The University of the State of New York

The State Education Department
State Review Officer
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No. 12-235

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

Appearances:
Law Office of Erika L. Hartley, attorney for petitioner, Erika L. Hartley, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeal from a decision of an impartial hearing officer (IHO) which denied her request to direct respondent (the district) to defer her daughter's placement into a nonpublic school setting as well as her request for compensatory additional services in the form of vision therapy and counseling, and an assistive technology evaluation of the student. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

At the time the impartial hearing convened, the student was attending first grade within the district's general education program while receiving special education teacher support services (SETSS) in addition to academic intervention services (AIS) and participated in the district public school's extended day program (Tr. pp. 31, 208, 211, 215).[1] The student has exhibited difficulties with phonemic awareness and receptive language (Tr. p. 67). In addition, the student reportedly

[1] In March 2012, the district also provided the student with related services authorizations (RSAs) to obtain speech-language therapy, occupational therapy (OT) and physical therapy (PT) (Tr. pp. 1005-06). The student received speech-language therapy, OT and PT during the period of May 2012 until the summer session began (Tr. p. 1006).

had a diagnosis of an attention deficit hyperactivity disorder (ADHD) and also presented with delays in expressive language and had difficulties with respect to reading skills and math calculation (Tr. p. 261; Dist. Exs. 3 at p. 9; 4 at p. 1). Further, the student had a history of asthma, and reportedly had a diagnosis of a central auditory processing disorder (CAPD) (Tr. pp. 243, 982; Parent Ex. S at p. 1).[2] The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student received special education services through the Early Intervention Program (EIP) beginning at age two, which was comprised of speech-language therapy, occupational therapy (OT) and physical therapy (PT) in addition to three hours per week of special education itinerant teacher (SEIT) services (Tr. pp. 974-75; Parent Ex. C at p. 6). After aging out of the EIP, the student enrolled in a district preschool within the district and in accordance with her November 2009 IEP, received three weekly 30-minute sessions of 1:1 speech-language therapy, two weekly 30-minute sessions of 1:1 OT, one 30-minute session per week of 1:1 PT in addition to ten hours of SEIT services per week (Tr. pp. 974, 977-78; Parent Ex. C at p. 7). On April 7, 2010, the CSE convened to conduct a "turning five" conference regarding the student which anticipated of the student's transition from preschool into kindergarten (Tr. p. 978). For the 2010-11 school year, the CSE recommended placement of the student in a collaborative team teaching or integrated co-teaching services (ICT) classroom and further proposed termination of the student's OT and PT, and reduction of the frequency of the student's speech-language therapy (Tr. pp. 978-79; Parent Ex. B at p. 3).[3] The parent disagreed with the April 2010 CSE's program recommendation for the student, and on June 21, 2010, by due process complaint notice, she requested an impartial hearing (Tr. p. 979; Dist. Ex. 15 at p. 1; Parent Ex. B at p. 3).

In an interim decision dated September 14, 2010, an IHO determined that placement in a kindergarten classroom within the district's general education environment combined with the student's related services recommendations outlined in the student's November 2009 IEP constituted the student's pendency (stay-put) placement (Parent Ex. B at p. 5). In a February 22, 2011 decision on the merits, an IHO concluded that the April 2010 IEP deprived the student of a FAPE, and as relief, she directed the district to provide the student with, among other things, compensatory additional services, which included 30 hours of SEIT services, 36.5 hours of speech-language therapy, 42 hours of OT, and 22.5 hours of PT (Parent Ex. C at p. 36). On April 21,

[2] As a result of her diagnosis of asthma, the district also provided the student with accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[l] [1998]) (Tr. pp. 243, 1031).

[3] State regulations incorporate "collaborative team teaching [CTT]" services within its "Continuum of services" as "integrated co-teaching services," which is defined as the following: "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an "integrated co-teaching class shall minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In April 2008, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued a guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (see http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf). For consistency within this decision, I will use the term "ICT" class when referring to the district's recommended placement for the 2010-11 school year.

2011, the parties entered into a settlement agreement, in which the district agreed, among other things, to provide the parent with RSAs to obtain 45 hours of "make-up" speech-language therapy, 42 hours of "make-up" OT, 22.5 hours of "make-up" PT as well as "make-up" SEIT services (Dist. Ex. 15 at p. 2). In addition, the parties stipulated that the district would reimburse the parent for the costs of private evaluations of the student with respect to her OT, PT and speech-language needs (id. at pp. 3-4). The district further agreed to conduct a vision therapy evaluation of the student, and pay for the costs of a neuropsychological/psychoeducational evaluation of the student (id. at p. 4).

By letter to the district dated January 3, 2012, the parent requested that the CSE reconvene (Parent Ex. J).[4] She advised the district that evaluations of the student had been completed with respect to OT, PT and in the area of speech and language and she submitted copies of the evaluative reports to the district (Tr. p. 985; Parent Ex. J at p. 1). The parent also requested that upon convening, that the CSE defer the matter of the student's placement to the district's central based support team (CBST) for placement in a nonpublic school setting (Parent Ex. J at p. 1).

On February 9, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 2 at p. 1). According to the February 2012 IEP, the CSE recommended placement of the student general education program with SETSS (id. at p. 6). Specifically, the February 2012 CSE recommended that the student participate in two sessions per week of SETSS for English language arts (ELA) and three sessions per week of SETSS for math within the general education setting or in a separate location as appropriate (id.). The February 2012 CSE also recommended the provision of three 30-minute sessions per week of speech-language therapy in a group in addition to the provision of twice weekly 30-minute sessions of 1:1 vision therapy (id.). To address the student's special education needs, the February 2012 IEP contained accommodations and supports including continuous reinforcement and encouragement, picture/visual prompts, teacher redirection and repetition in addition to the provision of academically centered strategies such as graphic organizers, differentiated instruction, manipulatives, and sentence starters (id. at p. 2). The February 2012 CSE determined that the student did not require an assistive technology device (id. at p. 3). The February 2012 CSE also developed annual goals in the areas of reading, writing, math and processing (id. at pp. 3-5). The February 2012 IEP further noted that the student's behavior did not seriously interfere with instruction and that the student did not require a behavioral intervention plan (BIP) (Dist. Ex. 2 at p. 2).

By final notice of recommendation (FNR) to the parent dated February 13, 2012, the district notified her of the particular public school site to which the student had been assigned for the 2012-2013 school year (Parent Ex. D).

A. Due Process Complaint Notice

By due process complaint notice dated February 14, 2012, the parent requested an impartial hearing, in which she raised a number of procedural and substantive claims surrounding the

[4] The parent addressed the letter "To The SBST," which within the context of the hearing record is appears to be an acronym for "School Based Support Team." (Parent Ex. J at p. 1; see Application of the Bd. of Educ., Appeal No. 06-037).

February 2012 IEP that she alleged resulted in a denial of a free appropriate public education (FAPE) to the student (Parent Ex. 1 at p. 3). The parent requested an order directing in essence the provision of the following: (1) a deferment letter to the district's CBST for placement of the student in an appropriate State-approved nonpublic school; (2) a finding that the February 2012 IEP was invalid; (3) an IEP for the student which provided for deferment of the student's placement to the CBST; (4) compensatory tutoring; (5) an FM unit for the student; (6) compensatory speech-language therapy; (7) vision therapy at enhanced rates; (8) OT at enhanced rates; (9) compensatory SETSS; (10) counseling at an enhanced rate; (11) transportation; (12) an award of reimbursement to the parent for the cost of transportation to the impartial hearing; and (13) an assistive technology evaluation to be provided at district expense (id. at p. 4).

B. Impartial Hearing Officer Decision and Interim Order

Following a pre-hearing conference that took place on March 21, 2012, the IHO issued a March 28, 2012 interim order which, among other things, identified the disputed issues surrounding the provision of a FAPE to the student during the 2011-12 school year (IHO Interim Decision at p. 4). On May 7, 2012, an impartial hearing convened, and concluded on September 21, 2012, after seven days of testimony (Tr. pp. 1-1046). In a final decision dated November 14, 2012, the IHO concluded, in part, that the district failed to adequately review and consider the evaluative data before it regarding the student (IHO Decision at pp. 8-9). In addition, the IHO found that the district failed to provide the student with an adequate amount of support in the classroom (id.). Lastly, the IHO determined that the district failed to take the student's CAPD into consideration when developing the February 2012 IEP (id. at p. 9).

Notwithstanding his determination that the district failed to provide the student with a sufficient amount of support in the classroom, the IHO denied the parent's request seeking deferral of the student's placement to the district's CBST for identification of a State-approved nonpublic school for the student (IHO Decision at p. 9). The IHO concluded that the hearing record reflected that, with the proper supports, the student could learn in a public school setting, and further noted that although the student had "attendance issues," she had progressed in some areas (id.). Consequently, the IHO directed the district to reconvene the CSE and provide the student with a minimum of two weekly periods of SETSS for reading, a minimum of three weekly periods of SETSS for writing and that all of the student's math instruction be provided in a small group setting (id. at pp. 9-10). He further directed that the student's instruction be provided within the general education environment (id. at p. 10). In addition, the IHO directed the district to provide the student with an FM unit, two weekly 30-minute sessions of 1:1 sensory-based OT, and two weekly 45-minute sessions of PT (id.).[5]

Furthermore, the IHO found that the student should have received two weekly 30-minute sessions of OT in a sensory gym setting (IHO Decision at p. 10). Accordingly, as additional services, the IHO directed the district to reimburse the parent for twice weekly 30-minute sessions

[5] The IHO did not specify whether the district should provide the student with two 45-minute sessions of PT in a group setting or on a 1:1 basis.

of OT for the remainder of the 2012-13 school year (id.).[6] Similarly, the IHO concluded that the student should have received twice weekly 45-minute sessions of PT, and as result, as additional services, he directed the district to reimburse the parent for twice weekly 45-minute sessions of PT for the remainder of the school year (id. at pp. 10-11).[7] Next, the IHO determined that although in May 2012, the student had received a related services authorization (RSA) for the provision of SETSS, the hearing record demonstrated that the student did not receive all of the hours mandated (id.). Under the circumstances, the IHO awarded the parent additional services in the form of 50 hours of 1:1 compensatory SETSS/tutoring services to be used during the 2012-13 school year (id. at pp. 11-12).[8]

Although the IHO awarded the parent additional services as described above, the IHO denied the parent's request for compensatory vision therapy and counseling, upon a determination that the IEP already included vision therapy parent thereafter failed to articulate why she was seeking these services (IHO Decision at p. 11). Additionally, the IHO found that the parent failed to include a request for the provision of vision therapy and/or counseling in her due process complaint notice (id.). The IHO also denied the parent's request that the district conduct an assistive technology evaluation of the student, having found that the hearing record failed contain a basis for awarding such relief and that the parent made only brief mention that one should have been done in her closing brief (id at p. 12). Lastly, the IHO also denied the parent's request for reimbursement for the costs of transportation to the impartial hearing, because the parent failed to submit any legal authority that would support such an award of relief (id).

IV. Appeal for State-Level Review

The parent appeal, seeking reversal of the IHO's decision to the extent that he denied her request for deferral of the student's placement to the CBST, an assistive technology evaluation, and compensatory additional services. Specifically, the parent claims that the IHO erred to the extent that he denied her request to defer selection of the student's placement to the district's CBST, because the evidence shows that the student cannot be satisfactorily educated in the general education environment, regardless of special education supports. The parent maintains that in light of the student's special education needs, including her diagnosis of a CAPD, speech-language needs and an ADHD, the student cannot receive educational benefits in a general education setting within a district public school. Moreover, the parent argues that the hearing record lacked evidence to support the district's claim that the student had progressed during the 2011-12 school year.

[6] With regard to the award for additional services in OT, the IHO clarified that such relief was additional to the provision of OT services already prescribed by the student's IEP (IHO Decision at p. 10).

[7] With regard to the award for additional services in PT, the IHO clarified that such relief was additional to the provision of PT services already prescribed by the student's IEP (IHO Decision at p. 11).

[8] The IHO further directed that the parent could select a provider of her own choosing, provided that the provider's rate was within the average range of rates within the community, and that such provider be a certified teacher with more than five years of teaching experience (IHO Decision at p. 12). In addition, the IHO indicated that the award for 50 hours of 1:1 compensatory SETSS/tutoring services was responsive to the parent's requests for the provision of compensatory SETSS services as well as the provision of compensatory tutoring (id.).

The parent further asserts that the IHO erred in failing to direct the district to conduct an assistive technology evaluation of the student. In particular, the parent argues that given the student's diagnosis of a CAPD, her vision deficits, and processing needs, the hearing record contains sufficient evidence on which to premise an award of an assistive technology evaluation. Next, the parent contends that the IHO erred to the extent that he failed to award compensatory additional services in the form of vision therapy, OT and PT. Furthermore, the parent asserts that the student is entitled to compensatory additional services in the form of counseling. Regarding her request for counseling, contrary to the IHO's finding, the parent maintains that her request for the provision of counseling had been included in the due process complaint.

Additionally, the parent seeks an amendment of the IHO's findings of fact. She further alleges that notwithstanding the objection of counsel at the impartial hearing, the IHO improperly admitted evidence into the hearing record. Lastly, as additional evidence for consideration on appeal, the parent submits the student's November 2012 progress report.

For relief, the parent requests the following: (1) nullification of the February 2012 IEP; (2) deferral of the student's placement to the district's CBST; (3) an RSA for related services not provided to the student during the 2011-12 school year, including vision therapy and counseling; and (4) an order directing the district to conduct an assistive technology evaluation of the student.

The district submitted an answer, contending that the IHO properly held that identification of the student's placement was not a matter that necessitated deferral to the district's CBST for a nonpublic school placement, that the student does not require an assistive technology evaluation and that the student is not entitled to compensatory additional services in the form of counseling. Regarding the parent's request that identification of the student's placement to the district's CBST, the district maintains that, in this particular instance, the hearing record does not afford a basis for such relief. The district contends that there is nothing in the hearing record to demonstrate that student could not receive educational benefits in the general education environment with appropriate supports. Moreover, the district alleges that in this matter, the hearing record indicates that placement in the general education environment was appropriate for the student, in part, because it constituted the student's least restrictive environment (LRE) and the student had made significant progress in that setting, despite absences. Additionally, the district contends that the IHO properly denied the parent's request for an assistive technology evaluation of the student, in pertinent part, because the parties never agreed to conduct such an evaluation of the student. Furthermore, the district alleges that the parent fails to articulate a basis for such relief. Next, the district asserts that the IHO properly declined to award the parent compensatory relief in the form of counseling, because the hearing record does not support the parent's request. Lastly, to the extent that the parent seeks further relief beyond the IHO's order, the district maintains that the IHO conducted a fact specific inquiry into an appropriate award of compensatory education services and that there is no need to provide the student with additional compensatory educational services beyond those ordered by the IHO.

V. 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, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] [quoting Rowley, 458 U.S. at 206]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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 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 R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

Initially, I note that the parent has attached the student's November 2012 progress report to

the petition as additional evidence for consideration on appeal.[9] The district objects to consideration of the November 2012 progress report, on the basis that it is not relevant to the issues at bar, because it does not pertain to the 2011-12 school year, which was at issue during the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041). While the parent correctly notes that the November 2012 progress report was not available for submission at the time of the impartial hearing, it is not necessary to reach a determination in this matter, and therefore, I decline to accept the additional evidence.

2. Admission of Evidence at the Impartial Hearing

Next, the parent alleges that notwithstanding her objection, the IHO improperly allowed the admission of evidence into the hearing record. While impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), each party has the right to prohibit introduction of any evidence which has not been disclosed at least five business days before the hearing (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2],[3]). In addition, the impartial hearing officer "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

Regarding the parent's challenge to the admission of testimony that pertained to a district "continuum which was not in effect at the time of [the student's] February 2012 IEP meeting," upon review of the hearing record, I find no indication that the IHO abused his discretion in permitting testimony with respect to the continuum of services available for students with disabilities (Tr. pp. 588-89). Accordingly, I decline to reach the conclusion that any error was made by the IHO in allowing the district to present testimony regarding the continuum of special education services (id).[10] Next, with respect to the parent's allegation that the IHO should not have allowed admission of District Exhibit 14 into evidence for want of timely disclosure,[11] a review of the hearing record reveals that, although the parent object to its admission, she did not raise the issue timeliness, and therefore, I decline to hear this objection to the document's admission on

[9] Although the parent refers to the additional evidence submitted on appeal as the student's "current report card," a review of the exhibit indicates that the November 2012 document was the student's progress report, and shall hereinafter be referred to as a progress report.

[10] Moreover, the parent's allegation on appeal that the IHO erred in admitting such testimony is disingenuous, given that she offered a copy of the district's Special Education Services As Part of A Unified Service Delivery System, which outlines the continuum of special education services, as an exhibit (Parent Ex. V).

[11] State regulations contemplate that the parties will disclose evidence to the opposing party at least five days prior to convening the impartial hearing (8 NYCRR 200.5[j][3][xii]).

timeliness grounds for the first time on appeal (Tr. pp. 13-18).[12] In any event, even I were to find that the IHO erred by allowing into evidence a document which was not submitted to the parents in a timely manner, the error was harmless in this instance, as there is no indication that its exclusion would have altered the outcome of the case, as the IHO referred to the document only once in order to note that the evaluation had been conducted in 2011 (see IHO Decision at p. 5). Lastly, with regard to the parent's claim that Dist. Ex. 15 should have been excluded from evidence because the district failed to timely disclose it to the parent prior to the commencement of the impartial hearing, the parent explicitly waived her objection to that particular document's admission (Tr. pp. 17-18). Accordingly, there is no basis whatsoever for finding that the IHO erred in admitting District Exhibit 15 into evidence.

B. Scope of Review

1. Finality of Unappealed Determinations

Prior to addressing the merits of the instant case, I note that neither party has appealed the following findings and directives by the IHO: (1) that the district did not offer the student a FAPE during the 2012-13 school year; (2) that the CSE reconvene and include the provision of SETSS, OT, and PT on the resultant IEP; (3) that the student be provided with an FM unit; (4) an award of twice weekly 30-minute sessions of compensatory OT as additional services for the remainder of the 2012-13 school year; (5) an award of twice weekly 45-minute sessions of PT for the remainder of the 2012-13 school year; and (6) an award of 50 hours of compensatory SETSS/tutoring services.[13] Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Additionally, I note that the district does not oppose the parent's request for the provision of related service authorizations (RSAs) for compensatory related services in lieu of reimbursement to the parent or the issuance of RSAs for 20 sessions of vision therapy as prescribed by the February 2012 IEP and, consequently, I will direct that vision therapy be provided accordingly. Under the circumstances, the remaining issues for review are: (1) whether the student's placement should be deferred to the district's CBST for placement in a State-approved nonpublic school; (2) whether the student required counseling services; and (3) whether the student should receive an assistive technology evaluation.

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[12] Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 2011 WL 2321461, at *4 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008]); Pachl v. School Bd. of Independent Sch. Dist. No. 11, 2005 WL 428587, at *18 [D.Minn. Feb. 23, 2005]; Letter to Steinke, [OSEP 1992]; see also Dell v. Board of Educ. Tp. High School Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

[13] Regarding the parent's request that the February 2012 IEP "be stricken for want of a proper Team," I note that neither party disputes that it was found inappropriate, and further, the February 2012 IEP has already expired by its own terms (Dist. Ex. 2 at p. 1). There is no further need to revise the document at this juncture.

C. Request for Placement of the Student in a Nonpublic School

At this juncture, it is now undisputed by the parties that the February 2012 IEP did not provide the student with a FAPE; however, the parties disagree about the appropriate relief to remedy the district's failure to offer the student a FAPE. As set forth in greater detail below, although there was a denial of a FAPE in this instance, the IHO correctly determined that the parent's request for the deferral to the district's CBST for placement in a nonpublic school was not warranted as a remedy in this case.

According to the parent, the evidence contained in the hearing record demonstrates that regardless of the provision of supports such as SETTS, the student cannot be satisfactorily educated in the general education environment, which necessitates placement in a State-approved nonpublic school. In essence, she the relief sought by the parent is not unlike a "Nickerson letter."[14] In this case, in response to the district's failure to sufficiently weigh the evaluative information or provide sufficient special education relief, the IHO resolved the issue of whether the district offered the student a FAPE for a portion of the 2011-12 school year in favor of the student and exercised his broad authority to craft equitable relief for the student, much of which neither party appeals nor disagrees. Like the IHO, I find that further relief placing the student in a nonpublic school is unnecessary insofar as the hearing record does not suggest that the student's special education needs warranted placement in a State-approved nonpublic school.

The evidence shows that that during the February 2012 CSE meeting, the CSE considered, but rejected the parent's request that the student's placement be deferred to the district's CBST for placement in a nonpublic school, having found that a nonpublic school was "far too restrictive" of a setting for the student in light of the progress that the student had made in the general education environment (Tr. p. 61; Dist. Ex. 2 at p. 10). The evidence also shows that the student functioned in the average to above average range in the general education environment (Tr. p. 591). The February 2012 IEP described the student as verbal, friendly, following classroom routines, and responding to praise (Dist. Ex. 2 at p. 1). In addition, the district special education evaluation and placement officer testified that during an observation of the student in the general education setting, she found that the student's attention was age appropriate, and further noted that during the lesson, the student was cooperative, easily engaged and did not require prompting from the teacher (Tr. pp. 73-75). The district special education evaluation and placement officer further explained that student handled a variety of transitions and activities during the ELA lesson well (Tr. pp. 73-74).

[14] A "Nickerson letter" is a remedy for a systemic denial of FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]; see Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092).

"The IDEA mandates that '[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily'" P. v Newington Bd. of Ed., 546 F3d 111, 119 [2d Cir. 2008] [emphasis added]; see 20 U.S.C. § 1412[a][5][A]; Walczak, 142 F.3d at 122; M.W. v New York City Dept. of Educ., 2013 WL 3868594, at *9 [2d Cir. July 29, 2013]; E.S. v. Katonah-Lewisboro School Dist., 2012 WL 2615366, at *1 [2d Cir. July 6, 2012] [explaining that "[t]he 'special education and related services must be provided in the least restrictive setting consistent with a child's needs'"]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]; R.C. v Byram Hills Sch. Dist., 906 F Supp 2d 256, 273 [S.D.N.Y. 2012] [noting that "[w]hile it is natural to assume that a student would benefit from being in a smaller classroom environment with more support, the IDEA does not require that the [d]istrict provide an ideal learning environment, but instead only one where the student can progress]). Under the circumstances of this case, an appropriate equitable remedy would be an award of additional educational services which the IHO has already awarded as relief, and the district does not oppose.[15] To the extent that the parent seeks the placement in a nonpublic school setting, the hearing record does not support the conclusion that the student must be removed from the public school altogether or requires separate schooling as the parent has suggested and, consequently, IHO appropriately directed the district to convene a CSE meeting to create a new program and placement for the student.

Based on the foregoing, the IHO properly denied the parent's request to defer consideration of the student's placement to the CBST for placement in a nonpublic school.

D. Administration of an Assistive Technology Evaluation

Turning next to the parent's request that the district administer an assistive technology evaluation of the student, although the hearing record does not reflect that the parent raised such a request at the time of the February 2012 CSE meeting, the parent testified that an IHO directed the district to conduct an assistive technology evaluation of the student but that the district has not yet done so (Tr. p. 1037). A review of the April 2011 settlement agreement between the parties does not address the administration of an assistive technology evaluation of the student, nor does the hearing record identify the previous IHO directing the district to complete such an evaluation to

[15] Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). Notably, the parent does not assert that the impartial hearing officer abused his discretion in either the relief awarded or in the relief denied.

which the parent referred (see Dist. Ex. 15). To the extent that the parent contends that pursuant to a either a settlement agreement or a prior IHO order, the district must conduct an assistive technology evaluation of the student, State regulations provide that settlement agreements "shall be enforceable in any State court of competent jurisdiction or in a district court of the United States" (8 NYCRR 200.5[j][2][iv]). Accordingly, the regulations do not confer jurisdiction to enforce settlement agreements at an impartial hearing or on appeal to a State Review Officer and the parent's claims that the district failed to implement the parties' settlement agreement will not be considered (see Application of the Bd. of Educ., Appeal No. 07-043). While a settlement agreement may, in some instances, be admissible and relevant to the facts underlying a parties' dispute in a due process proceeding, the administrative hearing officers in due process proceedings in New York lack enforcement mechanisms of their own and the Second Circuit has held that due process is not the appropriate procedure for enforcing the provisions of a settlement agreement (H.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 2144016 [2d Cir. 2009]). Nor have IHOs, or SROs for that matter, been granted authority to compel compliance or enforce prior decisions rendered by administrative hearing officers (see Application of a Child with a Disability, Appeal No. 07-110; Application of a Child with a Disability, Appeal No. 04-007 [recognizing that enforcement of prior orders of an impartial hearing officer and/or a State Review Officer are not properly determined by a State Review Officer]). Accordingly, the parent's request for an order directing the district to conduct an assistive technology evaluation of the student cannot be granted in these circumstances.[16]

E. Compensatory Additional Services

1. Counseling

The parent is also seeking compensatory additional services to remedy the denial of a FAPE that resulted from the district's failure to provide her with RSAs during the period of September 2011 through March 2012. Specifically, the parent argues that the IHO erred to the extent that he did not direct the district to provide the student with an RSA counseling.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case and may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (Wenger v. Canastota, 979 F. Supp. 147, 150-51 [N.D.N.Y. 1997]; 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 has been awarded to students who are ineligible for special education services by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr

[16] I note that the district has agreed to furnish assistive technology to the student in the form of an FM trainer as a result of this proceeding, and it is not otherwise clear what the parent seeks other than enforcement of a prior order. If the parent continues to seek an assistive technology evaluation for new concerns, she may request that the CSE conduct one and the CSE would be required to provide the parent with prior written notice explaining the reasons for its response (8 NYCRR 200.1 [oo], 200.5[a] [noting that a school district must describe why the "school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student" [emphasis added].

v. Ambach, 863 F.2d 1071, 1078 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; 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 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 relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 108 LRP 49659 [S.D.N.Y. Mar. 6, 2008], adopted by 50 IDELR 225 [S.D.N.Y. July 7, 2008]). Likewise, SROs 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, 1143-44 [4th Dep't 2005] [finding it proper for an SRO 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]; see, e.g., Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

The purpose of an award of additional services is to provide an appropriate remedy for 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 additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (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 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"]; Application of the Dep't of Educ., Appeal No. 12-135; Application of the Dep't of Educ., Appeal No. 11-132; Application of a Student with a Disability, Appeal No. 11-091).

According to the hearing record, during the 2011-12 school year, the parent asked the district to provide counseling services to the student (Tr. p. 1017).[17] The parent described the student as "overwhelmed" (Tr. p. 997). The parent further testified that she believed that as the student's work increased in difficulty, the student would become lost and would suffer (Tr. pp. 997, 1000). In addition, the parent explained that the student cried while completing her homework, and often asked the parent to write a note on her behalf, explaining that the student "tried her best" (Tr. pp. 1000-01). She further described the student as "not confident," and very overwhelmed (Tr. p. 1016). I further note that in March 2012, a private evaluator reported that the student was "at risk for further emotional, social, behavioral and academic difficulties without appropriate intervention," and recommended the provision of counseling services to the student to improve her attention on tasks, impulsive behaviors, frustrations, anxiety symptoms and academic confidence (Parent Ex. T at p. 3).[18] Accordingly, as outlined above, the evidence supports the parent's request for the provision of counseling to the student as compensatory additional services and it was not sufficiently rebutted by the district. I will, therefore, direct the district to provide the student with individual counseling services on a compensatory basis for once per week for 30 minutes for a minimum duration of one year from the date of this decision mindful that such an award should be designed to remediate the deficiencies identified in the district's program on an equitable basis and approximate placing the student in the position she would have occupied but for the district's failure to provide her with a FAPE.[19] As additional services, the services described above shall supplement rather than supplant any counseling services in the student's current IEP.

VII. Conclusion

Having examined the hearing record, I find that the IHO's determination that the district did not offer the student during a portion of the 2011-12 school was overall very thorough and well-supported. As described above, I modify in part the IHO's award of additional services to add counseling services for the student as a compensatory additional service.

In light of my findings herein, it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[17] While the parent admitted that she did not make the request for the provision of counseling services during the February 2012 IEP meeting, she testified that she made the request in writing; however, her letter was not incorporated into the hearing record (Tr. p. 1017).

[18] Although the Child Neurology Evaluation was not available at the time of the February 2012 CSE meeting, it was available at the time of the impartial hearing and in this instance, I rely on it for the limited purpose of fashioning compensatory relief (Parent Ex. T).

[19] The district is not precluding from providing the parent with an RSA in order to obtain counseling services.

IT IS ORDERED that, if it has not done so already, the district shall provide the student with 20 sessions of vision therapy either by reimbursing the parent for sessions already obtained for the student or providing the parent with an RSA for the student; and

IT IS FURTHER ORDERED that, unless the parties agree otherwise, the district shall provide the student with compensatory additional services in the form of individual counseling services one time per week for 30 minutes for one year.

Dated: **Albany, New York**
September 3, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER