The University of the State of New York

The State Education Department
State Review Officer
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No. 11-060

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:
Advocates for Children of New York, attorneys for petitioner, William M. Meyer, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, John Tseng, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request that respondent (the district) provide compensatory education services to her son. The appeal must be dismissed.

Background and Procedural History

At the time of the impartial hearing, the student was 22 years old and had been granted an individualized education program (IEP) diploma from the district (Tr. pp. 173, 175; Dist. Ex. 3 at p. 1). The student had been eligible for special education programs and services as a student with a learning disability (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]; see also Dist. Ex. 3 at p. 1). The student's eligibility for special education programs and services while he attended school in the district is not in dispute in this matter.

In a prior due process complaint notice dated April 28, 2008, the parent requested an impartial hearing contending that the district failed to provide the student with a free appropriate public education (FAPE) during three consecutive school years (2005-06, 2006-07, and 2007-08) (Dist. Ex. 26). After an impartial hearing was conducted, an impartial hearing officer (Hearing Officer 1), in a decision dated September 5, 2008, ordered the district to pay for 960 hours of 1:1 instruction at Lindamood-Bell, the cost of a Lindamood-Bell evaluation, and the cost of

transportation (Dist. Ex. 27 at p. 9). The district was also ordered to convene a Committee on Special Education (CSE) meeting for the purpose of developing an IEP to address the student's need for "intensive individual reading instruction with a supplemental trade school program" (id.).

On June 10, 2008, the district's school psychologist conducted a psychoeducational reevaluation of the student to ascertain his current level of functioning and to determine his educational needs (Dist. Ex. 49 at p. 1). Assessment instruments included an informal interview, a review of records, administration of the Stanford Binet Intelligence Scales–5th Edition (SB–5), and selected subtests of the Woodcock-Johnson III–Tests of Achievement (WJ–III ACH) (id.). A review of the psychoeducational reevaluation report indicates that the student's cognitive functioning was within the borderline delayed range (id. at p. 7). The student's strengths included fluid reasoning and visual-spatial processing skills (id.). The student's reading ability was assessed to be on the first grade level, and his math ability was assessed to be on the fourth grade level (id.).

A social history update report was prepared on September 16, 2008 by the same district psychologist who had conducted the June 2008 psychoeducational reevaluation, based upon information provided by the student and his parent (Dist. Ex. 8 at pp. 1-2). The September 2008 social history update reflected that the student presented with good receptive and expressive skills (id. at p. 1). The social history update also indicated that the student had not yet attended school for the 2008-09 school year, had excessive absences during the 2007-08 school year, and that he did not like the "worksites" to which he had been previously assigned (id.). Although the social history update reflected that according to the student's teacher, the student displayed a poor attitude at times and tended to frustrate easily, the report also indicated that he had positive relationships with family members and showed frustration by walking away or with verbal expression (id. at p. 2). The social history update also indicated that the student liked working on bicycles, videogames, music, and cooking (id.). As a result of a vocational assessment, namely the Interest Determination, Exploration and Assessment System (IDEAS), the student scored high in the mechanical/fixing, protective services, and food service categories; indicating that the student would be interested in making/fixing things, serving the community enforcing laws, and preparing food or working in a restaurant (id.).

On September 19, 2008, a CSE meeting convened for the purpose of developing a new IEP for the student for the 2008-09 school year (Tr. p. 74; Dist. Exs. 3; 5). Members of the CSE included the district's school psychologist who had conducted the June 2008 psychoeducational reevaluation and the September 2008 social history update, the assistant principal of the district's school, the student, the parent, and the parent's attorney (Dist. Ex. 3 at p. 2). The CSE recommended a 12:1+1 special class in a special school, with related services of speech-language therapy and counseling, all to be provided on a 12-month basis (id. at pp. 1, 14). The student's September 2008 IEP described the student's present levels of performance, referencing results from the WJ–III ACH and the SB–5 as reflected in the student's June 2008 psychoeducational reevaluation report (Dist. Ex. 3 at p. 4; see Dist. Ex. 49). Regarding the student's academic management needs, the September 2008 IEP indicated that he needed to gain "basic reading skills" in a small structured classroom, and that he required repetition and positive reinforcement (Dist. Ex. 3 at p. 5). Regarding transition services, the September 2008 IEP indicated that the student would participate in a "hands-on trade school program and an intensive reading program" (id. at p. 15). The CSE meeting minutes noted that the student was enrolled in the Lindamood-Bell

literacy program (Dist. Ex. 5 at p. 1). The hearing record reflects that the parent wanted the student to attend Lindamood-Bell to meet his literacy needs, and also wanted the district to provide the student with a vocational program (Tr. pp. 77-78). The hearing record further reflects that the parent asked the district about a locksmith program that the student had previously attended at a public school program (Public School A), which the student had liked (Tr. p. 78; Dist. Ex. 5 at p. 1).

The student was enrolled in Lindamood-Bell from September 22, 2008 through January 14, 2010 (Tr. pp. 425, 449, 486; Dist. Exs. 24; 48). The student attended the program 5 days per week, 4 hours per day, and received a total of 948 hours of instruction (Tr. p. 427; Dist. Ex. 48).

On September 22, 2008, the district's school psychologist who had attended the September 2008 CSE meeting contacted the district's placement office to inquire about vocational programs for the student (Tr. p. 92; Dist. Exs. 9; 10). The district's psychologist was informed about another public school program within the district (Public School B), spoke with the assistant principal about the programs at Public School B, and was advised that the student "sound[ed] like one of their typical students" regarding age, disability, and program (Tr. pp. 93-94; Dist. Exs. 9; 10). The hearing record indicates that when the district's psychologist discussed Public School B with the parent, she rejected the school as inappropriate without visiting it and asked that the student be placed at Public School A (Tr. pp. 97-98, 494-96, 521-22, 534-39, 542-45, 557-58; Dist. Exs. 9 at p. 2; 10 at p. 1).[1]

On September 26, 2010, the district's psychologist contacted Public School A and spoke with a guidance counselor at the school (Tr. p. 101; Dist. Exs. 9 at p. 3; 10 at p. 2). The district's psychologist then advised the parent regarding scheduling a meeting with the counselor at Public School A, and suggested that the parent pick up an application form and the student's IEP before the meeting; however, the documents were not picked up and the district's psychologist subsequently mailed the application, the IEP, and a document entitled "Change of Program Service Category" to the parent (Tr. pp. 101-104; Dist. Exs. 9 at pp. 3-4; 10 at p. 2; 13).[2] On October 2, 2008, the parent advised the district's psychologist in a telephone conversation that the counselor

[1] It appears from the hearing record that the district did not further pursue placement for the student at Public School B in order to comply with the parent's wishes (Tr. pp. 97-98, 494-96, 521-22, 534-39, 542-45, 557-58; Dist. Exs. 9 at p. 2; 10 at p. 1); however, the district is reminded that it has an affirmative obligation to offer the student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-81 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]); see Application of a Student with a Disability, Appeal No. 08-033; Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137).

[2] The hearing record reflects that the assigned school listed on the "Change of Program Service Category" form was the same district school to which the student had been previously assigned; that when the district's psychologist received a telephone call from the parent's attorney inquiring about the student's assignment in the same 12:1+1 class that he attended the previous year, the district's psychologist explained that the district was not specifically recommending the school in particular, but was researching other programs for the student (Tr. p. 111). The hearing record also demonstrates that the offer to assign the student to the same school as the previous school year was not intended to be the district's final offer (Tr. pp. 104-07, 110-11, 123). In a letter dated October 31, 2008, the parent's attorney advised the district that the student was enrolled in Lindamood-Bell, no longer attended the district' school, and it was requested that the district remove the student's name from the school's roster (Tr. pp. 112-113; Dist. Ex. 15).

at Public School A advised her that the program would not be appropriate with respect to the student's reading level (Tr. pp. 107-108; Dist. Exs. 9 at pp. 3-5; 10 at pp. 2-3). The district's psychologist spoke with the counselor at Public School A subsequently and confirmed this information (Tr. p. 108; Dist. Exs. 9 at p. 5; 10 at p. 3).

The hearing record reflects that in December 2008, a district special education teacher, the student, and the parent met at the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) to investigate possible vocational programs through that agency (Tr. pp. 160-61; Dist. Ex. 18).[3] However, the vocational programs available through VESID required full-day attendance and could not be scheduled in conjunction with the part-day Lindamood-Bell program (Tr. p. 501); therefore, the student's VESID application was placed on hold on January 22, 2009, until the student completed his literacy program at Lindamood-Bell (Tr. pp. 167-68, 170, 173-74, 502, 525; Dist. Ex. 18 at p. 6). The parties also contemplated the possibility that a more challenging vocational placement might be available to the student after he completed the Lindamood-Bell program (Tr. pp. 151-61, 167-70, 194-95, 229, 240-41, 524-25). A review of the hearing record reflects that the district's special education teacher had contact with the parent's attorney regarding the student until April 2010 (Tr. p. 172; Dist. Ex. 18 at pp. 4-7, 9-12). The district's special education teacher reported that "[the parent's attorney] and I spoke . . . she was on speed dial. We talked a lot" (Tr. p. 172).

In April 2010, the district's special education teacher dropped off the student's IEP diploma at the parent's attorney's office and the attorney advised that she was not sure if the student was still interested in VESID (Tr. pp. 175-76, 183). According to the district's special education teacher, on three occasions between 2008 and 2010, she asked the parent's attorney if there were any other steps needed to comply with Hearing Officer 1's order, and when she asked the same question again upon delivering the IEP diploma in April 2010, the parent's attorney responded "No, we're good" (Tr. pp. 174-75).

Due Process Complaint Notice

In a due process complaint notice dated May 24, 2010, the parent asserted that the student was entitled to compensatory education because the district failed to provide the student with a FAPE (Dist. Ex. 1 at p. 1). The May 2010 due process complaint notice referenced Hearing Officer 1's decision and asserted that the district failed in its obligation to implement that order because the student did not receive a "trade school placement" (id. at pp. 1-2). For relief, the parent requested that the district pay for an additional 360 hours of Lindamood-Bell services, including transportation, and provide "appropriate secondary training, such as a GED or locksmith program," once the student's reading ability had "reached an adequate level" (id. at p. 3).[4]

[3] In November 2008, the district special education teacher responsible for "transition planning" at the student's prior assigned school had been asked by the assistant principal to help the student and to "do whatever . . . [the student's] lawyer . . . wants you to do" (Tr. p. 155).

[4] Although not defined in the hearing record, it appears that GED refers to the "Tests of General Educational Development."

In a July 16, 2010 motion to dismiss, the district contended that the parent's cause of action in the May 2010 due process complaint notice was based upon the district's failure to fully implement Hearing Officer 1's decision, and that an impartial hearing officer lacked jurisdiction over the claim (Dist. Ex. 25 at pp. 4-5). The parent opposed the district's motion on July 21, 2010 (Dist. Ex. 29). In her response, the parent asserted that the May 2010 due process complaint notice alleged that the district failed to provide the student with a FAPE for the 2008-09 school year under State and federal law, independent of the district's obligations under Hearing Officer 1's decision (id. at p. 4). In an email dated July 28, 2010, the impartial hearing officer assigned to this case (Hearing Officer 2) denied the district's motion to dismiss for the reasons proffered by the parent (Dist. Ex. 30).

The parent subsequently filed an amended due process complaint notice dated October 8, 2010, asserting that the student was entitled to compensatory education because the district "grossly violated" the Individuals with Disabilities Education Act (IDEA) by failing to provide the student with a FAPE (Dist. Ex. 50 at p. 1). The October 2010 amended due process complaint notice asserted that the district failed to adequately evaluate the student and to "produce data sufficient to recommend an appropriate program" (id. at p. 2). The parent also alleged, without specificity, that there were procedural and substantive deficiencies in the student's September 2008 IEP (id.). Additionally, the parent contended that the district failed to recommend a placement that would meet the student's IEP goals and provide him with "meaningful educational and transitional progress" (id.). The parent also alleged that the district failed to provide a placement to the student in an appropriate vocational program (id.). The parent sought the same relief as in her May 2010 original due process complaint notice (id.).

Hearing Officer 2's Decision

An impartial hearing began on December 3, 2010 and concluded on February 25, 2011, after three days of proceedings (Tr. pp. 1-671). In a decision dated April 21, 2011, Hearing Officer 2 found that the only issue to be decided was whether the district "grossly denied the student a FAPE" for the 2008-09 school year, after Hearing Officer 1's decision (IHO Decision at p. 12). Hearing Officer 2 found that the evidence demonstrated that in September 2008, a CSE meeting was held pursuant to Hearing Officer 1's order, and that the parent's original and amended requests for an impartial hearing in this case did not allege the procedures followed at the CSE meeting were improper in any way; therefore, any contention that the CSE failed to follow procedures at the CSE meeting would not be considered (id.).

As to the parent's claim that the district failed to provide the student with a FAPE because it did not offer a "timely trade school placement," Hearing Officer 2 found that such allegation was "inextricably intertwined" with whether the district timely complied with Hearing Officer 1's order (IHO Decision at p. 3). Accordingly, Hearing Officer 2 dismissed the claim and found that it should be filed in federal court pursuant to the terms of a settlement in a class action suit involving the district (id. at pp. 3-4). In addition, Hearing Officer 2 found "little if any evidence" in the hearing record that the district acted in a way that constituted a gross denial of FAPE after the September 2008 CSE meeting was held with regard to the issue of providing the student with a literacy program (id. at p. 12). Hearing Officer 2 also found that there was no dispute that the district paid for and implemented that portion of Hearing Officer 1's order awarding the student

960 hours of Lindamood-Bell (id. at p. 13). She further found that the evidence showed that the student attended that program five days per week, four hours per day for nearly 1 1/2 years at the district's expense, and that the student did not require additional tutoring while attending Lindamood-Bell (id.). Accordingly, Hearing Officer 2 concluded that from September 2008 through January 2010, the student received "all the reading help he could handle" (id.).

Hearing Officer 2 further found that the evidence was "unclear" as to whether the Lindamood-Bell program was appropriate (IHO Decision at p. 13). More specifically, she found that test results provided by Lindamood-Bell purporting to show improvement in the student's reading skills were "unreliable in many respects" (id.). Hearing Officer 2 found that no valid method of measurement was used by Lindamood-Bell to assess the student's improvement in reading comprehension or decoding; that many tests were not normed for the student's age level; and other tests that were normed to the student's age level, while valid and demonstrating some improvement, showed the student was still functioning "well below" his age level after receiving 960 hours of reading instruction at Lindamood-Bell (id. at pp. 13-14). Hearing Officer 2 further found that "while the student might continue to improve incrementally" if more hours of Lindamood-Bell instruction were awarded, it was not certain that he would make any additional progress or that such additional instruction could be "justified" (id. at p. 14). She also found that it was not the responsibility of the district to provide the student with additional tutoring at Lindamood-Bell "or anywhere else" to help the student "regain skills that he lost due to his own failure to comply with instructions" (id.). Finally, she noted that even if additional hours of reading instruction were warranted, it was "impossible" to know how many hours should be awarded and that when the district had offered the parent additional testing to determine the student's current reading level, the parent had declined "without good reason" (id.). Therefore, Hearing Officer 2 reasoned, the parent failed to cooperate with the district (id.). For the reasons stated above, Hearing Officer 2 granted the district's motion to dismiss for lack of jurisdiction insofar as the parent's due process complaint sought to enforce Hearing Officer 1's order, and otherwise denied the parent's request for compensatory education for the 2008-09 school year (id. at pp. 14-15).

