that the CSE reconvene after each of the requested evaluations are conducted.

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[10] Consistent with the findings and reasoning of the IHO (see IHO Decision at pp. 13-14), neither an IHO nor an SRO has the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order, including the remedy of a Nickerson letter (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom., R.E., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; P.K. v. New York City Dept. of Educ. (Region 4), 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]). Therefore, this portion of the parent's request for relief in her due process complaint notice will not be further addressed.

[11] Although the June 2012 reevaluation of the student referenced by the IHO is not in the hearing record, the June 2014 psychoeducational evaluation presented the results of the student's November 2011 psychoeducational evaluation and June 2012 reevaluation, which used the Kaufman Test of Educational Achievement-Second Edition (KTEA-II) to measure the student's academic progress over the 2011-12 school year (Parent Ex. E at p. 2).

In an answer, the district responds to the parent's petition by denying the material allegations raised and by representing in that it does not challenge the IHO's determinations that the December 2012, December 2013, and June 2014 IEPs were inappropriate for the student and denied the student a FAPE for the corresponding school years. In addition, the district states that it while "takes no position" as to the parent's contention that the June 2012 IEP was inappropriate for the student but argues that any such claims are time barred under the applicable statute of limitations.

In response to the relief requested by the parent, the district represents that it consents to the provision of a neuropsychological evaluation at the district's expense, a central auditory processing evaluation, a speech-language evaluation, an assistive technology evaluation, and an OT evaluation.

Relative to the parent's request for compensatory tutoring services at an enhanced rate, the district argues the IHO correctly found that the student was not entitled to tutoring services because there was no evidence in the hearing record to support the parent's claim for compensatory additional services or to demonstrate the student's tutoring needs. The district also argues that, to the extent that the student is entitled to compensatory tutoring services, those services should be provided at the standard district rate. Finally, the district argues that the IHO properly denied the parent's request for deferral of the student's placement to the CBST because a more restrictive placement would not be appropriate for the student, particularly prior to the CSE having the opportunity to conduct the requested evaluations and to reconvene to consider the same.

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 Sch. Dist. 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][ii]; 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR

300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

The district did not assert a cross-appeal of the IHO's adverse determinations that the district failed to offer the student a FAPE based on the inappropriateness of the December 2012, December 2013, and June 2014 IEPs. As such these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see J.F. v New York City Dept. of Educ., 2012 WL 5984915, at *6 [SDNY Nov. 27, 2012]).

On appeal, the parent contests the IHO's determination that the June 2012 IEP was substantively appropriate for the student (see IHO Decision at p. 9). For the reasons that follow, however, the parent did not timely raise her claims relative to the June 2012 IEP, and the IHO, therefore, erred in finding that the IEP was appropriate.

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[12] In this instance, given that the parents filed their due process complaint notice on August 13, 2014 (see Parent Ex. A), claims relating to an IEP developed or implemented in excess of two years prior to such date were barred by the statute of limitations. Accordingly, to the extent that the IHO found that the June 2012 IEP was appropriate for the student, that finding is annulled because an inquiry into the appropriateness of the June 2012 IEP was beyond the proper scope of review in this case (see IHO Decision at p. 9).

[12] New York State has not explicitly established a different limitations period.

B. Compensatory Additional Services

As noted above, the district does not challenge the IHO's determinations that the December 2012, December 2013, and June 2014 IEPs were inappropriate for the student and denied the student a FAPE. On appeal, the parties dispute whether the IHO erred in denying the parent's request for compensatory educational services in the form of 500 hours of 1:1 tutoring to remedy the denial of a FAPE for the 2012-13 and 2013-14 school years.

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]). 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., 2008 WL 9731053, at *12-*13 [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 ten 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 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).

In this case, the district argues that the IHO did not err in denying the parent's request for compensatory additional services because the parent's due process complaint notice was impermissibly vague in that it did not set forth the frequency or nature of the requested services (see Parent Ex. A at p. 4). Although the parent did not indicate how many hours of additional services sought in her due process complaint notice, she explicitly requested an award of compensatory education and therefore preserved this issue for consideration (see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011] [party barred from seeking compensatory education when mentioned for the first time in a brief submitted at the close of the impartial hearing]).

Relevant to calculating an award of compensatory or additional educational services to place the student in the same position she would have occupied but for the district's failure to offer the student a FAPE, the evidence in the hearing record adequately reflects that the student demonstrated sustained delays in the areas of reading, writing, and mathematics (Parent Exs. E at p. 5; H at p. 1; W at p. 1; Y at pp. 1-2). Specifically, the June 2014 IEP indicated the student demonstrated difficulties with reading comprehension and decoding (Parent Ex. H at p. 1). In addition, in the area of writing, the student performed poorly with independent written expression tasks and only showed growth with much support (id.). Furthermore, in the area of mathematics, the student performed below expectations including demonstrating difficulties with math facts and new math concepts (id.).[13] Additionally, the hearing record reflects the student had a history of

[13] The June 2014 Success Academy speech-language progress report indicated the student presented with significantly below average receptive and expressive language skills (Parent Ex. O at p. 1).

performing below age and grade expectations in the areas of reading, writing, and mathematics as shown in both her December 2012 and December 2013 IEPs (see Parent Exs. W at p. 1; Y at pp. 1-2). The student's December 2012 IEP also reflected that the student "made remarkably little academic progress since the beginning of the year in both literacy and math," a notion also reflected in the December 2013 and June 2014 IEPs (see Parent Exs. H at p. 1; W at p 1; Y at pp. 1-2).

According to the May 28, 2014 education evaluation, the standardized assessments of the student also indicated that the student demonstrated deficits in reading, writing, and mathematics (Parent Ex. E). For example, the Kaufman Test of Educational Achievement-Second Edition (KTEA-II) results indicated the student achieved standard scores of 84 (below average) in letter and word recognition, 79 (borderline) in reading comprehension, 78 (borderline) in math concepts and applications, 77 (borderline) in math computation, 66 (extremely low) in written expression, and 76 (borderline) in oral language, all of which indicated significantly delayed academic skills (Parent Ex. E at p. 5).[14, 15]

Here, because the parties have prepared little argument with respect to the development of a compensatory additional services award, an award shall be formulated based upon the student's lack of progress in her educational program in the areas of reading, writing, and mathematics during the relevant portion of the 2012-13 school year and the 2013-14 school year.[16] From the date of implementation of the December 2012 IEP through the date of the parent's due process complaint notice, based on three 45-minute periods per day as part of a 10-month school year (consisting of 180 school days), in each of these three areas of need, the calculation of additional services totals 625.5 hours.

However, because there is no dispute in this case that the student actually received some special education services and instruction in the form of the recommended ICT and related services during the school years in question, this should also be factored in the total award of tutoring services (see Parent Ex. B at p. 2; see also Parent Exs. M; O). Thus, to effectively and equitably serve the purposes of compensatory or additional educational services in this case, it is appropriate under the facts of this case to reduce the sum total of 625.5 hours by 50 percent because the student actually received instruction in the areas of reading, writing, and mathematics and received some degree benefit therefrom (see id.; see also Parent Exs. E at pp. 1; V at pp. 1-6). Accordingly, the

[14] The psychoeducational evaluation included standard scores derived from both the age and grade norms; however, as the district retained the student in first grade, the scores derived from age norms are more indicative of the student's performance and progress (see Parent Ex. E at p. 5). Notwithstanding this, the June 2014 IEP reported the standard scores derived from the grade norms (see Parent Ex. H at p. 1).

[15] The June 2014 psychoeducational evaluation included the November 2011 Standard-Binet Intelligence Scales-Fifth Edition (SB-5) results, which assessed the student's cognitive abilities, wherein the student achieved a verbal IQ of 77 (6th percentile), a nonverbal IQ of 72 (2nd percentile), and a full scale IQ of 72 (3rd percentile), all of which indicated borderline range cognitive skills (Parent Ex. E at pp. 1-2). Although the parent expressed disagreement with the results of the June 2014 evaluation in her letter of June 9, 2014, the parent did not identify which aspect she disagreed with, and there is no independent evidence in the hearing record to suggest that the data and testing results in the June 2014 evaluation are inaccurate (see Parent Ex. D at p. 1).

[16] The parent's claim for compensatory education for the 2012-13 and 2013-14 school years dates back to the implementation of the December 2012, IEP, which, absent any evidence in the hearing record to the contrary, would be December 12, 2012 (see Parent Ex. W at p. 9).

district is ordered to provide the student with a total 312.75 hours of 1:1 tutoring services, which amounts to 104.25 hours of 1:1 tutoring services in each of the following subject areas: reading, writing, and mathematics. The district is responsible to provide the compensatory additional services, but is not precluded from either furnishing the 1:1 tutoring itself or utilizing a nonpublic private provider such as Huntington Learning Center, which was the provider identified by the parent. The parent is expected to make the student available and cooperate with the district's reasonable efforts to provide the compensatory additional services.

C. 2014-15 School Year—Relief

The parties also dispute whether the IHO erred in denying the parent's request for deferral of the student's placement to the CBST for a nonpublic school placement to remedy the denial of a FAPE for the 2014-15 school year.[17] In addition, the parent seeks deferment of the student's placement to the district's CBST for the purpose of recommending a State-approved non-public school. Generally, when determining an appropriate placement on the educational continuum, a CSE should first determine the extent to which the student can be educated with nondisabled peers in a public school setting before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013]; [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, in this case the district's CSE need not consider deferral of the student's placement to the CBST for a State-approved non-public school if a public school placement is available for the student. Accordingly, that portion of the IHO's decision that denied the parent's request for deferral of the student's placement to the CBST is affirmed.

Moreover, with regard to the appropriate remedy for the 2014-15 school year, the hearing record lacks information regarding whether the student was receiving the educational program recommended in the June 2014 IEP. The attorney for the parent indicated at the impartial hearing that the student began the 2014-15 school year in the third grade at a different public school (see Tr. p. 6); whereas, the June 2014 IEP recommended that the student attend a charter school (see Parent Ex. H at p. 10; J at p. 1). Given this lack of evidence as to implementation of the June 2014 IEP or the student's status during the 2014-15 school year, the district's agreement to complete evaluations requested by the parent, and the preference that the CSE review such evaluations and make appropriate recommendations based on the student's needs, any remedy relating to the 2014-15 school year is premature at this juncture.

[17] To remedy the district's failure to offer an appropriate educational program for the 2014-15 school year, the IHO ordered the CSE to reconvene within 30 days of the IHO's decision to develop an appropriate educational program for the 2014-15 school year. On appeal, the parties are in agreement that the IHO's order should be modified to order the CSE to reconvene after the requested evaluations are completed (see Pet. ¶ 83[d]; Answer ¶ 19).

VII. Conclusion

In sum, having deemed the IHO's decision final and binding with respect to the district's provision of a FAPE to the student for a portion of the 2012-13 school year and the 2013-14 school year, the parent is entitled to an award of compensatory tutoring services as set forth above. Notwithstanding the final and binding determination of the IHO that the district also failed to provide the student a FAPE for the 2014-15 school year, the IHO's denial of the parent's other requests for relief, including a Nickerson letter and deferral of the student's placement to the CBST for an appropriate State-approved nonpublic school placement, is affirmed. Given the district's agreement to fund or conduct the evaluations requested by the parent, those portions of the IHO's decision denying the parent's request for an IEE and additional evaluations is annulled. The IHO's order requiring the CSE to reconvene within 30 days is modified to allow the CSE to conduct the evaluations, after which time the CSE shall reconvene within 30 days to develop and appropriate educational program for the 2014-15 school year. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 7, 2014, is modified by reversing those portions which denied the parents' request for compensatory tutoring services and particular evaluations;

IT IS FURTHER ORDERED that unless the parties otherwise agree, within 60 days of the date of this decision, the district shall conduct a neuropsychological evaluation; a central auditory processing evaluation; a speech-language evaluation; an assistive technology evaluation; and an OT evaluation of the student, as consented to by the district and as described in the body of this decision; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the district shall provide the student with a total of 312.75 hours of compensatory additional educational services in the form of 1:1 tutoring services that are equally divided among the areas of reading, writing, and mathematics, which shall begin within 30 days from the date of this decision and be used by the student within three years from the date of this decision; provided, however, that if the district is unsuccessful in offering the tutoring services within the prescribed 30-day timeframe, it shall provide the parent with written authorization to obtain these services for the student at district expense.

Dated: **Albany, New York**
January 23, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER