The University of the State of New York

The State Education Department
State Review Officer
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No. 09-044

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

Appearances:
Friedman & Moses, LLP, attorneys for petitioner, Elisa Hyman, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer relating to the student's educational program and services for the 2005-06, 2006-07, 2007-08, and 2008-09 school years. The appeal must be sustained in part.

During the course of the impartial hearing, the student turned 17 and began receiving home instruction pursuant to an interim order of the impartial hearing officer (Parent Ex. A at p. 1; IHO Interim Decision at p. 3). The student had received a diagnosis of attention deficit hyperactivity disorder (ADHD), combined type, and was previously described as being compliant in taking medication for the diagnosis (Parent Ex. FF at p. 1). The student was receiving psychiatric treatment and was reported to have asthma and wear glasses (Parent Exs. C at p. 1; X at p. 1). The hearing record also reflects that the student "may be suffering from long term sleep deprivation" (Parent Ex. JJ at p. 2). The student's cognitive functioning is reflected by a full scale IQ score in the "[e]xtremely [l]ow" range (Parent Ex. Y at p. 4). She has deficits in organizing information, auditory sequential processing, short-term auditory memory, visual scanning and attention, vocabulary, long-term memory, and forming concepts with verbal information (id. at p. 2). Academic testing performed in July 2008 indicated that the student's performance ranged in reading skills from a high of grade 6.1 in passage comprehension to a low of grade 3.9 in word attack and was at a 4.7 grade level in math calculations (id. at p. 5). The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (Parent Exs. C at p. 1; D at p. 1; F at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

According to the parent, the student attended kindergarten and first grade at a public school and was first referred for a special education evaluation in either first or second grade (Tr. pp. 127-28). The parent reported that the student initially received special education services in a resource room setting, but that she was placed in a "smaller special education environment" in public school until sixth grade after the student's second grade teacher expressed that the student "needed more in depth help" (Tr. pp. 129-30). The student then attended sixth through eighth grade in a public school (Tr. p. 131). The hearing record reflects that in eighth grade the student was placed in a 12:1 "[s]pecial class in a community school" (id.; Parent Ex. F at p. 1).[1]

On October 17, 2005, when the student was in eighth grade, a parent interview was conducted by a district social worker as part of the Committee on Special Education (CSE) triennial evaluation of the student (Parent Ex. HH at p. 1). The report from the interview reflected that at the time of the interview the student was 13 years old, attending a 12:1+1 special education class and receiving counseling services of one 30-minute individual session per week (id.). The report of the interview reflected that the parent thought that the student's performance had improved, but that the student was unable to comprehend or explain what she read and that the student's main difficulty was in math (id. at pp. 1-2). The interview also reflected that the parent was satisfied with the student's current 12:1+1 special education program, but requested that the student be transferred to another class because of an altercation with other students (id. at p. 2). The parent reportedly indicated that the student was a "very lovable and likable child" who was very "attached" to the parent, although she also reported that the student refused to do any chores at home, had an "attitude," had difficulty making friends, and "act[ed] up when [the] parent ha[d] company" (id.). The parent indicated that the student had no behavior issues in the community, but did have "difficulties maintaining friends" and that the student was receiving counseling services twice per month at a "child adolescence clinic" (id.).

On October 18, 2005, also as part of the triennial evaluation, the student underwent a district psychoeducational evaluation (Parent Ex. GG at p. 1). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a full scale IQ score of 79 (upper end of the borderline range) and administration of the Wechsler Individual Achievement Test-II (WIAT-II) yielded composite scores of 72 in reading and 44 in mathematics (id. at p. 2). The report indicated that the student presented with age appropriate behavior and good interpersonal skills, demonstrated reasonably good tolerance for stress, and did not appear to perceive her environment as hostile or unfriendly (id. at pp. 2-3).

On November 2, 2005, when the student was in eighth grade, the CSE met for the student's triennial review and to develop the student's individualized education program (IEP) for the 2005-06 school year (Parent Ex. F at p. 1). The meeting attendees included the school psychologist, a district special education teacher, the student, and the parent (id. at p. 2). The resultant IEP reflected that the student was eligible for programs and services as a student with a learning disability and recommended that the student continue to be placed in a special class in a community school with a 12:1 student to teacher ratio and receive counseling services of one 30-minute

[1] I note that although the student's November 2, 2005 individualized education program (IEP) stated that the staffing ratio for the student's placement was 12:1, an October 17, 2005 social history update stated that the student's placement was in a class with a 12:1+1 staffing ratio (compare Parent Ex. F at p. 1, with Parent Ex. HH at pp. 1-2).

individual session per week (id. at pp. 1, 11).[2] In the area of academic performance and learning characteristics, the IEP stated that the student was administered the WIAT-II and received composite scores of 72 in reading (5th percentile) and 44 in mathematics (<0.1 percentile) (id. at p. 3). The student's instructional levels as reflected in the November 2, 2005 IEP ranged from a grade level of 1.6 to 5.0 in reading subtests and 2.2 to 2.8 in math subtests (id.). In the area of social-emotional performance, the student was described as having age appropriate behavior and good interpersonal skills, although she may experience "some anxiety and frustration when faced with challenging tasks" (id. at p. 4). The IEP included two goals with corresponding short-term objectives that addressed the student's reading comprehension and two goals with corresponding short-term objectives that addressed the student's writing skills, all at the seventh grade level (id. at pp. 7-8). There were no goals addressing the student's math needs. The student's social-emotional needs were addressed by one counseling goal that said "[t]est and re-evaluate so student can be placed in general education" (id. at p. 6). The IEP recommended testing accommodations which included extended time by 50 percent, separate location in a group of no more than 12, questions read and re-read aloud except on reading tests, directions read and re-read aloud, and use of arithmetic tables and charts, and a calculator (id. at p. 11). The IEP also indicated that the student's promotion criteria was modified and that the student would be required to achieve 60 percent of the English language arts tests and mathematics standards on the sixth grade level based on portfolios, teacher reports, and other tests (id.).

On November 2, 2005, the district issued a Final Notice of Recommendation (FNR) reflecting that, for the 2005-06 school year, the student would remain in a special class in a community school with related services of one individual counseling session per week (Parent Ex. II at p. 1).

In a report dated November 10, 2005, a private psychologist summarized an evaluation of the student which took place on three days between September 22, 2005 and November 3, 2005 (Parent Ex. FF at p. 1). The student had been referred for psychological testing by her therapist to "assess the influence of her intellectual capacity and emotional functioning" (id.). The student had reportedly been having behavioral difficulties at home, struggling in school academically and socially, and had previously received a diagnosis of ADHD, combined type (id.). The report indicated that the administration of the Weschler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 68; however, the student's performance on perceptual reasoning tasks was significantly lower than on verbal comprehension tasks (id. at p. 2). The student also reportedly struggled with processing information quickly, organization, and focusing her attention (id. at p. 5). The report indicated that the student's cognitive functioning adversely affected her academic and interpersonal functioning (id.). Administration of the Woodcock-Johnson III - Tests of Achievement (WJ-III ACH) yielded standard scores ranging between 63 and 78 across reading and math subtests, with a relative strength in mathematical reasoning skills and reading comprehension and the weakest performance in mathematical calculation skills and broad math (id. at p. 7).

According to the parent, for the 2006-07 school year, the student began attending a district high school in the ninth grade in September 2006, initially in a 15:1 class without an IEP for that

[2] See footnote 1, supra.

school year (Tr. pp. 131-32; Parent Ex. O).[3] On November 14, 2006, the CSE met to develop the student's IEP for the 2006-07 school year and recommended a ninth grade general education classroom with special education teacher support services (SETSS) three times per week in an 8:1 setting with related services of one 30-minute individual counseling session per week (Parent Ex. D at pp. 1, 5).[4] The CSE also recommended continuation of the student's 2005-06 IEP testing accommodations and indicated standard promotion criteria (id. at p. 6). In the area of academic performance and learning characteristics, the student was described as performing slightly below grade level in reading comprehension, decoding and mathematics, with a weakened ability to construct coherent writing, and a deficit in some basic mathematical concepts and skills (id. at p. 2). The IEP indicated that the student's present levels of performance were based on a November 9, 2006 "teacher evaluation" and reflected that her instructional levels in reading ranged from a 6.9 grade level to an 8.5 grade level and that her instructional levels in math ranged from a 4.5 grade level to a 4.7 grade level (id.). The IEP included three math goals with corresponding short-term objectives (id. at pp. 4, 8). It did not contain any reading or counseling goals or objectives (id. at pp. 1-8).

According to the parent, the recommended district school for the 2006-07 school year did not have a 15:1 special education classroom (Tr. pp. 133-34). The parent testified that she was told that the district would try the student in general education with SETSS and if the student "failed at any given point in time" it would place her back in the 15:1 special class setting (Tr. p. 134). The parent further testified that the student did not receive any SETSS in the general education setting during the 2006-07 school year (Tr. p. 135).

On January 22, 2007, the student's ninth grade special education teacher prepared a teacher questionnaire which rated the student's abilities in four areas when compared to students of the same age without impairments (Parent Ex. G at pp. 1-8). The special education teacher's responses reflected that the student's functional levels indicated a "slight" to "obvious problem" in acquiring and using information, "no problem" to a "slight problem" in attending and completing tasks, "no problem" to an "obvious problem" in interacting with others, and "no problem" to a "slight problem" in caring for herself (id. at pp. 2-6). The teacher also completed a questionnaire on school performance on the same date, which reflected that she rated the student's ability as "minimally impaired" with regard to participating at an age appropriate level socially, communicating both orally and in writing, demonstrating age appropriate intellectual, gross and fine motor skills, completing tasks in a timely manner, and demonstrating appropriate frustration

[3] Although the parent testified that the student began attending high school in a 15:1 class, she also testified that at the time of the CSE meeting on November 14, 2006, the high school did not have the special education class "that they needed" (Tr. pp. 133-34). Therefore, the hearing record is unclear what class the student was attending from the beginning of the 2006-07 school year until she was moved to a general education class as per her November 14, 2006 IEP, and it is unclear as to the date she actually began attending the general education class (id.).

[4] Attendees of the November 14, 2006 CSE meeting are not reflected on the November 14, 2006 IEP contained in the hearing record (see Parent Ex. D). I note that the page numbering of November 14, 2006 IEP reflects that several pages are missing from the document, although it appears that the document in the hearing record is the entire document that was admitted into evidence at the impartial hearing (id.; IHO Amended Decision at p. 14).

tolerance behaviors (Parent Ex. CC at pp. 1-4). The special education teacher identified the student's need for immediate attention as a behavior which was not age appropriate (id. at p. 4).

The hearing record reflects that for the first two quarters of the 2006-07 school year, the student's grades were reflected in a report card which indicated the student earned a "simple average" score of 74.22 percent and her grades for the third quarter of the 2006-07 school year indicated that her "simple average" was 59.57 percent (Parent Exs. M at p. 3; N at p. 4; O). By letter dated June 8, 2007, the school principal informed the student and the parent that the student had not met the requirements necessary to be promoted to the next grade and that she would have the opportunity to make up some of her credits at summer school (Parent Ex. P). The letter stated that a decision regarding the student's promotion would be made at the end of the summer school session (id.). According to a letter from the student's social worker at a child and adolescent clinic, the student attended the summer school session (Parent Ex. Q at pp. 1, 6); however, the hearing record reflects that the student was not promoted to tenth grade for the 2007-08 school year (see Parent Exs. K at p. 1; DD; EE). The parent testified that the student "failed" academically and that her emotional state was "[l]ousy" (Tr. p. 135).

With regard to the 2007-08 school year, the parent testified that a CSE meeting to formulate a program for the student did not take place before the school year began and that she called the superintendent's office in fall 2007 and requested an IEP review and a transfer; however, no meeting was arranged (Tr. pp. 136, 138). The parent testified that during fall 2007, she also contacted the student's guidance counselor and the school principal and that the process of attempting to get the review scheduled for the student went "[o]n and on and on" (Tr. pp. 136-38). The hearing record reflects that the student's first quarter progress report for the 2007-08 school year dated October 25, 2007, indicated that she was passing only physical education and music (Parent Ex. L at p. 1). A first term 2007-08 attendance report indicated that the student's attendance had declined and that at some point, the principal of the school contacted the Administration for Children's Services (ACS) regarding the fact that the student had missed 12 days of school (Tr. p. 149; Parent Ex. I).[5] The parent testified that in November 2007, an ACS worker accompanied her to the school to find out why a meeting had not been set up to review the student's IEP and that they were told that the school had not known the student long enough to review anything or evaluate her (Tr. pp. 149-51). Although the hearing record reflects that the school issued a CSE meeting notice on December 6, 2007 for a December 10, 2007 CSE meeting, this meeting was cancelled, and no 2007-08 IEP was ever developed for the student (Tr. p. 193; Parent Ex. E).

A second quarter progress report for the 2007-08 school year dated December 14, 2007 reflected that the student was failing all of her classes except physical education and listed the student's missing assignments for each class (Parent Ex. K). The report also indicated that the student had been absent eleven days and tardy three days during the second quarter (id. at pp. 4-5). A school attendance record reflected that the student was absent 44 out of 84 days from September 4, 2007 through January 17, 2008 (Parent Ex. I).

In a series of letters dated from December 2007 to January 2008 addressed "To Whom it May Concern," the student's private social worker and psychiatrist opined that the student's

[5] The hearing record reflects that ACS subsequently determined the case was unfounded (Parent Ex. A at p. 4).

educational needs were not being met and they recommended home instruction, suggested that the CSE should meet immediately to review the student's program as the student was "deeply affected by her failure in school and [was] asking for help," and stated that a transfer of school might be helpful (Parent Ex. Q at pp. 1, 2, 6). By letter dated January 17, 2008, the assistant principal of the "Home Instruction Schools" informed the parent that after a review of the documentation provided, the Home Instruction Schools' psychiatrist had determined that home instruction was not warranted for the student at that time (Parent Ex. II at p. 3).[6]

In two letters dated January 2008, the principal of the district high school informed the parent that the student was not meeting the promotion standards for ninth grade with regard to the required accumulation of credits, completion of coursework/exams and required attendance, and that the student was in "serious danger" of having to repeat the ninth grade a third time (Parent Exs. DD; EE). In the letters, the principal invited the parent to attend a prescheduled meeting to discuss the student's progress with school personnel to determine what was needed to assist the student in meeting promotion standards or to make an appointment to do the same (id.).

The parent testified that she contacted the school psychologist in January 2008 to explain her efforts to schedule a review for the student and that she again requested an IEP review for the 2007-08 school year; however, the hearing record indicates that the meeting did not take place until August 2008 (Tr. pp. 151-52). The parent further reported that during the 2007-08 school year, while waiting for an IEP review meeting, the student remained at home most of the time (Tr. p. 152).

A "Notice of Social History Meeting" dated April 14, 2008 was sent to the parent from the district (Parent Ex. Z). The notice informed the parent that the student was referred to the CSE for a review of her need for special education services and requested that the parent contact the district to schedule a meeting to conduct a social history update (id.).

In a letter dated June 23, 2008, the district high school notified the parent of a mandatory summer school session that the student was required to complete in order to be promoted to tenth grade (Parent Ex. AA). The letter indicated that the student was required to complete English, science, math and social studies (id.).

By due process complaint notice dated June 25, 2008, the parent, though her attorney, requested an impartial hearing pursuant to the Individuals with Disabilities Education Act (IDEA) and section 504 of the Rehabilitation Act (section 504) alleging that the district failed to provide the student with a free appropriate public education (FAPE) for the 2005-06, 2006-07, and 2007-08 school years (Parent Ex. A at p. 1). With respect to 2005-06 school year, the parent alleged, among other things, that: (1) the evaluations completed by the district were inadequate and did not comply with the standards of the IDEA or New York State law, and that the re-evaluation process did not comport with federal and State law; (2) it was unclear whether an independent evaluation obtained by the parent was considered by the CSE; (3) the IEP team was not properly constituted; (4) the IEP was not in place at the beginning of the school year; (5) the goals were vague, not measurable, insufficient, and not individually tailored to address the student's disability;

[6] The parent testified that she provided the "Office of Home Instruction" with two letters from the student's psychiatrist and social worker regarding the student's need for home instruction (Tr. pp. 187, 191).

(6) the IEP did not accurately describe the student's disability and strengths; (7) the IEP recommendations were not individualized and were predetermined; (8) the IEP recommended that the student was to meet 60 percent of the sixth grade standards; (9) no assistive technology was recommended; (10) the parent was not provided adequate prior notice and procedural due process rights and was not meaningfully included in the process; and (11) research based methodologies were not used (id. at p. 2).

With respect to the 2006-07 school year, the parent alleged, among other things, that: (1) the district improperly made a substantial change in the student's placement without re-evaluating her; (2) the district's evaluations were inadequate and the re-evaluation process did not comport with federal and State law; (3) the IEP team was not properly constituted as only a social worker and an education evaluator attended the CSE meeting with the student and the parent; (4) the IEP was not in place at the beginning of the school year; (5) the goals were vague, not measurable, insufficient, and not individually tailored to address the student's disability; (6) the IEP did not accurately describe the student's disability and strengths; (7) the recommendations on the IEP were not individualized and were predetermined; (8) the student was not receiving all of the IEP mandated services; (9) no assistive technology was recommended; (10) the parent was not provided adequate prior notice and procedural due process rights and was not meaningfully included in the process; and (11) the placement process did not comport with federal or State law (Parent Ex. A at pp. 2-3).

With respect to the 2007-08 school year, the parent alleged, among other things, that the home instruction office unilaterally rejected the parent's request for home instruction without a determination by the CSE or section 504 team as to whether the student would benefit from home instruction; the parent was informed that her request for a transfer of the student might be granted, but with certain conditions that the parent felt would be detrimental to the student; and a re-evaluation requested by the parent had not been completed (Parent Ex. A at p. 4).

The parent alleged that the two-year statute of limitations did not apply to bar the parent's IDEA claims prior to June 2006 because the parent was not provided with adequate notice or procedural due process and the exceptions to the two-year statute of limitations applied (Parent Ex. A. at p. 4). The parent further alleged that the due process complaint notice was also filed under section 504, which has a three-year statute of limitations (id.). For relief, the parent requested that the impartial hearing officer find and order that: (1) the district failed to provide the student with a FAPE for the 2005-06, 2006-07, and 2007-08 school years; (2) an interim plan for home instruction should be offered until an appropriate IEP and placement can be found; (3) the parent is entitled to a "Nickerson letter;"[7] (4) the operation of home instruction services violated the IDEA and section 504; (5) the parent is entitled to private evaluations at public expense and any and all further evaluations deemed necessary and appropriate by the impartial hearing officer,

[7] A "Nickerson letter" is a letter from the district to a parent authorizing the parent to immediately place the student in an appropriate special education program in any State-approved private school, at no cost to the parent (see Jose P. v. Ambach, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982], 553 IDELR 298). The remedy provided by the Jose P. decision is intended to address the situation in which a student has not been evaluated or placed in a timely manner (id.; see Application of a Student with a Disability, Appeal No. 08-020; Application of a Child with a Disability, Appeal No. 06-128; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

the parent, or private evaluators; (6) the CSE must reconvene upon completion of the private evaluations and offer the student a FAPE with an IEP created pursuant to the requirements of federal and State law; (7) the student should receive equitable additional services to compensate for the failure to provide the student with a FAPE and the lack of services necessary to try to achieve the student's transition goals; (8) the student is entitled to math, reading, and writing tutoring services that will incorporate multisensory, research based methodologies and 1:1 instruction; (9) the student is entitled to adequate transition services in the form of additional instruction and related services; and (10) the call to ACS was not legally warranted given the circumstances (id. at pp. 4-5).

In a letter dated June 2008, the district informed the parent that the student was eligible to participate in the 2008-09 "Progress Report Transfer" (PRT) program and had the option to apply to transfer to a higher performing school (Parent Ex. BB).[8]

By letter dated July 2008, the district responded to an application by the parent to transfer the student to a different school under the "No Child Left Behind Public School Choice" program, informing the parent that the student was not eligible to participate in the transfer program (Parent Ex. S).

The student's private psychiatrist addressed a letter dated July 3, 2008 to the "Department of Home Instruction," stating that the student needed "home based instruction while the school system is finding a new school placement" (Parent Ex. Q at p. 4). The student's psychiatrist, in another letter dated July 3, 2008 and addressed "To Whom It May Concern," requested copies of all evaluations conducted by the district regarding the student since she had begun receiving special education services (id. at p. 3).

In preparation for the student's triennial review, a social history update of the student was completed by a district social worker in July 2008 with information provided by both the student and the parent (Parent Ex. X at pp. 1-2). According to the social history update, the student got along well with family members, but had difficulty making friends, had low self-esteem, and was very attached to the parent (id. at p. 1). The social history update reflected that the student was currently seeing a private therapist and receiving psychiatric treatment (id.). Regarding the student's education, the social history update reflected that the student was currently repeating ninth grade for the third time and was receiving special education teacher services with mandated counseling (id.). At the time of the interview, the parent indicated that she was not pleased with the current program or school and that in the past, when the student was enrolled in a smaller class, the student was able to manage and pass her classes (id. at p. 2). The social history update reflected that during the interview with the parent, due process rights and mediation were discussed and the parent revealed that she had been in contact with an advocate group for parents (id.). The parent stated she would like the smaller class to be reinstated for the student as well as tutoring and possibly private school (id.).

[8] According to the hearing record, the PRT program allows a student who is enrolled in a school that receives an "F" grade on the "Progress Report," or a student who is enrolled in a school that is phasing out or closing, to apply to transfer to a higher performing school (Parent Ex. BB at p. 1).

On July 23, 2008, the district conducted a psychoeducational triennial evaluation of the student (Parent Ex. Y at p. 1). Administration of the WISC-IV yielded composite scores in the borderline range for verbal comprehension and working memory, in the extremely low range for perceptual reasoning and processing speed, and a full scale IQ score which also fell in the extremely low range (id. at p. 4). Administration of the WJ-III yielded percentile ranks of 14 in word attack (low average range), 19 in passage comprehension (low average range), 3 in calculations (extremely low range), and 6 in reading fluency (borderline range) (id. at p. 5). Corresponding grade equivalents ranged from a high of grade 6.1 in passage comprehension to a low of grade 3.9 in word attack (id.).

The student underwent a private academic evaluation at the Huntington Learning Center (HLC) on July 30, 2008 (Parent Ex. B at p. 1). The evaluation report included the results of the administration of seven tests which revealed the student had significant deficits in all areas tested (id. at pp. 1-3). Administration of the Slosson Visual Motor Performance Test (S-VMPT) yielded a standard score of 36 and a rating of "poor" (id. at p. 1). Administration of the Rosner's Test of Auditory Perception yielded a grade level of one (id.). The student's phonics skills were evaluated using the "Chall Phonetic Analysis" test, which revealed that the student had mastered phonetic skills ranging from the kindergarten level to the 3.9 grade level, with the majority of skills falling around the second grade level (id.).[9] However, administration of the Slosson Oral Reading Test revealed that the student's oral reading skills were at a 5.1 grade level and reflected a rating of "poor" (id.). The administration of the Informal Reading Inventory (IRI) reflected ratings primarily at the "poor" level (id.). The student's vocabulary and writing were assessed using subtests of the "CAT5," which indicated that the student's performance reflected a grade equivalent of 5.6, a percentile rank of 13, a rating of "very poor" in vocabulary, and a rating of "poor" in writing (id. at p. 2).[10] The Huntington Math Placement Exam assessed the student's performance on a variety of math skills and indicated that the student's expected grade level on each skill was between the 1.5 and 6.7 grade level (id. at pp. 2-3).

On August 11, 2008, the CSE convened to review the student's educational program for the 2008-09 school year (Parent Ex. C at p. 1). Meeting attendees included a district representative, a school psychologist, a regular education teacher, a special education teacher, the student, and the parent (id. at p. 2). The resulting IEP recommended placement in a ten-month 15:1 special class with related services of one 30-minute individual counseling session per week (id. at pp. 1, 11). The present levels of academic performance and learning characteristics on the August 11, 2008 IEP reflected the results of the July 23, 2008 administration of the WISC-IV and indicated that the student's verbal comprehension and working memory were in the borderline range and the student's perceptual reasoning, processing speed and full scale IQ were in the extremely low range (id. at p. 3; Parent Ex. Y at p. 4). The IEP also reflected the results of the July 23, 2008 administration of the WJ-III and indicated that the student's instructional level in reading ranged between the 3.9 grade level and the 6.1 grade level, and indicated that her instructional level in math was at a 4.7 grade level (Parent Exs. C at p. 3; Y at p. 5). The student's social-emotional present level of performance as noted on the IEP reflected that the student was receiving district

[9] The "Chall Phonetic Analysis" test is presumed to refer to the Roswell-Chall Diagnostic Reading Test of Word Analysis Skills.

