



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-035

**Application of a STUDENT WITH A DISABILITY, by his 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] School District**

### **Appearances:**

Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended the student for the 2008-09 school year was appropriate and which denied the parent's request for additional reading services at the Lindamood-Bell Learning Processes Center (Lindamood-Bell). The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending third grade in a 12:2+2 special education class at the School for Language and Communication Development (SLCD) (Tr. pp. 7, 63, 89). SLCD is a private school which has 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). Pursuant to his September 4, 2008 individualized education program (IEP) for the 2008-09 school year, the student had significant global delays and required an "intensive, small teacher-to-student ratio program" (Dist. Ex. 6 at p. 4). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; Dist. Ex. 6 at p. 1).

The student has a profound sensorineural bilateral hearing loss and received a cochlear implant in December 2002 (Dist. Exs. 7 at p. 1; 8 at p. 1). The student has difficulty discriminating sound, needs background noise minimized, and uses an FM trainer to amplify sound during school (Tr. p. 62). The student was initially found eligible for special education programs and services as a student with deafness; however, his classification was recently

changed to speech or language impairment (id.). The student has also received a diagnosis of a language-based learning disorder that cannot be attributed to his hearing loss (Dist. Ex. 7 at p. 7). Achievement and intellectual testing conducted in February and March 2008 revealed that the student is experiencing delays common to deaf students such as limited vocabulary, grammar, and verbal memory capacity; however, he is also experiencing difficulties with auditory processing, word naming, word generation, and syntax at a level that would not be expected in a student who has been "implanted" for a lengthy time period and who has received intensive speech-language remediation (id.). The student also presents with disorganization, slowed processing of information, and memory retrieval difficulties that contribute to his academic delays (id.). The student's overall cognitive functioning is in the extremely low range (id. at p. 3).

The student attended a private school for the deaf in kindergarten and first grade (Tr. p. 63). He repeated first grade at a district elementary school in a "blended" program and completed a district second grade "blended" program the following year (id.). During the 2007-08 school year, when the student was in second grade he received the following services: consultant teacher services, a classroom aide, hearing services, hearing consultation, occupational therapy (OT) consultation, speech-language consultation, speech-language therapy, and team meetings (Tr. p. 64; Parent Ex. D at p. 2).

On January 28, 2008, a speech-language evaluation and functional listening assessment of the student was conducted as a component of his five-year post-implant protocol (Dist. Ex. 8 at p. 1). The student's performance on a battery of speech perception measures including the Common Phrases Test, the AB List, the Peabody Picture Vocabulary Test "form 4A/B," the Clinical Evaluation of Language Fundamentals-4, the Structured Photographic Expressive Language Test-3, and the Goldman-Fristoe Test of Articulation revealed poorly developed phoneme and word scores for his length of implant use (id. at p. 4). The speech-language pathologist who conducted the evaluation opined in the evaluation report that the student's significantly delayed receptive vocabulary skills adversely affected his word recognition and his sequential memory difficulties and that his delayed syntax and grammar skills were likely the cause of his significantly poorer speech reception of longer and more complex utterances (id.). She noted that the student performed slightly better in the presence of competing background noise on word and phoneme recognition, but that the presence of noise moderately affected his sentence identification (id.). The speech-language pathologist described the student as a highly verbal youngster whose overall speech intelligibility was fairly good to the unfamiliar and unclued listener (id.).

The five-year post-implant evaluation report included recommendations that the student continue to be seen for regular audiological assessments to monitor his auditory acuity and his need for device modification and that he continue to utilize an FM device for all instructional routines (Dist. Ex. 8 at p. 5). The report also included recommendations to be implemented by the student's school-based support service providers and his private auditory-verbal therapist (id.). Specifically, the speech-language pathologist recommended that vocabulary expansion should continue to be a critical component of the student's program using pre-teaching of new vocabulary, exposure to new vocabulary through joint reading of a variety of literacy materials, and the use of synonyms during daily activities to introduce new and more sophisticated

vocabulary (id.). In response to parental concerns regarding the student's literacy skills development, the speech-language pathologist suggested consideration of phonemic based strategies such as those found in the Lindamood-Bell or Orton-Gillingham programs, which she reported had been effectively used in enhancing the reading skills of students with hearing loss (id.). She recommended continued development of open-set listening skills in both quiet and noise at the sentence level and suggested that these training tasks could be structured to simultaneously facilitate the student's syntax and grammar skill development and his phonemic identification and production (id.). The speech-language pathologist also included recommendations to address the student's expressive language skills, including using techniques of indirect auditory modeling and story modeling to facilitate his acquisition of more structurally accurate sentences, and holding the student accountable for providing contingent responses to "wh" questions, in the absence of a model to imitate (id.).

Over a three-day period beginning February 6, 2008 and ending March 1, 2008, the student was evaluated at the request of the district by a clinical neuropsychologist, in order to assess the student's cognitive functions and academic achievement (Dist. Ex. 7 at p. 1).<sup>1</sup> The evaluation report included the results of the administration of fourteen tests (id. at p. 3). The student's general cognitive functioning was assessed using the Wechsler Intelligence Scale for Children-Fourth Edition, which yielded a full scale IQ score of 68, reported by the neuropsychologist as in the extremely low range (id.). The administration also yielded scores within the low average range for nonverbal/performance intellectual functioning; and within the extremely low range for verbal intellectual functioning (id. at pp. 3, 7). The evaluation report indicated that the student was experiencing delays common to deaf students, specifically, limited vocabulary, grammar, and verbal memory capacity (id.). However, the student was also found to be experiencing difficulties with auditory processing, word naming, word generation, and syntax at a level that would not be expected in a student who had received intensive speech-language remediation and who had been implanted for a long period of time (id.). The neuropsychologist stated that the pattern of the student's scores suggested that the student had a language-based learning disorder that could not be attributed to his hearing loss (id.). The student was also reported to present with disorganization, slowed processing of information, and memory retrieval difficulties that also contributed to his academic delays (id.). The student's fine motor and graphomotor abilities were deemed to be within normal limits, although disorganization and visual-perceptual inattention to detail were noted as tasks became more complex (id.).

The neuropsychologist's evaluation report recommended among other things, that the CSE consider a classification of a learning disability for the student and that he continue to receive speech-language therapy and audioverbal therapy "as stipulated on his IEP" (Dist. Ex. 7 at p. 8). He also recommended that OT services be added to the IEP to develop the student's organizational, attending, and memory functions (id.). The neuropsychologist suggested that the

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<sup>1</sup> The evaluator noted that some of the tests administered have not been developed or fully standardized on children who are deaf or hard of hearing, although the tests of nonverbal cognition are regularly used to assess these populations and are recognized as adequate measures of nonverbal cognitive functioning (Dist. Ex. 7 at p. 3). He also noted that verbal subtests are often not administered to deaf individuals because in this population the subtests can be considered measures of verbal achievement or language proficiency rather than verbal cognition (id.). In this case, the student was administered the language-based tasks during the present evaluation to garner an estimate of his verbal cognitive functions and the evaluator opined that the findings were believed to be a fairly accurate representation of the student's true level of functioning (id. at pp. 3, 7).

student's teachers and therapists meet regularly to develop and implement strategies specifically designed for deaf students who are oral learners to support the development of the student's language and learning functions (id.). Summer services were recommended to reinforce concepts learned during the school year (id.).

On March 13, 2008, the student was evaluated by a district occupational therapist as part of the student's triennial evaluation (Dist. Ex. 9 at p. 1). Administration of the Beery-Buktenica Developmental Test of Visual-Motor Integration – Fifth Edition (VMI-5) yielded scores ranging from the below average range to the above average range in visual motor integration (63rd percentile), visual perception (23rd percentile), and motor coordination (77th percentile) (id.). The Wold Sentence Copy Test was used to assess the student's letter formation, directionality, and speed, and reflected below average scores for handwriting speed when compared to other second grade students (id. at p. 2). The student's upper extremity and fine motor function was assessed and his range of motion was deemed to be within normal limits for both upper extremities (id.). He presented as left hand dominant, used a tripod grasp when writing, and was able to write with good letter height, formation, proper use of margins and spacing between words although he occasionally exerted increased pressure on the writing implement (id.).

On March 25, 2008, the student's special education teacher at the district's school administered the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) - Form A to assess the student's academic skills (Dist. Ex. 16 at p. 1). The student's achieved scores revealed that when compared to other students his age, his performance in math skills was in the low range and his performance in basic reading skills was in the very low range (id. at pp. 1-2).

A report card reflecting the student's performance during the fall, winter, and spring quarters of the 2007-08 school year revealed that the student earned a designation of "1" indicating an "area of concern" for almost all subtasks under the categories of reading, writing, listening and speaking, and science (Dist. Ex 11 at p. 1). The student received slightly higher designations for "demonstrates effort" in most subject areas with handwriting and math reflecting relative strengths (id.). The student's designations for "work habits/personal development" reflected strengths in completing homework, following class rules and self-control, and reflected weaknesses in working independently and completing class work (id. at p. 2).

On April 28, 2008, the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 3). Participants at the meeting included the CSE chairperson, a district psychologist, the district's school principal, the student's speech-language pathologist, his regular education teacher, his special education teacher, his teacher of the deaf, his 1:1 aide, an occupational therapist, his auditory-verbal therapist, and his parents (id. at p. 5). The parents requested that an additional parent member not attend the CSE meeting (id.). CSE meeting comments reflected that the CSE reviewed and discussed the March 13, 2008 OT evaluation report and the March 1, 2008 neuropsychological evaluation report, as well as reports and observations by the student's parents and teachers (id.). Based on discussion, the CSE and the parents agreed that the student was in need of a more restrictive educational setting as a result of less than expected progress in meeting his IEP goals (id.). The CSE recommended that applications be made to out-of-district special education programs and obtained the parents' signed consent to release the student's documentation (id.).

By letter dated May 1, 2008, the parents informed the district that as a result of the April 28, 2008 CSE meeting they had been made aware that their son was not progressing at the rate he should be and that reading was the biggest area of concern (Parent Ex. I at p. 1). In their letter, the parents stated that based on the April 2008 CSE meeting they had visited the Lindamood-Bell program and they requested that the district visit the program and consider placement of the student there "immediately" (id.).

On May 2, 2008, the district's director of special education sent letters to fourteen out-of-district schools seeking placement for the student (Dist. Ex. 12 at pp. 1-14). The letters reflected that the student was eligible for special education programs and services as a student with deafness; however, a cochlear implant had successfully augmented his hearing (Dist. Ex. 12). The letters further reflected that due to a significant concomitant learning disability, the CSE had determined that the student required a self-contained setting for students with more significant learning impairments (id.).

By due process complaint notice dated May 14, 2008, the parents requested an impartial hearing (Parent Ex. K). The parents alleged that the district was not "moving in efficient manner to get [the student] the appropriate services needed" (id. at p. 3). The parents requested that the student receive a specialized reading program and that the CSE review the student's needs to ensure he was receiving the appropriate services (id.). The parents further requested that "outside consultants" review the student's needs since they were not being met by the district (id.).

On May 21, 2008, the district and the parents participated in a resolution meeting which resulted in the district's offer to increase the student's resource room instruction from one half hour every other day to one half hour daily and to provide him with an additional one hour session of "strict Wilson reading instruction" after school daily (see Parent Ex. I at p. 4). However, the parents did not agree to the district's offer, and therefore no resolution was reached and no modifications were made to the student's IEP (id.).

By letter dated May 30, 2008 to the district's director of special education, the parents requested that enrollment of the student in the Lindamood-Bell program be put on the June 5, 2008 Board of Education meeting agenda for consideration and approval (Parent Ex. I at p. 2). The letter further requested a response to the parents' previous request on May 27, 2008 regarding a list of reading interventions that had been used with the student over the past two years (id.).

By letter dated June 5, 2008, the parents requested that the district provide them with all of the student's files, including "any and all reports," and a list of interventions that had been used regarding the student's speech-language therapy, the student's response to these interventions, and progress made with the interventions (Parent Ex. I at p. 3). The letter also repeated the parents' previous request for a list of reading interventions used during the past two years and a request for the minutes of the student's CSE meetings and the May 21, 2008 resolution session (id.).

By letter dated June 10, 2008, the district's director of special education responded to the parents' letters and requests and stated that although there were no meeting minutes taken at the April 28, 2008 CSE meeting, the comments section on the resultant IEP described what took place at the meeting (Parent Ex. I at p. 4). The director's response letter included a verbatim copy of the April 28, 2008 IEP comments (id.). The director further stated that no minutes were taken at the May 21, 2008 resolution session and provided a general description of what had occurred at the session (id. at pp. 4-5). The director also indicated that a document describing the reading interventions provided to the student and his response to those interventions did not exist (id. at p. 5). He directed the parents to the student's IEP for information regarding the interventions provided to the student and to the student's evaluation documents and progress report cards for information regarding the student's progress toward meeting his IEP goals (id.).

By letter dated June 19, 2008, SLCD responded to the district's May 2, 2008 letter requesting placement and informed the district that they could provide a 12-month, full-day, language-based program for the student starting September 2, 2008 (Dist. Ex. 13). SLCD requested that the district send them an IEP for the student that reflected: "a classification of Speech Impaired;" a "student/teacher ratio of 12:2[+]2;" related services consisting of four 30-minute sessions of speech-language therapy, two 30-minute sessions of individual OT, two 30-minute sessions of "Hearing Ed Services," and parent training; Fast ForWord with cochlear implant modification; an FM unit; and testing modifications including an FM unit (id.).

A June 25, 2008 progress report on the student's IEP goals for the 2007-08 school year indicated that overall the student had made less than satisfactory progress, that he had shown inconsistent performance, and that he required teacher support for many of his goals (Dist. Ex. 10 at pp. 1-10).

On June 25, 2008, the CSE reconvened to consider the out-of-district placement options for the student (Dist. Ex. 4 at pp. 1-2). The meeting was attended by the CSE chairperson, a district psychologist, the student's speech-language therapist, a regular education teacher, the student's special education teacher, his teacher of the deaf, an audiologist from the BOCES Hearing Program, an occupational therapist, an additional parent member, and the student's parents (id. at p. 4). The student had been accepted into the BOCES Hearing Program for summer 2008 and the following 2008-09 school year; however, the parents rejected this placement stating the student would be misplaced in any program in which students communicated via signing (id. at p. 5). The CSE therefore recommended that the student be placed at SLCD for the 2008-09 school year, which was preferred by the parents and was also deemed appropriate by the CSE (id.). The student's IEP for the 2008-09 school year was modified to reflect a 12:2+2 class ratio and the use of "Fast ForWord with a cochlear implant modification" (id.). The CSE recommended related services including two 30-minute individual hearing education services per week, two 30-minute individual OT sessions per week, two one hour parent training sessions per month and four 30-minute individual speech-language therapy sessions per week (id. at pp. 1-2). The CSE also recommended extended school year services (ESY) for summer 2008 from the BOCES Itinerant Hearing Program with related services of two 45-minute individual hearing services per day and three 30-minute individual speech-language therapy sessions per week (id. at pp. 2, 5). The June 2008 IEP delineated program modifications and supports related to the student's hearing needs and listed an "FM Trainer" with a personal

micro-link FM system as an assistive technology device (id. at p. 2). Testing accommodations were also delineated to address the student's hearing and academic needs (id.). The June 2008 IEP contained goals in the areas of study skills, reading, writing, mathematics, speech-language, and hearing skills to address the student's identified needs in these areas (id. at pp. 5-9).

On July 17, 2008, the CSE convened again to review the student's program and make modifications to the previous June 25, 2008 IEP (Dist. Ex. 5 at pp. 1, 5). The CSE members included the CSE chairperson, a school psychologist, a speech-language therapist, a regular education teacher, a special education teacher, an additional parent member, and the parent (id. at p. 4). A psychologist from SLCD participated by telephone (id.). First, the CSE members, including the parent, agreed that the student presented with various deficits that affected his learning, and that his classification would be appropriately changed to a student with a speech or language impairment (id. at p. 5). Additionally, one new annual goal related to writing was added at the request of the parent, one new annual goal related to speech articulation was added, parent training sessions were reduced from two to one time per month, and a "scribe" was deleted from the student's testing accommodations (id.).

The hearing record shows that per a settlement agreement between the district and the parent, the student received 148 hours of Lindamood-Bell "Seeing Stars" instruction during summer 2008 (Tr. p. 79; Dist. Ex. 14). The Lindamood-Bell reading services were received for four hours per day, five days per week, for eight weeks (Tr. p. 571). The hearing record does not indicate when the services at Lindamood-Bell began or concluded.

The student's progress in Lindamood-Bell was reported in a "Testing Summary" report that reflected his performance on a variety of reading skills subtests administered on May 28, 2008 (pretest), and on July 30, 2008 and August 25, 2008 (Dist. Ex. 14). The report reflected that the student demonstrated progress in his ability to decode and encode as measured by administration of the Woodcock Reading Mastery Test – NU, word attack subtest; the word reading and spelling subtests of the Wide Range Achievement Test - 4; the Slosson Oral Reading Test – R3; and the symbol to sound subtest of the Informal Tests of Writing (id. at pp. 1-3). The student also demonstrated progress in his reading comprehension skills as measured by administration of the Gray Oral Reading Test, Form A, Paragraph Reading-Recall Per Passage (id. at p. 2).

In a due process complaint notice dated August 29, 2008, the parent alleged that the district was deliberately delaying a new CSE meeting, which he had requested from convening and that this delay was depriving his son from receiving a free appropriate public education (FAPE) (Dist. Ex. 1). The parent alleged that the student had regressed in his former district program and that he required Lindamood-Bell reading services, as noted by his improvement during summer 2008 (id. at pp. 2-3). The parent attached a copy of the Lindamood-Bell testing summary report to the due process complaint notice (id. at pp. 4-6).

On September 4, 2008, the CSE reconvened at the request of the parent (Dist. Ex. 6 at pp. 1, 5). The meeting was attended by the district's director of special education, the CSE chairperson, a district school psychologist, the student's regular education teacher, special education teacher, speech-language therapist, and occupational therapist from the 2007-08 school

year, a representative from Lindamood-Bell, an additional parent member, and the parent (Tr. pp. 20, 418, 529, 530; Dist. Ex. 6 at p. 5; see Dist. Ex. 9 at p. 1). The supervisor of psychologists and the student's current special education teacher from SLCD participated by telephone (Dist. Ex. 6 at p. 5). The September 4, 2008 IEP comments indicated that the parent stated that the student had benefited from the Lindamood-Bell program during the summer and requested that the CSE recommend the program for two hours per day for the 2008-09 school year (Dist. Ex. 6 at p. 5). The comments also reflected that all of the CSE members including the parent agreed that the SLCD program recommended at the June 25, 2008 CSE meeting was an appropriate program for the student (id.). The September 2008 comments further noted that the CSE did not recommend the addition of Lindamood-Bell reading instruction to the student's program due to the SLCD's reporting of the extent of their reading program which included a half hour daily of the Milestones, Fast ForWord, and Recipe for Reading programs (id.). The CSE determined that the student could be expected to benefit from the program and services offered at SLCD, not only in reading but in all of his other deficit areas, and the IEP noted that although the parent did not express disagreement with the recommendation of the SLCD program or services indicated on the IEP, he was not in agreement with the CSE's decision not to provide the additional Lindamood-Bell services (id.). The September 2008 IEP comments reflected that the Lindamood-Bell Testing Summary report was reviewed by the representative from Lindamood-Bell and the student's IEP goals were modified based on those test results (id.).

By letter dated September 8, 2008, the district responded to the parent's due process complaint notice, asserting that the district's recommendations in the July 17, 2008 IEP offered the student a FAPE, denied the parent's request for additional Lindamood-Bell reading services, and generally denied the allegation that the district was deliberately preventing the CSE from convening (Dist. Ex. 2).<sup>2</sup>

An impartial hearing began on October 14, 2008, and concluded on December 18, 2008, after five hearing dates. In a decision dated February 7, 2009, the impartial hearing officer determined that the student was receiving a FAPE based upon a program that was reasonably calculated to enable him to receive educational benefits as recommended in the September 4, 2008 IEP (IHO Decision at pp. 2, 6-7). The impartial hearing officer found that there was nothing in the hearing record to indicate that there were procedural inadequacies which impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (id. at p. 6). She further found that the school district was "providing personalized instruction with sufficient support services" to allow the student to benefit educationally at SLCD (id.). Lastly, the impartial hearing officer determined that the IEP accurately reflected the results of evaluations to identify the student's needs, established annual goals related to those needs, and provided for the use of appropriate special education services as those that were described by the student's teacher at SLCD (id.). Based on her determination that a FAPE was offered to the student, the impartial hearing officer did not determine whether Lindamood-Bell was appropriate and she denied the parent's request for Lindamood-Bell services (id. at p. 7).

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<sup>2</sup> I note that the answer to the parent's due process complaint notice occurred four days after the CSE reconvened and created the IEP that is now in contention on appeal, and that no new or amended due process complaint notice was filed by the parent.

The parent appeals the impartial hearing officer's decision, alleging among other things, that his son is being deprived of educational benefits because he is not receiving 1:1 reading services at SLCD. The parent alleges that the student is not making gains in his reading at SLCD. The parent further contends that the student made substantial gains while attending Lindamood-Bell. The parent requests that the student receive two hours per day of reading services at Lindamood-Bell during the 2008-09 school year and "the same services he was given over summer 2008," namely, four hours per day, five days per week. The parent attaches to his petition as additional evidence test results performed by Lindamood-Bell personnel on May 28, 2008, August 25, 2008, and February 18, 2009.

In its answer dated March 29, 2008, the district asserts, among other things, that it offered the student a FAPE in the least restrictive environment (LRE); that SLCD was an appropriate placement; that the student is not entitled to "compensatory education;" and that the additional evidence attached to the parent's petition should not be considered by a State Review Officer.

Initially, I will address the district's objection to the additional exhibit submitted by the parent with his petition for review. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (*see, e.g., Application of a Student with a Disability*, Appeal No. 08-030; *Application of the Dep't of Educ.*, Appeal No. 08-024; *Application of a Student with a Disability*, Appeal No. 08-003; *Application of the Bd. of Educ.*, Appeal No. 06-044; *Application of the Bd. of Educ.*, Appeal No. 06-040; *Application of a Child with a Disability*, Appeal No. 05-080; *Application of a Child with a Disability*, Appeal No. 05-068; *Application of the Bd. of Educ.*, Appeal No. 04-068). In this case, the additional exhibit is not necessary in order for me to render my decision, and as such, I will not consider the exhibit.

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 student 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; 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).

State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Application of a Student with a Disability, Appeal No. 09-016; Application of the Dep't of Educ., Appeal No. 08-017;

Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047).

The 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).

The parent argues on appeal that the student requires additional hours of Lindamood-Bell reading services after school each day in order for him to receive appropriate educational benefits. As discussed above, the student exhibits a language-based learning disability and significantly delayed receptive language skills, which may in part be a result of his hearing loss (Dist. Exs. 7 at p. 7; 8 at p. 4). The student's extremely low range of cognitive functioning also negatively affects his ability to learn (Dist. Ex. 7 at p. 3). After a series of meetings, the CSE recommended that the student be placed at SLCD in a 12:2+2 special class program that focused on the relationship between language development and academic success (Dist. Exs. 6 at p. 1; 15 at p. 1). The hearing record describes SLCD as employing a transdisciplinary program model that utilizes a professional team of educators and therapists to coordinate each student's instructional goals and activities (Dist. Ex. 15 at p. 1). The school evaluates each student to identify appropriate reading programs that emphasize phonemic awareness and semantic language development based on the student's identified needs (id.). The school offers differentiated levels of group instruction and 90 minutes of "intensive" daily reading instruction using the Milestones, Recipe for Reading, Wilson, Edmark, and Fast ForWord programs (id.). The hearing record also reflects that classrooms at SLCD are equipped with "FM sound field systems" to optimize teacher-student voice quality and increase students' listening skills (id. at p. 2). The September 4, 2008 CSE meeting minutes revealed that the CSE determined that the parent's requested Lindamood-Bell services were unnecessary based on the SLCD representatives' description of "the extent" of their reading program, which the CSE believed would benefit the student (Dist. Ex. 6 at p. 5). The September 4, 2008 IEP also reflected that the CSE modified the student's annual goals based on the results of August 2008 assessments conducted by Lindamood-Bell (id.).

The hearing record reveals that the CSE's recommended program and services as stated on the student's September 4, 2008 IEP reflected the student's present levels of performance, and the information provided by the student's 2008 neuropsychological evaluation and his January 2008 speech-language evaluation (compare Dist. Ex. 6, with Dist. Exs. 7; 8; 15). I find that the recommended program as envisioned by the September 4, 2008 CSE was reasonably calculated to provide educational benefits to the student during the 2008-09 school year, reflected the requisite alignment between the student's special education needs and his goals necessary for the provision of an appropriate program in the LRE, and provided for the student to be grouped with students of similar special education needs and abilities. Regarding the reading program offered at SLCD, the hearing record reflects that SLCD evaluates students to identify an appropriate reading program for each student which emphasizes phonemic awareness and semantic language

development (Dist. Ex. 15 at p. 1). With regard to this student's reading program, the district's director of special education testified that in addition to English language arts, SLCD provides daily, half-hour sessions each of the Milestones program, the Recipe for Reading program and the Fast ForWord program (Tr. pp. 91-92). The Milestones reading program is described by the student's teacher at SLCD as addressing sight word vocabulary, comprehension, processing, spelling, fluency, and sequencing (Tr. pp. 324, 325). She testified that students are pretested to determine their instructional level in the program, and then put into groups and that the student was in a group of either two or three children (Tr. p. 327). The Recipe for Reading program was described by the student's SLCD teacher as "a multisensory, visual, auditory, kinesthetic approach to phonetics and phonics, based on an Orton-Gillingham methodology" (Tr. pp. 329-30). The student's SLCD teacher described the Fast ForWord program as an individualized computer program that addresses auditory comprehension wherein the student progresses from one level to the next based on his correct responses (Tr. p. 331). The student's teacher at SLCD testified, without further explanation or referencing any objective evidence, that the student is "progressing" in the Milestones and Recipe for Reading programs (Tr. pp. 327-328, 330, 331). However, the extent of the student's progress in these programs is not further elucidated nor is the brief statement about progress referenced to the student's IEP goals.

Although I have determined that the program as formulated by the CSE was reasonably calculated to confer educational benefits to the student at the time it was designed, the hearing record does not demonstrate that the student's program provided at SLCD was being provided in conformity with the student's September 4, 2008 IEP. The term "free appropriate public education" means special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) *are provided in conformity with the individualized education program* required under section 1414(d) of this title (20 U.S.C. § 1401[9]) (emphasis added). In this case, the hearing record does not show that the student's otherwise appropriate IEP was properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087). The student's SLCD teacher testified that as of October 28, 2008 she had only reviewed the testing accommodations portion of the student's IEP (Tr. pp. 309-10, 349-50, 369-73). The teacher's testimony revealed that she was providing instruction without utilizing the student's IEP. The hearing record shows that the district was not providing special education and related services in conformity with the student's IEP.

Therefore, under the circumstances of this case, the district has not met its burden to show that a FAPE was offered (see 8 NYCRR 200.4[e][3][i], [iii]). As a result, I will award additional services to the student as compensation for the deprivation of a FAPE from September 2, 2008 to at least October 28, 2008, the time period in which the student's special education teacher testified that she provided instruction without utilizing the student' IEP, but for identifying the student's test accommodation needs. I will order the district to convene a CSE meeting and develop a program to provide the student with an additional 10 hours per week of services consisting of 1:1 reading instruction, beyond his current program, utilizing a multisensory sequential approach that is individually prescriptive to meet the student's identified deficits and allows him to progress at his own pace for the remainder of the 2008-09 school year and for summer 2009. The hearing record does not show that such additional services must be

provided through Lindamood-Bell in order for the student to receive educational benefits. I will also order the CSE, upon reconvening, to review the current implementation of the student's IEP. Therefore, I will modify the impartial hearing officer's order to be consistent with this decision.

I have considered the parties' remaining contentions and need not reach them in light of my determination herein. Lastly, unless the parties otherwise agree, the additional services ordered herein are to end at the conclusion of their provision during summer 2009 as ordered and are not to serve as a basis for any future pendency services.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision is hereby annulled to the extent that it determined that the student was being provided with a FAPE for the 2008-09 school year; and

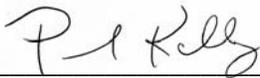
**IT IS FURTHER ORDERED**, unless the parties otherwise agree, that the district reconvene a CSE within 15 calendar days of the receipt of this decision to revise the student's 2008-09 IEP to include 1:1 reading instruction, beyond his current program, utilizing a multisensory sequential approach that is individually prescriptive to meet the student's identified deficits and allows him to progress at his own pace for 10 hours per week for the remainder of the 2008-09 school year as additional compensatory services; and

**IT IS FURTHER ORDERED**, unless the parties otherwise agree, that 1:1 reading instruction utilizing a multisensory sequential approach that is individually prescriptive to meet the student's identified deficits and allows for him to progress at his own pace be offered to the student as additional compensatory services for 10 hours per week, for six weeks during summer 2009; and

**IT IS FURTHER ORDERED**, unless the parties otherwise agree, that such additional reading services for the remainder of the 2008-09 school year shall be implemented no later than 30 calendar days after the date of this decision; and

**IT IS FURTHER ORDERED**, that upon reconvening, the CSE shall review the current implementation of the student's IEP.

**Dated:** Albany, New York  
April 22, 2009

  
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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**