



The University of the State of New York

The State Education Department State Review Officer

No. 07-135

Application of the BOARD OF EDUCATION OF THE SOUTHDOLD UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Ingerman Smith, LLP, attorney for petitioner, Susan E. Fine, Esq., of counsel

Law Office of Andrew K. Cuddy, attorney for respondents, Andrew K. Cuddy, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Southold Union Free School District, appeals from the decision of an impartial hearing officer which determined that the educational services recommended by its Committee on Special Education (CSE) for respondents' daughter for summer 2007 were not appropriate and directed petitioner to provide 24 hours of 1:1 reading tutoring as additional services. The appeal must be sustained.

As a preliminary matter, respondents attached three exhibits to their answer and offer the exhibits as additional documentary evidence for consideration in this appeal. In its reply, petitioner objected to the admission and consideration of one of the proposed exhibits—a neuropsychological evaluation conducted in August 2007. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). A review of the challenged exhibit indicates that the neuropsychological evaluation occurred in August 2007 (Answer Ex. A at p. 1). Respondents assert in their answer that the evaluation report was not available to offer into evidence at the time of the impartial hearing. Petitioner objects to the admission and consideration of this evaluation report because it was not available for the CSE's review at the student's annual review on June 15, 2007, and thus, it was not used in the decision-making process regarding the issues on appeal and should not now be considered. Although the completed report was not

available at the time of the impartial hearing, petitioner's objection is persuasive and I, therefore, decline to accept the neuropsychological evaluation because it is not necessary in order to render a decision. I will, however, accept respondents' two other proposed exhibits because petitioner does not object to their consideration.

As of the date of respondents' due process complaint notice, the student had completed the 2006-07 school year at an out-of-state residential private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Tr. p. 46; Dist. Ex. W at p. 7; Parent Ex. 2; Application of a Child with a Disability, Appeal No. 07-119). The student's prior educational history is discussed in previous appeals and will not be repeated here in detail (Application of a Child with a Disability, Appeal No. 07-119; Application of a Child with a Disability, Appeal No. 04-082; see Application of a Child with a Disability, Appeal No. 07-095). Cognitive testing performed in November 2005 indicated that the student's nonverbal reasoning abilities (high average range) were much better developed than her verbal reasoning abilities (average range), and that her full-scale IQ score of 102 fell within the average range (Dist. Ex. E at pp. 1-3, 5-6; see Tr. pp. 591-93). The hearing record indicates that the student exhibited difficulties with auditory processing, auditory memory, decoding, and reading fluency (Dist. Ex. H at pp. 1-7). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (see 8 NYCRR 200.1[zz][6]).

On June 15, 2007, petitioner's CSE convened to conduct the student's annual review and to prepare her individualized education program (IEP) for the 2007-08 school year (Dist. Ex. W at p. 1; Parent Ex. 9 at p. 1). Prior to the CSE meeting, the private school's liaison forwarded a draft copy of an IEP prepared by staff at the private school to petitioner's CSE Chairperson, as well as samples of the student's work as requested by the CSE Chairperson (Parent Exs. 3 at p. 1; 5; see Tr. pp. 47, 49, 51, 636; Dist. Exs. X-Y). The CSE convened in two locations via teleconference (Parent Ex. 9 at p. 1). The following members convened at petitioner's district location: petitioner's CSE Chairperson, school psychologist, special education teacher and regular education teacher; an additional parent member; and three of respondents' family friends (id.). The following members convened at the private school location: the student's private school science and math teacher, social studies teacher, oral expression/literature teacher, 1:1 language arts tutor, and language arts class teacher; the student's private school case manager; the private school's liaison; the student's mother; the student; and a family friend (id.). All of the private school teachers in attendance taught the student during the 2006-07 school year (Dist. Ex. W at p. 7; Parent Ex. 46 at p. 1).

At the beginning of the meeting, petitioner's CSE Chairperson proposed that the CSE review the draft copy of the IEP (Parent Ex. 9 at p. 2). With no disagreements noted, the private school's liaison led the CSE's page-by-page review of the draft IEP (Parent Exs. 9 at pp. 2-41; 6 at pp. 1-14; see Tr. pp. 56-59, 61, 64; see also Parent Ex. 2). After the CSE meeting, petitioner's CSE Chairperson transposed the entire draft IEP, with additional notes and comments from the meeting, into petitioner's IEP for the student for the 2007-08 school year, which was later mailed to respondents (see Parent Exs. 41 at pp. 1-3, 7-9; 9 at pp. 12-13; see also Tr. pp. 696-97, 700, 703, 878-79; Dist. Ex. R; compare Parent Ex. 6, with Dist. Ex. W).

According to the private school case manager, the student's May 2007 academic testing demonstrated increased percentile and standard scores in the areas of word attack, word identification, reading rate, reading accuracy, and reading fluency when compared to the student's scores from academic testing performed in March 2006 (Dist. Ex. W at p. 8; Parent Exs. 6 at p. 2; 9 at pp. 6-8). Similarly, he noted that the student's April 2007 academic testing demonstrated that she increased her scores in the areas of reading vocabulary, reading comprehension, math problem solving, math procedures, and spelling when compared to the student's scores from academic testing performed in September and October 2006 (Parent Exs. 6 at p. 2; 9 at pp. 6-8).

Following the presentation of the student's academic testing results, the CSE then addressed and discussed how the student's disability affected her progress in the curriculum and the accommodations recommended by the CSE in order for the student to make progress (Dist. Ex. W at pp. 1-3, 7-8; Parent Exs. 6 at pp. 4-6; 9 at pp. 10-19). In particular, the CSE recommended the use of a graphic organizer, a word bank, an individual auditory trainer, a laptop, Inspiration and Kurzweil software (and training to use the software), the Read Naturally program, and modified homework assignments (Dist. Ex. W at p. 2; Parent Exs. 6 at pp. 3-6; 9 at pp. 10-19). The CSE also recommended testing accommodations to include extended time, small group administration, special location, directions explained and read, and the use of a word processor or laptop, a word bank, and a calculator (Dist. Ex. W at pp. 2-4; Parent Exs. 6 at pp. 4-6; 9 at pp. 10-19; 13). Because the student's disability adversely affected her ability to learn a foreign language, the CSE recommended an exemption from the foreign language requirement (Dist. Ex. W at p. 3).

Each of the student's private school teachers individually reported on her progress throughout the 2006-07 school year, noted strategies and accommodations that assisted the student, and noted areas where the student required assistance (Dist. Ex. W at pp. 4-8, 11; Parent Exs. 6 at pp. 7-10; 9 at pp. 19-32). The CSE also discussed the student's goals and objectives for her areas of need; including study skills, reading, written language/language arts, and mathematics (Dist. Ex. W at pp. 12-14; Parent Exs. 6 at pp. 7-10; 9 at pp. 19-32). The private school's liaison recommended placement at the private school for the 2007-08 school year, and described how the student's recommended programs and services would be delivered at the private school, with dates of service noted on the draft IEP as September 2007 through June 2008 (Parent Exs. 6 at pp. 11-12; 9 at pp. 32-33).

Throughout the CSE meeting, both the student and the student's mother contributed information regarding specific assignments, identified particular areas of improvement during the 2006-07 school year, and indicated how certain accommodations aided the student's progress in her coursework (Parent Ex. 9 at pp. 3-5, 9-12, 14-26, 28-29, 31-32). As the CSE reviewed the draft IEP, the private school's liaison frequently asked whether any of the CSE members had questions or concerns with the information presented, whether the CSE members wished to include additional information, and/or whether the CSE members agreed with the accuracy and content of the statements on the student's draft IEP (id. at pp. 2-6, 8-20, 22-23, 26-27, 29, 32; see Tr. p. 699). No disagreements arose regarding the student's draft IEP or the information presented during the CSE meeting until the private school's liaison recommended placement at the private school for

the student's 2007-08 school year and extended school year (ESY)¹ services for summer 2007 (Parent Ex. 9 at pp. 33-44, 46-47; see Tr. pp. 697-98).

With respect to the student's recommended placement for the 2007-08 school year, petitioner's CSE Chairperson stated that based upon the information presented, the student's needs could be met within the district and recommended a return to the district for the 2007-08 school year (Dist. Ex. W at pp. 1-2; Parent Ex. 9 at p. 33). The CSE Chairperson explained that the student's scores did not support either an out-of-state placement or a residential placement at that time, but instead, supported a public school placement as the student's least restrictive environment (LRE) (Dist. Ex. W at pp. 8-9; Parent Ex. 9 at p. 33). She then described the recommended public school placement, how the student's needs would be met in petitioner's district, and answered questions regarding the recommendations (Dist. Ex. W at pp. 1-4, 8; Parent Ex. 9 at pp. 33-41). In particular, petitioner's CSE Chairperson described the student's recommended placement as an "inclusion class in a mainstream class environment" with 20 to 23 students, which would include no more than "one third" special education students (Parent Ex. 9 at p. 33). The student's inclusion classes for mathematics, English, social studies and science would contain a regular education teacher and a special education teacher (id.). Petitioner's CSE Chairperson also elaborated upon the use of Kurzweil software on the student's laptop and teacher training on the Kurzweil software (id.). She also described a daily, "one on one tutorial" with a certified reading instructor to address the student's fluency needs, and the addition of the Read Naturally program in order to improve the student's fluency (id. at pp. 33-34; see Dist. Ex. W at p. 2). Petitioner's CSE Chairperson further described a daily skills program to address the student's writing skills (id. at p. 34; see Dist. Ex. W at p. 1).

Toward the end of the June 2007 CSE meeting, the private school's liaison raised the issue of whether the student required ESY services for summer 2007 (Dist. Ex. W at pp. 1, 8; Parent Ex. 9 at p. 41). The private school's liaison noted that one statement in the draft IEP indicated that the

¹ According to the Regulations of the Commissioner of Education, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[j][1]; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The Regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>; see also Application of a Child with a Disability, Appeal No. 07-089).

student would regress if she did not have instruction or academic support for ten weeks (Dist. Ex. W at p. 9; Parent Exs. 6 at p. 12; 9 at p. 41). He then requested input from the CSE members on this issue (Parent Ex. 9 at p. 41). Petitioner's CSE Chairperson commented that the student did not qualify for ESY, but that the student could receive reading remediation as an academic intervention service (AIS) during summer 2007, three hours per week for eight weeks (Dist. Ex. W at pp. 8-9; Parent Ex. 9 at p. 42). When the student's mother asked why the student did not qualify for ESY, petitioner's CSE Chairperson stated that the student's scores did not support a recommendation for ESY (Parent Ex. 9 at p. 42). More specifically, petitioner's CSE Chairperson stated that there had been no evidence of regression presented (*id.*). At that point in the CSE meeting, the student's mother engaged in a discussion with petitioner's CSE Chairperson about the student's eligibility for ESY services and whether her daughter demonstrated substantial regression (*id.* at pp. 42-44). The student's mother requested summer services at the out-of-state private school based upon stay-put provisions, and then requested prior written notice and information for proceeding to an impartial hearing at the conclusion of the CSE meeting (*id.*).

By due process complaint notice dated June 21, 2007, respondents alleged that petitioner's CSE Chairperson unilaterally removed their daughter's summer 2007 services at the June 15, 2007 CSE meeting and that the CSE did not reach a consensus on that issue (IHO Ex. I at pp. 1-2). Respondents asserted that petitioner's CSE Chairperson could not unilaterally remove their daughter's out-of-state private school summer services, which she received in summer 2006, and that the CSE Chairperson improperly applied federal and State laws in making that decision (*id.* at pp. 2-4). As relief, respondents requested summer 2007 services at the out-of-state private school that the student had attended during summer 2006 pursuant to federal and State law stay-put provisions (*id.* at pp. 2-5). Alternatively, respondents requested reimbursement for the costs of any and all expenses incurred in connection with their daughter's attendance at the out-of-state private school's summer 2007 services, including transportation and housing (*id.* at p. 5).²

By letter dated June 22, 2007, petitioner sent respondents prior written notice, which they received on or about June 23, 2007 (Dist. Ex. U at pp. 1-2; Answer Ex. B at p. 2). With respect to summer 2007 services, petitioner's prior written notice explained that respondents' daughter did not qualify for ESY services because the student had not experienced "substantial regression" (Dist. Ex. U at p. 2). Petitioner then forwarded a Committee Recommendation for Continuation of Services letter, dated July 2, 2007, to respondents, along with the student's 2007-08 IEP and consent forms for services (Dist. Ex. V at pp. 1-4). The consent form advised that if respondents did not return the consent form, the "placement . . . of my child will occur as recommended" by the CSE (*id.* at pp. 2, 4). The hearing record indicates that respondents did not return the consent form (see generally Tr. pp. 1-947; Dist. Exs. A-C; E-Y; Parent Exs. 1-46; IHO Ex. I).

On July 16, 2007, the parties convened a resolution session (Parent Exs. 41 at p. 1; 14 at pp. 3-4). Petitioner's CSE Chairperson reiterated the position that the student did not qualify for ESY services because she had not experienced substantial regression and had no history of regression (Parent Ex. 41 at pp. 1-4; see Answer Ex. C at p. 1). Respondents stated that previous testing demonstrated regression and requested two updated evaluations (Parent Ex. 41 at pp. 4-7,

² The impartial hearing officer issued an interim pendency decision that denied respondents' request for summer 2007 services at the private school pursuant to pendency (see Application of a Child with a Disability, Appeal No. 07-095). The impartial hearing officer's interim pendency decision was upheld on appeal (*id.*).

11-13). The student also attended the resolution session and asked petitioner if she would have received 1:1 tutoring during summer 2007 if she had been "in New York this summer" (*id.* at p. 10). Petitioner's CSE Chairperson responded that the student would have received reading tutoring, and she identified the certified reading teacher who would have provided the instruction (*id.* at pp. 10-11). The student then asked what the reading teacher would have taught her (*id.* at p. 11). Petitioner's CSE Chairperson responded that she, herself, could not answer that question because she was not a reading teacher; however, she went on to state that the reading teacher would have reviewed the student's IEP, spoken with individuals at the district and the private school, assessed the student's needs, and worked on the student's reading and writing (*id.*). The student questioned why the certified reading teacher identified by petitioner's CSE Chairperson had not attended the June 15, 2007 CSE meeting, and the CSE Chairperson responded that the teacher was not available for the meeting (*id.*). Although the parties did not reach a resolution regarding summer 2007 services, petitioner agreed to respondents' request for the two updated evaluations (*id.* at pp. 1-4, 13).

On August 13, 2007, respondents forwarded a formal request to amend their due process complaint notice with respect to the remedy sought (Answer Ex. B at pp. 1-2). Instead of tuition reimbursement, respondents requested "corrective/compensatory educational services to make up for the wrongful denial of [the student's free appropriate public education]" (*id.* at p. 2). Petitioner responded by letter dated August 15, 2007, and asserted that no basis existed upon which to predicate an award of compensatory educational services (Answer Ex. C at p. 1). The impartial hearing officer allowed respondents to amend their due process complaint notice to include a request for compensatory educational services instead of tuition reimbursement, and respondents clarified at the impartial hearing that they sought 90 hours of compensatory services (Tr. pp. 870-73, 878, 880-82).

Unable to resolve the issue regarding summer 2007 services, the parties proceeded to an impartial hearing, which commenced on August 21, 2007, and concluded on September 27, 2007, after four days of testimony (Tr. pp. 1, 733). Respondents, who proceeded without an attorney, presented witnesses and submitted documentary evidence. Petitioner cross-examined respondents' witnesses, presented witnesses, including one rebuttal witness, and submitted documentary evidence (*see* Tr. pp. 1-947; Dist. Exs. A-C; E-Y; Parent Exs. 1-46; *see also* IHO Ex. I).

The private school's liaison testified on behalf of respondents (Tr. pp. 40-116). He confirmed his attendance at the June 15, 2007 CSE meeting (Tr. pp. 56-57; Dist. Ex. W at p. 7). He explained how teleconferenced CSE meetings typically proceeded, including the ability of the CSE members to add input or ask questions, and he noted that the June 15, 2007 meeting followed the identified process (Tr. pp. 57-59). In particular, the private school's liaison testified that "there didn't seem to be any question or objection to any of the goals and benchmarks or the [student's] current performance" (Tr. p. 58). According to his testimony, disagreement only arose when the CSE's discussion focused on the student's services and placement, as recommended on the draft IEP, for the 2007-08 school year (*id.*). He testified that at that point, the CSE Chairperson spoke on behalf of the CSE members convened at the district's location, and she noted agreement with the student's goals and benchmarks, but that "they could not agree that [the student] needed to be at [the private school] for the 2007-08 school year" (*id.*). In addition, he testified that the CSE Chairperson then described "in detail" the programs and services offered by petitioner's district (*id.*).

Respondents presented as a witness petitioner's eighth grade special education inclusion teacher who attended the June 15, 2007 CSE meeting (Tr. pp. 736-53; Dist. Ex. W at p. 7). She testified that she agreed with the CSE's recommended placement for the student in an inclusion classroom during the 2007-08 school year (Tr. p. 749). The teacher also agreed with the CSE's recommendation for AIS summer services in reading, testifying that she "felt [the student] made improvements during the last school year and that placement was correct" (id.). According to her testimony, AIS was a "support service" (Tr. p. 750).

Respondents also presented as a witness petitioner's high school regular education teacher who attended the June 15, 2007 CSE meeting (Tr. pp. 753-73; Dist. Ex. W at p. 7). She testified that within petitioner's district, a "student who demonstrate[d] an academic weakness [could] receive academic intervention services" (Tr. p. 763). She further testified that the CSE offered the student three hours per week of individualized reading instruction during summer 2007, which she believed was "more than adequate" for the student (Tr. pp. 763-64).

Petitioner's school psychologist who attended the June 15, 2007 CSE meeting was also called as a witness by respondents (Tr. pp. 533-604). Her testimony indicated that the student's AIS program for summer 2007 would have consisted of three hours per week of 1:1 reading tutorials for six to eight weeks (Tr. p. 576). She testified that the summer services offered to the student were not identified as special education services because the student did not qualify for ESY services, and further, that the student had benefited in the past from summer services (Tr. p. 593). She further testified that the AIS summer services offered to the student for summer 2007 would address the student's reading fluency needs and would encompass her auditory memory needs as well (Tr. pp. 598-99).

The student's mother also testified (Tr. pp. 788-886, 892-97, 917-20). She noted that in the past, petitioner offered and the student received AIS summer services for summer 2003, 2004, and 2005 (Tr. pp. 789-90, 792, 794, 854-55). In summer 2005, the AIS summer services offered and received included two hours per week of reading remediation for eight weeks (see Tr. pp. 478-79, 606; Dist. Ex. B at p. 1). For summer 2006, her daughter attended the private school's summer program as an AIS service (Tr. pp. 812, 814-15). Significantly, however, during summer 2007 the student did not attend the private school's summer program and she did not receive any other services (Tr. p. 873). The student's mother testified that summer 2007 was the first summer that her daughter did not receive any services, but indicated that her daughter had read on her own (id.).

In addition to cross-examining respondents' witnesses, petitioner called direct witnesses and one rebuttal witness in response to evidence submitted by respondents. The evidence submitted, although not available to the CSE at the June 15, 2007 meeting, consisted of the student's test results comparing May and September 2007 administrations of the Gray Oral Reading Test (GORT) (Parent Ex. 42; see Tr. pp. 873-78). Respondents submitted the test results to support their assertion that the student exhibited substantial regression during summer 2007 (Tr. pp. 873-78). The test results indicated that the student's September 2007 standard scores declined from the student's previous test scores in May 2007 (Parent Ex. 42). To rebut respondents' claim that the decreased test scores in September 2007 demonstrated substantial regression, petitioner called the district's speech-language pathologist/certified reading teacher as a rebuttal witness (Tr. pp. 886-92). The witness explained in testimony that although a comparison of the May and September 2007 results showed a decrease in the student's standard scores, the decrease in the

standard scores did not indicate that that the student experienced substantial regression because the student's performance in both May and September 2007 remained within the same standard deviation and were both within the normal range (Tr. pp. 887-92; see Parent Ex. 42).

Petitioner called the student's sixth grade regular education social studies teacher to testify (Tr. pp. 346-416). She testified that petitioner's district provided summer academic support services for both special education and regular education students (Tr. p. 355). The teacher taught AIS summer services for the first time during summer 2007, and she testified that the students in the program included those referred by parents who believed that their children needed "academic support over the summer" (Tr. pp. 355-56, 367, 379). The teacher testified that she understood AIS summer services as a "program that [was] available for students who we [felt] would need to continue their academics over the summer so that they continue that whole process. And . . . if it's a kid who's a little bit weaker in certain areas, this would only be a benefit for them" (Tr. p. 368).

Petitioner's CSE Chairperson who attended the June 15, 2007 CSE meeting also testified as a witness on behalf of petitioner (Tr. pp. 604-724). She testified that during summer 2005, petitioner's CSE offered, and the student received, remedial reading two times per week for 60 minutes per session for eight weeks (Tr. p. 606). She defined remedial reading as "reading that is provided to a student typically in a one-to-one setting by a certified reading teacher" (id.). The Chairperson noted that the summer 2005 services were not provided to student as an ESY service because she did not qualify for ESY services, and she further explained that "[the district] provide[d] a lot of reading remediation to a lot of students in the school district" (Tr. pp. 606-07). During the summer, petitioner's district "typically" provided reading remediation to approximately 60-80 students and approximately 75 percent of those students were special education students (Tr. pp. 606-07, 646). None of the students who received reading remediation received ESY services, but there were students in petitioner's district who qualified for, and received, ESY services (Tr. p. 607). She continued to explain that petitioner's district provided summer remediation services based upon teacher recommendation and/or demonstrated need of the student and that petitioner's district provided ESY services based upon evidence of substantial regression during school vacations or school breaks (Tr. pp. 636-37).

The witness also explained that during summer 2007, she had students "who received one-to-one [reading] remediation for eight weeks" through a certified reading teacher and that those services were similar to the summer services offered to the student for summer 2007 (Tr. pp. 646-47). The Chairperson noted that "[w]e provide a reasonable amount of remediation for students during the summer. We are very lucky that our board supports that" (Tr. pp. 651-52). She testified that petitioner's district offered summer services to students because they "could use some extra assistance during the summer" (Tr. p. 653).

The impartial hearing officer rendered a decision on November 11, 2007, which found that the student did not qualify for ESY services during summer 2007, and further, that the summer services offered by petitioner were not appropriate (IHO Decision at pp. 10-13). The impartial hearing officer determined that the summer services were not appropriate because respondents "proved the services would be uncertain at best and possibly unavailable," and petitioner's CSE Chairperson "supplied no details on who would have secured the tutor, what coordination there would have been to build upon the student's successes at [the private school] and what methodology or goals from the IEP would be implemented" (id. at p. 12). In addition, the impartial

hearing officer noted in her decision that "[o]nce the CSE determined that the student, while not entitled to ESY services under the regulations, did require some extra academic assistance during the summer months and the CSE incorporated that decision into the IEP, the District cannot disclaim any further responsibility" (*id.* at p. 13). As a remedy, the impartial hearing officer declined to award compensatory educational services, but noted that additional services may be a proper remedy for "improperly denied" services (*id.* at pp. 13-14). The impartial hearing officer noted that although respondents requested 90 hours of compensatory education services as a remedy, the proper remedy was "to provide the numerical equivalent of the 24 hours of 1:1 remedial instruction recommended for the summer of 2007" and thus, directed petitioner to provide 24 hours of 1:1 reading tutoring as additional services to remedy petitioner's failure to offer appropriate summer services (*id.* at pp. 14-15).

Petitioner appeals those portions of the impartial hearing officer's decision which determined that the summer services offered by petitioner were not appropriate and directed petitioner to provide 24 hours of 1:1 reading tutoring as additional services. Petitioner asserts that after finding that the student was not eligible for ESY services during summer 2007, the impartial hearing officer's inquiry was at an end, and thus, she improperly analyzed whether the summer services offered by petitioner were appropriate. In addition, petitioner asserts that the impartial hearing officer's award of additional services was contrary to law.

