



The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 08-155

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] District

Appearances:

Ingerman Smith, L.L.P., attorneys for respondent, Christopher Venator, Esq., of counsel

DECISION

Petitioner (the parent)¹ appeals from the decision of an impartial hearing officer which denied his request to be reimbursed for his daughter's tuition costs at the Vincent Smith School (Vincent Smith) and for the costs of private tutoring services at Lindamood-Bell Learning Processes (Lindamood-Bell) for the 2006-07 school year. The appeal must be dismissed.

The educational history of the student is described in Application of a Child with a Disability, Appeal No. 07-008, and will not be repeated in detail herein as the parties' familiarity therewith is presumed. At the time of the impartial hearing, the student was attending Vincent Smith (July 8, 2008 Tr. pp. 390-91). Vincent Smith has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 6 at p. 1; 8 NYCRR 200.1[zz][6]; 34 C.F.R. § 300.8[c][10]).

To summarize, for the 2005-06 school year, respondent's (the district's) Committee on Special Education (CSE) recommended that the student be placed in a 15:1+1 special class where she would be provided with a 1:1 aide and would receive related services of speech-language therapy and counseling (Parent Ex. C at p. 1). In addition, the student was

¹ Both the student's mother and father were parties at the impartial hearing, at which they were represented by counsel (see Parent Ex. A). Only the student's father is a petitioner in this appeal and he has appeared pro se (see Pet.).

recommended for daily supportive reading services (id. at pp. 1, 6). The student was also recommended for extended school year (ESY) services, which included placement in a 12:1+2 special class with speech-language therapy and daily reading instruction (id. at p. 2). The parents expressed disagreement with the recommended program and elected to send the student to the district's 15:1+1 special class in the morning and private Lindamood-Bell instruction in the afternoon (May 21, 2008 Tr. p. 78; July 8, 2008 Tr. pp. 371-72; Parent Ex. S). The student left the district school mid-day and did not participate in the English language arts (ELA) or skills class recommended by the CSE, nor did she receive reading instruction from the district (May 21, 2008 Tr. pp. 78-80). The parents also declined the recommended ESY services for summer 2005 (Parent Exs. C at p. 5; S at p. 2).

The hearing record includes documents detailing the student's educational performance during the 2005-06 school year (Dist. Exs. 4; 13; Parent Exs. AAA; FFF). Testing results from the New York State Testing Program (NYSTP) revealed that the student did not meet the State learning standards for eighth grade mathematics, ELA, social studies, or science (Parent Ex. FFF).

The student's April 2006 report card generated by the district indicated that the student attained the following grades in her core academic classes: social studies 7/8 (60), science 7/8 (67), and math 7/8 (83) (Dist. Ex. 4 at p. 1). The report card noted that the student's grades were based on a modified curriculum and contained comments suggesting that the student "must review class notes daily" and that "daily study is necessary" (id.). The report card reflected higher first and second quarter grades for social studies and science, but lower grades for math (id.).

The student's 2005-06 progress report indicated that the student's performance on several objectives in her 2005-06 individualized education program (IEP) were not started or could not be evaluated due to the fact that the student did not attend the ELA class, reading instruction, or skills class recommended by the CSE (Dist. Ex. 13 at pp. 2-5). The student achieved 17 out of 31 remaining objectives, including objectives related to study skills, mathematics, speech-language skills, and motor development (id. at pp. 1-2, 5-6, 8-11). Teacher/therapist comments indicated that the student was making "some progress" or "progressing satisfactorily" on the remainder of the 2005-06 IEP objectives (Dist. Ex. 13).

A comparison of the results of standardized testing conducted by Lindamood-Bell in May 2005 and May 2006, suggests that the student demonstrated improvement in some math and language skills (Parent Ex. AAA at pp. 472-77). However, the student's standard scores on measures of reading primarily remained the same (id.).

The CSE met on May 19, 2006 for an annual review and to develop the student's IEP for the 2006-07 school year (Dist. Ex. 6). Meeting attendees included a district chairperson, a middle school psychologist, the student's middle school speech-language therapist who would have been the student's high school speech-language therapist, the student's middle school special education teacher, the student's middle school regular education music teacher who would have been the student's high school regular education music teacher, a high school special education teacher, an additional parent member, the student's middle school occupational therapist who would have been the student's high school occupational therapist, the student's

mother and father, and an educational advocate who attended with the parents (id. at p. 6; May 21, 2008 Tr. pp. 94-95).

The CSE recommended that the student be placed in a 15:1+1 special class at the district's high school (Dist. Ex. 6 at p. 1). The CSE also recommended that the student receive related services of a 1:1 aide daily for all academic classes, individual counseling once per six-day cycle for 40 minutes, individual occupational therapy (OT) once per six-day cycle for 40 minutes, group OT in a 5:1 setting once per six-day cycle for 40 minutes, individual speech-language therapy twice per six-day cycle for 40 minutes, and group speech-language therapy in a 5:1 setting twice per six-day cycle for 40 minutes (id. at pp. 1-2). The student's 2006-07 IEP noted that "Daily Supportive Reading" was recommended and was to be provided by the district's high school reading department (id. at p. 2). The IEP also noted that the student was recommended for "Program Modifications/Accommodations/Supplementary Aids and Services" of refocusing, redirection and reteaching of materials as needed and "Assistive Technology Devices/Services" of access to a word processor and a spell check device as needed (id. at pp. 2-3). A recommendation for several testing accommodations was also reflected on the student's IEP (id. at p. 3).

For summer 2006, the CSE recommended ESY services for the student in a daily special education program at the district's middle school in a 12:1+2 setting with related services of OT in a 5:1 group once per week for 30-minutes each session and speech-language therapy in a 5:1 group twice per week for 30-minutes each session (Dist. Ex. 6 at pp. 1-2). The 2006-07 IEP also provided that the summer program would include daily small group instruction in reading, writing and math, as well as computers, art and physical education (id. at p. 2). The IEP also noted that additional individual reading instruction with a certified reading teacher was recommended for the student for the duration of the summer program (id.).

By letter dated June 17, 2006, the parents declined the program recommended by the May 19, 2006 CSE, including the summer program, opting to unilaterally enroll the student in Vincent Smith for the 2006-07 school year and to supplement the private school's program with continued instruction from Lindamood-Bell (Dist. Ex. 11 at p. 1). In addition to attending Vincent Smith for ninth grade, the hearing record indicates that the student received resource room services at the school from an outside agency (Tr. pp. 593-96, 650, 653).

The district responded to the parents' June 17, 2006 letter by letter dated June 30, 2006 (Parent Ex. W). The response from the district addressed a number of the concerns raised by the parents and provided the parents with information and details to "ensure that the [parents had] only the most accurate information regarding [the district's] High School programs" (id. at pp. 1-3).

Progress notes from the student's Vincent Smith teachers for the 2006-07 school year indicated that the student was an active participant in her classes, put forth good effort, and was willing to assist others (Parent Ex. LL at pp. 1-4, 10-12, 21, 29). The student's writing teacher reported that the student was working on developing paragraphs with topic sentences, main idea development, descriptive and narrative writing skills, creative writing skills, vocabulary, and writing mechanics (id. at pp. 3, 8, 22-23). The student reportedly used graphic organizers to organize ideas for stories (id. at p. 22). The student's science teacher reported that the student grasped complicated facts and had done well on tests (id. at p. 10). In the first quarter, the

student's math teacher reported that the student would be scheduled for a tutorial to help strengthen her computational skills (id. at p. 5). Subsequent reports from the math teacher indicated that the student demonstrated an improvement in her organizational skills and scored well on an exam that tested solving variable equations (id. at pp. 17, 24). According to the student's English teacher, the student was well prepared and worked hard to complete and understand assignments (id. at p. 11). The student's social studies teacher reported that the student had shown steady progress in her ability to grasp key concepts, as well as improvement in note-taking, time management, and following directions (id. at p. 14). The student's counselor at Vincent Smith reported some increase in the student's ability to initiate appropriate interactions with her classmates (Parent Ex. JJJ at p. 6). The counselor also noted that sustaining interactions remained a challenge for the student and that she had made limited progress in her ability to express her feelings (id.).

According to the student's Vincent Smith reading teacher, the student attended reading class twice weekly and worked on decoding and comprehension using the Lindamood-Bell Visualizing and Verbalizing program,² as well as strategies from the Wilson reading program to promote oral fluency (Parent Ex. LL at p. 35). A second term progress report from the student's reading teacher indicated that the student had been learning strategies to develop critical thinking skills, improve vocabulary, and decode multi-syllable words (id. at p. 36). The teacher reported that the student was making progress in oral fluency, decoding and comprehension (id.). Subsequent reports indicated that the student was learning previewing strategies to set a purpose for reading and accessing prior knowledge, identifying key words in questions in order to answer them more effectively, and focusing on the use of context clues to "unlock" the meaning of unfamiliar words (id. at p. 38). According to the reading teacher, the student demonstrated growth in all areas of reading as evidenced by her scores on standardized testing, including an increase of two grade levels in reading comprehension (id.).

The student's 2006-07 report card from Vincent Smith reflected the student's final grades for her core academic classes: literature 84, pre-algebra 88, global studies I 83, and earth science 87 (Parent Ex. LL at p. 31). The report card indicated that the student also passed resource room, reading, and writing (id.). A notation on the report card indicated that the grades on the student's report card were "a reflection of the student's efforts and ability and are not on grade level" (id.).

In addition to attending Vincent Smith for the 2006-07 school year, the student transitioned from intensive Lindamood-Bell instruction to a follow-up program (Aug. 13 2008, Tr. pp. 445-46). Progress notes from Lindamood-Bell indicated that the student's textbooks were used for application of skills during tutoring (Parent Ex. UU at p. 1). The notes further indicated that standard coaching and error handling from the Seeing Stars program³ was applied as the

² The Visualizing and Verbalizing program is described in the hearing record as "a program that is focused on the development of concept imagery, which is the ability to create mental images from incoming language, whether . . . oral or written language" (Aug. 13, 2008 Tr. p. 427).

³ The Seeing Stars program is described in the hearing record as being "focused on the development of orthographical awareness," and as a program that deals with "the visual skills that support work recognition, reading fluency and independent self-correction" (Aug. 13, 2008 Tr. pp. 426-27). Orthographical awareness is defined in the hearing record as "a general perception and awareness of the way words look" (id. at p. 426).

student processed sections of her textbook that coincided with homework assignments (id.). In addition, the student was asked to provide word summaries as a means of ensuring processing and higher order thinking questions were posed to the student (id.). With respect to math, progress notes indicated that the student reviewed relevant concepts using On Cloud Nine⁴ imagery techniques prior to completing any required computation (id.). The student's tutor reported that the student's ability to apply the Lindamood-Bell programs to her school work had proven successful (Parent Ex. VV at p. 1). In or around March 2007, the focus of the student's Lindamood-Bell tutoring switched to math only, as it was deemed the more challenging subject for the student (id.).

The student received private tutoring for at least part of the 2006-07 school year (Parent Ex. EEE). In a May 20, 2007 progress report, the student's private tutor noted a marked difference in the student's ability to compose sentences since she had resumed tutoring the student in March 2007, after not tutoring her for several months (July 11, 2008 Tr. p. 545; Parent Ex. EEE at p. 1). She reported that the student was able to produce more written work than in the past, but also indicated that writing continued to be a challenge for the student and that the student could not independently correct her own written work (Parent Ex. EEE at p. 1). The tutor reported improvement in the student's reading "stamina" and indicated that the student could read passages on a third to fourth grade level when provided with some assistance with complex sentences or vocabulary (id.). Finally, the tutor reported that the student seemed "more at ease and confident in her ability to learn" (id.).

A comparison of the results of standardized testing conducted in May 2006 and June 2007 suggests that the student's scores on measures of math and reading ability remained the same or declined (Parent Ex. AAA at pp. 470-74).

The parents, through their attorney, filed a due process complaint notice dated February 8, 2008 (Parent Ex. A). The parents alleged that there were substantive and procedural defects in the development of the student's IEP for the 2006-07 school year (id.). Procedurally, the parents alleged that they were not able to meaningfully participate in the development of the IEP (id.). Substantively, the parents contended that the CSE failed to recommend an appropriate program for the student (id.). They stated that the student had been enrolled in the district's programs until the end of the 2005-06 school year and had been receiving special education services from a public agency since 1995 (id.). The parents alleged that the student had not previously made educational progress while enrolled in the public programs recommended in her prior IEPs, and that the CSE had recommended the same program for the 2006-07 school year (a 15:1+1 special class), that it had recommended since the student was in sixth grade during the 2003-04 school year (id.). The parents requested tuition reimbursement for Vincent Smith, including expenses for resource room services received at Vincent Smith and private tutoring expenses at Lindamood-Bell, as well as reimbursement for transportation for the 2006-07 school year (id.).

The district, through its attorneys, provided a response to the parents' due process complaint notice dated February 21, 2008 (IHO Ex. A). In its response, the district alleged that

⁴ The On Cloud Nine program is described in the hearing record as "a math program that is based on . . . research and work in visual processing and comprehension" and as "an integrated approach through visual processing and comprehension as it relates to math" (Aug. 13, 2008 Tr. p. 428).

the program recommended for the student for the 2006-07 school year was an appropriate educational program; that the program was reasonably calculated to provide the student with the opportunity to make educational progress; that the parents had a full and fair opportunity to participate in the development of the student's 2006-07 IEP; that the student's 2006-07 IEP was developed upon careful consideration of the student's current evaluations, input from the parents, and input from district and other education professionals that were knowledgeable about the student and her educational needs; that the program that the student was placed in by the parents was not appropriate for the student and did not result in the student making educational progress; and that the parents were not legally entitled to the transportation they had requested (id.).

An impartial hearing convened for five days from May 21, 2008 to September 19, 2008 (May 21, 2008 Tr. p. 1; July 8, 2008 Tr. p. 207; July 11, 2008 Tr. p. 487; Aug. 13, 2008 Tr. p. 389; Sept. 19, 2008 Tr. p. 576). The district called three witnesses and submitted 13 documents into evidence (May 21, 2008 Tr. p. 69; July 8 Tr. pp. 211, 280; Dist. Exs. 1-13). The parents called nine witnesses, including the student's mother and father, and submitted 79 documents into evidence (July 8, 2008 Tr. pp. 299, 429; July 11, 2008 Tr. pp. 499, 533, 562; Aug. 13, 2008 Tr. pp. 421, 484, 528; Sept. 19, 2008 Tr. p. 580; Parent Exs. A-H; J-S; S1; U-Y; Y1; Z; Z1; Z2; AA-ZZ; AAA-SSS; UUU-XXX; AAAA-BBBB).

In a decision dated November 21, 2008, the impartial hearing officer found that the district offered the student a free appropriate public education (FAPE) for summer 2006 and for the 2006-07 school year, and she denied the parents' request for reimbursement without reaching the issue of whether the services obtained by the parents at Lindamood-Bell or the parents' unilateral placement at Vincent Smith were appropriate for the student (IHO Decision at p. 13). She also found that the parents had the opportunity to participate in the development of the IEP, including the development of the goals and objectives (id. at p. 12). The impartial hearing officer did not address the parents' argument raised at the impartial hearing that a 1:1 aide was inappropriate for the student.

This appeal ensued. The parent alleges, among other things, that: (1) the impartial hearing officer erred in her findings and did not base her decision on the preponderance of evidence; (2) the impartial hearing officer failed to explore the evidence demonstrating that the program offered by the district was not appropriate; (3) the impartial hearing officer failed to address the parents' "main argument" that a 1:1 aide was not appropriate for the student; (4) the impartial hearing officer was not "careful and thorough" in her decision; (5) the student was denied a FAPE; (6) the CSE recommendation for a 1:1 aide was inappropriate for the student; (7) the "large size" of the district's high school was inappropriate for the student because of "the multiple distractions and social stresses inherent in such a setting;" (8) the CSE's recommendation lacked a scientific-based reading and math program that the parent alleges the student needed; (9) the parents' placement of the student at Vincent Smith and Lindamood-Bell was appropriate to meet the student's needs; (10) the parents' placement of the student at Vincent Smith was reasonably calculated to confer educational benefits upon the student, prevent regression, and enable progression; (11) the Lindamood-Bell services were appropriate for the student to enable her to receive the benefits of educational instruction; and (12) the parents cooperated with the district.

Based on the foregoing allegations, the parent requests tuition reimbursement for Vincent Smith, including resource room services, reimbursement for Lindamood-Bell services, and transportation reimbursement from Vincent Smith to Lindamood-Bell for the student for the 2006-07 school year.

In its answer, the district denied many of the parent's allegations. The district alleges that the impartial hearing officer correctly held that the CSE recommended an appropriate placement for the student and that the parents are not entitled to tuition reimbursement, that any typographical errors by the impartial hearing officer have no bearing on the decision of the impartial hearing officer, and that Vincent Smith and the Lindamood-Bell services are not appropriate for the student. The district also asserts as an affirmative defense that claims raised by the parent that arose more than two years before the 2006-07 school year are outside the applicable statute of limitations and should not be considered.⁵

At the outset, I will first address a procedural issue that has arisen on appeal. I note that the parent submitted two letters one dated January 13, 2009 and one January 15, 2009 requesting that the district's answer be stricken, asserting that the district failed to timely serve its answer. State regulations provide that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer of the State Education Department, except a reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). A reply filed with the Office of State Review must also be accompanied with proof of service upon the opposing party (*id.*). In this case, the parent's letters asserting untimeliness of the answer are not additional pleadings permitted by State regulations inasmuch as they do not respond to procedural defenses raised in the answer, nor was any additional evidence submitted with the answer. Furthermore, when submitted, the letters were neither verified nor were they accompanied with an affidavit of service upon the district, but merely contained a notation that they were sent by mail to the district (*see* 8 NYCRR 279.6, 279.7).

Moreover, even if the parent's January 13, 2009 and January 15, 2009 letters constituted permissible additional pleadings that were properly verified, served and filed, his argument that the answer should be stricken is unpersuasive. State regulations provide that service of pleadings subsequent to a petition made "by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service" (8 NYCRR 275.8[b]).⁶ In this case, the district's verified answer was accompanied by an affidavit of service showing that the district's affidavit of service accompanying the verified answer indicates that that the verified answer was properly addressed to the parent and deposited in the mail on January 9, 2009 in accordance with the governing regulations and within applicable timelines (*see* 8 NYCRR 279.5; 275.8[b]). Accordingly, the parent's request to preclude the district's answer is denied.

⁵ The district's petition does not clarify which of the parent's claims it believes are barred by the statute of limitations. However, the district does not argue that the parent's request for relief relating to the 2006-07 school year, including summer 2006 is time barred by the statute of limitations.

⁶ Service may also be completed by private express delivery (*see* 8 NYCRR 275.8[b]).

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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 student, 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]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016)..

Turning to a review of the appropriateness of the educational program and services offered by the district in the May 19, 2006 IEP, I note that the hearing record indicates that the CSE reviewed the parents' privately obtained May 2005 neuropsychological evaluation as part of the student's May 19, 2006 annual review (May 21, 2008 Tr. p. 82; Dist. Ex. 6 at p. 7). According to the May 19, 2006 IEP, the student demonstrated "slow and steady" progress during the 2005-06 school year in the district's program and improved her understanding of math concepts related to money, telling time, and simple operations (Dist. Ex. 6 at p. 4). The student was able to solve one-step problems with minimal assistance and demonstrated progress in her ability to solve multi-step arithmetic problems (id.). Although the student did not attend reading or English class during the middle school day, gains in reading fluency were noted in the student's content area classes (id.). Content area materials were reported to be at a fourth to fifth grade reading level (id.). As reported in the student's IEP, the student was able to decode most of the materials in class; however, she had difficulty answering related comprehension questions (id.). The student required assistance in self-correcting errors when reading (id.). The student's writing, as assessed in her content area classes, was characterized as "simplistic" (id.). As noted in the IEP, the student demonstrated growth in her ability to comprehend and retain information from highly motivating written material; however, when the content was less motivating the student's retention and comprehension skills decreased "dramatically" (id.).

The student's IEP indicated that the student had difficulty with spelling and grammar and that she required "quite a bit of assistance in writing mechanics" (Dist. Ex. 6 at p. 4). The student required a "moderate amount of help" to transfer her ideas to writing and needed to work on extending sentences and using a more extensive vocabulary (id.). The student reportedly demonstrated limited gains in her written language skills (id.). According to the IEP, during the 2005-06 school year, the student was an active participant in group speech-language services and she was able to maintain "fairly consistent" levels of motivation and cooperation throughout the

school year (id.). The student demonstrated both expressive and receptive language delays; however, progress was noted in each area addressed in speech-language therapy, including significant gains in the student's ability to comprehend and use idioms and multiple meaning words, and to express personal feelings (id.).

With respect to social development, the IEP indicated that the student was a "quiet girl" who seemed most at ease in small structured settings (Dist. Ex. 6 at p. 5). The IEP further indicated that at times, the student exhibited some moderately defiant behaviors toward her teachers and 1:1 aides (id. at p. 4). With respect to physical development, the IEP indicated that the student's fine and gross motor skills were within a functional range (id. at p. 5). The student's visual-motor skills were deemed to be below age expectations as evidenced by her difficulty during tasks requiring visual discrimination, visual memory and visual figure ground (id.). According to the IEP, the student required increased time and moderate assistance when attempting to identify small differences in visual information and during far-point copying tasks (id. at p. 4). The student reportedly tended to lose her place and had difficulty organizing materials (id.). The IEP indicated that the student was learning to organize written material using a word processing program and her typing was described as "functional" (id. at p. 5).

The May 19, 2006 CSE recommended that the student be placed in 15:1+1 special class described as a "Regents intensive support program" (July 8, 2008 Tr. p. 285; Dist. Ex. 6 at p. 1). The teacher of the proposed class testified that the class usually consisted of seven to ten students (July 8, 2008 Tr. p. 285). According to the teacher, in the proposed class the Regents curriculum was broken down for each individual student using vocabulary, tactile information, or auditory information (id.). The class included group instruction as well as "a lot" of 1:1 instruction (id.). The recommended program also included a skills class (May 21, 2008 Tr. p. 101). In addition to placement in a special class, the CSE recommended that the student be provided with a 1:1 aide for all academic classes (Dist. Ex. 6 at p. 1). The aide was recommended to facilitate instruction and to help re-present and review material, and keep the student engaged and on task (May 21, 2008 Tr. pp. 101, 105). The IEP indicated that the district reading department recommended that the student receive supportive reading for forty minutes daily in a group of two to three students (May 21, 2008 Tr. p. 191; Dist. Ex. 6 at pp. 2, 7). The student's reading instruction would have been provided by certified reading teachers (May 21, 2008 Tr. pp. 102-03). The student's IEP included academic goals for study skills, reading, writing, and mathematics (Dist. Ex. 6 at pp. 8-12).

The student's mother testified that the parents were in agreement with the related services recommended by the May 19, 2006 CSE (July 8, 2008 Tr. p. 470). To address the student's speech-language needs, the CSE recommended that the student receive individual speech-language therapy twice per six-day cycle and group speech-language therapy twice per six-day cycle (Dist. Ex. 6 at pp. 1-2). The student's IEP included 11 speech-language goals that targeted the student's identified expressive, receptive, and pragmatic language needs (id. at pp. 12-14). The CSE recommended that the student receive individual counseling once per six-day cycle at the request of the parents and in order to address the student's social-emotional needs (id. at p. 1). The student's IEP included one social/emotional/behavioral goal requiring her to accept teacher/teacher aide assistance without verbal objection or turning away (id. at p. 14). To address the student's needs related to physical development, the CSE recommended individual OT once per six-day cycle and group OT once per six-day cycle (id. at p. 2). The recommended

IEP included six motor goals, each of which detailed the student's then current functioning, and included criteria for evaluation (id. at pp. 14-16).

In addition to recommending special education and related services, the CSE recommended the following program modifications/accommodations/supplementary aides and services for the student: refocusing and redirection, and reteaching of materials (Dist. Ex. 6 at p. 2). The IEP afforded the student access to a word processor as needed and also recommended that the student have access to a spell check device (id. at p. 3). The IEP included the following testing accommodations: extended time (2.0); directions explained; directions read; special location; administer in a small group; answers recorded in any manner; test passages, questions, items and multiple choice responses read to student; use of a calculator; and spelling requirements waived (id.).

The parent asserts on appeal that the district failed to offer the student "a Scientific Research Based Reading and Math program" for the 2006-07 school year. Federal regulations require, in part, that an IEP must include a "statement of the special education and related services and supplementary aides and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (34 C.F.R. § 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). Official commentary to the federal regulations pertaining to section 1414(d)(1)(A)(i)(IV) of the IDEA states that the law

requires special education and related services, and supplementary aides and services, to be based on peer-reviewed research to the extent practicable. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for the child to receive a FAPE. Likewise, there is nothing in the Act to suggest that the failure of the public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aides and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs

(Statement of Special Education and Related Services, 71 Fed. Reg. 46665 [Aug. 14, 2006]).

Here, the hearing record indicates that the CSE recommended a program based on the student's individual needs (see Dist. Ex. 6). The hearing record indicates that the student would have been provided with daily reading instruction by a certified reading teacher (May 21, 2008 Tr. pp. 102-03, 140). Furthermore, the hearing record indicates that the district had taken steps to provide its reading teachers with training, in differing reading methodologies, including the one favored by the parents (May 21, 2008 Tr. pp. 138-41, 193-94). Consistent with the impartial hearing officer, I do not find that the offered instruction would have denied the student a FAPE.

On appeal, the parent also asserts that the CSE recommendation of a 1:1 aide for the student was "substantively wrong," would be "socially stigmatizing" to the student, and was

likely to produce regression rather than progression. The parent argues that the aide would have had all the responsibility of teaching the student, that the aide had no particular training in working with autistic children nor did she have training related to the student's identified disabilities, and that the student's previous 1:1 aide caused emotional and physical harm to the student and had to be removed. Based on the above, the parent asserts that the district's recommendation for a 1:1 aide was inappropriate and contributed to a denial of FAPE. I note that the hearing record reflects that the parents did not raise any concerns at the May 19, 2006 CSE meeting about a 1:1 aide being provided for the student (May 21, 2008 Tr. p. 111; July 8, 2008 Tr. pp. 378-79, 466-67). I also note that the parents did not raise any concerns about this issue in their subsequent letter to the district in which they objected to the program offered to the student, or in their due process complaint notice (Dist. Ex. 11; Parent Ex. A).

The hearing record indicates that the student was assigned a 1:1 aide during the 2005-06 school year (May 21, 2008 Tr. p. 75). According to the student's eighth grade teacher, the student had difficulty with the first aide assigned to her, but the second aide worked "well" with the student (July 8, 2008 Tr. p. 273; see May 21, 2008 Tr. pp. 165-68; July 8, 2008 Tr. pp. 273-75, 372-73). The student's teacher testified that during the 2005-06 school year when the student was in the eighth grade, the student's 1:1 aide provided her with refocusing and redirection and, "when appropriate, took the student aside to work with her one-to-one" (July 8, 2008 Tr. p. 221). The student's teacher further testified that the aide was able to keep the student on task when her motivation waned, made sure she was writing notes from the board correctly, and was available to clarify assignments for the student if she had difficulty (July 8, 2008 Tr. p. 260). The 1:1 aide also recorded the student's progress toward some of her IEP goals (July 8, 2008 Tr. pp. 225-27). The teacher opined that use of the aide was successful and that the student was able to pass the teacher's eighth grade classes with the provided supports (July 8, 2008 Tr. pp. 221, 242). According to the CSE chairperson, the curriculum for the proposed class for the 2006-07 school year was based on the "New York State Education Regents level 9th grade curriculum," which would have been modified based on the student's needs (May 21, 2008 Tr. p. 105). With respect to the proposed class, the student would have been functioning in the "middle of the pack" (id.). The CSE chairperson testified that the CSE recommended a 1:1 aide for the student because it was aware that some of the concepts that were going to be presented to the student were going to be challenging (id.). She also noted that given the student's auditory processing deficit and attention deficit, maintaining attention was a challenge for the student and the aide would help to keep the student engaged and on task (id.). The duties of the proposed aide were consistent with the student's needs as identified in her May 19, 2006 IEP, including statements that the student required frequent refocusing and redirection during class activities due to "attentional issues," that "concepts and skills need to be consistently be reinforced," and that the student "require[d] supervision to function successfully in the educational setting" (Dist. Ex. 6 at pp. 2, 6).

During the impartial hearing, the parents presented as witnesses professionals who worked privately with the student and who testified that the student had made significant gains after beginning the Lindamood-Bell program (July 11, 2008 Tr. pp. 510-11, 539-42, 547-49, 555-56 570-71; Aug. 13, 2008 Tr. pp. 493-94, 501-02; Parent Exs. CCC; DDD). The parents also presented witnesses at the impartial hearing who opined that a 1:1 aide would be stigmatizing for the student (July 11, 2008 Tr. pp. 513-14, 543, 545-46, 573; Aug. 13, 2008 Tr. pp. 508, 538). I have given the parent's evidence regarding the student's progress at Lindamood-Bell due consideration, and I have given due consideration to the student's social needs and the

possible stigmatizing effect of a 1:1 aide, and I cannot conclude, based on an independent and thorough review of the hearing record, that the CSE's recommended instructional program for the 2006-07 school year, which included the support of a 1:1 aide, was substantively inappropriate or impermissibly restrictive (see generally A.C., 553 F.3d at 172-73). Upon review of the student's 2006-07 IEP, I find that the recommended service of a 1:1 aide was consistent with the educational needs of the student as identified on that IEP, and that it was part of an educational program that was reasonably calculated to confer educational benefits to the student. I note that the aide was only recommended for the academic portion of the student's day that amounted to three hours and thirty minutes daily (Dist. Ex. 6). In addition, I note positively the testimony of the student's eighth grade teacher who opined, based upon her knowledge of working with the student, that the aide was educationally beneficial to the student (July 8, 2008 Tr. pp. 221, 242). The teacher provided the student with instruction for three of her core academic classes during the 2005-06 school year and was in the position to weigh the benefit or detriment of the aide to the student in the classroom.

Here, the CSE offered the student placement in a 15:1+1 special class, along with daily reading instruction and related services of speech-language therapy, OT and counseling, which were based on the student's present levels of performance and which targeted the student's needs as identified in her May 19, 2006 IEP (see Dist. Ex. 6). Moreover, the disputed IEP offered the student assistive technology, testing accommodations, program modifications and accommodations and ESY services. Based on the above, I find that the May 19, 2006 IEP offered the student an educational program that would confer educational benefits to the student in the LRE.

Turning to the student's need for summer services, the student's May 19, 2006 IEP included recommendations for ESY services (Dist. Ex. 6 at p. 2). Specifically, the student was recommended for the district's summer program which included placement in a 12:1+2 special class with daily small group instruction in reading, writing, and math (May 21, 2008 Tr. pp. 103-04; Dist. Ex. 6 at p. 2). With respect to related services, the CSE recommended that the student receive group OT once per week and group speech therapy twice per week (Dist. Ex. 6 at pp. 2, 7). The IEP indicated that daily, individual reading instruction with a certified reading teacher was also recommended for the student (id.).

Students shall be considered for 12-month special services and/or programs if they exhibit the need for a service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the CSE (8 NYCRR 200.6[j][v]). "Substantial regression" is further defined as "a 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]).

The parent claims that the 2006-07 CSE recommendation, which included a recommendation for ESY services, was substantially the same as the program that the student attended during previous years, which the parent alleges led to "dismal" results. The student's father testified at the impartial hearing that the district's ESY program "had never worked in the past" and that the district did not offer a "scientifically researched based program" (July 8, 2008

Tr. p. 388). The hearing record reveals that the recommended ESY program included instruction in reading, writing and math, which were deficit areas for the student, and additionally provided for daily, individual reading instruction, as well as therapy services to address the student's speech-language and motor weaknesses (Dist. Ex. 6 at p. 2). As such, I find that the recommended ESY program was based on the student's needs and designed to prevent substantial regression.

Based upon a thorough and independent review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process, that the district offered the student a FAPE in the LRE, that the parent is not entitled to reimbursement for educational services and related transportation costs, and that there is no need to modify the determination of the impartial hearing officer. Having found that the district offered the student a FAPE in the LRE for the 2006-07 school year, the necessary inquiry is at an end and I need not decide whether the placement of the student at Vincent Smith or the services the student received at Lindamood-Bell were appropriate (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058). I have reviewed the parties' remaining contentions and find them to be without merit or unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
March 9, 2009

PAUL F. KELLY
STATE REVIEW OFFICER