



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-145

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:

Law Office of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, 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 State-approved private high school (see 8 NYCRR 200.1[d], 200.7) in June 2009 with a local diploma and was attending a community college (Tr. pp. 13, 27-30, 80). While the student was attending the State-approved private school, he was eligible for special education programs and services as a student with a learning disability (34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]). The student's eligibility for special education programs and services is not in dispute in this matter.

By due process complaint notice dated July 17, 2009, the parent,¹ through her attorney, alleged that the student was denied a free appropriate public education (FAPE)² because the

¹ In this decision, the term "parent" refers to the student's mother.

² The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

district: (1) failed to develop appropriate individualized education programs (IEPs) with accurate present levels of performance; (2) failed to conduct a required evaluation of the student; (3) failed to address the student's needs related to his disabilities; (4) provided the parent with misleading information about the student; (5) interfered with the parent's participation in the IEP process; (6) failed to develop an adequate transition plan for the student; (7) changed the student's goal of graduating with a Regent's diploma to graduating with a local diploma without informing the parent; and (8) failed to provide appropriate special education services to the student throughout his high school years (Parent Ex. A at pp. 1-3). The parent further alleged that the district's procedural failures resulted in inappropriate IEPs during the student's high school years (2005-06, 2006-07, 2007-08, and 2008-09), and that the student was both procedurally and substantively denied a FAPE (*id.* at p. 3). The parent requested the provision and payment of four years of compensatory education and services, including transition services (*id.*).

In August 2009, the district submitted a motion to dismiss the due process complaint notice for mootness, arguing that the student's rights to the protections and procedures of the Individuals with Disabilities Education Act (IDEA) had been extinguished by his graduation with a diploma from the State-approved private high school (IHO Interim Order at p. 1). The parent's attorney submitted a response to the district's motion, and by interim order dated September 2, 2009, an impartial hearing officer (Hearing Officer 1) determined that compensatory education could be awarded after the student was no longer eligible for instruction because of graduation if there had been a gross violation of the IDEA (*id.*) Hearing Officer 1 found that the parent's complaint was not moot and ordered that the matter proceed to an impartial hearing (*id.*).³

An impartial hearing was conducted on October 13, 2009 (IHO Decision at p. 2). By decision dated November 10, 2009, a second impartial hearing officer (Hearing Officer 2) determined that the student was not entitled to compensatory education because there was no "gross violation" of the IDEA⁴ resulting in the denial of, or exclusion from, educational services for a substantial period of time (*id.* at pp. 7-9). Hearing Officer 2 noted that the student had attended a State-approved private high school that was chosen by the parent and "obtained" from the district following a prior impartial hearing (*id.* at pp. 7-8). Hearing Officer 2 further found that the student had successfully completed his high school education (*id.* at p. 8). Hearing Officer 2 found that the student passed four out of five Regents exams, and was given four opportunities to take a preparatory course and retake the fifth Regents exam (*id.*). In addition, Hearing Officer 2 found that, although the student did not pass the fifth Regents exam as required for a Regents diploma, he passed with enough credit to earn a local diploma (*id.*). Hearing Officer 2 noted that the student's local diploma qualified him for college, as evidenced by his attendance at a community college, where he was taking basic courses in order to qualify for college level courses (*id.*). Hearing Officer 2 further found that the student's high school was a State-approved private school that adhered to the State's curriculum (*id.* at p. 9). Hearing Officer 2 noted that, although the student's high school offered various after-school tutoring and reading programs, the student did not participate in those programs, in part, because it interfered with the student's basketball

³ Hearing Officer 1 also ordered the district to file an answer to the parent's due process complaint notice by a certain date, if it had not done so already (IHO Interim Order at p. 1).

⁴ 20 U.S.C. §§ 1400-1482.

team practice (id.). Based upon the foregoing, Hearing Officer 2 dismissed the parent's complaint (id.).

The parent appeals, asserting that the district denied the student a FAPE for all four of the student's high school years by failing to evaluate him on a triennial basis, failing to provide a transition plan, failing to provide progress reports on goals and objectives, and failing to provide meaningful and measurable annual goals with accurate academic baselines. Specifically, the parent alleges that: (1) the student was not evaluated with standardized testing at the State-approved private school; (2) the student was not provided with individualized instruction to address his reading and math deficits; (3) the student's reading levels had not been evaluated by the district since December 2004; (4) the student did not attend the State-approved private school's after-school reading program because he played basketball after school; (5) all of the student's progress reports at the State-approved private school were based upon teacher observation; (6) an independent evaluation (comparing grade equivalent scores) revealed that the student minimally progressed during his high school years; and (7) the parent's requests to have the student evaluated during high school were unsuccessful. The parent further alleges that the program offered by the district was not reasonably calculated to provide the student with educational benefits. In addition, the parent asserts that Hearing Officer 2 erred: (1) by not addressing whether the student received a FAPE; (2) by applying an incorrect "gross violation" standard since the student has not aged out of his IDEA eligibility; (3) in determining that the district did not commit such a violation because the student was given a local diploma in June 2009; (4) in failing to address the parent's argument that a two year statute of limitations should not apply because the district withheld information from the parent by failing to timely evaluate the student, thus concealing the student's lack of progress from the parent; and (5) by relying on the student's completion of high school and enrollment at a community college as a significant factor in denying compensatory education. The parent further alleges that the student failed all of his remedial classes at the community college in November 2009 and left the school upon speaking to his advisor and concluding that he could not function academically at a remedial level at the community college. The parent also asserts that the district's granting of a "meaningless local diploma" did not prepare the student for college. As relief, the parent requests four years of compensatory services.

In its answer, the district asserts that the student attended a State-approved private school for four years at its expense and graduated with a local diploma in June 2009. The district asserts that the private school is a State-approved program for college-bound students with learning disabilities, which offers students an intensive support program with 12:1⁵ classes, related services, and a voluntary after-school reading program. The district further asserts that the private school's transition support services consisted of a school psychologist who works with the students and their families to provide college search and application information. The district also alleges that the private school offers SAT preparation courses and after-school tutoring for Regents preparation.

Specifically, the district alleges that in December 2004, it conducted a psychoeducational evaluation of the student. The district also alleges that to address the student's academic needs, the student's ninth grade teacher recommended using multimodal instruction, permitting the student to read and reread assignments, permitting extra time to complete exams, showing the

⁵ This indicates 12 students and one teacher.

student how to use graphic organizers, and having him summarize and identify details in text to ensure comprehension. The district asserts that the student participated in a portion of the after-school reading program and was encouraged to participate in the summer reading program, but did not do so. The district further alleges that the student passed all but one of his Regents exams, and he then retook the exam and failed, but he did not attend the Regents review course. The district alleges that while the parent became unhappy with the student's education at the State-approved private school, she did not consider requesting a transfer because she did not want to disrupt the student's education. In addition, the district alleges that in February 2009, after the student was unable to pass his last Regents exam, the Committee on Special Education (CSE) changed the diploma objective on the student's IEP from a Regents diploma to a local diploma; however, if the student passed the June 2009 Regents exam, the diploma would have been converted to a Regents diploma.

The district further contends that Hearing Officer 2 correctly determined that the student is not entitled to compensatory education because he graduated with a local diploma, which is evidence that the student received educational benefit. The district argues that the student's passing grades, advancement from grade to grade, graduation with a local diploma, and passing four out of five Regents exams indicate that there has not been a gross deprivation of a FAPE. The district contends that its failure to conduct a triennial evaluation did not deprive the student of a FAPE, nor was it a gross violation. The district also alleges that the April 2009 private evaluation report confirmed the validity of the district's evaluations and teacher reports. The district argues that incomplete transition plans on the student's IEPs did not deny the student a FAPE, nor was it a gross violation. The district further asserts that the annual goals on the student's IEPs and the student's progress reports were sufficient under the IDEA. The district contends that the parent failed to demonstrate that there was a gross deprivation of a FAPE for a substantial period of time. The district argues that its program was appropriate for the student. The district argues in the alternative that, even if there was a gross deprivation of a FAPE, the parent failed to demonstrate that the requested relief is an appropriate remedy.

As an affirmative defense, the district contends that the petition should be dismissed because it does not comply with State regulations. Specifically, the district asserts that a memorandum of law is not a substitute for a pleading, and that the parent's request in her memorandum of law for 1440 hours of tutoring, additional speech-language services, and transition services was not properly raised in the petition. The district also contends that the parent's memorandum of law, not the petition, contains the argument that the statute of limitations should be tolled because the district allegedly misrepresented the student's academic performance by withholding progress reports and granting the student testing accommodations on his Regents exams, which permitted him to pass exams that he otherwise would have failed. The district also asserts that the parent's petition does not clearly indicate the reasons for challenging Hearing Officer 2's decision. As an additional affirmative defense, the district argues that the parent's allegations related to the 2005-06 and 2006-07 school years are barred by the two year statute of limitations. The district alleges that the statute of limitations should not be tolled because the parent was aware of the student's deficits as evidenced by her expressed concerns about the student's progress, and the district was required to provide the student with testing accommodations on his Regents exams.

In her reply, the parent denies that the petition must contain a party's entire argument and alleges that State regulations permit a party's legal arguments to be contained in a memorandum

of law. The parent also admits that there is a two year statute of limitations, but argues that it should be tolled because the district withheld information from the parent that was required to be provided to the parent pursuant to State regulations.

As an initial procedural matter, pursuant to State regulations, a reply is limited to 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 with a Disability, Appeal No. 09-056; Application of a Student 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 procedural defenses in the district's answer, but the reply also contained additional arguments in response to the substantive arguments interposed by the district in its answer. Therefore, I will consider the reply for the limited purpose of addressing the district's procedural defenses, and the remainder of the parent's reply will not be considered (see 8 NYCRR 279.6; Application of a Student with a Disability, Appeal No. 09-085; Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 09-056; 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).

Second, the district requests that those arguments raised in the petition that are further specified in the parent's memorandum of law be dismissed as insufficient and not considered on appeal. State regulations require the petition for review to clearly indicate the reasons for challenging an impartial hearing officer's decision; identifying the findings, conclusions, and orders to which exceptions are taken; and to indicate what relief should be granted by a State Review Officer to the petitioner (8 NYCRR 279.4[a]; see Application of the Dep't of Educ., Appeal No. 09-051; Application of the Bd. of Educ., Appeal No. 07-097). In the exercise of my discretion, I decline the district's request to reject the arguments in the parent's petition on sufficiency grounds.

Third, the district argues on appeal that the statute of limitations bars the parent's claims regarding the student's first two years of high school (2005-06 and 2006-07). The parent asserts that Hearing Officer 2 erred by failing to determine that her claims regarding the student's 2005-06 and 2006-07 school years were not barred by the statute of limitations. However, there is nothing in the hearing record that indicates that the parent raised this issue at the impartial hearing.⁶ In addition, the hearing record reveals that the district did not challenge the due process complaint notice as insufficient or raise its statute of limitations defense below, and the evidence in the hearing record was not developed as relevant to this issue. Accordingly, I decline to address this issue under the circumstances of this case, in part because it was not raised below and is not properly before me (see Educ. Law § 4404[2]; 34 C.F.R. § 300.508[d][1]; 8 NYCRR 200.5[i][3], 279.12[a]).

⁶ Hearing Officer 2 did not include the parties' post-hearing briefs in the hearing record. Also, since Hearing Officer 2 did not apply the statute of limitations to bar the parent's claims pertaining to the student's first two years of high school, the parent was not aggrieved by Hearing Officer 2's decision in that regard.

Turning now to the merits of the appeal, the parent asserts that Hearing Officer 2 erred by applying an incorrect gross violation standard, determining that there was no gross violation of the IDEA because the student had graduated from high school with a local diploma, and finding that the student was not entitled to an award of compensatory education. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

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

additional services awards of physical therapy and speech-language therapy]; Application of 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).

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 2009, 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, for a student who is otherwise ineligible by reason of age or graduation, in order for the student to be awarded compensatory education (see Somoza, 538 F.3d at 109 n.2, 113 n.6; 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 Student with a Disability, Appeal No. 09-056; 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 hearing record, as more fully discussed below, I agree with Hearing Officer 2's determination that the instant matter does not present that rare case (IHO Decision at p. 9).

The student has a history of delays and academic difficulties. As a young child, the student received speech-language services and physical therapy through the Early Intervention program, and later, he received resource room services and speech-language therapy in elementary school (Parent Exs. CC-3 at p. 1; G at p. 3). Cognitive testing conducted in February 2003 (sixth grade) reportedly yielded a full scale IQ score of 77; however, significant subtest scatter was noted (Parent Exs. CC-3; CC-5 at p. 2). The student attended the district's schools in sixth and seventh grades (Parent Ex. CC-3 at p. 1). For eighth grade (2004-05), the student attended a parochial school at district expense (Tr. pp. 85, 90). In December 2004, the district conducted a psychoeducational evaluation of the student that revealed low average ability in reading comprehension, decoding, and mathematical skills and reasoning, along with a relative strength in spelling (Parent Ex. CC-5 at p. 4).

The CSE met for a requested review on January 7, 2005 (Parent Ex. AA-6 at pp. 1-2). The student was classified as having a learning disability and the CSE's recommendation that the student be placed in a State-approved private school, day program for ninth grade was deferred to the "Central Based Support Team" (CBST) (Tr. p. 15; Parent Exs. AA-6 at pp. 1, 2; BB-17). The CSE reconvened for a requested review on February 7, 2005, at which time the student was

recommended for a 12:1+1⁷ special class at a specific State-approved private school (Parent Exs. AA-5 at pp. 1, 2; BB-10). The proposed IEP indicated that the student demonstrated a relative strength in spelling, as well as low average ability in reading comprehension and decoding (Parent Ex. AA-5 at p. 3). The student's academic instructional levels, as measured by the WIAT-II, were reported as follows: decoding 6.1, reading comprehension 5.6, spelling 8.2, math computation 5.5, and problem solving 4.8 (*id.*). The student's February 2005 IEP also indicated that he showed a desire to achieve and do well socially and academically (*id.* at p. 4). It also noted that, at times, the student tended to be distractible and impulsive (*id.*). The February 2005 IEP recommended that the student receive reading and math instruction and that he be provided extended time on tests (*id.* at pp. 11, 13).

On March 3, 2006, a school psychologist completed a psychosocial update of the student, with the parent serving as informant (Parent Ex. CC-3). The psychologist noted that the student's teachers at the State-approved private school reported that he was very social and that he got along well with peers, but that at times he would engage in "immature arguments" (*id.* at p. 2). However, it was further indicated that the student usually worked well in class when redirected (*id.*). According to the psychosocial evaluation report, the student felt "down" when he did not do well on tests, but his success on the school's basketball team helped to improve his overall self-image (*id.*). The psychologist reported that based on the student's report card, his first trimester grades for his core academic classes were as follows: English (72), global studies (72), math (72), and life science (70) (*id.*). The psychologist noted that the parent indicated that she was "very pleased" with the student's performance at the State-approved private school, that the program was "phenomenal," and that the instructors were "excellent people" (*id.*). The psychologist reported that the student's interdisciplinary team recommended that he continue to be enrolled in a 12:1+1 self-contained class at the State-approved private school (*id.* at p. 3).

In an undated educational progress report regarding the student's ninth grade year at the State-approved private school, the student's teacher described the student as "a quiet and shy young man who is easily engaged in conversation" (Parent Ex. CC-3 at p. 4). The teacher indicated that the student was a multimodal learner who processed and retrieved information slowly and who needed time to complete assignments (*id.*). She noted that the student's reading, writing, and math skills were significantly delayed and that the student struggled with reading comprehension and word problems (*id.*). She further indicated that the student participated in class discussions only when called upon by the teacher and that his responses were brief (*id.*). According to the teacher, the student struggled with motivation and his class work and homework were frequently missing (*id.*). In addition, the student was easily distracted, frequently off task, and required refocusing (*id.*). The teacher cautioned that that the student needed to be refocused in a way that did not call attention to him, otherwise he could react impulsively or become confrontational or oppositional (*id.*). The teacher indicated that the student could write short paragraphs on a given topic, but that the paragraphs were generally simplistic and did not contain substantial details (*id.* at p. 5). She reported that the student was able to perform math calculations, but had difficulty with word problems, especially those with multiple steps (*id.*). According to the teacher, the student was able to read words by sight and, with encouragement, would attempt to decode unrecognized words (*id.*). When called upon, the student had difficulty identifying the main idea or details of a passage

⁷ This indicates 12 students, one teacher, and one aide.

(id.). The teacher indicated that the student had difficulty focusing on material that was lengthy or abstract (id.).

The student's teacher detailed the strategies and methods that would be used to address the student's difficulties including the use of small groups in a language-based special education class (Parent Ex. CC-3 at p. 5). The teacher noted that multimodal instruction and textbooks with modified reading levels were incorporated into the classroom setting and that teachers at the school were trained in Smart Board technology, which was present in all the classrooms (id.). The teacher indicated that assignments were read and repeated, that the student would be provided additional time to process information, that graphic organizers would be used to help the student organize his thoughts and ideas when writing, and that the student would plan and sequence the steps needed for completing word problems (id.). The teacher recommended that the student continue to receive special education services in a small, structured, language-based environment to address his receptive, expressive and pragmatic language delays and to address the student's IEP goals and improve his overall academic performance (id. at p. 6). The progress report also included an annual goal and short-term objectives to address the student's needs in the area of study skills (id. at p. 5).

The CSE reconvened on March 7, 2006, for the student's annual review and recommended that the student continue to be classified as having a learning disability and that he continue to be placed in a 12:1+1 special class at the same State-approved private school as the previous school year (Parent Ex. AA-4 at p. 1). The resultant March 2006 IEP characterized the student as a multimodal learner and noted that he processed and retrieved information slowly (id. at p. 3). It further indicated that the student struggled with motivation and that according to his teachers, his class work and homework were frequently missing (id.). Based on teacher observation, the student's instructional levels for passage comprehension, writing, and problem solving were judged to be at the fifth grade level, while his decoding and computation skills were judged to be at the sixth grade level (id.). The March 2006 IEP included curriculum related goals, as well as study skills and time management goals (id. at pp. 6-14). It also indicated that the student would receive one period of reading, writing, and math remediation as part of his instructional program (id. at p. 15). The March 2006 CSE recommended that the student be provided testing accommodations including extended time (double) and use of a calculator on tests longer than 45 minutes (id. at p. 17). The March 2006 IEP included a transition section that listed long-term adult outcomes such as "live independently" and "attend a post secondary institution for a Bachelor of Arts degree," but did not identify any specific transition services to be provided to the student (id. at p. 18).

In December 2006, the school psychologist at the student's State-approved private school completed a psychosocial update of the student in preparation for his annual review (Parent Ex. CC-2). According to the psychologist, the student attained the following grades in his core academic classes for the first trimester of tenth grade (2006-07): English (60), global studies (65), math (75), and life science (65) (id. at p. 2). The psychologist reported that the parent indicated she was "pleased" with the student's school performance, but also that he needed more help to fulfill his potential (id.). The psychologist noted that the parent "love[d]" the program at the State-approved private school, but believed that "some improvements" could be made and that, in addition to focusing on the Regents exams, the students needed to start preparing for the PSATs and SATs (id.).

The CSE convened on March 15, 2007, for the student's annual review (Parent Ex. F). The resultant March 2007 IEP indicated that the student needed new material to be repeated and reworded and that the student had difficulty with lengthy, abstract or theoretical lessons that resulted in a diminished ability to focus (id. at p. 3). Based on teacher observation, the March 2007 IEP reflected that the student was at a sixth grade instructional level for reading and written expression, and a sixth to seventh grade instructional level for math (id.). The March 2007 CSE recommended that the student continue to be classified as a student with a learning disability and that he continue to be placed in a 12:1+1 special class at the same State-approved private school (id. at p. 1). The March 2007 IEP included curriculum related goals as well as goals related to study skills, organizational techniques, and time management (id. at pp. 6-14). Consistent with the student's previous IEPs, the March 2007 IEP indicated that the student would receive one period of reading, writing, and math remediation as part of his instructional program (id. at p. 15). The March 2007 CSE recommended that an additional testing accommodation be added to the student's March 2007 IEP that allowed for test directions to be read aloud and reread (id. at p. 17). The student's March 2007 IEP included a transition section that listed long-term adult outcomes, but did not include any transition services (id. at p. 18). The March 2007 IEP indicated that the student had earned 14 credits and was expected to graduate in June 2009 with a Regents diploma (id.).

The student's report card for the 2006-07 school year (tenth grade) from the State-approved private school reflected the following final grades for the student's core academic classes: English 10 (66), mathematics 10 (71), and living environment (61) (Parent Ex. M).⁸ In an undated letter to the parent, staff at the student's school indicated that he had attended eight out of fifteen possible after-school reading classes and had improved his ability to read sight words by 1.6 grade levels (Parent Ex. V). The letter indicated that the reading program would continue free of charge over the summer and urged the parent to continue the student's participation in the program (id.).

An educational progress report from the student's eleventh grade year (2007-08)⁹ at the State-approved private school stated that the student did not demonstrate the ability to attend class on time and was not always prepared to work (Parent Ex. J at p. 1). The evaluator noted that with consistent verbal prompts, the student demonstrated the ability to attend to task and that his seat behavior was good (id.). However, the progress report indicated that the student did not submit assignments in a timely fashion and that his class work was inconsistent, although he would ask for assistance when needed (id.). According to the evaluator, the student's ability to process new information was considered to be average and the student was able to multitask, comprehend abstract information, and synthesize information given to him (id.). The evaluator stated that the student was able to break down simple and multisyllabic words, that his ability to comprehend what he had read was "good," and that the student was competent in determining the main idea and answering questions regarding the supporting details of a story (id.). According to the evaluator, the student could draw conclusions and make inferences (id.). The evaluator indicated that the student could construct a simple sentence with errors in grammar and syntax and that he

⁸ There was no final grade reported for global studies 10 (see Parent Ex. M).

⁹ Although the report is dated January 30, 2007, the evaluator refers to the student as a "junior" (Parent Ex. J at p. 1). Language from the report is included verbatim in the February 2008 IEP, which was drafted when the student was in eleventh grade (compare Parent Ex. E at p. 3, with Parent Ex. J). It appears from the context of the hearing record that this report was actually developed in January 2008.

was not able to prepare an organized, sequential, cohesive essay (id.). In addition to strategies and methods detailed in prior reports, the evaluator indicated that modeling and lead-in questions were utilized to assist the student with retrieval of prior knowledge and facilitate mastery of new concepts; that math skills were presented using a rules-based step by step approach; and that prompting, cuing, and wait time strategies were utilized in the classroom (id. at p. 2). The evaluator recommended that the student continue to receive special education services in a small, structured, language-based classroom to address his academic needs (id.).

A psychosocial update completed by a school psychologist in February 2008 indicated that the student received the following grades in his core academic subjects for the first trimester of eleventh grade (2007-08): English (70), U.S. history (60), mathematics (70), and chemistry (65) (Parent Ex. H at p. 2). As in the previous year, the parent indicated that she was pleased with the program, but that she believed her son required more help to fulfill his potential (id.). As recorded by the psychologist, the parent also indicated that she believed that the students at the State-approved private school should have the opportunity to attend more mainstream classes (id.). The psychologist reported that the interdisciplinary team recommended that the student continue to be enrolled in a 12:1+1 self-contained program at the school and that no related services needed to be added to the student's IEP (id. at p. 3).

A classroom observation of the student conducted in February 2008 indicated that the student fell asleep in his history class (Parent Ex. I at p. 2). It further indicated that the student was easily disrupted by others talking during class and that he easily became engaged in other conversations as well (id.). It also noted that while he was on time for class, he was not prepared and did not have his homework (id.). The observation reflected that the student took out his materials without prompting, remained seated throughout the lesson, focused on the instructor throughout the lesson, and did not speak out of turn (id.). However, the student did require verbal redirection two times (id.). It was further reflected that the student completed the class assignment for the day and when the class was over, he packed up his belongings in an organized fashion and left the room (id.).

The CSE met on February 7, 2008 for the student's annual review (Parent Exs. E; AA-2).¹⁰ The resultant February 2008 IEP reflected the student's present levels of performance as detailed in the student's educational progress report (compare Parent Ex. E at p. 3, with Parent Ex. J). Based on teacher observation, the student's instructional level for reading was judged to be at the 7.8 grade level, written expression at the 8.9 grade level, and math at the 7.0 grade level (Parent Ex. E at p. 3). The February 2008 CSE recommended that the student continue to attend a 12:1+1 special class at the State-approved private school (id. at p. 1). The February 2008 IEP included annual goals targeting the student's mastery of the eighth grade math curriculum and improving his reading skills to a ninth grade level, as well as study skills goals and curriculum related goals (id. at pp. 6-13). The February 2008 IEP indicated that the student would receive one period of reading, writing, and math remediation as part of his instructional program (id. at p. 14). The February 2008 CSE recommended that an additional testing accommodation, which allowed for questions to be read aloud, be added to the student's February 2008 IEP (Parent Exs. E at p. 16; AA-2 at p.

¹⁰ As noted in the hearing record, both Parent Ex. E and Parent Ex. AA-2 are IEPs dated February 7, 2008; however, there is a page discrepancy between the exhibits (Tr. p. 7). In addition, the pages within the exhibits are ordered differently.

3). The student's February 2008 IEP included a transition section that listed long-term adult outcomes, but did not include any transition services (Parent Ex. AA-2 at p. 16). The February 2008 IEP indicated that the student had earned 21 credits and was expected to graduate in June 2009 with a Regents diploma (id.).

The student's report card for the 2007-08 school year (eleventh grade) reflected the following final grades for the student's core academic classes: English 11 (73), United States history (56), mathematics 11 (75), and principles of chemistry (68) (Parent Ex. L). The student's GPA was reported to be a 74.20 (id.). The student's final grade his for reading and math course was 74 (id.).

On June 30, 2008, a CSE meeting was held to add an additional testing modification "answers recorded in any manner" to the student's IEP (Parent Ex. D at pp. 2, 3).

In a letter dated July 2, 2008, the State-approved private school informed the parent that the student had not yet passed the U.S. history Regents examination, which was required in order for the student to be granted "a diploma New York State" (Parent Ex. U). The letter indicated that the New York State Board of Regents required that schools offer remediation to students who need to retake the examination and further indicated that student's school was requiring the student attend a ten-day review class to assist in the student's preparation for the August 2008 examination (id.).

In a letter to the CSE chairperson and copied to the parent's attorney dated August 20, 2008, the parent indicated that, following a review of evaluations performed by the school district, she was not in agreement with the CSE's findings (Parent Ex. Q). The parent requested a written reply from the district within ten calendar days authorizing an independent psychological evaluation to be conducted at district expense or, in the alternative, the initiation of an impartial hearing by the district to determine if the evaluations performed by the district were appropriate (id.). In a response dated September 12, 2008, the CSE chairperson indicated that the district was capable of conducting the requested evaluation "using licensed and certified professionals" and denied the parent's request for an independent educational evaluation (IEE) (Parent Ex. P). The parent responded to the CSE chairperson by letter dated September 8, 2008, in which she indicated that if the district did not initiate an impartial hearing regarding her request for an IEE within ten days, she would do so herself (Parent Ex. O). The parent also stated that she was "willing to waive the resolution session and go directly to the [impartial] hearing" (id.). On December 12, 2008, the district issued an "Assessment Authorization Form" for an independent occupational therapy evaluation (Parent Ex. BB). The form indicated that if the parent had any questions, she should contact the person listed on the form (id.).

In January 2009, a psychologist and school psychology intern from the State-approved private school completed a psychosocial update in preparation for the student's annual review and for the stated purpose of addressing the student's needs while he transitioned out of the high school program (Parent Ex. CC). According to the updated psychosocial report, the parent stated that the student had done better during the current school year and that the student was "striving to exit high school and ha[d] set other goals for himself" (id. at p. 2). The psychosocial report indicated that the parent opined that "the [State-approved private school] [p]rogram is an excellent program;" however, she expressed some frustration with the student's reading evaluations and of not being aware of the student's grade level (id.). The psychosocial report further noted that the parent

believed that the student's reading disorder had not been addressed (id.). The report concluded with a recommendation that the student continue to receive special education services within a small, structured, language-based therapeutic environment to address his reading and math delays (id. at p. 3).

The student was observed in his math class on January 21, 2009 (Parent Ex. EE). The observer noted that the student was not on time, was not prepared for class, and did not take his materials out without prompting (id. at p. 1). According to the observer, the student remained seated throughout the lesson and was focused on the instructor throughout the lesson, but needed verbal redirection "more than a few times" because he had been absent the day before (id.). The observer noted that the student asked a question "for assistance" and completed the class assignment for the day (id. at p. 2). The observer stated that the student did not speak out of turn, but was distracted "very quickly" and that attendance was a "big factor" in the student not understanding class work (id. at pp. 1, 3). The observer also noted that when the class ended, the student packed up his belongings in an organized fashion and left the room (id. at p. 2).

A February 2009 educational progress report written by staff at the State-approved private school reiterated that the student was a multimodal learner who needed information to be taught in a variety of ways so that he could expand his present knowledge base (Parent Ex. DD at p. 1). Staff indicated that the student was able to answer "teacher-based" factual and abstract questions and to synthesize information given to him (id.). According to staff, the student required redirection due to his limited attention span, and frequent reminders to copy class notes and home work assignments (id.). Additionally, staff indicated that the student worked best in a small group that could provide him with the support needed to improve his reading, writing, mathematical, and organizational skills (id.). Staff noted that the student had difficulty organizing his thoughts and developing the theme of an essay and that he struggled with mastering new vocabulary words, but was able to identify the main idea and supporting facts in a reading passage (id.). Details of the strategies and methods used to address the student's needs and the recommendation that the student continue to receive special education services in a small, structured, language-based environment to address his cognitive skills while providing him with the necessary supports to address his reading, reading comprehension, writing/organization, and mathematical difficulties were consistent with educational reports previously generated by the school (id. at pp. 1, 2).

The CSE met on February 11, 2009 for the student's annual review (Parent Ex. AA). The CSE recommended that the student attend a 12:1+1 special class in the same State-approved private school that he had been attending since 2005 (id. at p. 1). The student's estimated instructional levels remained the same as in his February 2008 IEP (compare Parent Ex. AA at p. 3, with Parent Ex. E). The resultant February 2009 IEP included revised annual goals targeting the student's mastery of the ninth grade math curriculum, and improving his reading skills to a tenth grade level, as well as study skills goals (Parent Ex. AA at pp. 6-7). The student's February 2009 IEP included a transition plan with long-term adult outcomes, but did not include any transition services (id. at p. 11). The February 2009 IEP indicated that the student had earned 28 credits and was expected to graduate in June 2009 with a local diploma (id.).

An independent neuropsychological evaluation took place over the course of three dates in April and May 2009 (Parent Ex. G).¹¹ According to the evaluating psychologist, the parent believed that the student continued to require intensive reading and math instruction and that the student's academic and social/emotional needs had not been fully met at the student's academic placement (*id.* at p. 1). The report noted that as a result, the evaluation was being conducted to identify the student's needs and to make recommendations to aid in educational and therapeutic treatment planning (*id.*). The report indicated that the student had a long history of academic difficulties and had recently begun to demonstrate increased emotional difficulties (*id.* at pp. 1, 3, 14).¹² Administration of the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) yielded a full scale IQ score of 70, which fell within the borderline range of intellectual functioning (*id.* at p. 5). The psychologist cautioned that the student's full scale IQ score did not accurately reflect the student's functioning as there was substantial degree of variation in the subtests that made up the score (*id.* at p. 14). She further noted that the student was able to function well in his community, interact with same age peers in the neighborhood, and care for his personal needs (*id.*). The psychologist indicated that the student displayed weaknesses in executive functioning including poor inhibitory control, impulsivity, inconsistent self-monitoring, and poor planning and organization of complex visually presented material (*id.*). According to the psychologist, the student also demonstrated difficulty with sustained visual and auditory attention (*id.*). The psychologist opined that language-based difficulties played a role in many of the academic difficulties the student experienced and were relevant to the student's performance on tests, in class assignments, and homework (*id.*). The psychologist reported that the student evidence impaired visuo-motor integration skills and that he demonstrated poor spelling and use of grammar and punctuation (*id.*). She noted that the student had difficulty with higher order abstract language, as well as difficulty expressing himself (*id.* at p. 15). The psychologist further reported that the student's memory skills were somewhat stronger than expected (*id.*). The psychologist described the student's reading as "slow and effortful" (*id.*). She noted that the student lacked decoding skills and that he demonstrated substantial difficulty with reading comprehension (*id.*). With respect to mathematics, the psychologist reported that the student demonstrated adequate, although not automatic, math fact knowledge for single digit addition, subtraction, and multiplication tasks (*id.* at p. 12). She indicated that the student demonstrated difficulty with money concepts, reading clocks, fractions and following number patterns (*id.*). The psychologist noted that, although the student's academic performance was not significantly discrepant from his level of intellectual functioning, the student's performance was far below grade level in all areas (*id.* at pp. 12-13).

According to the psychologist, the student displayed a good range of affect during the evaluation (Parent Ex. G at p. 15). She indicated that on objective measures, the student endorsed some feelings of depression and anxiety and on non-objective tasks reflected themes of frustration, sadness, and worry (*id.*). Responses provided by the student's family and teachers on behavior

¹¹ The hearing record reflects that the parent requested an independent psychoeducational evaluation in August 2008, but that her request was rejected by the district (Parent Exs. P; Q). The district stated in its answer that it was ordered to conduct an evaluation following an impartial hearing (Answer ¶ 51, n.5). The district acknowledged that it failed to conduct the ordered evaluation, and that the parent obtained the 2009 independent neuropsychological evaluation at district expense (*id.*).

