The University of the State of New York

The State Education Department
State Review Officer
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**No. 09-056**

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

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

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

## DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for compensatory education services. The appeal must be dismissed.

At the time of the impartial hearing, the student had graduated from a district high school in June 2006 with a local diploma and was attending the School of Cooperative Technical Education (Co-Op Tech) (Tr. pp. 1, 67, 105-11, 662, 667, 727; Dist. Exs. 13; 16 at pp. 1-6).[1] During the impartial hearing, the student completed his coursework at Co-Op Tech and received a Certificate of Competency for electrical installation (see Tr. pp. 667-68, 799, 814-15, 839-41; Dist. Ex. 16 at p. 6). When the student attended public school, he was eligible for special education programs and services as a student with a learning disability; the student's eligibility for special education programs and services was not in dispute in this matter (34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

By due process complaint notice dated April 8, 2008, the parent—through her attorney—sought an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) "during his high school career" and requested compensatory education services to remedy the district's failure (Pet. Ex. SRO I at p. 3). The parent noted in the due process

[1] A pamphlet submitted into evidence at the impartial hearing described Co-Op Tech as a part of the district that offered free training programs to students between the ages of 16 and 21 to attain "technical and trade skills," such as in the building trades, cosmetology, computer and electrical technology, and electrical installation (Dist. Ex. 16 at p. 3).

complaint notice that although the student believed he earned a local diploma, this fact had not yet been confirmed by a review of his educational records (id. at pp. 3-4). To support her allegation that the district failed to offer the student a FAPE during his high school career, the parent claimed the following: the student's most recent individualized education program (IEP) dated May 3, 2006, failed to include evaluation report summaries of the student's academic achievements; the student's "last formal testing" occurred in 2002; and despite the student's severe academic delays, the May 3, 2006 IEP only offered daily special education teacher support services (SETSS) in an 8:1 setting and two 40-minute sessions per week of speech-language therapy services (id. at p. 4).[2] In addition, the parent asserted that the student's February 26, 2002 IEP, which she alleged to be the student's last IEP prior to the May 3, 2006 IEP, offered daily SETSS services in an 8:1 setting and two 40-minute sessions per week of speech-language therapy services (id.). The parent contended that the student's placement and services arose from the district's "blanket policy and practice . . . to limit services and provide [services] in [a] particular group size" and further, that the district failed to provide the student's "minimal" services on a "regular basis" (id.).

To further support her allegation that the district failed to offer the student a FAPE during his high school career, the parent noted in her due process complaint notice that although the student "amassed significantly more credits" than required to graduate, the district "never provided the research-based, individualized special education and related services" the student needed to acquire basic academic skills (Pet. Ex. SRO I at p. 4). As a result of this failure, the student "did not leave high school with the academic skill level he should have been able to obtain" (id.). In addition, the parent contended that the district failed to adequately address the student's speech-language needs, and the student continued to struggle with communication in his daily life (id.). The parent asserted that the district failed to conduct a functional behavioral assessment (FBA) to address the student's attendance issues, the district failed to provide appropriate transition services, the district failed to adequately evaluate the student to assess his needs in all areas of his disability, and the district failed to offer appropriate assistive technology or supports or accommodations, such as books on tape, a note taker, and accessible materials (id. at pp. 4-5). The parent argued that these failures prevented the student from pursuing "meaningful post-secondary options" (id. at p. 5).

Procedurally, the parent asserted that neither she nor the student received adequate notice of their procedural due process rights because the parent is Spanish-speaking and has a limited educational background, and the student struggled with reading (Pet. Ex. SRO I at p. 5). The parent alleged that the district failed to provide prior written notice, procedural safeguards notice, or "adequate process prior to terminating [the student's] special education services," and the district failed to "explain the IEP process" to the parent (id.).

Finally, the parent argued that the two year statute of limitations did not apply to the present matter for the following reasons: the student only "recently" became aware of the claim; neither the parent nor the student received legally adequate notice of their rights; the district failed to take "adequate steps" before terminating the student's special education services; the statute of limitations should be tolled due to the student's age and disability, since the student brought the impartial hearing on his own behalf; section 504 of the Rehabilitation Act of 1973 (section 504)

[2] Testimony at the impartial hearing indicated that the inclusion of speech-language therapy services on the May 3, 2006 IEP was a clerical error, as those services had been terminated in May 2005 (Tr. pp. 118-24; Dist. Exs. 6 at pp. 2, 11; 7; 11 at pp. 1, 9).

(29 U.S.C. §§701-796[l][1998]) does not have a two year statute of limitations; the statute of limitations should not be applied retroactively since neither the parent nor the student had notice of the limitations period; the alleged violations in due process complaint notice constituted continuing violations; and the request for compensatory education services, an equitable remedy, was subject to a longer statute of limitations period (Pet. Ex. SRO I at p. 5). The parent further argued that the "failures complained of herein [were] of a systemic nature," resulting in irreparable harm to the student (id.).

As relief, the parent requested a "bank of 1:1 tutoring services" using multisensory instruction or some other peer-reviewed researched based methodology, such that the "total amount of these services should be sufficient to ensure" that the student "can try to reach grade level in math, reading and writing" (Pet. Ex. SRO I at p. 5). In addition, the parent requested intensive speech-language therapy "make-up and compensatory education services" to enable the student to "improve his receptive and expressive language delays;" compensatory transition services to ensure the student's effective transition to post-secondary outcomes; supplemental aids and services to "take advantage of the compensatory education" and to use them effectively in post-secondary life; other compensatory education or relief as deemed appropriate; a finding that the district failed to provide the student with a FAPE during his high school career; comprehensive private evaluations including a neuropsychological evaluation, an assistive technology evaluation, occupational therapy (OT) and speech-language evaluations, an evaluation by a learning disability specialist, a psychological evaluation, and a vocational evaluation; and transportation costs, as well as costs associated with admission and application fees and equipment needed to "take advantage" of the requested services (id. at pp. 5-6).

The parties proceeded to an impartial hearing on June 17, 2008, and concluded on February 5, 2009, after eight days (Tr. pp. 1, 876). By Interim Decision dated August 19, 2008, the impartial hearing officer concluded that neither an impartial hearing officer nor a State Review Officer could pass in an impartial hearing upon the academic standards required by the State of New York for graduation, and as such his decision must be limited to special education programs and services offered by the district (IHO Interim Decision at pp. 2-3). He also noted that an award of compensatory education services, as a continuation of instruction after a student is no longer eligible for instruction because of age or graduation, must be based upon a finding of a gross violation of the Individuals with Disabilities Education Act (IDEA), such as the type resulting in the denial of, or exclusion from, education services for a substantial period of time during the student's period of eligibility for special education (id.). He further noted that a finding of a gross violation must be limited to the programs and services provided by the district (id. at p. 3). In conclusion, the impartial hearing officer indicated that he would not "entertain any testimony or evidence" regarding the academic standards required by the State of New York for graduation, but would concern himself with "any gross violation of the IDEA with regard to the program and related services" provided to the student and whether compensatory education services were warranted (id.).

By decision dated April 1, 2009, the impartial hearing officer concluded that the district "met its obligation to the student" by providing him with personalized instruction and support services to enable him to receive educational benefits, resulting in his graduation from high school with a local diploma and his recent completion of an electrical installation program at Co-Op Tech (IHO Decision at pp. 1-11). Based upon the evidence, the impartial hearing officer found that the parent had attended all of the student's Committee on Special Education (CSE) meetings, school

meetings, and the student's pre-graduation meeting near the conclusion of the 2005-06 school year (id. at p. 10). The impartial hearing officer also found the parent, who testified that she graduated from high school, and read and spoke English, received "paperwork" from the district, and if she was unclear as to the meaning of the paperwork, the parent relied upon her daughter to explain it to her (id.). In addition, the impartial hearing officer found that according to the evidence, the student failed to avail himself of the services available to him either before or after school, and that attendance issues plagued the student's 2004-05 speech-language therapy services and overall attendance during his 2005-06 school year (id.). The impartial hearing officer noted that as a result of the student's lack of attendance at speech-language therapy during the 2004-05 school year, the district applied an internal policy and terminated the student's speech-language therapy near the conclusion of that year and did not recommend speech-language therapy for the 2005-06 school year (id.). Finally, the impartial hearing officer determined that despite "all of the inadequacies, the student did manage to earn 58 credits and pass the forty four credits of required courses," as well as pass the "requisite" Regents Competency Tests (RCTs) to earn a "local diploma" (id. at pp. 10-11). Based upon the foregoing, the impartial hearing officer dismissed the parent's complaint (id. at p. 11).

On appeal, the parent asserts that the impartial hearing officer committed numerous legal and evidentiary errors that effectively denied her right to due process and require a reversal of the impartial hearing officer's decision. The parent alleges that the student was subjected to a "gross, prolonged and extensive violation" of a FAPE and a denial of educational services that justifies an award of compensatory education services. The parent further alleges that the impartial hearing officer erred by failing to render a decision regarding the lack of transition services provided to the student and that he committed numerous errors of law and fact. In particular, the parent asserts that the impartial hearing officer "incorrectly credited" the district's defense that the student's eligibility for special education programs and services terminated upon his receipt of a local diploma, finding no jurisdiction upon which to evaluate the validity of the defense. The parent also contends that the impartial hearing officer's decision failed to address whether the district satisfied its legal burden under the appropriate legal standards. In addition, the parent alleges that the impartial hearing officer failed to address certain issues raised in the due process complaint notice, such as the parent's request for private evaluations, the district's failure to adequately evaluate the student, and the district's failure to conduct an FBA. The parent also alleges that the impartial hearing officer improperly relied upon the student's absenteeism and failure to avail himself of services offered at school as a basis upon which to deny compensatory education services. The parent asserts that the impartial hearing officer failed to apply and consider factors pertaining to the statute of limitations, which the district raised as a defense, and he failed to make any findings of fact or conclusions of law on this issue or on the parent's section 504 claims. As relief, the parent seeks a reversal of the impartial hearing officer's decision and that a State Review Officer direct the district to provide the following as compensatory education services: up to 640 hours of speech-language therapy services; up to 500 hours of tutoring services; payment of all transportation costs, admissions fees, application fees, and to provide the equipment necessary to take advantage of the compensatory education services; private evaluations and payment of the same; make-up transition services and supplementary supports and services; and a finding that the district denied the student a FAPE throughout his high school career and subsequent to his graduation.

In its answer, the district asserts both procedural and substantive affirmative defenses to the petition and seeks to uphold the impartial hearing officer's decision in its entirety.

Procedurally, the district alleges that the parent failed to timely serve the petition and failed to establish good cause for such failure in the petition for review. Substantively, the district argues that the impartial hearing officer properly limited the impartial hearing to claims arising from the 2005-06 school year to the present and that he properly denied the parent's request for compensatory education services. In addition, the district argues that the parent is not entitled to be reimbursed for seven independent evaluations and that a State Review Officer does not have jurisdiction to decide claims pursuant to section 504. Although the district seeks to dismiss the parent's petition in its entirety, it notes that regardless of the outcome of the appeal, the district has agreed to provide—and will provide—the student with 53.2 hours of compensatory speech-language therapy services and to reimburse the parent for the $1000 cost of the privately obtained speech-language therapy evaluation.

Before proceeding to the merits of the appeal, initially, procedural issues must be addressed. As noted above, the district asserts as an affirmative defense in its answer that the parent failed to timely serve the petition for review and failed to assert good cause in the petition as to the reason for such failure (see 8 NYCRR 279.2[b], 279.4[a], 279.11, 279.13). According to State regulations, the petition for review must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). If the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (id.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13).

In the instant case, the impartial hearing officer's decision is dated April 1, 2009 (IHO Decision at p. 11). During the course of the impartial hearing, the parent was represented by an attorney (see Tr. pp. 1, 876; Pet. Ex. SRO I at p. 3). According to the district's answer, the impartial hearing officer's decision was delivered to both the district's attorney and the parent's attorney via e-mail on April 1, 2009, and further, that the impartial hearing officer's decision was mailed to the parent on April 1, 2009 (Answer Ex. SRO I at p. 2; see Reply Ex. A at p. 1).[3] By excluding the date of mailing of the impartial hearing officer's decision and the four days subsequent thereto, the petition needed to be served by the parent upon the district no later than May 10, 2009, a Sunday (8 NYCRR 279.2[b]). State regulations provide that if the last day for service is a Saturday or Sunday, then timely service may be made on the following Monday, which in this case was May 11, 2009 (see 8 NYCRR 279.11). Accordingly, the parent's May 11, 2009 personal service of the petition for review upon the district was timely according to State regulations (see 8 NYCRR 279.2[b], 279.11; Parent Aff. of Personal Service).

Next, the parent filed a reply to the district's answer, dated July 22, 2009. By letter dated July 23, 2009, the district requested that a State Review Officer reject the parent's reply because it exceeded the permissible scope of a reply under the State regulations and because the parent failed to verify the reply. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6; see Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student

[3] According to State regulations, "the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the *parents*, to the board of education, and to the Office of Vocational and Educational Services for Individuals with Disabilities" (8 NYCRR 200.5[j][5]) (emphasis added).

with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the parent's reply did respond to the district's procedural defense regarding untimely service of the petition for review, but the reply also contained additional arguments directed at the substantive defenses interposed by the district. Therefore, I will consider the reply for the limited purpose of addressing the district's procedural defense regarding untimely service, and the remainder of the parent's reply will not be considered (see 8 NYCRR 275.14[a], 279.6; Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009).

Turning now to the merits of the appeal, within the Second Circuit, compensatory education for a student after he or she is no longer eligible because of age or graduation to receive IDEA services 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]; see also Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]). In New York State, a student with a disability is eligible for services under the IDEA until he or she receives either a local or Regents high school diploma (8 NYCRR 100.5[b][7][iii], [vi-vii]; see 34 C.F.R. § 300.122[a][3][i]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the school year in which he or she turns twenty-one (Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; see 8 NYCRR 200.1[zz]; see also 8 NYCRR 100.9[e]; Application of a Child with a Disability, Appeal No. 04-100). 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]).[4]

At the impartial hearing, the parent asserted two potential time periods within which to justify an award of compensatory education services: first, during the two years after the student's graduation with a local diploma in June 2006; and second, during the student's period of eligibility for special education programs and services during his high school career (Tr. pp. 8-11). As for the parent's claim for compensatory education services based upon alleged violations in the two years after the student's graduation in June 2006, the parent questioned the validity of the student's local diploma, arguing that because it did not align with State standards for graduation the student remained eligible for special education programs and services, but did not receive services after his graduation in June 2006 with the local diploma (IHO Interim Decision at pp. 2-3; Tr. pp. 8-11, 67-76, 268-98; Pet. Exs. SRO IV at pp. 1-11; SRO VI at pp. 1-3). In the instant case, an

[4] It should be noted that 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 Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060; 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).

independent review of the evidence indicates that the impartial hearing officer correctly determined that the student successfully completed the required course work, that he acquired the requisite credits, and that he passed the required RCTs to earn a local diploma, and beyond that, neither an impartial hearing officer nor a State Review Officer can pass upon the academic standards required by the State of New York for graduation in an impartial hearing, as such must be limited to special education programs and services offered by the district (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; IHO Decision at pp. 3-4, 10-11; IHO Interim Decision at pp. 2-3; see Tr. pp. 105-12, 128-49; Dist. Ex. 13 at pp. 1-2; Application of the Bd. of Educ., Appeal No. 08-071; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 03-070; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 96-67; Application of a Child with a Disability, Appeal No. 94-31; Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agencies' rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]).[5] Thus, to the extent that the parent appeals the impartial hearing officer's dismissal of her claim for compensatory education services for any alleged violations that may have accrued in the two years after the student's entitlement to special education programs and services ended with the student's graduation in June 2006, those claims are without merit and are dismissed.

As for the parent's claim for compensatory education services based upon alleged violations during the student's period of eligibility during his high school career prior to his graduation in June 2006, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583 [S.D.N.Y. 1998]; Application of the Bd. of Educ., Appeal No. 05-037; see also Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.28 [1982]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998][noting that "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" under the IDEA]), the receipt of which terminates a student's entitlement to a FAPE (34 C.F.R. § 300.122[a][3][i]; 8 NYCRR 100.5[b][7][iii]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility in order for the student to qualify for an award of compensatory education (see Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it would appear that it would be the rare case where a student graduates with a Regents or local high school diploma and yet still qualifies for an award of compensatory education (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [D. Conn. 1997][where student apparently graduated and received diploma prior to the district establishing the appropriate graduation requirements, court decided student had established a prima facie case of likelihood of success on the merits on a possible award of continued compensatory education]; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037). Based upon an independent review of the evidence, the instant matter does not present that rare case.

[5] As previously noted, it is not beyond an impartial hearing officer's authority to hear evidence related to a district's decision to award or disallow credit or to issue a diploma insofar as it may be relevant to the identification, evaluation, and the provision of special education programs and services to a student with a disability (see 8 NYCRR 200.5[j][1]; Application of the Bd. of Educ., Appeal No. 08-071 fn.7).

According to the evidence, the student in this case attended district public schools in a general education setting with related services of speech-language therapy and SETSS/resource room throughout his educational history (see Dist. Exs. 1 at pp. 1, 13; 6 at p. 1; Parent Ex. F at p. 1; N at p. 1; O at p. 1). He first received special education programs and services—speech-language therapy services—in kindergarten after being referred to the CSE by a teacher who expressed concerns about the student's ability to speak and who informed the student's mother that the student "was scared" to talk (Tr. pp. 807-08, 827-28). The student began receiving resource room services in third grade, in addition to the speech-language therapy services, to assist the student with reading, writing, and mathematics (Tr. pp. 807-08, 830-32, 849; Parent Ex. L at p. 2). In his testimony at the impartial hearing, the student recalled receiving speech-language therapy and resource room services throughout elementary and middle school (Tr. pp. 402-03; see Parent Exs. M at p. 2; N at p. 1; P at p. 1). The student also testified that he spoke very little Spanish and did not read or write in Spanish (Tr. pp. 406-07, 431). He also testified that English was his mother's first language, but that his father spoke both English and Spanish (Tr. pp. 401-02).

During the 2001-02 school year, the student entered ninth grade at a district high school (HS 1), where he continued to attend school for tenth grade (2002-03), eleventh grade (2003-04), and twelfth grade (2004-05) (see Tr. pp. 403-06; Dist. Exs. 2; 3 at p. 1; 8 at pp. 2, 4; 13 at pp. 1-2; Parent Ex. F at p. 1). The student testified that when he started at HS 1 in ninth grade, he recalled receiving resource room and pull-out speech-language therapy services, and he further noted that resource room had been on his schedule throughout his four years attending HS 1 (Tr. pp. 403-06). Although he could not recall the specific date, the student testified that at some point during his four years at HS 1, he stopped receiving speech-language therapy services (Tr. pp. 405-06, 700-01). At the time of the impartial hearing, the student testified that he did not want to stop getting speech-language therapy services because "sometimes" when he spoke to people, "they don't understand me, what I'm trying to say," and he "sometimes" had difficulty communicating with people (Tr. pp. 406-07). Later in his testimony, the student stated that he did not attend speech-language therapy at all during the 2004-05 school year, and further, that he was unaware of whether he was supposed to receive speech-language therapy services during his last year at HS 1 in 2004-05, and that he did not tell anyone that he wanted to receive speech-language therapy services or that he was not receiving speech-language therapy services (Tr. pp. 699-701).

With respect to attendance, the student admitted being absent during the 2004-05 school year at HS 1, but "not a lot," and that he testified that he regularly attended his classes (Tr. p. 698). Documentary evidence indicated; however, that the student was marked absent 29 days out of 168 total school days during the 2004-05 school year (Dist. Ex. 12 at p. 1). In addition, teacher reports documented the student's poor attendance in resource room, economic applications, and a global studies Regents preparatory class during the 2004-05 school year (Dist. Ex. 5 at pp. 1-3).

Evidence submitted into the hearing record indicated that the although student's 2004-05 IEP included a recommendation for speech-language therapy services for the 2004-05 school year, the student only attended 9 sessions of speech-language therapy and was marked absent for 38 sessions of speech-language therapy during the 2004-05 school year (Dist. Exs. 1 at pp. 1-2, 13; 4 at p. 1). Using district policy guidelines described at the impartial hearing, a district speech-language pathologist recommended terminating the student's speech-language therapy services for the 2005-06 school year (Tr. pp. 896-97, 910-14; Dist. Ex. 4 at p. 1; see Tr. pp. 900-02, 904-05, 917-19, 989-94, 999-1002, 1005-09). By notice dated May 17, 2005, the district informed the parent of the student's upcoming Educational Planning Conference (EPC) meeting scheduled for

May 27, 2005, and enclosed a copy of the "Notice of Parental Rights" to the parent (Dist. Ex. 2). According to the evidence, the district did not recommend speech-language therapy for the student's 2005-06 school year, and the student did not receive speech-language therapy services during the 2005-06 school year (Dist. Exs. 6 at pp. 1-2, 11; 7; see Tr. p. 412). By "Final Notice of Recommendation of Modification of IEP," dated June 17, 2005, the district notified the parent of the discontinuation of the student's speech-language therapy services for the 2005-06 school year and enclosed copies of the "Notice of Parental Rights" and the student's 2005-06 IEP (Dist. Ex. 7).

According to the student's testimony, he needed to transfer to another district high school (HS 2) for the 2005-06 school year because he had not received credits in the required courses during his four years at HS 1 that he needed to graduate, such as science and gym (Tr. pp. 407-08, 683-84). He became aware of the insufficient credits during his last year at HS 1 and that he would not be able to graduate from HS 1 (Tr. pp. 408-09). The student testified that his resource room teacher at HS 1 suggested that he transfer to HS 2 in order to fulfill his requirements for graduation (Tr. pp. 410, 701-02). The student's father helped him enroll at HS 2 (Tr. pp. 679, 682-83; Dist. Exs. 8 at pp. 1, 4; 9 at pp. 1-2).

At the impartial hearing, the HS 2 assistant principal described HS 2 as a transfer school that accepted both regular education and special education students aged 17 or older, who had completed at least 15 high school credits (Tr. pp. 88-94, 104-05). Enrollment at HS 2 required a one-on-one interview with parents and students, and the completion of an application packet; upon acceptance, the student attended an orientation session (Tr. pp. 93, 823). An IEP coordinator/special education teacher at HS 2 conducted the interviews for students with IEPs (Tr. p. 94). According to the HS 2 assistant principal, guidance staff or parents often referred students to HS 2 (Tr. p. 93). All of the students at HS 2 previously attended at least one other high school (id.).