Appeal for State-Level Review

The parent appeals and asserts that Hearing Officer 2 incorrectly found that she did not have jurisdiction to consider the parent's claim that the district failed to provide an appropriate program or placement during the 2008-09 school year by erroneously holding that the relief the parent sought for the 2008-09 school year had been awarded in a prior impartial hearing, and that the parent's claim had been addressed in a federal class action settlement. The parent also asserts that Hearing Officer 2 further erred by: (1) finding that the parent had not adequately alleged in her due process complaint notice that the district failed to comply with the procedures for conducting the CSE meeting, and thus refusing to consider evidence of those procedural violations; (2) applying an incorrect legal standard for an award of compensatory education; (3) relying upon an incorrect standard in weighing evidence concerning the parent's proposed compensatory education program; and (4) incorrectly assigning the burden of proof regarding equitable considerations to the parent and incorrectly considering equitable factors. For relief, the parent requests, among other things, that the district be ordered to provide 360 hours of Lindamood-Bell

instruction,[5] including roundtrip transportation and an appropriate educational placement such as a GED or skilled trade program, once the student's reading ability reaches a level high enough for such a program.

The district counters in its answer that Hearing Officer 2's conclusions were correct and that her decision should be upheld. Specifically, the district maintains that Hearing Officer 2: (1) properly classified the parent's request for an educational placement as an enforcement action; (2) correctly declined to consider procedural defects that were not pled sufficiently in the parent's due process complaint notice; (3) properly found that a "gross violation" of a FAPE was the proper standard for determining a compensatory education claim; (4) properly found that the student was provided with a FAPE for the 2008-09 school year because an IEP was developed that provided educational benefits to the student and the parent thwarted the district's attempts to secure a vocational program; (5) properly found that the parent bears the burden of proof regarding equitable considerations; (6) properly found that res judicata precluded the parent's claim for 360 hours of reading instruction at Lindamood-Bell; and (7) properly found that compensatory damages are not available to remedy a violation of a FAPE.

Discussion

Scope of the Impartial Hearing

I will first address the parent's allegation that Hearing Officer 2 erred by finding that the parent had not adequately alleged in her due process complaint notice that the district had failed to conduct a procedurally appropriate CSE meeting in September 2008. It is well settled that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, under the IDEA, a complaining party is not entitled to proceed to an impartial hearing unless the challenged due process complaint notice meets minimal pleading requirements to be legally sufficient, including a description of the nature of the problem of the student "relating to the proposed or refused initiation or change, including facts relating to the problem" (20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). In this case, a review of the parent's October 2010 amended due process complaint notice indicates that the parent alleged that the student's September 2008 IEP was "procedurally and substantively deficient" (Dist. Ex. 50 at p. 2). While the hearing record contains some testimony describing who attended the CSE meeting, it does not show that the district agreed to expand the scope of the impartial hearing to include allegations regarding the CSE meeting process, and I find that the language in the parent's

[5] Although I need not reach the issue of whether 360 hours of Lindamood-Bell is an appropriate remedy based on the determination herein, I find that the evidence shows that the Lindamood-Bell program would not be an appropriate compensatory education remedy for the student in this case, where the essence of the deficiency alleged by the parent was the failure of the district to recommend an appropriate vocational program (see Dist. Ex. 50 at p. 2).