Respondents contend in their answer that petitioner improperly characterizes the issue raised in the due process complaint notice as solely that of the student's eligibility for ESY services. Respondents allege throughout their answer that the due process complaint notice raised the issue of petitioner's failure to provide services recommended by petitioner's CSE and included in the student's June 2007 IEP. Through the affirmative defenses asserted, respondents seek to dismiss the petition alleging that petitioner failed to file a complete and accurate hearing record, and request that a State Review Officer dismiss the petition and uphold the impartial hearing officer's decision.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP 20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).³

³ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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 persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Initially, I note that neither party appeals from the impartial hearing officer's determination that the student did not qualify for ESY services for summer 2007 (IHO Decision at pp. 10-11). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determination that the student did not qualify for ESY services for summer 2007 is final and binding upon the parties (Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

I turn now to petitioner's contentions that the impartial hearing officer erred when she determined that the summer services offered by petitioner were not appropriate and directed petitioner to provide 24 hours of 1:1 reading tutoring as additional service. The hearing record indicates that although petitioner's CSE determined that the student was not eligible for ESY services during summer 2007, the CSE approved reading remediation as an AIS summer service and noted in the student's June 2007 IEP that the student was "approved for Reading Remediation as an Academic Intervention Service 3 hours a week for 8 weeks during the summer of 2007" (Dist. Ex. W at p. 8). As noted in her decision, the impartial hearing officer proceeded to analyze the appropriateness of the AIS summer services mentioned in the student's June IEP because she determined that petitioner's CSE found that the student "did require some extra academic assistance during the summer months" and that "decision" was "incorporated" into the student's IEP (IHO Decision at pp. 10-13). The impartial hearing officer noted that although petitioner argued that the summer services offered to the student were contained within the "comments" section of the IEP, she concluded that "if it is on the IEP it must be provided or the student has the benefits and the remedies incorporated in the IDEA and case law" (*id.* at p. 13).

A review of the student's June IEP indicates that while it may be technically accurate to state that the CSE placed the approval of AIS summer services in the student's IEP, it must be noted that the CSE placed it within the section of the IEP that detailed the CSE meeting minutes and did not place it within any other required sections of the IEP⁴, including the following sections: Recommended Classification and Placement Information; Recommended Special Education Programs and Services; Program Modifications/Accommodations/Supplementary Aids and Services; Assistive Technology Devices/Services; Support for School Personnel on Behalf of Student; Testing Accommodations; Participation in State and Local Assessments; Removal from the General Education Environment; Present Levels of Academic Achievement, Functional Performance, and Individual Needs; How the Student's Disability Affects Involvement and Progress in the General Education Curriculum; Academic Achievement, Functional Performance and Learning Characteristics; Social Development; Physical Development; or Management Needs (Dist. Ex. W at pp. 1-4, 6-7; compare Dist. Ex. R at pp. 1-7, with Dist. Ex. W at pp. 7-9). In

⁴ See 34 C.F.R. § 300.320; 8 NYCRR 200.4(d)(2).

addition, AIS services are not generally considered specialized instruction or special education.⁵ AIS services are regular education services, not special education services, which provide "additional instruction"⁶ that supplements regular classroom instruction (see 8 NYCRR 100.1[g]).

Therefore, assuming, arguendo, and without making a determination regarding whether petitioner was obligated to provide the AIS summer services based upon the unique facts and circumstances of this case, I do not agree with the impartial hearing officer's ultimate conclusion that the AIS summer services were not appropriate because respondents "proved the services would be uncertain at best and possibly unavailable," and petitioner's CSE Chairperson "supplied no details on who would have secured the tutor, what coordination there would have been to build upon the student's successes at [the private school] and what methodology or goals from the IEP would be implemented" (IHO Decision at p. 12). In accord with Schaffer, respondents, as the party challenging the June IEP and seeking relief, bore the burden of persuasion in this administrative hearing (see Schaffer, 546 U.S. at 59-62). I find that respondents did not sustain their burden to establish that the AIS summer services were not appropriate. Significantly, the hearing record does not contain sufficient evidence to support the impartial hearing officer's conclusion that the "services would be uncertain at best and possibly unavailable" (id.). To the contrary, the hearing record indicates that petitioner's district, during summer 2007, provided a "one-to-one [reading] remediation" program for eight weeks through a certified reading teacher, and that those services were similar to the summer services offered to the student for summer 2007 (Tr. pp. 646-47). In addition, the hearing record demonstrates that petitioner's district has historically offered and provided summer services to both its regular education and special education students (Tr. p. 355). The student's mother testified that petitioner has offered, and provided, summer services throughout her daughter's entire educational history (Tr. pp. 789-90, 792, 794, 854-55).

Similarly, I note that the hearing record does not contain sufficient evidence to support respondents' assertion that petitioner failed to provide the AIS summer services approved by petitioner's CSE and identified on the student's June 2007 IEP. The hearing record simply does not offer sufficient evidence to discern why respondents' daughter did not attend the AIS summer services offered by petitioner, other than the student's own statement during the resolution session from which it can be reasonably inferred that the student was not "in New York" during summer

⁵ Academic intervention services means "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards as defined in subdivision (t) of this section and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance; provided that such services shall not include . . . special education services and programs as defined in Education law section 4401(1) and (2). . . . Academic intervention services shall be made available to students with disabilities on the same basis as nondisabled students, provided, however, that such services shall be provided to the extent consistent with the individualized education program developed for such student pursuant to section 4402 of the Education Law" (8 NYCRR 100.1[g]).

⁶ According to a guidance memorandum, "additional instruction" means the "provision of extra time for focused instruction and/or increased student-teacher instructional contact time designed to help students achieve the learning standards in the standards areas requiring AIS" (www.emsc.nysed.gov/docs/AISQAweb.pdf; see also Appeal of a Student with a Disability, 46 Ed. Dep't Rep. ___, Decision No. 15,548 [Mar. 19, 2007]).

2007. I find that the hearing record contains sufficient evidence to conclude that petitioner offered, and made available within the district, the AIS summer services referred to in the student's June IEP during summer 2007 and respondents did not avail themselves of the services offered. Thus, I cannot conclude, as the impartial hearing officer did, that the AIS summer services were neither available nor appropriate based upon these asserted rationale.

In addition to the above, I must also note that even if respondents had sustained their burden to establish that petitioner failed to offer the AIS summer services, I would not find that the failure to provide the services resulted in a denial of a FAPE for the 2006-07 school year. According to the hearing record, the student's private school teachers' reported at the June 15, 2007 CSE meeting that the student had demonstrated improvement and progress during the normal 10-month school year in all of her areas of weakness, including reading (Dist. Ex. W at pp. 1-4, 7-8, 11; Parent Exs. 6 at pp. 4-10; 9 at pp. 19-32). Moreover, without any type of formal summer services program during summer 2007, the student's reading skills, when comparing the results of the GORT administered to the student in May 2007 and, again, in September 2007, remained within the normal range (Tr. pp. 873, 887-92; Parent Ex. 42). As noted, a comparison of the student's academic testing in March 2006 and May 2007 demonstrated improvement and progress in several areas, including word attack, word identification, reading rate, reading accuracy, and reading fluency (Dist. Ex. W at p. 8; Parent Exs. 6 at p. 2; 9 at pp. 6-8). Similarly, a comparison of the student's academic testing in September and October 2006 with testing performed in April 2007, demonstrated improvement and progress in the other areas, such as reading vocabulary, reading comprehension, math problem solving, math procedures, and spelling (Parent Exs. 6 at p. 2; 9 at pp. 6-8).

I now turn to petitioner's contention that the impartial hearing officer erroneously awarded 24 hours of 1:1 remedial instruction as additional services (IHO Decision at pp. 13-15). It is well settled that an award of either compensatory educational services or additional services must be predicated upon a finding that the student was denied a FAPE. Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]).

While compensatory education is a remedy available to students who are no longer eligible for instruction, additional services have been awarded 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 (Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047; see also Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). In general, the award of additional educational services for a student who is still eligible for instruction requires a finding that the student has been denied a

FAPE (Application of a Child with a Disability, Appeal No. 07-109; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047).

In this case, the impartial hearing officer did not determine that the student was denied a FAPE. Thus, absent a determination by the impartial hearing officer that there was a denial of a FAPE, there was no basis upon which to predicate an award of additional services. Therefore, the impartial hearing officer's award of 24 hours of 1:1 reading tutoring as additional services must be annulled.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it determined that the AIS summer services offered to the student for summer 2007 were not appropriate and directed petitioner to provide 24 hours of 1:1 reading tutoring as additional services.

Dated: **Albany, New York**
 February 8, 2008

PAUL F. KELLY
STATE REVIEW OFFICER