At HS 2, students could receive related services, such as counseling, speech-language therapy, and SETSS/resource room; and HS 2 also offered special classes in 15:1 and 12:1+1 ratios (Tr. pp. 90, 97-99). The HS 2 assistant principal described the SETSS service as "general education with special education teacher support" provided to students who participated in the general education setting "for a majority of their day," but who needed "some type of special education teacher support either inside the classroom or outside the classroom" (Tr. p. 98). At HS 2, the SETSS service could follow the more traditional structure—a teacher working in a classroom with eight students—or it could be "subject specific" for a student who has a particular need, such as in mathematics, writing, or science (Tr. pp. 98-99). The SETSS service was targeted to a specific subject, which helped students to prepare for specific exams (Tr. p. 99). A review of a students' transcript determined which type of SETSS service an HS 2 student received (Tr. pp. 99-100). For example, a student who enrolled at HS 2 having already passed a number of exams, but who still required a mathematics credit might receive a SETSS service specifically targeting that isolated need (Tr. p. 100). In addition to the regular school day, HS 2 also offered optional morning and afternoon periods to provide students with extra classes to receive more credits, enrichment in certain subjects, informal tutoring, or course-specific Regents exam preparation (Tr. pp. 90-93).

Relevant to the student in this case, the HS 2 assistant principal testified that the student attended HS 2 for one year during 2005-06 school year and graduated in June 2006 with a local

diploma, having earned 58 credits (Tr. pp. 101-02, 105-12).[6] At the beginning of the 2005-06 school year, the student had already completed a number of credits and passed a number of exams required for graduation, but he specifically needed to pass exams in science and global studies (Tr. pp. 115, 129-32). According to the HS 2 assistant principal, the student required the following credits in particular courses at the beginning of the 2005-06 school year in order to graduate: two credits in social studies, two credits in science, two credits in a foreign language, one credit in mathematics, one credit in health, and one credit in art or music (Tr. pp. 129-30). She explained the total amount of credits required to graduate with a local or Regents diploma, as well as the number of credits needed in the required courses, the particular exams—either Regents or RCTs—a student needed to pass to receive a local or a Regents diploma, and the score required to pass either the Regents or RCT exams (Tr. pp. 130-63).[7] She also explained that because the student in this case needed to pass a science exam to graduate and HS 2 had a SETSS service established to specifically target science, the student received the SETSS service recommended in his 2005-06 IEP in the SETSS service specialized for science at HS 2 (Tr. pp. 115, 141, 144-46). The HS 2 assistant principal pointed out that on the student's school transcript, the following classes represented the student's SETSS service specialized for science: "SCI WRKSHP 1A" in Term 1, "SCI WRKSHP 1B" in Term 2, "SCI WRKSHP 2A" in Term 3, and "SCI WRKSHP 2B" in Term 4 (Tr. pp. 141-42; Dist. Ex. 13 at p. 1). According to her testimony, the student received one 45-minute session per week of SETSS services, in accord with the recommendation in his 2005-06 IEP (Tr. p. 142; see Dist. Ex. 6 at pp. 1, 9).

With respect to the transition services available at HS 2, the HS 2 assistant principal described the transition teacher/coordinator at HS 2, his responsibilities, and the transition services available at HS 2 (Tr. pp. 115-18; see Tr. pp. 124-26). She indicated that the student in this case was particularly interested in becoming an electrician and that a Vocational and Educational Services for Individuals with Disabilities (VESID) application had been completed for the student (Tr. pp. 116-18). The HS 2 assistant principal testified that the student in this case attended Co-Op Tech after graduation, which she described as a vocational training program that accepted students referred by their own high schools (Tr. pp. 117-18).

According to his testimony, the student did not believe that he received his resource room services during the 2005-06 school year at HS 2 because resource room was not identified on his "schedule," as it had been at HS 1 (Tr. pp. 410-11). He did recall, however, taking courses such as "science, history, gym, lunch, [and] family group" at HS 2 (Tr. p. 412).

With respect to transition services, the student testified that although he had not seen the "Student Exit Summary" dated June 23, 2006 and submitted into evidence at the impartial hearing, he knew the transition coordinator listed on the document and admitted meeting with him on one occasion in which they discussed VESID (Tr. pp. 431-32, 703-06; see Dist. Ex. 14). At that meeting, the transition coordinator told him that VESID could assist the student with his interest

[6] The HS 2 assistant principal testified that in order to graduate from high school, a student was only required to earn 44 credits in particular subject categories and pass an appropriate number of Regents exams, or if the student had an IEP, the student needed to pass an appropriate number of RCTs, including RCTs in mathematics, writing, reading, science, global history, and U.S. history (Tr. pp. 108-09, 148-49).

[7] In this case, a review of the student's school transcript indicated that he not only passed the mathematics (2003), writing (2004), reading (2004), science (2005), and global history (2005) RCTs, but that he also passed a mathematics Regents exam (2003) and a U.S. History Regents exam (2003) (Dist. Ex. 13 at p. 2).

in "electrical" (Tr. p. 717; see Dist. Ex. 14 at pp. 1-3). In addition to speaking with the transition coordinator about his plans after graduation, the student testified that he also spoke with his family group teacher at HS 2 about his plans after graduation, telling her the "same thing" he told the transition coordinator—that he wanted to pursue "school for electrical" (Tr. pp. 716-17). Although the student learned through the transition coordinator that VESID could assist him in getting a job, he acknowledged that he did not contact VESID and that he did not visit VESID (Tr. pp. 431-33, 703-04). When asked to review a letter addressed to him that had been submitted into evidence, the student testified that although he did not recall receiving the letter, he understood that it notified him "about going over there to be evaluated" at VESID (Tr. p. 433; Dist. Exs. 10; 14 at p. 3). The student testified that he did not pursue any contact with VESID because his sister told him that VESID was not "for [him]" and would probably not be "good for [him]" (Tr. pp. 704-05, 721-22). The "Student Exit Summary" identified one of the student's goals as attending a "career program at Co-Op Technical School" and that his goal was to "become an electrician" (Dist. Ex. 14 at p. 2). The "Student Exit Summary" also listed contact information for Co-Op Tech and VESID (id. at p. 3).

In order to graduate, the student testified that he understood that he required credits in "global, gym, [and] science," which he received at HS 2 (Tr. pp. 412, 684, 686-87, 716). With respect to his attendance at HS 2 during the 2005-06 school year, the student testified that he was absent during the 2005-06 school year at HS 2, but "not . . . a lot" (Tr. p. 715). Documentary evidence indicated, however, that during the 2005-06 school year, the student was marked absent 55 days out of 164 total school days (Dist. Ex. 12 at p. 1). While at HS 2, the student recalled discussing his attendance with his family group teacher and that he explained to the family group teacher that he "woke up late" (Tr. pp. 725-26; see Tr. pp. 113, 329-33). During the 2005-06 school year at HS 2, the student worked five days per week, but he testified that his job responsibilities did not interfere with his attendance at school (Tr. pp. 727-28).

At the impartial hearing, the student testified that he currently attended Co-Op Tech and worked in a retail store (Tr. p. 666). Prior to his current employment, he had worked for five years in another retail store (Tr. pp. 666-67). At the time of his testimony, the student had been attending Co-Op Tech for approximately one year, and upon completion of his electrical training at Co-Op Tech, the student intended to remain enrolled at Co-Op Tech in another six-month training program while awaiting entrance into the construction skills program at Co-Op Tech (Tr. pp. 667-68, 670-71, 708-09). According to the student, he discovered Co-Op Tech—a free training program—during his search for an "electrical school" over the internet "sometime in 2007" (Tr. p. 668). After locating Co-Op Tech on the internet, he contacted the school, registered, and began attending classes (Tr. pp. 668-69). In order to enroll at Co-Op Tech, the student provided his diploma and completed an application (Tr. p. 669). He noted that during high school, he studied "Kelsey Electrical" and that he wanted to work in the electrical field (id.; see Tr. pp. 840-41). According to his testimony, the student filed the present claim because he was "trying to better" himself and "get a better job" (Tr. p. 677). He believed more services would help him to "speak to people" and not be as "shy" (Tr. pp. 677-78).

In order to receive a certificate from Co-Op Tech, the program required the student to maintain a 75 average (Tr. p. 707). Receiving a certificate from the Co-Op Tech electrical installation program would allow the student to become employed as an electrical helper in the workforce (Tr. pp. 707-08). While at Co-Op Tech, the student testified that he did not receive any

testing accommodations, such as additional time for tests or having the directions read to him (Tr. p. 722).

The parent also testified at the impartial hearing (Tr. pp. 803-50). She testified that she first came to the United States when she was four years old; she attended public school, and she graduated from high school (Tr. pp. 803-04, 819). The parent testified that her own ability to read English was "not bad" and explained that if she read something she did not understand, she asked someone for assistance, such as her daughter (Tr. pp. 808, 831-32, 838-39). She testified that she neither read nor spoke Spanish and that she and her family spoke English at home (Tr. pp. 808, 833, 846). When asked to review the attendance page of the student's 2005-06 IEP, the parent testified that she understood that someone else signed her name as participating via telephone at that meeting, and further, that she understood the purpose of the meeting was to discuss the student's "speech" (Tr. pp. 810-12, 835-37, 848-49; see Dist. Ex. 6 at p. 2). Prior to these meetings, the parent received notices in the mail advising her of the meetings, and she also testified that she preferred the documents and the meetings to be in English (Tr. pp. 838, 841-42). The parent also testified that she "used to go to meetings and they [said] they were going to give him speech," that she wanted the student to continue to receive speech-language therapy services, and that she never asked the district to provide more services to her son (Tr. pp. 812, 825-26, 832, 837, 848-49). The parent then testified that she recalled receiving a copy of the student's 2005-06 IEP after the meeting and that "[t]he[y] would send me a copy of every—all the papers" (id.; see Tr. pp. 830-31). Referring to a copy of the student's 2004-05 IEP, the parent testified that although she may not have understood the document, she never told anyone at the district that she did not understand the contents of the document (Tr. pp. 831, 838-39). The parent further testified that she relied upon her daughter to explain the documents to her (Tr. pp. 831-32). When asked to review a copy of the New York State Education Department Procedural Safeguards Notice, dated August 2003, the parent acknowledged that she had seen the document previously (Tr. pp. 815-16, 819-22; see Tr. pp. 841-42; Parent Ex. D).[8]

When the student began school at HS 2 in the 2005-06 school year, the parent testified that she attended a meeting with other parents and students, and that throughout the school year, she also attended parent-teacher conferences (Tr. p. 823). At the end of the 2005-06 school year, the parent attended a meeting with other parents and students to discuss the students' plans after graduation (Tr. p. 824). With respect to HS 1, the parent testified that she similarly attended parent-teacher conferences during the 2004-05 school year (Tr. pp. 824-25).

Therefore, based upon the evidence presented, the impartial hearing officer properly concluded that the student was neither excluded from, nor denied, special education programs and services—cumulatively or individually—for a substantial period of time such that a gross violation of the IDEA occurred warranting an award of compensatory education services beyond the student's period of entitlement for special education services and programs (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078; Application of a Child with a Disability, Appeal No. 05-089; Application of a Child with a Disability, Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 05-018; Application of a Child Suspected of Having a Disability, Appeal No. 03-094). As noted

[8] In addition to the New York State Education Department Procedural Safeguards Notice, dated August 2003, the parent also submitted a New York State Education Department Procedural Safeguards Notice, dated September 2005, into evidence during the impartial hearing (Parent Ex. E).

above, the student continuously received speech-language therapy services up through the 2003-04 school year, and although the district attempted to provide speech-language therapy services to the student during the 2004-05 school year, the student failed to attend a majority of the offered services (Dist. Exs. 1 at pp. 1-2, 13; 4 at p. 1). In addition, the student continuously received SETSS/resource room services up through the conclusion of the 2005-06 school year (Tr. pp. 115, 141-42, 144-46, 403-06; Dist. Ex. 13 at p. 1; see Dist. Ex. 6 at pp. 1, 9). Thus, even assuming as true the parent's claim that the district improperly terminated the student's speech-language therapy services for the 2005-06 school year, the evidence does not indicate how, if at all, the absence of the speech-language therapy services during the 2005-06 school year constituted a gross violation of the IDEA, especially in light of the fact that without the services and coupled with the student's absences, the student successfully completed the required course work, acquired the requisite credits, passed the required RCTs, and graduated from high school with a local diploma (IHO Decision at pp. 3-4, 10-11; IHO Interim Decision at pp. 2-3; see Tr. pp. 105-12, 128-49; Dist. Ex. 13 at pp. 1-2). Moreover, I note that the student in this case has also successfully completed a post-graduation electrical installation program with plans to continue at Co-Op Tech for further education and training (Tr. pp. 666-68, 670-71, 708-09, 799, 814-15, 839-41; Dist. Ex. 16 at p. 6). I further note that even if the district's termination of the student's speech-language therapy services or the district's failure to provide one year of speech-language therapy services did rise to the level of a gross violation of the IDEA, such that the student was denied, or excluded, from services for a substantial period of time warranting an award of compensatory education services, the hearing record does not contain sufficient evidence to justify the award of compensatory education services requested by the parent, which include, but is not limited to, 640 hours of speech-language therapy services, 500 hours of private tutoring, and numerous additional private evaluations. Finally, I note that regardless of the outcome of the instant appeal, the district has already agreed to provide 53.2 hours of speech-language therapy as compensatory education services to the student and to reimburse the parent for the costs of the private evaluation conducted after the parent filed her due process complaint notice.[9]

Accordingly, I have considered the parties' remaining contentions and in light of my determinations, I find that they are without merit and I need not reach them.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**August 24, 2009**

**PAUL F. KELLY**
**STATE REVIEW OFFICER**

[9] To the extent that the parent appeals the impartial hearing officer's alleged failure to address any of the section 504 claims contained within her due process complaint notice, I remind the parent and her attorney that 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. 09-044; 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, I have no jurisdiction to review that issue.