



The University of the State of New York

The State Education Department State Review Officer

No. 07-103

Application of the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Ingerman Smith, LLP, attorney for petitioner, Ralph C. DeMarco, Esq., of counsel

Don L. Doernberg, Esq., attorney for respondents

DECISION

Petitioner appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' son and ordered it to reimburse respondents for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2006-07 school year. Petitioner also appeals from the impartial hearing officer's determination that the student should be classified as having a learning disability. The appeal must be dismissed.

The student was attending Eagle Hill when the impartial hearing began in February 2007. Eagle Hill has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

The student's profile is very complex and he has difficulties that cross multiple domains (Tr. pp. 58, 66). His verbal skills are above average, while his nonverbal and spatial skills are deficient (Joint Ex. 11). He has deficits in reading, writing and mathematics (Joint Ex. 14 at p. 7). He also has receptive language and communication difficulties (Tr. p. 121; Joint Ex. 12 at p. 8). The student also exhibits significant delays in visual motor control, visual motor integration and motor coordination (Joint Ex. 16 at p. 4). His graphomotor skills are below age expectancy (Joint Ex. 13 at p. 6). He also has weaknesses in the areas of attention, concentration, perceptual reasoning, working memory and processing speed (*id.* at pp. 5-6). In addition, the student has social deficits that limit his adaptive functioning (Joint Ex. 11 at p. 5). He has difficulty engaging and socializing with his peers (Tr. p. 641). He also exhibits anxiety (Joint Ex. 7 at p.

3). The student has a history of seizures, but has not had a seizure since approximately 2004 (Tr. pp. 192, 235).

The student began attending school in petitioner's district for the 2001-02 school year (Joint Ex. 12 at p. 1). In April 2002, he was referred for a private psychological evaluation to assess his cognitive and academic functioning (Joint Ex. 26). His teachers at the time reported behavior problems including arguing with adults and difficulty making transitions (id. at p. 1). In addition, the student exhibited difficulties with fine and gross motor tasks and social skills (id.).

The psychologist who conducted the evaluation reported that the student's overall cognitive functioning measured in the average range of intelligence (Joint Ex. 26 at p. 9). She noted, however, that the student's perceptual organization skills were not as well developed as his verbal comprehension skills (id.). The psychologist indicated that the student's reading skills were at an appropriate level for his age and that his mathematical skills were just beginning to develop (id. at p. 7). She also indicated that the student's sensorimotor functions were not developed to expected levels for his age (id. at p. 9). The psychologist reported that memory was an area of weakness for the student and that the student's memory appeared to be affected by his poor ability to sustain attention (id.). She noted that the student was easily frustrated (id.). She also noted that the student had difficulty staying engaged in tasks that required sustained mental effort and that the effort to stay engaged tired him (id.). Additionally, the psychologist indicated that the student exhibited hyperactive and impulsive behavior that further interfered with his learning (id.).

The psychologist concluded that the student's inattentiveness and inability to sustain his attention met the criteria for a diagnosis of an attention deficit hyperactivity disorder (ADHD), predominately inattentive type (Joint Ex. 26 at p. 9). She noted that reports of the student's behavior in school, observations during testing and observations in the classroom setting indicated that the student had severe problems with social skills, lack of flexibility, and oppositional and defiant behavior (id.). She indicated that the student's "behavior was markedly different than that of his peers, that he was isolated from his peers, and had difficulties in his interactions with adults" (id.).

The student continued to attend school in petitioner's district for the 2002-03 school year (Joint Ex. 12 at p. 1). During that year, he was initially classified and received special education services (id.). For the 2003-04 school year, the student remained in petitioner's district and continued to receive special education services (id.).

In November 2003, respondents arranged for a private neuropsychological evaluation of their son (Joint Ex. 23). The neuropsychologist described the student as marginally related (id. at p. 8). He reported that the student's verbal ability was much better than his nonverbal skills (id.). He further reported that while the student had acquired the ability to decode some sight words, he had not developed the knowledge of sound symbol correspondence (id. at p. 6). The student's reading comprehension skills fell in the deficient range as did his math computation and problem solving skills (id. at pp. 7-8). The neuropsychologist noted that throughout the academic portion of the evaluation the student displayed significant difficulty with all aspects of self-regulation (id. at p. 8). He further noted that the student exhibited deficits in motor skills, perceptual organizational abilities, and spatial memory, and indicated that this cluster of deficits "has been

described in experimental literature as a 'nonverbal learning disorder (NLD)' (id.). The neuropsychologist also noted that the student's sustained attention was poor and that his working memory, planning, and organizational skills were far below age expectancy (id.). He found that the student had many of the core symptoms of the inattentive type of an ADHD (id.). He further noted that the student's attention, executive, and perceptual/spatial deficits were causing a very serious impairment in the student's learning (id. at p. 9). The neuropsychologist concluded that the student met the criteria for "wide ranging learning disorders (Disorders of Reading, Mathematics, and Written Expression)" (id.). He recommended an extremely small class size, highly integrated lesson planning across all subjects, intensive individualized remediation in reading and mathematics, and consideration of a private school (id.).

The student began attending Eagle Hill in September 2004 for the 2004-05 school year (Joint Ex. 9 at p. 1). In spring 2005, the Committee on Special Education (CSE) conducted various evaluations of the student (Joint Exs. 12; 13; 14; 15; 16; 17). A May 2005 physical therapy evaluation report indicated that results of the Test of Gross Motor Development II placed the student's gross motor skills in the average range (Joint Ex. 17 at p. 3). The report further indicated that the student scored in the average range for his locomotion skills and in the poor range for his object manipulation skills (id.).

In a May 2005 occupational therapy evaluation, the evaluator reported that the student exhibited significant delays in visual motor control, upper limb speed/dexterity, visual motor integration and motor coordination (Joint Ex. 16 at p. 4). The evaluator also reported that the student demonstrated moderate delays in response speed and visual perception (id.). Observations by the evaluator indicated that the student had difficulty with sensory input and performing complex fine motor and gross motor tasks (id.).

In May 2005, one of petitioner's learning specialists conducted an educational evaluation of the student (Joint Ex. 14). The evaluator noted that the student appeared apathetic to the testing and was not being careful with his responses, especially when tasks became more difficult (id. at p. 1). She indicated that due to the student's testing behavior, the tests results should be interpreted with caution (id. at p. 2). The evaluator reported that the student scored below the average range in reading, written language and math (id. at p. 7). She indicated that subtests that required the student to work quickly, efficiently and automatically were more difficult for the student (id.). She also indicated that the student struggled to sustain his attention in many tasks (id.).

In a May 2005 psychological evaluation of the student, one of petitioner's school psychologists indicated that the student had recently been placed on medication to address his ADHD and noted that through the entire testing the student was biting his nails (Joint Ex. 13 at p. 2). The school psychologist reported that the student demonstrated average verbal abilities and weaknesses in the areas of attention, concentration, perceptual reasoning, working memory and processing speed (id. at pp. 5-6). The student's graphomotor skills were below age expectancy and his short-term visual memory skills were low average (id. at p. 6).

A speech-language evaluation of the student was conducted in May 2005 (Joint Ex. 12). Testing was administered in one 2-hour session during which the student bit his fingernails frequently and chewed on his sleeve (id. at p. 1). Results of the speech-language evaluation indicated weaknesses in working memory and more apparent difficulty in receptive language

tasks than expressive language tasks (id. at p. 8). Specific weaknesses included recognizing and supporting semantic relationships, which the evaluator indicated affected both comprehension and written expression (id.).

The neuropsychologist conducted another examination of the student in June 2005 (Joint Ex. 11). He described the student's emotional state as mildly labile and dysphoric (id. at p. 1). He indicated that cognitively the student's ability was grossly uneven, consistent with prior testing (id. at p. 2). Academically, the student's reading decoding, reading fluency, reading comprehension and oral reading were below average and his written expression and math operations were in the deficient range (id. at p. 4). The neuropsychologist noted that the student demonstrated weak social and pragmatic skills (id. at p. 1). The student's language pragmatics were poor as he struggled to expand conversation in reciprocal fashion (id. at p. 2). A structured psychiatric interview did not find evidence of a mood, anxiety, psychotic, developmental or behavioral disorder; however, subthreshold elevations were noted on the anxiety and developmental module (id. at p. 5). The neuropsychologist noted that the student had a continuing NLD and continued to show marked attentional dysfunction (id.).

The student continued to attend Eagle Hill for the 2005-06 school year (Joint Ex. 10). A December 2005 report from the student's educational advisor at Eagle Hill indicated that the student was having difficulty during unstructured class activities and recess (id. at p. 1). The educational advisor reported that the student found it difficult to remain on topic and although he was working on improving skills, his inability to build upon what others were saying and navigate his interactions remained an obstacle for him (id.). The educational advisor also reported that during recess, the student was better able to handle more unstructured time in small "callback groups" where there was teacher proximity and guided participation in the activities (id.). She noted that the student was able to transition more fluidly and that he was better able to follow the routine and quickly begin a task even in classes that met after recess (id.). The student's educational advisor further indicated that the student was working with the speech and language teachers to gain confidence in answering questions within the small group, but had not been able to bring that confidence to the larger classroom (id.). She also indicated that the student was beginning to understand that he was not alone in his struggle to learn more effectively (id. at p. 2).

In March 2006, one of petitioner's social workers and one of petitioner's special education teachers conducted a two hour classroom observation of the student at Eagle Hill (Joint Ex. 9). The student was first observed in his math class, which had a total of three students (id. at p. 1). The student worked diligently on a multiplication worksheet and used a compensatory strategy of speaking the numbers and operations softly to himself under his breath (id.). After he completed the worksheet, the teacher prompted him to review the problems he could not answer, but the student did not look back at his paper (id.). The observers noted that the student became anxious as his speech was pressured and he was fidgeting (id.).

The student also was observed in his tutorial class which had two other students (Joint Ex. 9 at p. 2). He did not follow teacher directions on several occasions and was prompted and redirected numerous times (id. at pp. 2-4). During recess break, the student had the option of going to the library, going outside to play or going to the gym and he chose to go to the library (id. at p. 4). For the first few minutes he observed another student on the computer, then spent the rest of his break talking with a teacher (id.). The observers met with the student's educational

advisor who indicated that the student had made slow growth, though he had difficulty in the area of writing, especially when asked to generate his own ideas (id.). The educational advisor also indicated that the student's social skills remained immature but that he was not an aggressive behavior problem (id.). She also advised the observers that making friends was difficult for the student and that he struggled with anxiety (id.). She further advised the observers that she was trying to address the student's social difficulties by forming a partnership with another student and focusing on conversational skills (id.).

On May 5, 2006, the neuropsychologist reassessed the student's academic progress in the areas of reading, mathematics and writing (Joint Ex. 8). He reported growth in the student's reading skills, but noted continued difficulty in the student's oral reading rate and decoding accuracy (id.). He also reported that the student demonstrated progress in mathematical skills, but noted that the student's quantitative reasoning skills were still below average (id.). The neuropsychologist indicated that the student continued to have significant difficulties with the basic organization of a story and that his spelling, sentence structure and punctuation were very delayed for his age (id.). He further noted that the student showed less resistance to academic tasks and improved confidence as a learner (id.).

A private neurologist evaluated the student on May 10, 2006 (Joint Ex. 7). The neurologist noted evidence of a NLD characterized by deficits in visual motor, fine motor and gross motor skills (id. at p. 3). She indicated that the student was socially awkward and could be tangential in his thinking (id.). She also indicated that the student exhibited a significant receptive and expressive language disorder with difficulty with sentence structure and semantics, that his attention was inconsistent and that his executive functioning skills were delayed (id.). The neurologist recommended that the student was in need of continued placement in a small, special education setting with a low student to teacher ratio; the availability of one to one instruction; and counseling, speech and occupational therapy (id.).

The CSE convened on June 6, 2006 for the student's annual review and to recommend a program for the student for the 2006-07 school year (Joint Ex. 2). It determined that the student continue to be classified as having a learning disability and that he be placed in the meeting academic challenges III (MAC III) class (id. at p. 1). It further recommended related services of group counseling, group and individual occupational therapy, group speech-language therapy and social skills training once per week for 30 minutes (id. at pp. 1-2). In addition, the CSE recommended that the student participate in the regular education setting for special area classes, lunch and recess (id. at p. 2).

In a June 2006 progress report from Eagle Hill, the student's educational advisor indicated that the student continued to struggle with the give and take of a conversation and that he tended to focus a conversation around himself (Joint Ex. 6 at p. 2). She further indicated that during unstructured times the student struggled with the normal physical interactions that occurred in the hallway or on the playground (id.). She also indicated that the student had difficulty with the appropriate pragmatic behaviors to begin class (id.).

In a letter dated August 29, 2006, the neurologist who evaluated the student in May 2006 described the student as complex with significant academic, cognitive and social deficits (Joint Ex. 22). She indicated that the student had difficulty with receptive and expressive language; that his fine motor, gross motor and graphomotor skills were poorly developed; that his attention

was limited; and that he was self-directed (id.). She also indicated that the student's interactive skills and relationships with peers was impaired (id.). The neurologist reported that the student had difficulty navigating in a small classroom, that he became extremely anxious and agitated in large venues and that he "unravels" during unstructured time when he is not carefully supervised (id.).

The neurologist advised that because of the student's complex difficulties "the educational setting in which he is placed is most important" (Joint Ex. 22). She opined that in order for the student to learn he needed to be in a small self-contained classroom (id.). She noted that the student had exhibited difficulty in his class with only three students and much individualized attention, and that a class with 12 students may be too overwhelming for him (id.). She indicated that the student required a lot of one on one attention and careful monitoring of his behavior (id.). She also indicated that she did not believe that the student would tolerate inclusion in a classroom for even part of the day and would become overly agitated and anxious in the mainstream for gym and/or lunch (id.).

In August 2006, respondents arranged for a private psychiatric assessment of their son to understand his emotional needs in relation to an appropriate school placement and treatment (Joint Ex. 4). The private psychiatrist indicated that the student had severe developmental problems (id. at p. 3). She further indicated that the student's "constitutional vulnerability has led to severely delayed language development despite evident intelligence and willingness to listen" (id.). She also indicated that the student's difficulty in communicating with and understanding others caused him an inordinate amount of difficulty in learning both academically and motorically and as a result he was very impaired socially (id.). The private psychiatrist noted that the student was extremely frustrated, angry, and anxious, which further complicated his ability to move forward (id.). She indicated that anxiety overwhelmed the student at times and caused him difficulty in distinguishing reality from fantasy and inner perceptions from outside experiences (id.).

The private psychiatrist recommended that the student continue in a small classroom in a specialized school for children with language and learning disorders for all his classes in order to accommodate his extreme social, emotional, academic and physical deficits (Joint Ex. 4 at p. 3). She indicated that continuity within the school setting would assist the student to feel secure and make friends (id.). She also recommended ongoing speech-language therapy and continuation of his psychotherapy to deal with his anger and anxieties (id.).

The student remained at Eagle Hill for the 2006-07 school year (Joint Ex. 27). In September 2006, the neuropsychologist evaluated the student for educational and treatment decision making (Joint Ex. 5). He noted that the student was marginally related and distant in style, exhibiting an anxious mood throughout the testing (id. at p. 1). He also noted that the student had difficulty maintaining a consistent focus on tasks for sustained periods of time and struggled with shifting between tasks (id. at p. 2). The neuropsychologist indicated that the student's attention tended to fade quickly and he often required structure, guidance, and redirection (id.).

Results of the Children's Diagnostic Interview Schedule (CDIS) were significant for an anxiety disorder (Joint Ex. 5 at p. 2). The neuropsychologist indicated that the anxiety disorder in large part was caused by the student's unconventional ways of interpreting social information,

social skill deficits and poor reflective capabilities (id. at p. 3). He further indicated that these deficits often left the student bewildered in social encounters with his peers which increased his high baseline anxiety (id.). He explained that anxiety derailed the student's ability to organize his affective experience and think in a goal directed manner. Results of the CDIS were near threshold for psychosis, however, the neuropsychologist reported that the data did not support a stable psychotic process at the time (id. at pp. 2, 3). In addition, the neuropsychologist noted that the student presented with an ADHD and NLD as articulated in his prior reports (id. at p. 3).

The neuropsychologist indicated that the student remained highly fragile and needed a highly integrated psychosocial and educational program as well as psychotherapeutic intervention (Joint Ex. 5 at p. 3). He noted that the student had done well academically and behaviorally at Eagle Hill and opined that a change in placement would be detrimental in many respects. He further opined that the student could not manage a complex transition such as a change in school without a high risk for deterioration in his psychological functioning (id.).

In November 2006, petitioner arranged for a psychiatric consultant to assess the student and to make recommendations with regard to placement settings (Joint Ex. 3). The psychiatric consultant noted that the student made less than the average amount of eye contact and that his thinking at times showed repetitive ideations (id. at p. 2). He described the student's affect as fairly constricted and indicated that the student was anxious (id.). He further indicated that the student's insight was fair, but that he used fantasy to manage his stress (id.). He reported that the student feels stressed but was not able to define what the stress was (id.).

The psychiatric consultant indicated that the student had significant symptoms that were consistent with a developmental disorder (Joint Ex. 3 at p. 2). He indicated that the student had repetitive and preservative thoughts, difficulties with eye contact and difficulties reading social situations (id.). The psychiatric consultant further indicated that the student was able to function quite well when the academic demands were consistent with his ability levels (id.). He also indicated that emotional concerns did not significantly affect the student's learning and that a therapeutic setting did not seem to be indicated (id.).

The psychiatric consultant posited the following diagnoses: Pervasive Developmental Disorder, not otherwise specified (NOS); Anxiety Disorder, NOS; ADHD, by history; Learning Disorder; Speech Language Disorder; and Motor Coordination Disorder as defined by previous reports (Joint Ex. 3 at p. 2). He viewed the prognosis of the student as good and stated that the student would benefit from a program that academically was in line with his learning strengths and weaknesses and provided significant structure and support (id. at p. 3).

The CSE convened on November 16, 2006 at the request of respondents to consider additional information (Joint Ex. 1 at p. 1). It determined that the student's classification be changed to a student having an emotional disturbance (id.). It continued to recommend that he be placed in the MAC III class with related services of group counseling, group and individual occupational therapy and group speech-language therapy (id.). The CSE also recommended that the student participate in the regular education setting for special area classes, lunch and recess (id. at p. 2). In addition, the CSE believed that there was enough evidence in recent information to consider additional options and decided to explore alternative placement options that might meet the student's learning, emotional and therapeutic needs (id. at p. 7). The CSE discussed alternative programs, explained the referral process to respondents and indicated that upon

completion of the referral process it would reconvene to make a final determination for placement and program (id.). Respondents provided written consent to the CSE to send referral packets to alternative programs (Joint Ex. 21); however, the following day they rescinded their consent (Joint Ex. 20).

On December 6, 2006 respondents filed a due process complaint notice alleging that the program the CSE recommended for their son for the 2006-07 school year was not appropriate because, among other things, it provided for the student to participate in the regular education setting for special area classes, lunch and recess (Joint Ex. 19). They also alleged that the alternative programs the CSE suggested were not appropriate because they were not intensive, language-based programs (id.). Respondents requested that the student continue at Eagle Hill and requested reimbursement (id.). Petitioner filed a response denying each and every allegation in respondents' due process complaint notice (Joint Ex. 18).

The impartial hearing began on February 7, 2007 and concluded on April 27, 2007 after six days of testimony. The impartial hearing officer found that the CSE should not have changed the student's classification from having a learning disability to having an emotional disturbance. She further found that the program recommended for the student for the 2006-07 school year, specifically the mainstreaming component of the program, was not adequate to meet the student's needs (IHO Decision at p. 7). She also found that respondents demonstrated that the recommended program did not provide their son a free appropriate public education (FAPE)¹ (id.). In addition, the impartial hearing officer found that respondents established that the program they provided for their son was appropriate and that the equities favored their claim for reimbursement (id.).

Petitioner appeals contending that the impartial hearing officer erred in determining that the student should be classified as having a learning disability, that the 2006-07 individualized education program (IEP) was not appropriate for the student, that Eagle Hill was appropriate, that equitable considerations supported respondents' claim for tuition reimbursement and in disregarding the testimony of its witnesses.

First, petitioner asserts that the impartial hearing officer erred in determining that the student should be classified as having a learning disability. A learning disability is defined as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of

¹ 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]).

environmental, cultural or economic disadvantage (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The November 2006 CSE changed the student's classification from having a learning disability to having an emotional disturbance (Joint Ex. 1 at p. 7). The information considered by the November 2006 CSE included the August 2006 neurological evaluation report which noted that the student continued to demonstrate serious academic deficits and severe language deficits (Joint Ex. 22). The CSE also considered the September 2006 private psychiatric assessment which indicated that the student's difficulty in communicating had caused him inordinate difficulty in learning (Joint Ex. 4 at p. 3). Further, the report from petitioner's psychiatric consultant indicated that emotional concerns did not significantly impact the student's learning and that a therapeutic setting was not indicated (Joint Ex. 3 at p. 2). The neuropsychologist testified that the student's primary educational needs fall within his reading, writing, mathematics and language difficulties (Tr. p. 275). The private psychiatrist testified that the student's primary problem is rooted in his educational and language difficulties (Tr. pp. 129-30). In addition, as noted above the neurologist who has been treating the student since 2004 testified that the student had a moderately severe neurobehavioral disorder where the "main mechanism was a language and social disability" (Tr. p. 215). He further testified the student's anxiety and emotional difficulties stem from his communication difficulties (Tr. p. 240). He states that addressing the student's learning disability would help him become more resilient and less fragile (*id.*). The medical professionals are consistent in indicating that the student's primary needs are in the educational arena (Tr. pp. 274-76). I agree with the impartial hearing officer and find that the record demonstrates that the student meets the criteria for classification as having a learning disability.

Petitioner also challenges the impartial hearing officer's determination that the June 2006 IEP was not appropriate. Specifically, petitioner asserts that the impartial hearing officer erred in finding that the mainstream component of the MAC III program would put the student at "substantial risk." It argues that the student would have the support of the aide who accompanied the MAC III students in the mainstream settings and that the record does not support that any alleged anxiety would impede the student's learning and/or prevent him from receiving a FAPE.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [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][D]; 34 C.F.R. § 300.17[d];² see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

² The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). 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 a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and 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 Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]). The placement of an individual student in the least restrictive environment (LRE) shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). In addition, in arranging for the provision of nonacademic services and activities, including meals and recess periods, the school district must ensure that each child with a disability participates with nondisabled children to the maximum extent appropriate to the needs of that child (34 C.F.R. § 300.117).

When the CSE convened in June 2006 to recommend a program for the student for the 2006-07 school year, the student's neuropsychologist participated in the meeting by teleconference (Joint Ex. 2 at p. 6). The IEP developed as a result of the June 2006 meeting included comments from CSE meetings in 2004 and 2005 during which the neuropsychologist's reports were reviewed (id. at pp. 7-11). As noted above, in his 2003 report, the neuropsychologist indicated that the student needed an extremely small class size and recommended consideration of a separate school for children with significant learning needs (Joint Ex. 23 at p. 9). In his 2005 report, the neuropsychologist recommended that the student remain at Eagle Hill (Joint Ex. 11 at p. 5).

The student's neuropsychologist testified that he first evaluated the student several years ago and that he had been seeing the student once per week for psychotherapy (Tr. pp. 264-65). He further testified that the student's difficulties were best understood as a NLD with associated psychological difficulties which included anxiety (id.). He explained that anxiety further eroded attention and the ability to process information which affected learning and caused distress (Tr. p. 266). He continued to explain that when the student was overwhelmed he became disorganized which created difficulty in the areas of problem solving and reaching reasonable conclusions about the information he was trying to process (id.).

The neuropsychologist also testified that the student had difficulty navigating transition and the complex social demands in less structured situations (Tr. p. 269). He indicated that given the student's prior history and current difficulties it was reasonable to conclude that the student would struggle when he participated in less structured regular education settings such as physical education and lunch (Tr. pp. 269-70). He explained that with less structure there would be more complex social exchanges, less familiarity with the progression of events and greater probability of the student experiencing heightened anxiety and feeling overwhelmed (Tr. p. 271). He further explained that when the student was overwhelmed his thinking became suspicious and he might say things that were inappropriate because he was feeling overwhelmed and misreading the social exchange (Tr. p. 270). The neuropsychologist described the student as fragile and overwhelmed, struggling to function adaptively in his world (Tr. p. 300).

The May 2006 private neurological evaluation report considered by the June 2006 CSE also addressed the student's functioning in the regular education setting (Joint Ex. 7 at p. 1). It indicated that the student had difficulty at petitioner's school mastering reading and math skills and relating to other students, and became increasingly frustrated and anxious about attending school (*id.*). It also indicated that the student was socially awkward, had difficulty relating to his peers, could be tangential in his thinking and could be quite anxious (*id.* at p. 3). The neurologist recommended that the student needed continued placement in a small, special education setting with a small student to teacher ratio and the availability of individual instruction and counseling (*id.*).

The June 2006 CSE also reviewed the Eagle Hill December 2005 report which noted that the student continued to have difficulty during unstructured class activities and recess at which times he found it difficult to remain on topic (Joint Ex. 10 at p. 1). The report indicated that the student's inability to build upon what others were saying and navigate peer interactions remained an obstacle for him (*id.*). In addition, the CSE considered the March 2006 observation of the student at Eagle Hill which noted the student's anxiety and difficulties in the classroom setting (Joint Ex. 9). The observation report also noted that the student did not follow teacher directions on several occasions and was prompted and redirected numerous times (*id.* at pp. 2-4). It further noted that the student's educational advisor reported that the student's social skills remained immature and that he struggled with anxiety (*id.* at p. 4).

The evaluation reports prepared by petitioner's staff for the June 2006 CSE meeting described similar behaviors (Joint Exs. 12; 13; 14). The educational evaluation report indicated that the student often began to speak off topic requiring redirection and was unable to sustain attention to a task (Joint Ex. 14 at p. 1). The psychological evaluation report noted inconsistencies in the student's concentration and low frustration tolerance to complete tasks and indicated that extra prompts were used throughout the assessment (Joint Ex. 13 at p. 2). It further noted that the student bit his nails throughout the entire evaluation process (*id.*). Similarly, the speech-language evaluation report noted that the student bit his fingernails frequently and approximately halfway through the assessment began to chew on his sleeve (Joint Ex. 12 at p. 1).

Based upon the foregoing, I find that the June 2006 CSE recommendation which included the student's participation in the regular education environment for special area classes, lunch and recess was not appropriate to the student's needs. Moreover, I note that in August 2006 the neurologist who assessed the student in May 2006 indicated that the student had difficulty in an

extremely small class at Eagle Hill with much individualized attention and that a class of 12 might be overwhelming for him (Joint Ex. 22). She indicated that the student would not be able to tolerate inclusion in a large classroom for even part of the day and would become agitated and anxious if expected to be in the mainstream for gym or lunch periods (*id.*). I also note that in September 2006 the student's neuropsychologist indicated that the student could not manage a complex transition such as a change in school without a high risk for deterioration in his psychological functioning (Joint Ex. 5 at p. 3). Further, in a November 2006 report, petitioner's psychiatric consultant indicated that the student required a program that provided significant structure and support (Joint Ex. 3 at p. 3). He noted that the student appeared to be functioning fairly well in his present program at Eagle Hill and recommended that "a similar program certainly would be appropriate for him" (*id.*).

Additionally, a neurologist who began seeing the student in 2004 testified even with structure and support the student struggled (Tr. pp. 197-98). He recommended that the student remain in a small structured program with individualized instruction to accommodate his fragile learning state and social skills (Tr. p. 215).

The private psychiatrist who assessed the student in September 2006 testified that the student had severe language and communication difficulties which made it difficult for him to socialize in an age-appropriate way (Tr. p. 74). She further testified that the student's anxiety overwhelmed him and that socially he came across in an odd way (Tr. p. 132). She stated that the student's retreat into fantasy was a response to his difficulty dealing with reality and with his anxiety (Tr. p. 113). She explained that anxiety derailed the student's ability to organize his emotions and he became disorganized and lapsed into fantasy (Tr. p. 137). She opined that to mainstream the student at this point in his life would put him at high risk (Tr. pp. 128-29). I note that petitioner did not present any testimony or documentary evidence from a medical professional to refute the testimony of respondents' witnesses.

I also note that the student's teachers at Eagle Hill during the 2006-07 school year reported that the student continued to exhibit an inability to engage socially which continued to be extraordinarily difficult as did organizing his thoughts to express himself (Joint Ex. 1 at p. 7).

Given the student's complex profile and resulting special education needs, I concur with the impartial hearing officer's finding that the program recommended by the June 2006 CSE was not appropriate and find that the hearing record demonstrates that a program that provided for participation in a regular education environment for special area classes, lunch and recess was not appropriate to the student's needs (see Application of a Child with a Disability, Appeal No. 97-90). Therefore, I concur with the impartial hearing officer and find that the student was denied a FAPE for the 2006-07 school year. Accordingly, respondents have prevailed with respect to the first criterion Burlington/Carter analysis for tuition reimbursement.

With respect to the second criterion for an award of reimbursement, respondents must show that the services they obtained for their son were appropriate to meet his special education needs for the 2006-07 school year (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363). In order to meet that burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that "the private education services obtained by the parents were appropriate to the child's needs" (Walczak, 142 F.3d at 129; see also Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192). 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 at 105).

As noted above, the student has reading, writing and math deficits (Joint Ex. 14 at p. 7). The hearing record shows that Eagle Hill offers a tutorial class which provides intensive remedial instruction in language arts (Joint Ex. 6 at p. 4). To develop reading skills, instruction is provided in decoding, phonemic awareness and word analysis strategies (id.). Emphasis is placed on developing reading comprehension, oral and written expression, spelling, vocabulary and appropriate supplementary skills such as study skills (id.). The student's tutorial teacher during the 2006-07 school year indicated that the student's 80-minute tutorial class had a student to staff ratio of 2:1 (Joint Ex. 1 at p. 7). She reported that the student's focus had improved and that he appeared to more comfortable with himself (id.).

The student's writing class at Eagle Hill provided practice in the formation of letters together with activities and exercises designed to improve fine motor skills (Joint Ex. 6 at p. 14). Daily instruction in sentence structure, basic paragraph writing and mechanics was provided (id.). A structured approach to writing was used to help the student organize his thoughts (id. at p. 3). Spelling instruction was coordinated with the tutorial class (id. at p. 14). A variety of strategies, such as the use of a paper clip to assure proper spacing and different types of paper and lines, were used to assist the student with his writing (id. at p. 3). A consultant was available in the student's writing class one time weekly (Joint Ex. 2 at p. 7). The student was also provided access to word processing and a scribe (id. at p. 6). The use of a keyboard was addressed with the student but he often encountered the same difficulties attending to and remaining connected to the keyboard as he did with paper (Joint Ex. 6 at p. 3).

The student's mathematics class at Eagle Hill emphasized concepts and operations, problem solving and number sense (Joint Ex. 6 at p. 9). The class was individualized to allow students to progress at their own rates (id.). Eagle Hill also used manipulatives and a structured approach to teach problem-solving skills (Joint Ex. 2 at p. 7).

In addition, the student received speech-language therapy at Eagle Hill once per week and participated in a collaborative speech and language program designed to help generalize and integrate speech and language in the classroom setting (Joint Exs. 6 at p. 23; 10 at p. 19). The student also worked with the speech department on gaining confidence to perform in individual and small group settings (Joint Ex. 10 at p. 2). The student also had access as needed to counselors and at his request had sessions with the psychologists or social worker (Joint Ex. 2 at p. 7).

To address the student's difficulty during unstructured time, he participated in small "callback groups" where there was teacher proximity and guided participation in activities (Joint Ex. 10 at p. 2). To facilitate transitions from recess and from task to task, Eagle Hill used a posted agenda, transition words and cues from the environment (id.). Eagle Hill also used other strategies with the student to regulate the pace and presentation and amount of material being presented at one time, to help him process information effectively and remain attentive throughout class and to enhance his personal organization (Joint Ex. 6 at pp. 21-22). Eagle Hill

also worked with the student on improving his interpersonal skills with both peers and adults (id. at p. 2).

I note that in the December 2006 progress report from Eagle Hill, the student's educational advisor indicated that the student had made progress in speaking to and working with his peers, had started to admit that his interpersonal relationships were difficult, worked with his communication teacher to temper his negative responses which he knew was a problem for him, and understood that larger groups were more difficult for him and that he needed to attend to tasks better (Joint Ex. 27 at pp. 2-3).

I am not persuaded by petitioner's challenges to the impartial hearing officer's findings regarding the appropriateness of Eagle Hill. The hearing record contains detailed progress reports from Eagle Hill (Joint Exs. 6; 10). It also includes minutes from the CSE meetings during which Eagle Hill staff participated and provided information about the student's functioning (Joint Exs. 1; 2). The hearing record shows that Eagle Hill worked with the student to address his special education needs, including his motor and social skills deficits (Joint Exs. 6 at pp. 2-3; 10 at pp. 2-3). The student also had access to counselors as needed (Joint Ex. 2 at p. 5). With respect to the curriculum at Eagle Hill, the requirement that the school meet the standards of the state educational agency does not apply to private parental placements (Carter, 510 U.S. at 365).

Based upon the information before me, I agree with the impartial hearing officer and find that the hearing record demonstrates that Eagle Hill was appropriate for the student for the 2006-07 school year. Accordingly, respondents have prevailed with respect to the second criterion of the Burlington/Carter analysis for tuition reimbursement.

The final criterion for an award of tuition reimbursement is that the parents' claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at 363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417).

The impartial hearing officer found that respondents cooperated with petitioner and that the equities favored them (IHO Decision at p. 48). Petitioner asserts that respondents' failure to cooperate with the CSE's recommendation to send out packets to therapeutic programs "prevented the CSE from finding a more appropriate program in the event the concerns about [the student's] potential to develop a psychotic disorder came to fruition." As noted above, when the CSE met in November 2006 it believed that there was enough information to consider additional placement options (Joint Ex. 1 at p. 7). It discussed alternative programs, explained the referral process to respondents and indicated that upon completion of the referral process it

would reconvene to make a final determination for placement and program (*id.*). Respondents provided, then subsequently withdrew, written consent to the CSE to send referral packets to alternative programs (Joint Exs. 20; 21).

The November 2006 CSE decided to explore potential future alternative placement options (Joint Ex. 1 at p. 7). It did not recommend that the student's program be changed. The CSE chairperson testified that the CSE decided to be "proactive" given the information in the evaluations about a potential mental illness (Tr. p. 67). I note that petitioner's psychiatric consultant concluded that a therapeutic setting did not "seem to be indicated" (Joint Ex. 3). The medical professionals who testified on behalf of the student shared the same opinion. The neuropsychologist testified that the student did not need a therapeutic setting because he was functioning in a nontherapeutic setting (Tr. pp. 277-79). The neurologist who began seeing the student in 2004 testified that the student did not require the level of support that a therapeutic setting provided (Tr. pp. 201-02). He indicated that academic success would be the best route to helping the student emotionally (Tr. pp. 239-41). The private psychiatrist who assessed the student in September 2006 testified that the student's primary deficits were language based rather than emotionally based and stated that a therapeutic setting was not appropriate (Tr. pp. 139, 155-57). Under the circumstances, I am unable to find that respondents' withdrawal of consent to send referral packets to alternative programs impeded petitioner's ability to offer a FAPE. I agree with the impartial hearing officer and find that equitable considerations do not preclude an award of tuition reimbursement for respondents' son's tuition at Eagle Hill for the 2006-07 school year.

Finally, I am not persuaded by petitioner's assertion that the impartial hearing officer disregarded the testimony of its witnesses. The impartial hearing officer determined that respondents' witnesses were credible and her findings are supported by the record (see Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 01-019; Application of a Child with a Disability, Appeal No. 97-73).

I have considered petitioner's remaining contentions and I find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 18, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**