



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-085

**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, David L. Goodwin, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2014-15 school year were appropriate. 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]; 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**

With regard to his educational history, the evidence in the hearing record reflects that the student had continuously attended the Churchill School (Churchill), a 10-month State-approved non-public school, since the third grade (Tr. pp. 308, 459, 464; see 8 NYCRR 200.1[d], 200.7).

On February 26, 2014, the CSE convened to conduct the student's annual review (Parent Ex. C at pp. 1, 9; see Tr. p. 459). Finding that the student remained eligible for special education as a student with speech or language impairment, the February 2014 CSE recommended an IEP that provided for a 10-month school year program in a 12:1+1 special class placement at a State-approved nonpublic school, with the following related services: one 45-minute session per week of group counseling and one 45-minute session of group speech-language therapy (Parent Ex. C

at pp. 1, 6-7, 10). In a school location letter dated April 7, 2014, the district notified the parent that the program and services recommended on the February 2014 IEP would be provided at Churchill (Dist. Ex. 10).

The parent and the principal at Churchill exchanged a series of emails with the district between February 2014 through June 2014, in which the parents and the Churchill principal stated and/or reiterated the parent's requests: that the CSE consider an October 2013 private neuropsychological evaluation, a copy of which was provided at the February 2014 CSE meeting; that the CSE recommend summer services for the student, specifically at a Lindamood-Bell (LMB) Learning Center; that the CSE find the student eligible for special education as a student with a learning disability, rather than as a student with a speech or language impairment; that the CSE recommend additional speech-language therapy for the student; that the district conduct an assistive technology evaluation; and, ultimately, that the CSE reconvene (see Parent Exs. D at pp. 1-2; E at pp. 1-2; R at pp. 1-3; T at pp. 1-2; U at pp. 1-2; V at p. 1; X; see also Tr. pp. 60-61, 95-97; Parent Ex. B at p. 1). During July 2014, the district social worker responded to the parent's request for summer services/LMB tutoring via telephone and indicated that the district could offer the student a summer program at a district specialized school placement "to help [the student] with his reading difficulties" (Tr. pp. 67, 108-09, 338-39). The parent testified that the social worker did not identify what programs were available, and did not discuss either a reading program or speech-language therapy services (Tr. p. 339). The parent indicated that she did not believe specialized schools within this particular district could offer "an appropriate environment" or appropriate peer grouping for the student (Tr. pp. 339-40, 465-66).

The CSE reconvened on July 30, 2014, to amend the February 2014 IEP (Tr. pp. 127-28; Parent Ex. G at p. 13). Finding the student eligible for special education as a student with a learning disability, the July 2014 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a State-approved nonpublic school, with the following related services on a weekly basis: one 45-minute session of counseling in a group, one 45-minute session of speech-language therapy in a group, and one 45-minute session of individual speech-language therapy (Parent Ex. G at pp. 1, 9-10, 14). The CSE also recommended assistive technology for the student: specifically, a laptop computer with "word prediction[,] auditory feedback [and] reading software" (id. at p. 10). As for the 12-month services, the IEP indicated that the student would receive the same program and services during July and August as the rest of the school year (id. at p. 10).<sup>1</sup>

Following the commencement of the 2014-15 school year, the student was evaluated by LMB on August 27, 2014 (Parent Ex. H at p. 2). The student received tutoring at LMB between November 2014 and January 2015, scheduled for two hours a day, five days per week (Tr. pp. 379,

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<sup>1</sup> Whereas the February 2014 IEP set forth a projected implementation date of September 1, 2014, the July 2014 IEP reflected the recommendation for 12-month services with a projected implementation date of June 25, 2014 (compare Parent Ex. C at p. 1, with Parent Ex. G at p. 1). Notwithstanding this, the July 2014 IEP continued the projected beginning service date of September 1, 2014 for the special class placement and related services (Parent Ex. G at pp. 1, 9-10).

383, 384-35). The student received an additional 20 hours of tutoring beginning in February 2015 (Tr. p. 404).<sup>2</sup>

### **A. Due Process Complaint Notice**

In a due process complaint notice, dated February 25, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (Parent Ex. A at pp. 1, 8-9). The parent alleged that by failing to include provision for LMB services on the student's IEP, as recommended in the October 2013 private neuropsychological evaluation report, the CSE failed to offer an appropriate program to address the student's significant reading delays (*id.* at pp. 7, 8). The parent opined that no school could spend the hours the student required on reading remediation without negatively impacting his other studies and, therefore, the student required supplemental after-school tutoring to address his reading and decoding deficits (*id.* at p. 8).<sup>3</sup>

In support of her claim, the parent cites to the student's longstanding lack of progress in the area of reading notwithstanding the many different reading programs tried with the student at Churchill through grammar school and middle school (Parent Ex. A at p. 2).<sup>4</sup> The parent alleged that the student's significant reading deficits were having an impact on his other areas of learning (*id.* at p. 3). The parent also alleged that the student had begun to "experience social/emotional issues associated with his lack of ability to read" (*id.*). However, the parent alleged that, with LMB tutoring, a pretest and retest of the student showed "improvement in almost all areas, some significant" (*id.* at p. 6). The parent also asserted that the student's "teachers at Churchill saw 'dramatic and perceptible' improvements in [the student's] abilities and confidence," and detailed the gains he had made in his reading ability, progressing from a first grade to a second grade reading level on some measures of progress (*id.* at p. 7).

Next, the parent set forth the substance of her requests communicated to the CSE and the district, including her request that the CSE recommend services for the student for summer 2014 and, in particular, that the CSE recommend that the student attend an LMB summer program at district expense (Parent Ex. A at pp. 4-5). The parent alleged that the district refused her request and offered a summer program for the student at a district specialized school, which the parent rejected, arguing that it would have been inappropriate (*id.* at p. 5). The parent also noted that, while the July 2014 IEP recommended a 12-month school year program, the recommendation that the student receive the same program and services during July and August as the rest of the school

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<sup>2</sup> According to the hearing record, the initial 78 hours of tutoring were funded by a scholarship coordinated through Churchill and paid for by an anonymous donor and the subsequent 20 hours were funded in part by the scholarship and in part by LMB's provision of 12 hours of complimentary tutoring services (*see* Tr. pp. 383-84, 387-88, 404-05).

<sup>3</sup> The parent also asserted that LMB services can only be provided after school, at an LMB Center, and that "it is the combination of LMB instruction and reinforcement of that instruction during the school day [at Churchill] that is linchpin to [the student] achieving a functional literacy level" (Parent Ex. A at p. 8; *see id.* at p. 9).

<sup>4</sup> However, the parent repeatedly asserted that Churchill was an appropriate placement for the student (Parent Ex. A at p. 2). Specifically, the parent indicated that "at Churchill, because of the small classes, technical assistance and individualized attention, [the student] has progressed in all subjects except for reading" (*id.* [emphasis added]).

year did not make sense as Churchill did not offer a 12-month school year program (id. at p. 5 & n.5).

Lastly, the parent alleged that, while the July 2014 included a recommendation for assistive technology, the student did not receive the recommended laptop until January 2015 (Parent Ex. A at p. 6 n. 6).

As relief, the parent requested an award of "compensatory services" and, in particular, that the IHO order the district to pay for the student's instruction at LMB for 592 hours or until the student reaches "an instructional reading level of 5th grade . . . whichever occurs first" (Parent Ex. A at p. 9).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on April 28, 2015, and concluded on May 14, 2015, after three days of proceedings (see Tr. pp. 1-577). In a decision dated July 9, 2015, the IHO found that the district offered the student a FAPE for the 2014-15 school year and denied the parent's request for relief (see IHO Decision at pp. 17-21).

The IHO identified the "crux of th[e] case" to include whether or not the district had denied the student a FAPE as a consequence of its failed to "pay for after-school tutoring" at the LMB center (IHO Decision at p. 18). As a preliminary matter, the IHO noted that, "unless otherwise indicated," he credited the testimony of all of the witnesses (id.). The IHO also noted that the due process complaint notice "d[id] not allege any procedural violations of the IDEA" and, further, found that the district "ha[d] complied with all procedural requirements" (id. at p. 17). Additionally, the IHO held that "[t]he parent ha[d] at all times been provided a full opportunity to participate in the decision making process" and that "the CSE gave full consideration to all of the recommendations contained in the [October 2013 private neuropsychological] evaluation as well as the parent's concerns" (id.).

The IHO held that it was "uncontroverted" that the student had significant deficits in decoding and reading and that "he ha[d] made little or no progress throughout the years" in these areas (IHO Decision at p. 18). However, the IHO held that school districts need not "maximize" the potential of a student and that, in this case, the district "took appropriate steps to address the needs of the student" (id. at p. 20). The IHO noted testimony that "the focus upon [the student's] entering 8th grade shifted" to developing "compensatory strateg[ies] to enable [him] to access information and move forward in his instruction" (id. at p. 19). The IHO found that, as a result of the compensatory strategies and assistive technology, the student was able to make progress in areas other than reading and decoding and was anticipated to meet his goals (id.).<sup>5</sup> The IHO held that the CSE developed and implemented an appropriate IEP with measurable goals and provided "necessary support services" in the form of speech-language therapy, counseling, services from a

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<sup>5</sup> Regarding the use of assistive technology, the IHO acknowledged that the laptop recommended by the July 2014 CSE was not provided until January 2015 (IHO Decision at p. 19). However, the IHO noted: that the student had access to an iPad and laptops provided by Churchill even before the assistive technology evaluation was completed, which had "enabled [him] to access information and participate in class on a more equal basis"; that the student was proficient in the use of the assistive technology; and the laptop ultimately provided in January 2015 was used primarily to assist the student with writing (id.).

learning specialist, and assistive technology (*id.* at p. 20). The IHO also noted that "the parent and [the learning specialist] both acknowledged that slow progress was being made even though they felt that it was not meaningful" (*id.*).

With regard to LMB specifically, the IHO held that "the fact that progress is accelerated beyond what is currently being achieved per the existing IEP does not establish a basis for finding that the [district] has denied a FAPE" (IHO Decision at p. 21). The IHO concluded that such an intensive schedule of after-school tutoring would benefit any student, regardless of disability level, and that the provision of such intensive tutoring "goes far beyond what is required by FAPE" (*id.*). The IHO also expressed concern about the "private for profit" nature of LMB (*id.* at p. 20). Specifically, the IHO cited his concerns: that no schools in the district had a partnership with the LMB program; that LMB services could only be provided at LMB learning centers; that Churchill staff was not trained in the LMB methodology; and that worksheets and materials were not shared with Churchill (*id.*). The IHO characterized LMB as "a closely guarded proprietary concern" and raised "the question as to how such tutoring by LMB could be incorporated into an IEP when members of the CSE team and the teachers involved would not have the training or the materials necessary to formulate and monitor appropriate goals" (*id.* at pp. 20-21).

Regarding 12-month services, the IHO acknowledged that the district offered the parent "unspecified summer services" for the student at a district specialized school, which the parent rejected (IHO Decision at p. 19). The IHO did not, however, make a separate ruling on the parent's claim regarding the 12-month school year services.

As a result of the determinations detailed above, the IHO ruled that the district offered the student a FAPE for the 2014-15 school year and, therefore, denied the parent's request for compensatory services (IHO Decision at p. 21).

#### **IV. Appeal for State-Level Review**

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2014-15 school year. Initially, the parent asserts that the IHO incorrectly framed the issue to be determined and conflated the relief requested by the parent with the district's obligation to provide the student with appropriate services. The parent asserts that the district failed to meet its burden to show that the special education programs and services set forth in the February 2014 and July 2014 IEPs were reasonably calculated to provide a FAPE to the student.

The parent argues that both IEPs failed to include 12-month school year services, with the February 2014 IEP including no such services and the July 2014 IEP including the paradoxical statement that the student receive summer services at Churchill, which did not offer a 12-month school year. The parent further maintains that a specialized school placement was not appropriate for the student for summer 2014 and argues that the district's effort at the hearing to explain those services was an impermissible attempt to rehabilitate a deficient IEP.

The parent alleges that the IEPs developed for the student's 2014-15 school year were substantively inadequate given the student's disability and potential, and argues that the student required more than the opportunity for "trivial advancement" that his educational program afforded

him. The parent argues that the district's recommendations were not reasonably calculated to address the student's needs in the area of decoding. The parent further asserts that the student did not make meaningful progress in the area of decoding at Churchill.<sup>6</sup> The parent argues that, as the district was aware of the student's lack of progress, the CSE's recommendation for Churchill without additional supports for the student in the area of decoding was not appropriate. The parent further asserts that, given the academic demands presented by the eighth grade curriculum and consistent with the recommendations included in the October 2013 private neuropsychological evaluation report provided to the CSE, the student required such additional decoding instruction outside of the regular academic schedule either during the summer and/or after-school. As for assistive technology, the parent alleges that the testimony from the district school psychologist that assistive technology addressed the student's decoding needs constituted an impermissible attempt to rehabilitate the July 2014 IEP. The parent asserts that, to the extent the IHO determined that assistive technology was an appropriate substitute for teaching the student to decode, the IHO must be reversed.<sup>7</sup>

Regarding LMB services specifically, the parent alleges that the after-school tutoring the student received during the 2014-15 school year had proven effective, and allowed him to make substantial progress in decoding. The parent alleges that the student progressed from a first grade level of decoding to a second grade level after a total of 98 hours of LMB services. The parent appeals the IHO's characterization of the LMB services as maximization. Additionally, the parent argues that the IHO erred to the extent that he found that the proprietary nature of LMB's program relieved the district of its obligation to offer the student appropriate decoding instruction. The parent also opines that, even if the district was not inclined to fund LMB services, it was free to propose and offer alternative services sufficient to provide the student with a FAPE, but did not do so.

Finally, as relief, the parent asserts that the student should be awarded 384 hours of tutoring from LMB as compensatory services to redress the district's denial of a FAPE for the 12-month 2014-15 school year.

In an answer, the district responds to the parent's petition by variously admitting or denying the allegations raised and argues that the IHO correctly determined that the district offered the student a FAPE for the 2014-15 school year.

## **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

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<sup>6</sup> The parent alleges that the student's 8th grade teacher was not trained to provide decoding instruction, that his curriculum did not teach decoding, and that the student's only in-school decoding instruction took place during a single, one-on-one 45-minute session per week with the learning specialist.

<sup>7</sup> Since the parent asserts for the first time on appeal that, notwithstanding her request in April 2014, the district did not reconvene the CSE until July 2014, this allegation is outside the scope of review and will not be considered (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see, e.g., T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

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. 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]). 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).

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]). 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).

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]), 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]).

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**

### **A. Summer Services**

Turning first to the issue of 12-month school year services, the parent alleged that the student was denied a FAPE, in part, because the February and July 2014 CSEs failed to recommend appropriate reading and decoding services for the summer 2014.<sup>8</sup>

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<sup>8</sup> Both the February 2014 and July 2014 IEPs were developed by the CSE to be implemented during the student's 2014-15 school year (see Parent. Exs. C at pp. 1, 6-7; G at pp. 1, 9-10). As of the beginning of the 12-month school year on July 1, 2014, the February 2014 IEP was the operative IEP (see Parent Ex. C at pp. 1, 6-7, 9; see also N.Y. Educ. Law § 2[15] [defining the school year as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following"]). At the earliest, on July 30, 2014, the July 2014 IEP superseded the February 2014 IEP and became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review. Notwithstanding that the July 2014 IEP included a general implementation date of June 25, 2014 (Dist. Ex. 3 at p. 1), in general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P., 841 F. Supp. 2d at 614; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]). Therefore, this retroactive date does not serve to supersede the February 2014—in effect as of the beginning of the school

In developing an IEP for a student with a disability, a CSE "shall include" a recommendation for 12-month services in the IEP for students who meet the eligibility requirements (8 NYCRR 200.4[d][2][x]; see 34 CFR 300.106[a][1], [a][2] [requiring districts to "ensure that extended school year services are available as necessary to provide FAPE," and further requiring that extended school year services "must be provided" to a student if the CSE determines "that the services are necessary for the provision of a FAPE"], 300.106[b] [defining extended school year services as both "special education and related services" that are provided to a student with a disability beyond the "normal school year," in accordance with the student's IEP, and at no cost to the parents]; see also Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at \*12 [E.D.N.Y. Jan. 4, 2010]). To determine eligibility, State regulation requires that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1], [1][v]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>).

In the course of this case, it is problematic in this case for the parent to on take the position on the one hand that the student required 12-month services without also arguing on the other that the student met the standard for 12 month-services by having either experienced or highly likely to experience substantial regression—that is the requisite severe loss of skills during July and August that meets the definition within State regulations. If the parent had pressed such an argument, it would be up to the district to prove that there was no substantial regression. Instead, the parent alleges that the February 2014 CSE failed to recommend 12-month services for the student for the 2014-15 school year, notwithstanding the recommendation for the same in the October 2013 private neuropsychological evaluation report (see Parent Ex. B at p. 18). However, review of the neuropsychological evaluation report in evidence reveals no mention at all that the student should receive additional decoding/reading instruction during the summer (see id.). Rather, the psychologist recommended, more generally, "that outside of school [the student] receive individual tutoring based on [LMB's] Phoneme Sequencing . . . program" (id.). This evidence does not support a request for 12-month services as the parent suggests.

The district social worker, who attended the February 2014 CSE meeting, testified that the parent requested "an extension of services throughout the summer but not specific to [LMB]" and, further, that the parent "wanted to make up for services that [the student] might not have received" during the school year (Tr. pp. 60-61, 104-05). Additionally, the school social worker testified that he informed the parent that the addition of summer services would convert the student's "ten-month program recommendation into a 12-month which would have to be different [be]cause . . . Churchill only accommodate[d] a ten-month program"; and further that the parent did not want to change the student's program recommendation because it would possibly mean changing the

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year—for the purpose of evaluating the parent's claim relating to 12-month school year services.

student's school (Tr. pp. 61-62). Further, there is no indication in the hearing record that the February 2014 CSE had before it information actually indicating that the student experienced substantial regression within the meaning of State Regulation.

The parent's subsequent communications also suggest that the parent's request for summer services for the student reflected concerns that were insufficiently related to regression in skills. In February 28, 2014 and April 3, 2014, emails to the district, the parent acknowledged that school districts typically consider regression/recoupment in determining eligibility for 12-month services, but urged the CSE to consider the following additional factors: the October 2013 neuropsychological evaluation report, "[s]kills that will be lost over the summer months" addressed above, "[t]he nature and severity of the disability," and "[t]he child's ability to benefit from special education" (Parent Exs. D at p. 1; E at p. 1). The parent went on to emphasize the student's "extensive" needs and the "transition process" as he entered eighth grade (Parent Exs. D at p. 2; E at p. 2). While the parent made reference to "[s]kills that will be lost during the summer months" she did not indicate that the student had previously experienced such loss of skill (Parent Exs. D at p. 1; E at p. 1).<sup>9</sup>

Notwithstanding the course of events described in the evidence above, the July 2014 CSE convened and subsequently found the student eligible for 12-month services (see Tr. pp. 151-52; see Dist Ex. 3 at p. 9). The school psychologist stated that on the 12-month service section of the IEP she "checked off yes because [the student] [wa]s [eligible] given the information that we know about him to prevent regression of skill" (Tr. p. 152). The parent correctly points out several irregularities in the text of the July 2014 IEP. The IEP stated that the student was eligible for 12-month services, but that such services would be provided in the same program as the student's program for the remainder of the school year (e.g., Churchill) (see Dist. Ex. 3 at pp. 8-9). The IEP notes the start date for that special education program to be September 1, 2014 (id. at p. 8), after the conclusion of the summer session (Tr. pp. 110-11), but also lists a general IEP implementation date as June 25, 2014 (Dist Ex. 3 at p. 1).

Accordingly, the evidence in the hearing record reveals that summer services in the IEP, as written, were incapable of being implemented at Churchill. Under these unique circumstances, the internal inconsistencies in the July 2014 IEP are chargeable to and weigh against the district, and insofar as the parent should be able to rely on the services set forth in the IEP, this is a factor that ultimately contributes to my determination below that the district failed to offer the student a FAPE for the 2014-15 school year.<sup>10</sup>

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<sup>9</sup> The parent and social worker testified that the social worker followed up with the parent and indicated that the district could offer the student a district specialized school to attend for summer 2014 services, which the parent rejected, citing that the setting was inappropriate for the student (Tr. pp. 61-62, 464-66, 490-91). No IEP was ever developed for the student that included such a recommendation and, therefore, the appropriateness thereof will not be addressed.

<sup>10</sup> As it is unnecessary to reach the question, I express no opinion regarding whether the deficiency with respect to 12-month services in the IEP, standing alone, would result in a denial of a FAPE to the student.

## **B. July 2014 IEP**

### **1. Background Evaluative Information**

In this instance, although the sufficiency and consideration of the evaluative information before the July 2014 CSE and the accuracy and sufficiency of the present levels of performance included in the July 2014 IEP are not directly in dispute, a discussion thereof provides context for the discussion of the issue to be resolved—namely, whether the July 2014 IEP included a recommendation sufficient to address the student's decoding needs in order to offer the student with a FAPE for the 2014-15 school year.

The evidence in the hearing record demonstrates that the July 2014 CSE relied upon the following evaluative information to develop the July 2014 IEP: an October 2013 private neuropsychological evaluation report, a 2013-14 Churchill speech-language mid-year report card, a February 2014 Churchill counseling report, the February 2014 IEP, a May 2014 district assistive technology evaluation report, and a June 2014 district follow-up assistive technology report (see Tr. pp. 129-31, 134, 139-40; see generally Dist. Exs. 4-5; 7-8; Parent Exs. B; C).<sup>11</sup>

The October 2013 neuropsychological evaluation, conducted at the request of the parent, consisted of both qualitative and quantitative measures of the student's abilities (Parent Ex. B at p. 5). The October 2013 evaluation took place over three non-consecutive days, each session lasting between three and four hours, and included assessments of the student's general intellectual functioning, visual-motor and graphomotor skills, attention and executive functions, academic achievement, and social/emotional functioning (id. at pp. 1-11). The evaluator indicated that the student presented as "pleasant and cooperative, though a bit reserved" and "displayed appropriate social skills" and that "during the testing, [the student's] approach to the formal tasks, was focused and determined" (id. at p. 5).

The July 2014 IEP reflected the results of several of the quantitative measures used by the evaluating psychologist including the following index standard scores (SS) resulting from the administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV): verbal comprehension 96 (average), perceptual reasoning 94 (average), working memory 71 (borderline), and processing speed 83 (low average) (Parent Ex. G at p. 1; see Parent Ex. B at p. 6). According to the evaluator, due to the "notable variability among [the student's] index scores," the general ability index (GAI), which placed the student's functioning in the average range (SS 95), "was used to obtain a more accurate representation of his overall intellectual abilities" (Parent. Ex. B at p. 6). The IEP also reflected standard scores for academic achievement in reading, writing, and math, obtained as a result of the administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III): pseudoword decoding 55 (extremely low), word reading 49 (extremely low), reading fluency 1.4 grade equivalency, reading comprehension 71 (borderline), spelling 50 (extremely low), math problem solving 69 (extremely low), numerical operation 62 (extremely low), math fluency subtraction 51 (extremely low), math fluency addition 52 (extremely low), and

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<sup>11</sup> The district school psychologist, who attended the July 2014 CSE meeting, indicated that the CSE reviewed "teacher reports"; however, upon review of the hearing record, a March 2014 Fountas-Pinnell recording form completed by the student's learning specialist at Churchill is the only teacher report included in the hearing record that the July 2014 CSE could have reviewed (see Tr. p. 134; Parent Ex. O at pp. 1-4).

math fluency multiplication 72 (borderline) (Parent Ex. G at p. 1; see Parent Ex. B at pp. 13-15). In her report, the evaluator noted that the student's score in decoding suggested that he had "an extremely poor knowledge of sound-symbol relationships and word attack skills" (Parent Ex. B at p. 13). Further, the evaluator described the student's reading fluency as "notably weak," stating that the student's "ability to decode words based on phonemes [wa]s extremely poor" (id. at p. 14). With respect to reading comprehension, the evaluator noted that, during testing, the student needed to re-read the passage after every question and that this was a "good strategy" but also suggested that the student was not absorbing the information he read the first time around (id.). According to the evaluator, in the area of written language, the student also demonstrated "notable difficulty," demonstrating weaknesses in grammar, punctuation, spelling, and the ability to create a cohesive narrative (id.). With respect to the student's math scores, the evaluator indicated that the student demonstrated "overall and significant weaknesses in math" and, specifically, that the student had not yet attained mastery in addition, subtraction, and multiplication (id. at p. 15). The student also struggled with applied math and the ability to solve word problems (id.). Additional assessments revealed weaknesses in the student's phonological awareness and rapid naming ability, letter sequencing and ability to alternate a sequence between numbers and letters, and memory for verbal learning, as well as motor coordination (id. at pp. 7-8, 11, 12-13).

Based on the student's performance, the evaluator concluded that diagnoses of a reading disorder, disorder of written expression, and mathematics disorder were warranted (Parent Ex. B at p. 17). The evaluator opined that the student needed to receive reading remediation through an instructional program that taught phonemic awareness and fluency using a multisensory approach (id. at p. 18). She noted that the student continued to present with reading difficulties, despite receiving instruction using the "Wilson Reading Program" at school, and recommended that, outside of the school, the student receive individual tutoring based on LMB's Phoneme Sequencing program (id.). Among other things, the evaluator also suggested that the student receive individual tutoring to solidify his basic math knowledge, two 45-minute sessions of speech-language therapy, either individually or in a group of no more than three, and an occupational therapy evaluation due to his graphomotor difficulties (id. at pp. 18-21). The student's July 2014 IEP reflected his: struggle with decoding; difficulty with spelling, grammar and the mechanics of writing; difficulty with solving word problems, and his need for repeated practice in functional math skills (Parent Ex. G at p. 2).

According to the Churchill speech-language mid-year report, during the 2013-14 school year, the student received "language services in a large discourse group" that met once weekly for 45 minutes (Dist. Ex. 7). The group engaged in the following activities that paralleled classroom language demands: verbal discourse skills, word skills, and conversational exchange (id.). According to the speech-language report, the student had made progress in evaluating the relevancy of information, as well as advocating for himself when needing assistance (id.). Additionally, the report noted that, with moderate support, the student was able to be more specific in his descriptions and to improve his oral presentation skills (id.). The speech-language report indicated that, going forward, language services would focus on increasing skills for producing and organizing oral language by determining main ideas, expanding supporting points, and connecting information (id.). The speech-language pathologist recommended that, for the 2014-15 school year, the student receive one 45-minute session of "language services" (id.). The student's July 2014 IEP included speech-language goals related to the student's communication needs as described above (Parent Ex. G at p. 8).

According to the February 2014 counseling report, all of Churchill's middle school student's participated in a once weekly "Health and Human Relations" group that combined education with a counseling and decision group (Dist. Ex. 8). Although the group clinician reported that the student was cooperative and participated in group discussions, he also noted that the student rarely shared his personal thoughts, feelings, or experiences (id.). The clinician explained that the student became very frustrated by his difficulties and at times accepted adult support, but at other times became overwhelmed and shut down (id.). The clinician advised that the student should continue to work on: verbalizing his thoughts and feelings, especially those related to his "learning disability"; navigating challenging social situations; and identifying when he is frustrated and seeking out support or implementing a positive coping skill at such times (id.). Consistent with the information in the February 2014 counseling report, the July 2014 IEP reflects the student's difficulties with becoming discouraged when faced with a difficult academic task, navigating some social situations, and developing strategies to deal with frustration (compare Parent Ex. G at pp. 3, 8, with Dist. Ex. 8 at p. 1).

Next, the July 2014 CSE had available to it the results of a May 2014 assistive technology evaluation conducted by the district (see generally Dist. Ex. 5). According to the assistive technology evaluation report, the student was referred by his parent to determine "if assistive technology was needed to facilitate the production of written communications commensurate with [the student's] ability to generate ideas and oral compositions" (id. at p. 1). The report indicated that information on the referral form described the student as a "bright and motivated student whose academic skills severely limit his ability to complete most of his academic work independently" (id.). The evaluation report noted that Churchill expressed the school's anticipation that technology would enhance the student's education by filling the gap between the student's cognitive ability and his limited academic skills (id. at pp. 1-2; see Dist. Ex. 4 at p. 1). Additional expectations were to increase the student's independent output of written work and to increase his comprehension skills by providing assistance with decoding (Dist. Ex. 5 at pp. 1-2; see Dist. Ex. 4 at p. 1).

The student's then-current learning specialist from Churchill participated in the assistive technology evaluation and reported to the evaluator that the student was reading independently on the first grade level but that, when an adult was reading or when the student used text-to-speech technology, the student's comprehension level was closer to grade level (Dist. Ex. 5 at pp. 1, 3). The learning specialist further indicated that, at the time of the evaluation, the student used audio from an adult reader when reading textbooks and novels, audio books, and an iPad with speech-to-text technology (id. at p. 3).<sup>12</sup> The learning specialist reported that the student generated all of his English writing assignments using the speech-to-text technology (id.).<sup>13</sup> Although speech-to-text allowed the student to "get his content down" and answer comprehension questions, the student spoke in a stream of consciousness and was often unaware of the conventions of writing as evidenced by his lack of punctuation and use of unnecessary "filler words" (id.). The student's spelling was described as "sometimes phonetic and sometimes from memory" (id.). The

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<sup>12</sup> According to the report, although the student struggled with math, assistive technology was not requested at that time to address his math needs (Dist. Ex. 5 at p. 3).

<sup>13</sup> The learning specialist reported that the student was the only one in his class who used speech-to-text programmatically (Dist. Ex. 5 at p. 3; see id. at p. 2).

evaluation report noted that the student was able to memorize some sight words and spell them (id.). The student's reading ability was evaluated using the Protocol for Accommodations in Reading (PAR), which compared his reading comprehension performance across three reading conditions: student read aloud, adult read aloud, and text reader (id. at p. 4). For the student read aloud, the student was presented with a third grade reading passage and, although he worked hard, his reading rate was 28 words per minute and he had frequent misreads, word omissions, and substitutions (id.). The student correctly answered 50 percent of comprehension questions presented to him (id.). For the adult read aloud, the student was able to correctly answer 75 percent of comprehensions presented in response to a seventh grade level text (id.). Under the third condition, using electronic text (e-text) reading software, the student answered the same number of comprehension questions correctly (75 percent) (id.). With respect to written communication, the student participated in a rote writing task which resulted in omissions and capitalization errors, the majority of which the student was able to correct with prompting (id.). The student demonstrated spelling difficulties when writing dictated words and his self-generated writing sample revealed difficulty with spelling, punctuation, and capitalization (id.). Next the evaluator assessed the student's writing ability using a variety of software programs and determined that the student produced "the greatest quality of writing using a laptop computer with advanced word prediction that included topic dictionaries, flexible spelling, and auditory feedback" (id. at pp. 5-6).<sup>14</sup>

The evaluator recommended that the student have access to speech-to-text technology with visual prompts and that he trial a laptop with advanced word prediction throughout the day for writing assignments of one paragraph or longer (Parent Ex. 5 at p. 6). The evaluator also recommended that the student continue to use an iPad with built in speech-to-text and text-to-speech to access instructional reading assignments and answer comprehension questions "on a programmatic basis" (id. at p. 7). The evaluator also recommended two assistive technology goals: the first goal addressed the student's ability to produce a 3 paragraph essay with no more than 5 spelling errors using assistive technology, while the second goal addressed the student's ability to read three pages of a sixth grade level passage and correctly answer comprehension questions using assistive technology (id. at p. 8).

After completion of the trial period recommended in the May 2014 assistive technology evaluation report, in June 2014, a follow-up evaluation was completed (see generally Dist. Ex. 4). Based on the student's improvement noted by his teacher during the trial period and reflected in the student's writing sample, the evaluator's recommendations for assistive technology devices and goals remained the same as in the May 2014 evaluation report (id. at pp. 2-4, 5). The July 2014 IEP reflects the results and recommendations of the May 2014 assistive technology evaluation and the June 2014 follow-up review (compare Parent Ex. G at pp. 1-6, 10, with Parent Exs. 4 at pp. 2-4, 5; 5 at pp. 6-8).

Finally, the district school psychologist testified that the July 2014 CSE reviewed information from the student's February 2014 IEP and determined that the academic functional

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<sup>14</sup> The evaluator noted that, in comparing the student's handwritten versus his typewritten work, it was evident that composing written work was difficult for the student and that the handwritten work was shorter in length and contained less grade appropriate content than work completed using a laptop with advanced word prediction (Dist. Ex. 5 at p. 6).

levels, management needs, and annual goals continued to appropriately reflect and address the student's needs but that, in response to the parent's concerns, changes were made to the disability category and the speech-language therapy mandate, and annual goals and assistive technology were added to the July 2014 IEP (Tr. pp. 138-40, 149-50; compare Parent Ex. G at pp. 1-10, 14, with Parent Ex. C at pp. 1-7, 9-10).

## 2. Decoding

While the parent's due process complaint notice largely framed the parent's claims by reference to the CSE's failure to include LMB services on the student's IEP, review of the due process complaint notice as a whole, as well as the IHO's analysis and the parent's further articulation of the issue on appeal, reveals that the crux of the parties' dispute is whether the student required explicit instruction in decoding in order to receive a FAPE and, if so, if that instruction needed to be provided using LMB methodologies. The parties agreed that, with the exception of decoding, the student had made progress while attending Churchill and Churchill continued to be an appropriate school placement for the student (Tr. pp. 72-75, 91, 95, 159, , 537-38). However, both the parent and Churchill staff assert that, in addition to attending Churchill, the student requires LMB tutoring in order to receive a FAPE. In contrast, the district maintains that placement at Churchill, alone, is sufficient to address the student's needs.

The evidence in the hearing record suggests that Churchill has provided the student with intensive decoding instruction, although the exact nature and timing of the instruction is unclear. With respect to the student's educational history, the hearing record indicates that he repeated kindergarten and evidenced weaknesses in reading development in first and second grades (Parent Ex. B at p. 2). As a result the parent enrolled the student in an intensive summer reading program at Churchill (id.). The student subsequently enrolled in Churchill for third grade and has remained there since that time (id.). According to the Churchill learning specialist, in grammar school, both Preventing Academic Failure (PAF) and Wilson (an Orton-Gillingham based program) were used to teach the student decoding (Tr. pp. 516-17; see Parent Ex. B at p. 18). The learning specialist opined that due to the student's "severe" decoding needs he would have met with a learning specialist during his grammar school years, but she could not say with certainty how often (Tr. p. 517).

The private psychologist who evaluated the student in seventh grade (October 2013) reported that the student was receiving pull-out reading remediation three times per week in a small group and was "about to begin individual reading remediation with the [Churchill's] learning specialist twice a week as well" (Parent Ex. B at p. 2). The Churchill learning specialist testified that, during seventh grade, she saw the student "at least" once per week for 45 minutes to "work mainly on decoding and some other classroom support" (Tr. p. 566). However, she indicated that, in addition serving as the student's learning specialist, she also served as his seventh grade English teacher and homeroom/advisory teacher and that she had direct interaction with the student between two to three hours per day (Tr. pp. 495-97).<sup>15</sup> The learning specialist reported that she personally used some basic Orton-Gillingham approaches to attempt to teach the student decoding and that, when that didn't work, she tried glass analysis (Tr. pp. 518-19). According to the learning

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<sup>15</sup> The hearing record does not indicate that she worked on decoding with the student in English class or advisory.



specialist, although the student made "small progress" in the two years that she taught him English language arts, he did not make "meaningful progress" in decoding (Tr. p. 519).

The district school psychologist acknowledged that Churchill had tried multiple methods and programs with the student to improve his decoding but noted that by eighth grade it had not improved (Tr. p. 165). The psychologist indicated that the student's decoding level had remained "stagnant" over the past three years and stated that the student had not obtained decoding skills "despite the intense level of intervention" (Tr. p. 142). The hearing record shows that, at the time of the July 2014 CSE meeting, the student's decoding skills remained at or around a first grade level (Dist. Ex. 5 at p. 2; Parent Ex. B at p. 13).

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]).

Here, the July 2014 IEP noted the student's struggles with reading decoding and his need to have texts read aloud or audio recordings in order to comprehend a text (Parent Ex. G at p. 2). The IEP also included an increase in speech-language therapy, a recommendation that the student be provided with a laptop computer and word recognition software, and decoding and assistive technology goals (id. at pp. 6, 9, 10). The July 2014 IEP did not indicate that the student had been receiving specialized reading instruction at Churchill or recommend that the student receive specialized reading instruction during the 2014-15 school year (see generally id.). Thus, while the July 2014 CSE adjusted the recommended program relative to years prior, it does not appear that the adjustments sufficiently targeted the area of need in which the student had failed to make progress.

Notably, one of the changes adopted at the July 2014 CSE meeting, in response to a recommendation in the October 2013 private neuropsychological evaluation, was a change in the disability category relative to the student's eligibility for special education from speech or language impairment to learning disability (compare Parent Ex. C at p. 1, with Parent Ex. G at p. 1). Yet, there is no indication in the hearing record that, in doing so, the district complied with federal and State regulations relating to identification of students with learning disabilities (see 34 CFR 300.307–300.311; 8 NYCRR 200.1[j]; see also 8 NYCRR 200.4[c][6]). That is, to ensure that underachievement exhibited by a student suspected of having a learning disability is not due to lack of appropriate instruction in reading or mathematics, the CSE must consider data that demonstrates that, prior to the referral process, the student was provided appropriate instruction in general education settings, delivered by qualified personnel, and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents (34 CFR

300.309[b]; 8 NYCRR 200.4[j][1][ii]).<sup>16</sup> The recommendation of the private psychologist was not an appropriate substitute for the regulatory process and the required data would have been particularly useful in this instance, as it may have offered an additional understanding as to the student's lack of progress in decoding and the reasons underlying the same. Other evidence that would have been useful, both to the CSE process and to the administrative review in this case, includes the student's prior IEPs. Here, the student's lack of progress was prominently argued in the parent's due process complaint notice (see Parent Ex. A at pp. 2-3), and, as a consequence, the student's prior IEPs would have been useful to examining the district's static or evolving approaches over time to address the student's relatively constant decoding abilities.<sup>17</sup>

Turning to the district's reasoning underlying the July 2014 CSE's recommendations, the district school psychologist testified at length about the district's need to provide the student with a developmentally appropriate program, which included shifting the focus of the student's reading development from decoding to comprehension (Tr. pp. 141-43, 166-67, 173). She explained how the district would attempt to address the student's academic needs by providing some decoding instruction via related services, but also by recommending assistive technology that would allow the student greater access to the curriculum (Tr. pp. 141-43, 166-67). The district psychologist opined that, considering the student's grade and age level, adding assistive technology was an appropriate compensatory strategy that looked to build on the student's strengths and prepare him for the future (Tr. p. 142). She testified that the student did not need tutoring, in addition to the services provided by Churchill, in order to receive a FAPE (Tr. pp. 158-59).

The district school psychologist testified that she was aware of the recommendation in the October 2013 neuropsychological evaluation report for the student to receive reading remediation through a multisensory instructional program but again noted that the student's decoding deficits could be sufficiently addressed through a related service provider and not by the student's overall educational program (Tr. pp 160-67). She opined that Churchill provided the student with a developmentally appropriate educational model, specifically in English language arts, which in eighth grade focused on literature and writing paragraphs (Tr. p. 174). She agreed that it would not be appropriate to pull the student out of his English language arts class to work on decoding (Tr. p. 175; see Tr. pp. 179-80).

Consistent with the testimony of the district psychologist, the Churchill learning specialist explained that there was a shift in middle school in that students were no longer learning to read but were rather reading to learn (Tr. p. 504). Therefore, she opined that it was important that the school have technology available for the student to access materials rather than to have his decoding struggles hold him back (Tr. p. 505). According to the learning specialist, the assistive

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<sup>16</sup> The language in 34 CFR 300.309[b], which relates to the federal criteria for determining whether a student is eligible for services as a child with a specific learning disability, references evaluation procedures for both the initial evaluation and reevaluations of a student (see 34 CFR 300.304-306).

<sup>17</sup> Two of the student's prior IEPs, dated March 2012 and April 2013, were marked for identification at the impartial hearing but ultimately withdrawn (Tr. pp. 2-3, 198-200, 573). They were, however, submitted with the hearing record provided to the Office of State Review (see Parent Exs. M; N). As review of the hearing record reveals that these exhibits were not admitted into evidence at the impartial hearing, they have not been considered. However, despite the district's objections to the contrary (Tr. p. 198), as noted above, these exhibits should have been deemed relevant to the parent's claims in this case.

technology evaluation came about because, at the CSE meeting, committee members discussed the student's strengths and weaknesses and his need for something more than what was available at Churchill to all students; specifically, something to help him with his writing (Tr. p. 510). She reported that the student's decoding or the "auditory part of his needs" was addressed through the use of an iPad (Tr. pp. 512, 513).

Thus, while both parties agree that the student required a means other than decoding to access the general education curriculum, they also agreed that the student continued to need instruction in decoding (Tr. pp. 166-67, 504-05; Parent Ex. G at p. 3). For the 2014-15 school year the district psychologist testified that the student's decoding needs would be addressed by a related service provider (see Tr. p. 180). However, a review of the student's July 2014 IEP shows that there was no provision made for the delivery of decoding instruction. Although the student's speech-language therapy was increased by one individual 45-minute session per week for the 2014-15 school year, the district psychologist testified that it was increased in response to a recommendation made by the private psychologist who evaluated the student (Tr. p. 160; compare Parent Ex. C at p. 7 with Parent Ex. G at p. 9). However, according to her evaluation report, the psychologist recommended the increase in speech-language therapy in order to support the development of the student's receptive and expressive language skills (Parent Ex. B at p. 20). To the extent that the district school psychologist testified that the student's decoding needs would be addressed by receiving individual speech-language therapy up to five times per week during the summer, such a recommendation is not included in the student's July 2014 IEP (Tr. pp. 151-54, 163-64, 175-78; see Parent Ex. G at p. 10) and, therefore, this testimony may not be relied upon to rehabilitate an otherwise inadequate IEP (see R.E., 694 F.3d at 186).<sup>18</sup>

There is no dispute that the student continues to demonstrate significant struggles with reading and is not "decoding at a functionally literate level" (Tr. p. 539; see generally Dist. Exs. 4-5; 7-8; Parent Exs. B; C; G). The July 2014 IEP does recognize that the student "need[ed] further decoding skills instruction," and includes a reading goal and decoding goal (see Parent Ex. G at pp. 3, 6). Despite this, even though the July 2014 IEP reflects the student's significant reading and decoding needs, the July 2014 CSE failed to make any specific recommendations or provide specific services that were designed to target the student's reading and decoding deficits (see generally Dist. Ex. 3).<sup>19</sup> Therefore, for the reasons detailed above, and considered cumulatively with the confusion in the IEP regarding 12-month services, I find that the district failed to offer the student a FAPE for the 2014-15 school year.

### **3. Methodology**

Next, the parent argues that the student required implementation of LMB services in order to be provided with a FAPE. The precise teaching methodology to be used by a student's teacher

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<sup>18</sup> Moreover, the hearing record also indicates that, as a general matter, speech-language therapy does not encompass decoding instruction (see Tr. pp. 102-103, 273, 498-99).

<sup>19</sup> Among other options on the continuum of special education programs and services that might address the student's needs, State regulation explicitly contemplates "specially designed reading instruction" as a service to be included in an IEP and defines such service as "specially designed individualized or group instruction or special services or programs . . . in the area of reading and which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]).

is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]).

While the parent argues that the July 2014 CSE did not adopt the private psychologist's recommendation that the student receive LMB services, a CSE is not obligated to accede to recommendations made by private evaluators (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). The October 2013 neuropsychological evaluation report recommended LMB as a possible methodology to address the student's significant reading and decoding needs; however, the district social worker, who attended the February 2014 CSE meeting, testified that the student's IEP did not incorporate that recommendation because such specificity in curriculum or programs would usually be left to the school to determine (Tr. pp. 117-18; see Parent Ex. B at pp. 18-19). Subsequent to the February 2014 CSE meeting, in emails dated February 2014 and April 2014, the parent reiterated her request that the student receive LMB services to the district, this time specifying that her request pertained to summer 2014 services (see Parent Exs. D; E).

As described above, the student did not achieve progress in decoding using the methodologies attempted by Churchill (see Tr. pp. 516-19; see also Parent Ex. B at p. 18). Therefore, the CSE should have considered what prior instructional methods and strategies had been utilized with the student to avoid reinstituting programs that would likely be ineffective based upon past experience with the student (see "Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About "Lack of Instruction" in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). On the other hand, the July 2014 CSE did not have before it information that the LMB methodology, in particular, was necessary for the student to receive educational benefit. The October 2013 private neuropsychological evaluation, while including LMB instruction as an example of a program for which the student might benefit, did not go on to foreclose other methodologies (Parent Ex. B at p. 18). Further, while the parent cites to the student's subsequent progress with the LMB methodology during the course of the 2014-15 school year, this information was not available to the CSE and, therefore, may not be used by the parent to invalidate the IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Accordingly, while the July 2014 CSE failed to appropriately consider which prior instructional methods and strategies under which the student failed to succeed, its failure to specify and limit the student's instruction under the student's IEP solely to LMB methodology does not contribute to my determination that the district failed to offer the student a FAPE for the 2014-15 school year. The evidence of the student's progress with the

LMB services after the CSE meeting is not ultimately relevant to the determination that the district denied the student a FAPE, however, it becomes relevant to matter of crafting an appropriate remedy in this instance and, therefore, is discussed further below.

### **C. Relief—Additional Services**

The parent asserts that the IHO erred in denying the request for compensatory educational services. A review of the hearing record supports the parent's assertions that the district did not provide adequate services for the student's reading and decoding needs, and thereby denied the student with a FAPE. Therefore, the student is entitled to compensatory educational services in the form of additional reading and decoding instruction.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd. of Educ., 2008 WL 9731053, at \*12-\*13 [S.D.N.Y. March 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]).<sup>20</sup> 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-

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<sup>20</sup> In addition, in the Second Circuit, compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA 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 E. Lyme Bd. of Educ., 790 F.3d at 456 n.15; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; M.W. v New York City Dept. of Educ., 2015 WL 5025368, at \*3 [S.D.N.Y. Aug. 25, 2015]).

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 compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; 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).

For the reasons more fully detailed above, the student has been denied a FAPE, and is therefore entitled to compensatory services. As a remedy, the parent seeks compensatory services in the form of tutoring with LMB. According to the LMB executive center director, LMB addresses decoding by "stimulat[ing] the underlying processing on a cognitive level that is necessary to becom[ing] a good decoder" (Tr. p. 354). Further, the director testified that phonemic awareness and symbol imagery are the two sensory cognitive functions that must be stimulated to support decoding (Tr. pp. 354-55). Additionally, the director commented that the Orton-Gillingham based programs do not "retrain a student's brain to actually get that processing in place" like the LMB method does (Tr. pp. 356-57).

According to the hearing record, the LMB center tested the student in August 2014 and again in January 2015, after the student had received an initial 78 hours of tutoring from November 2014 to January 2015 (Tr. pp. 343, 383-85, 387-88, 404-05; Parent Exs. H; I at p. 2). With respect to the Woodcock Reading Mastery Tests-Third Edition, , which evaluated decoding, the director testified that the student performed at the first grade equivalent before instruction, and at the second grade level following instruction (Tr. pp. 355, 392-93, 402-03; see Parent Ex. I at p. 2). The director testified that, before LMB instruction, the student's symbol imagery or visual memory for letters was below the first percentile, and "after instruction he was at the 21st percentile" (Tr. pp. 402-03). Further, the director testified that the significance of this improvement from "pretest to retest means . . . that he's responding very positively to this type of instruction and is getting the foundational processing in place that would then allow him to improve the mechanics of reading" (Tr. p. 403).

The evidence in the hearing record reveals that the student responded very well to LMB instruction (Tr. p. 403) and was reported by Churchill staff to have made "real progress" in his decoding abilities (Tr. pp. 524-26). The hearing record shows that, whereas the student did not make significant progress in decoding at Churchill, following LMB tutoring, he attempted to sound out more words, demonstrated a general confidence, performed better on assessment conducted by Churchill, improved in his reading accuracy, and was more positive about school, (Tr. pp. 276, 285-90, 524-27, 529; see Parent Exs. O; P; Q). Additionally, the learning specialist indicated that while the student received LMB tutoring, she had contact with his tutors, and provided reinforcement and modified lessons based on what the student was working on at LMB (Tr. pp. 522-24).

It could be that another, as yet untested, methodology would allow the student to make more than trivial progress, but no such methodology is identified in the hearing record. In addition, other than asserting that the student should receive no compensatory services, the district does not offer any argument for or against any particular means for calculating an award, essentially abandoning the opportunity it had to be heard on the issue. Based on the state of the hearing record, the 384 hours requested by the parent appears to be a reasonable amount taking into account the qualitative considerations described above, which is appropriately designed to place the student in the position he would have been in had the district complied with its obligations under the IDEA. Therefore, for the reasons detailed above, I find that LMB is an appropriate service provider, and in the absence of any other reasonable options that could have been presented by the district for consideration, the district shall be ordered to fund the 384 hours of LMB tutoring services, to be provided within two years.<sup>21</sup> The compensatory services are required separate and apart from of any IEP services that the student may otherwise receive, and, therefore, the district and parent are

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<sup>21</sup> The IHO noted that the district is not required to "maximize" the student's potential (IHO Decision at pp. 16, 20; citing Rowley, 458 U.S. at 189, 199; Walczak, 142 F.3d at 132). The IHO is correct in that, as noted above, the hearing record does not reflect that the CSE was required to include after-school LMB tutoring on the student's IEP in order to provide a FAPE and a finding otherwise would, indeed, seem to require a maximization of the student's potential. On the contrary, the CSE was required to recommend at least some instruction to target the student's greatest area of acknowledged need in decoding. Further, the award of compensatory services in the form of LMB tutoring services, may be unnecessarily high; however, it is not awarded with the goal of maximization in mind. The number of hours provided and the specification of LMB as a service provider do not reflect any particular goal or standard of functional literacy, but reflects that the district did not attempt to develop the record or offer any reasonable alternatives for consideration to the relief requested by the parent.

free to schedule the compensatory services in a flexible manner, and may, by agreement, utilize school vacations and the summer months for delivery of the LMB services.

Additionally, the district will be directed to conduct an evaluation of the student's reading and decoding needs and reconvene the CSE upon completion of such evaluation in order to review the most recent information regarding the student's needs, as well as to evaluate and consider the effectiveness of the various methodologies that have been utilized with the student in the past.

## **VII. Conclusion**

In summary, the evidence in the hearing record supports a finding that the district failed to offer the student with a FAPE for the 2014-15 school year and that the student is entitled to compensatory educational services in the form of LMB tutoring. I have considered the parties' remaining contentions and find them to be without merit.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision initially dated July 9, 2015, is modified, by reversing those portions of the decision which found that the district offered the student a FAPE for the 2014-15 school year, and denied the parent's request for compensatory additional services; and

**IT IS FURTHER ORDERED** that the district is directed to fund 384 hours of LMB reading and decoding services, to be used by the student within two years of the date of this decision; and

**IT IS FURTHER ORDERED** that the district shall conduct an evaluation of the student and reconvene to consider the results as detailed in the body of this decision.

**Dated:**           **Albany, New York**  
                          **October 8, 2015**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**