¹² According to the evaluation report, the student had a history of therapeutic and pharmacological treatment to address issues related to anxiety and depressive symptoms (Parent Ex. G at p. 3). At the time of the evaluation the student was seeing a private psychiatrist for periodic updates (*id.*).

assessment scales indicated elevations on measures of anxiety and attention problems (*id.*). The psychologist reported that while the student's placement at the State-approved private school was aimed at fulfilling the student's language and academic needs, the student had a great deal of frustration and disappointment in his educational experiences at the school (*id.*). She noted that the student continued to require intensive academic intervention in all areas, as he had expressed an interest in improving his academic skills so that he might go to college (*id.* at p. 2). The psychologist offered the following diagnoses: attention deficit hyperactivity disorder-inattentive type (ADHD), learning disorder "NOS,"¹³ and an adjustment disorder with mixed anxiety and depressed mood (*id.* at p. 16). Among other things, the psychologist suggested that a comprehensive speech-language evaluation was warranted and that the student required more intensive and more frequent speech-language therapy, that the student required direct intervention in reading with a specific focus on reading comprehension, and that the student required direct process introduction for mathematics (*id.* at pp. 16-17).

At the impartial hearing, the parent testified that when the student was in eighth grade at the private parochial school, she had determined that the State-approved private school would be appropriate for the student because it had been recommended and "it looked very attractive" after visiting (Tr. pp. 85-87). The parent also testified that she had been "impressed that they had . . . everything under one roof and [would] not have to contract out" for services (Tr. p. 86). In addition, the parent testified that one of the reasons for placing the student at the State-approved private school was that the program was "heavily focused" on the student attaining a Regents diploma (Tr. p. 78). The parent stated that she started trying to determine the student's progress at the school when he was in tenth grade and requested an evaluation of the student in 2008 (Tr. pp. 70, 73). The parent further testified that, although the student was unhappy at the school because he did not feel academically challenged, she kept him there because she believed the school was helping him (Tr. pp. 99-100). The parent also stated that, during the student's last three years of high school, she did not consider seeking an alternative high school placement for her son because she wanted him to have consistency, and the student's goal was to graduate with a Regent's diploma, not an IEP diploma, and she believed that any other school would have provided him with an IEP diploma (Tr. p. 100).

Relevant to the student in this case, the State-approved private school's principal testified that the school offers a 12:1+1 intensive support program, including the provision of related services, for college-bound students with learning disabilities (Tr. pp. 13-14). The principal testified that the school is State-approved, follows the State curriculum, and grants either Regents or local diplomas (Tr. pp. 13-14). The hearing record reveals that the school offered an after-school intensive reading program, which the student partially attended in tenth grade, but did not attend afterwards (Tr. pp. 14, 20, 46-47, 49, 55-56, 104). The hearing record also reflects that the student was offered multiple opportunities to attend review classes and retake the Regents exam that he initially failed and ultimately passed for RCT¹⁴ credit (Tr. pp. 26-29).

With respect to transition services, the principal testified that school has a transition officer and school psychologist who assist the students with their college searches (Tr. p. 19). In addition,

¹³ "NOS" is presumed to stand for "not otherwise specified."

¹⁴ Although the hearing record does not define "RCT," it is presumed to stand for "Regents Competency Test."

the principal stated that the school's staff prepare the students to take the SATs (*id.*). The principal testified that the school offered the parent several parent meetings "regarding applying to schools and the different support programs" and that the parent was contacted by the school's psychologist and transition officer to discuss these transition issues (Tr. pp. 52-53).

Therefore, based upon the evidence presented, Hearing Officer 2 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 above, the student continuously received a special education program at the State-approved private school that included modifications and accommodations designed to meet the student's unique special education needs (Parent Exs. AA; AA-1; AA-2; AA-4; AA-5; AA-6). The hearing record reveals that during the student's four years in attendance at the State-approved private school, he passed four out of five Regents exams, graduated from high school with a local diploma, and was admitted to a community college (Tr. pp. 26-30, 80, 88-89). Thus, even assuming as true the parent's assertion that the district procedurally and substantively violated the IDEA such that it constituted a gross violation of the IDEA, the student successfully completed the required high school course work, acquired the requisite credits, passed the required exams, and graduated from high school with a local diploma (IHO Decision at pp. 2-4, 7-9; see Tr. pp. 26-30, 80, 88-89). Neither an impartial hearing officer in an impartial hearing nor a State Review Officer can pass upon the academic standards required by the State of New York for graduation, 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]; Application of a Student with a Disability, Appeal No. 09-056; 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]).¹⁵ I further note that even if the district's alleged violations 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

¹⁵ 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).

parent, which include 1440 hours of tutoring, plus speech-language services in the amount of one hour per the number of school weeks in four school years.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 March 31, 2010

PAUL F. KELLY
STATE REVIEW OFFICER