October 2010 amended due process complaint notice did not reasonably place the district on notice regarding the alleged nature of the problems with the CSE process or identification of facts related thereto. Further, the hearing record does not reflect that the parents submitted, or that Hearing Officer 2 authorized, a second amended due process complaint notice to include additional issues. Therefore, I find that the issue of whether the September 2008 CSE meeting was procedurally appropriate was not properly raised in the parent's October 2010 amended due process complaint notice, was outside the scope of the impartial hearing, and is not properly before me. Therefore I will not consider whether the district failed to conduct a procedurally appropriate CSE meeting in September 2008.[6]

Jurisdiction

Next, I will consider the parent's contention that she was not seeking enforcement of Hearing Officer 1's decision, but rather asserting a new claim that the district failed to provide the student with a FAPE for the 2008-09 school year. Hearing Officer 2 found that she lacked jurisdiction over the parent's claim that the district denied the student a FAPE because it did not offer the student a timely trade school placement, as that claim could not be construed as a separate claim for FAPE, independent from the enforcement of Hearing Officer 1's order (IHO Decision at pp. 3-4). It is well settled that the enforcement of an impartial hearing officer's order can properly be sought by filing an administrative complaint with the Office of Special Education pursuant to applicable federal and State regulations, or in federal court under 42 U.S.C. § 1983 (see 34 C.F.R. §§ 300.151-300.153; 8 NYCRR 200.5[l]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7 [E.D.N.Y. 1998]; Blazejewski v. Bd. of Educ., 560 F. Supp. 701 [W.D.N.Y. 1983]; Application of a Child with a Disability, Appeal No. 06-130; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 99-004); see generally A.R. v. New York City Dep't of Educ., 407 F.3d 65, 78 n.13 [2d Cir. 2005] [noting that impartial hearing officers have no enforcement mechanism of their own]; Application of a Child with a Disability, Appeal No. 04-100; Application of a Child with a Disability, Appeal No. 04-007 [recognizing that enforcement of prior orders of an impartial hearing officer and/or a State Review Officer are not properly determined by a State Review Officer]; Application of a Child Suspected of Having a Disability, Appeal No. 03-071 [holding that petitioner's enforcement remedies include judicial enforcement pursuant to CPLR Article 78, an action in federal court, or an Office of Special Education administrative complaint procedure]; Application of a Child with a Disability, Appeal No. 01-086 [holding that petitioner's enforcement request was not properly before a State Review Officer; petitioner's remedy was to seek judicial enforcement of the impartial hearing officer's tuition reimbursement award]; Application of the Bd. of Educ., Appeal No. 99-4 [holding that respondent's remedy was to seek enforcement in state or federal court] [citing Blazejewski, 560 F. Supp. 701; A.T., 1998 WL 765371).

[6] The only fact alleged in the parent's amended due process complaint notice that can reasonably be construed as a substantive or procedural defect is that the district "failed to adequately evaluate [the student] in his areas of disability" (Dist. Ex. 50 at p. 2). Upon review of the entire hearing record, I find that the district conducted an adequate evaluation of the student (see Dist. Ex. 49), and that the CSE considered appropriate evaluative information in making its recommendations in the September 2008 IEP (see Dist. Ex. 3).

Here, the parent's amended due process complaint notice asserted claims that the district failed to implement Hearing Officer 1's order and that such failure was "further proof of its gross failure to provide [the student] with a FAPE" (Dist. Ex. 50 at pp. 2-3). Accordingly, Hearing Officer 2 correctly concluded that she lacked jurisdiction over those claims regarding enforcement of Hearing Officer 1's decision. However, the parent has not reiterated these claims on appeal. Moreover, I disagree with Hearing Officer 2 that the issue of whether a trade school should have been offered to the student as part of a FAPE for the 2008-09 school year was so "inextricably intertwined" with the enforcement of Hearing Officer 1's order as to preclude any independent consideration of this issue (IHO Decision at p. 3). However, Hearing Officer 2 properly found that the issue to be decided was whether the district grossly violated the IDEA during the 2008-09 school year, after Hearing Officer 1's decision was issued in September 2008 (see IHO Decision at pp. 3, 12), and my decision shall be limited to this issue.

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 ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[7] 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, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; see also Application of a Student with a Disability, Appeal No. 10-109 [finding no gross violation of the IDEA]; 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 this case, although the parent asserts that a lesser standard was applied for an award of compensatory education in P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008), the Court in Newington used the term "compensatory education" in a different factual context, as the student in that case was eight years old at the time of the action and, unlike this case, the student in Newington maintained continuing statutory eligibility for special education services at all relevant times (id. at 114; see Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e], 200.1[zz];

[7] If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

see also 34 C.F.R. § 300.102[a][1], [a][3][ii]). 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 Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). 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 a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

I have reviewed the hearing record and conclude that the failure of the district to provide a vocational program to the student for the 2008-09 school year did not rise to the level of a gross violation of the IDEA, which resulted in a denial or exclusion of the student from educational services for a substantial period of time necessary to warrant an award of compensatory education after his statutory eligibility for special education services ended (see Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C., 916 F.2d at 75; Burr, 863 F.2d at 1078; Cosgrove, 175 F. Supp. 2d at 387).

In reaching this determination I note that the parent declined to consider a vocational program at Public School B, which the hearing record reflects, was a possible placement for the student in September 2008 (Tr. pp. 97-99, 101, 131, 550, 554-55; Dist. Exs. 9 at p. 2; 10 at p. 1). Moreover, a review of the hearing record reflects that Public School B would have been an appropriate vocational placement for the student, and included 19 work sites where the students are employed in community-based vocational training, such as internships, hospital sites, building trade sites, retail stores, paraprofessional training sites, and college sites (Tr. p. 395). The hearing record further reflects that the purpose of the Public School B program is to provide students with

basic vocational job skills that would allow them to be placed in full-time competitive employment in the work place (Tr. pp. 395-96). The transition coordinator for Public School B testified that if the student had enrolled in the school, he would have met with the student, the parent, and guidance counselors to determine what vocational training site would be best for the student's needs and interests (Tr. pp. 402-403). The transition coordinator noted comments on the student's September 2008 IEP that the student wanted to be a corrections officer or police officer, and testified that their security guard internship might have been a potential placement for him (Tr. p. 403; see Dist. Ex. 3 at p. 6). Regarding a notation in the student's September 16, 2008 social history update and the student's June 10, 2008 psychoeducational reevaluation report that the student had an interest in working on bicycles, the transition coordinator noted that Public School B had a bicycle repair shop (Tr. p. 403; see Dist. Exs. 8 at p. 2; 49 at p. 6). The transition coordinator also testified that the school had two armory sites where they taught building trades, electrical, plumbing, and plastering and tiling; noting an indication that the student was interested in "hands-on" activities (id.). The transition coordinator also testified that Public School B had a 75 percent placement rate for competitive employment, and that the students did "incredibly well" transitioning into full-time employment (Tr. p. 404). In addition, the transition coordinator opined that Public School B was "[p]robably one of the best schools for [the student]" (Tr. p. 407). He further described the school as offering a morning program for academic instruction and an afternoon vocational program, with a full day from 8 a.m. to 3 p.m. (Tr. p. 409).

Accordingly, after review of the hearing record, I find no gross violation of the IDEA due to the failure to provide the student with a vocational program, particularly where the district attempted to offer an appropriate vocational program and it was rejected by the parent (see Application of a Child with a Disability, Appeal No. 04-084). Furthermore, I note that the parent's attorney remained in communication with the district in its attempts to identify a vocational program for the student and on the parent's behalf, continually affirmed to the district that there were no other outstanding issues with regard to the student (Tr. pp. 155, 172, 174-75, 175-76, 183).

Conclusion

Based upon a review of the hearing record, the parent's appeal must be dismissed.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 28, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER