



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-119

**Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Southold Union Free School District**

### **Appearances:**

Law Office of Andrew K. Cuddy, attorney for petitioners, Andrew K. Cuddy, Esq., of counsel

Ingerman Smith, LLP, attorney for respondent, Christopher Venator, Esq., of counsel

### **DECISION**

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Landmark School (Landmark) for the 2006-07 school year. The appeal must be dismissed.

Preliminarily, I will address a procedural issue. Petitioners attach to their appeal an August 2007 neuropsychological evaluation report, an August 2007 auditory and language processing evaluation report and standardized test results from Landmark. In its answer, respondent objects to petitioners' request to introduce these documents. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable a State Review Officer to render a decision (Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). The exhibits are not necessary for my review and I decline to accept them.

The student was attending Landmark when the impartial hearing began in October 2006 (Parent Ex. 141).<sup>1,2</sup> Landmark is a private school for students with average to above average cognitive abilities who also have a specific language-based learning disability (Parent Ex. 111A at pp. 3-4). Landmark 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 was described as having a language-based learning disability and difficulty with auditory processing, auditory memory, decoding and reading fluency (Tr. pp. 47-48; Parent Ex. 116). Her nonverbal reasoning abilities are much better developed than her verbal reasoning abilities and her academic achievement scores are in the average range with the exception of reading fluency which is low average (Parent Exs. 17; 130 at p. 3). The student's classification and eligibility for special education services as a student having a learning disability are not in dispute in this appeal (8 NYCRR 200.1[zz][6]).

The student's prior educational history through the end of the 2003-04 school year was discussed in Application of a Child with Disability, Appeal No. 04-082 and will not be repeated here in detail. For the 2004-05 school year, the student continued to attend school in respondent's district (Parent Ex. 78). In September 2004, respondent's Committee on Special Education (CSE) determined that the student continue to be classified as a student with a learning disability and recommended continuation of her program of resource room instruction and reading three times per six-day cycle (*id.* at pp. 1, 4).

On May 11, 2005, the CSE convened for the student's annual review (Dist. Ex. A; Parent Ex. 91 at p. 2). The CSE determined that for the 2005-06 school year the student continue to be classified as having a learning disability and that she receive resource room three times per six-day cycle (Parent Ex. 91 at p. 2). In addition, the CSE agreed that the student should receive individual speech-language therapy two times per five day week and reading remediation two times per five day week as academic intervention services (AIS)<sup>3</sup> (*id.*; Tr. pp. 19-20, 23).

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<sup>1</sup> On October 24, 2007, the Office of State Review received an incomplete hearing record from respondent. In correspondence dated October 26, 2007, the Office of State Review advised respondent that the hearing record was incomplete and noted several discrepancies and omissions. Respondent submitted additional exhibits on November 7 and 21, 2007. By letter dated December 5, 2007, the Office of State Review requested that the parties work together to submit a complete and accurate record of the proceeding before the impartial hearing officer. On December 21, 2007, the Office of State Review received a record from petitioner and on December 24, 2007, the Office of State Review received the original exhibits that were before the impartial hearing officer from respondent. The records are substantially similar and the Office of State Review now has a complete record of the proceeding before the impartial hearing officer.

<sup>2</sup> The record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 06-074).

<sup>3</sup> Respondent's administrator of pupil personnel services testified that academic intervention services are provided to students identified by a teacher as having a difficult time in the classroom setting prior to classification as a student with a disability (see Tr. pp. 21-22).

During summer 2005, the student received AIS consisting of reading remediation two hours per week for eight weeks and 45-minute speech-language therapy sessions twice weekly for six weeks (Parent Ex. 91 at p. 2). For the 2005-06 school year, the student attended respondent's recommended program (Dist. Ex. C; Parent Ex. 18). On October 6, 2005 respondent's reading teacher administered selected tests from the Woodcock-Johnson Psycho-Educational Battery-Revised (WJ-R) (Parent Ex. 134A). She reported that the student's performance in basic reading and reading comprehension was average compared to peers at her grade level, and opined that the student would find the demands of grade-level tasks involving basic reading and reading comprehension skills "manageable" (id.).

Also in October 2005, respondent's school psychologist administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student (Tr. pp. 874, 877-78; Parent Ex. 17). The student's verbal comprehension index composite score was 96 (39th percentile, average), perceptual reasoning index composite score was 117 (87th percentile, high average), working memory index composite score was 80 (9th percentile, low average) and her processing speed index composite score was 109 (73rd percentile, average) (Parent Ex. 17 at p. 2). The school psychologist reported that the student's reasoning abilities for verbal tasks were generally in the average range, while her nonverbal reasoning abilities were significantly higher and in the high average range (id.).

In November 2005, the school psychologist also conducted a cognitive and educational assessment of the student and administered selected subtests of the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG) and the Woodcock-Johnson Tests of Achievement (WJ-III ACH) (Dist. Ex. A at p. 4; Parent Ex. 149). The school psychologist reported that the student's standard score of 85 on the working memory cluster was in the low average range (Parent Ex. 149 at pp. 1, 3). She indicated that the student may have difficulty performing age-level tasks that require complex processing of information (id. at p. 1). The student achieved a broad reading cluster standard score of 90 (low average to average), a broad written language standard score of 110 (average), a broad written expression standard score of 106 (average) and an academic fluency standard score of 93 (average) (id.). The school psychologist reported that the student's performance fluency for mathematics and writing was average and that her reading fluency was "limited" (id.).

On December 20, 2005, an independent speech-language pathologist/audiologist conducted an auditory and language processing reevaluation of the student (Parent Ex. 116).<sup>4</sup> Despite variability among subtest scores on the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4), the student's composite language scores were all in the average range (Tr. pp. 289-92). The evaluator concluded that the student had made progress and improvement through accommodations, interventions and reading instruction, but continued to present with an

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<sup>4</sup> The original evaluation of the student was conducted on September 3, 2004 and identified an auditory processing disorder in the areas of auditory figure-ground listening, integration, phonemic awareness, organization, short-term memory, comprehension and receptive and expressive language skills (Parent Ex. 116 at p. 1).

auditory processing disorder and receptive language disorder that contributed to her language-based learning disability and reading disorder (Parent Ex. 116 at p. 7). Results of the assessment indicated that the student exhibited difficulties in the areas of auditory figure-ground listening, integration, temporal integration, phonemic awareness, short-term memory, auditory comprehension, receptive language and word retrieval (id.). A number of recommendations were offered, including changing the student's classification from learning disabled to speech or language impaired, continued use of classroom/testing accommodations, use of a personal FM ear-level unit, speech-language therapy, extended school year (ESY) services, reading and writing instruction, use of a laptop and specific software programs (id. at p. 8).

On December 27, 2005 an independent assistive technology evaluation of the student was conducted (Parent Ex. 18). After interviewing three of the student's teachers, the student and her mother, and reviewing the student's skill areas, the evaluator recommended specific equipment including a laptop computer and FM classroom amplification system, software including Microsoft Office for Students (OneNote), "Inspiration" software and text reader programs, and internet usage (id. at pp. 6-7).

On March 9, 2006 the CSE convened to review the independent speech-language pathologist/audiologist's report and the assistive technology and psychological evaluation reports (Parent Exs. 9 at p. 2; 11 at p. 5). Consistent with the December 2005 independent assistive technology evaluation report, the CSE agreed to provide the student with a laptop computer and student specific software, and her classroom was equipped with a "LightSPEED" sound system (compare Parent Exs. 9 at p. 2; 11 at p. 1, with Parent Ex. 18 at pp. 6-7). Throughout spring and summer 2006 the parties communicated regarding provision of the student's assistive technology services (Parent Exs. 121d; 121i-l; 131a).

On April 26, 2006 the CSE convened at petitioners' request to discuss summer 2006 services (Parent Ex. 9 at p. 2). The CSE considered the student's eligibility for ESY services, and after discussion with a representative from Landmark, agreed that the student should receive an AIS program at Landmark for five weeks during summer 2006 (id. at p. 4; Parent Ex. 112A at pp. 22-24). The student's AIS program for summer 2006 included five times per week 1:1 remediation, with additional language arts and literature/writing remediation classes (id. at p. 3).

A May 23, 2006 speech-language annual review report indicated that an assessment of the student's auditory perceptual skills yielded scores that scattered from below average to the high average range (Parent Ex. 97 at p. 1). The speech-language pathologist reported that the student had made progress toward many of her speech-language goals and had mastered the ability to demonstrate auditory behaviors necessary for communication if the listening environment was not compromised with extraneous noises (id. at p. 2). The student exhibited difficulty working with vocabulary units from her classroom (id.). The speech-language pathologist concluded that the student continued to present with auditory deficits that significantly affected her academic performance (id.). Recommendations were deferred until after the student completed her summer program at Landmark (id.).

On May 26, 2006 the CSE convened for the student's annual review (Dist. Ex. I). The CSE discussed the student's use of the LightSPEED sound system and agreed that for the 2006-

07 school year the student would use an individual personal device in her academic classes (id. at p. 5). The student's reading teacher reported that the student's comprehension and organization had improved and that she did not present with a decoding weakness (id.). The student's speech-language pathologist reported that the student exhibited weakness in the areas of auditory memory and interpretation of directions (id.). The special education teacher indicated that the student used the accommodations of separate location and directions read and explained, but did not need to use extended time (id.).

The May 2006 individualized education program (IEP) described the student as having a delay in reading and writing fluency, difficulty generating ideas while writing, and difficulty with writing cohesive paragraphs and summaries (Dist. Ex. I at p. 2). The IEP stated that the student needed to continue to develop reading skills with strategies to focus on flexible use of the "three cueing system" (syntactic, semantic and graphophonic) (id. at pp. 2-3). In addition, the IEP indicated that the student needed to improve her inferential reading comprehension skills (id. at p. 3). The IEP stated that she also needed a multisensory instructional approach, to use technology to help her organize information, and preferential seating (id.). The CSE described the student's social-emotional development as within age appropriate expectations and did not identify any physical or motor needs (id. at pp. 4-5). The May 2006 IEP contained annual goals in the areas of study skills, reading, writing, and mathematics (id. at pp. 7-9).

The May 2006 CSE recommended that for the 2006-07 school year, the student receive a daily resource room program to improve writing fluency (Dist. Ex. I at pp. 1, 3). The CSE recommended the use of a graphic organizer, Inspiration software computer program, an individual auditory trainer, laptop, and books on CD, as well as testing accommodations of extended time (2.0), small group administration, special location, directions explained/read, and use of a word processor or laptop (id. at pp. 1-2, 5). The May 2006 IEP indicated that the student was ineligible for ESY services (id. at p. 1). Petitioners agreed to the CSE's recommended program and requested that the CSE reconvene in August 2006 after the student had completed her summer program at Landmark (Dist. Ex. L; Parent Ex. 121b; see Tr. pp. 1221-25).

On June 23, 2006, respondent's pupil personnel services administrator provided petitioners with a report indicating the student's progress toward meeting the 2005-06 IEP goals (Parent Ex. 3).<sup>5</sup> The student attended Landmark during summer 2006 (Parent Ex. 87). By letter dated July 26, 2006, respondent's pupil personnel services administrator notified petitioners that the CSE recommended that their daughter receive the special education services indicated on the May 2006 IEP, which it enclosed with the letter (Parent Ex. 106).

On July 31, 2006, a CSE subcommittee meeting was held with Landmark staff to determine what, if any, other services the student needed for the upcoming school year (Dist. Ex. P; Parent Ex. 111A at pp. 1-3). A representative from Landmark reported that during the summer session the student participated in morning seamanship sessions, an afternoon 1:1 language arts tutorial, language arts class and math class (Parent Ex. 111A at pp. 3-4). The student's mother reported that the student spent an unreasonable amount of time on homework

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<sup>5</sup> The impartial hearing officer lists the June 23, 2006 progress report as Exhibit 2; however, the progress report was admitted into the record as Exhibit 3 and will be referred to as Parent Ex. 3 in this decision.

during sixth grade, that the student only attained 2 or 3 goals out of 26, that the student did not use the LightSPEED system during May and June 2006, and that the assistive technology agreed upon for the 2006-07 school year had not been received (Dist. Ex. P at p. 5; see Parent Ex. 111A). Petitioners discussed their concerns about respondent's program and why they believed the Landmark program was appropriate (Parent Ex. 111A). After further discussion, the CSE subcommittee decided to continue the May 2006 recommendation for the student's placement in a daily resource room program and the CSE subcommittee added a daily individual tutorial session either in school or after school to be conducted by a special education teacher (Tr. p. 39; District Ex. P at p. 6). The student also would continue to receive two sessions per week of individual reading remediation services (Tr. pp. 40-41; see Parent Exs. 9 at p. 1; 111A at pp. 24-25). In addition, the July 2006 CSE subcommittee added modified homework assignments, use of a word bank and specified that the student would receive books on CD for English, science and social studies classes (compare Dist. Ex. I at pp. 1-2, with Dist. Ex. P at pp. 1-2). It also added use of a word bank as a testing accommodation (compare Dist. Ex. I at p. 2, with Dist. Ex. P at p. 2).

On August 1, 2006, petitioners requested that a full CSE meeting be scheduled (Parent Exs. 44; 121b). By letter dated August 15, 2006, respondent's superintendent denied petitioners' request for a full CSE meeting before the end of the summer and indicated that he had instructed the pupil services office to schedule a CSE meeting at the beginning of the 2006-07 school year (Parent Ex. 43).

By due process complaint notice dated August 18, 2006, petitioners requested an impartial hearing (Parent Ex. 1). In their due process complaint notice, petitioners asserted, among other things, that respondent refused to convene a full CSE meeting to review the CSE subcommittee's July 31, 2006 recommendation and that no appropriate program was in place for their daughter for September 2006 (id. at p. 8). They also asserted that Landmark was appropriate to meet their daughter's needs and that they cooperated with the CSE at all times (id. at p. 9). As a proposed solution, they suggested that their daughter be placed at Landmark for the 2006-07 school year "with all related expenses including parent and child's room and board, transportation expenses, books, assistive technology costs, other related expenses [sic] to the child's attendance at Landmark throughout the year" (id. at p. 10).

The impartial hearing began on October 23, 2006 and concluded on April 27, 2007, after ten days of testimony. The impartial hearing officer rendered his decision on September 5, 2007 (IHO Decision at p. 41). He found that while the student's IEP contained some procedural violations, petitioners did not show how those violations affected their daughter's right to a free appropriate public education (FAPE) (id. at p. 39).<sup>6</sup> He further found that the program

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<sup>6</sup> 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]).

recommended for the student would likely have produced progress for the 2006-07 school year (*id.* at pp. 39-40). Accordingly, he found that the program recommended for the student for the 2006-07 school year was appropriate and denied petitioners' request for reimbursement (*id.* at p. 40).

Petitioners appeal from the impartial hearing officer's decision. They assert that the impartial hearing officer erred in concluding that procedural violations did not deny their daughter a FAPE and that the program recommended for the student was appropriate on substantive grounds.<sup>7</sup> In addition, they argue that Landmark met their daughter's needs and was an appropriate placement, and that the impartial hearing officer erred in failing to award reimbursement.<sup>8</sup>

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];<sup>9</sup> 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 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]).

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<sup>7</sup> Petitioners assert that the FAPE standard has been raised and that the impartial hearing officer used the wrong standard. I find that the impartial hearing officer applied the proper legal analysis in determining whether the student was offered a FAPE.

<sup>8</sup> In their petition, petitioners ask that I recuse myself. I have considered petitioners' request and find no basis for recusal (see 8 NYCRR 279.1).

<sup>9</sup> 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.

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). In addition, the student's recommended program must 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 132).

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, 427 F.3d 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the 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).

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).

As noted above, petitioners assert that the impartial hearing officer erred in concluding that the procedural violations in the development of the IEPs for the 2006-07 school year did not deny their daughter a FAPE. They argue that respondent failed to review their daughter's progress toward meeting her 2005-06 IEP goals and that no one participated in the development of their daughter's annual goals for the 2006-07 school year. Respondent argues that the May 2006 IEP was provided to petitioners in advance of the July 2006 meeting, that petitioners had the opportunity to review the May 2006 IEP including the annual goals listed therein, and that petitioners had ample opportunity to raise questions about those annual goals. It asserts that the failure to specifically discuss the 2006-07 annual goals was harmless, noting that numerous CSE meetings were held during the year at petitioners' request, that the student's mother was an active participant in the discussions of the student's needs and was significantly involved in the development of the student's IEP. As discussed below, the hearing record supports the impartial hearing officer's finding that petitioners have not demonstrated how the procedural violations significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE to their daughter.

The hearing record indicates that the student's program for the 2006-07 school year was developed at the May 2006 CSE meeting and the July 2006 CSE subcommittee meeting (Tr. pp. 53-54, 976). At the May 26, 2006 meeting, petitioners reported that their daughter needed help with organization and note taking, and the student's reading teacher, speech therapist and special education teacher reported on the student's performance (Dist. Ex. I at p. 5). The CSE recommended that the student receive resource room services and the student's mother agreed to the recommendation (id.; Dist. Ex. L). In addition, the CSE agreed to reconvene after the student completed the summer program at Landmark (Tr. pp. 1221-25; Dist. Ex. L). The IEP developed as a result of the May 2006 meeting contains annual goals for study skills, reading, writing and mathematics (Dist. Ex. I at pp. 7-9).

The hearing record also shows that respondent provided a copy of the May 2006 IEP to petitioners by letter dated July 26, 2006, in advance of the July 31, 2006 meeting (Parent Ex. 106). At the July 2006 meeting, the student's mother discussed the report that she received in June 2006 regarding the student's progress toward meeting the 2005-06 IEP goals (Parent Ex. 111A).

The student's mother participated in CSE meetings in March, April, May and July 2006, and had the opportunity to participate in a CSE meeting scheduled for September 11, 2006. Discussions about the student's performance during the 2005-06 school year occurred at both the May and July 2006 meetings (Dist. Ex. I at p. 5; Parent Ex. 111A). At the May 2006 meeting, petitioners agreed to the recommended program (Dist. Ex. L). They were provided with the May 2006 IEP in advance of the July 2006 meeting (Parent Ex. 106) and had the opportunity to review the annual goals listed on the May 2006 IEP and raise their concerns at the July 2006 meeting. I note that there is nothing in the hearing record that indicates that petitioners expressed any concerns with respect to the 2006-07 annual goals upon receipt of the May 2006 IEP, at the July 2006 CSE subcommittee meeting, or in connection with their request for a full

CSE meeting after the July 2006 CSE subcommittee meeting. I also note that petitioners could have discussed their concerns about the 2006-07 annual goals at the CSE meeting scheduled for September 2006. Moreover, petitioners have not raised any objections to the appropriateness or adequacy of the 2006-07 annual goals. Under the circumstances, I am unable to conclude that the lack of discussion about the goals at the CSE meetings significantly impeded parental participation in the development of the IEP and resulted in a denial of a FAPE to the student.

Petitioners also assert that respondent failed to convene a full CSE meeting to review the CSE subcommittee's July 2006 recommendation. State regulations provide that upon receipt of a written request from the parent of a student, the subcommittee shall immediately refer to the committee for its review any recommendation of the subcommittee concerning the identification, evaluation, educational placement or provision of a free appropriate public education to a student that is not acceptable to the parent (8 NYCRR 200.3[c][5]).

The hearing record shows that a subcommittee of the CSE met on July 31, 2006 (Dist. Ex. P). The hearing record further shows that petitioners disagreed with the recommendation and the following day requested that the pupil personnel services administrator convene a full CSE meeting prior to the beginning of the school year (Tr. pp. 97-98, 177-79, 1075; Parent Ex. 44). On August 10, 2006, petitioners met with respondent's superintendent of schools to discuss several issues regarding their daughter's program including their request for a full CSE meeting (Tr. pp. 1116; Parent Exs. 43; 121b). By letter dated August 15, 2007, respondent's superintendent denied petitioners' request for a summer CSE meeting and indicated that he had instructed the pupil services office to schedule a CSE meeting at the beginning of the 2006-07 school year (Tr. p. 1113; Parent Ex. 43). On August 18, 2006, petitioners requested an impartial hearing (Parent Ex. 1). In a letter dated August 25, 2007, respondent's pupil personnel services administrator notified petitioners that a CSE meeting was scheduled for September 11, 2006 (Dist. Ex. U). In response to the letter scheduling the September 2006 CSE meeting, the student's mother indicated that because an impartial hearing request had been filed, her attorney should be contacted (Tr. pp. 1245-46). By letter dated September 8, 2006 to respondent's pupil personnel services administrator, petitioners declined the invitation to the September 2006 CSE meeting and requested that it be cancelled as they had filed an impartial hearing request (Parent Ex. 121b).

While respondent should have promptly convened a full CSE meeting upon receipt of petitioners' request, under the circumstances, I am unable to find that respondent's failure to do so impeded the student's right to a FAPE or significantly impeded petitioners' opportunity to participate in the decision-making process regarding the provision of a FAPE to their daughter. I note that the student's mother testified that she disagreed with the CSE subcommittee because the subcommittee would not consider discussing Landmark or keeping her daughter at Landmark, and she believed that her daughter should stay at Landmark (Tr. p. 1075). As discussed herein, the hearing record does not support the argument that the student required a full-time special education program such as Landmark in order to meet her needs that result from her disability.

Petitioners further assert that the impartial hearing officer erred in concluding that the program recommended for the student for the 2006-07 school year was appropriate on substantive grounds. The hearing record shows that the student had a language-based learning

disability and difficulty with auditory processing, auditory memory, decoding and reading fluency (Tr. pp. 47-48; Parent Ex. 116). For the 2005-06 school year, the student's IEP provided for regular education classes with resource room three days out of a six-day cycle (Dist. Ex. A at p. 1). The student also received speech-language therapy and remedial reading services two days per week (Tr. pp. 218, 297-98, 322-23, 1031; Dist. Ex. A at p. 5). In addition, the student attended a one time per week after school AIS math program (Tr. pp. 579-80).

The regular education teacher who taught the student math, science and study skills during the 2005-06 school year testified that the student "fell within the average range" and generally achieved grades between 70 and 85 (Tr. pp. 569-70, 607, 1361-62, 1415-19). She indicated that she based her statement that the student's performance was in the average range upon the student's performance in the classroom, on tests, in groups and on projects (Tr. pp. 609-10). The teacher testified that at the beginning of the school year she noted weaknesses in some of the student's math skills, self-advocacy skills and social studies question interpretation (Tr. pp. 607-08). She further testified that she did not change the delivery of her instruction and that the student's weaknesses were not anything that she did not see from the majority of sixth grade students (Tr. pp. 577-78). She stated that the student did not require special modifications in math or science in order to be successful in her classes (Tr. p. 1399).

The regular education teacher who taught the student social studies testified that she recalled the student's trimester grades as 79, 80 and 80 (Tr. pp. 610-11, 1433, 1441). She further testified that the student's performance in her class was in the average range and that the student was able to perform as well as the majority of students in the class (Tr. pp. 644, 646-47, 1430). She stated that the student did not receive any special education modifications to the curriculum in her class (Tr. p. 1444). The social studies teacher also testified that the student was fairly proficient with completing graphic organizers, and she opined that the student followed along with the reading material "as well as everybody else" (Tr. p. 1435). She stated that the student's performance on written tests was sometimes better than what she demonstrated on standardized tests and that the resource room teacher did not need to modify any of the student's social studies assignments (Tr. pp. 616, 645-46). The social studies teacher stated that the student did not receive special adaptations to test administration and that the student took tests along with the entire class (Tr. pp. 619-20). The social studies teacher opined that the student did not need an inclusion program because students in inclusion classes need "quite a bit more" (Tr. p. 644).

The regular education language arts teacher who taught the student during the 2005-06 school year testified that the student's performance was in the average band in reading, low average band for written language and that the student's overall language skills were in the low average band compared to the peers in her classroom (Tr. pp. 747, 792-95). She stated that the student accomplished all of the sixth grade material and demonstrated growth during her sixth grade year (Tr. p. 808). The student's 2005-06 reading teacher reported that the student had areas that needed improvement, but opined that the student was not significantly below grade level and was an "average" student (Tr. pp. 366; Parent Ex. 100). The reading teacher stated that the student's reading decoding skills were a "little weak" but that she knew how to use strategies (Parent Ex. 100). The reading teacher concluded that the student compensated well because her reading comprehension was good (id.).

The student's 2005-06 resource room teacher, a certified special education teacher, testified that the purpose of the student's resource room instruction was to focus on skills that the student had difficulty with and to show her new ways to study and use technology (Tr. pp. 811, 815). He further testified that another focus was to improve study and work habits (Tr. p. 857). He indicated that he worked on vocabulary skills, writing skills and completion of lengthy writing assignments with the student (Tr. p. 858), and that occasionally he and the student worked on long-term projects (Tr. p. 815). The resource room teacher opined that the results of the student's November 2005 cognitive and educational evaluation were "acceptable" except that the grade equivalent scores for working memory, broad reading and reading fluency were low compared to what he observed the student's performance to be in his resource room (Tr. pp. 834-36). He stated that the student's level of effort was "on line" with her peers and that she needed to work a bit harder than the average student due to her cognitive deficits (Tr. p. 838).

The student's math and science teacher for the 2005-06 school year described the student as social, liked by peers and as one who did not exhibit any behavior problems (Tr. pp. 1364-65). The student's social studies teacher for the 2005-06 school year stated that the student engaged in conversations and took part in answering questions (Tr. pp. 1429-30). She indicated that the student did not exhibit behavior problems in class and had good relationships with peers (id.).

During the 2005-06 school year, the student took part in the New York State English Language Arts (ELA) assessment (Tr. pp. 1366-67). Pursuant to the student's mother's request, the assessment was administered without IEP testing accommodations (id.). The student achieved a "Level 3," which, as explained by one of her providers, indicated that she was at a level that did not require the receipt of additional services (Tr. pp. 220-21, 341-42).

As discussed above, the hearing record shows that the student met grade level standards and made meaningful progress toward IEP goals during the 2005-06 school year in respondent's program. The hearing record supports the impartial hearing officer's conclusion that the student's 2005-06 program was successful.

In developing the student's program for the 2006-07 school year, the May 2006 CSE and the July 2006 CSE subcommittee reviewed evaluative information indicating that with the exception of the student's auditory memory, working memory and reading fluency skills, all other skills assessed both independently and by respondent's staff were in the average to high average range (Dist. Exs. I at pp. 3-4; P at pp. 3-4). The CSE and CSE subcommittee identified these areas of weakness in the present levels of performance contained in the resultant IEPs (Dist. Exs. I at pp. 2-3; P at p. 3). As noted above, the May and July 2006 IEPs contained annual goals to address the student's weaknesses in study skills, reading, writing and mathematics (Dist. Exs. I at pp. 7-9; P at pp. 8-10).<sup>10</sup>

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<sup>10</sup> Despite November 2005 WJ-III ACH math fluency, writing fluency and writing sample scores in the average range (46th percentile, 64th percentile, 69th percentile, respectively), teacher reports indicated that the student had difficulty with written language and math skills (Tr. pp. 579-80; 1437; Dist. Exs. I at pp. 2-4; P at pp. 3-4). The IEPs identified written language and math as areas of need and provided annual goals in these areas (Dist. Exs. I at pp. 2-4, 6, 8-9; P at pp. 3, 6-7, 9-10).

The program recommended by respondent for the student for the 2006-07 school year consisted of one period per day of resource room and one period per day of individual tutoring provided by a special education teacher (Tr. pp. 38-39; Dist. Ex. P at pp. 1, 3, 6). The student was also recommended to receive twice weekly individual reading remediation services provided by a certified reading teacher (Tr. pp. 41, 378). The resource room program, which was increased from three days per a six-day cycle to one period per day, would continue to provide instruction to increase the student's skills and address her transition to seventh grade (Tr. p. 870). In response to the student's mother's concern that the student struggled with homework, a daily tutoring service was recommended to help the student learn to manage assignments and to start and complete long-term projects (Tr. p. 39). The IEP provided for program modifications, assistive technology and testing accommodations that had been specifically recommended in the December 2005 independent auditory and language processing reevaluation report, including the use of a graphic organizer, Inspiration software program, preferential seating, use of a personal auditory enhancer, use of a laptop, special location, directions read and explained, and extended time (Dist. Ex. P at pp. 1-3; Parent Ex. 116 at p. 8). In addition, the CSE recommended modified homework assignments, use of a word bank, and books on CD to address the student's difficulty with homework completion and reading (Dist. Ex. P at pp. 1-2).

I note that the student also would have received twice weekly individual reading remediation services provided by a certified reading teacher (Tr. pp. 38-41, 378; Dist. Ex. P at pp. 1, 3, 6). The certified reading teacher would have used a combination of Orton-Gillingham and Wilson methodologies in response to the student's need for multisensory instruction (Tr. p. 379; Dist. Ex. P at p. 3).

As noted above, the hearing record shows that the student was successful during the 2005-06 school year. Her teachers consistently testified that she was performing in the average range (Tr. pp. 607, 646-47, 747, 792-95). Her report card for the 2005-06 school year indicated that her performance was either "acceptable" or met grade-level expectations (Dist. Ex. X). She achieved two of the annual goals and demonstrated either "some progress" or "progressing satisfactorily" on the remainder of the goals and objectives contained in her IEP for the 2005-06 school year (Parent Ex. 3). The program recommended for the 2006-07 school year increased the resource room component from three days out of a six-day cycle to one period per day and added one period per day of individual tutoring provided by a special education teacher. I agree with the impartial hearing officer and find that the hearing record supports respondent's assertion that it offered a FAPE to the student for the 2006-07 school year. Accordingly, petitioners have not prevailed with respect to the first criterion of the Burlington/Carter analysis for an award of tuition reimbursement and their request for tuition reimbursement is denied.

Although my finding with respect to the first criterion of the Burlington/Carter analysis is dispositive of respondent's claim for tuition reimbursement for the 2005-06 school year, I have also considered the appropriateness of the program offered to the student by Landmark. With respect to the second criterion for an award of reimbursement, petitioners must show that the services they obtained for their daughter were appropriate to meet her 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, petitioners 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 services addressed the child's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 129). 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).

The hearing record shows that Landmark, a private school in Massachusetts, instructs 144 "day" (non-residential) students on its elementary/middle school campus who exhibit average cognitive potential and are diagnosed with a language-based learning disability (Tr. pp. 478-81, 501-03). Students also must exhibit a discrepancy between their cognitive ability and their academic achievement in that their skills are below grade level (Tr. p. 481). Approximately 55 percent of the students who attend Landmark have IEPs developed by their home school district, but all students who attend Landmark are children with disabilities (Tr. pp. 501-02, 512, 514-15).

There is no basis in the hearing record to conclude that the student required a full-time special education program in order to meet her needs that result from her disability. During the 2005-06 school year, the student's IEP provided for regular education classes with resource room three days out of a six-day cycle, as well as other supports (Dist. Ex. A). As discussed above, the hearing record shows that the student met grade level standards and made meaningful progress toward her IEP goals (Dist. Ex. X; Parent Ex. 3). Therefore, I conclude that the student's placement at Landmark was overly restrictive because she did not require a full day special education placement to receive appropriate educational services.

I have considered petitioners' remaining contentions and I find that they are not supported by the hearing record, without merit, or that it is unnecessary to address them in light of my determination.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
January 3, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**