The University of the State of New York

The State Education Department
State Review Officer
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No. 14-066

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

Appearances:
Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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) appeals from the decision of an impartial hearing officer (IHO) which awarded 60 hours of compensatory educational services as relief for respondent's (the district's) failure to offer an appropriate educational program to the student for the 2011-12 and 2012-13 school years. The district cross-appeals from the IHO's finding that it failed to offer an appropriate educational program to the student for the 2011-12 and 2012-13 school years. The appeal must be sustained in part. The cross-appeal must be dismissed.

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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

For the 2011-12 school year, the CSE convened on April 11, 2011 and developed an IEP (third grade) (see Parent Ex. R at pp. 1, 9). Finding that the student remained eligible for special education and related services as a student with a learning disability, the April 2011 CSE recommended a 12:1 special class placement at a community school with the related service of two 30-minute sessions per week of speech-language therapy in a small group (id. at pp. 1, 5, 9).

On March 13, 2012, the CSE convened and developed an IEP for the 2012-13 school year (see Parent Ex. U at pp. 1, 11).[1] Finding that the student remained eligible for special education and related services as a student with a learning disability, the March 2012 CSE recommended a 12:1 special class placement in a community school with the related service of three 30-minute sessions per week of speech-language therapy in a small group (id. at pp. 1, 7-8).[2] On January 17, 2013, the CSE reconvened (see Parent Ex. X at pp. 1, 10). At that time, the January 2013 CSE recommended a 12:1+1 special class placement at a community school with the related service of three 30-minute sessions per week of speech-language therapy in a small group (id. at p. 7). In addition, the January 2013 CSE developed new annual goals for the student and modified the promotion criteria (compare Parent Ex. X at pp. 4-6, 11, with Parent Ex. U at pp. 4-6, 12).[3]

A. Due Process Complaint Notice

By due process complaint notice dated September 27, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years and failed to provide "appropriate transportation" to the student for a portion of the 2013-14 school year (see Parent Ex. A at pp. 1, 6). With respect to the 2011-12 school year, the parent asserted that the district failed to evaluate the student to "determine the cause of his lack of academic progress," the district failed to "properly evaluate" or reevaluate the student, and the district failed to obtain and consider the student's most recent evaluative information—a March 2011 psychoeducational evaluation and social history—to develop the IEP (id. at p. 4). In addition, the parent asserted that the district failed to "timely reconvene" the CSE to address the student's "lack of academic progress" (id.). Further, the parent alleged that the district recommended an "academic program and placement" that was not appropriate for the student, and within the 12:1 special class placement, the district failed to provide the student with appropriate "instruction"—including reading instruction—that would enable the student to make academic progress (id. at pp. 4-5).

With respect to the 2012-13 school year, the parent alleged that the district failed to "timely reevaluate" the student (Parent Ex. A at pp. 4-5). More specifically, the parent asserted that the district continued to rely on the same "outdated and insufficient" evaluative information used to develop the student's IEP for the previous school year, and although the student repeated third grade during the 2012-13 school year, the district did not "reevaluate his learning needs" (id. at p. 5). The parent asserted that notwithstanding the student's lack of progress, the January 2013 IEP did not include any "meaningful changes" to the student's "academic program," and failed to offer a "program" reasonably calculated to enable the student to make academic progress (id.). Further,

[1] At the conclusion of the 2011-12 school year, the student failed to meet the promotion standards to advance to fourth grade and was "encouraged to attend the summer success academy;" however, the student repeated third grade during the 2012-13 school year (see Parent Ex. V; see also Tr. pp. 569-71).

[2] The student's eligibility for special education programs and related services as a student with a learning disability for both the 2011-12 and 2012-13 school years is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[3] For the 2013-14 school year and pursuant to a September 2013 IEP, the student attended an 8:1+1 special class placement at a State-approved nonpublic school (see Parent Ex. JJ at pp. 8-9, 11-12; see also Parent Exs. LL-OO).

the parent alleged that the annual goals in the January 2013 IEP were "substantively deficient" and failed to indicate what "appropriate progress for [the student] would look like" (id.). Finally, the parent asserted that the "12:1+1 class program" recommended in the January 2013 IEP was not sufficient, and similar to the 12:1 special class placement, the student failed to receive "appropriate instruction in reading" within the 12:1+1 special class placement (id. at pp. 5-6).

As relief for the district's failure to offer the student a FAPE for the 2011-12 and 2012-13 school years, the parent requested an award of compensatory educational services in the form of 702 hours of 1:1 "multi-sensory tutoring using the Orton Gillingham technique" and reimbursement for the transportation costs incurred by the parent during the beginning of the 2013-14 school year (id. at pp. 6-7).

B. Impartial Hearing Officer Decision

On December 5, 2013, the parties proceeded to an impartial hearing, which concluded on February 28, 2014 following five days of proceedings (see Tr. pp. 1-757). In a decision dated March 27, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years; thus, the IHO ordered the district to provide the student with compensatory educational services in the form of 60 hours of 1:1 tutoring with a "special education teacher trained in an evidence-based reading program" and ordered that such services could be provided—at the parent's option—"either by a teacher provided by the [district] or via an authorization" enabling the parent to "obtain services of a special education teacher on their own" (IHO Decision at pp. 9-12, 14). In addition, the IHO ordered the district to reimburse the parent for transportation costs incurred for the beginning of the 2013-14 school year (see id. at p. 14).

Initially, the IHO set forth the applicable legal standards and then summarized the documentary and testimonial evidence in the findings of fact (see IHO Decision at pp. 3-9). Based upon evidence in the hearing record, the IHO found that the student "struggl[ed] in reading and required instruction" to remediate his reading difficulties (id. at p. 10). However, neither the 2011 IEP nor the 2012 IEP included a recommendation for such instruction; as a result, the IHO determined that the district "should have recommended some form of remediation" with annual goals designed to address the student's particular needs and that such failure deprived the student of a FAPE during the 2011-12 and 2012-13 school years (id. at pp. 10-11). In addition, the IHO found that although the hearing record established that the student made "gains" during the 2012-13 school year, the "IEP" was not reasonably calculated to provide the student with educational benefit without the support of additional services and annual goals that targeted the student's demonstrated needs in reading (id. at p. 11).

Accordingly, the IHO concluded that the student was entitled to compensatory educational services as relief (see IHO Decision at pp. 11-12). Here, in arriving at the determination that the student was entitled to 60 hours of 1:1 tutoring services, the IHO indicated that the student should have received "two years of daily [special education teacher support services (SETSS)] instruction with a structured reading program to remediate his deficits in decoding and comprehension"—for a total of 360 hours (id. at p. 12). However, the IHO noted that if the student received 1:1 tutoring services, he would "make progress six times as quickly as he would in the 6:1 SETSS class" and thus, the IHO reduced the award of compensatory educational services to a total of 60 hours of 1:1

tutoring services to adjust for the student's ability to make progress more quickly in a 1:1 setting (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parent appeals, and contends that the IHO erred in awarding "only" 60 hours of compensatory educational services in the form of 1:1 tutoring. The parent argues that the IHO should have awarded the student the entire "702 hours of compensatory tutoring." In addition, the parent alleges that the IHO erred in failing to provide that the 1:1 tutoring could be obtained at a rate not to exceed $110.00 per hour in the event that the parent selects a non-district provider.

In an answer, the district responds to the parent's allegations. As a cross-appeal, the district alleges that the IHO erred in finding that it failed to offer the student a FAPE for the 2011-12 and 2012-13 school years.[4] In the alternative, the district alleges that if the IHO properly found that it failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, then the 60 hours of 1:1 compensatory educational services must be provided by a district special education teacher trained in an evidence-based reading program designed to address the student's difficulties in the areas of decoding and reading comprehension.

In an answer to the district's cross-appeal, the parent asserts that the IHO properly determined that the district failed to provide the student a FAPE for the 2011-12 and 2012-13 school years and appropriately provided that the 60 hours of compensatory educational services could, at the option of the parent, be provided by a "private provider."

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 Sch. Dist. 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.

[4] The district does not cross-appeal the IHO's determination to award the parent reimbursement for transportation costs incurred during the 2013-14 school year; thus, the IHO's determination has become final and binding upon the parties and will not be discussed in this decision (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 13-14).

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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 CFR 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. 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 and enable him or her to make progress in the general education curriculum (see 34 CFR 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 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

Turning first to the district's cross-appeal, upon careful review the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years (see IHO Decision at pp. 9-12). The IHO accurately recounted the facts of the case, addressed the issues identified in the parent's due process complaint notice, and set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2011-12 and 2012-13 school years (id. at pp. 6-12). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the IHO's ultimate conclusions (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are

hereby adopted, but as explained more fully below, the IHO's award of compensatory educational services must be modified.[5]

With respect to the 2011-12 school year, the hearing record establishes that the April 2011 CSE recommended a 12:1 special class placement in a community school with the related service of two 30-minute sessions per week of speech-language therapy in a small group for the student (see Parent Ex. R at pp. 5-6). However, a review of the April 2011 IEP reveals that other than approximately four short statements in the present levels of performance and individual needs section of the IEP that vaguely described the student's difficulty with writing, his need for a "lot of individual support," his difficulty interacting with peers, and his ability to articulate his needs, the April 2011 IEP—contrary to State and federal regulations—provided little, if any, information about the student's academic achievement, functional performance or how the student's disability affected his progress in relation to the general education curriculum (compare Parent Ex. R at pp. 1-2, with 20 U.S.C. § 1414[d][1][A][i][I], and 34 CFR 300.320[a][1], and 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In addition, contrary to State and federal regulations, neither the evidence in the hearing record nor the April 2011 IEP, itself, indicates whether the April 2011 CSE considered the student's strengths, the concerns of the parent, or the student's developmental or functional needs in the development of the IEP (compare Parent Ex. R at pp. 1-2, with 34 CFR 300.324[a], and 8 NYCRR 200.4[d][2]).

Next, consistent with the parent's assertion, neither the hearing record nor the April 2011 IEP, itself, contains sufficient evidence to establish what evaluative information the April 2011 CSE relied upon to develop the IEP, notwithstanding that the April 2011 CSE should have had a recently conducted March 2011 psychoeducational evaluation of the student, a March 2011 social history update, and a March 2011 speech-language evaluation available for review and consideration (compare Parent Ex. O at pp. 1-5, and Parent Ex. P at pp. 1-8, and Parent Ex. Q at pp. 1-9, with Parent Ex. R at pp. 1-10). Further, a review of the March 2011 speech-language evaluation reflects that it included two annual goals developed by the evaluator, which the April 2011 IEP did not incorporate (compare Parent Ex. P at pp. 7-8, with Parent Ex. R at pp. 3-5). Similarly, the March 2011 psychoeducational evaluation report included three annual goals developed by the evaluator, information concerning the student's present levels of academic performance, and the student's test scores from an administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III); however, a review of the April 2011 IEP reflects that it did not include any of this information (compare Parent Ex. Q at pp. at 6-9, with Parent Ex. R at pp. 1-10).

Although the April 2011 IEP contains eight annual goals, the hearing record is devoid of evidence establishing—consistent with State and federal regulations—just how the April 2011

[5] In this regard, a review of the IHO's decision reveals that she appeared to primarily base her conclusion that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years on whether the student made progress during the subject school years, as opposed to whether the IEPs—as written—were reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). However, a prospective analysis of the student's IEPs for the 2011-12 and 2012-13 school years results in the same ultimate conclusions as made by the IHO: the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years.

CSE developed the annual goals and whether they targeted the student's identified areas of need (compare Parent Ex. R at pp. 4-6, with 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]). Accordingly, the IHO properly concluded that the district failed to establish that the April 2011 IEP offered the student a FAPE for the 2011-12 school year.

Similarly—and based upon the same rationale explained with regard to the April 2011 IEP—the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year. With respect to the March 2012 IEP, the March 2012 CSE recommended a 12:1 special class placement in a community school with the related service of three 30-minute sessions per week of speech-language therapy in a small group (see Parent Ex. U at pp. 7-8). Here, the hearing record contains little, if any, evidence regarding the development of the March 2012 IEP, except that a review of the IEP, itself, reflects that the March 2012 CSE reviewed the March 2011 speech-language evaluation and reported the testing results in the March 2012 IEP (compare Parent Ex. U at p. 1, with Parent Ex. P at p. 2). However, upon review of the evidence in the hearing record and the March 2012 IEP, it is not apparent that the March 2012 CSE considered the March 2011 psychoeducational evaluation report in the development of the March 2012 IEP, contrary to the State and federal regulations noted previously (compare Parent Ex. Q at pp. 1-9, with Parent Ex. U at pp. 1-12).

In addition, a review of the eight annual goals in the March 2012 IEP reveals that the March 2012 CSE copied, verbatim, six of the annual goals from the April 2011 IEP (compare Parent Ex. R at pp. 3-5, with Parent Ex. U at pp. 4-6) and that the March 2012 CSE developed two new annual goals—one of which was taken directly from the March 2011 speech-language evaluation report (compare Parent Ex. U at p. 6, with Parent Ex. P at p. 8). Similar to the April 2011 IEP, the hearing record contains little, if any, evidence regarding how the March 2012 CSE developed the annual goals and whether they targeted the student's identified areas of need (compare Parent Ex. U at pp. 4-7, with 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]). In addition, although the March 2012 IEP contained different information regarding the student's academic achievement, functional performance, learning characteristics, academic development, functional needs and strengths as reported in the April 2011 IEP, each of the present levels of performance sections in the March 2012 IEP repeated similar information about the student (see Parent Ex. U at pp. 1-3).[6] Further, the evidence in the hearing record does not establish what evaluative information the March 2012 CSE relied upon to develop the student's present levels of performance and individual needs (see id.). Thus, the evidence in the hearing record supports a finding that the district failed to establish that the May 2012 IEP offered the student a FAPE for the 2012-13 school year.

Turning next to the January 2013 IEP, the evidence in the hearing record reveals that the January 2013 CSE recommended a 12:1+1 special class placement in a community school with the related service of three 30-minute sessions per week of speech-language therapy in a small group (see Parent Ex. X at pp. 6-7). In addition to changing the student's placement on the continuum, the January 2013 CSE also developed nine new annual goals for the student, modified

[6] In particular, the March 2012 IEP repeatedly noted that the student could read approximately "100 sight words" from a second grade list, read "level J" books independently, applied some reading strategies to read "unknown words," located and used library media resources to require information, and answered literal questions and made predictions about text (see Parent Ex. U at pp. 1-2).

the student's promotion criteria, and updated the present levels of performance and individual needs section of the IEP (compare Parent Ex. X at pp. 1-6, 11, with Parent Ex. U at pp. 1-6, 12). However, regardless of the foregoing modifications in the January 2013 IEP, the hearing record fails to contain sufficient evidence to establish what evaluative information the January 2013 CSE relied upon to develop the student's present levels of performance and individual needs, how the January 2013 CSE reached the decision to recommend a 12:1+1 special class placement, or the reasoning behind the modification to the promotion criteria (see Tr. pp. 1-757; Parent Exs. A-E; G-Z; AA-RR; TT-ZZ; AAA-DDD; IHO Exs. I-IV). Similarly, although the January 2013 IEP contained nine new annual goals—which appeared to be aligned with the limited information in the January 2013 IEP regarding the student's present levels of performance and individual needs (compare Parent Ex. X at pp. 1-4, with Parent Ex. X at pp. 4-6)—the hearing record lacks sufficient evidence to determine how the January 2013 CSE developed the annual goals (id.). Accordingly, the evidence in the hearing record supports a finding that the district failed to establish that the January 2013 IEP offered the student a FAPE for the 2012-13 school year.

Having determined that the evidence in the hearing record supports the IHO's finding that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, the inquiry now turns to the parent's appeal of the IHO's decision and the request for compensatory educational services in the form of 702 hours of 1:1 tutoring as relief. 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 CFR 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]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Mr. and Mrs. P v. Newington Bd. Ed., 546 F.3d 111, 123 [2d Cir. 2008][stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of

twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at *12-13 [S.D.N.Y. March 6, 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 [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]; 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).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; 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 [D.C. 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"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; 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 [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 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]; Application of a Student with a Disability, Appeal No. 13-168; 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).

Upon careful review of the hearing record, the IHO erred in awarding only 60 hours of 1:1 tutoring as compensatory educational services for the district's failure to offer the student a FAPE for the 2011-12 and 2012-13 school years. Initially, a review of the IHO's decision reveals that although portions of the IHO's formula appear reasonable, the hearing record contains little, if any, evidence to support the IHO's conclusion that in a 1:1 setting the student could be expected to make progress six times faster than in a 6:1 SETSS setting (see IHO Decision at pp. 12, 14).[7]

Therefore, in recalculating an award of compensatory or additional educational services to place the student in the same position he would have occupied but for the district's failure to offer the student a FAPE for the 2011-12 and 2012-13 school years, the evidence established that during both the 2011-12 and 2012-13 school years the student received 1.5 hours per day of reading and writing instruction (Tr. pp. 400-01).[8] Thus, for each school year, the amount of time dedicated to reading and writing instruction totaled 270 hours (1.5 hours per day times 180 school days). Based upon the evidence in the hearing record—and as noted by the IHO—during the 2011-12 school year, the student made little, if any, progress in the areas of reading and writing (see IHO Decision at pp. 6-7, 10-11; Parent Exs. Q; S-T; V-W). However, during the 2012-13 school year, the evidence in the hearing record demonstrated—and the IHO noted—that the student made progress in these areas with the additional supports and services provided to the student (see Tr. pp. 152-54, 194-95, 204-05, 207-10; IHO Decision at pp. 7-9, 11-12; compare Parent Ex. Q at p. 3, with Parent Ex. FF at p. 5). Thus, to effectively and equitably serve the purposes of compensatory or additional educational services in this case, the student is entitled to 270 hours of 1:1 tutoring for the district's failure to offer the student a FAPE for the 2011-12 school year and 135 hours of 1:1 tutoring for the district's failure to offer the student a FAPE for the 2012-13 school year.

Accordingly, the district is ordered to provide compensatory or additional educational services to the student in the form of 405 hours of 1:1 tutoring services and such services are to be provided by a special education teacher trained in an evidence-based reading program designed to address both decoding and reading comprehension, such as, but not limited to, Orton Gillingham;

[7] According to a June 2013 neuropsychological evaluation, the student exhibited a specific learning disability in both phonological processing and orthographic processing, which affected and compromised his decoding, spelling, reading comprehension, and writing skills and which should be addressed with an evidence-based reading program (see Parent Ex. FF at pp. 13-14; see also Tr. pp. 677-79, 682). However, at the impartial hearing the neuropsychologist who conducted the June 2013 evaluation of the student testified that while evidence-based programs had proven effective to remediate specific learning disabilities, it was not possible to predict the specific amount of improvement that an individual student would make over a given time period and that the progress would be different for each individual (see Tr. pp. 675-77, 727-28).

[8] Although the hearing record contains inconsistent testimony concerning the amount of time the student received reading and writing instruction during the 2011-12 and 2012-13 school years, it appears that the response to intervention teacher's testimony reflected the most reliable and clearest explanation regarding the amount of time the student received reading and writing instruction for these time periods (see Tr. pp. 400-01; but see Tr. pp. 107, 110-11).

and further, that such compensatory or additional educational services shall be provided—at the option of the parent—by either a district provider or a non-district/private provider (including, but not limited to, EBL Coaching) and at a rate not to exceed $110.00 per hour. Finally, the student must use the 405 hours of compensatory or additional educational services within two years from the date of this decision, and the provision of such services may include providing services to the student during summer 2015 and summer 2016.[9]

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's conclusion that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years. However, as explained above, the IHO erred in awarding only 60 hours of compensatory or additional educational services in the form of 1:1 tutoring as relief. 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 DISMISSED.

IT IS ORDERED that the IHO's decision dated March 27, 2014 is modified by reversing that portion which ordered the district to provide the student with 60 hours of compensatory or additional educational services; and,

IT IS FURTHER ORDERED that the IHO's decision dated March 27, 2014 is modified by ordering the district to provide the student with a total of 405 hours of compensatory or additional educational services in the form of 1:1 tutoring services consistent with this decision.

Dated: **Albany, New York**
November 13, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER

[9] In support of the request for 702 hours of compensatory educational services, the parent asserts that the student received approximately 720 hours of inappropriate reading and writing instruction during the 2011-12 and 2012-13 school years. At the impartial hearing, the director of EBL Coaching testified that she recommended approximately 700 hours of tutoring to bring all of the student's academic skills—including his mathematics skills—up to a fourth grade level (see Tr. pp. 474-76). In addition, the evidence further established that if the student's orthographic processing needs were addressed through tutoring, his mathematics skills would simultaneously improve; therefore, any calculation of an award of compensatory educational services must be reduced so as not to include additional tutoring services to address the student's mathematics skills (see Tr. pp. 733-34).