



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-008

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

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 that portion of a decision of an impartial hearing officer (IHO) which denied her request for additional special education related services for her daughter for the 2015-16 school year. The district cross-appeals from that portion of the IHO's decision which found that it failed to provide the student with special education related services for the 2015-16 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

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

The hearing record in this case is sparse, but the following facts can be piecemealed together: the student attended a nonpublic school during the 2014-15 and 2015-16 school years at parental expense, but received special education teacher support services (SETSS) as a student with a speech or language impairment at district expense through an individualized education service program (IESP) (IHO Exs. I at pp. 1, 7, 9; II; see Tr. pp. 11, 28).¹ The hearing record also

¹ Under State law, when a student with a disability is dually enrolled by the parent in both a nonpublic school and a public school, the district where the nonpublic school the student is located develops an individualized education service program "in the same manner and with the same contents as an individualized education program"; however, special education programs and services are available "on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools

shows that during first grade (the 2015-16 school year) the student experienced difficulties in reading comprehension, phonemic awareness, decoding, math, attention and focus, social skills, auditory processing, and fine motor skills (Tr. p. 25; Parent Exs. 1; 2; 4; IHO Exs. I; III). The hearing record also shows that the last IESP created by the CSE was dated July 14, 2014 and was to be implemented during the 2014-15 school year (Tr. p. 11; see IHO Ex. I). By letter dated March 10, 2015, the parent requested that the district increase the student's level of SETSS and conduct an occupational therapy (OT) evaluation (Parent Ex. 3).² Included with the letter was a copy of a prescription written by the student's doctor that read "[p]lease evaluate for O.T." (Parent Exs. 3; 5). No follow up communication by the district appeared in the hearing record. On June 22, 2015, the district, through a contract agency, conducted a psychoeducational reevaluation of the student (IHO Ex. III). By email dated August 13, 2015, the parent informed the district that the contract agency had notified her that the results of the psychoeducational reevaluation had been forwarded to the district (Parent Ex. 7). The parent also attached her March 2015 request for increased SETSS and an OT evaluation and noted the district's failure to schedule an OT evaluation and reconvene the CSE (id.). The parent asked the district for help in the matter, or she would be "forced to hire a lawyer and request an impartial hearing" (id.). Again, no follow up communication by the district appeared in the hearing record.

A. Due Process Complaint Notice

In a November 17, 2015, due process complaint notice, the parent again attached her March 2015 request to the CSE, noted the district's lack of a response, and requested that an IHO "help me obtain [i]ncreased SETSS and Occupational Therapy" for the student, as well as "make up sessions for the time lost because [of] the CSE's unreasonable delay" (IHO Ex. II).

B. Impartial Hearing Officer Decision

An impartial hearing was held on December 18, 2015 (see Tr. pp. 1-33). During the hearing, the district rested, without submitting any evidence or calling any witnesses to testify (Tr. pp. 9, 18-19). The district representative also stated that the district did not disagree with the parent's allegations (Tr. p. 18). The district begrudgingly produced the student's most recent IESP, dated July 2014, and a June 2015 psychoeducational evaluation report, after the IHO directed the district representative to produce them (Tr. pp. 5-11, 22-24; see IHO Exs. I; III).³ The parent testified that she tried to but was not able to obtain a copy of the district's psychoeducational

located within the school district" " (Educ. Law 3602-c[2][b][1]).

² The 2014 IESP shows that the student was recommended to receive individual speech-language therapy, twice a week for 30 minutes per session as well as direct group SETSS three times per week (IHO Ex. II at p. 7). The hearing record shows that although the student received three hours of SETSS per week, due to the extent of her literacy deficits, all three hours of SETSS focused on reading (Parent Exs. 1 at p. 2; 2 at p. 2).

³ During the impartial hearing, the parent submitted three unsigned and undated reports, two from the student's SETSS provider and one from the student's teacher (Parent Exs. 1; 2; 4). Two of the letters were written while the student was in the first grade (see Parent Exs. 1; 2), while the third appears to be written while the student was in kindergarten (see Parent Ex. 4). All three letters indicate that the student requires additional supports, including an increase in SETSS (Parent Ex. 1 at p. 2; 2 at p. 2; 4 at 2). The March 2015 letter also contained two enclosures, a copy of a letter from the student's then current SETSS provider and a copy of an OT prescription for an evaluation of the student (Parent Ex. 3; see Parent Exs. 4; 6).

evaluation report, and she objected to the inclusion of it into the record because it was not provided within the required time limits, which affected her preparation (Tr. pp. 22-25). The IHO admitted the June 2015 psychoeducational evaluation report as an IHO exhibit over the parent's objection (Tr. pp. 24-25).

In a decision dated January 8, 2016, the IHO found that the district failed to recommend or provide any services for the 2015-16 school year and that additional evaluations were needed to determine the appropriate program and services that student required (IHO Decision at pp. 3-4). The IHO also opined that the student may have been inappropriately placed in a general education setting, relying on a letter from the student's teacher indicating that the student would be better served "[o]n an individual basis, in a less distractive environment" (*id.* at p. 4). The IHO ordered the district to evaluate the student for an attention deficit disorder and to conduct an OT evaluation within 30 days of the IHO's decision (*id.*). The IHO also ordered the district to provide the parent with all copies of evaluations and records and convene a CSE meeting within 40 days of the IHO's decision to create a new IESP (*id.*).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO made procedural and substantive errors during the impartial hearing and in her determinations. The parent asserts that the IHO erred in: (a) improperly admitting the psychoeducational evaluation into evidence; (b) failing to address her requests for additional SETSS sessions; (c) failing to "help her in obtaining OT" because ordering an evaluation was insufficient and the IHO should have directed an OT evaluation and reconvened the hearing after the CSE considered the resulting evaluation; (d) failing to address her request for compensatory services; (e) finding that the district failed to provide the student with services for the 2015-16 school year; and (f) positing that the student may have been inappropriately placed in a general education setting. The parent also asserts that the relief directing an OT evaluation within 30 days was insufficient, noting that as of 32 days after the IHO's decision the district had yet to conduct the evaluation. For relief, the parent requests that the undersigned order: (a) the CSE to rewrite the student's IESP to include an increase of SETSS to eight sessions per week; (b) the district to provide compensatory services for the five extra sessions per week of SETSS the parent had requested computed from September 2015; (c) an independent educational evaluation (IEE) in the area of OT; and (d) compensatory OT services in the event that the OT evaluation recommends OT.

In its answer, the district asserts general admissions and denials, and cross-appeals the IHO's determination that it failed to provide the student with services. The district does not cross-appeal any other of the IHO's determinations from which it is aggrieved.⁴ For relief, the district

⁴ An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). In this case, the district does not appeal from the IHO's determinations that the district failed to convene the CSE to recommend services for the 2015-16 school year and that additional evaluations were needed to determine what services and programs would meet the student's needs (IHO Decision at pp. 3-4). The district also does not appeal the IHO's order to evaluate the student with regard to an attention deficit disorder and to conduct an OT evaluation within 30 days, to provide the parent with copies of all evaluations and records, and to convene a CSE meeting within 40 days of the order to create a new IESP (*id.* at p. 4).

requests that an SRO either dismiss the petition in its entirety, or if not, remand the case back to the IHO for further proceedings.

In an answer to the district's cross-appeal, the parent objects to six statements found within the district's answer and cross-appeal, and provides counter statements. The parent requests that an SRO reject the district's cross-appeal, and order the relief requested in the petition.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

Education Law § 3602-c – commonly referred to as the dual-enrollment statute – requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.). Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; 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

As noted above, prior to any evidence being admitted, the district made the concession that it did not disagree with the parent's allegations (Tr. p. 18). Additionally, the hearing record shows the breadth of the district's failure to adhere to State and federal procedural requirements. For

example, starting in March 2015, the district failed to: respond to the parent's written request for an OT evaluation of the student ; properly evaluate the student to determine her deficits in all domains; provide the parent with a copy of the results of the June 2015 psychoeducational evaluation; and convene a CSE to conduct an annual review and create an IESP for the 2015-16 school year after a written request by the parent (Tr. p. 11 21-23, 25, 27-29; Parent Exs. 3; 7). I further note that, as of the time it filed its answer, the district had failed to comply with the IHO's order to conduct an OT evaluation of the student (Ans. ¶ 21).⁵

Initially, I will address the district's cross-appeal, as the parent, while not aggrieved by the IHO's statement, also objected to the IHO's determination that the district failed to provide the student with related services during the 2015-16 school year. Although the CSE did not convene to develop an IESP, letters from the student's teachers and SETSS providers indicated that the student was nevertheless receiving some special education services and the parent admitted during the impartial hearing that the student was receiving services (Tr. p. 28; Parent Exs. 1; 2). As such, the IHO's factual finding that the district failed to provide services is error; however, as mentioned above, the IHO's determinations that the district failed to convene the CSE to recommend services for the 2015-16 school year and that additional evaluations were needed to determine what services and programs would meet the student's needs were not appealed and, therefore, have become final and binding on the parties.

A. Compulsory Introduction of Documentary Evidence by the IHO

During the impartial hearing, the parent objected to the IHO's admission of the June 2015 psychoeducational evaluation report into evidence, after the district produced the evaluation report in response to a request by the IHO arising during the parent's testimony, after the district rested its case without introducing documentary evidence or witnesses (Tr. pp. 22-25). The parent's disagreement with the inclusion of the evaluation report is twofold: first, she did not have time to properly prepare for its inclusion; and, secondly, the parent asserts that the IHO was improperly influenced by the evaluation because of the IHO's statement that the student may have been improperly placed in a general education setting. The district asserts that the parent's concerns are moot, as the IHO's order to reconvene a CSE meeting would allow the parties to fully consider the results of the evaluation report.

The parent's assertion demonstrates the nuances in the express and implied authority accorded to IHOs—balancing the rights of parties while ensuring the efficiency and effectiveness of the impartial hearing process. Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). While State regulations are silent on the specific issue of whether an IHO can order a district to provide certain documentary evidence, an

⁵ With respect to the IHO's directive for OT evaluation, the district representative at the impartial hearing appeared to infer that an order directing an independent educational evaluation (IEE) by the IHO would be a more expeditious method of obtaining an OT evaluation, as there was a "glitch" in the district's system (Tr. pp. 31-32).

IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, if a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]). Additionally, it is within an IHO's authority to order an IEE at public expense as part of a hearing (8 NYCRR 200.5[g][2], [j][3][viii]). Further, an IHO may receive any oral, documentary, or tangible evidence he or she does not deem to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]) and State regulations provide that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

In this case, the IHO required the district to provide two documents into evidence, the student's most recent IESP and a June 2015 psychoeducational evaluation report, because the IHO determined that the record was inadequate, and she "needed information" concerning the student (Tr. p. 8; see Tr. pp. 6-10, 22-24). The parent objected only to the introduction of the June 2015 psychoeducational evaluation report, which she testified she had never been given a copy of, despite her requests (Tr. pp. 22-23). The IHO inquired as to the existence of any other evaluations that district may have failed to produce, then weighed the parent's objection to the introduction of the report, noted the parent's objection and the fact that the district failed to provide the parent with a copy of the report, and nevertheless decided to accept the evaluation report into evidence (Tr. pp. 23-24). Given the subject of the impartial hearing,—the parent's requests for increased SETSS services and an OT evaluation, and the IHO's recognition that additional evaluations were necessary in order to determine the student's needs because the hearing record was inadequate, the IHO did not abuse her discretion in ruling that the June 2015 psychoeducational evaluation report should be admitted into evidence over the parent's objection.

B. Compensatory Educational Services

The parent has requested that the district provide the student with compensatory related services in the form of five additional hours of SETSS and OT in the aggregate, to make up for services missed beginning at the start of the 2015-16 school year through the date make-up services are provided. 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]).⁶ 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]).

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). 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"]).

⁶ 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]).

1. SETSS

In her petition, the parent has requested compensatory services based on the student's providers' recommendation of eight hours per week of SETSS rather than the three hours per week provided by the district. While the parent did not specifically request eight hours of SETSS per week in her due process complaint notice, the parent submitted letters from the student's teacher and SETSS provider indicating a need for increased SETSS and recommending eight hours per week (Parent Exs. 1 at p. 2; 2 at p. 2; 4 at p. 2) and the district not provide any evidence to the contrary. Moreover, the district conceded during the impartial hearing that it was not in disagreement with any of the parent's allegations (Tr. p. 18). Further a review of the hearing record indicates that the student experienced difficulties in reading comprehension, phonemic awareness, decoding, math, attention and focus, social skills, auditory processing, and fine motor skills (Parent Exs. 1; 2; 4; IHO Exs. I, III).

The limited evidence in the hearing record supports the parent's contention that the student requires an increase in the amount of SETSS (see Parent Exs. 1; 2).⁷ Specifically, a letter from the student's current SETSS provider (who was also the student's SETSS provider the prior school year) indicated that during her first grade year the student experienced "great difficulty keeping up with her peers" (Parent Ex. 1 at p. 1). Additionally, the letter described that the student knew the sounds of approximately half of the alphabet; struggled to hear the vowel sound in CVC words; did not consistently know the sound of each vowel; had weak memory skills; had not learned any sight words; had difficulty recalling main characters and events in a story; had weak phonemic awareness; and she did not yet understand temporal concepts (id.). Furthermore, the SETSS provider indicated that the student required a lot of time to learn a concept or skill; did not pick up information from her environment; and had difficulty focusing and needed a lot of positive reinforcement to stay on task (id.). Finally, the SETSS provider reported that the student required math remediation in addition to reading and further reported that the current mandate of three hours per week of SETSS was not enough time to work on both due to the severity of the student's reading deficits (id. at p. 2).

A letter from the student's current first grade teacher described the student's performance as "way below that of her peers" (Parent Ex. 2 at p. 1). Specifically, the student's teacher described that the student had not mastered the names and sounds of letters; she often confused similar letters and could not decode CVC words easily; she lacked phonemic awareness; she had difficulty blending letters and matching rhyming pictures; she could not answer simple questions about a story or short passage; she did not differentiate between sight words and words she must decode; she had difficulty copying letters and became "totally overwhelmed" when copying words; and she could not write her name from memory and was inconsistent when copying her name from a name card (id.). Furthermore, the first grade teacher described that in math the student recognized numbers and could count objects; however, she had difficulty with reasoning skills and confused the vocabulary words "plus," "minus," "add," and "subtract" (id.). The letter also indicated that the student did not understand temporal concepts and she required targeted instruction to learn math reasoning concepts (id.). The teacher described several accommodations the student was

⁷ The undated letters indicate that they were written during the student's first grade year, which the hearing record indicates is the 2015-16 school year (Tr. pp. 25-26; Parent Exs. 1 at p. 1; 2 at p. 1; IHO Ex. III at p. 1).

receiving such as preferential seating in order to minimize distractions; a behavior modification plan; individualized attention; and a multisensory approach to instruction (*id.*). Finally, the teacher indicated that the three hours of SETSS have been utilized to support the student's literacy skills; however, she further opined that the student required direct instruction in both literacy and math, therefore, she recommended that the student receive five sessions of SETSS for reading and three sessions for math instruction per week (*id.* at p. 2).

The June 2015 psychoeducational evaluation reported the results of Wechsler Preschool and Primary Scale of Intelligence–Third Edition (WPPSI-III), which indicated that the student's cognitive skills fell within the borderline to average range, with a full scale IQ within the low average range (IHO Ex. III at pp. 2-3). The administrator opined that the full scale IQ might be an underestimate of the student's actual cognitive abilities due to "variations in her focusing on tasks" (*id.* at p. 2). The report also described that during the assessment the student occasionally responded "in a haphazard manner, without fully reflecting on the tasks before offering responses" (*id.* at p. 3). Finally, the June 2015 psychoeducational evaluation reported the results of selected subtests of the Wechsler Individual Achievement Test–Third Edition (WIAT-III), which indicated the student's performance on tasks measuring early reading skills fell within the very low range and performance on tasks measuring math problem solving and numerical operation skills fell within the below average to average range (*id.* on p. 3).⁸

The July 2014 IESP indicated that the student had difficulty answering questions about "recently learned material," and once the student was "lost," it was difficult to re-engage her (IHO Ex. I at p. 2). Furthermore, the July 2014 IESP indicated that the student needed reminders and prompts to follow basic directives and she needed prompts during transitions (IHO Ex. I at p. 2). It is noted that the July 2014 IESP did not indicate that the student had any behavioral or management needs; however, the IESP did describe the student's short attention span, difficulty focusing, and that the student could be impulsive and would engage in disruptive behaviors (IHO Ex. I at pp. 1-2). The student's first grade teacher indicated that the student presented with difficulties in attending, focusing on the tasks presented and required frequent redirection (Parent Ex. 2 at pp. 1-2). Finally, the student's SETSS provider indicated that the student's "significant attentional deficits" affected her ability to focus in class and that she needed constant refocusing and "a lot of positive reinforcements to stay on task" (Parent Ex. 1 at p. 1-2).

Based on the information described above, I find that the three hours per week of SETSS provided to the student was not adequate to address the student's needs for the 2015-16 school year. The SETSS provider and classroom teachers' recommendations for eight hours per week of SETSS, with three of the eight hours set aside for math remediation, provides a basis for determining an award of compensatory additional services that were necessary but neither recommended by the CSE or provided by the district.

The hearing record shows that the parent requested an increase in SETSS in March 2015 and that the district failed to respond (Parent Ex. 3). Had the district timely responded to the parent's request (i.e., followed procedures to evaluate the student and determine if she required additional

⁸ The student's actual scores on the early reading skills subtests of the WIAT-III were omitted from the June 2015 psychoeducational evaluation report and the results were summarized at the end of the report (IHO Ex. III at p. 3).

services), the student may possibly have started receiving the requested services before the end of the 2014-15 school year, and the calculation of compensatory services could have started from some point late in the 2014-15 school year. However, determining that precise moment in time is unnecessary as the parent specifically identified a slightly later starting point of September 2015 for appropriate remedial relief of compensatory SETSS for the student (Pet. at p. 6), and that request is reasonable in light of the hearing record developed and will be granted.

The district did not disagree with the parent's request for additional SETSS during the impartial hearing, nor did it provide any evidence to controvert the student's SETSS provider and teacher's opinion that the student required eight hours of SETSS per week; therefore, as further described below the district is ordered to provide 130 hours of SETSS as a compensatory additional service to make up for five hours per week of SETSS the student missed beginning at the start of the 2015-16 school year through the date of this decision.

As for the calculation of the award, had the student attended a district school, she would have most likely began attending classes after the Labor Day holiday in September 2015 and the award should continue through April 1, 2016, the date of this decision.⁹ Therefore, the student would have attended classes for approximately 26 weeks, and thus, at five compensatory hours per week, the student is owed 130 hours of compensatory SETSS. Of that total, 78 hours shall be utilized for math remediation (approximately three out of every five hours of compensatory SETSS), because the student did not receive SETSS to address math as the services she received were only directed at remediating her deficits in reading and writing (Parent Exs. 1 at p. 2; 2 at p. 2).

2. Occupational Therapy

With regard to the parent's request for an OT evaluation, the hearing record supports the IHO's decision that an OT evaluation is necessary.

In this case, the hearing record does not show if the student has been adequately evaluated to determine if she has deficits with her fine or gross motor skills or whether such deficits contribute to the student's lack of achievement. However, there is sufficient evidence in the hearing record to indicate that the student has been experiencing difficulties with her graphomotor skills (Parent Ex. 2; IHO Ex. I at pp. 1-2), which, when combined with the district's complete failure in identifying or evaluating the student's needs, I find is a sufficient basis to support an award of compensatory OT services as further described below.

With regard to the present need for evaluation, the July 2014 IESP reported that an undated administration of the Vineland-II showed delays in both fine motor and gross motor skills, and that the student could drink from a cup and use appropriate utensils; however, she would spill when using utensils and often avoided eating foods that were difficult to eat neatly (IHO Ex. I at pp. 1-2). The IESP also reflected that the student struggled with clothing fasteners such as snaps and buttons, and reported parent concerns that the student did not cut out complex shapes (*id.* at pp. 1-

⁹ The days considered are school attendance days; therefore, holidays and scheduled days off are not included in the calculation, because the student, had she attended a district school, would not have received any SETSS services on those days.

2). Additionally, the student's first grade teacher described the student as having difficulty copying letters and becoming "totally overwhelmed" when copying words (Parent Ex. 2 at p. 1). Furthermore, the teacher described the student as being unable to write her name from memory and as inconsistent when copying her name from a card (id.). Based on this information, I find that the student exhibited difficulties in fine motor and visual motor skills, which indicate that an OT evaluation is necessary in order to clearly identify the student's current levels of functioning and needs.

Although an evaluation is necessary to determine the student's services going forward, the hearing record, while sparse, also provides at least some rudimentary, albeit far from perfect way to measure of the extent to which the student required OT services up until this point in time. Had the district punctually responded to the parent's request for an OT evaluation, the student would have been evaluated prior to the start of the 2015-16 school year and would have very likely have begun receiving OT services at the start of the 2015-16 school year. Therefore, in order to address those deficits that are demonstrated in the hearing record and to make up for OT services that the student may have received but were not due to the district's failure to evaluate the student, the district shall provide the student with compensatory OT services, computed from the beginning of the 2015-16 school year through the date of this decision at a level of three individual 45-minute sessions per week, which equates to 78 individual 45-minute sessions of OT (three sessions per week for approximately 26 weeks). These services are designed to approximate, as best as possible, the student's deficits that were already identified above, which is a limited hearing record. Accordingly, it is at least possible that a higher level of remedial OT services may be needed as a formal evaluation has yet been conducted. Therefore, in the event that the student's needs, as identified in a subsequent evaluation, warrant a higher level of services, the parent may request that the CSE provide further additional compensatory OT services to account for the difference between level of the three 45-minute sessions per week calculated in this decision and the level of services recommended after formal evaluation of the student.¹⁰ Additionally, in the event that the district has not completed the evaluation ordered by the IHO within 15 days from the date of this decision, an OT provider may proceed to conduct his or her own evaluation of the student at district expense so that compensatory OT services may commence as soon as possible thereafter.

C. Order to Conduct a Comprehensive Evaluation

As I concur with the IHO's determination that additional evaluations are necessary in order to identify and address the student's needs and the district has at the time of its answer failed to complete an OT evaluation within 30 days of the IHO's order, as it was ordered to do, the district is directed to evaluate the student in accordance with the regulations.¹¹

¹⁰ In the event that an evaluation ultimately indicates that the student requires OT services at a level less than three 45-minute sessions per week, the district is nevertheless precluded from reducing this compensatory education award in the absence of written consent from the parent. There is nothing in the record to indicate that this level of services would be harmful to the student and it is the consequence of ignoring the parents requests for evaluation and appearing at a due process hearing with no evidence to support the district's burden of production and persuasion.

¹¹ By not appealing the IHO's order to conduct an OT evaluation (which was well supported) the district has, at this juncture, added failing to comply with IHO's due process order to its litany of violations in this case. An

Furthermore, the CSE shall review existing evaluation data on the student, including the information provided by the student's teacher and SETSS provider, and identify what additional data, if any, is necessary to determine student's present levels of academic achievement and related developmental needs and whether any additions or modifications to the recommended special education services are necessary for the student to meet her annual goals (see 8 NYCRR 200.4[5]).

For example, the hearing record indicates that a psychoeducational evaluation was conducted in June 2015; however, details from the WIAT-III Early Reading Skills subtest are missing from the psychoeducational evaluation report (IHO Ex. III at p. 3). In light of the fact that the hearing record shows that the student struggled in the areas of reading and math and to the extent that the WIAT-III may not have been completely administered, the district should consider conducting a full evaluation of the student's academic skills (Parent Exs. 1; 2; 4; IHO Exs. I; III). Additionally, the hearing record shows that the student exhibits significant difficulty in understanding letter-sound relationships, hearing and identifying the vowel sounds in CVC words, and learning all of the letters' sounds, which might indicate the need for further evaluations to identify any areas of need related to possible hearing deficits or a central auditory processing disorder (Parent Exs. 1; 2).

With respect to the IHO's determination that the CSE conduct a test for an attentional deficit disorder, the hearing record as discussed above indicates that the student presents with significant difficulty in focusing and attention, and can exhibit impulsive and disruptive behaviors (IHO Decision at p. 4; Parent Exs. 1; 2; IHO Exs. I at pp. 1-2; III at p. 2). To the extent that the student continues to exhibit these difficulties, the district should consider whether these behaviors are related to the difficulties the student may be experiencing in other domains, or if an assessment of the student's attentional skills is warranted.

The district is directed to reconvene the CSE within 45 days of this order to review the results of the evaluations, and if necessary, create a new special education program for the student. If the district continues to fail to evaluate the student or develop IESPs, the parent is reminded that she may request an independent educational evaluation (IEE) at district expense (34 CFR 300.502[b][1]; 8 NYCRR 200.5[g]).¹²

Finally, if the district fails to abide by this decision within the time frames allotted, the parent is also reminded of her right to file a State complaint with the Office of Special Education at the State Education Department, which has the authority to determine if any other additional administrative processes are required and may be effective in resolving some of the compliance

unappealed order is not stayed during State-level administrative review.

¹² The district is reminded that once a parent has requested an IEE at public expense, the district must provide a list of independent evaluators and "it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the IEE" (Letter to Parker, 41 IDELR 155 [OSEP 2004]; see Application of a Student with a Disability, Appeal No. 15-082 [where the same district improperly argued that a private evaluator selected and paid by the district to conduct an evaluation in lieu of a district staff member constituted the one IEE at public expense that the parent was entitled to]).

issues that appear to be present in this case (Educ. Law § 4403[20]; see <http://www.p12.nysed.gov/specialed/quality/complaintqa.htm>).¹³

VII. Conclusion

Based on the above, the district failed to follow the procedures for evaluating a student and, particularly, failed to respond to the parent's request to convene a CSE to develop an IESP for the student for the 2015-16 school year. Based on the limited information available in hearing record, the district will be directed to provide the student with compensatory services including 130 hours of SETSS (with 78 hours dedicated to instruction in math and 52 hours dedicated to instruction in reading) and 78 45-minute sessions of OT services; identify what additional data, if any, is necessary to determine student's present levels of academic achievement; and within 30 days from the date of this decision, reconvene the CSE to create a program for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated January 8, 2016 is modified by reversing that portion which determined that the district failed to provide the student with related services during the 2015-16 school year; and,

IT IS FURTHER ORDERED that the IHO's decision dated January 8, 2016 is modified to the extent that the district shall, within 15 days of the date of this decision, begin to provide the student with 130 hours of compensatory SETSS (with 78 hours to be used to address the student's math deficits and 52 hours to be used to address the student's reading deficits) and shall complete the services within two years from the date of this decision; and

IT IS FURTHER ORDERED that the IHO's decision dated January 8, 2016 is modified to the extent that the district shall, within 15 days from the date of this decision, begin to provide the student with 78 45-minute sessions of compensatory OT services and shall complete the services within two years from the date of this decision; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the compensatory SETTS and OT services shall be delivered at the student's nonpublic school;

IT IS FURTHER ORDERED that the district shall consider whether further evaluations of the student are necessary in accordance with the guidelines set forth herein and after due consideration, shall provide the parent with prior written notice, which provides, if applicable, its reasoning in detail for concluding that additional evaluative data of the student was unnecessary.

¹³ This complaint is often referred to as a "60 day" complaint. The link provided is a question and answer page, with further links to the complaint form.

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the CSE shall reconvene to consider all evaluative information about the student and develop an appropriate educational program for the student within 30 days from the date of this decision.

Dated: **Albany, New York**
 April 1, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER