



The University of the State of New York
The State Education Department
State Review Officer

No. 07-034

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Yonkers City School District

Appearances:

Law Offices of George Zelma, attorney for petitioners, George Zelma, Esq., of counsel

Donoghue, Thomas, Auslander & Drohan, attorney for respondent, Anna I. Gonzalez, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at Windward School (Windward) for the 2005-06 school year. Respondent, the Board of Education of the City School District of the City of Yonkers, cross-appeals from the impartial hearing officer's determination that it failed to offer an appropriate educational program to the student for that year as well as that part of the impartial hearing officer's decision which placed the burden on petitioner to show that an appropriate program was offered to petitioners' son. The appeal must be dismissed. The cross-appeal must be sustained in part.

Petitioners' son was nine years old and attending Windward at the time of the commencement of the impartial hearing on December 5, 2006 (Parent Ex. V at p. 1; Tr. p. 80). Windward has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The child has identified deficits in phonological awareness and memory which affect his academic performance in reading, written language and math (Parent Ex. H at p. 4). The child's eligibility for special education services as a student with a learning disability (see 34 C.F.R. § 300.8[c][10];¹ 8 NYCRR 200.1[zz][6]) is not in dispute in this appeal.

¹ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this

Preliminarily, I note that a previous appeal relating to petitioners' request for tuition reimbursement at Windward for the 2005-06 school year was decided on procedural grounds by Application of a Child with a Disability, Appeal No. 06-032, issued on May 12, 2006 (see Dist. Ex. 6). In that appeal, petitioners appealed from the decision of a different impartial hearing officer. The impartial hearing officer in that case dismissed petitioners' appeal on the basis that the parents never received services from a public agency and concluded that tuition reimbursement was not available to the parent as a matter of law pursuant to 20 U.S.C. § 1412(a)(10)(c)(ii) (see id. at p. 3). In my review of petitioners' prior appeal I concluded that the impartial hearing officer had erred in the conclusion that petitioners' appeal was prohibited as a matter of law (id. at p. 4).² Application of a Child with a Disability, Appeal No. 06-032 sustained petitioners' appeal, annulled the impartial hearing officer's decision, and ordered that respondent schedule an impartial hearing before a new hearing officer to take evidence and make a determination on the merits regarding petitioners' claims in their hearing request dated August 18, 2005 (id.).

Petitioners' son was enrolled in public school for kindergarten (Tr. pp. 191-92). Petitioners enrolled the child in a private school in Manhattan for the 2003-04 school year when he was in the first grade (Tr. pp. 192-93). Upon enrollment, the private school determined that he would require support services from its learning specialist and he saw that person twice a week during school hours (Parent Ex. K). During that school year, the child also received one-to-one reading remediation twice a week outside of school (Parent Ex. K; Tr. pp. 192-93). According to a report from the private school, petitioners' son made "slow and somewhat inconsistent" academic progress (Parent Ex. K). The child remained at the private school for the 2004-05 school year when he was in the second grade (Tr. p. 194). In the second grade, the school put in place a Wilson Fundamentals program for a reading group that included the child (Parent Ex. K; Tr. pp. 260-61, 264-65, 269, 271). During that school year, the student also received support at school from a "learning specialist," a certified special education teacher (Tr. p. 270) who saw him for one hour twice a week for help with reading (Tr. pp. 260-62, 270-71; Parent Exs. J at p.1; K). The child also received private tutoring for 55 minutes, twice a week from a "certified reading specialist" (Tr. pp. 193, 368; Parent Ex. J at p.1; see also Parent Ex. K). The private school advised petitioners during that school year that the private school was not appropriate for petitioners' son and that they should seek "other options"

case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

²On July 27, 2006, the Second Circuit Court of Appeals held that the Individuals with Disabilities Education Act (IDEA) does not preclude an award of tuition reimbursement where special education and related services have not been previously provided to a student by a public school or public agency (Frank G. v. Bd. of Educ., 459 F.3d F. 3d 356, 376 (2d Cir. 2006); see also Carmel Cent. Sch. Dist. v. V.P., 2006 WL 2335140, at *1 [2d Cir. Aug. 9, 2006]; Application of a Child with a Disability, Appeal No. 06-077; Application of a Child with a Disability, Appeal No. 06-041; Application of a Child with a Disability, Appeal No. 06-032; Application of a Child with a Disability, Appeal No. 06-021)

(Tr. pp. 215-16, 264-65; see also Parent Ex. K). The licensed clinical psychologist who was formerly the school psychologist at the private school testified that petitioners' son "remained significantly below grade level in terms of his basic academic reading and writing skills" when he was there for the second grade (Tr. p. 263).

By letter dated April 1, 2005 petitioner mother wrote the Chairperson of respondent's Committee on Special Education (CSE) (see Parent Ex. O). She advised the CSE Chairperson that she believed that the child was in need of special education services and requested a CSE evaluation and review (id.). Earlier that school year petitioners had referred their son to respondent's CSE but reportedly because respondent had proceeded to contact the private school for an evaluation without first obtaining petitioners' specific consent for doing so petitioners subsequently withdrew that referral (see Parent Ex. Q at p. 1; Dist. Exs. 2; 3).

A private psychologist evaluated petitioners' son over a period of six days in April and May 2005 (see Dist. Ex. 11 at p. 1). Administration of the Wechsler Intelligence Scale for Children – IV (WISC-IV) (id. at p. 9; Tr. p. 31) yielded a full scale IQ score of 106, which is in the average range of cognitive functioning (id. at p. 9). The evaluator noted that the student's verbal comprehension, working memory, and processing speed index scores on the WISC-IV were in the average range and his perceptual reasoning index score of 115 was at the 84th percentile (Dist. Ex. 11 at pp. 2, 9). However, she advised that the child's full scale IQ score was difficult to interpret and "a less reliable indicator of overall intellectual potential" because the differences among several of the child's index scores were statistically significant (id. at pp. 2, 8). She indicated that the child's memory functioning was uneven and that his high score on this index masked the fact that while he remembered many details in a story he had difficulty maintaining the sequence of events (id. at p. 8). She also indicated that the child had difficulty retaining visual abstract information and that his "struggle to pair auditory and visual abstract stimuli have had a direct, negative on his ability to master phonetic decoding, word recognition, and early writing skills" (id.). She noted that weaknesses in phonological awareness compounded his problems (id.). She advised that the child's oral language was "often awkward," and that this pattern extended to his writing (id.). His graphomotor control was reported to be good when he had all the time that he needed, "and quite poor when he was under time pressure" (id.). The child's "fine motor speed and dexterity was poor with his dominant hand" (id.).

The evaluator reported that many of the child's scores on tests of academic functioning were average but added, however, that "these scores mask the high degree of inconsistency in [the child's] performance" (id. at p. 8). She also indicated that discussion of the child's academic functioning must take his remediation schedule into account (id. at p. 7). The evaluator indicated that petitioners' son had not yet mastered phonetic decoding in that at times he was able to read difficult words but that "a few minutes later he made elementary errors" (id. at p. 8). She further indicated that none of his skills have become automatic despite an intensive remediation schedule (id.).

The psychologist stated that petitioners' son was "struggling with the effects of a language disorder (Mixed Receptive-Expressive Language Disorder, 315.31), graphomotor deficits (Developmental Coordination Disorder, 315.4), dyslexia (Reading Disorder, 315.00), and dysgraphia (Disorder of Written Expression, 315.2)" (id.). She advised that the child required "a curriculum that folds language therapy into reading and writing remediation" and that "because these deficits [were] intertwined, they cannot successfully be addressed separately" (id.). She also advised that the child "requires a full-time special education environment geared to students with strong intellectual functioning and significant language and learning disabilities" (id.). She indicated that without full time educational support, it was unlikely that petitioners' son would master early educational skills (id.).

The psychologist specifically recommended that the child not remain in his current educational setting, that he "requires a full-time special education placement," and that "[s]mall classes, specially trained teachers, on site specialists and a curriculum that combines remediation with knowledge acquisition are all essential for him" (id.). She further recommended that he continue to work with his individual tutor over the summer, and that he be reevaluated in three years (id.).

A "speech and language evaluation" report form indicates that respondent conducted a speech and language evaluation on May 17, 2005 (see Parent Ex. X). On the Oral and Written Language Scales (OWLS), the child received standard scores of 93 in listening comprehension, 95 in oral expression, and 94 for oral composite (id.). The child received a standard score of 96 on the Peabody Picture Vocabulary Test IIIB (id.). "[N]o errors noted - intelligible" was written in the space for the child's score on the Goldman Fristoe Test of Articulation (id.). With respect to the child's "observed" speech and language behavior, the report form indicates that petitioners' son "is intelligible in words and connected speech," that "articulation is within normal limits," and that the child can "converse and answer questions appropriately, but keeps his answers short" (id.). The form states that "all language areas fall in the average range, however there was scatter in testing exhibiting some highs and lows" and that "[the child's] strengths compensate for any weakness yielding an average composite and demonstrating very functional language" (id.). While the test form identifies an "examiner," no indication of that person's qualifications were provided and the form was unsigned (see id.).

A CSE referral packet was prepared by the child's private school and was reviewed by the school's principal on June 8, 2005 (see Parent Ex. R at pp. 1, 6). The report contains a narrative, a classroom observation report, a listing of resource services provided to the child, and individual teacher reports. According to the narrative report, petitioners' son had stronger expressive language skills than receptive language skills (id. at p. 7). Consistent with this, he did not always understand instructions and he needed them repeated and broken down into smaller steps (id. at p. 7). The narrative stated that the child had "strong conceptual skills" but "struggles with language-based skills," which "has affected his reading, both in decoding and in comprehension" (id.). The narrative advised that the child's "difficulty in language-based activities affects not only language arts, but math, science, and social studies as well" (id.). The narrative report

characterized the child's "retention of skills" as "inconsistent" (*id.*). The private school the child previously attended reported that the child had received teacher supports which, as indicated above, included the assistance of a learning specialist twice a week in reading and writing and use of the "Wilson Fundamentals" curriculum (*id.* at pp. 18-19). The child exhibited "positive relationships" with others and "interact[ed] easily in informal social situations" (*id.* at pp. 7, 8). Subject and learning area reports were consistent with the narrative and indicated that petitioners' son was functioning below grade level at the time of the review (*id.* at pp. 23-27).

A speech-language pathologist conducted a private speech-language evaluation of petitioners' son in June 2005 when he was eight years, two months old (*see* Parent Ex. I). The evaluator observed the child and administered a number of tests including the Receptive One Word Picture Vocabulary Test (ROWPVT), the Expressive One Word Vocabulary Test (EOWPVT), the Clinical Evaluation of Language Fundamentals – 4 (CELF-4) and the Phonological Awareness Test (*id.* at pp. 1-2). The child's standard score of 104 on the ROWPVT was at the 61st percentile (*id.* at p. 1). His score of 82 on the EOWPVT was at the 11th percentile (*id.*). On the CELF-4, the student's performance yielded subtest scores in the 50th percentile for concepts and directions, the 25th percentile for word structure, the 16th percentile for recalling sentences, the 63rd percentile for word class (receptive), the 9th percentile for word class (expressive), the 63rd percentile for sentence structure and the 9th percentile for expressive vocabulary (*id.*). The child's scores on six of the subtests of the Phonological Awareness Test were at or above age level, but his performance on subtests measuring the ability to identify sounds in isolation, deletion of compounds and syllables and substitution of sounds without the use of manipulatives were below age norms (*id.* at p. 2). The evaluator advised that the "child's performance on formal testing along with clinical observations suggest[ed] mild to moderate receptive and moderate expressive language delays" (*id.* at p. 4). The evaluator indicated that weaknesses were found across all areas of language learning (*id.*). "Relative strength was identified in the areas of receptive vocabulary and to a limited extent auditory comprehension" but the evaluator noted that "weaknesses, however, were much broader and affecting almost all areas of language learning" (*id.*). Auditory comprehension skills were found to be limited (*id.*). Auditory short term memory was found to be slightly below age/grade level expectancy and in the area of phonological awareness, the child's skills ranged from adequate to inadequate (*id.*). The evaluator determined that the child's expressive language skills were below age level expectancy with "[t]he most glaring features about his verbal production ... the reduction in length of sentences and the increased use of non-specific referring terms along with inaccurate/inappropriate words in place of content words" and with the result that the child "impress[ed] as a much younger speaker" (*id.* at pp. 4-5). The evaluator concluded that petitioners' son presented with "notable language and speech concerns that prevent his participation in a mainstreamed, academic setting" (*id.*). She advised that he was "a candidate for a language-based academic program with a small student-teacher ratio" so that "his strengths [could be] enhanced and compensatory strategies developed to deal with weaknesses in the various language areas" (*id.*). "Given his current level of functioning," the evaluator recommended a 6:1+1 program so that the child's "marked needs in the language areas can be met" (*id.*). She also recommended that petitioners' son

be offered speech-language therapy on an individualized basis four times a week to address his need to increase his vocabulary skills and word knowledge, increase his lexical access skills, increase his auditory comprehension skills, increase his use of age-appropriate syntactic forms, increase his narrative skills and increase his verbal reasoning abilities (id.).

A school psychologist conducted a psychological evaluation of petitioners' son on July 5, 2005 (see Parent Ex. V; see also Parent Ex. W). The psychologist noted that he observed an "overall inconsistent responsiveness" on the part of the child "which resulted in scattered scores" and that "[t]he presence of intratest scatter [was] particularly noteworthy reflecting [the child's] processing difficulties and the impact that it [had] on the consistency of his overall academic functioning" (id. at p. 1). The psychologist administered the Woodcock Johnson Tests of Achievement - III and reported that petitioners' son "obtained scores ranging from the Borderline through the Average ranges" (id.). The evaluator noted "[s]ignificant deficits in basic word attack skills," "that in those subtests that rely heavily on language [the child] had considerably difficulty," that his "basic ability to decode [fell] into the bottom of the Low Average range," and that when he was required to compute math using language, he demonstrated a significant weakness in his Borderline quantitative concept abilities" (id. at pp. 2, 3). The psychologist also noted "the presence of intratest scatter" "reflecting uneven processing and retention of basic academic material" (id. at p. 3). The psychologist advised that "[i]n all areas of academic functioning" petitioners' son required "time, one to one attention and structure to successfully complete the task" (id. at p. 2). The psychologist also administered the VMI, a test of visual motor integration (id. at p.1). He reported that "the scorable results of [the] test indicate Average visual motor functioning" but that a qualitative analysis of [the child's] protocol suggest[ed] inconsistent graphomotor functioning and the presence of anxiety when [the child was] required to integrate, organize, or process visual stimuli" (id.).

Respondent's psychologist "strongly recommended" that petitioners' son be provided with a small and structured special education classroom (id. at p. 2). He further advised that "[re]source room services that will help improve [the child's] basic language skills may be appropriate for him at this time (id.).

The child's tutor, who had tutored the child twice a week since September 2003 and who was a certified reading specialist, completed a report on petitioners' son dated July 6, 2005 (see Parent Ex. J). She indicated that her work with the child had "focused on the acquisition of beginning reading and writing skills" and that the child had "needed intensive multi-sensory teaching in order to attain the skills needed for beginning reading and writing" (id. at p. 1). With respect to beginning reading she advised that she worked on "learning the phonetic code, developing a sight reading vocabulary, and learning to use context clues as a decoding tool" (id.). Her report also advised that she also worked on "structured comprehension" and "vocabulary development" (id.). With respect to writing, she advised that her work focused on handwriting, phonetic spelling dictations and developing a sight spelling vocabulary of high frequency words (id.). She indicated that petitioners' son struggled with the acquisition of language and literacy skills (id.).

She reported that the child had "weak phonological processing and sequencing skills" and that he had been "able to learn sound-symbol associations after much practice and 'overlearning'"(id.). She advised that she had employed Orton-Gillingham and Lindamood-Bell techniques to help the child learn these letter sounds (id.). She also reported that the child "struggled to learn the motor sequences involved in letter formation" and that "with multi-sensory teaching, repetition, and practice, [he] learned to correctly and fluidly form letters, although at times he still [had] reversals" (id.). She also reported that petitioners' son "needed intensive work and practice in order to sequence and blend sounds to decode one-syllable words" and that he [had] learned to decode certain one-syllable words but that "these skills are not fully automatic" (id. at pp. 1-2). She further reported that the child's "acquisition of a sight reading vocabulary [had] been an area of relative strength" and that this [had] allowed him to read books at an early second-grade level with comfort and confidence" (id. at p. 2). She also reported that the acquisition of this sight vocabulary "also required multi-sensory intervention and much repetition and practice" (id.). The tutor also reported that the child's "weak receptive and expressive language skills ... also impacted upon his reading" and that his "word retrieval [had] also been an area of concern" (id.). She indicated that word retrieval had affected his oral and written language, and that it had also added to his struggle with reading (id.). She also indicated that because of this problem, the child's "struggle" with reading would increase as he encounter[ed] the developmental task of "reading in order to learn new concepts and vocabulary" (id.). She stated that the child also needed the expertise of an Orton-Gillingham based reading and writing program which also incorporates the development of receptive and expressive language skills and that a part time program would not be sufficient (id.).

The Head of the Lower Elementary Division of the child's previous private school prepared a letter dated July 7, for review by respondent's CSE (see Parent Ex. K). She indicated that she was familiar with the child and had worked closely with him, and his parents and his teachers over the past two years (id.). She reviewed the child's history at her school during first and second grades, the supports he received at that school during those grades, and his performance with those supports (id.). She reported that as the language based demands increased at the school during the child's second year and "despite active parental involvement, close support and monitoring by the school, adaptations to class assignments and work settings, remediation with the school's learning specialist twice a week, work in the Wilson Foundations program with a small group of children at least twice a week, as well as work outside of school with a private reading specialist twice a week, [the child] was unable to progress adequately ..." (id.). The Head of the Lower Elementary Division also reported that after many conversations with the child's parents, it was agreed that the prior private school was not the right place for petitioners' son at this time (id.). She indicated that it was believed that the child would "find success in a small self-contained special education class that offers a full-time language-based curriculum with direct instruction and small teacher-student ratios" (id.).

Respondent's CSE met on July 14, 2005 (Parent Exs. D at p. 1; F at p. 1). CSE attendance included petitioners, their advocate, a special education teacher, a regular education teacher, a school psychologist, and the CSE Chairperson (Parent Ex. F. at p. 4;

Tr. p. 314). The school psychologist who attended the meeting was not the same school psychologist who had evaluated the child earlier that month. Petitioners agreed to proceed at the meeting without an additional parent member present (Dist. Ex. 10). The CSE determined to classify petitioners' son as a student with a learning disability (Parent Ex. F at pp. 1, 4). At the meeting the CSE had before it and reviewed the evaluations conducted by respondent as well as the independent evaluations and other material from petitioners (see Tr. p. 200; Parent Ex. F at p. 4; see also Tr. pp. 207-09). The CSE recommended that petitioners' son be placed in an inclusion class and petitioners understood that this was the recommended placement (Parent Ex. F at p. 1; Tr. pp. 316, 317-18). The school psychologist who attended the CSE meeting testified that the recommended class would have been a general education class of about 25 students with two teachers and that eight or nine of the students in the class would be special needs children (Tr. p. 691). The CSE also recommended that the child be provided with speech-language therapy (Tr. p. 690). The record does not indicate that petitioners or their advocate objected to the recommended program at the time of the CSE meeting (Tr. p. 714).

By letter dated August 11, 2005 the CSE Chairperson mistakenly advised petitioners that the CSE had recommended that the child did not meet the criteria to be classified as a student with a disability and did not require special education at this time (Parent Ex. C).

By due process complaint dated August 18, 2005, petitioners' attorney requested an impartial hearing (Parent Ex. A2). Among other things, petitioners objected to the recommended inclusion class with related services of speech-language therapy and asserted that petitioners' son required a "full time, small, language based, special education setting with individualized learning environment in order to benefit from instruction" (id. at p. 2). The complaint also stated that petitioners unilaterally enrolled their son in the Windward School and that petitioners' son would begin attending Windward in September 2005 at public expense (id.).

By letter dated August 26, 2005, petitioners advised the CSE Chairperson that they had received another IEP from the CSE Chairperson which indicated that the child had been classified and that an inclusion class placement had been recommended (Parent Ex. G). Petitioners' letter also stated that no particular school placement had been recommended and petitioners advised the CSE Chairperson that they had no choice but to send the child to Windward for the 2005-06 school year (id.).

In conjunction with the scheduling of a new impartial hearing, petitioners filed a second or "amended" impartial hearing request dated October 11, 2006 and respondent did not object to it (see Tr. pp. 6-7; see Parent Ex. A1). The parties agreed that the October 11, 2006 impartial hearing request would be the impartial hearing request pending before the newly assigned impartial hearing officer (see Tr. p. 432).

In the amended complaint petitioners noted that they received no response or offer of a specific placement from respondent after sending their August 26, 2005 letter stating that no specific class placement has been recommended.

The impartial hearing commenced on December 5, 2006, continued on December 6 and 7, 2006, and concluded on January 18, 2007. The impartial hearing officer rendered a decision on March 12, 2007. The impartial hearing officer held that respondent had the burden of demonstrating the appropriateness of the program recommended by its CSE and that it had failed to do so (IHO Decision at p. 26). In particular, the impartial hearing officer concluded that the CSE's additional parent member was properly waived but that the July 14, 2005 CSE was not validly composed and the resulting IEP was invalid because respondent did not submit any evidence to show that the regular education teacher and special education teacher at the meeting were appropriately certified to teach the child or would be responsible to implement the IEP (*id.* at p. 27). The impartial hearing officer also concluded that the evidence was insufficient to determine if a current classroom observation was obtained in 2005 and that the absence of the classroom observation rendered the IEP defective (*id.*). The impartial hearing officer further concluded that the evidence submitted by respondent failed to include current medical information and that the absence of direct evidence of current medical information rendered the IEP defective (*id.*). The impartial hearing officer concluded that the evidence submitted by respondent did not include the social history report referenced in the IEP and that the absence of direct evidence that a social history had been completed in 2005 rendered the IEP defective (*id.* at p. 28). The impartial hearing officer concluded that the IEP did not properly identify the child's placement. In particular, she concluded that the IEP did not list the correct ratio for the inclusion program in that ratio listed on the IEP of 15:1 was inconsistent with the services actually provided, which was 8:1 in a general education class of 25 students 15 of whom were regular education students and eight of whom, were special education students with a regular education teacher and a special education teacher (*id.* at pp. 30-31). She also concluded that respondent was not required to identify on the IEP the particular location where the recommended program was to be located but that it was required to "provide a placement of the recommended inclusion class that the parents could observe" (*id.* at p. 31). The impartial hearing officer concluded that respondent had failed to show that the CSE provided petitioners with a particular third grade inclusion class that they could observe and that therefore the CSE had failed to specify the recommended placement on the July 14, 2005 IEP and that this was a violation of FAPE (*id.*). Regarding the timeliness of the CSE's evaluation, the impartial hearing officer found that the evaluations were not completed in a timely manner (*id.* at pp. 31-32).

In addition, the impartial hearing officer concluded that respondent did not show that the recommended inclusion program was appropriate for petitioners' son. She concluded that respondent's evaluating psychologist recommended a self-contained special education class for the child (*id.* at p. 29). She also concluded that petitioners had established their assertion that only in a small, self-contained class that offered a language based program could the student attain his annual goals (*id.* at p. 30). The impartial hearing officer also concluded that the child's "self-esteem problems and his

negative feelings about his inability to read" were not addressed by the July 14, 2005 IEP and that there was substantial evidence before the CSE that the child would not have his academic and emotional needs met by a placement in an inclusion class with speech and language services, which was what was recommended by respondent's IEP (id.).

The impartial hearing officer held that petitioners had the burden to prove that the services they obtained for their son were appropriate for his needs (id. at p. 32). The impartial hearing officer concluded that petitioners established that Windward was a small, self-contained class with a language based program and that the child's difficulties in reading and writing required such a program (id. at p. 33). She also concluded that the program at Windward matched the recommendations for petitioners' son of respondent's evaluating psychologist as well as the psychologist and speech-language pathologist who evaluated the child on behalf of petitioners (id. at pp. 33-34). However, the impartial hearing officer stated that she could not make a determination on progress because no staff from Windward appeared at the impartial hearing (id. at p. 34). She reviewed the student's progress reports and report cards (id.). Although she noted that the progress reports evidenced improvement in certain areas and that the child's teachers and that the report card indicated that the child "progressed from satisfactory to good in many key areas in language arts and math" that she would have preferred to question the staff as to the report card and progress reports (id.). The impartial hearing officer concluded that there was insufficient information in the record to demonstrate how the teachers at Windward met the child's special education needs (id. at p. 35). As a consequence, the impartial hearing officer concluded that petitioners failed to meet their burden (id.). Because of her conclusion that petitioners did not meet their burden regarding the appropriateness of their placement, the impartial hearing officer indicated that she did not consider whether the equities favored petitioners (id.).

This appeal and cross-appeal ensued. Petitioners assert that the impartial hearing officer erred in finding that petitioners failed to sustain their burden of demonstrating the appropriateness of the private placement.

Respondent's cross-appeal contends that the impartial hearing officer decision erroneously placed the burden of proof on the school district instead of on petitioners "in direct contravention" of the Supreme Court's ruling in Schaffer v. Weast, 546 U.S.49, 126 S.Ct. 528 (2005). It also contends that the impartial hearing officer erred as it related to the conclusion that it did not "offer and provide a free and appropriate public education to Petitioner." With respect to the impartial hearing officer's conclusion that the IEP did not properly identify the child's placement, respondents cite Concerned Parents & Citizens for the Continuing Education at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751 (2d Cir. 1980) and White v. Ascension Parish Sch. Bd., 343 F.3d 373 (5th Cir. 2003) and argue that the CSE's recommendation on the IEP of "inclusion class with related services of speech and language therapy to be provided at a District School" is sufficient. Respondent also argues that "coming off of more than twenty years of a desegregation court order," it has a policy of including parents in the "administrative determination" of naming the location of the recommended placement and that "accordingly, it continues to partner with parents in placing students in its schools and

seeks parents' input and cooperation in determining the location of where special education services would be provided." It also contends that testimony showed that there were eight inclusion classes in eight locations throughout the district, that these programs were "substantially similar," and that the testimony was that the location of the placement was not inserted into the IEP so that the parents of the child would have the opportunity, like other parents, to choose the location. Respondent further argues that petitioners did not collaborate in determining the school location and that had they not rejected the placement, respondent would have appropriately selected the location for the child and inserted that into the IEP.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)³ is to ensure that students with disabilities have available to them a free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁴

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). 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 (Burlington, 471 U.S. at 370-71). "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 child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

³ Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, et. seq.]). Since most of the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the generally IDEA apply. Therefore, unless otherwise specified, the citations contained in this decision are to IDEA 2004.

⁴ The term "free appropriate public education" means special education and related services that --
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

A FAPE is offered to a child when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures "an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 122). The LRE has been described as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]). In determining an appropriate placement in the LRE, the IDEA requires that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. §

1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also Walczak, 142 F.3d at 122; Bay Shore Union Free Sch. Dist. v. T., 405 F. Supp. 2d 230, 239-40 [E.D.N.Y. 2005]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]). Further, "[e]ven in cases in which mainstreaming is not a feasible alternative,' the statutory preference for a least restrictive placement applies" (Walczak, 142 F.3d at 132, quoting Sherri A.D. v. Kirby, 975 F.2d 193, 206 [5th Cir. 1992]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]; 8 NYCRR 200.6).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

I will first address respondent's cross-appeal as it relates to the impartial hearing officer's review of the evidence relating to the appropriateness of the program offered by respondent for petitioners' son. Respondent is correct that the impartial hearing officer placed the burden of persuasion on the wrong party. Moreover she did so, not upon notice to the parties at the impartial hearing, but after the close of the record and without notice to the parties. As a result of the United States Supreme Court decision in Schaffer, issued on November 14, 2005, the burden of persuasion has been placed on the party seeking relief at the impartial hearing (Schaffer, 126 S. Ct. at 531, 535). In this case, petitioners requested the impartial hearing and the burden of persuasion therefore was on them. In reaching her determinations, the impartial hearing officer found that respondent did not meet its burden with respect to several FAPE related issues and concluded that a FAPE was denied. She erred in improperly assigning the burden of persuasion to the disadvantage of respondent; therefore her determinations on those issues must be annulled (see generally Gagliardo v. Arlington Cent. Sch. Dist., 418 F. Supp. 2d 559, 572 [S.D.N.Y. 2006], rev'd on other grounds 2007 WL 1545988 [2d Cir. May 30, 2007]).

The impartial hearing officer properly considered whether the CSE should have included a parent member and properly determined that petitioners waived their right with respect to that. The impartial hearing officer also properly considered the question of whether an observation was conducted and whether the CSE reviewed and considered the results of a physical examination of the child as petitioners did raise these two issues. However, the impartial hearing officer's conclusion that an observation was not conducted and considered by the CSE was error as a review of the record indicates that an observation of the child during second grade was done and that it was considered by the CSE (see Parent Exs. F at p. 4; R at p. 9). The impartial hearing officer also erred in

concluding that there was a deprivation of a FAPE because the CSE did not consider medical information. While the impartial hearing officer was correct that the CSE did not review and consider this information, I note that the child's classification is not at issue in this appeal and that petitioners did not raise any issue regarding the connection between the medical information and the placement issues that they have raised. However, although respondent was not required to identify a particular school location on the IEP, the record reflects that respondent never actually offered the student a school to attend, even after petitioner gave notice that one was not offered. In failing to offer a location of a school to attend prior to the commencement of the school year, the child was denied a FAPE.

In light of my determination that because respondent's failure to offer petitioners a school in which an IEP could be implemented resulted in a denial of FAPE for petitioners' son, I do not need to consider the other issues raised in respondent's cross-appeal. Further, in light of my determination that respondent did not offer a FAPE to petitioners' son, petitioners have therefore prevailed with respect to the first criterion of the Burlington/Carter analysis for an award of tuition reimbursement for their son's attendance at Windward for the 2005-06 school year.

I must now consider whether petitioners have met their burden of demonstrating that the placement selected for the child at Windward for the 2005-06 school year was appropriate (Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). The private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the child's special education needs (Application of a Child with a Disability, Appeal No. 04-108; Application of a Child with a Disability, Appeal No. 01-010). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105). However, while evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo v. Arlington Cent. Sch. Dist., 2007 WL 1545988 at *9). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65).

Windward is a private coeducational day school for children with language-based learning disabilities (Dist. Ex. 8; Parent Exs. Y at pp. 1, 2; Z at p. 1). It provides direct instruction in small class settings (Parent Exs. Y at pp. 2, 4; Z at p. 8). The Lower School, which includes the third grade, has three periods a day specifically focusing on the language arts including oral language, reading, spelling, and writing (Parent Exs. Y at p. 7; Z at p. 5). The school uses specialized methods of teaching reading, including the Orton-Gillingham program for reading instruction and includes education and instruction both in decoding skills and comprehension skills (see Parent Exs. Y at p. 4, 6; Z at p. 3; see also Tr. pp. 391-93). Respondent does not dispute that petitioners' son has a learning disability which includes a "language based" reading disorder (see Tr. pp. 547, 556, 561, 567, 573, 574-75, 594, 595, 606, 607, 619, 684). The impartial hearing officer concluded that the program at Windward matched the recommendations for petitioners' son of respondent's evaluating psychologist as well as of the psychologist and speech-language pathologist who evaluated the child on behalf of petitioners (id. at pp. 33-34; see also Parent Exs. V, I, H).

While it is true that no one from Windward testified at the impartial hearing, that fact alone is not dispositive of whether petitioners are able to show that Windward was an appropriate placement for their son (Application of the Bd. of Educ., Appeal No. 05-092; see also Application of a Child with a Disability, Appeal No. 02-093; Application of a Child with a Disability, Appeal No. 01-105; Application of a Child with a Disability, 97-02; Application of a Child with a Disability, Appeal No. 96-09). In this case, the record includes a number of Windward documents relating to the child including but not limited to the child's schedule, report card during the 2005-06 school year, progress reports for that school year which contain narrative and other relevant information relating to the child, evaluations from and testimony of persons who were both familiar with the child as well as with Windward including a licensed clinical psychologist who had been the school psychologist at Solomon Schechter when the child attended that school (Tr. p. 258) and the reading specialist who had tutored the child for almost two years (Parent Ex. J at p. 1), and testimony from petitioner mother regarding that school (see Tr. pp. 305-06). I note that the record also contains the tutor's testimony with respect to her observations of the child at Windward in three classes in March 2006 during the 2005-06 school year.

The record also contains information regarding the instructional strategies used by Windward to address the child's needs. For example, in a January 2006 progress report, the child's language arts teacher indicated that petitioners' son was "learning strategies to decode and spell words with one or more syllables containing a variety of sounds" and "applying these strategies to daily dictations, word lists and text" (Parent Ex. U at p. 6). Repeated exposure to spelling rules was used to reinforce his learning. Redirection was used to help the child remain on task and to complete his work (id.). Spelling and the use of cursive writing was taught through daily written dictation (id. at pp. 3, 6). He was also learning to use Quick Outline to plan and organize his ideas and for writing paragraphs (id. at p. 6). Manipulatives were used in math (id. at p. 7).

The child's private tutor during 2004-05 observed him in three classes at Windward in March 2006 (Tr. pp. 417-18). In testimony, she described her observations in each class. In a reading lesson, the child's teacher provided sentences which had examples of a word class that was the lesson for the day and the class read aloud from a text that incorporated those sentences (Tr. p. 418). In math class, the private tutor testified that "the teacher kept breaking down those terms throughout the course of the instruction through different activities that the kids did and ... she kept coming back to the language they were using" (Tr. p. 419). She described strategies used by the math teacher to demonstrate how the child was to identify relevant and irrelevant information when solving word problems and how the child was to determine which math procedures to use (*id.*). In writing class, the Windward teacher reviewed "categorizing words" such as "who," "what," "when," "where" and "why," and gave the class words to place in those categories (Tr. p. 420). When introducing use of the conjunction "if" the teacher first reviewed other conjunctions the students had learned (Tr. pp. 420-21). While reading aloud from a book entitled If I Were President, she stopped to provide explanations of concepts such as the branches of government, after which students wrote sentences beginning with "If I were president" (*id.*). The private tutor commented on the child's "beautiful cursive handwriting" and noted that this was a new skill, as she had not taught him to write in cursive the previous year (Tr. p. 421).

The record shows that petitioners' son made some progress at Windward. In January 2006 the child's language arts teacher reported that the child's reading had become more fluent and accurate and that his focus had improved (Parent Ex. U at p. 6). He had learned the lower case cursive letters and was using cursive writing in his daily written dictation. His teacher reported that the child would frequently choose to write simple sentences but could expand them to more complex sentences if given assistance. In June 2006, the child's language arts teacher reported that the child's written work had improved, that he had learned the cursive alphabet, and that he was now able to use Quick Outline to write a basic paragraph (*id.*). In reading, the child was using strategies taught in class to decode multisyllabic words (*id.*). The teacher reported that the child's spelling had improved and, although he still exhibited difficulty discriminating short vowel sounds and reversed letters, he could usually correct his errors when prompted to review his work (*id.*).

In January 2006, the child's math teacher reported that the child had learned the skills necessary to solve missing addends, fact families and rounding problems (*id.* at p. 12). His computations were described as "usually accurate with only a few mistakes" and his teacher noted that the student could usually correct the mistakes himself (*id.*). In June 2006, the teacher reported that the child's computational skills had improved and that he had learned to apply them to problems (*id.*).

Upon review of the Windward progress reports and the observations of the child's private tutor, I find that there is information in the record describing strategies used by Windward to instruct the child in his areas of academic need. I also find that Windward progress reports provided objective measurable information regarding the child's academic progress. The strategies described are consistent with the recommendation of

the private psychologist who conducted the private psychoeducational evaluation of the child in April and May 2005 and the private speech-language therapist who evaluated the child in June 2005 (see Parent Exs. H at p. 8; I at p. 5), as well as the reading specialist who had tutored petitioners' son in reading and writing skills for almost two years (see Parent Ex. J at p. 2) and respondent's own evaluating psychologist (see Parent Ex. V at p. 3), all of whom recommended placement in a small self-contained special education classroom environment that offers a full-time language based curriculum.

However, I am concerned by the lack of information in the record regarding how the child's speech-language needs are addressed at Windward. The private psychologist who evaluated petitioners' son in April and May 2005 indicated that the child's "struggle to pair auditory and visual abstract stimuli have had a direct, negative (sic) on his ability to master phonetic decoding, word recognition, and early writing skills" and noted that his difficulties were compounded by weaknesses in phonological awareness (Dist. Ex. 11 at p. 8). The private psychologist stated that petitioners' son was "struggling with the effects of a language disorder" and offered diagnoses of a mixed receptive-expressive language disorder, in addition to diagnoses of disorders of developmental coordination, reading and written expression (id.). The private psychologist specifically recommended that the child receive services in a program with "on site specialists and a curriculum that combines remediation with knowledge acquisition" (id.). The child's private tutor, who had tutored the child twice a week since September 2003 reported that the child had "weak phonological processing and sequencing skills" (Parent Ex. J at p. 1). The private speech-language pathologist who evaluated the child in June 2005 identified deficits in expressive language, auditory comprehension, auditory short term memory and phonological awareness and indicated that these weaknesses affected "almost all areas of language learning" (Parent Ex. I at pp. 1, 2, 4). She recommended that petitioners' son be offered speech-language therapy on an individualized basis four times a week to address his need to increase his vocabulary skills and word knowledge, increase his lexical access skills, increase his auditory comprehension skills, increase his use of age-appropriate syntactic forms, increase his narrative skills and increase his verbal reasoning abilities (id. at p. 5). While the Windward reports offer evidence of some progress in reading, writing and written expression, the reports are devoid of any information regarding how, in the absence of formal speech-language therapy, the child's language deficits are addressed. Given the severity of his language needs as described in the record by petitioners' private evaluators, as well as the recommendation by the private speech therapist that the child receive individual speech-language therapy four times per week, I find that, while Windward is teaching the child skills, it is not an appropriate program because it does not offer speech-language services to remediate the severe underlying language deficits which have been identified by petitioners' private evaluators.

Having determined that petitioners did not meet their burden to establish the second criterion of the Burlington/Carter analysis for tuition reimbursement, I need not reach the issue of whether equitable considerations support petitioners' claim for tuition reimbursement, the third criterion of the Burlington/Carter analysis, and the necessary inquiry is at an end (Application of a Child with a Disability, Appeal No. 07-015;

Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent it is inconsistent with this decision.

Dated: Albany, New York
July 5, 2007

PAUL F. KELLY
STATE REVIEW OFFICER