[10] The "CAT5" is presumed to refer to the California Achievement Test, Fifth Edition.

mandated counseling services as well as outside counseling services, and that she was prescribed psychotropic medication to address her emotional needs (Parent Ex. C at p. 5). The IEP further reflected that the student was repeating ninth grade for the third time (id.). The IEP included one annual goal to address the student's reading skills at a seventh grade level with four corresponding short-term objectives and one annual goal to address the student's math skills at an unspecified grade level with four corresponding short-term objectives (id. at p. 7). There were no counseling goals included in the IEP (id. at pp. 1-13). The IEP included a transition plan with four long-term adult transition outcomes which indicated that the student would integrate into the community, attend a vocational training program, live independently with minimum support, and obtain services from varied employment resources (id. at p. 12). Transition services addressing instructional activities, community integration, post high school, and independent living were also included in the IEP (id. at pp. 12-13). The IEP reflected that the CSE considered a collaborative team teaching (CTT) setting and a special class in a specialized school, but deemed both settings inappropriate to meet the student's needs (id. at p. 10).

Also on August 11, 2008, the district issued a "Final Notice of Change of Program/Service Category" letter informing the parent that as a result of the August 11, 2008 CSE meeting, the student's service category had been changed to "special class 15:1;" however, it did not include a specific school site (Parent Ex. U at p. 1).

The parent was issued an admission letter from the 2008-09 PRT program stating that the student's transfer to a different district high school was confirmed and that the student was eligible for a half fare metro card for transportation (Parent Ex. T).[11] However, the hearing record reflects that when the parent went to register the student at the new school, she was told that there were no special education classes available at that school for the student, and therefore, the student had not been receiving any special education services during the 2008-09 school year as of the start of the impartial hearing in this matter (Parent Ex. MM at p. 4).

An impartial hearing convened for five days from September 22, 2008 until February 2, 2009. The district did not call any witnesses or submit any documents into evidence. The parent called four witnesses, including the student and the parent, and submitted 39 documents into evidence (Tr. pp. 42, 99, 123, 230; Parent Exs. A-MM). The impartial hearing officer submitted one document into evidence (IHO Ex. I).

By a letter from her attorneys dated October 2, 2008, the parent filed an amended due process complaint notice seeking to add allegations relating to the denial of a FAPE for the 2008-09 school year (Parent Ex. MM at p. 1). The parent alleged, among other things, that the student was transferred to a new school during summer 2008, prior to a CSE meeting, because the student's prior high school was on the "failing list" (id. at p. 4). The parent stated that when she registered

[11] The parent testified that she received the letter before the August 11, 2008 CSE meeting (Tr. p. 162). Although the admission letter for the 2008-09 PRT program was unsigned and undated, the hearing record reflects that the district provided the parent with a similar form in Spanish, which was signed and dated September 3, 2008 (Parent Ex. W). The form in Spanish did not contain the student's name or specified school (id.). Furthermore, the hearing record includes a 2008-09 disposition letter, which informed the principal of the new school that the student had been enrolled in the school as per the PRT program (Parent Ex. V). Although the disposition letter is dated September 3, 2004, it is presumed that the correct date was September 3, 2008 (id.).

the student at the new school, she was told there were no classes available and, as such, the student had not been receiving any special education services (id.). The parent also alleged that the IEP created in August 2008 offered the student a 15:1 class and that the parent wanted a smaller class and more services for the student; the IEP did not adequately describe the student's range of needs; the IEP offered only a small class and counseling and contained only two goals; and the IEP changed the student's transition goal from a post-secondary institution to a vocational training program (id.). The parent alleged that the student was entitled to a Nickerson letter based on the delay in the district's offer of a placement for the 2007-08 school year and that, had the Nickerson letter been issued, it would have permitted the student to receive funding for the 2008-09 school year (id. at p. 5). The parent stated that she would like the student to receive "intensive remediation" to address the student's academic delays (id.).

In addition to the relief that the parent had requested in her original June 25, 2008 due process complaint notice, the parent requested, among other things, that the impartial hearing officer find and order: (1) a "P-3" for tutoring at an increased rate; (2) that the parent is entitled to tuition at an appropriate private school at district expense; (3) that the student is entitled to math, reading, and writing services that will incorporate a multisensory, research based approach and be provided on a 1:1 basis; (4) all costs, including transportation, necessary to use the relief requested; (5) travel training and other life and activities of daily living (ADL) skills; (5) a 12-month extended school year (ESY); and (7) three years of compensatory education beyond the age of 21 (Parent Ex. A at pp. 5-6).

In letters dated October 7, 2008 and October 13, 2008 addressed "To Whom It May Concern," the student's private psychiatrist and private social worker reiterated that the student's continued lack of a 15:1 placement was affecting her emotionally and physically such that the parent had chosen to keep the student out of school (Parent Ex. Q at pp. 5, 7).

On October 20, 2008, the impartial hearing officer issued an interim order directing the district to provide the student with three hours of home instruction per day until she received a seat in another school or until a final order was rendered (IHO Interim Decision at p. 3). The interim order also indicated that the district issued the parent a "P-3" letter on October 16, 2008 (id.).

On November 29, 2008, the parent completed the parent form of the Behavior Rating Inventory of Executive Function (BRIEF) (Parent Ex. LL at p. 2). The interpretive report of the parent's ratings of the student's executive function exhibited in her everyday behavior revealed some "areas of concern" (id.). According to the report, the student exhibited elevated scores which suggested that the student exhibited difficulty in her ability to adjust to changes in routine or task demands, modulate emotions, initiate problem solving or activity, sustain working memory, plan and organize problem-solving approaches, and monitor her own behavior (id.). The student's ability to inhibit impulsive responses and organize her environment and materials was "not described as problematic" (id.).

The student was referred by the parent's attorney for a private neuropsychological evaluation to assist with educational planning (Parent Ex. JJ at p. 1). The evaluation was conducted by a private bilingual licensed psychologist on November 29, 2008 (id.). Administration of the Wechsler Adult Intelligence Scale-III (WAIS-III) yielded a verbal IQ of 80 (low average range), a performance IQ of 74 (borderline range), and a full scale IQ of 75 (borderline range) (id. at pp.

4-5). Administration of the Woodcock-Johnson III - Tests of Cognitive Abilities (WJ-III COG) revealed the student's overall intellectual ability standard score to be in the low range (id. at p. 7). With regard to achievement skills, the student was administered a set of subtests from the WJ-III ACH which revealed the student's abilities to be at the average level in decoding skills; the low average level in reading comprehension and oral comprehension skills; the low level in spelling, reading fluency, and writing fluency; and the very low level in math calculations, problem solving skills, and math fluency (id.).

The neuropsychological evaluation also assessed the student's sensorimotor skills, attention skills, visual spatial functioning, language and phonological processing, memory skills, executive functioning, and emotional considerations (Parent Ex. JJ at pp. 9-22). Overall, the evaluation indicated that the student had marked variability in her abilities with skills ranging from very low to average levels in almost all areas of functioning (id. at p. 22). However, the evaluator opined that the "overall picture strongly suggested that despite some skills that are below age level, [the student] has the capacity and potential to dramatically improve in all areas of educational achievement and to function at age level in most" (id.). He further opined that the student's performance on the tests administered suggests "math dyscalculia" related to both working memory and spatial issues and "mixed dyslexia" related to phonemic awareness (id. at p. 23).

The private psychologist provided a list of recommendations to address the findings of his evaluation (Parent Ex. JJ at pp. 23-31). Among other things, the private psychologist recommended that the student receive evaluations in the areas of assistive technology, speech-language, central auditory processing, occupational therapy (OT), a vocational evaluation, and a sleep disorder evaluation; intensive math, reading and writing tutoring that incorporates multisensory, research based methodologies and 1:1 instruction; counseling services to address emotional difficulties which interfere with the student's academic success; possible options for "unique educational environments," which would meet the student's needs; home instruction and tutoring until such time as an appropriate program can be found; exclusion from foreign language requirements; and provision of a flexible way to make up for lost high school credits (id. at pp. 23-24).

In a decision dated February 25, 2009, an impartial hearing officer determined that the parent's claims relating to the 2005-06 school year were barred by the statute of limitations and that the district failed to meet its burden to show that it offered the student a FAPE for the 2006-07 and 2007-08 school years (IHO Decision at pp. 5, 10). The district conceded that it failed to offer the student a FAPE for the 2008-09 school year (Tr. p. 22; IHO Decision at p. 10). With respect to the 2006-07 school year, the impartial hearing officer noted that the student's placement was changed from a special class to a general education class with SETSS, despite concerns expressed by the parent (IHO Decision at p. 10). She further found that SETSS was never provided, the student did not make progress, and that the student failed many of her classes (id.). With respect to the 2007-08 school year, the impartial hearing officer noted that the district continued to send the student to the school she had attended during the 2006-07 school year despite the parent's continued concerns, that the parent's request for a transfer, a re-evaluation and home instruction were all denied, that the student was experiencing emotional difficulties as a result of school experience and, as a result, that she missed a lot of school (id.).

The impartial hearing officer determined that the student was entitled to compensatory services in the form of 400 hours at either HLC or a different agency that the parent chooses at a rate of up to $85 per hour (IHO Decision at pp. 10-12). The impartial hearing officer further ordered that the student was to continue to receive home instruction at a frequency of "3 hours per week until a place is secured for the student" (id. at pp. 11-12).[12]

The impartial hearing officer found that the parent's request for tutoring was duplicative of the award of 1:1 compensatory services and therefore declined to award it (IHO Decision at p. 11). She remanded the matter back to the CSE to develop an appropriate IEP after conducting further evaluations, including but not limited to a speech-language evaluation and an OT evaluation, to determine what extra services may be required for the student (id. at pp. 11-13). The impartial hearing officer further determined that the parent had a right to the private evaluation she had obtained and ordered the district pay the evaluating psychologist for his evaluation (id. at pp. 12-13).[13] The impartial hearing officer declined to award the student any travel expenses to and from her tutoring services, stating that there were several options available to the student (id. at p. 12). Concerning equitable considerations, the impartial hearing officer stated that the parent had reached out to the district on several occasions without success and that as such, the equities did not bar the parent from receiving relief (id. at p. 11).

The impartial hearing officer issued an amended decision dated March 3, 2009 (IHO Amended Decision at p. 13). Among other things, in the amended decision the impartial hearing officer ordered the district to pay for a metro card for the student to go to and from wherever her compensatory services take place, and she ordered that a "P-3" letter was to be awarded that would cover the duration of the 2008-09 school year (id.).[14]

This appeal ensued. The parent appeals the findings and orders of the impartial hearing officer "to the extent the decision was silent in terms of the relief requested and/or ruled against her." Specifically, the parent appeals: (1) the denial of her request for independent OT, speech-language, assistive technology, auditory processing, vocational, and sleep disorder evaluations, to the extent not covered by insurance, and the impartial hearing officer's remand back to the CSE with full discretion to conduct the evaluations sought by the parent,; (2) the denial of the extension of a Nickerson letter to cover the 2008-09 school year; (3) the denial of compensatory education for three years after the student's 21st birthday; (4) the failure of the impartial hearing officer to permit the parent to exhaust a retaliation claim; (5) the denial of her request that the district provide make-up sessions for IEP mandated related counseling services that it should have provided the student over the past three years; (6) the denial of the parent's request for travel training and

[12] The interim decision of the impartial hearing officer ordered three hours per day of home instruction as opposed to three hours per week (compare IHO Interim Decision at p. 3, with IHO Decision at pp. 11-12). Neither party raises this apparent inconsistency on appeal.

[13] The impartial hearing officer reduced the amount of the award for the private evaluation to a lower rate than what was requested by the parent (IHO Decision at pp. 12-13).

[14] I note that the parent alleges that the reference by the impartial hearing officer in her amended decision to a "P-3" is a typographical error that should read "P-1," which is another name for a Nickerson letter (Pet. ¶ 36; see Answer ¶ 21). Although it is unclear whether this is in fact a typographical error, I need not address it given my determinations herein.

transportation for the student to travel to her make-up services; (7) the ruling of the impartial hearing officer that the statute of limitations barred the parent's various claims concerning the 2005-06 school year; and (8) the denial of ESY services. The parent also requests that a State Review Officer issue a decision finding that the district's home instruction consideration process violated the IDEA and the New York State Education Law, that the district denied the student a FAPE during the 2005-06 school year, and that it was improper for the impartial hearing officer to remand the consideration of remedies to the discretion of the CSE. The parent also attaches additional evidence in the form of two affidavits to her petition.

In its answer, the district denies many of the parent's allegations and alleges that: (1) the impartial hearing officer correctly rejected claims relating to the 2005-06 school year as they are barred by the statute of limitations; (2) even if the student was denied a FAPE during the 2005-06 school year, she is not entitled to compensatory education for that period because the parent failed to demonstrate that the student was impacted by any denial of a FAPE; (3) the impartial hearing officer awarded an appropriate remedy for the denial of a FAPE during the 2006-07 and 2007-08 school years, namely 400 hours of prospective tutoring, and therefore, the student is not entitled to compensatory education beyond age 21; (4) the impartial hearing officer correctly remanded the case to the CSE to conduct evaluations, determine the student's level of need, and create an appropriate IEP for the student; (5) the impartial hearing officer correctly refused to rule on the issue of the retaliation; and (6) there is no basis in the hearing record to find that ESY services are appropriate for the student. The district also objects to the affidavits attached to the parent's petition.[15]

In a joint letter by the parties to the Office of State Review dated June 5, 2009, the parties stated that following the decision by the impartial hearing officer, the district conducted a speech-language evaluation, an OT evaluation and prepared a new IEP for the student. The May 14, 2009 IEP attached to the June 5, 2009 letter reflects that the CSE continued the student's eligibility for special education services and programs as a student with a learning disability, recommended a 12-month school year, related services of counseling and speech-language therapy, and deferred the program recommendation to the "CBST". The letter indicated that based on those documents and discussions between the parties, some issues in the matter have been fully or partially resolved. Specifically, the letter stated that the parties fully resolved the issue of ESY services and travel training for the student. The letter stated that the parties partially resolved the issue of transportation, as the student was approved for "Access-a-Ride," but that they were unable to resolve the issue of transportation should the student lose her eligibility for "Access-a-Ride" and still require accessible transportation to access her tutoring services. The letter also stated that the parties had partially resolved the issue of evaluations in that they had resolved the issue of a request for an independent OT evaluation. It does not appear from the letter that the parent's request for other evaluations has been resolved.

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

[15] It is unnecessary to address the parties' arguments relating to the affidavits attached to the petition as they relate to a matter that has been resolved between the parties.

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 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; 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 (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 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]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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 C.F.R. §§ 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; 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 accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2];

8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The impartial hearing officer's determination that the district failed to provide the student with a FAPE for the 2006-07 and 2007-08 school years is not disputed on appeal, and the district has conceded that it failed to provide the student with a FAPE for the 2008-09 school year. I will now address the remaining individual issues that are before me on appeal.

First, the parent appeals the denial of her request for independent evaluations and opposes the impartial hearing officer's remand back to the CSE so that it may conduct updated evaluations including but not limited to speech-language and OT. The June 5, 2009 joint letter from the parties indicates that the issue of an OT evaluation has been resolved. There is no indication in the letter that the issue of the remaining independent evaluations sought by the parent has been settled, despite the fact that the district conducted a speech-language evaluation of the student on April 26, 2009. I am not persuaded by the hearing record that it was improper for the impartial hearing officer to remand the matter of determining and performing necessary updated evaluations to the CSE and I decline to disturb the finding of the impartial hearing officer with respect to this matter. The parent's appeal with respect to this issue is denied.[16]

Second, the parent appeals the denial by the impartial hearing officer of the extension of a Nickerson letter and is seeking one that covers the 2008-09 school year. Although not addressed in the parties' joint letter dated June 5, 2009, the district alleges in its answer that it provided the parent with a Nickerson letter on or about March 23, 2009 for the duration of the 2008-09 school year (Answer ¶¶ 21, 52).[17] That assertion has not been disputed in a reply by the parent. Therefore, I will order that if the district has not already done so, it is to provide the parent with a Nickerson letter for the 2008-09 school year.

[16] If the parent disagrees with an evaluation obtained by the district, the parent may request an independent educational evaluation at public expense (8 NYCRR 200.5[g]).

[17] Specifically, the district alleges that it "provided Petitioner with a Nickerson Letter which can be used in the 2008/2009 and 2009/2010" school year (Answer ¶ 52).

Third, the parent appeals the denial of compensatory education and is seeking three years of educational services past the student's 21st birthday. Within the Second Circuit, compensatory education has been viewed as instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It has been awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education for a gross violation of the IDEA]; but see Newington, 546 F.3d 111, 123 [upholding an award of compensatory services for a school aged student). 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]). State Review Officers also have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Child with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory additional services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

The impartial hearing officer in this matter determined that the student was entitled to additional compensatory services in the form of 400 hours of services at HLC or a different agency of the parent's choosing (IHO Decision at pp. 10-12). The impartial hearing officer based her determination and order on the undisputed testimony of the managing director at HLC that 400 hours would be appropriate services for the student (id.; see Tr. p. 75). In response to the question of whether the director of HLC had a "recommendation as to how many hours of instruction [the student] would require to start the process of approaching grade level work," she testified that it was HLC's recommendation that the student "do 400 hours of instruction" (Tr. p. 75). The managing director further testified that she could not be 100 percent sure that the student would be able to reach grade level with 400 hours of instruction as there are "factors that may impact the accuracy of that projection," but that she believed the projection of 400 hours "to be as accurate as one could make it" (id.). I find that based on the hearing record, the impartial hearing officer properly determined the student's entitlement to additional services, as well as the number of hours of services appropriate for the student. I note that this testimony by the parent's witness is not contradicted in the hearing record. Although the parent seeks on appeal the provision of compensatory education services for the student for three years beyond age 21, I note that the student was 17 years old at the conclusion of the impartial hearing and that the hearing record does not support a need for extended eligibility in this case beyond the 400 hours of services ordered by the impartial hearing officer. Therefore, I will uphold the impartial hearing officer's award with respect to additional compensatory services and the parent's appeal with respect to this issue is denied.

Fourth, the parent appeals the failure of the impartial hearing officer to permit the parent to exhaust a retaliation claim. The parent in this matter initiated her due process complaint notice pursuant to the IDEA, the New York State Education Law, and section 504 (Parent Exs. A at p. 1; MM at p. 1). New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (Application of a Student with a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, to the extent that the parent's appeal with respect to the failure of the impartial hearing officer to permit the parent to exhaust a retaliation claim relates to a section 504 claim, I have no jurisdiction to review the issue.[18]

Fifth, the parent appeals the denial of her request that the district make up sessions for IEP mandated related counseling services that it should have provided to the student over the past three years, which the amended decision of the impartial hearing officer expressly denied, but indicated that the CSE should consider upon remand (IHO Amended Decision at p. 13). The parent is seeking the immediate provision of the mandated counseling services and an order awarding make-up counseling services. The student's May 14, 2009 IEP, developed after the parent filed the petition for this appeal and submitted to the Office of State Review with the parties' joint letter dated June 5, 2009, contains a recommendation for the student to receive one 30-minute individual counseling session per week as part of the student's 12-month school year. With respect to the requested make-up services for missed counseling sessions, I find that district did not provide the student with at least some of the counseling services mandated on her 2008-09 IEP, as the student was not attending school for at least a portion of that school year (Parent Exs. C at p. 11; MM at p. 4; Q at p. 7). The hearing record is unclear as to the extent of IEP mandated counseling services that were missed, if any, during the 2006-07 and 2007-08 school years.[19] Due to the lack of clarity in the hearing record as to the number of sessions or hours of mandated counseling that the student missed during the 2006-07, 2007-08 and 2008-09 school years, as well as the number of sessions that would be necessary to remedy the failure of the district to provide that mandated counseling, I remand this matter to the CSE to convene and determine the amount of IEP mandated counseling that the student was not provided during the 2006-07, 2007-08, and 2008-09 school years and the amount of counseling that is necessary to make up for the services that were not provided, and that the district shall provide make-up counseling sessions during the 2009-10 school year in the amount appropriate to remedy the prior failure of the district (see Mr. I. v. Maine Sch. Admin.

[18] I find that the impartial hearing officer did not err in declining to address the parent's retaliation claim as it was framed by the parent.

[19] I reiterate that the parent seeks make-up services for missed "IEP-mandated related counseling services" (Pet. ¶ 39). The student testified that during her second year in the high school, which was the 2007-08 school year, the district "took all [her] counseling away from [her]" (Tr. p. 99). Although there was no 2007-08 IEP created for the student, counseling services were mandated on the November 14, 2006 IEP (Tr. p. 193; Parent Ex. D at p. 6).

Dist. No. 55, 480 F.3d 1, 26 [1st Cir. 2007]; Application of a Student with a Disability, Appeal No. 09-025). The parent's appeal with respect to this issue is accordingly sustained in part.

Sixth, the parent appeals the denial of the parent's request for travel training and transportation for the student to travel to her make-up services. As per the parties' joint letter dated June 5, 2009, the issue of travel training has been resolved. The issue of transportation has also been resolved, but the parties state in their letter that they are unable to resolve the issue of transportation for the future in the event that the current arrangement is no longer possible for the student. The parties give no indication as to when, if at all, it is expected that the current arrangement will no longer be an option for the student, and I therefore, find the matter to be premature and I decline to make a finding on this issue. If transportation does become an issue in the future, the CSE is encouraged to immediately reconvene to discuss and recommend an appropriate solution to the matter and the parent may exercise her due process rights under 8 NYCRR 200.5.

Seventh, the parent appeals the ruling of the impartial hearing officer that the statute of limitations bars the parent's claims concerning the 2005-06 school year. The IDEA was amended in 2004 with an effective date of July 1, 2005. The IDEA 2004 amendments added an explicit limitations period for filing a due process hearing request and also added explicit accrual language. IDEA 2004 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]). Absent clear congressional intent, a newly enacted federal statute of limitations does not operate retroactively (see Landgraf v. USI Film Products, 511 U.S. 244, 280 [1994]; In re Enterprise Mortgage Acceptance Co., 391 F.3d 401 [2d Cir. 2005] [holding that the limitations period in the Sarbanes-Oxley Act of 2002 did not have the effect of reviving stale claims]; Application of a Child with a Disability, Appeal No. 06-083). Prior to the IDEA 2004 amendments, the IDEA did not prescribe a time period for filing a request for an administrative due process hearing and a one-year limitations period was applied in New York (M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; Application of the Bd. of Educ., Appeal No. 02-119). A claim accrues when the complaining party knew or should have known of the injury involved, i.e., the inappropriate education (Southington, 334 F.3d at 221). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

The parent in this case alleges that the district did not meet its burden to establish the date that the claims accrued and that the parent proved she did not find out the extent of the student's disabilities and academic delays until 2008 when the district reevaluated the student and when she received the report of a private neuropsychological evaluation. The parent also alleges that the first time she found out she "could seek a hearing to address the issues she was having with the schools was at a meeting she attended in 2007" and that no one ever advised her as to the statute of limitations in which to bring a claim about the student's special education.

The hearing record in this matter indicates that the student was first referred for a special education evaluation in either first grade or second grade and that she continuously received special education services, or was recommended to receive them, through the date that the parent filed the due process complaint notice (June 25, 2008) (Tr. pp. 127-31). The parent was also aware that as of the start of the 2005-06 school year she had not yet received an IEP for the student for that school year (Parent Ex. A at p. 2). I find that the parent's claims regarding the 2005-06 school year accrued at the beginning of that school year when the parent did not timely receive an IEP for the student. Additionally, I am not persuaded by the hearing record that the exception to the timeframe in which to file a due process complaint notice applies in this case. Therefore, I agree with the impartial hearing officer and find that the parent's claims relating to the 2005-06 school year are barred by the statute of limitations and the parent's appeal with respect to this issue is denied.

Eighth, the parent appeals the denial of ESY services, which the original decision of the impartial hearing officer did not decide and the amended decision of the impartial hearing officer remanded back to the CSE for a determination. In accordance with the joint letter of the parties dated June 5, 2009, this matter has been resolved and it is therefore unnecessary for me to address it on appeal.

Lastly, the parent requests that a State Review Officer issue a decision finding that the home instruction consideration process of the district violated the IDEA and the New York State Education Law. Based upon the hearing record as developed, I decline to make a finding as to whether the home instruction consideration process utilized by the district violates federal or State law and I remind the parent that she may file a complaint pursuant to 8 NYCRR 200.5(*l*).

I have considered the parties' remaining contentions and find them to be unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that within 30 days of the date of this decision, unless the parties otherwise agree, a CSE shall convene to determine what additional evaluations, if any, are necessary for the student and that the student's IEP shall be revised as necessary in accordance with any updated evaluations, and

IT IS FURTHER ORDERED, that, if it has not already done so, the district is to provide the parent with a Nickerson letter for the 2008-09 school year, and

IT IS FURTHER ORDERED, that the portion of the impartial hearing officer's amended decision dated March 3, 2009 that denied the parent's request for additional make-up services is hereby annulled, and

IT IS FURTHER ORDERED, that within 30 days of the date of this decision, unless the parties otherwise agree, a CSE shall convene to determine the amount of IEP recommended counseling services that the student was not provided during the 2006-07, 2007-08, and 2008-09 school years and the amount of counseling that is necessary to make up for the services that were not provided, and that the district shall provide make-up counseling sessions to the student during the 2009-10 school year in the amount appropriate to remedy the prior failure of the district to provide these services.

Dated: **Albany, New York**
June 25, 2009

PAUL F. KELLY
STATE REVIEW OFFICER