The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 11-121

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

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

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Diane da Cunha, Esq., of counsel

DECISION

Petitioner (the student) appeals from those portions of a decision of an impartial hearing officer which denied his request for compensatory education services for the 1994-95 through 2009-10 school years.[1] The appeal must be sustained in part.

At the time the impartial hearing convened in August 2010, the student was 21 years old and had not attended school since approximately September 2008 (Tr. pp. 54-55; Dist. Exs. 45-

[1] According to State regulations, either a "parent or school district may file a due process complaint" (8 NYCRR 200.5[i][1]; see 8 NYCRR 200.1[ii][1]-[4] [defining "parent" and identifying individuals who may act in that capacity]). At the impartial hearing, counsel for the student stated that the due process complaint notice "was brought by the student, not the parent" (Tr. pp. 3-4, 9). State regulations defining and identifying who may act in the capacity of "parent" do not include a student with a disability who has reached the age of 21, and New York State does not provide for the transfer of all rights previously granted to parents under the Individuals with Disabilities Education Act (IDEA) to students who reach the age of majority (see 20 U.S.C. § 1415[m]; 34 C.F.R. § 300.520; Individuals with Disabilities Education Act [IDEA] Part B Final Supplemental Regulations Issued December 1, 2008 and Effective December 31, 2008 – Non-Regulatory Guidance [VESID May 2009], available at http://www.p12.nysed.gov/specialed/idea/nonregulatoryguidancememo.htm [stating that "NYS law does not grant a child who has reached the age of majority all rights previously granted to parents under IDEA"] [emphasis in original]). It is unclear whether in New York a student who is no longer eligible for special education programs and related services as a result of age may request an impartial hearing on his or her own behalf. As the district has not contended either at the impartial hearing below or on appeal that the student does not have standing to maintain his claims, I assume for purposes of this decision that he does.

46). His eligibility for special education programs and related services as a student with a disability until the end of the 2009-10 school year is not in dispute in this appeal.[2]

Background

The student has a long history of receiving special education services while he attended school. However, as further discussed below, I find that most of his claims are barred by the statute of limitations; therefore, the student's educational history will be discussed only to the extent necessary as it relates to his remaining claims.

The student has received special education services since the 1993-94 school year (Student Ex. CC). From 1996 until the time he left school during the 2008-09 school year, the student was classified as a student with an emotional disturbance and received speech-language therapy, occupational therapy (OT), and counseling (Dist. Exs. 7-9; 56-57; Student Exs. V-BB; see 34 C.F.R. § 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]). At the beginning of the 2005-06 school year, when the student was 16, he began participating in alternate assessment at a vocational high school (Tr. pp. 2170-72; Dist. Exs. 16; 40 at p. 2; 54; 56 at p. 2). The student's attendance declined after he was placed in alternate assessment, and he was present on 72 school days for each of the 2005-06 and 2006-07 school years (Student Ex. EEEE at p. 52). During the 2007-08 school year, the student was present at school only twice (id.). The student was absent for the first few weeks of the 2008-09 school year, after which the district initiated discharge proceedings (Dist. Exs. 46-48). When neither the student nor his mother participated at the planning interview scheduled by the district to address his truancy and the district discharged the student from enrollment, effective from the first school day of the 2008-09 school year (Dist. Ex. 45; Student Ex. CCCC).

Sometime between 2009 and January 2010, the student contacted the Huntington Learning Center (HLC) after seeing a television advertisement for their tutoring services; after learning that he could not afford the program and hearing his account of the district's failure to assist the student, HLC referred the student to the attorney that represented him at the impartial hearing and represents him on appeal (Tr. pp. 2224-26; Student Ex. I).

Due Process Complaint Notice and Response

By due process complaint notice dated June 3, 3010, the student asserted claims against the district pursuant to the IDEA, section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[l] [1998]), and 42 U.S.C. § 1983 (section 1983) (Dist. Ex. 1). Specific to his IDEA claims, the student asserted that the district had failed to provide him with a free appropriate public education (FAPE) "for his entire school career to date" by failing to follow the IDEA's procedural requirements and by developing individualized education programs (IEPs) that failed to address the student's needs (id. at pp. 3-4, 7). The student contended that his claims were not barred by the IDEA's two-year statute of limitations because the district failed to provide the student and the parent with required notice; the student did not know of his claims; notice was not provided to the student in a format accessible to him as a nonreader; the student was challenging

[2] The student asserted at the impartial hearing and asserts on appeal that the district improperly classified him as a student with an emotional disturbance (Dist. Ex. 1 at p. 7; see 34 C.F.R. § 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

systemic policies and practices, of which he was not aware prior to being advised by counsel; the student's membership in a class action lawsuit tolled the limitations periods of some of his claims; and the student did not learn that he was learning disabled until 2010 (id. at p. 6). The student also asserted that the district discharged him for truancy without following the required procedures for discharging a student with a disability (id. at pp. 5-6).

The student specifically challenged the district's classification of him as a student with an emotional disturbance; its "fail[ure] to adequately diagnose [his] learning disability and speech and language delays;" and its treatment of him as though he were "mentally retarded" (Dist. Ex. 1 at p. 7). The student also alleged that the district adopted unlawful policies and procedures relating to classification, evaluation, and discharge of students with disabilities (id.).

For relief, the student requested that the impartial hearing officer make certain findings with regard to the district's actions, and sought compensatory education and "extended eligibility beyond the age of twenty-one" (Dist. Ex. 1 at p. 8). Specifically, the student requested "intensive 1:1 tutoring" sufficient to enable him to prepare for the GED exam,[3] transition services, assistive technology, speech-language services, OT, counseling, social work services, transportation expenses, and "any other special education, related services and supports and accommodations necessary to compensate the student for the denial of [a] FAPE" (id.). The student also requested that the district be ordered to fund previously obtained private evaluations, as well as additional private evaluations not yet conducted but necessary to determine the student's need for compensatory services (id. at pp. 8-9). Finally, the student requested an interim order awarding him services pending resolution of his claim, including 1:1 tutoring, speech-language services, and OT (id. at p. 8).

In a response to the due process complaint notice dated June 11, 2010, the district asserted that the classification of the student as a student with an emotional disturbance was continued as a result of a March 2006 committee on special education (CSE) meeting (Dist. Ex. 41 at p. 1). The district further asserted that a final notice of recommendation (FNR) dated September 23, 2008, offered the student an appropriate placement (id. at p. 3). The district affirmatively asserted that the student was not entitled to compensatory education, as "no gross, flagrant, or prolonged violation of the law" had occurred (id.). As an affirmative defense, the district contended that all of the student's claims were barred by the statute of limitations and there was no basis for tolling the limitations period (id.).

Impartial Hearing and Decision

An impartial hearing convened on August 16, 2010 and concluded on June 22, 2011, after 15 hearing days culminating in a hearing transcript spanning 2,660 pages. The student submitted 73 exhibits, the district submitted 66 exhibits, and the impartial hearing officer marked 10 exhibits.

On the first day of hearing, the district stipulated that IDEA claims for the 2008-09 and 2009-10 school years were not time-barred (Tr. p. 45). Also on the first day of hearing, the impartial hearing officer sought clarification of the student's claims and indicated that she would

[3] Although not defined in the hearing record, it is clear from context that "the GED exam" refers to the Tests of General Education Development (see 8 NYCRR 100.7; http://www.acces.nysed.gov/ged/about_us.html).

not adjudicate claims relating to the district's systemic practices and policies (Tr. pp. 42-44, 61). At the next hearing date, the impartial hearing officer dismissed all of the student's claims prior to the 2005-06 school year, finding that it would be prejudicial to the district to consider those claims (Tr. pp. 310-14). With regard to subsequent school years, the impartial hearing officer indicated that the district would be required to establish that it "met the requirements under the statute of limitations" (Tr. pp. 315-18). Also on that day, the district conceded that it failed to offer the student a FAPE for the 2008-09 and 2009-10 school years (Tr. p. 336).

In response to the student's request on the second hearing day that the impartial hearing officer order independent evaluations for OT, assistive technology, and auditory processing (Tr. pp. 442-45), the impartial hearing officer ordered the district to conduct the requested evaluations (Tr. pp. 448-55). At the sixth hearing date, November 2, 2010, after the evaluations had been completed, the student indicated dissatisfaction with the district's assistive technology evaluation and requested an IEE to remedy the deficiencies in the district's evaluation, upon which the district indicated its intent to defend its evaluation (Tr. pp. 895-97, 899-907, 926-27).

In a thorough, well-written 74-page decision dated August 17, 2011, the impartial hearing officer awarded the student compensatory education for the 2008-09 and 2009-10 school years, including reading instruction at Lindamood-Bell (LMB), speech-language therapy, a vocational assessment, vocational training, transition counseling, assistive technology, and transportation expenses (IHO Decision at pp. 72-74).[4, 5] With respect to the statute of limitations, the impartial

[4] The impartial hearing officer issued an interim order dated February 1, 2011, memorializing an order granting the student's request for an independent auditory processing evaluation and speech and language evaluation at district expense (Interim IHO Decision at p. 4).

[5] I note that the hearing record does not indicate that the timelines within which an impartial hearing is to be held were followed in this case. Numerous extensions were granted throughout the course of the ten-month hearing (Tr. pp. 337-38, 435, 457, 646, 655-56, 714-16, 852-54, 857, 1334, 1434, 1525-26, 1670, 2004, 2012, 2017), yet the hearing record does not reflect that the impartial hearing officer documented her reasons for granting the extensions, fully considered the cumulative impact of the factors relevant to granting extensions, or responded in writing to the extension requests (8 NYCRR 200.5[j][5][i], [ii], [iv]). Rather, the hearing record indicates that the impartial hearing officer improperly granted extensions based solely on agreement of the parties due to scheduling conflicts, without a compelling reason or a showing of substantial hardship, in violation of State regulation (8 NYCRR 200.5[j][5][iii]). Additionally, on at least one occasion the impartial hearing officer apparently granted multiple 30-day extensions at once to accommodate a hearing date, in violation of State regulation (Tr. pp. 1670, 1672, 2004; see 8 NYCRR 200.5[j][5][i]). On multiple occasions, hearing dates were scheduled and not kept, without explanation in the hearing record (Tr. pp. 1107-10, 1434-36). I remind the impartial hearing officer that she is not permitted to accept appointment unless she is available to conduct a hearing in a timely manner, and additional hearing days are required to be scheduled on consecutive days to the extent practical (8 NYCRR 200.5[j][3][i][b], [j][3][xiii]). I also note that State regulations contain provisions stating that "[e]ach party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]). In this case, there were many instances where the impartial hearing officer allowed far more time than was reasonably necessary for the examination of witnesses, including extensive redirect and re-cross examination. I remind the impartial hearing officer that she has the power to limit examination of witnesses whose testimony she determines to be irrelevant, immaterial or unduly repetitious (8 NYCRR 200.5[j][3][xii][d]). At the close of the hearing, the impartial hearing officer scheduled submissions for posthearing memoranda for July 27, 2011, "[s]ubject to . . . any requests for extensions" (Tr. pp. 2657-58). The hearing record indicates that the district submitted its posthearing memorandum on July 29, 2011 (IHO Decision at p. 81). Recent guidance from the State Education Department reminds impartial hearing officers that "[a] record is closed when all post-hearing submissions are received by the IHO . . . Once a record is closed, there may be no further extensions to

hearing officer reiterated her finding that claims based on events occurring prior to the 2005-06 school year were untimely (IHO Decision at p. 11). Additionally, with respect to the student's claims for the 2005-06 through 2007-08 school years, the impartial hearing officer found that the student's mother's consistent participation in CSE meetings for those school years and the district's history of providing notice, indicated that she knew or should have known of her claims that took place during the 2005-06, 2006-07, and 2007-08 school years; therefore, those claims were also time barred (id. at pp. 11-13). With regard to the student's argument that his claims regarding an alleged misdiagnosis did not accrue until 2010, the impartial hearing officer noted that the student's records showed "a consistent history of learning-based difficulties [and] behavioral issues," such that the diagnosis did not establish that his classification as a student with an emotional disturbance was incorrect, nor did it establish that the district ignored the student's learning disability (id. at p. 12).

Regarding the 2008-09 and 2009-10 school years, the impartial hearing officer noted that the district conceded that it failed to offer a FAPE to the student during those years (IHO Decision at p. 17). Therefore, she found that the student was eligible for compensatory education for those years because the district's denial of educational services to the student during the 2008-09 and 2009-10 school years—a period during which the student was entitled to educational services—constituted a "gross violation of the IDEA" (id. at pp. 14-17). After an extensive review of the testimony presented in support of a compensatory education award (id. at pp. 18-51), the impartial hearing officer found that the student's inability to read "more than basic words" had prevented the student from finding gainful employment (id. at p. 51). She further found that "the evidence almost universally supports [that the student] has significant learning, auditory processing and memory deficits" (id.). Accordingly, she determined that "any award of compensatory education and services has to be tempered by reality and a clear understanding of what its goals should be" (id.). The impartial hearing officer then determined that "to tailor [a compensatory education] award to the uniqueness of the student's circumstances, its focus must be on his learning to read competently, followed by appropriate vocational training" (id.).

In order to address this need, the impartial hearing officer awarded the student 480 hours of LMB reading instruction (four hours per day, five days per week for 26 weeks) and 19.5 hours of speech-language therapy (one 45-minute session per week for 26 weeks) (IHO Decision at p. 52). The impartial hearing officer directed LMB to chart the student's progress with weekly progress reports and interim evaluations every ten weeks (id.). At the conclusion of the 26-week period, the impartial hearing officer ordered an independent educational evaluator or psychologist, agreed upon by the district and the student, to evaluate the student at the district's expense (id. at p. 53). If the student was found to have made objective progress, he would be entitled to another 480 hours of LMB reading instruction and an additional 19.5 hours of speech-language therapy; if the student was found not to have made objective progress, the awards would cease (id.).

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the hearing timelines . . . When a case has been properly extended, the written decision of the IHO must be rendered and mailed within 14 days" of the record close date ("Changes in the Impartial Hearing Reporting System," Office of Special Educ. [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). The impartial hearing officer's decision is dated August 17, 2011, outside of the 14-day period permitted by State regulation (8 NYCRR 200.5[j][5]). I urge the impartial hearing officer to ensure that a decision is issued within the 45-day timeline and that extensions are granted for appropriate purposes only and documented in the hearing record.

Similarly, if the student did not comply with the LMB attendance policy, he could be discharged, in which case he would lose any remaining hours of the award (id.).

In addition to the award of services, the impartial hearing officer directed the district's "assistive technology team" to observe the student at LMB and if necessary, at his speech-language therapy sessions, in order to determine what assistive technology was appropriate for the student "under the circumstances of their respective programs" (IHO Decision at p. 53). The impartial hearing officer also awarded the student a laptop with the Kurzweil 3000 reading program and a calculator, as well as training in their use (id. at pp. 53-54). The impartial hearing officer further directed the district to refer the student for an "intensive vocational assessment" at district expense no earlier than the end of the first 26-week period, and provide appropriate vocational training and transition counseling designed "to assist the student with budgeting, financial matters and life skills" (id. at p. 53). Finally, the impartial hearing officer awarded the student unlimited public transportation for the duration of his academic programs (id. at p. 54).

Addressing the student's request for reimbursement for a private neuropsychological evaluation and assistive technology evaluation, the impartial hearing officer found that the student was not entitled to reimbursement, as there was no district evaluation with which he disagreed (IHO Decision at p. 69). Additionally, the impartial hearing officer determined that at no point prior to the impartial hearing did the student request an IEE at district expense (id. at pp. 69-70). She further found that the district's failure to conduct all necessary evaluations during the time that the student was enrolled in the district's schools did "not justify requiring the [district] to pay for an evaluation the student sought privately and without notice" (id. at p. 70). Also, with respect to the private assistive technology evaluation, the impartial hearing officer found that it "offered little, if any, significantly different from the [district's] evaluation, to have warranted a second one" (id.).

Appeal for State-Level Review

The student appeals the impartial hearing officer's decision, arguing that she erred in dismissing his claims relating to school years prior to the 2008-09 school year and in not awarding him all of the compensatory education he requested.[6]

Specifically, the student asserts that the impartial hearing officer erred in considering the district's motion to dismiss his claims relating to school years prior to the 2008-09 school year, as the motions were untimely. Furthermore, the student contends that the district was required to establish the date on which each of the student's claims accrued and that by not holding the district to this burden, the impartial hearing officer impermissibly shifted the burden of proof regarding this issue to him. In any event, the student asserts that the impartial hearing officer erred in finding that he was on notice of his claims. Specifically, the student argues that the district was obligated to provide him, rather than his mother, with the notice required by the IDEA and its implementing regulations. Therefore, his claims did not accrue because the district introduced no IEPs for the 2004-05 and 2007-08 school years, and no educational records for the 2005-06 and 2007-08 school

[6] The student's petition states that it "incorporate[s] by reference" all of the exhibits, testimony, and discussion contained in the hearing record. I remind counsel for the student that the petition is expected to set forth the petitioner's allegations via citations to the record on appeal (8 NYCRR 279.8[a][3], [b]). I also note that the petition includes citation to exhibits that were not admitted at the impartial hearing because they were duplicative of district exhibits.

years. The student also alleges that his claims regarding the misdiagnosis of his disabilities and improper classification did not accrue until he received diagnoses of dyslexia and an auditory processing disorder in 2010. In addition, the student asserts that the exceptions to the limitations period apply because the district failed to provide all of the required notices and because the district misrepresented to him and his mother that his transfer to the vocational high school would be beneficial to him because he was incapable of learning.

With regard to his requests for compensatory education, the student asserts that he should be "provided sufficient research-based and multisensory 1:1 instruction in order to build his skills to a point where he could prepare for the GED." Specifically, the student requests additional LMB reading instruction, unless he has reached a twelfth grade level by the end of the instruction awarded by the impartial hearing officer. He also requests additional time to complete each portion of the award and tutoring in math, as recommended by HLC and not contested by the district at the impartial hearing. The student also seeks an increase in the award of speech-language therapy to conform to the amount recommended by the speech-language pathologist who evaluated him, OT as recommended by the district's OT evaluator, and some of the additional assistive technology recommended by the private assistive technology evaluator.

The student also appeals the impartial hearing officer's denial of his request for reimbursement of the neuropsychological and assistive technology IEEs, asserting that his failure to comply with the procedures specified by the IDEA should be excused because the district failed to establish that it had provided him with notice of the procedural safeguards. Additionally, he appeals the impartial hearing officer's dismissal of his claims relating to district policies, the district's classification of the student as emotionally disturbed, the district's failure to determine whether his truancy was related to his disability, and the district's discharge of the student in violation of the IDEA as part of a policy or practice of discharging truant students with IEPs. The student also alleges that a negative inference should have been drawn against the district for its failure to locate significant portions of the student's educational record. Finally, the student contends that the impartial hearing officer had an inadequate understanding of the statute of limitations, did not understand the issues raised at the hearing, and failed to maintain order.

For relief, the student requests: (1) 300 additional hours of speech-language therapy; (2) the OT recommended by the district's evaluator; (3) payment for the private neuropsychological and assistive technology evaluations; (4) 800 hours of tutoring at HLC; (5) 500 additional hours of tutoring at LMB; (6) reversal of the impartial hearing officer's findings with respect to the statute of limitations; (7) 1155 hours of 1:1 tutoring for each year that the statute of limitations is found not to be a defense "until [the student] cannot make any more progress or reaches a level where he can reasonably take the Regents with accommodations"; (8) that the student be permitted to defer his vocational training award until completion of the educational services awarded; (9) voice-dictation software; (10) a money calculator; and (11) reversal of various rulings made by the impartial hearing officer with regard to the student's section 504 and systemic policy and practices claims.

The district submits an answer denying the student's allegations in the petition. The district also affirmatively sets forth a statement of facts supporting its classification of the student as emotionally disturbed and asserts that the student's grandmother and mother received notice of all decisions regarding his education, such that the statute of limitations barred the student's claims

prior to the 2008-09 school year. With regard to the student's request for additional compensatory educational services, the district argues that the student is "not entitled to any particular level of achievement." The district further asserts that the impartial hearing officer correctly denied the student's request for the IEEs not ordered by the impartial hearing officer, as the student had not requested an evaluation at public expense. Finally, the district contends that a State Review Officer does not have jurisdiction to review the student's section 504 and section 1983 claims.[7]

Discussion

Scope of Review

Section 504 and 1983 Claims

On the second hearing date, the impartial hearing officer granted the district's motion to dismiss the student's section 1983 claims on the grounds that she did not have jurisdiction over them (Tr. p. 274). An impartial hearing may be held on issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 C.F.R. § 300.507[a][1]; see 20 U.S.C. § 1415[b][6]; see also Application of a Child with a Handicapping Condition, Appeal No. 92-37). While claims that are systemic in nature are not unable to be addressed in the due process forum, the particular questions regarding how to address an individual student's needs are within the scope of a hearing officer's jurisdiction Levine v. Greece Cent. School Dist., 2009 WL 261470, *9 [W.D.N.Y. 2009]). Compensatory damages are not available in the administrative forum under the IDEA (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483, [2nd Cir. 2002]; see R.B.. v. Board of Educ. of City of New York, 99 F.Supp.2d 411, 418 [S.D.N.Y. 2000]). I also note that claims alleging general violations of State or Federal laws or regulations by a district are properly subject to the State complaint procedures set forth in regulation (8 NYCRR 200.5[*l*]; see 34 C.F.R. §§ 300.151-300.153), rather than the due process impartial hearing system (see Application of a Student with a Disability, Appeal No. 10-031; Application of a Student with a Disability, Appeal No. 09-044; Application of a Student with a Disability, Appeal No. 09-042; Application of a Child with a Disability, Appeal No. 97-80; Application of a Child Suspected of Having a Disability, Appeal No. 97-54; Application of a Child Suspected of Having a Disability, Appeal No. 95-23). Given the limited scope of an impartial hearing under the IDEA, the parents' claims will be reviewed to the extent that they assert violations of the IDEA and state regulations.

Regarding the student's section 504 claims, New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims, a fact of which the student's counsel has been reminded on several occasions (Application of a Student with a Disability, Appeal No. 09-056; Application of a Student with a Disability, Appeal No. 09-044; see Educ. Law § 4404[2] [State Review Officers review determinations of impartial hearing officers "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special

[7] As discussed further below, the district does not cross-appeal any of the impartial hearing officer's determinations, including that it failed to offer the student a FAPE and that such denial amounted to a gross violation of the IDEA warranting an award of compensatory education.

education program or service and the failure to provide such program"]). Therefore, I have no jurisdiction to review any portion of the student's claims or the impartial hearing officer's decision regarding section 504.

Unappealed Determinations

Neither party has appealed from the impartial hearing officer's determinations: (1) that the student receive some amount of LMB instruction and speech-language therapy, or the conditional nature and form of the award; (2) that the district shall conduct an intensive vocational assessment and provide the student with vocational training and transitional counseling; (3) that the student be provided with assistive technology consisting of a laptop with reading software and a calculator, to be supplemented by whatever assistive technology the district's evaluators determine to be appropriate after observing the student at LMB, and that he be provide with assistive technology training; or (4) the award of unlimited public transportation during the student's enrollment in his compensatory educational programs. Accordingly, these determinations are final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Statute of Limitations

The student appeals the impartial hearing officer's determinations that some of his claims are barred by the statute of limitations. Under the IDEA, a claim accrues when the petitioner "knew or should have known about the alleged action that forms the basis of the complaint" (20 U.S.C. § 1415[f][3][C]; see 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[e]; 8 NYCRR 200.5[j][1][i]; see also Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]). In her decision, the impartial hearing officer applied two different limitations periods to the student's claims: the one-year period applicable prior to the July 2005 amendments to the IDEA and the two-year limitations period applicable at the time the student filed his due process complaint notice (see 20 U.S.C. § 1415[f][3][C]; M.D., 334 F.3d at 221-22; see also Application of a Child with a Disability, Appeal No. 06-013; Application of the Bd. of Educ., Appeal No. 02-119). Because, as discussed below, I conclude that the majority of the student's claims are time-barred under either limitations period, I need not address the impartial hearing officer's conclusion that the one-year period applied to the student's claims relating to actions taken by the district prior to the effective date of the amendments.

The Student's Claims for Actions Prior to the 2008-09 School Year

In her decision, the impartial hearing officer found that the parent knew or should have known of the complained of actions taken by the district during the 2005-06 through 2007-08 school years, based on a documented history of parental involvement in CSE meetings and that the student's claims for those school years were barred by the statute of limitations (IHO Decision at pp. 11-13).

On appeal, the student contends that the district failed to meet its burden of establishing when each of his claims accrued. The student asserts that he did not and should not have known of his claims during the 2005-06 through 2007-08 school years because, among other things, there

was insufficient evidence of notice that would have alerted him (or his mother) to the existence of his claims. With regard to specific claims, the student asserts that his claims relating to misdiagnosis and improper classification did not begin to run until he was offered diagnoses of dyslexia and an auditory processing disorder in 2010. As further described below, the student's eligibility determinations and any description of the student's deficits or lack thereof are related to events that occurred more than two years prior to the filing of the due process complaint notice. Additionally, in his petition the student suggests no alternate accrual dates for his other claims; moreover, his claims as set forth in the due process complaint notice are phrased in general terms and do not otherwise raise specific challenges to the district's actions in any specific school year (see Dist. Ex. 1 at pp. 3-4, 7).[8]

Accordingly, I find that the district met its burden of establishing that the student's claims prior to the 2008-09 school year accrued more than two years before the student filed his due process complaint notice and are therefore barred by the statute of limitations. Courts that have addressed the issue have generally held that the IDEA's language that an impartial hearing must be requested "within 2 years of the date the parent . . . knew or should have known about the alleged action that forms the basis of the complaint" mandates that accrual occurs when the complained-of action is known of, not when the parent becomes aware that the district's actions were objectionable (20 U.S.C. § 1415[f][3][C]; see J.P. v. Enid Public Sch., 2009 WL 3104014, at *6 [W.D. Okla. Sept. 23, 2009]; Bell v. Bd. of Educ., 2008 WL 4104070, at *17 [D.N.M. Mar. 26, 2008]; see also Application of the Bd. of Educ., Appeal No. 10-014). Beginning in 1996 and continuing through 2003, social history updates and evaluation reports indicate that the student's mother and grandmother were aware of the student's academic difficulties. In a social history update conducted in April 1996 with the student's grandmother as informant, she indicated that she knew that the student had not made progress (Dist. Ex. 18).[9] A social history update conducted in October 1996 also indicates that the student's grandmother knew that the student could not read (Dist. Ex. 19 at p. 1). By July 1998, the student's grandmother opined that the student's placement in the district's school offered him an inappropriate curriculum and she expressed her concern regarding the student's reading (Dist. Ex. 20 at pp. 2-3). In June 1999, the student's mother acknowledged awareness of the student's behavioral and academic problems (Dist. Ex. 21 at p. 2). When the student was given a psychiatric evaluation in September 1999, the student's mother provided a history indicating that the student could not read and experienced behavior problems in school (Dist. Ex. 37 at p. 1). A social history update conducted with the mother in January 2003 indicated that she knew that the student performed poorly academically, knew that the student could not read and struggled with language development, and expressed her desire that he learn to read (Dist. Ex. 23 at pp. 2-3). In addition to these direct reports, the student's IEPs for the 2000-01 through 2002-03 school years consistently indicated that the student was not capable of reading and that the student's mother was present at each of the meetings at which these IEPs were developed (Student Exs. W at pp. 2, 4; X at pp. 2-3; Y at pp. 2-3). Accordingly, I find that the

[8] The due process complaint notice alleges that "[e]very IEP and placement developed for [the student] during the time he was eligible for public education . . . was substantively and procedurally flawed" (Dist. Ex. 1 at pp. 3-4) and that the district "failed to provide [the student] with [a FAPE] for his entire school career to date" (id. at p. 7).

[9] The hearing record indicates that the student lived with his grandmother in kinship care from at least April 1993 until April 1999 (Dist. Exs. 17 at p. 3; 19 at p. 2; 21 at p. 3; 36 at pp. 1-2; 37 at pp. 1-2; Student Ex. CC at pp. 1-2; see 20 U.S.C. § 1401[23][A], [C]; 34 C.F.R. § 300.30[a][2], [4]; 8 NYCRR 200.1[ii][1], [2]).

impartial hearing officer correctly found that the student's mother knew or should have known of any deficiencies in the student's IEPs at the time they were developed and consequently, the student's claims relating to school years until 2002-03 are barred by the statute of limitations.

With respect to the 2003-04 school year, exhibits introduced into evidence at the impartial hearing indicated that the mother was not present at the initial meeting to develop an IEP for the 2003-04 school year, but that the resultant IEP indicating that the student was a nonreader was mailed to her (Student Ex. V at pp. 2-3). During the 2004-05 school year, an "[u]pdate [c]onference" was held in December 2004 and it was recommended that the student participate in alternate assessment (Dist. Ex. 16). The student's mother was present at the conference and the fact that the student had "not made any growth academically" was discussed (id.). For the 2005-06 school year, the student's mother did not attend the CSE meeting despite being sent a notice of the meeting; however, the IEP noting that the student was being switched to alternate assessment was mailed to her as was an FNR (Dist. Exs. 54; 55; 56 at p. 2). The hearing record further shows that the district made several attempts to ensure the parent's participation at the CSE meeting for the 2006-07 school year, sending an initial notice and following up twice, once by letter and once by telephone (Dist. Exs. 52; 57 at p. 2). Based on the above, I find that the student's mother knew or should have known of any deficiencies in the student's IEPs for the 2003-04 through 2006-07 school years at the times the IEPs were developed, and that the student's claims from those years were properly found by the impartial hearing officer to be time barred.

No IEP was entered into evidence for the 2007-08 school year, and the student contends that absent any educational records in the hearing record for that year, the district could not meet its burden of establishing when the student's claims for that year accrued. However, as no claims were specifically asserted with respect to the 2007-08 school year, I cannot ascertain when any claims, if any, the student may have had regarding that school year accrued. By the time of the 2007-08 school year, it cannot be reasonably said that the parent was unaware of the annual review process for developing an new IEP and either an IEP was developed and sent to the student's mother, in which case she knew or should have known about her claims at that time for the reasons stated above, or it was not, in which case she knew or should have known that the district failed to offer the student a FAPE due to the failure to convene a CSE meeting or develop an IEP (see Application of the Bd. of Educ., Appeal No. 10-014).[10]

To the extent that the student argues that his claims relating to the district's misdiagnosis and improper classification of him did not accrue until he was evaluated in 2010, I find this

[10] In any event, even if I were to find that the district failed to establish accrual dates outside of the limitations period, I agree with the impartial hearing officer that the student failed to articulate any position relating to the quantity or qualities of the remedies sought for any year in particular, such that no meaningful compensatory education could be awarded for any specific school year (Tr. p. 2285). Furthermore, counsel for the district conceded during the impartial hearing that it was not presenting evidence with regard to whether it offered the student a FAPE for the 2005-06 through 2007-08 school years (Tr. p. 2293). The impartial hearing officer indicated that if the district had failed to establish that the statute of limitations barred the student's claims for those years, then the student would have prevailed with regard to whether the district offered the student a FAPE (Tr. p. 2284). However, even had the district conceded FAPE for those years, I note that the Second Circuit has recently reaffirmed that unless the district committed a "gross procedural violation" of the IDEA resulting in "the student's complete deprivation of a FAPE," the student would not be entitled to compensatory education for those years, and I would find on this record that the student has not alleged sufficient procedural violations to rise to such a level (French v. New York State Dep't of Educ., 2011 WL 5222856, at *2 -*3 [2d Cir. Nov. 3, 2011]).

argument unavailing. I find that the district acknowledged the deficits of which the student now complains, repeatedly and over a period of years. As noted above, the student's inability to read was detailed beginning in 1996 (Dist. Ex. 19 at p. 1) and was noted on many of his IEPs (Student Exs. V at p. 3; W at p. 4; X at p. 3; Y at p. 3). The student's difficulty with auditory processing was first referenced in a psychological evaluation report from February 2000, which noted that the student had poor auditory memory, receptive language difficulties, and weaknesses in receptive and expressive language (Dist. Ex. 38 at pp. 5, 7). The report also noted that the student was "capable of some learning and improvement in functioning" (id. at p. 5). Subsequent IEPs noted below grade level listening comprehension and difficulty in auditory processing (Dist Exs. 56 at p. 3; 57 at pp. 3, 4; Student Exs. W at p. 4; X at p. 3; Y at pp. 3, 4). I find that the student's mother knew or should have known of the student's difficulties with auditory processing and reading at the time these IEPs were developed or shortly thereafter, and that the student's claims relating to misdiagnosis and classification are time-barred.

Exceptions to the Limitations Period

The student argues that even if his claims were not filed within the two year statute of limitations, they should not be time-barred because an exception applies. A due process complaint notice must be filed within two years of the accrual of the complaint unless the parent, as the complaining party, "was prevented from requesting the impartial hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint or the school district's withholding of information from the parent that was required to be provided to the parent" (8 NYCRR 200.5[j][1][i]; see 20 U.S.C. § 1415[f][3][D]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[f]). As discussed below, I find that neither exception applies in this case.

The student asserts that the specific misrepresentation exception applies because the district informed the student and his mother that the student's participation in alternate assessment would benefit him because he was incapable of learning. I find that this fails to meet the statutory exception, which requires that the district specifically misrepresent that it had resolved the problem forming the basis of the complaint, such that the parent was prevented from requesting an impartial hearing (C.H. v. Northwest Indep. Sch. Dist., 2011 WL 4537784, at *5 [E.D. Tex. Sept. 30, 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 2011 WL 3273203, at *11 [S.D. Ind. July 29, 2011]). The failure to conduct sufficient evaluations or properly diagnose the student does not constitute a specific misrepresentation that provides an exception to the limitations period (C.H., 2011 WL 4537784, at *6); rather, the district must intentionally misrepresent that is has resolved the problem on which the due process complaint notice was based (Sch. Dist. of Philadelphia v. Deborah A., 2009 WL 778321, at *4 [E.D. Pa. Mar.24, 2009], aff'd 2011 WL 1289145 [3d Cir. Apr. 6, 2011]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *6 [E.D. Pa. Nov. 4, 2008]).

The student's claims in this case do not constitute specific misrepresentations. Here, a review of the hearing record shows that the district informed the student and his mother that the student would benefit from participation in alternate assessment as he had not progressed academically and he experienced agitation and sadness relating to his lack of progress (Dist. Exs. 16; 40 at p. 2; 56 at p. 5; Student Ex. NN at p. 1). However, rather than stating that the student was incapable of learning, the district's records indicate that the student's cognitive functioning

had improved between 2003 and 2005 (Dist. Ex. 40 at p. 5), but that his academic difficulties were often a function of his inattention in class (Student Ex. NN at p. 1). Accordingly, the district recommended participation in alternate assessment at a vocational high school to allow the student to experience success and make attending school a more positive experience for him (Dist. Exs. 16; 56 at p. 5). Therefore, under the circumstances, the exception to the statute of limitations does not apply.

The student further argues that the hearing record establishes that the district at no point provided notices to either him or his mother sufficient to meet the definitions of prior written notice or procedural safeguards notice under the IDEA (20 U.S.C. § 1415[c][1], [d][2]; see 34 C.F.R. §§ 300.503[b]; 300.504[c]). However, as discussed below, I find that although the district did not provide the parent with all the information it was required to, the parent was not prevented from requesting an impartial hearing because of this. Case law interpreting the "withholding of information" exception to the statute of limitations has found the phrase to apply only to the requirement that parents be provided with certain procedural safeguards (C.H., 2011 WL 4537784, at *7; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; Tindell, 2011 WL 3273203, at *11; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943 [W.D. Tex. 2008]; Evan H., 2008 WL 4791634, at *7; see 20 U.S.C. § 1415[d]; 34 C.F.R. § 300.504; 8 NYCRR 200.5[f]). Furthermore, if the parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (R.B., 2011 WL 4375694, at *7; El Paso Indep. Sch. Dist., 567 F. Supp. 2d at 945; see Application of a Child with a Disability, Appeal No. 07-116). In this case, although the enclosures are not included in the hearing record, letters from the district to the parent, as well as the student's IEPs, indicate that the student's mother and grandmother were provided with copies of the procedural safeguards notice on numerous occasions between 1994 and 2005 (Dist. Exs. 6 at p. 4; 8 at p. 1; 17 at p. 5; 24-27; 51 at pp. 1-2; 54-55; see Dist. Ex. 23 at p. 3). On other occasions, although not always clear if the parent or grandmother was provided with a full notice of procedural safeguards, communications to the parent or grandmother indicate specifically the right to request an impartial hearing if they disagreed with the recommendations of the district (Dist. Exs. 25; 27-29; 31; 51 at p. 1; 54). Accordingly, I find that the evidence does not support the conclusion that the student's mother was prevented from timely requesting an impartial hearing on the basis that the district withheld the procedural safeguard notices it was required to provide her and the exception to the statute of limitations defense does not apply.[11]

Compensatory Education—Applicable Standards

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (see Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the

[11] The student also asserts that after he reached 18 years of age, the district was obligated to provide him directly with the procedural safeguards, instead of his parent. However, as noted above, New York does not transfer procedural rights held by parents of disabled students to the students at the age of majority. Moreover, a district may not terminate the provision of special education services to a student between the ages of 18 and 21 on the basis of the student's consent, despite the student's legal competence (see Mrs. C. v. Wheaton, 916 F.2d 69, 72-74 [2d Cir. 1990]). Therefore, I find this argument unpersuasive.

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]; see 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];[12] 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 French, 2011 WL 5222856, at *2; Somoza, 538 F.3d at 109 n.2, 113 n.6; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1075 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Wenger, 979 F. Supp. at 150-51; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Here, as discussed above, the district conceded that it did not offer the student a FAPE for the 2008-09 and 2009-10 school years, and it has not appealed the impartial hearing officer's determination that there was a gross violation of the IDEA for those school years, such that the student is entitled to compensatory education. The purpose of a compensatory education award is to remedy a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 1998] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "(a)ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075; Application of a Student with a Disability, Appeal No. 10-052). Accordingly, an award of compensatory education should aim to place the student in the position he would have been in had the district complied with its obligations (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "(c)ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address (the student's) educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the

[12] If a student with a disability reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible for extended school year services, 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]).

school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]).[13]

Lindamood-Bell

The impartial hearing officer awarded 480 hours of 1:1 reading instruction at LMB, with an additional 480 hours awarded if certain conditions were met (IHO Decision at p. 72). On appeal, the student requests 500 additional hours of tutoring at LMB. The center director for LMB's learning center testified that the student exhibited severe difficulties in orthographic processing and phoneme awareness (Tr. pp. 762, 775-77, 788). When LMB first evaluated the student in April 2010, it recommended that the student receive 480 hours of instruction (Student Ex. H at p. 4).[14] The center director testified that the recommendation was designed to be sufficient "to stimulate both phoneme awareness, orthographic processing, and that imagery language connection, enough that [the student] would be a functional reader," sufficient to allow him to read signs and directions (Tr. pp. 791-93). She further testified that upon learning that the student desired to take the GED exam, the recommendation was revised upward to reflect a ninth grade reading level, which she believed could be achieved with between 1,000 and 1,5000 hours of instruction (Tr. pp. 792-94).

Although the student seeks additional hours of LMB services beyond the 960 hours already awarded him, he provides no legal basis for such an additional award. As discussed above, the purpose of compensatory education is not to guarantee a particular result or level of student achievement, but to fashion a remedy that attempts to place a student in the position he or she would have occupied had the public school complied with its obligations under the IDEA. There is no evidence in this case that supports the student's need for additional services beyond the first 960 hours to compensate him for the district's gross violation. Therefore, I find no reason to modify the impartial hearing officer's award, which is well tailored to meet the student's acknowledged weaknesses in reading, and provide him with an opportunity to allow him to achieve competence in reading.

The student also objects to the impartial hearing officer's timeline for completing his award, stating that an illness could cause him to lose the remainder of his award. I find this argument to be without merit, as the LMB director testified that a student is permitted three unexcused absences for each 480-hour period of instruction and additionally, that illnesses documented by a doctor's note and documented family emergencies constitute excused absences (Tr. pp. 835-36).

[13] Despite the student's claims regarding whether his discharge from the district in 2008 was appropriate, I do not address that issue here, as the district conceded that it did not offer the student a FAPE for the 2008-09 and 2009-10 school years (Tr. p. 336).

[14] The hearing record contains multiple duplicative exhibits, mostly as a result of the student submitting multiple copies of the same exhibits into evidence (Student Exs. J; L; N; P). For purposes of this decision, only student exhibits are cited in instances in which both district and student exhibits are identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

Huntington Learning Center

The student also asserts that the impartial hearing officer erred in not awarding him compensatory math instruction from HLC, and requests an award of 800 hours of 1:1 tutoring from HLC to address his math needs. The HLC managing director testified that testing revealed the student's highest level of math mastery to be at approximately the second grade level (Tr. pp. 1008-10, 1051-52). She found that the student understood the basic concepts of addition, subtraction, multiplication, and division, but often made careless errors, which "would likely be overcome by the use of assistive technologies . . . as simple as a calculator" (Tr. pp. 998-1006). The student had difficulty with word problems, questions relating to place values, and monetary calculations (Tr. pp. 1003-05). The director opined that the student's difficulties with word problems were likely a result of his auditory comprehension deficits (Tr. p. 1003). The student also exhibited difficulties with general math concepts, including questions on probability, multiples and divisors, and geometry (Tr. p. 1007). The director testified that the student would require 800 hours of instruction to progress to the ninth or tenth grade level necessary to pass the GED exam (Tr. pp. 1009, 1014, 1055-56). To reach a level of functional math literacy of approximately a seventh grade level, sufficient to manage a bank account and credit card, the director opined that the student would require 500 hours of instruction (Tr. pp. 1016, 1059).

The neuropsychologist who evaluated the student found that the student functioned at a 3.8 grade level in math calculation skills, a 4.1 grade level in problem solving skills, and a 4.5 grade level in math fluency (Tr. p. 1642; Student Ex. S at pp. 13, 28-29). The private neuropsychological evaluation report indicated that the student could answer addition and subtraction questions to the extent that they did not require understanding of place value or the ability to regroup (Student Ex. S at p. 13). The student could also multiply and divide one-digit numbers (id.). However, the student "show[ed] little understanding o[f] what is need to solve word problems" (id.).[15] The neuropsychologist also noted that the student had difficulties understanding basic math facts, performing multistep problems, and determining which operations were required to solve problems (id.). The neuropsychologist concluded that the student exhibited traits common to dyscalculia, "a specific neurologic disorder affecting a person's ability to understand and/or manipulate numbers" (id. at p. 28). The neuropsychologist recommended that the student receive "math remediation and programs to help him with spatial, procedural and verbal aspects of math calculation and problem solving skills" (id. at p. 30).

While I find that the hearing record shows that the mathematics tutoring services offered by HLC would be part of an appropriate compensatory education award, the evidence does not support an award in the amount of math tutoring recommended by HLC. Again, in crafting an appropriate award for the student, it is important to remember that any services granted should aim to put the student in the position he would have occupied had the district met its obligations under the IDEA. The HLC director testified that she estimated that the student would require approximately 100 hours of instruction to increase his math functioning one grade level (Tr. pp. 1009, 1014, 1059). Because the student was deprived of services for two school years, I will award him 200 hours of HLC tutoring in math (Tr. p. 1021).

[15] In a deviation from the findings of the HLC testing, the neuropsychologist reported that the student could identify the value of and add coins (Student Ex. S at p. 13).

Speech-language Therapy

On appeal, the student requests an award of an additional 300 hours of speech-language services, based on the recommendation of the speech-language pathologist who evaluated him. The evaluation found the student to have auditory and phonological processing disorders (Student Exs. P; Q). The speech-language pathologist testified that the student was at the third percentile in auditory processing (Tr. p. 1365). She further testified that the student suffered from short-term and working memory deficits, which could be related to his problems with auditory processing (Tr. pp. 1367, 1374-75, 1380). Furthermore, the student had significant difficulty with temporal integration, such that he required additional time to process speech (Tr. pp. 1367-68, 1371). In addition, the student had difficulties with phoneme blending and auditory decoding, indicative of his reading disability (Tr. pp. 1371-73). The speech-language pathologist recommended that the student receive two or three 45-minute sessions of speech language therapy over a period of two to three years (Tr. pp. 1404-05).

Based on my review of hearing record, including the student's auditory processing and language processing evaluations (Student Exs. P at p. 8; Q at pp. 8-9), I agree with the student that the impartial hearing officer awarded him an insufficient amount of speech-language therapy to compensate for the deprivations he suffered during the 2008-09 and 2009-10 school years. Although a 1:1 hourly award is not always appropriate, I note that the last IEPs developed for the student for the 2005-06 and 2006-07 school years specified that he receive speech-language therapy twice weekly (Dist. Ex. 56 at p. 12; Dist. Ex. 57 at p. 15). Upon review of the student's significant receptive and expressive language needs, I find that one session per week of speech-language therapy would not be sufficient to address them. Accordingly, the student should receive 126 hours of speech language therapy (two 45-minute sessions per week for two 42-week school years).

Occupational Therapy

The student also contends that as the district OT evaluator recommended the provision of OT to the student, the impartial hearing officer erred in not awarding any OT services. I agree. The district's occupational therapist testified that the student had difficulties writing, including letter size, word formation, word spacing, and alignment (Tr. pp. 1281-82). She noted that, although keyboarding skills generally take precedence once a student reaches nine years of age, it is still "very important . . . to have basic writing skills" sufficient to fill out job applications and write checks (Tr. pp. 1282-83). She also opined that the student's writing difficulties were exacerbated by his inability to read (Tr. p. 1311). Furthermore, she testified that unless the student received OT to address his memory and ocular motor deficits, those deficits would have a significant impact on his ability to use a keyboard, such that it was necessary for the student to work on both skill sets (Tr. pp. 1286, 1290-91). She recommended that the student receive OT twice weekly for 30-minute sessions for between six months and one year, as one session per week "would not be sufficient" to address the student's deficits (Tr. pp. 1303-5). The occupational therapist admitted that she was unsure what amount of services would address the student's lack of OT services for several years; rather, she focused on "what I think would be optimal right at this moment" (Tr. pp. 1307-08).

Based on the testimony of the district's OT evaluator, and my review of the hearing record, I find that the record supports an award of 42 hours of OT (one year of two 30-minute sessions per week for a 42-week school year).

Vocational Training

The student requests that he be permitted to defer his vocational training award until the completion of his compensatory education award. He provides no arguments as to why it is inappropriate to initiate the vocational training after the first 26-week period of LMB reading instruction; however, having considered the testimony of the private neuropsychologist who evaluated the student that he should be given vocational training after completion of his educational program (Tr. pp. 1613-14, 1639), I find that it would be equitable in these circumstances to permit the student to defer vocational assessment and training until completion of his LMB reading instruction and HLC math instruction. In the event that the student does not complete his award of educational services, he will be permitted to request the vocational assessment at any time within one year from the date of this decision.

Assistive Technology

On appeal, the student requests voice dictation software and a money calculator as assistive technology devices. State regulations provide that in developing an IEP, the CSE shall "consider whether the student requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a free appropriate public education" (8 NYCRR 200.4[d][3][v]). Accordingly, in these circumstances, compensatory education in the form of an assistive technology services award should be granted when the services are necessary to assist the student in accessing the instructional portions of a compensatory education award.

The district's assistive technology evaluation report recommended that the student be provided with assistive technology to aide him in writing, spelling, and reading (Student Ex. L at p. 2). Specifically, the report recommended that the student be given a laptop with word prediction and reading/writing software with scanning capabilities, a scanner, and a flash drive (id. at pp. 3-4). The private assistive technology evaluation report also recommended voice dictation software, a microphone, a printer, math software, a money calculator, and technology training (Student Ex. R at pp. 5-7). The private assistive technology evaluator testified that he recommended dictation software because it would be "much more efficient and easier" for the student to use (Tr. p. 1476). However, he did not opine that word prediction software would not be appropriate to address the student's needs, simply that voice dictation software was "the technology that best addresses" the student's writing deficiencies (Tr. pp. 1483-86). The district's director of the center of assistive technology testified that assistive technology recommendations must consider the tasks the student will be asked to perform and in what environment (Tr. pp. 1141-45, 1147-50). She opined that as the student was not currently in an educational placement, it made more sense to recommend a trial with basic assistive technology and then evaluate the student once a placement was determined (Tr. pp. 1154-56, 1159-61, 1165-67, 1230).

I find that the impartial hearing officer's award properly addressed the student's immediate need for assistive technology services to access his compensatory education award, and left flexibility for additional assistive technology services in the event that he requires them. I note

that the student's program at LMB is directed at teaching him to read and the student has failed to establish how voice dictation software would assist him in this endeavor. Once the student's reading deficits have been remediated and OT has been implemented to address his ocular motor deficits, his ability to use a keyboard should increase significantly, lessening the discrepancy between the student's ability to write using a keyboard and using dictation software.

Independent Educational Evaluations

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 C.F.R. § 300.502; 8 NYCRR 200.5[g]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 C.F.R. § 300.502[a][3][i]). In addition to the generalized right to an IEE, parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district, or if an impartial hearing officer requests that one be conducted as part of a hearing on a due process complaint notice (34 C.F.R § 300.502[b], [d]; 8 NYCRR 200.5[g][1], [2]).

The student contends that because the district did not attempt to defend the psychoeducational evaluation it conducted in 2005, he was entitled to reimbursement for the private neuropsychological evaluation he obtained in 2010. However, I note that in order to obtain an IEE at public expense the district must have conducted an evaluation with which the parent disagrees, and the parent must make a request for an IEE at public expense (34 C.F.R. 300.502[b][1], [2]). The private neuropsychological evaluation obtained by the student was conducted over three days, two of which occurred prior to the date of the due process complaint notice (Dist. Ex. 1; Student Ex. M). The hearing record contains no indication that the student requested that the district pay for an IEE prior to the time that he obtained one. Furthermore, the due process complaint notice did not request an IEE at public expense, instead seeking reimbursement for a private evaluation already obtained (Dist. Ex. 1 at p. 8). In any event, there is no evidence of disagreement with any district evaluation. Because the student was not challenging a district evaluation, the district was not responsible for reimbursement (P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 740 [3d Cir. 2009]).

With regard to the private assistive technology evaluation, counsel for the student asserted that the district's assistive technology evaluation was deficient and incomplete and requested that the impartial hearing officer order the district to fund an IEE (Tr. pp. 896-97). The district indicated its belief that the evaluation was sufficient and that it intended to defend its evaluation (Tr. pp. 895-97, 899-907, 926-27; see 34 C.F.R. § 300.502[b][2][i], [3]). The impartial hearing officer explicitly found that the district's assistive technology evaluation was appropriate (IHO Decision at p. 70), such that the student was not entitled to funding for the private assistive technology evaluation at public expense (34 C.F.R. § 300.503[b][3]). Furthermore, the request for reimbursement for the private assistive technology evaluation was not set forth in the student's due process complaint notice, and 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. §§ 300.508[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. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see C.F. v. Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B., 2011 WL 4375694, at *6; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). Accordingly, the student is not entitled to reimbursement for the private assistive technology evaluation.

Conclusion

For the reasons stated above, I find the impartial hearing officer's compensatory education awards relating to LMB instruction and assistive technology were appropriate equitable remedies designed to compensate the student for the district's gross violations of the IDEA. However, I find the impartial hearing officer's award of speech-language therapy and her failure to award the student any OT or math tutoring did not sufficiently compensate the student for the deprivations caused him by the district's failures to comply with the IDEA. Accordingly, I order the district to provide the student with compensatory speech-language therapy, OT, and math tutoring in the amounts stated above. Additionally, given the student's previous lack of attendance in school,[16] I find that the impartial hearing officer appropriately used her discretion in structuring the relief in stages.

In closing, I note that despite the student's statutory ineligibility for further special education programs and services beyond those awarded to him as compensatory education, there are other resources available to him. The hearing record does not reflect that the student has pursued adult education programs or employment and independent living services available through the Office of Adult Career and Continuing Education Services' (ACCES, formerly known as VESID) Adult Education Programs and Policy (AEPP) or Vocational Rehabilitation (ACCESS-VR) (http://www.acces.nysed.gov). I encourage him to do so, if he finds that he requires further assistance after completing his award of compensatory education.

I have considered the student's remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated August 17, 2011 is modified to the extent that the district shall also fund 100 hours of compensatory 1:1 instruction in math on a 12-month school year basis at HLC (or a different agency agreed upon by the parties) at a rate of up to $85 per hour, payable on submission of proof of attendance and to be completed within one year from the date of this decision; and

[16] The hearing record does not indicate that the sole reason for the student's lack of attendance was the deficiencies in his special education services.

IT IS FURTHER ORDERED that the same independent educational evaluator or independent New York State licensed psychologist identified in the impartial hearing officer's order shall, after the first 100 hours of HLC instruction, also review the student's progress with regard to the deficits noted by the neuropsychological evaluation report and the body of this decision and record such findings in a written report to be provided to the parties and funded by the district. If the independent evaluator determines student has attended the instruction and made progress after the first 100 hours of instruction, he shall be entitled 100 additional hours of the HLC math instruction; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision with regard to compensatory speech-language therapy services is modified as follows: the district shall fund 126 hours of 1:1 speech-language therapy, less any amounts already received by the student pursuant to the impartial hearing officer's decision, on a 12-month school year basis to be provided by a private provider of the student's choosing, payable on submission of proof of attendance and to be completed within two years from the date of this decision; and

IT IS FURTHER ORDERED that the district pay an independent New York State licensed speech-language pathologist to evaluate the student after 60 hours of services review the student's progress with regard to the deficits noted by the language processing evaluation report and record or her findings in a written report to be provided to the parties and funded by the district. If the speech language pathologist determines the student has attended therapy sessions and made progress after the first 60 hours of therapy, he shall be entitled to the remainder of the speech language therapy; and

IT IS FURTHER ORDERED that the district fund 42 hours of 1:1 OT on a 12-month school year basis to be provided by a private provider of the student's choosing, payable on submission of proof of attendance and to be completed within one year from the date of this decision; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's decision directing a vocational assessment is modified as follows: the district shall refer the student for such assessment within one month of his completion of the LMB and HLC awards, provided however, that the student may seek the assessment after one year from the date of this decision.

Dated: **Albany, New York**
December 5, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER