



The University of the State of New York

The State Education Department State Review Officer

No. 08-017

Application of the [REDACTED] DEPARTMENT OF
EDUCATION for review of a determination of a hearing
officer relating to the provision of educational services to a
student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmuller, Esq., of counsel

Advocates for Children, attorney for respondent, Erika Palmer, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer, which determined that it had failed to offer an appropriate educational program to respondent's (the parent) son and directed the district to offer the student private tutoring and provide the parent with an opportunity to observe the multisensory teaching approach. The appeal must be sustained in part.

During the impartial hearing that began on November 20, 2007, the student was in the fifth grade at one of the district's elementary schools where he was attending a 12:1 special class and receiving related services of speech-language therapy and counseling (Parent Ex. E at pp. 1, 10). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record is sparse regarding the student's educational history. Briefly, the student was referred to the district's Committee on Special Education (CSE) in November 2005, when he was in the third grade (Parent Ex. P at p. 1). A social history report dated November 9, 2005 indicates that the student was reading at a very low level for his age, took a long time to write even a few words, and that he could only count by ones (id.). The report also indicates that the student had experienced a number of medical concerns, including surgery to correct a

congenital condition, in the previous year (*id.* at p. 2). The student was taking five medications to treat his chronic asthma (Parent Ex. N at p. 3).

A speech-language evaluation of the student was completed on December 2, 2005 (Parent Ex. M). The speech-language pathologist administered selected subtests of the Test of Word Knowledge and assessment instruments identified in the hearing record as the ITPA-3, TACL-3, and CELF-3 (*id.*).¹ Her report indicated that the student's scores on assessment subtests that measured his skills in receptive vocabulary, verbal reasoning, listening comprehension, oral expression, auditory sequential memory for spoken words and morphology, semantics and syntax skills were in the below average range (*id.* at p. 2). The speech-language pathologist reported that the student exhibited improvement in his ability to respond to auditory processing tasks when provided with compensatory strategies and verbal cues (*id.* at p. 1). The student demonstrated good rhyming, phonology and phonemic sequential memory skills (*id.*). Although she reported that the student demonstrated adequate ability to informally answer questions about personal information, "aspirations and predilections," his overall linguistic processing skills measured by the TACL-3 were in the below average range (10th percentile) (*id.* at p. 2). The student usually exhibited organized, on topic and appropriately sequenced expressive language skills in conversation (*id.*). The speech-language pathologist opined that while the student's "lower-level" grammatical skills were generally adequate, he demonstrated deficits in his use of age-level complex sentences (*id.* at p. 3). On a sequential picture story retelling task, the student failed to clearly state cause-effect relationships or include key items in the sequence, resulting in an unclear story line (*id.*). He demonstrated adequate word retrieval skills in order to express basic intent, and above average expressive vocabulary skills (*id.* at pp. 1-2). Specific (antonym and synonym) word retrieval skills were in the low average to below average range (*id.* at p. 1). The speech-language pathologist recommended that the student receive speech-language therapy to improve his semantic, auditory processing and expressive language skills (*id.* at p. 4). She noted that simultaneous reading/language instruction has been found to be effective for improving these skills and she recommended that approach when implementing the student's speech-language therapy goals (*id.*).

The district conducted a psychoeducational evaluation of the student over two sessions in December 2005 (Parent Ex. N at p. 3). The evaluator noted that the student seemed unmotivated and restless, putting his head on the table and "fidgeting" with his eyes, ears, and fingers (*id.* at p. 4). He complained of fatigue and boredom (*id.*). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension score of 75, a working memory score of 97, a perceptual reasoning score of 61, a processing score of 73, and a full scale IQ score of 70, indicating that the student was functioning within the borderline range of cognitive ability (*id.* at pp. 4-6). The evaluator noted that the student exhibited strength in the area of working memory, which measured his short-term memory, attention, and concentration (*id.* at p. 9). Relative weakness was indicated in the area of perceptual reasoning, which measured his visual perception and his abstract and fluid reasoning abilities (*id.*). Administration of the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH) yielded standard and (percentile) scores of 74 (4) in broad reading, 71 (3) in broad math, and 62 (1) in broad written language (*id.* at p. 11). The student achieved a total achievement standard score of 69

¹ Illinois Test of Psycholinguistic Abilities-Third Edition (ITPA-3), Test of Auditory Comprehension of Language-Third Edition (TACL-3), Clinical Evaluation of Language Fundamentals-Third Edition (CELF-3).

(2nd percentile) placing him in the deficient range of academic functioning (id. at pp. 6, 11). In addition to conducting a clinical interview to assess the student's social emotional functioning, the evaluator administered a number of projective tests identified in the hearing record as "Draw a Person," "Kinetic Family," "3 Wishes," and "Thematic Apperception Test" (id. at pp. 1, 8-9). She reported that the data compiled provided a profile of a "reserved boy who has difficulty relating to his peers and authority figures" (id. at p. 8). The evaluator opined that the student had poor coping skills, used verbal and physical aggression to deal with intimidating situations, and that although the student recognized his difficulties in writing and reading, he did not like to ask for help for fear of being teased (id.).

The CSE convened on December 8, 2005, found the student eligible for special education programs and services as a student with a learning disability, and recommended a program of general education with direct special education teacher support services (SETSS) in a group of 8:1 for 10 periods per week and related services of speech-language therapy and counseling for the remainder of the 2004-05 school year and for the 2005-06 school year (Parent Ex. H at pp. 1, 2). Extended school year (ESY) services were not recommended (id.).² The academic performance and learning characteristics portion of the student's proposed individualized education program (IEP) indicates that he was reading at an early first grade level and performing at a kindergarten to first grade level in math (id. at p. 4). The CSE developed goals and short-term objectives to address the student's deficits in his reading, writing, mathematics, language, auditory processing, and social emotional skills (id. at pp. 9-14).

The CSE convened on April 11, 2006 for the student's annual review and recommended no change in his program and services for the 2006-07 school year (Parent Ex. G at pp. 1-2). The IEP included goals and short-term objectives to address the student's deficits in spelling, writing, mathematics, language, auditory processing, and social emotional skills (id. at pp. 7-11). The IEP contained no goals or short-term objectives to meet his reading deficits in decoding and comprehension (id.).

² According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[j][1]; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>; see also Application of a Child with a Disability, Appeal No. 07-089).

The CSE convened again on June 15, 2006 and changed the student's recommended placement for the 2006-07 school year to a 12:1 special class with related services of one 30-minute session of counseling per week in a group of five and two 30-minute sessions of speech-language therapy per week in a group of three (Parent Ex. F at pp. 1, 13). The IEP reflects that the CSE determined that the student had made "minimal progress" in his previous program and "continue[s] to struggle," that he required on-going attention to keep him motivated and engaged, and that he should benefit from additional adult attention and support (*id.* at p. 12). The academic performance and learning characteristics, social/emotional performance, and health and physical development portions of the June 15, 2006 IEP, as well as, the annual goals and short-term objectives were identical to those on the student's initial IEP developed by the CSE on December 8, 2005 (compare Parent Ex. H at pp. 4-14, with Parent Ex. F at pp. 3-11).

The CSE convened on June 18, 2007 for the student's annual review and to develop his program for the 2007-08 school year (Parent Ex. E). The academic performance and learning characteristics portion of the student's IEP stated that based on teacher assessments, the student's reading skills were at an instructional level of "C," his math skills were at a second grade instructional level, and his listening comprehension skills were at a third grade instructional level (*id.* at p. 3). In the area of social emotional performance, the student reportedly did not know how to deal with frustrations caused by his academic delays and when he was presented with a difficult task he acted inappropriately by fighting with his peers or staring into space (*id.* at p. 4). The CSE recommended that for the 2007-08 school year the student continue in a 12:1 special class with related services of one 30-minute session of counseling per week in a group of five and two 30-minute sessions of speech-language therapy per week in a group of three (*id.* at p. 10). The proposed IEP provided that the student participate in State and local assessments with the following accommodations: directions read and reread aloud, separate location, questions read and reread aloud except on tests that measure reading comprehension, and double time (*id.*). The CSE developed goals and short-term objectives to address the student's deficits in listening comprehension, math, reading, writing, and social emotional skills (*id.* at pp. 6-7).

The parent had her son privately evaluated in August 2007, when he had completed the fourth grade (Parent Ex. L). The evaluator administered the Woodcock Reading Mastery Test-Revised to the student who achieved grade equivalent scores of 1.9 in visual-auditory learning, 1.2 in letter identification, 2.1 in word identification, 2.8 in word attack, 2.5 in word comprehension, and 2.8 in passage comprehension (*id.* at p. 2). The student achieved a grade equivalent score of 5.0 in listening comprehension (Tr. pp. 259-60).

On September 13, 2007, the parent through her attorney, requested an impartial hearing contending that despite the student's receipt of special education services in school, he required additional services to address his academic deficits (Parent Ex. A at p. 1). The parent requested that the district provide her with a "P-3 letter at an enhanced rate" for 10 hours per week of private tutoring for the student in the Orton-Gillingham method for the 2007-08 school year and any further relief deemed appropriate (*id.*).³

³ A "P-3 letter" that is issued from petitioner to a parent authorizes the parent to obtain at the district's expense special education teacher support services (SETSS) from an approved tutor (see Application of a Child with a Disability, Appeal No. 05-097; Application of a Child with a Disability, Appeal No. 05-039).

A resolution meeting⁴ convened on October 4, 2007 whereby the district agreed to conduct updated evaluations of the student and to conduct an expedited CSE review (Parent Ex. B at p. 1).

The district conducted a psychoeducational evaluation of the student over three sessions beginning October 22, 2007 and ending October 25, 2007 (Parent Ex. K at pp. 1, 2). The evaluator noted that the student was generally cooperative and compliant but frequently needed prompting and repetition to work on tasks (id. at p. 1). She reported that he worked very slowly and lost interest as tasks became more challenging (id.). Administration of the WISC-IV yielded a verbal comprehension score of 79, a perceptual reasoning score of 75, a working memory score of 65, a processing speed score of 70, and a full scale IQ score of 68 indicating the student was functioning in the extremely low range of cognitive abilities (id. at p. 2). He achieved a general ability index score of 75, in the borderline range of ability which, the evaluator opined to be "a better indicator of his overall level of ability, as it is comprised of the knowledge and reasoning areas" (id. at p. 3). In the area of academic testing, administration of the WJ-III ACH yielded standard (and percentile) scores of 61 (0.4) in broad reading, 64 (1) in broad math, 58 (0.3) in broad written language, and 82 (11) in oral language (id. at p. 5). The student achieved a standard (and percentile) score of 63 (1) in reading comprehension (extremely low range) as measured by the Wechsler Individual Achievement Test – Third Edition (WIAT-III) (id.). The evaluator reported that the student demonstrated very weak skills in his recognition of sounds, individual words, and comprehension of written material (id.). Although he attempted to sound out words, it was difficult for him and she opined that he did not appear "knowledgeable enough" regarding letter combinations and phonemes and that his comprehension of written material was partly affected by his limitations in decoding (id.). Although the student was able to solve some basic addition and subtraction problems, the evaluator reported that he relied on concrete methods and was unable to utilize skills of regrouping (id. at p. 7). The student exhibited his strongest skills in oral language (low average) (id.). When asked to listen to brief stories and repeat the information, the evaluator reported that he did well, recalling many of the details accurately (id.). In the area of social emotional functioning, the evaluator reported that the student generally engaged well with others, appeared to enjoy social interactions, was usually cooperative and compliant in the classroom, and that he appeared to need a great deal of structure and support (id. at pp. 7-8). The evaluator determined that the student would benefit from help learning how to organize information and solve problems in an organized and structured way, additional time to complete tasks, learning time management techniques, and frequent refocusing and redirection (id. at p. 8).

In a letter dated October 25, 2007, the student's guidance counselor reported that the student was a very respectful young man who got along well with adults and his peers (Parent Ex. J). She stated that the student became frustrated and easily distracted when he was unable to complete a task and that he required frequent prompting by her (id.). She opined that the student exhibited significant academic delays and needed to practice reading and writing on a daily basis (id.).

⁴ According to federal regulations, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [school district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 C.F.R. § 300.510[a][2]; see also 8 NYCRR 200.5[j][2]).

The CSE reconvened on November 9, 2007 and developed a new IEP for the student who was in the fifth grade (Parent Ex. D at p. 1). The CSE recommended continued placement in a 12:1 special class with related services of counseling and speech-language therapy (id. at pp. 1, 14). The academic performance and learning characteristics portion of the IEP indicates that the student's instructional levels in reading and writing ranged from beginning second grade to middle second grade, and in math from beginning second grade to middle third grade (id. at p. 3). He was reported to be at the beginning to middle fifth grade instructional level for story recall and at the middle third grade level for understanding directions (id.). The IEP stated that the student exhibited poor decoding skills and awareness of phonemes, limited comprehension of reading material, and difficulty spelling individual words and expressing ideas in writing (id.). The CSE developed new goals and short-term objectives to address the student's deficits in decoding, reading comprehension, arithmetic and number concepts, math word problems, writing, language, and social emotional skills (id. at pp. 7-11). The IEP further indicates that the CSE did not recommend SETSS in addition to the special class it recommended for the student because it believed that "the services he is receiving within and outside the classroom are addressing his many delays" (id. at p. 13).

The impartial hearing concluded on January 8, 2008 after two days of testimony. By decision dated January 31, 2008, the impartial hearing officer found that the IEP contained no procedural defects (IHO Decision at p. 20). However, she determined that the district did not offer the student a free appropriate public education (FAPE) because of the district's failure to include services, such as SETSS, in the student's 2007-08 IEP (id. at p. 21). Although the student had not received private tutoring from a specific private tutor preferred by the parent, the impartial hearing officer found that the parent had met her burden to establish the appropriateness of that specific private tutor providing 1:1 instruction in Orton-Gillingham to the student (id.). The impartial hearing officer also found that the parent cooperated with the district (id. at p. 22). The impartial hearing officer ordered the district to award a "P-3 letter" authorizing the parent to hire a specific private tutor for up to 10 hours per week at the requested enhanced rate (id.). The impartial hearing officer also ordered an occupational therapy (OT) evaluation of the student and directed the CSE to convene within one week of the receipt of the OT evaluation to consider the results (id.). Additionally, the impartial hearing officer ordered that the parent is to be provided "with an opportunity, either through the student's teachers or [the private tutor], to observe and obtain a working knowledge of the multisensory approach so that she may carry over such learning techniques at home" (id.).

The district appeals, alleging that the impartial hearing officer erred in concluding that it failed to offer the student a FAPE. The district asserts that it provides the student with additional reading instruction that uses a multisensory approach in the form of extended day services and pull-out sessions. The district argues that it is not required to maximize the potential of each student and it is not required to implement a specific methodology requested by the parent. The district seeks to annul the impartial hearing officer's decision insofar as it ordered the district to issue a P-3 letter authorizing 1:1 private tutoring for the 2007-08 school year, and ordered the district to provide the parent with an opportunity to observe the multisensory teaching approach so that she may implement the learning techniques at home.

In her answer, the parent alleges that the impartial hearing officer correctly determined that the district did not offer the student a FAPE. According to the parent's answer, the district is alleging that the parent is attempting to dictate teaching methodology; however, the parent

contends that methodology is not the issue.⁵ Instead, the parent argues that the district has failed to modify the student's program in order to provide him with a FAPE and therefore the award of a P-3 letter for 10 hours per week of private tutoring, as well as providing the parent with the opportunity to observe the multisensory approach, should be upheld.

Initially, I note that neither party appeals from the impartial hearing officer's order directing the district to conduct an OT evaluation of the student within 10 days of the issuance of the order followed by the CSE reconvening to consider the results (IHO Decision at p. 22). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determination that the student is to receive an OT evaluation is final and binding upon the parties (Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

A 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]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁶

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 student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak 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

⁵ Generally, although an IEP must provide for specialized instruction in the child's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a child's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of the Bd. of Educ., Appeal No. 02-047; Application of a Child with a Disability, Appeal No. 02-022; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

⁶ 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]).

Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]). 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 v. Pawling Cent. Sch. Dist., 427 F.3d 186, 195 [2d Cir. 2005], quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *15 [S.D.N.Y. Feb. 9, 2007]). 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).

State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047).

The impartial hearing officer determined that although she found no procedural defects with respect to development of the student's 2007-08 IEP, the student's program lacked "the individualization necessary to enable him to move forward and utilize the fund of knowledge that both the parent's and the Department's witnesses believe he possesses" (IHO Decision at pp. 20, 21). As discussed below, I find that the hearing record amply supports the impartial hearing officer's finding that the district failed to offer the student a FAPE.

The hearing record reflects that the CSE convened on June 18, 2007 for the student's annual review and to develop his program for the 2007-08 school year (Parent Ex. E). The CSE recommended that for the 2007-08 school year the student continue in a 12:1 special class with related services of one 30-minute session of counseling per week in a group of five and two 30-minute sessions of speech-language therapy per week in a group of three (*id.* at p. 10). Although the CSE reconvened on November 9, 2007 following its psychoeducational evaluation of the student in October 2007, the district's representative at the impartial hearing stated that only the goals were modified, but the recommended services remained the same (Tr. p. 21). The hearing record further reflects that the IEP indicates that the CSE rejected a recommendation of SETSS in addition to the special class it recommended for the student because it believed that "the services he is receiving within and outside the classroom are addressing his many delays" (Parent Ex. D at p. 13).

The student's special education teacher testified that the student has been in her 12:1 class since the beginning of the 2006-07 school year (Tr. p. 125). She described him as functioning on

approximately a second grade level, able to calculate addition and subtraction problems without borrowing or regrouping, and familiar with the sounds of the alphabet however continuing to exhibit difficulty blending sounds together (Tr. pp. 125-26). She stated that the student had difficulty "handling" his academic frustration and that when he became frustrated he became disruptive and initiated fights with other students (Tr. p. 126). The student's special education teacher testified that she addresses the student's academic frustration by modifying the curriculum for him, writing out his assignments, and sitting with him in a small group to reinforce what has been taught (Tr. p. 127). Within the 12:1 class, the special education teacher uses the Reading Street program in which she instructs the students as a large group, daily for 90 minutes (Tr. p. 132). She further testified that the reading instructional levels of the students in her class range from the first to the fifth grade and that the student had received instruction using the Reading Street program during the 2006-07 school year as well (Tr. pp. 136, 156).

In September 2007, the district began to provide the student with pull-out reading group instruction and "extended day" reading services that use the Wilson Reading Method (Wilson), because the student had achieved a score of one on the New York State English Language Arts (ELA) examination during the previous school year (Tr. pp. 128-29, 135-36, 160). The student's special education teacher testified that a score of one indicated that the student was performing far below grade level (Tr. p. 160). Testimony elicited from the district's school psychologist and the student's special education teacher reflects that the pull-out and extended day reading services provided to the student are not special education services, but are "academic services" provided to students "who scored low on their reading test" and therefore are not included on his IEP (Tr. pp. 55, 128-29).⁷

The hearing record reveals that the student receives the pull-out reading instruction from a reading teacher, three times per week for one hour, in a group with three other students (Tr. pp. 127-28, 141). His special education teacher testified that the pull-out group is comprised of a student at the same reading level as respondent's son, a student learning English as a second language, and a student who is reading at a third grade level (Tr. pp. 143-44). Four times per week, the student also receives extended day reading services for nearly 38 minutes within a group of three students (Tr. p. 133).⁸ His special education teacher testified that the group is comprised of the same students that are in the pull-out reading session and that the extended day lessons go very slowly because of the students' academic abilities and the shortened session time (Tr. pp. 143-44). She further testified that the students do not usually retain the information from the previous day and that she needs to reteach it (Tr. p. 143). Within the extended day reading group the special education teacher works on decoding, passage comprehension, and fluency (Tr. p. 144). The student's special education teacher testified that the student has made

⁷ Pursuant to State regulations, academic intervention services means "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards as defined in subdivision (t) of this section and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance; provided that such services shall not include . . . special education services and programs as defined in Education law section 4401(1) and (2). . . Academic intervention services shall be made available to students with disabilities on the same basis as nondisabled students, provided, however, that such services shall be provided to the extent consistent with the individualized education program developed for such student pursuant to section 4402 of the Education Law" (8 NYCRR 100.1[g]; see Application of the Bd. of Educ., Appeal No. 07-135).

⁸ The hearing record reflects that the student is provided with extended day services after the end of the school day, from 2:40 p.m. to 3:17 p.m. (Tr. p. 131).

approximately one year of progress in reading since October 2006 and is now able to decode material that is more complicated and comprehend it (Tr. p. 147). She attributes his progress to the pull-out and extended day Wilson reading services as well as the individualized attention he receives in the classroom (Tr. p. 148).

As noted above, the hearing record shows that the student has experienced limited success in his educational placements. Despite the special education teacher's testimony that the student has made approximately one year of progress in reading since October 2006, achievement testing conducted by both the district and by the parent's private evaluator indicate that the student has made minimal progress in reading since he was first evaluated in December 2005 (compare Parent Exs. K; L, with Parent Ex. N). For example, in 2005 when he was in the third grade, the student achieved grade equivalent scores of 2.2 in letter-word identification, 1.2 in spelling, 1.3 in passage comprehension, and 1.8 in broad reading (Parent Ex. N at p. 11). In October 2007, when he was in the fifth grade, the student achieved grade equivalent scores of 2.3 in letter-word identification, 1.5 in spelling, 1.6 in passage comprehension, and 2.0 in broad reading, indicating that he has only made a few months of progress in his reading skills in nearly two years (Parent Ex. K at p. 10). By comparison, the student has made more than one year's worth of progress in the areas of math and written expression during this same time period (compare Parent Exs. K; L, with Parent Ex. N). The student's minimal progress in reading is not consistent with the student's cognitive profile and the progress he has demonstrated in other academic areas.

At the impartial hearing, the district's school psychologist testified that she believes that the student is receiving the services he needs and that he is delayed because of his lower cognitive ability (Tr. p. 57). The school psychologist indicated that the student was among the "bottom performers" in the school, stating "[i]t's really sort of in line with our expectations;" however, when testifying about the discrepancy between the student's low average oral language subtest score on the WJ-III ACH and his other subtest scores that were in the very low range, the school psychologist was only able to indicate that "poor" oral language affects a student's ability to perform academically, but could not explain why and was unable to clarify the discrepancy in the student's scores (Tr. pp. 51-53, 59). The special education teacher who privately evaluated the student (private evaluator) in August 2007 testified that she had wanted to compare the student's ability to decode to his knowledge and that the two sets of grade equivalent scores that she reported for the word comprehension (2.5, 5.0) and passage comprehension (2.8, 4.2) subtests of the WRMT-R reflected his achievement when he read on his own and his achievement when the private evaluator went back and read to him (Tr. p. 167). She opined that the difference between the scores indicated to her that the student had a fund of knowledge that exceeded his ability to decode and read for himself (Tr. pp. 183-86; Parent Ex. L at p. 2).

Based on the hearing record before me, I concur with the impartial hearing officer in finding that the program recommended by the district for the 2007-08 school year was not reasonably calculated to enable the student to receive meaningful educational benefit because it did not provide adequate reading instruction to meet the student's primary area of need. Despite the student's significant delays in reading, which the district has been aware of since December 2005, it did not provide him with any reading intervention services until September 2007. The hearing record reflects that during the 2006-07 school year, the student's only reading services were provided in a group of 12 students whose reading instructional levels ranged from first to fifth grade and although the teacher is reportedly "trained in Wilson and incorporates such

strategies into her classroom," there is no information regarding how the special education teacher incorporates these strategies other than reminding the student to use the "tapping technique" (Tr. pp. 55, 136, 156, 161-64). For the 2007-08 school year, the district recommended the same program as it did for the 2006-07 school year. The District also began providing the additional group reading instruction in September 2007. Given the student's reading needs, the record demonstrates that 1:1 specialized reading instruction, as opposed to group instruction, should have been provided in conjunction with the student's 12:1 program.

To the extent that the parent seeks additional services to remedy the district's failure to offer a FAPE for the 2007-08 school year, I will review the impartial hearing officer's order awarding 10 hours of 1:1 remedial instruction, by a specific instructor, pursuant to a P-3 letter at an enhanced rate (IHO Decision at p. 22).

Although the student's mother testified that the private evaluator and the student had a good rapport and that he was happy to work with her and felt encouraged, there is insufficient evidence in the hearing record to determine that the student can only learn to read with Orton-Gillingham instruction provided by the parent's preferred provider (Tr. pp. 230, 260). Testimonial evidence from the student's mother, his special education teacher, and his speech-language pathologist indicates that the student has started to show some improvement since the implementation of the pull-out and extended day reading instruction (Tr. pp. 95-96, 130, 140, 145, 147, 211, 223). However, the hearing record also reflects that the student exhibits academic frustration, is self-conscious of his delays in front of his peers, and requires frequent repetition of material (Tr. pp. 126, 217-19, 241, 259). The private evaluator testified that the student needed to "catch up with what he's able to comprehend" which had to be done on an individual basis to "move" him along (Tr. p. 260). She opined that if the student was in a group with other students he could become frustrated and embarrassed if a lesson was not "geared to just him," and was addressing material that he could not do at the same rate, which could lead to his acting out (*id.*). The private evaluator further testified that because the student was so far behind in reading and also became frustrated at times in a group, he needed to be in an environment where the reading lesson was individualized for him and if he was unable to retrieve something that had been previously taught, the teacher would not have to move forward with the rest of the group (Tr. pp. 283-84).

Consistent with the impartial hearing officer, I find the private evaluator's testimony regarding the student's need for 1:1 reading instruction to be persuasive (Tr. pp. 260, 283-84).

Under the circumstances I will order the district to convene a CSE meeting and develop a program to provide the student with 10 hours per week of services consisting of 1:1 reading instruction utilizing a multisensory sequential approach that is individually prescriptive for the student's identified deficits and allows for him to progress at his own pace. Such services shall be provided to the student, by a provider selected by the district for the remainder of the 2007-08 school year and for summer 2008. Therefore, I will modify the impartial hearing officer's order to be consistent with this decision and direct the parties to reconvene at a CSE meeting to revise the student's 2007-08 IEP to include 1:1 reading instruction for 10 hours per week, if they have not done so already. I will also direct the district to consider providing this service in the student's IEP for the 2008-09 school year. The district is neither required to utilize the parent's preferred provider to provide this service, nor are they precluded from doing so.

The district requests that the impartial hearing officer's order to provide the parent with training from the private tutor in the multisensory approach be dismissed. State regulations authorize parent counseling and training in order to assist parents in understanding the special needs of their child by providing information about their child's development and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP (8 NYCRR 200.1[kk]; see 34 C.F.R. § 300.34 [c][8]). The parent training and counseling is classified as a related service and is to be indicated in the student's IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; 8 NYCRR 200.1[qq], 200.4 [d][2][v][b][5]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). The related service is to be provided by individuals with appropriate certification or license in each area of the related service (8 NYCRR 200.6[b][4]).

I note that the parent had previously requested training in the multisensory strategies being taught to her son so that she could assist him at home with his reading skills (Tr. pp. 223-24). However, the parent received only a brief overview of the multisensory strategies at a parent teacher conference and is currently unable to reinforce the strategies at home because of the limited instruction she received (Tr. p. 224). While the impartial hearing officer ordered that the parent be afforded with an opportunity to "observe and obtain a working knowledge" of the multisensory approach either from the student's teachers or the private tutor, I will modify this order to direct the district to offer parent counseling and training to enable the parent to acquire the necessary skills that will allow her to support the implementation of her son's IEP and to add this related service to the student's 2007-08 IEP. In addition, I will order that this service be provided in conjunction with the summer 2008 services ordered herein, and will also order that this service be considered for the 2008-09 school year at the CSE meeting ordered herein.

Lastly, I note that the student's special education teacher testified that the student demonstrates difficulty with retention over an extended period (Tr. p. 160). During cross-examination when asked why the student was reading at a kindergarten level in October 2006 when he had been reading at a 1.8 grade equivalent level in December 2005, the student's special education teacher opined that the student may have forgotten the sounds over the summer (Tr. pp. 159-60). Accordingly, I will direct the district to consider the student's need for ESY services during summer 2008, in addition to the ordered 1:1 services, in formulating his IEP for the 2008-09 school year.

I note also that the student's 2005-06, 2006-07, and 2007-08 IEPs, testimony from the parent, and testimony from the student's special education teacher reflect that the student becomes frustrated and "shuts down," or exhibits verbal or aggressive behaviors (Tr. pp. 126-27, 217-19, 220; Parent Exs. D at p. 5; E at p. 4; F at p. 4; H at p. 6). Although the student achieved very little progress toward mastering his goals and objectives, the CSE did not alter the student's program so that he could reasonably achieve meaningful educational benefit in reading. The district speculates that the student's behavioral difficulties are a result of the student's frustration over his academic deficits, although I note it has not conducted a Functional Behavioral Assessment (FBA) or developed a Behavioral Intervention Plan (BIP) to address the behavior, but instead stated in the social/emotional management needs section of the student's IEP that the student should be refocused or be allowed to draw when he is feeling angry (Parent Exs. D at p. 5; E at p. 4; F at p. 4; H at p. 6).⁹ I will direct the district to consider conducting an FBA and

⁹ An FBA is warranted for children whose behavior impedes their learning or that of others (20 U.S.C. § 1414[d][3][B][i]; 8 NYCRR 200.4[b][1][v]; 8 NYCRR 200.4[d][3][i]).

developing a BIP to address the student's frustrations and verbal or aggressive behaviors when revising his 2007-08 and 2008-09 IEPs.

In light of my determination, I need not address the parties' remaining arguments.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is modified to the extent that the district is to reconvene within 30 days from the date of this decision to revise the student's 2007-08 IEP to include 1:1 reading instruction for 10 hours per week for the remainder of the 2007-08 school year and summer 2008; and

IT IS FURTHER ORDERED that the CSE reconvene within 30 days of the date of this decision to formulate the student's IEP for the 2008-09 school year, which should include a consideration of the student's need for ESY, an FBA, parent counseling and training, and continuation of 1:1 reading instruction, if they have not already done so; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision is modified to the extent that the parent is to receive the related service of parent counseling and training from the provider selected by the district to provide the student's 1:1 reading instruction.

Dated: Albany, New York
April 18, 2008

PAUL F. KELLY
STATE REVIEW OFFICER