The University of the State of New York

The State Education Department
State Review Officer
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No. 11-132

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, John Tseng, Esq., of counsel

Friedman & Moses, LLP, attorneys for respondent, Alicia Abelli, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational programs and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2008-09 and 2009-10 school years were not appropriate and awarded the student additional services. The parent cross-appeals from the impartial hearing officer's decision to the extent that she did not reach certain determinations on issues raised in the due process complaint notice and from that portion of the impartial hearing officer's decision which denied her request for additional occupational therapy (OT) services. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending an accelerated general education fourth grade class at a district elementary school and was recommended to receive OT to address her difficulties with handwriting, written organization, self-regulation, and attention (Tr. pp. 511, 567; Parent Exs. B at pp. 1, 7, 13; I at p. 6).[1] The student's current eligibility for special education programs and services as a student with an other health-impairment is not in dispute in this appeal (Parent Ex. B at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[1] The hearing record contains multiple duplicative exhibits (see Tr. pp. 88-89). For purposes of this decision, only parent exhibits are cited in instances in which both district and parent 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]).

Background

The student received OT and attended a general education classroom during the 2007-08 school year (Parent Ex. CC at pp. 1-2, 9, 11). At a CSE meeting held on April 30, 2008, the CSE determined that the student was not eligible for special education programs and services, and terminated the student's OT as of the beginning of the 2008-09 school year (Parent Ex. M at pp. 1-2).[2] During the 2008-09 school year, the parent shared with the district her concerns about the student's performance (Tr. pp. 216, 238, 523-24). In August 2009, the parent obtained a private psychoeducational evaluation of the student and requested that the CSE "reopen" the student's case (Tr. pp. 525-26). The district conducted a social history update in January 2010, a classroom observation of the student in February 2010, and an OT evaluation in March 2010 (Parent Exs. I-K). The CSE convened on March 5, 2010 and developed an individualized education program (IEP) for the student for the period of March 8, 2010 through March 9, 2011 that offered placement in a general education classroom with two sessions of OT in a group of three per week (Parent Ex. B at pp. 1, 11, 13). The district also referred the student for an assistive technology evaluation (id. at p. 6; Parent Ex. D).

The parent disagreed with the March 2010 CSE's placement recommendation by letter to the district dated March 31, 2010 (Parent Ex. G). The parent specifically disagreed with the lack of a recommendation for tutoring services as recommended by the August 2009 private psychoeducational evaluation (id. at p. 1). The parent also disagreed with the results of the March 2010 OT evaluation conducted by the district and disagreed with the CSE's recommendations regarding OT, questioned why the district had not completed an assistive technology evaluation prior to the CSE meeting, and noted that she had not yet been informed when the assistive technology evaluation would be conducted (id.). The parent requested that the district refer the student for an auditory processing evaluation and requested independent educational evaluations (IEE) for OT and assistive technology (id.).

Due Process Complaint Notice and Response

In a due process complaint notice dated June 24, 2010, the parent requested an impartial hearing and asserted claims against the district pursuant to the Individuals with Disabilities Education Act (IDEA), section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794 [1998]), 42 U.S.C. § 1983 (section 1983), and New York State Education Law § 4401 based on the district's failure to provide the student a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years (Parent Ex. A at p. 1).

The parent asserted that the district wrongly terminated the student's OT services and declassified the student from special education in April 2008 without first evaluating her (Parent Ex. A at p. 2). The parent additionally contended that the district failed to provide her with required prior written notice or notice of her parental rights before declassifying the student (id.). According to the parent, the student began the 2008-09 school year in a general education classroom without any special education supports (id.). The parent alleged that when she brought her concerns regarding the student's difficulties to the district's attention in February 2009, the

[2] The hearing record indicates that the parent requested that the student's OT be terminated rather than have the OT provided on a "pull-out" basis during academic instruction, as OT was not available before or after school or in the student's classroom (Tr. pp. 213-14, 230-32, 516-19, 580).

district directed her to obtain a private evaluation, as the district was unable to conduct a sufficiently comprehensive evaluation (id.). The parent noted that she obtained a private psychoeducational evaluation, which reflected diagnoses of dyslexia, an attention deficit hyperactivity disorder, predominantly hyperactive-impulsive type (ADHD), and a disorder of written expression, and the student presented with a below average working memory (id.).

The parent further alleged in her due process complaint notice that she requested the student's case be "reopened" in August 2009; however, when the parent met with the district to complete a social history, the district asked her to consider a section 504 accommodation plan instead and a meeting to develop an IEP for the student was not scheduled (Parent Ex. A at pp. 2-3). The parent asserted that she continued to express her desire to have an IEP developed for the student throughout fall 2009; however, in November 2009 the parent was informed by the district that the student's case had been "closed" in October 2009 (id. at p. 3). The parent further asserted that she again referred the student to the district for an evaluation via facsimile and was informed in December 2009 that the student's case had not yet been reopened and that she must resubmit the request via e-mail; when she did so, the student's case was reopened (id.).

The parent contended that she learned at the March 2010 CSE meeting that the district had only conducted an OT evaluation, which the parent asserted did not fully address the student's OT needs (Parent Ex. A at p. 3). In addition, when she requested at the March 2010 CSE meeting that the student receive individual OT, she was told that the school could only offer group OT (id.). The parent asserted that she requested the student be provided with special education teacher support services (SETSS),[3] but was told that the only available SETSS class at the student's school was an 8:1 group that was full and behaviorally inappropriate for the student (id. at p. 4). The parent further asserted that when she inquired about why an assistive technology evaluation had not been conducted, the district replied that it could only make a referral for an assistive technology evaluation for students with IEPs and that one would be scheduled after the IEP was completed (id.).

In addition to the concerns raised above, the parent also raised various contentions regarding the development of the March 2010 IEP, including that: (1) the district failed to conduct timely evaluations of the student; (2) the parent was denied meaningful participation in the evaluation process; (3) the district did not obtain consent from the parent prior to evaluating the student; (4) the evaluation conducted was insufficient; (5) the IEP was not based on sufficient evaluative data; (6) the March 2010 CSE was improperly constituted; (7) the district ignored recommendations made by the private evaluator; (8) the parent was denied meaningful participation in development of the IEP; (9) the IEP did not describe the student in all areas of disability; (10) the IEP failed to address the student's functioning in math; (11) the goals contained in the IEP were vague, inadequate, and insufficient; (12) the recommendation of the CSE was predetermined; (13) the district failed to provide the parent with required notice; (14) the CSE did not consider alternate program and service recommendations; (15) the CSE did not consider whether the student required assistive technology; and (16) the recommended program was not reasonably calculated to provide the student with educational benefits (Parent Ex. A at p. 4).

[3] SETSS is described in the hearing record as a group consisting of "usually eight students and one teacher and they do . . . reading, they do math, and they do writing" (Tr. p. 278). It is also stated in the hearing record that SETSS "could be a push-in program also, where the SETTS teacher goes into the classroom," but that the student's school did not offer such a program (Tr. p. 280).

The parent further asserted that she requested an IEE for OT and assistive technology, and for the student to be referred for an auditory processing evaluation in March 2010, and that she received notice sometime thereafter that the district had referred the student for an assistive technology evaluation, but the district informed her that the evaluation could not be completed until September 2010 (Parent Ex. A at p. 4). Finally, the parent contended that the student had not received the amount of OT mandated on her IEP, the OT provided was not fully addressing the student's needs, and that the district had not responded to the parent's requests for progress reports regarding the student's OT (id.).

For relief, the parent requested that the impartial hearing officer: (1) find that the district did not offer the student a FAPE for the 2008-09 and 2009-10 school years; (2) order the district to fund assistive technology, auditory processing, and OT evaluations; (3) award the student "compensatory/equitable additional services;" (4) award the parent "funding for all transportation costs necessary" to access any award of additional services; and (5) reimburse the parent for her "out-of-pocket expenses" for privately obtained evaluations, tutoring costs, related services, and transportation costs (Parent Ex. A at p. 5).

In a response to the due process complaint notice dated August 9, 2010, the district asserted that the March 2010 CSE determined the student to be eligible for special education programs and services as a student with an other health-impairment and offered her a general education placement with related services (Dist. Ex. 2 at pp. 1-2, 4). The district further asserted that the March 2010 CSE was properly constituted; that the parent had an opportunity to participate in the review; that the CSE considered documents provided by the parent; and that the CSE discussed the student's needs, IEP goals and objectives, and the program recommendation (id. at p. 4). The district alleged that it "had no reason to suspect a disability or that special education services may be needed to address that disability for the 2008-09 school year" and that it had "attempted to conduct a social history with the student's mother" in September 2009, but she had refused to give consent (id.). With respect to the parent's request for an assistive technology IEE, the district asserted that it had notified the parent of its intention to conduct an assistive technology evaluation in September 2010 (id.).

Prehearing Conference and Interim Decision

A prehearing conference was held on August 11, 2010, at which time the district requested that the parent clarify her request for IEEs and the remedy she sought in terms of "compensatory equitable additional services" (Tr. pp. 7, 10-11). The parent requested that the student receive "make up occupational therapy services for the portion of the 2009-2010 school year" that she did not receive OT (Tr. pp. 13-14). The parent also argued that the student was improperly declassified from special education services prior to the 2008-09 school year and was entitled to "make-up services" for that school year as well (Tr. pp. 14-15). Finally, the parent requested "make-up SETSS or a tutoring service" for the 2008-09 and 2009-10 school years as relief for the district's failure to offer tutoring with a learning specialist as recommended by the August 2009 private psychoeducational evaluation to address the student's writing delays (Tr. pp. 15-16). The district requested that the parent be required to specify the amount of compensatory additional services that she was seeking, to which the parent replied that the student's needs could not be accurately determined until the requested evaluations had been conducted (Tr. pp. 20-21). The impartial hearing officer indicated that she would permit the parent to develop her request for the amount of additional services sought during the impartial hearing (Tr. p. 23).

The parent also requested at the prehearing conference an interim order for IEEs for assistive technology, auditory processing, and OT (Tr. pp. 3-4). The impartial hearing officer ordered the district to fund an OT IEE of the student and scheduled a hearing to determine whether the parent was entitled to independent assistive technology and auditory processing evaluations of the student at public expense (Tr. pp. 29-32, 36-37). At the subsequent hearing date, the parent testified that in her March 2010 letter to the district she had requested OT and assistive technology IEEs and that the student be referred for an auditory processing evaluation from the district, but that the district never responded to the letter (Tr. pp. 55-60). The parent further testified that although the district promised her at the March 2010 CSE meeting that the student would receive an assistive technology evaluation within a few weeks of the meeting, she received a letter from the district during the last week of the 2009-10 school year indicating that the evaluation would be conducted on September 24, 2010 (Tr. pp. 55-57, 60-61; see Parent Ex. L). The district admitted that it was not "in a position to deny or defend against any of these allegations" because of witness unavailability, and that it had not conducted either of the requested evaluations (Tr. pp. 42-46, 49).

In an interim order dated October 14, 2010, the impartial hearing officer confirmed her oral order with regard to the parent's entitlement to an OT IEE and granted the parent's request for assistive technology and auditory processing IEEs at district expense (IHO Interim Decision at pp. 2-4). The impartial hearing officer found that the parent had expressed her disagreement with the district's OT evaluation in her March 2010 letter and that the district had failed to timely file a due process complaint notice to defend its evaluation at an impartial hearing (id. at pp. 2-3). The impartial hearing officer also found that the district's delay in scheduling an assistive technology evaluation entitled the parent to receive one at public expense (id. at p. 3). The impartial hearing officer further found that the parent had established the need for an auditory processing evaluation and that the district had failed to respond to her request for one (id. at pp. 3-4).

Impartial Hearing and Decision

The parties proceeded to an impartial hearing on October 6, 2010, which concluded on May 13, 2011, after six hearing dates.[4] In a decision dated September 12, 2011, the impartial

[4] The hearing record shows that at the close of the second prehearing date and at five of the six impartial hearing dates, the impartial hearing officer solicited requests for extension of the compliance date for issuing a decision from both parties and granted them orally, but did not otherwise document them in the hearing record (Tr. pp. 80, 290, 392, 470-71, 603, 635). Such solicitations on the part of the impartial hearing officer violate federal and State regulations governing impartial hearings, which require that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][[5]; see Letter to Kerr, 22 IDELR 364 [OSEP 1994] [an impartial hearing officer "cannot extend the timeline on his or her own initiative, or pressure a party to request an extension"]). While the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal and State regulations (see 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) and regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that she must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR200.5[j][5]). The impartial hearing officer is reminded that it is her obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (see Application of the Dep't of Educ., Appeal No. 11-095; Application of the Dep't of Educ., Appeal No. 11-037; Application of a Student with a Disability, Appeal No. 08-064; Application of the Dep't of Educ., Appeal No. 08-061). Additionally, while the district's post hearing memorandum is dated June 24, 2011 (IHO Ex. I at p. 13), the impartial hearing officer's decision indicates that the record was closed on August 29, 2011 (IHO Decision at p. 3). I caution the impartial hearing officer to comply with State regulations, which require that in cases where extensions of time to render a decision have been granted, the decision must be

hearing officer first found that the parent's claims regarding the 2008-09 school year were not precluded by the IDEA's statute of limitations, as an exception to the limitations period applied based on the district's failure to provide the parent with written notice of her procedural rights (IHO Decision at p. 11).

With regard to the April 2008 CSE's decision to declassify the student and terminate her OT services, the impartial hearing officer found that even though the parent requested termination of the student's OT services because the parent was concerned that the student was missing academic instruction, the district should have arranged to modify the delivery of the student's OT services so as to avoid removing her from academic instruction rather than terminate her OT services (IHO Decision at p. 13). The impartial hearing officer further found that the district had improperly declassified the student without first evaluating her (id.).

Because the district had improperly terminated the student's OT services, the impartial hearing officer awarded her 80 hours of additional OT by a private provider (IHO Decision at pp. 14-15). Furthermore, the impartial hearing officer determined that the district improperly refused to offer the student SETSS on a 1:1 basis and awarded the student 400 hours of 1:1 tutoring to be provided by a private agency as additional services (id. at p. 15). With regard to assistive technology, the impartial hearing officer disregarded the district's evaluation and awarded the student the amount recommended by the independent assistive technology evaluator, including access to a computer and a printer and specified software (id. at pp. 15-16). However, the impartial hearing officer denied the parent's request for reimbursement for the August 2009 private psychoeducational evaluation, finding that the parent had neither requested an IEE at public expense nor disagreed with a district evaluation (id.). Finally, the impartial hearing officer awarded the parent reimbursement for transportation costs associated with the awarded additional services (id. at p. 16).

Appeal for State-Level Review

The district appeals and asserts that the impartial hearing officer erred in considering the parent's claims, as they were barred by the statute of limitations. Specifically, the district asserts that the parent's claim arose more than two years prior to the filing of her due process complaint notice, and that an exception to the limitations period does not apply because the parent was made aware of her parental rights while the student was receiving early intervention services and again in January 2010. The district further contends that it properly declassified the student from special education at the April 2008 CSE meeting based on both the parent's request and the CSE's assessment of the student's needs, as the student had met her OT goals for the 2007-08 school year and the student's teacher opined that she did not require further OT services. The district further asserts that any delay in providing services to the student during the 2009-10 school year was a result of the parent's failure to provide consent for the district to evaluate the student. Additionally, the district argues that it offered the student a FAPE when she was reclassified as a student with a disability in March 2010. As an alternative argument, the district asserts that even if it did not offer the student a FAPE, the district asserts that the additional services awarded by the impartial hearing officer are not appropriate and that the 1:1 tutoring awarded could be provided by a district

rendered no later than 14 days from the date the record is closed, which is "when all post-hearing submissions are received by the IHO" (Office of Special Education guidance memorandum dated August 2011 titled "Changes in the Impartial Hearing Reporting System," available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf; see 8 NYCRR 200.5[j][5]).

provider. The district also asserts that the impartial hearing officer erred in refusing to consider its assistive technology evaluation recommendations and that the recommendations made in the private assistive technology evaluation were not necessary to remedy the denial of a FAPE. Finally, the district argues that the hearing record contains no evidence regarding the student's need for transportation costs and that the impartial hearing officer should not have awarded them.

The parent answers, denying the district's allegations with respect to the contested issues, and cross-appeals the impartial hearing officer's denial of some of her requests for additional services and the impartial hearing officer's failure to rule on claims raised in the parent's due process complaint notice. Among other things, the parent cross-appeals the impartial hearing officer's decision to the extent that the impartial hearing officer did not explicitly find that: (1) the district did not comply with procedures governing the reevaluation of students; (2) the March 2010 IEP did not offer the student a FAPE; and (3) the district violated section 504. The parent also cross-appeals the impartial hearing officer's decision to award her 80, rather than 160 hours of additional OT services, and the ruling that she was not entitled to reimbursement for the August 2009 psychoeducational evaluation. The parent affirmatively asserts that to the extent the district had not introduced any evidence regarding an appropriate additional services remedy, the district was bound by the parent's evidence. The parent also contends that the entity initiating the appeal was without standing to do so.

The district answers the cross-appeal and denies the parent's allegations. The district requests that the impartial hearing officer's decision be upheld to the extent appealed from by the parent. With regard to the parent's challenge to its standing to initiate the appeal, the district admits that its petition contained a single misidentification of the appropriate entity and asserts that the correct entity is named in the caption of the petition, on the signature page, and in the verification accompanying the petition.

The parent submitted a reply to the district's answer to the cross-appeal. To the extent that the reply does not comply with 8 NYCRR 279.6, which limits a reply to any procedural defenses interposed by a respondent or to any additional evidence submitted with the answer, I will not consider the reply because such additional allegations are beyond the scope of State regulations (see 8 NYCRR 279.6; Application of a Student with a Disability, Appeal No. 10-118; Application of the Bd. of Educ., Appeal No. 10-036; Application of a Student with a Disability, Appeal No. 09-145).

Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, __, 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors

render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 C.F.R. § 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of

Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Preliminary Matters

Standing

The parent contends that the district's petition was improperly initiated by an entity without standing to commence the appeal. The district concedes that it named a predecessor entity at one point in the petition by error. I accept the district's representation that the party named in the caption, and in all other instances in the petition than the lone instance referenced by the parent, is the initiating party, and decline to dismiss the petition on this basis.

Scope of Review

Regarding the parent's claims raised pursuant to section 504, New York State Education Law makes no provision for State-level administrative review of impartial hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (Application of the Bd. of Educ., Appeal No. 11-122; Application of a Student with a Disability, Appeal No. 11-098; 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 education program or service and the failure to provide such program"]). Therefore, I have no jurisdiction to review any portion of the parent's claims or the impartial hearing officer's decision regarding section 504 (see A.M. v. NYC Dep't of Educ., 2012 WL 120052, at *7 n.17 [E.D.N.Y. Jan. 17, 2012]).

Statute of Limitations

The district appeals the impartial hearing officer's determinations that the parent's claims for the 2008-09 school year are not barred by the statute of limitations. Under the IDEA, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party "knew or should have known 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]).[5] An exception to the timeline to request an impartial hearing applies if a

[5] New York State has not established a different limitations period.

parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 C.F.R. § 300.511[f]; 8 NYCRR 200.5[j][1][i]). In her decision, the impartial hearing officer found that an exception to the limitations period applied because the parent was prevented from timely filing a due process complaint notice by the district's failure to provide her with required procedural safeguards (IHO Decision at p. 11; see 20 U.S.C. § 1415[f][3][D]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[f]; 8 NYCRR 200.5[j][1][i]).

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 (Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; C.H. v. Northwest Indep. Sch. Dist., 2011 WL 4537784, at *7 [E.D. Tex. Sept. 30, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]; 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, the parent testified without contradiction by the district that from the time that the student had received early intervention services until January 2010 she did not receive notice of the procedural safeguards (Tr. pp. 567-69, 571-72). I disagree with the district's assertion that her receipt of the procedural safeguards at some unspecified point prior to the student turning three years of age, in combination with her receipt of the required notice in January 2010 (Parent Ex. V), somehow excuses its failure to provide the parent with the required procedural safeguards at any point during the intervening years. I find that the evidence supports the impartial hearing officer's conclusion that the student's mother was prevented from timely requesting an impartial hearing on the basis that the district withheld from her the procedural safeguard notices it was required to provide, and that therefore the exception to the statute of limitations defense applies.

Declassification

Turning to the merits of the appeal, the district asserts that it properly declassified the student from special education services at the parent's request for the 2008-09 school year.[6] I find this argument unconvincing for two reasons. First of all, for a revocation of consent to the

[6] The parent testified that in spring 2008, she requested that the student receive OT services either in the classroom or outside of school hours, so as not to miss instructional time (Tr. p. 516). She testified that she was told her options were to continue to have the student pulled out of classes to receive OT or have them discontinued (id.). The parent further testified that at the April 2008 CSE meeting she was informed that OT could only be provided to the student in a pull-out model during the student's academic periods (Tr. pp. 518-19). However, she admitted that when given the choice between terminating OT and having the student continue to miss academic instruction, she requested that the student's OT be terminated, as she considered it to be "less detrimental . . . at the time" (Tr. pp. 584-85). Although the district's school psychologist testified that the parent made a written request to the district in April 2008 that the student's OT be terminated, such a request was not introduced into the hearing record (Tr. pp. 212-13, 225-26).

continued provision of special education programs and services to the student to be effective, State regulations require that the revocation must be in writing and that the district must provide prior written notice before ceasing provision of services (8 NYCRR 200.5[b][5][i]; see 20 U.S.C. § 1415[b][3], [c][1]; 34 C.F.R. § 300.503; 8 NYCRR 200.5[a]). As the district introduced no written revocation of consent or prior written notice into evidence at the impartial hearing and, as noted above, the parent had not received the required procedural safeguards, I find that the district's failure to comply with mandated procedures in this instance impeded the parent's opportunity to participate in developing an appropriate educational program for her child (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Furthermore, although the district asserts that it properly declassified the student at the April 2008 CSE meeting, the IDEA requires that a district conduct an evaluation of a student previously determined to be eligible for special education prior to determining that the student no longer requires special education (20 U.S.C. § 1414[c][5][A]; 34 C.F.R. § 300.305[e][1]; 8 NYCRR 200.4[c][3]). I note that the district does not appeal the impartial hearing officer's finding that it did not evaluate the student prior to determining her to be ineligible for special education programs and related services. However, on appeal, the district asserts that it had sufficient information regarding the student's functioning to properly declassify her, but a review of the hearing record demonstrates that the reasons given by the district for declassifying the student are not sufficient in this case. The district's school psychologist who attended the April 2008 CSE meeting testified that the student's classroom teacher believed that the student no longer required OT, and that the student's occupational therapist stated that the student "had met her goals" for the year (Tr. p. 214). She further testified that the only document relied on by the CSE in declassifying the student was a report prepared by the student's classroom teacher (Tr. pp. 228-29).[7] The school psychologist admitted that while a student having met his or her goals would not ordinarily result in declassification, it did in this instance because of the parent's request that the student be declassified (Tr. pp. 231-32). Additionally, she testified that that the CSE did not specifically discuss the student's writing abilities because the discussion at the CSE meeting was about the student's "overall academics," and that the CSE did not consider other special education services for the student because the student was at or above grade level academically (Tr. pp. 229, 234). Under the circumstances of this case, I find that the district's reasons for decertifying the student were in contravention of the IDEA and its implementing regulations regarding evaluating students prior to declassifying them from eligibility for special education programs and services (see Application of the Bd. of Educ., Appeal No. 11-142).

In view of the foregoing, I find that the district failed to offer the student a FAPE for the 2008-09 school year because the district failed to properly document the parent's alleged revocation of consent for the provision of special education programs and services and failed to have sufficient evaluative data regarding the student's functioning prior to declassifying the student (see 20 U.S.C. § 1414[c][5][A]; 34 C.F.R. § 300.305[e][1]; 8 NYCRR 200.4[c][3]).

[7] Even if I were inclined to consider this single document to be sufficient evaluative data to justify declassifying a student without first conducting an evaluation, this report was not introduced into evidence at the impartial hearing, nor did the occupational therapist who determined that the student no longer required OT testify.

2009-10 School Year

Next, I turn to whether the district offered the student a FAPE for the 2009-10 school year. The school psychologist testified that she met with the parent in May 2009 to discuss the parent's concern that the student "may be dyslexic" and informed the parent regarding the process of referring a student to the CSE (Tr. pp. 216, 238). She further testified that at that time, the parent indicated that she was planning on having the student evaluated to determine if she was dyslexic (Tr. p. 217). To the contrary, the parent testified that the student had difficulty academically during the 2008-09 school year and that the student's teacher referred the student to the school psychologist to determine if she required an evaluation (Tr. pp. 522-24). The parent further testified that the school psychologist indicated that the student should be evaluated; however, when the parent requested that the school perform the evaluation, the school psychologist stated that a private provider should evaluate the student for dyslexia since she could not provide such an evaluation (Tr. p. 524).

The parent referred the student for a private psychoeducational evaluation to determine if supports would be helpful for the student (Parent Ex. F at p. 1).[8] The August 4, 2009 private psychoeducational evaluation report indicated that the student "excelled academically and socially throughout her second grade year," although her writing difficulties remained an "area of concern" (id. at p. 2). The parent described the student as "inconsistently attentive" and as having difficulties with self-regulation, with a decreased awareness of bodily needs, impulsivity, and vulnerabilities in self-monitoring (id. at p. 4). However, the student's second grade teacher did not report concerns with attention, impulsivity, or hyperactivity (id.). The evaluating psychologist also noted that the student was prone to becoming bored and "silly," but responded well to encouragement, support, and redirection (id. at p. 2).

The psychologist noted variability in the student's cognitive profile, with very superior ability in the areas of nonverbal reasoning (perceptual reasoning index) and rapid and accurate processing of visual inputs (processing speed index), but with average verbal reasoning (verbal comprehension index), and low average reasoning memory (working memory index) (Parent Ex. F at p. 3). The student sometimes lost points on verbal conceptual tasks "because she could not integrate her ideas sufficiently" (id.). She experienced difficulty in "efficiently organiz[ing] her responses" and "retaining sequential information" (id. at p. 4). The student displayed difficulties with executive functioning areas such as adopting new task requirements, shifting among task demands, and self-monitoring performance (id. at p. 5). The student required time to consolidate information in memory and performed "most competently on memory tasks that were less complex and provided an opportunity for repetition and consolidation" (id. at pp. 6-8). The student performed better when given small amounts of narrative information, or at a slower pace, and displayed difficulty with long-term memory for novel visual-spatial information (id. at p. 7). With regard to the student's language processing and verbal expression abilities, the psychologist found that the student's verbal abilities, although average, were far below her superior nonverbal abilities (id. at p. 8).

[8] The August 2009 private psychoeducational evaluation report indicated that the parent was concerned about school reports of the student's uneven academic achievement in that reading fluency, comprehension, and overall performance were well above grade level, but spelling and writing skills were not as developed (Parent Ex. F at p. 1). Furthermore, the parent had concerns related to the student's attention (id.).

The psychologist also found that the student exhibited a lack of precision in graphomotor ability, but age-level visual-spatial competence (Parent Ex. F at p. 9). Her handwriting was reported to be generally legible, but her mechanics of writing were weak, leading the psychologist to suggest that the student perform some writing on a computer (id. at pp. 10, 12). The student's writing fluency and editing were in the high average range, but the student was inconsistent at editing her own work, and her writing tended to be disorganized (id. at p. 11). The psychologist noted that although the student was currently scoring at grade level on writing tests, she was struggling with underlying delays in the consolidation of basic skills (id. at p. 14).

The psychologist opined that the student's cognitive and academic profiles revealed a pattern of strengths and vulnerabilities common in students with dyslexia (Parent Ex. F at p. 13). According to the psychologist, in both writing and reading the student exhibited particular difficulty in working with the sound structure of language (id.). In addition, the psychologist noted that the student's written material met the diagnostic criteria for a disorder of written expression (id.). Furthermore, the student's behavioral and cognitive profiles revealed a pattern characteristic of students with an attention deficit hyperactivity disorder, predominantly hyperactive-impulsive type (ADHD) (id. at p. 14). Recommendations included extra support with writing in school, close monitoring of the student's decoding skills, weekly tutoring with a learning specialist, weekly play therapy, and provision of "parent guidance" to the parent to support the parent's ability to understand the student's learning needs (id.).

By letter to the district dated August 17, 2009, the parent requested that the student's "IEP be reopened" and provided a copy of the August 2009 private psychoeducational evaluation (Tr. pp. 525-26; Parent Ex. T). In September 2009, the parent met with the school psychologist and a social worker to provide a social history for the student (Tr. pp. 526-27). At that time, the parent was requested to sign consent for the district to evaluate the student; however, she questioned the need for an additional evaluation because had already provided the district with the August 2009 psychoeducational evaluation (Tr. pp. 526-27). The school psychologist informed the parent that the consent form needed to be signed, but did not provide clarification regarding the nature of evaluations that the district wished to conduct (Tr. pp. 528-29, 572). The parent was then told that if she did not wish to have the student evaluated, she could instead obtain a section 504 plan for the student, and was referred to the school guidance counselor with instructions to contact the school psychologist when she decided which avenue she wished to pursue (Tr. pp. 527-30).

The parent conferred with the student's teacher, who opined that the student required OT, rather than the testing accommodations available with a section 504 plan (Tr. p. 532). Several weeks later, the parent telephoned the school psychologist and left a message (Tr. p. 533). The parent followed up over several weeks in October and November 2009, each time leaving a message stating that she would like the district to develop an IEP for the student (Tr. pp. 533-34, 574-75). The school psychologist never responded and in November 2009, the parent spoke to the school social worker, who informed her that the school psychologist was on medical leave and that the student's case "had since been closed" (Tr. pp. 534-35). The parent testified that she never received notice from the district that the case was closed (Tr. pp. 536-37). According to the parent's testimony, when she asked the district how to reopen the case, she was told that she should send a request that the case be reopened by facsimile "to the CSE office" (Tr. p. 537). The parent sent a facsimile, but never received any response and after calling the CSE office, she was directed to send an e-mail requesting that the student's case be reopened, after which the case was reopened in December 2009 (Tr. pp. 538-40; Parent Ex. U).

In January 2010, the parent provided consent for the district to evaluate the student (Tr. pp. 540-41; Parent Ex. V). According to the parent's testimony, she was told during the January 2010 social history interview that there would be a delay in conducting the CSE meeting "because there were a lot of other children ahead of her, who needed to be evaluated" (Tr. p. 542). The social history update report indicated the parent voiced her concern that the student had received diagnoses of dyslexia, a disorder of written expression, and an ADHD (Parent Ex. J at p. 1). The report further noted that the student experienced difficulty in reading and math, and that the parent wanted the student's OT services to be reinstated and for a learning specialist to be provided to the student (id. at pp. 1-2).

A February 5, 2010 classroom observation reflected that the student complied and cooperated with classroom routines and the teacher's directions (Parent Ex. K). In a parent checklist also dated February 5, 2010, the parent stated that her greatest concern with respect to the student's performance in school was that writing was "a physical obstacle" for the student, and that she also had difficulties with organization and time management (Parent Ex. W at p. 1). In a teacher checklist dated February 5, 2010, the student's teacher indicated that the student was distractible with a short attention span, was a slow worker, was disorganized, and did not complete assignments (id. at p. 2). She also indicated that the student appeared to be overly sensitive to loud noises (id.). She further reported that the student had a poor pencil grasp; did not write legibly; could not keep pace in class; had trouble discriminating shapes, letters, and numbers; reversed letters or numbers; and exhibited poor desk posture (id.). The teacher indicated that math and expressive writing were areas of academic difficulty for the student (id.).

The district conducted an OT evaluation of the student that was memorialized in a report dated March 5, 2010 (Parent Ex. I). The OT evaluator observed the student in the classroom to have good social-emotional, attention, self-regulation and learning behaviors, but concluded that she had significant difficulties with written work performance, memory, organization, and time management (id. at pp. 3, 6). The student had difficulty "screening out sound distractions" and a history of sensory modulation issues; however, she was generally "able to self-regulate in class without appearing fidgety or restless" (id. at p. 5). She exhibited some distractibility and impulsivity in class, and had "difficulty modulating or self-regulating her alertness states and discomfort states" (id.). The student also had difficulty "orienting and organizing herself in response to new task demands, needing to absorb new information slowly, in order to make it automatic" (id.).

The occupational therapist noted that student had particular difficulty with completing written assignments in a timely fashion (Parent Ex. I at p. 3). The student had "mild low endurance for sitting and desk posture," and exhibited difficulties with pencil grasp and graphomotor precision skills (id. at p. 4). Handwriting and printing quality were noted to be two years below grade level, with uneven spacing, sizing, and placement of letters, such that her writing as a whole was illegible (id.). The student also had difficulty with visual-motor precision control when copying designs, but exhibited advanced "visual presentation of line and form" when drawing independently (id.). The student showed number and letter reversals in written work and had difficulties with sequential memory (id. at p. 5). The report further reflected that the student had visual-perceptual skills two years above age level, but visual-motor integration skills two years below age level (id. at pp. 4-5). The student was able to type accurately on a keyboard, but was inefficient at touch typing; accordingly, the occupational therapist recommended that the student be "assessed for portable computer word processor school usage" (id. at p. 5).

The occupational therapist recommended that the student receive OT in a small group (up to 3:1) one time per week for 30 minutes, indirect daily monitoring, and OT consultation as needed (Parent Ex. I at p. 6). Additional recommendations were for an assistive technology evaluation to be conducted by the district, and testing modifications of answers to be recorded in any manner (scribe and/or word processor), and extra time for written essays and long answers (id. at p. 7). Furthermore, the occupational therapist recommended that the student receive additional after school "learning specialist/tutor/center" services and that those services be coordinated with the student's teacher and occupational therapist to insure carryover in the classroom (id.).

The CSE convened on March 5, 2010 (Parent Ex. B at pp. 1-2). Attendees were the school psychologist who also participated in the meeting as the district representative, the school social worker, the student's regular education teacher, a special education teacher, the occupational therapist who conducted the March 2010 OT evaluation, and the parent (id. at p. 2). The CSE determined that the student was eligible for special education programs and services as a student with an other health-impairment and recommended that the student attend a general education class with related services of small group (3:1) OT two times per week for 30 minutes within the general education setting (id. at pp. 11, 13). The March 2010 IEP indicated that based upon cognitive testing, the student scored in the superior range of intelligence with variability in her cognitive profile (id. at p. 3). The IEP indicated that the student's "ability to briefly remember and mentally manipulate auditory verbal inputs emerged as a relative weakness with her score falling in the low average range" (id.). The IEP also indicated that writing was an area of relative difficulty for the student; that she reversed letters and numbers; that she did not adequately space letters and words; and that she made punctuation, capitalization, and other errors involving writing mechanics (id. at pp. 3, 5). In addition, the IEP noted that the student had difficulty generating ideas for writing assignments, and that she had received diagnoses of dyslexia and a disorder of written expression (id.). The IEP further indicated that the student's processing skills were faster than her graphomotor skills; she struggled with pencil grasp and visual-motor precision (id. at p. 5). The IEP indicated that according to the student's teacher at the time, the student was functioning and a third grade level for reading, math and written language, yet math was described as "a concern" (id. at p. 3). The IEP did not indicate any academic management needs (see id.).

The March 2010 IEP reflected that despite the student's cognitive and academic strengths, she had "some difficulty" with attending skills as she displayed distractibility, restlessness, and sound/noise sensitivities (Parent Ex. B at p. 5). The student was reported to display difficulties with self-regulation specific to her awareness of her own states of alertness, which interfered with her ability to stay focused and remain on task and follow directions consistently (id.). The IEP indicated that the student displayed difficulty with organization of her classroom materials (desk/folders), written structure, and with time management of her written work (id.). The result of these difficulties was that the student's written work performance was less efficient than her academic potential for success, as it lacked completion and legibility (id.).

With respect to the student's health/physical management needs, the March 2010 IEP reflected that the student required direct and indirect OT services to address the "above areas of concern, and annual IEP goals" included in the IEP (Parent Ex. B at pp. 6-7). The CSE recommended that the student participate in State and local assessments with testing accommodations of extended time (1.5), separate location, questions read aloud, answers recorded in any manner (scribe), and directions read and reread (id. at p. 13).

The parent testified that during the March 2010 CSE meeting, she requested that the student receive the services of a learning specialist, as recommended in the August 2009 private psychoeducational evaluation (Tr. pp. 547-48). However, she was informed that the school did not offer that service and that the student was not eligible for resource room services because she was not performing two years below grade level (Tr. p. 548). The school psychologist testified that the student's teacher opined at the CSE meeting that the student did not require tutoring services with a learning specialist because she was performing well in the classroom (Tr. pp. 272-73). Furthermore, the psychologist testified that the district could not recommend that a student receive SETSS services unless the student was functioning at least two years below grade level (Tr. pp. 267, 274-75).

For the reasons discussed in greater detail below, I find that the district failed to offer the student a FAPE for the 2009-10 school year. Upon the parent's referral of the student to the CSE in August 2009, the district was required to provide the parent with a copy of the procedural safeguards notice, give her prior written notice detailing the purposes of the evaluation, and attempt to obtain her informed consent thereto (see 34 C.F.R. §§ 300.300[a][1]; 300.503[a], [b]; 300.504[a][1]; 8 NYCRR 200.5[a], [b][1][i], [f]).[9] The parent and school psychologist each testified that the parent was not provided with a written copy of the procedural safeguards notice prior to being presented with the consent to evaluate form in September 2009 (Tr. pp. 219, 531) and the parent testified that despite her request for clarification regarding the purposes of the evaluation, she was given none (Tr. pp. 527-28, 572). Accordingly, I find that the district improperly closed the student's case for the parent's failure to give consent to evaluate the student when the district failed to comply with its obligations under the IDEA.

When the CSE convened in March 2010, it developed an IEP that insufficiently addressed the student's writing, memory, and organizational needs. The March 2010 IEP contained annual goals and a recommendation for a referral for an assistive technology evaluation that addressed the student's cursive writing, printing handwriting, keyboarding skills, organization of classroom materials, self-regulation awareness, and visual-motor precision needs, consistent with the graphomotor and visual-motor difficulties noted in the district's OT evaluation report (compare Parent Exs. B at pp. 7-10, with Parent Ex. I at pp. 1-7). However, inconsistent with the student's relative weaknesses related to the sound structure of language in both reading and writing, ability to briefly remember and mentally manipulate auditory verbal inputs, difficulty generating ideas for writing assignments, retaining sequential information and recognizing the sound structure of words included in the March 2010 IEP, the IEP contains no goals, modifications or classroom accommodations to address the student's difficulties in these areas. I find this particularly noteworthy because, as discussed above, the March 2010 OT evaluation report contained a recommendation that the student receive additional after-school learning specialist/tutor/center instruction to address concerns related to basic written expressive language skills (e.g. consistent application of orthographic rules for spelling, correct spacing, punctuation and capitalization rules, word structure and sound-symbol association rules, paragraph formation), and to overcome or reduce difficulties with memory overload and disorganization (Parent Ex. I at p. 7).

[9] I also note that State regulations require that a parent who refuses to consent to an initial evaluation "be given an opportunity to attend an informal conference with the [CSE and, among others,] counsel or an advisor of the parent's choice, at which time the parent shall be afforded an opportunity to ask questions regarding the proposed evaluation" (8 NYCRR 200.5[b][1][i][c]).

In addition, although the August 2009 private psychoeducational evaluation report indicated that the student had some basic language difficulties that affected her academically, the CSE did not recommend a language evaluation for the student to address her difficulties with basic phonemic, language, memory skills, and the effect those difficulties might have on her reading and writing decoding and encoding abilities, as well as the effect on her math skills. Although the CSE indicated on the March 2010 IEP that formal cognitive testing revealed the student demonstrated an overall superior range of intelligence, it also indicated variability in her cognitive profile (Parent Ex. B at p. 3). I find that the March 2010 CSE's failure to evaluate the student's area of possible language need was detrimental to her academic progress. The lack of evaluative information related to language likely fostered the student's struggle with writing and completing assignments (id.). I also note that the March 2010 IEP is silent in regard to the student's possible need for counseling, despite the recommendation included in the August 2009 private psychoeducational evaluation report for weekly play therapy to support the student in learning to better understand her difficulties with impulsivity and self-regulation, memory, reading, writing, and personal family matters (Parent Ex. F at p. 14).

Compensatory Additional Services

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];[10] 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 v. New York State Dep't of Educ., 2011 WL 5222856, at *2 [2d Cir. Nov. 3, 2011]; 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]).

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

[10] 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]).

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 U.S. Dist. LEXIS 113149, at *38-39 [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).

Here, as discussed above, the district did not offer the student a FAPE for the 2008-09 and 2009-10 school years. The purpose of a compensatory education award, and by extension an award of additional services, is to remedy a denial of a FAPE (see Newington, 546 F.3d at 123 [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 she 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 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 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"]).

1:1 Multisensory Tutoring

The district asserts that it should have been given the opportunity to provide the student with 1:1 tutoring, rather than being required to pay for the student to receive tutoring from a private agency.[11] However, I note that the hearing record contains no information regarding the district's ability to provide the student with 1:1 tutoring. To the contrary, the district's school psychologist testified that the district had no services equivalent to 1:1 special education tutoring such as that provided by a learning specialist (Tr. pp. 280-82). Similarly, the "IEP teacher" at the student's school testified that SETSS was provided in groups of up to eight students and could not be recommended in a 1:1 ratio even if required by a student (Tr. pp. 352-54, 356-57, 362-63). I remind the district that placement decisions must be based on a student's unique needs as reflected in the IEP, rather than IEPs developed on the basis of services already available in the district (34 C.F.R. § 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Adams v. State, 195 F.3d 1141, 1150-51 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]). The IDEA further requires that the services to be offered to a student are dictated by the student's needs, not by location of the services (Rowley, 458 U.S. at 203). If a student requires services that are not offered within a specific building, then, as a general rule, a district must ensure that the student has access to the services if such services are needed to provide the student with a FAPE (Placements, 71 Fed. Reg. 46,588 [Aug. 14, 2006] ["Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities . . . In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

The director of the private agency from whom the parent sought an award of 1:1 multisensory instruction testified that the student required multisensory instruction in order to address her weaknesses in spelling and written language, executive functioning, attention, and working memory (Tr. pp. 410-11). I find that this type of instruction appropriately remediates the district's failure to appropriately address the student's disability, as discussed above. Furthermore, because the district presented no evidence on this issue, I confirm the impartial hearing officer's award of 400 hours of 1:1 multisensory instruction by the private agency (see Application of a Student with a Disability, Appeal No. 11-091).

Assistive Technology Services

The district contends that the portable word processor it recommended for the student was sufficient to meet her needs, while the parent asserts that the student requires the use of a computer

[11] The district has not appealed the amount of 1:1 multisensory tutoring awarded by the impartial hearing officer. Accordingly, as I find that the district denied the student a FAPE and that additional services are an appropriate equitable remedy, that determination is 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]).

and special software to support her ability to write. 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 [FAPE]" (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 (see Application of a Student with a Disability, Appeal No. 11-121).

The district conducted an assistive technology evaluation of the student in September 2010, which noted that the student's writing was "characterized by multiple spelling errors and poor use of punctuation and capitalization" (Tr. p. 2). The evaluators recommended that the student practice typing and be given the use of a portable word processor (Tr. p. 3). The private assistive technology evaluator recommended that the student be given the use of a computer, as she required "a certain type of software program to support her writing" (Tr. pp. 450-51). Specifically, the private evaluator opined that the portable word processor recommended by the district was insufficient because such a device worked best for students with physical difficulties with handwriting, rather than for a student with difficulties both with the physical act of handwriting and the compositional part of writing (Tr. pp. 454-55).

Initially, I note that it is now more than one year since the student was evaluated for assistive technology, and that the recommendations contained in the evaluation reports may no longer be necessary to enable the student to access her education. Furthermore, I find that the assistive technology awarded by the impartial hearing officer was not necessary to improve the student's access to her education. For example, while the student had significant difficulties with printing, the hearing record indicates that she had far greater fluency with cursive writing shortly after she began using it (Dist. Ex. 9 at pp. 7, 14). Furthermore, although in some circumstances assistive technology may be an appropriate component of a compensatory education or additional services award, and the August 2009 private psychoeducational evaluation supports the conclusion that the student requires assistance in organizing her thoughts when writing, in this case, I note that awarding the software recommended by the private evaluator could limit the student's ability to learn the skills necessary to become an effective writer. Given the award of 1:1 multisensory instruction that is designed specifically to address the student's difficulties with written expression, executive function, attention, and working memory (Tr. pp. 410-11), in this case, I find that the district's assistive technology recommendation is appropriate so as to avoid the student becoming over reliant on software that may inhibit the student's development of necessary skills. However, I remind the district of its obligation to consider the results of the private evaluation with regard to "any decision made with respect to the provision of FAPE to the student," so long as the evaluation meets district criteria (34 C.F.R. § 300.502[c][1]; see 8 NYCRR 200.5[g][1][vi][a]).

Occupational Therapy

Turning to the cross-appeal, the parent argues that because the impartial hearing officer properly found the district failed to provide the student with OT during the 2008-09 and 2009-10 school years, she should have awarded the student 160, rather than 80 hours of additional services, as the CSE recommended that the student receive one hour of OT per week and the private OT evaluator recommended that the student receive one hour per week in addition to what was

recommended by the CSE.[12] The district asserts that the private occupational therapist's recommendations are designed to address the student's current needs and do not speak to the amount required by the student to make up for the district's denial of a FAPE. Before addressing the merits of the parent's cross-appeal, I note that the school psychologist testified that the district would not offer individual OT to the student as the occupational therapist's supervisors had told her "not to give one-to-one services" because "[t]hey do not have enough--they feel that students do better with other students for the socialization" (Tr. pp. 277-78). I strongly caution the district that as with decisions regarding a student's placement recommendation, decisions regarding the provision of related services must be governed by a student's needs, rather than matters of administrative convenience or cost for the district (34 C.F.R. § 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Rowley, 458 U.S. at 203; Adams, 195 F.3d at 1150-51; Reusch, 872 F. Supp. at 1425-26; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]).

The district's March 2010 OT evaluation of the student indicated that the student displayed difficulties in five out of seven areas of school-based function that were identified as the areas of motor function, hand function, visual function, sensory motor function, and academic function (Parent Ex. I at p. 6). The evaluation report also indicated that the student had significant memory, organization, and time management difficulties that interfered with all areas of learning including written work (id.). The student experienced difficulties screening out distractions and self-regulating her physical needs, and orienting and organizing herself with respect to new task demands (id.). The report reflected that the student had particular difficulty with completing written assignments in a timely fashion (id. at p. 3).

The OT IEE obtained by the parent in August 2010 indicated that the parent stressed the student's auditory processing and tactile/touch processing sensory areas as areas of concern (Parent Ex. Y at p. 3). The evaluator found the student to have well-developed gross motor and coordination skills with "sensory processing delays, visual motor integration delays, [and] motor coordination delays" (id. at p. 7). The evaluator recommended that the student receive individual OT once per week for 60 minutes to work on short-term goals, in addition to the current IEP mandate (id. at p. 7). The private occupational therapist testified at the impartial hearing that he recommended that the student receive one hour per week of individual OT to focus on the student's sensory needs in addition to the group OT that she received in school (Tr. pp. 496-97).

The impartial hearing officer found that the student missed 80 hours of OT for the 2008-09 and 2009-10 school years and stated that she found the private occupational therapist's testimony and evaluation to be persuasive (IHO Decision at pp. 14-15). I disagree with the parent that the student should receive an award of 160 hours of OT as additional services because as noted above, there is no requirement under the IDEA that services be recompensed on an hour for hour basis (L.M., 478 F.3d at 316; Puyallup, 31 F.3d at 1497). In any event, at no point did the private occupational therapist specify that the student required that amount to make up for services she had missed, rather than to continue making progress. For the foregoing reasons and given the 1:1

[12] The district has not appealed the impartial hearing officer's determination that the student was entitled to receive additional OT services from a private provider and that determination is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

multisensory instruction awarded the student, I decline to disturb the impartial hearing officer's award of additional OT.

Independent Educational Evaluation

With regard to the parent's request in her cross-appeal for reimbursement for the August 2009 private psychoeducational evaluation, 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 parent contends that because the district did not attempt to defend the prior psychoeducational evaluation it had conducted of the student, she was entitled to reimbursement for the August 2009 private psychoeducational evaluation. I agree with the impartial hearing officer that the hearing record contains no indication that the parent disagreed with any district evaluation. However, I note that the parent testified that she requested that the district perform the evaluation prior to the time that she obtained one independently, at which time the school psychologist encouraged her to obtain an evaluation; the district did not conduct its own psychological or educational evaluations of the student; and the district considered the August 2009 private psychoeducational evaluation when developing the March 2010 IEP. I also note that the United States Education Department's Office of Special Education Programs has stated that it would be consistent with federal regulation to allow reimbursement for an IEE when the district failed to provide an evaluation in compliance with the IDEA (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010]). The district admits that it did not evaluate the student prior to declassifying her from special education (Tr. pp. 214, 228-29), in violation of the requirement that it do so (20 U.S.C. § 1414[c][5][A]; 34 C.F.R. § 300.305[e][1]; 8 NYCRR 200.4[c][3]).[13] Under the circumstances of this case, I find that the parent is entitled to reimbursement for the cost of the August 2009 private psychoeducational evaluation.

Transportation

Returning to the district's appeal, in her due process complaint notice, the parent requested "funding for all transportation costs necessary to utilize" the requested compensatory education services (Parent Ex. A at p. 5). While the parent asserts that any compensatory award that requires travel to be redeemed must include transportation costs to truly compensate for a lack of a FAPE; I note that transportation services are included within the IDEA's definition of related services, which are defined as those services "as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26]; 34 C.F.R. § 300.34[a]). On appeal, the district

[13] I also note that there is no indication in the hearing record that the district had conducted an evaluation of the student within three years of the parent obtaining the August 2009 private psychoeducational evaluation, in violation of the IDEA and its implementing regulations (20 U.S.C. § 1414[a][2][B][ii]; 34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]).

asserts that the hearing record contains no evidence that the student required transportation services to enable her to benefit from special education, and a review of the hearing record supports this assertion. No witnesses testified to this issue. The student's IEPs included in the hearing record show that she was not recommended to receive special education transportation services (see Parent Exs. B; M; CC; DD). Therefore, this request seems to be more akin to a request for damages, which is not permitted under the IDEA (Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Application of a Student with a Disability, Appeal No. 11-091; Application of the Dep't of Educ., Appeal No. 11-004; Application of a Child with a Disability, Appeal No. 05-039). Accordingly, there is no basis to support the parent's request and I annul the impartial hearing officer's decision to the extent that it granted the parent's request for transportation costs associated with redemption of the compensatory related services award.[14]

Conclusion

Because the district failed to comply with its obligation to reevaluate the student, I grant the parent's request for reimbursement for the August 2009 private psychoeducational evaluation that she obtained at her expense. I further find that the hearing record does not support the parent's request for compensatory additional services beyond those awarded by the impartial hearing officer, that the assistive technology offered by the district was adequate to meet the student's needs, and that the parent is not entitled to transportation costs separate and apart from the district's preexisting obligation to provide the student with transportation.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision which awarded the parent reimbursement for transportation costs is annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled to the extent that it awarded the student additional assistive technology services as recommended by the assistive technology IEE; and

IT IS FURTHER ORDERED that the student is awarded the additional assistive technology services recommended by the district's assistive technology evaluation; and

[14] To the extent that the district otherwise has an obligation to provide transportation services to any program or services the student may receive, this decision should not be construed to relieve the district of its obligation.

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's decision which denied the parent's request for reimbursement for the private psychoeducational evaluation is annulled and the district shall reimburse the parent for the cost of the private psychoeducational evaluation upon receipt of proof of payment.

Dated: **Albany, New York**
March 1, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER