



The University of the State of New York

The State Education Department State Review Officer

No. 09-002

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

Appearances:

Law Office of Andrew K. Cuddy, attorneys for petitioners, Andrew K. Cuddy, Esq., and Jason H. Sterne, Esq., of counsel

Lexow, Berbit and Associates, P.C., attorneys for respondent, Susan Mills Richmond, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2007-08 school year were appropriate and denied their request to be reimbursed for the costs of their son's privately obtained evaluation and tutoring services for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending tenth grade in a general education setting at the district's high school with the exception of social studies, which he attended in a 15:1 special class (see Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1; see also Tr. pp. 893-95, 923). Pursuant to his November 2007 individualized educational program (IEP) for the 2007-08 school year, the student also received daily resource room services, program modifications/ accommodations/ supplementary aids and services, and testing accommodations (see Dist. Ex. 5 at p. 1). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (8 NYCRR 200.1[zz][10]; 34 C.F.R. § 300.8[c][10]; see Tr. pp. 3, 1121, 1304-06).

In this case, the student began receiving speech-language services in kindergarten to address articulation weaknesses (Parent Ex. D at p. 2). In kindergarten and first grade, the student reportedly struggled with reading and spelling (id.). Due to their concerns, the parents referred him for a psychoeducational assessment in second grade (id.). Testing revealed that the student demonstrated high average intellectual ability, but weak word decoding and spelling skills (id. at pp. 2-3). According to the parents' testimony at the impartial hearing, the district developed an IEP and provided reading instruction to the student in a small group setting with five to six other students during second and third grade (Tr. p. 1125; see Tr. pp. 1121-22, 1134-35; Parent Ex. D at pp. 2-3).¹ The student remained classified as a student with a learning disability throughout elementary and middle school and continued to receive a variety of special education programs and services during that time (see Parent Ex. D at pp. 1-4).

During fall 2005 when the student entered eighth grade, the district performed his triennial evaluation, which included an assessment of the student's reading, mathematics, and written language skills through the administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) (Tr. pp. 1138-44; see Parent Ex. D2 at pp. 2, 5-6). At that time, the student demonstrated academic skills in the low average to average range, while his overall academic achievement scores fell in the average range (Parent Ex. D2 at pp. 2, 5). The evaluation report identified the student's "significant strength" in mathematics, especially in the areas of operation and reasoning (id.). The evaluator described the student's decoding skills as "somewhat soft" and noted that his overall academic fluency fell in the average range (id. at p. 5). The results of the WJ-III ACH also identified the student's areas of difficulty in spelling, writing fluency, and passage (reading) comprehension, which fell within the low average range (id. at pp. 2, 5-6; see Parent Ex. D at p. 4).

An administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to measure the student's verbal comprehension and perceptual reasoning skills yielded scores in the average range (Parent Ex. D2 at p. 6). In addition, the student's working memory scores fell within the high average range and his processing speed score fell within the average range (id.). The evaluator noted that when the student lacked interest in an academic task or had difficulty with an academic task, his processing speed weakened (id.). Based upon the testing results, the evaluator concluded that the student was properly classified as a student with a learning disability (id. at p. 7).

During the 2006-07 school year, the student attended ninth grade at the district's high school where he initially received daily resource room services for academic support in English, math, science, and social studies (Parent Ex. D at p. 4). Due to the parents' concerns regarding their son's academic progress in all of his courses, the district invited the parents to attend an Instructional Support Team (IST) meeting on November 29, 2006, to discuss and assess their son's academic performance in order to improve his functioning (Parent Ex. I2 at p. 1; see Dist.

¹ Based upon evidence submitted at the impartial hearing, the student participated in the New York State assessments during fourth and fifth grade (Dist. Ex. 26 at pp. 1-3). On the English Language Arts assessment conducted in February 2002, the student received the highest score allowed—"4"—and notably, he also received the highest score allowed—"4"—as a "Reading Score" (id. at p. 3). The student also received scores of "4" on both the mathematics and social studies assessments (id. at pp. 1-2). According to the report, a score of "4" indicated that the student "exceeded standards" (id. at p. 1).

Ex. 13 at p. 1). At the IST meeting, the team reviewed forms completed by the student's teachers describing his present levels of functioning (Dist. Ex. 13 at pp. 1-10). According to the teachers' reports, the student experienced particular difficulty in English, biology, and social studies, and the student had difficulty focusing and completing homework (id. at p. 1). The team recommended that the student take advantage of the testing accommodations in his IEP, which the student resisted (id. at p. 2). The team also discussed and described the Wilson Reading Program (Wilson) and indicated that the student could participate in Wilson, but that his participation would require a schedule change that was not recommended at that time (id.). The parents inquired as to whether the student could be reassessed, as they did not "believe the testing that was done last year in the middle school [was] accurate" (id.). The team discussed that the district could administer a Wechsler Individual Achievement Test (WIAT) if further testing was required and if it "would assist in the decision to enroll" the student in Wilson next year (id.). As a result of the IST meeting, the team recommended moving the student from biology to an intensive biology class, providing a copy of the social studies class notes to the student's "IEP/Study Lab" teacher for use, and for the school psychologist to distribute an assessment to the student's teacher, if requested, as well as reassess the student in the area of reading and spelling if "the move to the Wilson" program "should be considered" (id.).²

After the IST meeting, the parents communicated via e-mail with the district to note their continued concerns with their son's academic difficulties and their willingness to "continue to work on it" despite feeling frustrated with the IST meeting (Parent Ex. AA at p. 1). In particular, the parents noted that they were "100% sure" that the student's reading and writing problems constituted the "root of all the problems" and that he had "never been offered a reading program," with the exception of one summer (id.). By e-mail dated December 1, 2006, the parents wrote to the district to advise that they had "a call in to the Neuro and he may also do more testing and did not want [the student] to be 'over-tested'"—thus, the parents requested that the district "not do any further testing . . . as was originally discussed at the [IST] meeting" (Dist. Ex. 14 at p. R53). Shortly thereafter, the special education teacher who attended the IST meeting communicated to the parents via e-mail to confirm that the parents did not want to proceed with "further testing" of their son; she also reviewed the "options" to address the parents' concerns about the student's reading difficulties, which included scheduling the student to receive Wilson during his resource room (Parent Ex. Z at p. 10). The special education teacher also noted that the student's IEP could be revised to include the development of reading skills in the resource room, but that would interfere with the student's ability to work on class assignments during resource room (id.). By e-mail of the same date, the parents responded to the special education teacher and stated that "[a]s much as [we] would like to start [our son] in reading, [we] feel he still has catching up to do" (id.). The parents also noted that they would like to "know more about the Wilson reading program, how that will directly help him and who teaches it" (id.). The parents sent another e-mail, dated December 6, 2006, which indicated that they had "become very 'gun shy' in taking the districts [sic] recommendations" and as a result, they were pursuing an evaluation of their son "outside the school" (id. at p. 9).

In December 2006, the parents scheduled a private neuropsychological evaluation of their son, which occurred in January 2007 (Tr. pp. 1138-40; see Parent Ex. D). The report indicated

² At the impartial hearing, a district witness described an "intensive" class as a "general education" classroom with a smaller class size (Tr. pp. 31-32).

that the parents sought an independent evaluation due to their concerns about the student's lack of progress and academic difficulties (Parent Ex. D at p. 1). The report included a recitation of the student's educational history as reported by his parents, as well as results of the student's early educational evaluations (id. at pp. 1-4). In particular, the parents noted the student became "easily frustrated" by school work, noting a "particular difficulty with reading and writing," although his math skills were strong (id. at p. 2). The parents also reported that the student demonstrated weaknesses in organization and that his attention could be variable (id.). Based upon the parents' completion of the Conners' Parent Rating Scale-Revised Edition (short version), the student's behavior did not yield clinical elevations on any of the scales; however, the parents "rated as very true" that the student exhibited problems completing homework and with organization (id.).

To assess the student's current levels of intellectual functioning, the evaluators administered the WISC-IV, which yielded the following standard scores: verbal comprehension, 98 (average range); perceptual reasoning, 108 (higher end of average range); processing speed, 115 (high average range); and working memory, 91 (below average range) (Parent Ex. D at p. 6). The student achieved a full-scale IQ score of 104 (average range) (id.). According to the report, the student's index scores ranged from the lower end of average to high average, and he demonstrated "significant variability" in his performance on the working memory subtests (id.). In particular, the student required repetition of "many of the oral word problems" in order for him to process the information on the arithmetic subtest (id.). In addition, the student performed in the low average range on a task that required the student to repeat numbers verbatim and in reverse order (id.).

The evaluators measured the student's academic achievement using the Wechsler Individual Achievement Test-Second Edition (WIAT-II) and selected subtests of the WJ-III ACH (Parent Ex. D at p. 7). Administration of the WIAT-II yielded the following subtest standard scores: word reading, 79 (below average); reading comprehension, 98 (average range); pseudoword decoding, 89 (lower end of average range); numerical operations, 114 (high average range); math reasoning, 108 (average range); spelling, 87 (low average range); and written expression, 103 (average range) (id. at pp. 7-8, 17-18).

To measure the student's reading skills, the evaluators administered three subtests of the WIAT-II (Parent Ex. D at p. 7). Generally, the evaluators noted that the student demonstrated "low average spelling skills," "weaknesses in expository writing," "well-developed math computation and problem solving skills," "variable" reading comprehension skills, and "weak" word identification and decoding skills (id.). The student's overall performance in reading fell within the low average range, which the evaluators characterized as "below expectation" based upon the student's intelligence (id.). The evaluators described the student's ability to decode single sight words as "well below an expected level for his age" and further noted that the student "evidenced a very limited sight word vocabulary" and "considerable difficulty in reading irregular words" and "identifying vowel sounds" (id.). The evaluators noted that although the student scored in the average range on the reading comprehension subtest, the student could not answer any questions about a passage without rereading the passage "several times" (id.). The evaluators also noted that student could not answer fact-based questions without rereading the passage, and further that he exhibited "considerable difficulty" answering questions that required

"abstract, inferential, and deductive reading comprehension" (id. at pp. 7-8). The evaluators described the student's ability to define contextual vocabulary within reading passages as "weak" (id. at p. 8).

On the WIAT-II subtests used to measure the student's written language skills, the student's overall performance fell within the average range, but the evaluators noted "significant variability" among the student's skills (Parent Ex. D at p. 8). In particular, the report indicated that the student performed in the low average range in spelling, he exhibited difficulty spelling "common irregular words," and he demonstrated difficulty spelling "vowel sounds," which was consistent with his "decoding weakness" (id.). On tests of written expression, the student performed in the average range, but the evaluators noted variability across subtest components (id.). In particular, when asked to "combine 2-3 sentences into a single compound sentence and to spontaneously generate descriptive sentences in response to pictures," the student "displayed weaknesses" in understanding syntax and basic sentence construction (id.). Additionally the student used "very simple" vocabulary on the essay subsection and the evaluators described his sentence constructions as "awkward in places" (id.).

In addition to the WIAT-II, the evaluators administered the reading fluency and math fluency subtests of the WJ-III ACH, which yielded the following standard scores: reading fluency, 106 (average range) and math fluency, 110 (higher end of average range) (Parent Ex. D at pp. 8-9, 18). The evaluators noted that the student exhibited difficulty subtracting fractions and decimals (id. at p. 8).³

In summary, the evaluators concluded that the "clinical picture that emerge[d] from this evaluation [was] that of an intellectually capable adolescent who display[ed] unevenness in his cognitive and academic skills that impede[d] his ability to achieve up to his potential in school" (Parent Ex. D at pp. 11-12). Based upon the student's testing results and educational history, the evaluators opined that the student displayed language-based learning disabilities in reading and writing (id. at p. 12). In addition, the evaluators opined that the student's decoding and word identification skills, which the evaluators characterized as "critical for accurate and fluent reading," were "four to five years below his current grade placement" (id.). According to the evaluators, the student's "history of reading and spelling difficulty" were "consistent" with diagnoses of developmental dyslexia and a reading disorder (id.). The evaluators also concluded that the student did not have an attention deficit disorder nor did he demonstrate difficulties with fine motor planning characteristic of dysgraphia (id. at pp. 11-12).

The evaluators further opined that since the student's learning disability had not been "successfully remediated," his language-arts learning disorders had "become increasing liabilities . . . as he [had] advanced on in his academic career without having established a firm foundation

³ In addition to the intellectual and achievement testing, the evaluators administered a battery of neuropsychological measures to "delineate the specific strengths and weaknesses" in the student's cognitive profile (Parent Ex. D at p. 9). The student performed in the average range on tasks measuring language, visual motor integration, nonverbal memory, and verbal learning skills (id. at pp. 9-11). The student's performed at the low end of the average range with respect to nonverbal reasoning, motor tasks, tasks involving rote verbal memory, and word generation tasks (id. at p. 11). With respect to emotional functioning, the evaluators concluded that the student presented as "well-adjusted," with a "tendency to keep concerns to himself and to represent himself in a socially acquiescent manner" (id.).

in reading" (Parent Ex. D at p. 13). With regard to the student's current IEP, the evaluators noted that it did not provide the student with "specific reading and written language remediation" and that the daily resource room support did not adequately meet the student's "unique learning needs" (*id.*). According to the evaluators, the student required "intensive, individualized remedial instruction" provided by "teachers trained in the special education and reading remediation of older students" with language-arts learning difficulties (*id.*). The evaluators noted that the student needed to "work daily and 1:1 with special education teachers who [were] sensitive to the learning issues of the adolescent/young adult learner, who can often be embarrassed by his ongoing learning weaknesses" (*id.*). To address the student's reading and writing difficulties, the evaluators recommended an "intensive individualized remediation using very specific, systematic programs of instruction" (*id.*). The evaluators alternatively suggested enrolling the student in a "special education school for students with language arts learning difficulties" (*id.*).

With respect to "specific remedial-based interventions," the evaluators recommended the following to address the student's needs in the areas of reading, spelling, and writing: implementation of a "systematic, phonologically-based, individualized reading program, such as the Orton-Gillingham system;" development of the student's "higher order reading comprehension skills;" learning "basic spelling rules and word families;" and teaching the student the "process approach to writing, which breaks down writing into its component parts" (Parent Ex. D at pp. 14-15). The evaluators opined that the student could benefit from the use of certain computer programs to assist in writing, that the student should continue to receive textbooks on tape, and that he should continue to receive "extended time and other testing accommodations currently listed on his IEP" (*id.* at p. 15). In addition, the evaluators recommended an assistive technology evaluation and further, that the parents should discuss dyslexia with the student to assist him in understanding the nature of his difficulties (*id.*). The evaluators met to review the neuropsychological evaluation results and recommendations with the parents on February 16, 2007 (*id.*).

On February 12, 2007, the CSE met to revise the student's 2006-07 IEP (Dist. Ex. 2 at p. 1). According to the "Committee Meeting Information" section of the IEP, the CSE discussed the student's current special education services, his progress, his academic difficulties, and his grades, which resulted in the CSE's recommendation to place the student in a 15:1 special class for both English and social studies (*id.* at pp. 1, 4). As reflected in the same section, the CSE's discussion of the student's English class placement included a suggestion by the special education teacher that the student "might benefit" from the Wilson program, but questioned whether scheduling would allow for the student's participation in Wilson during the remainder of the 2006-07 school year (*id.* at p. 4). According to the IEP, the parents indicated that it would not "be practical" for the student to participate in Wilson at that time (*id.*).⁴ The IEP also noted that the CSE chairperson "pointed out" that the student did not qualify for Wilson, "but offered to allow for [the student's] participation next year" (*id.*).

As a follow-up to the February 2007 CSE meeting, the parents e-mailed the district on February 13, 2007 "to review some points" from the meeting (Parent Ex. X at pp. 7-8). The

⁴ At the impartial hearing, the parents testified that the February 2006-07 IEP accurately reflected the discussion about the Wilson program at that meeting (Tr. pp. 1277-78).

parents' comments noted the following: the unfairness of penalizing the student for "notebook checks" given his organizational difficulties and stating the student's notebook should only be "graded if it will help him;" the grading of the student's homework, explaining that if notebook or the homework had not been graded, the student would have achieved a "B" in math instead of a "C;" the discrepancy between the student's testing results in reading compared to "how [the student] actually reads;" the distraction caused by the additional parent member's attendance via telephone due to noise; the development and implementation of a plan to address the student's organizational and study skills; the discussion of the "Study Lab" and its purpose at the CSE meeting; the CSE's agreement to move the student to self-contained special classes for English and social studies; the student's biology project and the lack of specific directions; the parents' uncertainty about the recommendation to remove the "tests read" accommodation in conjunction with his placement in the self-contained special classes; the extra help the student received in "Study Lab" and through a tutor, noting that "sometimes extra help with the subject teacher [was] not helpful;" and that now was "not" the time for the student to advocate for himself (id.).

On February 26, 2007, the parents e-mailed the district to report preliminary results from the student's private neuropsychological evaluation in January 2007 and that a completed report would be available to them in approximately two weeks (Parent Ex. X at pp. 4-5). The parents reported that the student received a diagnosis of developmental dyslexia (id. at p. 4). Among other things, the parents expressed their "anger" toward the district, that they could "no longer trust any recommendations" from certain district personnel, and that the "district clearly failed" their son "in so many ways" (id. at pp. 4-5). In a similar e-mail of the same date, the parents wrote to several district personnel who attended the February 2007 CSE meeting to report the results of the neuropsychological evaluation (id. at pp. 2-3). The parents also requested a CSE meeting to reformulate a plan for their son based upon the new information and indicated that they would be "submitting the testing bill to the district for reimbursement" since they had "been constantly complaining about [the student's] 8th grade test results" and were forced to go "out of the district to have [the student] tested" (id. at p. 3). On February 27, 2007, the parents sent another e-mail to district personnel reiterating much of the same information as sent in the previous day's e-mail (see id. at p. 1). In closing, the parents indicated that they were "in the process of interviewing tutors that specialize[d] in Orton-Gillingham, Wilson or another comparable reading program" and sought assistance from district personnel as to their knowledge of "someone local" (id.). Based upon a "Tutoring Expense Sheet" submitted into evidence by the parents at the impartial hearing, the student received approximately nine sessions of private Wilson tutoring during the 2006-07 school year, beginning on February 26, 2007, and ending on April 18, 2007 (Parent Ex. K at pp. 1-2).

By letter dated March 4, 2007, the parents notified the district that they received the student's revised IEP from the February 2007 CSE meeting (Parent Ex. II at p. 1). In the letter, the parents stated that they found the IEP "inadequate" due to their "follow-up e-mail of 2/13/07" and "the results of [the student's] testing e-mailed to the CSE members on 2/26/07" (id.). The parents also expressed some disagreement with the district's "assessment of the CSE meeting" (id. at pp. 1-2). With respect to the Wilson program, the parents acknowledged that the district first identified Wilson at the November 2006 IST meeting, but were told at that time that it was "too late" for the student to enter the program (id. at p. 2). The parents also noted that at the February 2007 CSE meeting, they were advised that the student could enter the Wilson program

at that time, but that his schedule would be altered (id.). In addition, the parents claimed that although the district asserted at the CSE meeting that the student did not qualify for the Wilson program, the district offered to allow the student to participate "next year" (id.). According to the letter, the parents could not "believe the district cannot come up with a better solution for [the student] than waiting until next year" (id.). The parents requested a meeting in March 2007 to review the information recently submitted to the district (id.). By letter dated March 8, 2007, the district responded to the parents' March 4, 2007 letter and advised them that in order for the CSE to appropriately revise their son's IEP, the CSE required a completed copy of the neuropsychological evaluation report (Parent Ex. C6). The letter also noted that the district would schedule a CSE meeting upon submission of the report (id.).

During May 2007, a district special education teacher communicated with the student's private Wilson tutor, who reported the results of the student's Wilson Assessment of Decoding and Encoding (WADE) that the tutor administered before implementing the private Wilson tutoring (Dist. Ex. 16 at pp. M96-M101). The district special education teacher then e-mailed her own opinion of the student's WADE results to the parents, specifically noting that the student "tested much higher" than "other high school students who take the Wilson program" (id. at p. M96). The special education teacher reported that the student received "100%" on his sight reading and "92%" on a list of "higher difficulty" (id.). She noted that although the student had "some difficulty with the 'nonsense words,'" the student's score of "57%" was still higher compared to other students (id.). The special education teacher also noted that the student's score on "nonsense words" could indicate that he "has compensated for his reading difficulties by 'learning' many words by recognition" (id.). According to the student's private Wilson tutor, the student was "doing exceptionally well" and that even at "level 3.1 he was flying through the exercises" (id.). After explaining the nature of the Wilson program, the special education teacher indicated that the student would "most likely benefit" from the "higher books" in Wilson, but that the decision to continue the program was up to the parents (id. at pp. 1-2). In response, the parents e-mailed the special education teacher and thanked her for the "2nd opinion" (id. at p. 1). The parents admitted that at times their son mentioned that the Wilson program "'was stupid'" (id.). In addition, the parents stated that they did not "want to put [their son] in the reading program in school next year because he will have to take it in place of [American Sign Language] 3 or TV production 2," which the student enjoyed (id.; see Parent Ex. U at pp. 9-10). The e-mail also noted that the parents wanted their son to work on reading "over the summer, one on one" (Dist. Ex. 16 at p. 1).

By letter dated May 21, 2007, the parents submitted the completed neuropsychological evaluation report to the district (Parent Ex. L1; see Parent Ex. C6). By notice dated June 4, 2007, the district invited the parents to attend the student's upcoming annual review for the 2007-08 school year scheduled on June 14, 2007 (Parent Ex. C4).

By letter to the district dated June 5, 2007, the parents outlined their "priorities for guiding our discussion" at the student's annual review scheduled on June 14, 2007 (Parent Ex. C3 at p. 1).⁵ In particular, items deemed as the "highest priority" to be determined at the June meeting included the following: an "objective review" of the student's 2006-07 "corrected

⁵ According to testimony at the impartial hearing, the parents composed the June 5, 2007 letter with the assistance of an educational advocate (Tr. pp. 945-52).

assignments (homework projects/tests/quizzes in Biology and Math) to ascertain if IEP modifications were taken into consideration and consistently applied;" and the parents' proposal for the district to "take immediate fiscal responsibility for appropriate reading instruction . . . to address [the student's] reading deficits including compensatory individually based summer reading instruction" (id.). As a "secondary priority" to be determined prior to September 1, 2007, the parents sought the development of an IEP with "clearly defined and measurable goals . . . with primary emphasis on continuation of intensive reading instruction which [was] systematic, phonologically-based, and individualized and include[d] high-order reading comprehension skills, as well as addressing spelling and writing skills" (id.). In addition, the parents noted that the IEP should address the student's need for executive function skills training, vocational planning, and any other needs identified by evaluations (id. at pp. 1-2). Prior to September 1, 2007, the parents also requested an assistive technology evaluation and the development of an improved communication system between the parents and the teachers, which should be included in the student's IEP (id. at p. 2).

On June 14, 2007, a subcommittee of the CSE convened to conduct the student's annual review and to develop an IEP for the 2007-08 school year (Dist. Ex. 3). Meeting participants included the chairperson, the assistant principal, the special education chair, a special education teacher, a regular education teacher, a psychologist, a friend of the family, and the student's mother (id. at p. 5).⁶ As noted in the "Committee Meeting or Agreement Information" section of the IEP, the parents submitted a "private evaluation" and sought the provision of additional services (id.). The same section of the IEP documented the CSE subcommittee's discussion of the student's services during the 2006-07 school year, his progress, and the development of the special education programs and services for the 2007-08 school year (id.). The IEP indicated that the student did well in the 15:1 special class for English, noting that "many of assignments [were] orally presented" and further, that "class discussion" represented "an area of strength for the student" (id.). The IEP also noted that according to the student's teachers, the student could be "task avoidant," had difficulty "completing tasks" and "independent work," and could become "disengaged easily" (id.). The IEP described mathematics as an area of strength for the student, but indicated that he was "hesitant to take notes and show his work on problems" (id.). In biology, the student became "less engaged in classwork when he [was] given the copy of the full notes" and "sometimes [had] difficulty following directions" (id.). The student's mother reported that sitting near the homework board in biology had been helpful to the student in completing his assignments (id.). Further discussion included the student's placement in a "specialized learning environment in a private day school, as suggested by the private evaluation," which, as stated by the student's mother, was "not an option" (id.). The CSE subcommittee also discussed the Wilson reading program, which was offered to the student to address his decoding weaknesses, and that the student's 2007-08 program included placement in a co-taught, regular education English class and an "intensive" earth science class (id.).

According to the IEP, the student's mother requested that the district pay for the private Wilson tutoring that the student "[had] been receiving outside of school" and also for "summer

⁶ The educational advocate, who assisted in the preparation of the parents' June 5, 2007 letter to the district, attended the June 14, 2007 CSE meeting as a "friend of the family" (compare Dist. Ex. 3 at p. 5, with Tr. pp. 945-53).

tutoring" (Dist. Ex. 3 at p. 5). The chairperson indicated that the student was not eligible for an extended school year program based upon his level of functioning (id.).

Addressing the student's academic achievement, functional performance, and learning characteristics, the CSE subcommittee identified that the student's weaknesses in organizational skills and writing mechanics continued to interfere with his ability to be "fully successful in general education" (Dist. Ex. 3 at p. 3). The CSE subcommittee noted that the student needed to develop his reading skills, writing skills, and study skills, and to complete assignments (id.). The CSE subcommittee incorporated the standardized test results obtained from the parents' private neuropsychological evaluation into the IEP (id.). With regard to social development, the CSE subcommittee noted the student's tendency to become "easily frustrated" and to avoid "academic tasks" (id.). It further noted the student's inability to "reflect on present difficulties and plan for more successful school functioning" (id.). The CSE subcommittee identified the student's ability to "problem solve" and to "develop better coping skills" as areas of need, and suggested that the student needed to advocate for his needs (id. at pp. 3-4). With regard to management needs, the CSE subcommittee noted that the student should be seated in the front of the room and that he benefited from prompts to remain focused (id. at p. 4). To address his management needs, the CSE subcommittee indicated that the student required support with organization, to maintain an agenda, and to complete homework on a regular basis (id.).

For the 2007-08 school year, the CSE subcommittee recommended placement in a general education setting with the following special education programs and services: direct consultant teacher services for three 44-minute sessions per six day cycle (resource room); indirect consultant teacher services for one 44-minute session weekly; and placement in a 15:1 special class for social studies (Dist. Ex. 3 at p. 1). The IEP indicated that the student would receive consultant teacher services to support his general education classes (id.). In addition, the CSE subcommittee recommended the following as program modifications/ accommodations/ supplementary aids and services: books on tape, check for understanding, and preferential seating (id. at pp. 1-2). The IEP indicated that an assistive technology evaluation would be conducted in November 2007 (id. at p. 2). The IEP also included the following testing accommodations: extended time (1.5), special location, directions read and explained, tests read (except reading comprehension tests), and record short answers (noting that the transfer of answers to scantron should be monitored) (id.). The IEP indicated that the CSE subcommittee also reviewed the annual goals to address the student's identified needs in the areas of study skills, reading, and career/ vocational/ transition goals, and further, that the student's mother had been given "the opportunity to provide input" (id. at pp. 5-8).

By e-mail dated June 21, 2007, the parents communicated with the district's associate superintendent for pupil services (superintendent) regarding the June 14, 2007 CSE subcommittee meeting and alleged a "history of neglect on the district's part regarding [the student's] reading impairment" (Dist. Ex. 27 at pp. 1-2). The parents specifically noted that the student's "current IEP [did] not provide him with specific reading or written language remediation" and further, that the CSE subcommittee's offer to provide the student with "a Wilson reading program three days a week in a group setting" did not follow the services recommended in the private evaluation report (id. at p. 2). The parents requested that the district "work with [them] as [they] get the appropriate program in place" for the student (id.).

Specifically, the parents noted that they had "identified a Wilson trained tutor who will work with [the student] over the summer" as suggested in the private evaluation report (*id.*). The parents "view[ed] this as less costly for the district" and for the student (*id.*). The parents then requested a response from the district no later than June 29, 2007 (*id.*). By letter dated June 29, 2007, the district's superintendent acknowledged receipt of the parents' June 21, 2007 e-mail and advised that she would "leave the letter" for the incoming superintendent, who would begin her new position on July 2, 2007 (Dist. Ex. 28).

According to testimony at the impartial hearing, the parents met with district personnel, including the new superintendent, in August 2007 to discuss the student and the Wilson program (Tr. pp. 434-40). As a result, the district offered—and scheduled—the student to participate in the Wilson program, in a 1:1 setting, for three sessions per week during eighth period (Tr. pp. 436-37; *see* Parent Ex. Q at p. 7). The testimony further indicated that the parents wanted the Wilson program provided to the student during third period so it would not interfere with his resource room services during eighth period, but that due to the Wilson teachers' availability their request could not be accommodated (Tr. pp. 436-40; *see* Parent Ex. Q at p. 7).

At the impartial hearing, the parents submitted a copy of the student's tenth grade schedule for the 2007-08 school year, dated August 22, 2007, which indicated that the district had scheduled the student to participate in the Wilson program for three days out of a six-day cycle during eighth period (Parent Ex. G1). By e-mail dated August 30, 2007, the parents indicated that they were "angry that the Wilson was included" and wanted Wilson removed from the student's schedule (*see* Dist. Ex. 17 at p. H7). In a letter dated August 30, 2007, the parents noted that the "Doctor's report was also very clear that [the student] need[ed] a one on one reading program" and further, that "a group Wilson program would not be beneficial and would not meet [the student's] needs" (Dist. Ex. 23).

The CSE subcommittee reconvened on September 27, 2007, to revise the student's 2007-08 IEP (Dist. Ex. 4 at p. 1). The CSE subcommittee discussed the role of the resource room teacher with regard to homework completion and the CSE subcommittee agreed—contrary to the language contained in June 14, 2007 IEP—that the resource room teacher could review the student's homework needs in order to develop appropriate strategies (*id.* at p. 5; *compare* Dist. Ex. 4 at p. 5, *with* Dist. Ex. 3 at p. 5). The CSE subcommittee agreed that resource room would not be used as a study hall and that the development of targeted study skills required the student to move beyond the daily completion of homework (Dist. Ex. 4 at p. 5). Due to insufficient time, the CSE subcommittee could not review the student's current annual goals and decided to reconvene to address the annual goals (*id.*).

After the September 27, 2007 CSE subcommittee meeting, the parents e-mailed the district on September 28, 2007, noting that it had been "one of the most positive meetings" and commenting on several aspects of the student's IEP (Parent Ex. Q at pp. 6-9). With respect to reading, the parents acknowledged that the district's reading program "graciously offered (2-3 X week, 1:1, 8th period)" would "take away from [the student's] resource time," which they believed the student required in order to keep up with his current course load (*id.* at p. 7). The parents requested that the district, at that time, "pay for a private Wilson Tutor outside of the regular school day" (*id.*). By e-mail dated October 1, 2007, the superintendent responded to the

parents' e-mail and reiterated that "the district has offered reading instruction that you did not use" and further, that "the district will not pay for private or after-school tutoring" (id. at p. 6).

On November 9, 2007, the CSE subcommittee reconvened to revise the student's 2007-08 IEP (Dist. Ex. 5 at p. 1). At this meeting, the CSE subcommittee added information to the student's present levels of performance, including a statement indicating that the student needed to "review word problem format" in mathematics and a second statement, indicating that the student needed to "practice math skills to assist in the development of an organized step by step response" (id. at p. 3). According to the IEP, the CSE subcommittee agreed to increase the student's special education services from direct consultant teacher services to daily resource room services (id. at pp. 1, 5; compare Dist. Exs. 3 at p. 1, and 4 at p. 1, with Dist. Ex. 5 at p. 1). The CSE subcommittee reviewed and edited the student's annual goals to reflect the student's present needs, removing two study skills goals and one reading goal (see Dist. Ex. 5 at pp. 5-7).

By due process complaint notice dated February 12, 2008, the parents challenged the student's 2007-08 IEP and alleged that the district failed to offer the student a free appropriate public education (FAPE) on the following grounds: the district's failure to provide specially designed instruction to address the student's needs in reading and mathematics; the 2007-08 IEP failed to accurately represent the student's present levels of performance; the district's failure to consider a privately obtained neuropsychological evaluation and fully incorporate the recommendations in the evaluation report;⁷ the district's failure to conduct a timely assistive technology evaluation or to approve any assistive technology services;⁸ the district's failure to provide appropriate classroom and testing accommodations; the district's failure to implement an appropriate transition plan;⁹ the district's failure to implement meaningful and measurable annual goals; the district's failure to discuss methodologies to be used in the student's program; and the district's failure to provide appropriate summer programming (Parent Ex. A at pp. 1-4). To address their concerns, the parents requested the following relief: annulment of the student's current IEP; the provision of an appropriate IEP with consideration given to the private neuropsychological evaluation and assistive technology evaluation, appropriately addressing the student's needs, accurately reflecting the student's present levels of performance, and including necessary methodologies, appropriate and measurable goals, and a transition plan; an assistive technology evaluation, the implementation of recommendations contained in the evaluation report, and goals to address the student's needs; the provision of the Wilson Reading Program by an experienced and certified provider—of the parents' choosing—for at least 60 minutes per day at the convenience of the family; the provision of extended school day academic intervention services for all content areas through the continued payment of the student's current tutors; the provision of an intensive extended school year reading program of the parents' choosing; reimbursement for privately obtained reading instruction; reimbursement for privately obtained

⁷ According to their due process complaint notice, the parents obtained the private neuropsychological evaluation because they disagreed with the district's "inaccurate" and "incomplete evaluation," but the parents did not identify the disputed evaluation in their due process complaint notice (Parent Ex. A at p. 2).

⁸ According to the evidence submitted at the impartial hearing, the district conducted the assistive technology evaluation in February 2008 (Dist. Ex. 20 at p. 1; see Parent Ex. A at pp. 2-3).

⁹ At the conclusion of the impartial hearing, the parents withdrew their claim alleging that the district failed to implement an appropriate transition plan (Tr. p. 1547).

academic tutoring; reimbursement for the privately obtained neuropsychological evaluation; the development of an appropriate transition plan, including goals and objectives; and payment of the parents' attorneys fees and expenses or other relief deemed just and proper (id. at p. 4).

Prior to the impartial hearing, the parties met at a resolution session on March 4, 2008, and by letter dated March 11, 2008, the district forwarded a copy of the completed assistive technology evaluation to the parents and noted that the district had ordered the "software . . . recommended" in the evaluation report (Dist. Ex. 21; see Dist. Ex. 20; Parent Exs. A1; M at p. 15). The letter also addressed the issue of transition planning and scheduling a Wilson assessment to establish the student's functional levels for the purpose of implementing the Wilson program (Dist. Ex. 21). On March 18, 2008, the parties attended a prehearing conference to identify and clarify issues, to establish impartial hearing dates, and to address other administrative matters (Tr. pp. 5-6; IHO Ex. 1; see IHO Decision at p. 3). By letter dated April 17, 2008, the district reiterated the information in the March 11, 2008 letter and forwarded a copy of the student's Wilson assessment to the parents, noting that although the assessment results did not "indicate Wilson reading instruction for [the student,]" the district would "again offer to provide it to [the student] as a courtesy because of [the parents'] strong interest in it" (Dist. Ex. 18; see Dist. Ex. 19).¹⁰ Failing to resolve their dispute, the parties proceeded to an impartial hearing on May 1, 2008, which concluded on October 7, 2008, after eight days of testimony (Tr. pp. 1, 1505).

At the impartial hearing, the parents testified that they disagreed with the district's triennial evaluation conducted in fall 2005 because they believed it contained errors, the "decoding piece was not done," and they did not "trust" the results (see Tr. pp. 1138-42, 1144-45; Dist. Ex. 2 at p. 4). According to further testimony, the parents then sought out an "independent person," which resulted in a privately obtained neuropsychological evaluation of the student in January 2007 (Tr. p. 1140).

According to the student's final report card for the 2007-08 school year submitted by the parents at the impartial hearing, the student passed all of his content area courses and the Regents examinations in social studies and earth science (Parent Ex. HH). In testimony, the parents acknowledged that the student had not failed any content area courses during ninth (2006-07 school year) or tenth grade (2007-08 school year), and he had not failed any Regents examinations to date (Tr. pp. 1259-64; see Parent Exs. F4; HH). In addition, evidence submitted at the impartial hearing indicated that the student achieved all the annual goals on his 2007-08 IEP, with the exception of a career/ vocational/ transition goal (Dist. Ex. 30).

By decision dated November 22, 2008, the impartial hearing officer concluded that the district offered the student a FAPE in the least restrictive environment (LRE) (IHO Decision at pp. 18-22). Before setting forth her conclusions of law, the impartial hearing officer identified

¹⁰ The Wilson assessment referenced in the April 17, 2008 letter was not attached to the letter (see Dist. Ex. 18). By letter dated April 16, 2008, a district special education teacher wrote to the parents that according to the results of the Wilson assessment performed on April 2 and 8, 2008, the student "would not be an appropriate candidate for Wilson" because his scores "were found to be much higher overall" when compared to the students already enrolled in the district's Wilson program (Dist. Ex. 19). The special education teacher concluded that the Wilson program would not "significantly improve" the student's skills (id.).

the disputed issues and presented her findings of fact based upon the documentary and testimonial evidence presented (id. at pp. 4-7). The impartial hearing officer then enunciated the arguments, legal authority, and evidence in support of each party's assertions with respect to the disputed issues (id. at pp. 5-18).

Moving on to the issues and conclusions of law, the impartial hearing officer first noted that at the conclusion of the impartial hearing, the parents withdrew their claim that the district failed to implement an appropriate transition plan, and thus, such claim would not be considered (IHO Decision at p. 18; see Tr. p. 1547). Next, the impartial hearing officer concluded that based upon the hearing record, the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2007-08 school year (IHO Decision at pp. 18-21). The impartial hearing officer set forth the appropriate legal standard, noting that a district met its burden by proving that, "among other things, the student 'has made satisfactory progress in the program outlined by these IEPs'" (id. at p. 18). The impartial hearing officer continued her FAPE analysis by noting that a district "fulfills its obligations under the [Individuals with Disabilities Education Act (IDEA)] if it provides an IEP that is likely to 'produce progress, not regression' and provides the student with opportunity greater than mere 'trivial advancement'" and by further noting that "districts are not 'required to "maximize" the potential of students with disabilities, but rather ensure an "appropriate" education, not one that provides everything that might be thought desirable by loving parents'" (id.).

Here, the impartial hearing officer found that the hearing record amply supported that the student made "far more than trivial progress in that he has passed all required Regents examination to date and have never failed a course, progressing from grade to grade with 6.5 credits on his high school transcript at the end of ninth (9th) grade, 2006-07 school year" (IHO Decision at p. 19). With regard to the 2007-08 school year, the impartial hearing officer determined that although the parents asserted that the district did not "offer" the Wilson program because it was not "presented in writing" to the parents on the student's IEPs, the IEP "is a total written document presented to the parents under the [IDEA], and includes all sections, including the 'Comments Sections' that document the activities, discussion, and intent of the Committee Members of the CSE, including the parent when present" and thus, the IEP could not be "dissect[ed]" in the manner argued by the parents (id.). The impartial hearing officer found that the parents had a meaningful opportunity to participate in all of the CSE meetings, to review all of the IEPs, and to challenge or seek modifications of the IEPs throughout the process (id.). She also found that the district "demonstrated a sincere interest in planning and implementing a program directed at attainment of appropriate educational progress" and further, that the district willingly reviewed and developed IEPs at "two additional meetings and chang[ed] the student's program to ensure the additional support services sought by the Parent" (id.). Addressing the specific issue of the Wilson reading program, the impartial hearing officer determined that the parents did not challenge the appropriateness of the Wilson program, that the hearing record supported "the conclusion that the student has had the opportunity to receive a District implemented Wilson Reading Program, both in the summer between 9th and 10th grades, and during the 9th and 10th [grade] school years," and further, that the parents' refusal of the "summer Wilson program offered" was inconsistent with the recommendation set forth in the privately obtained neuropsychological evaluation report (id. at pp. 19-20).

The impartial hearing officer then addressed the issue raised by the parents regarding the reading goals contained the student's 2007-08 IEP (IHO Decision at p. 20). According to her decision, the impartial hearing officer found the reading goals to be "deficient," "well below [the student's] level of achievement," and "not accurately reflect[ing] the student's needs and abilities" (*id.*). Despite these characterizations, the impartial hearing officer determined that the reading goals in the student's IEP necessarily became "null" when the district was unable to implement the Wilson reading program in the 2007-08 school year (*id.*). The impartial hearing officer did note, however, that the reading goals should have been reviewed (*id.*). And finally, the impartial hearing officer also found that although the student's 2007-08 IEP was deficient because it did not contain a "Coordinated Set of Transition Activities," these "procedural errors" did not rise to the level of a denial of a FAPE (*id.*).

In her conclusion, the impartial hearing officer summarized her findings that the district offered the student a FAPE in the LRE for the 2007-08 school year and thus, the parents were not entitled to reimbursement (IHO Decision at pp. 21-23). The impartial hearing officer concluded that the district met its obligations to offer a FAPE by developing an appropriate IEP on June 14, 2007, and by reconvening at two subsequent IEP development meetings to add additional services or to revise services based upon updated evaluative data and parental input (*id.* at p. 22). The impartial hearing officer also concluded that the IEPs developed for the 2007-08 school year recommended a "comprehensive program designed to ensure that the student's individual management and academic needs would be met" (*id.*). She also briefly summarized her determination that based upon the hearing record, the parents had not sustained their burden to establish the appropriateness of the privately obtained tutoring services (*id.*). The impartial hearing officer noted that the hearing record failed to contain sufficient evidence, such as "written reports or testimony of the teachers/tutors/organizations who provided the unilaterally offered services to the student" (*id.*). According to the impartial hearing officer, the hearing record also did not contain evidence that the unilateral providers either consulted with the district or made recommendations to the district (*id.*).

As a result of the impartial hearing officer's conclusions, she determined that the district offered the student a FAPE in the LRE for the 2007-08 school year and denied the parents' request for reimbursement for the privately obtained evaluation and tutoring services (IHO Decision at p. 23). In addition, the impartial hearing officer ordered the CSE to convene within approximately 30 days of the date of her decision to review the following: the current status of remedial reading intervention for the student (Wilson or other); updated present levels of performance (particularly in the areas of reading); assistive technology evaluation (if not already completed and reviewed by the CSE); a transition plan update to include specific activities and timelines (if not already completed and reviewed by the CSE); and updated annual goals to ensure that they reflect any revision made to the IEP and reflect the student's most current functioning levels (*id.*).

On appeal, the parents allege that the impartial hearing officer erred when she determined that the district offered the student a FAPE for the 2007-08 school year, arguing that the impartial hearing officer ignored relevant legal authority that limited her evaluation of the program offered by the district to the written IEP, which, according to the parents, did not include a written offer of the Wilson program. The parents contend that the impartial hearing

officer also erred when she failed to find a denial of a FAPE despite concluding that the student's annual goals for reading were deficient. In addition, the parents argue that the impartial hearing officer erred in failing to consider whether the parents sustained their burden to establish the appropriateness of the privately obtained services, in denying the parents' request to be reimbursed for the privately obtained tutoring services, and in denying the parents' request to be reimbursed for the privately obtained neuropsychological evaluation. As relief, the parents seek an annulment of the student's 2007-08 IEP; reimbursement for the private tutoring services obtained by the parents; a finding that the district denied the student a FAPE for the 2007-08 school year; an award of additional services in the form of the Wilson reading program; reimbursement for the privately obtained neuropsychological evaluation; an order directing the CSE to reconvene to develop an appropriate program including the recommendations contained in the assistive technology evaluation, updated present levels of performance, and meaningful, measurable annual goals for reading; and an order directing the CSE to develop an appropriate transition plan.

In its answer, the district asserted the following as affirmative defenses: the hearing record fully supported the impartial hearing officer's decision that the district offered the student a FAPE for the 2007-08 school year; the IEPs developed were appropriate to meet the student's needs and were not deficient for failing to specify the Wilson program; the parents failed to sustain their burden to establish the appropriateness of the private tutoring services obtained by the parents, thus the parents would not be entitled to reimbursement even if the impartial hearing officer found that the district failed to offer the student a FAPE; the parents submitted insufficient evidence to support their claims for reimbursement; equitable considerations did not favor the parents and the parents failed to provide any notice to the district of their unilateral decisions; the parents failed to sustain their burden to establish their right to reimbursement for the privately obtained neuropsychological evaluation and/or unilaterally obtained tutors or unilaterally obtained reading instruction; the parents failed to establish a right to reimbursement for the privately obtained neuropsychological evaluation and failed to adhere to regulatory procedures for obtaining an independent educational evaluation (IEE); the parents failed to offer any goals and objectives different from those set forth in the student's IEPs; and that the parents' notice of intention to seek review was defective. The district seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss the parents' appeal. In a reply to the district's answer, the parents asserted that several of the affirmative defenses raised by the district were improper.

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., 2008 WL 5505470, at *4 [2d Cir. Jan. 16, 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]; see also O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). 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 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;¹¹ Application of a Child with a Disability, Appeal No. 06-059; Application

¹¹ The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

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 implemented (34 C.F.R. § 300.323[c][2]; 8 NYCRR 200.4[e][3],[7]; see Application of a Student with a Disability, Appeal No. 08-087). Also, a FAPE must be available to an eligible student who needs special education and related services, even though the student is advancing from grade to grade (8 NYCRR 200.4[c][5]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The 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 (see Application of the Bd. of Educ., Appeal No. 08-016).

After carefully reviewing the entire hearing record, I find that the impartial hearing officer, in a thorough and well-supported 24-page decision, correctly determined that the district's recommended program and placement for the 2007-08 school year was reasonably calculated to confer educational benefit and thus, offered the student a FAPE in the LRE, and further, that the parents were not entitled to reimbursement for the costs of the private tutoring services obtained during the 2007-08 school year (IHO Decision at pp. 18-21). The impartial hearing officer applied the proper legal standard in determining whether the student was offered a FAPE in the LRE, including whether the district complied with the procedural requirements in the IDEA and whether the recommended special education programs and services were reasonably calculated to confer educational benefit (id.).

In addition to the impartial hearing officer's findings of fact and conclusions of law, I note that the district's fall 2005 triennial evaluation used to develop the student's 2006-07 IEP revealed that the student's decoding skills were "somewhat soft" and that he had academic difficulties in spelling, writing fluency and passage comprehension (Dist. Ex. 8 at p. 5). At the beginning of the 2006-07 school year, the student attended a daily resource room designed to provide him with academic support in English, math, science and social studies (Dist. Ex. 11 at

p. 4). In addition, he received program modifications and testing accommodations (id.). Due to parental concerns regarding the student's academic progress during the 2006-07 school year, the CSE recommended in February 2007 that the student attend a special class for English (15:1) and a special class for social studies (15:1) to address his needs (Dist. Ex. 2 at pp. 1, 4).¹² The hearing record indicates that the student's academic performance in English and social studies improved after the addition of the self-contained classes (Parent Ex. F4). Furthermore the student passed all of his ninth grade classes, received academic credits for each of his classes, and attained a GPA of 2.94 (Parent Ex. G).

For the 2007-08 school year (tenth grade), the hearing record indicates that the CSE recommended a program of special education services similar to those that the student had received the previous year and with which the student had demonstrated educational progress (compare Dist. Exs. 3-5, with Dist. Ex. 2). Specifically, the CSE recommended that the student receive daily resource room services and be placed in a special class (15:1) for social studies (Dist. Ex. 5 at p. 1). The student was recommended for an English class in a general education setting that was co-taught (Dist. Ex. 3 at p. 8). The student's IEP was modified to reflect additional program modifications and testing accommodations (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). Based upon the foregoing, I concur with the impartial hearing officer's conclusion that the CSE's recommended special education programs and services for the 2007-08 school year, which had been based in part upon the student's previous progress, were designed to enable the student to receive educational benefits.

Noting the foregoing, I disagree with the parents' argument asserted on appeal that the impartial hearing officer ignored relevant legal authority that limited her evaluation of the program offered by the district to the written IEP, which, according to the parents, did not include a written offer of the Wilson program, as the hearing record supports a conclusion that the district offered the student a FAPE in the LRE regardless of any determination on this issue. The hearing record amply supports the conclusion that there was adequate compliance with IDEA procedures and that the parents were significantly involved in the formulation of the 2007-08 IEPs (see Cerra, 427 F.3d at 192). The hearing record also amply supports the impartial hearing officer's overall conclusion that, while not perfect, the 2007-08 IEPs were substantively adequate to offer the student a FAPE in the LRE. Moreover, the hearing record reflects that the student demonstrated educational progress under the district's IEPs leading up to the 2007-08 school year and that he continued to show progress during the 2007-08 school year (Tr. pp. 1259-64; see Parent Exs. F4; HH).

With respect to the parents' contention that the impartial hearing officer erred in denying their request to be reimbursed for the privately obtained neuropsychological evaluation, I find that although the impartial hearing officer did not directly address this issue in her legal conclusions, she properly concluded that the parents were not entitled to reimbursement for the IEE (IHO Decision at pp. 18-21). Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an

¹² According to the hearing record, the parents did not challenge the appropriateness of the student's 2006-07 IEPs prior to initiating the instant action, and furthermore, the parents' due process complaint notice, dated February 12, 2008, raised no challenges to the student's 2006-07 IEPs (Parent Ex. A; see Dist. Exs. 1-30; Parent Exs. A-EE; HH-JJ; IHO Ex. 1)

evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027). In addition, an unnecessary delay in the district seeking an impartial hearing to contest a parent's request for an IEE may result in district liability for an IEE at public expense (Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289 [N.D. Cal. Dec. 15, 2006] [finding the district liable to pay for an IEE due to nearly three months unnecessary delay in requesting an impartial hearing]; but see L.S. v. Abington Sch. Dist., 2007 WL 2851268, at *9, *10, *13 [E.D. Pa. Sept. 28, 2007] [six week delay in the district requesting an impartial hearing to dispute parent's request for IEE reimbursement is consistent with procedures and intent of IDEA where the district first attempted to resolve the matter]; see also Letter to Sapperstone, 21 IDELR 1127 [OSEP 1994] [there is no specific time period within which a district must request an impartial hearing to dispute a parent's request for IEE reimbursement, but an impartial hearing request may not be delayed such that it interferes with a free appropriate public education]).

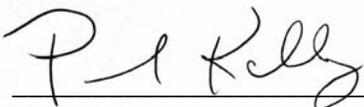
Here, the hearing record indicates that the parents inquired at the November 2006 IST meeting as to whether the district could reassess the student, stating that they did not believe the testing performed in fall 2005 "[was] accurate" (Dist. Ex. 13 at p. 2; see Parent Exs. D2; D3). However, the hearing record also indicates that at the IST meeting, the district offered to reassess the student, which the parents ultimately rejected a few days later in order to prevent "over-testing" of the student in light of his scheduled neuropsychological evaluation in January 2007 (Dist. Ex. 14 at p. R53; Parent Ex. Z at p. 10). As noted in the neuropsychological evaluation report, the parents sought an independent evaluation due to their concerns about the student's lack of progress and academic difficulties (Parent Ex. D at p. 1). After receiving a preliminary report of the neuropsychological evaluation results, the parents e-mailed the district on February 26, 2007, indicating that they would be "submitting the testing bill to the district for reimbursement" since they had "been constantly complaining about [the student's] 8th grade test results" and were forced to go "out of the district to have [the student] tested" (Parent Ex. X at pp. 3-5). Based upon the foregoing, I am not persuaded that the parents disagreed with the 2005 district evaluation, properly requested an IEE at public expense, or otherwise complied with the regulatory requirements governing IEEs (see 8 NYCRR 200.5[g]). Thus, the parents' request for reimbursement for the privately obtained neuropsychological evaluation must be denied and dismissed.

Finally, I note that the impartial hearing officer's decision demonstrates that she carefully marshaled and weighed all of the testimonial and documentary evidence presented by both parties with regard to the parents' procedural and substantive challenges to the student's 2007-08 IEP and properly based her ultimate determinations on the weight of the evidence. The hearing record amply supports the impartial hearing officer's conclusion that the district offered the student a program that was appropriate to meet his special education needs. In short, based upon my review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the findings of fact or conclusions of law as determined by the impartial hearing officer regarding the issues raised in the parents' appeal, and thus, the parents' appeal is dismissed in its entirety (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]; see Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 05-095; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

I have considered the parties' remaining contentions and find that in light of my determinations, I need not reach them.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 30, 2009**



**PAUL F. KELLY
STATE REVIEW OFFICER**