



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-102

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

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, Ralph C. DeMarco, Esq., of counsel

Law Office of Peter D. Hoffman, P.C., attorneys for respondents, Betty J. Potenza, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the student's tuition costs and expenses at Windward School (Windward) during the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Windward (Tr. pp. 3485-87; Parent Exs. J at p. 3; Z). The Commissioner of Education has not approved Windward as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (Tr. pp. 899-900; Dist. Exs. 1 at p. 1; 2 at p. 1, see 34 C.F.R. § 300.8 [c][10][i]; 8 NYCRR 200.1[zz][6]).¹

¹ The hearing record is unclear whether the parents challenged at the impartial hearing, the appropriateness of the May 2008 change in the student's eligibility from a student with an other health impairment to a student with a learning disability (Tr. pp. 370, 899-900; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]). However, the parents' due process complaint notice did not indicate that they objected to this classification change (Parent

The hearing record reveals that the student attended a general education nursery and preschool program during the 2004-05 and 2005-06 school years (Tr. pp. 2479-81; Parent Ex. N at p. 4).

At the start of the 2006-07 school year, the student attended the district's half-day general education kindergarten program (Tr. pp. 2489-90).² During the same time period, fall 2006, the parents hired a full-time nanny with an undergraduate degree in special and general education (Tr. pp. 2998-99, 3007).

A speech-language evaluation dated September 20, 2006 from a private speech-language pathologist, revealed that the student had excellent knowledge about the structure of language (Joint Ex. 1B at pp. 38-39). The private speech-language pathologist administered the Comprehensive Test of Phonological Processing (CTOPP), the Illinois Test of Psycholinguistic Abilities-Third Edition (ITPA-3), and the Clinical Evaluation of Language Fundamentals-Preschool (CELF-P) (*id.* at pp. 35-37). Results from the CTOPP indicated that the student's phonological awareness skills were in the 23rd percentile, her phonological memory skills were in the 16th percentile, and her rapid naming skills were in the 2nd percentile (*id.* at p. 35).³ The private speech-language pathologist also reported that the student made speech sound substitutions, had difficulty with sound blending, rapid production and/or organization of spoken language, and word retrieval and phonological memory (*id.*). Results from the CELF-P indicated that the student's language skills were in the superior to mid-average range (*id.* at p. 37). However, the speech-language pathologist opined that the student could have difficulty with time order sequential-linear type language (following directions), and with short term memory (working memory) tasks (*id.*). According to the private speech-language pathologist, the results from the ITPA-3 indicated that the student's phonological processing skills were in the "deficient range," and required "immediate attention" (*id.* at p. 36). The speech-language pathologist also reported that the student took a long time to identify letters in her own name, failed to identify many letters by name/sound, failed to identify individual numbers, failed to name numbers past 10, and had difficulty using names for people and items (*id.* at p. 37). She was also reported as to be easily distracted (*id.*). The speech-language pathologist opined that the student exhibited moderate-severe phonological processing "compromises," rapid naming "compromises," and short-term memory "compromises" (*id.* at p. 39). She recommended speech-language "treatment" at least twice weekly for 30-45 minute sessions, computer based auditory enhancing programming, and at-home "kid coaching" for behavioral applications and improved listening (*id.*). After the September 2006 private speech-language evaluation, the hearing record reveals that the student began attending two weekly sessions of speech-language therapy provided by the

Ex. 1B pp. 1-13) and the impartial hearing officer did not address this issue in her decision (see IHO Decision). Moreover, neither party has raised this issue on appeal.

² The hearing record reveals that prior to kindergarten, the parents had been concerned about the student's articulation skills, her memory skills, and her lack of interest in certain alphabet related activities (Tr. pp. 2481-90).

³ Composite standard scores included: 89 (phonological awareness), 85 (phonological memory), and 70 (rapid naming) (Joint Ex. 1B at p. 35).

private speech-language pathologist (Tr. pp. 2495-97). The student also began attending "kindergarten enrichment" sessions (Joint Ex. 1B at p. 45).⁴

An October 2006 screening conducted by the district's kindergarten teacher revealed that the student exhibited a lack of phonemic awareness skills, poor rhyming and letter/sound symbol skills, and weak fine motor skills (Tr. pp. 382-83, 420-23). During the screening, the student identified 17 upper case letters, 16 lower case letters, 1 sight word, and 2 letter sounds (Tr. pp. 420, 423-25; Dist. Exs. 43; 47 at p. 2). In October and November 2006, the district began providing "building-level" reading intervention services to the student consisting of three sessions per week of small group phonemic awareness/reading support intervention services and two sessions per week of "push-in" speech-language therapy (Tr. pp. 306-07, 383, 420-21, 425-26; see Dist. Exs. 3 at p. 4; 9 at p. 1). The district's reading specialist who provided the student's reading services utilized the Wilson Foundations program (Tr. p. 425). The student also received an "OT packet" which included exercises for the student to use at home (Tr. p. 383).

A private audiologic and auditory processing evaluation report dated November 1, 2006, indicated that the student possessed normal hearing ability in both ears (Joint Ex. 1B at p. 30). However, the student was found to have an auditory processing disorder that made it difficult for her to receive distorted or degraded auditory information (such as by competing noise or by distortions to the auditory signal) (id.). The audiologist reported that she expected the auditory processing disorder to interfere with the student's classroom learning (id.). The audiologist recommended that the student be taught in a quiet classroom away from noisy streets, lunchrooms or restrooms with seating that was close to the instructor (id. at p. 31). She also recommended the use of a personal wearable FM system, utilizing written materials to provide important information to the student (such as assignments), "listening breaks" to reduce the stress of listening throughout the day, and preteaching of educational lessons (id.). The audiologist also recommended that the student obtain a speech-language evaluation, and further suggested that auditory integration training might be successful in improving the student's auditory processing and auditory attention (id.).

By e-mail dated November 14, 2006, the student's mother informed the district of the private auditory processing evaluation and speech-language evaluation, and requested that the district's Child Study Team (CST) or the Committee on Special Education (CSE) convene (Dist. Exs. 20 at p. 1; 21 at p. 1). In an e-mail response sent to the student's mother later that day, the assistant director of special services informed the student's mother that she considered the e-mail a referral of the student to the CSE (Dist. Ex. 20 at p. 1; see Dist. Exs. 60-62).

In December 2006 and January 2007, a district speech-language pathologist conducted a speech-language evaluation of the student (Dist. Exs. 9-12). The evaluation report noted that the student had received the diagnosis of an auditory processing deficit for which a personal FM system was prescribed (Dist. Ex. 9 at p. 1). Administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) and the Test of Language Development-

⁴ From November 15, 2006 through April 11, 2007, the student participated in 33 individual "kindergarten enrichment" sessions at a private speech-language and literacy agency, focusing on language and auditory processing skills (Joint Ex. 1B at p. 45).

Primary: Third Edition (TOLD-P:3) yielded receptive and expressive language subtest scores in the average to superior range (id. at pp. 1-2). The district speech-language pathologist also reported that the student's auditory processing skills were in the average range for word, sentence, and paragraph processing (id. at pp. 2-3). She also reported that the student "readily understood directions without rephrasing or clarification" (id.). The district speech-language pathologist characterized the student's speech sound substitutions as "age appropriate" based on the results of a test measuring the student's articulation skills, and reported the student's overall speech intelligibility to be "good" to "very good," depending on the context (id.).

A district educational evaluation report dated January 3, 2007 indicated that the student exhibited "physical restlessness and a relatively short attention span" during testing (Dist. Ex. 35 at p. 1). Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded the following subtest standard scores (percentile): word reading 95 (37), numerical operations 95 (37), math reasoning 98 (45), spelling 99 (47), and listening comprehension 110 (75) (id.). The evaluator concluded that based on these results, the student demonstrated average early reading skills, emerging phonemic awareness abilities, average math and spelling skills, and a relative strength in listening comprehension skills (id. at p. 2). The evaluator did not recommend that the student receive academic intervention in the areas assessed; however, she suggested that the CSE might want to investigate the student's ability to sustain her attention and concentration (id.).

A social history conducted by the district on January 8, 2007 reported that the parents expressed concern about the student's difficulty with phonemic awareness and with her recall skills (Dist. Ex. 56 at p. 1). The social history report also noted that the parents were concerned that their daughter might be "dyslexic" (id.).

A teacher report dated January 12, 2007, noted that the student recognized all upper-case letters and 25 lower-case letters, reflecting progress since the beginning of the school year (Dist. Ex. 84). The teacher also reported that the student knew all the sounds that had been covered, recognized seven sight words, and recognized the numbers one through eight (id.). However, the student was reported to have difficulty writing numbers and difficulty with math computations (id.). The teacher also indicated that the student exhibited weaknesses in her ability to sit still, follow verbal and multi-step directions, and at times, express herself (id.).

In an OT evaluation report dated January 14, 2007, the district's occupational therapist reported that the student exhibited weaknesses in postural control, bilateral motor coordination, fine motor skills, and crossing midline skills (Dist. Ex. 55 at p. 2).

On January 16, 2007 a district special education teacher conducted a classroom observation of the student (Dist. Ex. 34). The report noted that the student did not raise her hand to answer questions nor did she fully participate in large group activities, but she appeared to be attentive to the teacher (id. at p. 1). She was observed looking at her classmates and teacher for cues (id. at pp. 1-2). She was also noted to have difficulty completing activities without teacher support and when other students were talking (id.).

A medical report dated January 17, 2007, indicated that the student did not exhibit any "behavior, growth or medical problems," nor did she possess any "abnormality" that might interfere with her ability to learn (Dist. Ex. 59 at p. 1).

In January 2007, a district school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 53). Administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) yielded the following standard scores (percentile): verbal IQ 110 (75), performance IQ 103 (58), processing speed IQ 100 (50), and full scale IQ 107 (68) (*id.* at pp. 2-3). All subtest scores were within the average or high average range (*id.*). The school psychologist reported that the student became distracted, fidgeted in her seat, and answered questions impulsively (*id.* at p. 1). The student's attention and concentration were reported to be variable, but she did not require directions or test questions to be repeated (*id.*). Administration of selected subtests of the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG), measuring "cognitive fluency," yielded a cluster standard score (percentile) of 78 (7), considered to be in the borderline range of skill (*id.* at pp. 3-4; Dist. Ex. 54).⁵ The school psychologist reported that only one of the three subtests scores fell below the average range, and that the student's fatigue or interest level during the administration of the test might have had a negative effect on the overall cluster score (Dist. Ex. 53 at p. 4). The school psychologist also reported that although the student had exhibited some "distractibility and squirminess" during testing, these behaviors did not affect the outcome of the assessments (*id.*). The school psychologist concluded that the student exhibited a "solid cognitive profile," but that her difficulties with attention, focus, and motivation could affect her classroom performance (*id.* at p. 5). She recommended that the student's teachers provide the student with movement breaks, check with the student to ensure that she understands, chunk verbal information into small bits, and warn the student about upcoming changes in activities (*id.*).

On January 24, 2007, a CSE convened to determine the student's eligibility for special education services for the remainder of the 2006-07 school year (Dist. Ex. 3).⁶ The CSE found the student eligible for special education services as a student with an other health impairment following review of teacher, cognitive, academic, auditory processing, language, and OT assessment reports (*id.* at pp. 1-5). The CSE recommended that the student participate in a general education program and receive one session of group OT per week, two sessions of pull-out group speech-language therapy per week, and access to an FM system (*id.* at pp. 1-2). The CSE also recommended program modifications including preferential seating, direction clarification, cues to stay on task, and predictable routines (*id.*).⁷ The hearing record reflects that

⁵ The school psychologist defined "cognitive fluency" as a "subsection of processing speed," which refers to the "ease and speed by which a student performs cognitive tasks, including the fluency of retrieval from stored knowledge as well as the speed of forming simple concepts" (Dist. Ex. 53 at p. 4).

⁶ One day earlier, on January 23, 2007, the district's CST had convened and discussed the student's school performance (Tr. pp. 249- 52; Dist. Ex. 17). The CST recommended that the student receive speech-language therapy twice per week, one session of OT per week, preferential seating, and use of the "Radium" classroom-based FM system (Tr. pp. 3234-35; Dist. Ex. 17).

⁷ On February 7, 2007, the district received the parents' consent to provide the services recommended in the January 24, 2007 IEP (Dist. Exs. 64-65).

after this CSE meeting, the student also continued to receive three weekly sessions of building-level reading intervention services (Tr. p. 384).

On May 1, 2007, the student's mother completed an application for admission of the student to Windward for the 2007-08 school year (Parent Ex. N); however, the hearing record reflects that the student attended the district's general education program for the 2007-08 school year (Dist. Ex. 15 at p. 3).

Toward the end of the 2006-07 school year, the district's reading specialist noted that the student was able to identify all upper and lower-case letters and recognized all letter sounds (Tr. p. 430; see Dist Exs. 47 at p. 2; 85 at p. 7). The student was also reported to be able to recognize 16 sight words (Dist. Ex. 47 at p. 2). Additionally, a May 2007 assessment of the student's reading skills, measured by the Developmental Reading Assessment (DRA), indicated that the student's independent reading was at a "Level 1," her instructional reading was at a "Level 2," and she was considered to be an "emergent" reader (Tr. p. 443; Dist. Ex. 39).

On May 16, 2007, the CSE convened for the student's annual review and to develop her IEP for the 2007-08 school year (Dist. Ex. 2). The IEP noted that the student's diagnosis of an auditory processing disorder might explain her "inconsistent grasp of skills and ability to follow directions in all settings," and her difficulty with organizational skills (id. at p. 3). The IEP also noted the student's weaknesses in cognitive fluency, fine motor skills, low average word reading skills, and her need for teacher support to stay focused and follow directions (id. at pp. 2-4). The CSE recommended that the student participate in a general education first grade program during the 2007-08 school year with related services of one session of group OT per week, two sessions of group speech-language therapy per week, and several program modifications including preferential seating, direction clarification, structured/predictable routines, and cues to help the student stay on task (id. at pp. 1-2). The CSE also recommended the use of a slant board, a seat cushion, and access to an FM system (id. at p. 2).⁸ Annual goals were developed in the areas of speech-language and fine motor skills (id. at pp. 5-6).

In June 2007, the district, in a report of the student's progress toward her IEP annual goals, indicated that the student was "progressing satisfactorily" toward four out of six speech-language annual goals, that two out of six speech-language annual goals were achieved, and that the student demonstrated "some progress" toward two out of two annual goals in the area of motor skills (Dist. Ex. 8). The student's teacher reported that the student was a happy, positive member of the class and "made many strides academically and socially;" despite finding work challenging and needing assistance to complete tasks (Dist. Ex. 85 at p. 2).

In summer 2007, the student attended a private out-of-State summer program that offered a "tutorial program" and "scholastic summer workshops in reading and writing" (Tr. pp. 2530-31). The parents also arranged for the summer program to provide the student with speech-language therapy that focused on increasing phonemic awareness skills (id.; Parent Ex. E).

⁸ The student's mother testified that at the time that the 2007-08 IEP was developed, she believed that the program was appropriate and did not have any objections (Tr. pp. 2524-25).

During the 2007-08 school year, the student's general education first grade classroom was composed of seventeen students exhibiting "mixed ability" and one classroom teacher (Dist. Ex. 15 at p. 3).⁹ The hearing record reveals that the student's daily language instruction consisted of a shared reading time where the teacher read aloud while the class followed along in their own books, writing activities in response to the shared reading time, book discussion, phonics, spelling, handwriting lessons, guided reading group instruction, and independent reading time (Tr. pp. 1112-19). The district's reading specialist also provided the student with four 30-minute small group intervention sessions of remedial reading per week (Tr. pp. 385, 434-36, 441-42; Dist. Ex. 30). The reading specialist testified that she used multisensory techniques, guided reading level trade books, "Strategies that Work" comprehension strategies, and Wilson Foundations (Tr. pp. 441-45).¹⁰ Additionally, pursuant to the student's 2007-08 IEP, the district provided the student with two 30-minute sessions of group speech-language therapy per week and one 30-minute group session of OT per week (Dist. Exs. 2 at p. 1; 15 at p. 3).¹¹

During the 2007-08 school year, the student was assessed numerous times by the district (Dist Exs. 29; 37; 37A; 38; 40; 43). A September/October 2007 assessment of the student's reading levels as measured by the DRA indicated that the student's independent reading was at "Level 2" and her instructional reading was at "Level 3" (Tr. p. 1136; Dist. Exs. 37; 37A; 38 at pp. 1-8). An October 11, 2007 administration of the Dynamic Indicators of Basic Early Learning Skills (DIBELS) Oral Reading Fluency (DORF) Progress Monitoring resulted in five words read correctly (WRC) by the student in one minute (Tr. pp. 412, 466-67, 478-79; Dist. Ex. 29 at p. 1). A November 30, 2007 administration of a "PM Benchmark" running record assessment of the student indicated that the student read at "Level 5," guided reading level "D" at the 91st percentile (Tr. pp 479-80; Dist. Exs 40 at p. 3; 43). A January 9, 2008 re-administration of the DIBELS reflected that the student achieved ten WRC in one minute (Tr. pp. 467-68; Dist. Ex. 29 at p. 3). A January 25, 2008 administration of selected subtests of the WIAT-II yielded the following subtest standard scores (percentile): word reading 92 (30), numerical operations 83 (13), and spelling 104 (61) (Tr. pp. 822, 864-66; Dist. Ex. 27 at p. 1). A February 2008 PM Benchmark running record assessment of the student indicated that the student read at "Level 6," guided reading level "D" at the 98th percentile (Dist Exs. 40 at p. 2; 42 at 2; 43). A reading progress report from the district's reading specialist dated winter 2008 noted that the student had shown great progress with her beginning reading skills, and was confident of vowel sounds and some sight words (Dist. Ex. 50).

⁹ An assessment completed by a district reading specialist dated September 7, 2007, indicated that the student identified 52 out of 54 letters, identified 23 out of 26 letter sounds, completed 8 out of 24 phonemic awareness tasks, read 15 out of 26 high frequency words, wrote 8 out of 37 sounds heard in words dictated, and identified all 4 concepts of print (Tr. pp. 406, 434-35; Dist. Ex. 30).

¹⁰ The hearing record reveals that the student also received instruction from the private nanny at home using the "Preventing Academic Failure" (PAF) and "Handwriting Without Tears" programs (Tr. pp. 2999, 3342-43).

¹¹ In an e-mail dated September 21, 2007, the speech-language pathologist indicated that the student's FM system had not been implemented yet due to a technology related conflict with another student's assistive technology device (Tr. pp. 124-35; Dist. Ex. 19 at p. 1). The speech-language pathologist also reported that the student did not exhibit the need for the FM system in the classroom (id.).

A March 6, 2008 report from the student's first grade teacher indicated that the student exhibited weaknesses in oral expression, organizational skills, fine motor skills, and basic reading and math skills (Dist Ex. 26). The teacher also noted that the student needed "wait time" to retrieve information, that directions needed to be provided clearly with only one step explained at a time, and that the student needed repetition in order to acquire basic reading and math skills (id.).

On March 6, 2008, the parents signed an enrollment contract with Windward for the 2008-09 school year (Parent Ex. P). Thereafter, by letter dated March 17, 2008, the parents informed the district clerk that the student would "no longer attend [the district's elementary school] – effective school year 2008-09. She will attend the Windward School" (Parent Ex. Q).

Results from a March 20, 2008 administration of the CELF-4 by the district's speech-language pathologist and compared to results from a 2007 administration of the CELF-4, indicated that the student continued to present with an intact language system and did not display any areas of delay or deficit (Joint Ex. 1B at pp. 40-41). The speech-language pathologist reported that all areas of the student's language were in the average to superior range of development and therefore, the speech-language pathologist did not recommend speech-language intervention (id. at pp. 40-41).¹²

An April 14, 2008 administration of the reading subtests of the WIAT-II by the district's reading specialist resulted in the following standard scores (percentile): word reading 92 (30), reading comprehension 96 (39), pseudoword decoding 106 (66) (Dist. Ex. 24 at p. 1). The student's reading composite standard score (percentile) was 95 (37) (id.).¹³

An April 15, 2008 report from the student's first grade teacher indicated that the student exhibited strengths in effort, listening comprehension, class participation, counting coins and telling time (Dist. Ex. 23). The student was noted to exhibit weaknesses in written organization, attention/focus, reading fluency, and word problem solving skills (id.). The first grade teacher also reported that the student decoded three letter short vowel words, wrote simple sentences, and exhibited grade appropriate spelling and basic math skills (id.). The teacher reported further that the student's conflict resolution skills were developing, and she sought out adult assistance when she had a question about work or conflict with peers (id.). Results from an April 2008 administration of the DRA reflected that the student had progressed from an independent reading "Level 2" to a "Level 6" (Tr. pp. 1164-74; Dist. Ex. 38 at pp. 9-11).

¹² The report also noted that the student exhibited mild word finding difficulty and a rush of ideas that caused her to "clutter language elements" (Joint Ex. 1B at p. 40).

¹³ The hearing record reflects that the word reading subtest of the WIAT-II had been previously administered to the student on January 25, 2008 by the special education teacher (Dist. Exs. 24 at pp. 3-5; 27 at pp. 2-4). Comparison of the student's performance from each administration reflects that she made essentially the same errors, resulting in the same raw and standard scores (id.). These two sets of WIAT-II results indicated that in January and April 2008 the student achieved reading subtest standard scores in the average range, with the word reading subtest score falling in the "lower end of the average range" (Tr. pp. 2193-94, 2238-39).

An April 16, 2008 administration of the CTOPP by the district's speech-language pathologist yielded the following standard scores (percentile): phonological awareness 109 (73), phonological memory 91 (27), rapid naming 85 (16), and alternate rapid naming 76 (5) (Tr. pp. 144-46; Dist. Exs. 6; 22; Joint Ex. 1B at p. 43). The student's auditory memory skills for words and numbers was reported to be in the average range (Joint Ex. 1B at p. 43). The student was also reported to have an awareness of the phonological sounds accompanying letters both in print and auditorily and she was able to accurately hear and blend words and isolate sounds within words heard (id.). The report also noted that the student was "deficient" in cognitive fluency characterized by an inability to rapidly recall the name of pictured items (id.). The speech-language pathologist reported that this skill was required to "recall letters and their assigned phonological sounds as in the reading process" (id.).

In spring 2008, the district's reading specialist noted that the student had made progress in developing her reading skills and becoming an independent reader (Dist. Exs. 41; 52; see Tr. pp. 449, 452-54, 466-69, 483-84; Dist. Ex. 50).¹⁴ The reading specialist reported that the student had begun to use reading comprehension strategies such as retelling and text-to-self connections (Dist. Ex. 52). She stated that she had personally observed the student reading aloud from guided reading books during small group instruction (Tr. pp. 454-55, 635-36). A comparison of the results of DIBELS WRC assessments conducted during the 2007-08 school year, indicated that in April 2008, the student accurately read 29 words in one minute, up from 10 words per minute in January 2008, and 5 words per minute in October 2007 (Dist. Exs. 29 at p. 4; 52). According to the reading specialist, the results from the DIBELS WRC assessments indicated "significant progress" (Tr. pp. 449, 466-69).

On May 8, 2008, the CSE convened for the student's annual review and to develop her IEP for the 2008-09 school year (Dist. Ex. 1). Attendees included the CSE chairperson, a school psychologist, a special education teacher, the student's first grade regular education teacher, a speech-language pathologist, a reading teacher, the private nanny, the parents, and counsel for both the district and the parents (id. at p. 5). The IEP indicated that the parents declined the participation of an additional parent member at the CSE meeting (id.). The IEP reflected that at the meeting, the CSE discussed the student's progress in writing and math and her weaknesses in the areas of organization, attention and focus, reading fluency, and word problems (id.). The IEP also noted that the student's WIAT-II reading subtest scores were all in the average range, her performance on the DIBELS WRC subtest was average, and her performance on the DRA indicated that her designation as an emergent reader was "in the adequate range" (id.).¹⁵ The IEP also described the student's phonological skills as "good," and her phonological memory skills as average (id.). The district's reading specialist reported that the standardized testing and progress monitoring scores showed that the student's reading skills were progressing (id.). The IEP

¹⁴ In an undated report from the reading specialist, the student's reading skills were measured in four categories (fluency, reading strategies [i.e. decoding], comprehension, and application of reading skills to writing) (Dist. Ex. 50). The reading specialist indicated that during the period between winter 2007-08 and spring 2008, the student progressed in all four categories (id.).

¹⁵ On May 12, 2008, four days after the CSE meeting, a PM Benchmark running record assessment of the student indicated that the student read at "Level 9," guided reading level "F" at the 90th percentile (Dist Exs. 40 at p. 1; 42 at p. 2; 43).

reflected that the speech-language pathologist opined that the student did not require direct speech-language therapy because the student's language skills were in the average to superior range (*id.*). The student's cognitive fluency deficits and its effect on her academic skills prompted the CSE to recommend a change in the student's classification from a student with an other health impairment to a student with a learning disability (Dist. Exs. 1 at p. 5; 5).

For the 2008-09 school year, the May 2008 CSE recommended that the student be placed in a general education second grade class with four 45-minute sessions of resource room per week (two in class and two in a separate location), three 30-minute sessions of 8:1 reading instruction per week, one 30-minute session of 5:1 OT per week to address fine and gross motor skills deficits, and one speech-language therapy consult per month to monitor the student's use of the in-class FM system (Dist. Ex. 1 at pp. 1-2). The CSE also recommended program modifications including cues to stay on task, preferential seating, direction clarification, structured and predictable routines, additional time to complete tasks, and wait time to process directions and instructions (*id.*). The CSE recommended testing accommodations including a special test location, extended time, proctor cuing, and clarification of directions (*id.* at p. 2). Further, the CSE also made assistive technology recommendations including access to an FM system, a slant board, and a seating cushion (*id.*). The CSE also developed annual goals in the areas of study, reading, writing, mathematics, and motor skills (*id.* at pp. 6-8).¹⁶

On May 21, 2008, the private speech-language pathologist conducted a speech-language reevaluation of the student (Joint Ex. 1B at pp. 45-53). She administered the following assessments: the ITPA-3, the Lindamood Auditory Conceptualization Test (LAC), the Test of Language Competence-Expanded Edition (TLC-E), and the CELF-4 Observational Rating Scale (*id.*). The private speech-language pathologist also obtained a completed "school questionnaire" from the student's first grade teacher, reading teacher, occupational therapist, and speech-language pathologist (Dist. Ex. 15; Joint Ex. 1B at p. 46). Results from these assessments indicated to the private speech-language pathologist that the student exhibited mild pragmatic social language challenges, severe auditory processing difficulties in the areas of discrimination and memory, moderate expressive language challenges (including retrieval, formulation, rapid and non-fluent speech challenges), and a severe phonological decoding processing disorder (Joint Ex. 1B at p. 51). The private speech-language pathologist recommended speech-language therapy and suggested that the therapy focus on the student's auditory processing and speech production skills (*id.* at p. 52). The speech-language pathologist also recommended several social language training strategies, several literacy building strategies, and several accommodations to assist the student (*id.* at pp. 52-53).¹⁷

¹⁶ The student's mother testified that participants at the May 2008 CSE meeting "presented their reports" about the student and that she and the nanny participated in discussions about the student's progress (Tr. pp. 3420, 3423-25). At the CSE meeting, the parents did not disagree with the proposed program modifications or testing accommodations (Tr. pp. 3432-35). However, they did disagree with the change in classification (Tr. p. 370).

¹⁷ The hearing record reflects that the district did not receive a copy of the report from the private May 21, 2008 speech-language evaluation until it was received as an attachment to the parents' due process complaint notice (Tr. pp. 3559-60, 3665-66; see Joint Ex. 1B at pp. 45-53).

By letter dated June 2, 2008 to the district's assistant director of special services, the parents rejected the proposed annual goals in the 2008-09 IEP (Joint Ex. 1B at p. 24).¹⁸

In June 2008, the reading specialist reported that the student "grew as a reader," "developed independent reading habits," and was considered to be an "early reader," ending the school year at a DRA independent "Level 12" and an instructional "Level 14" (Tr. pp. 469-71; Dist. Exs. 36; 38 at pp. 22-24; 39 at p. 1). The district's speech-language pathologist's annual report of progress toward IEP annual goals indicated that the student achieved four out of four speech-language goals: focusing on expressing information related to a story/event; following multistep directions presented orally; recalling and comprehending a sequence of events presented orally; and verbally expressing the main idea/supporting details of a reading selection (Tr. pp. 28, 31, 167-68; Dist. Ex. 4).¹⁹

By letter dated July 10, 2008 to the district's superintendent, the parents advised the district that they believed that the proposed May 2008 IEP was not appropriate for the student (Joint Ex. 1B at p. 26). The parents indicated that that the IEP lacked "suitable writing goals, neglect[ed] decoding [and] encoding strategies, overlook[ed] objectives for increasing sight vocabulary, disregard[ed] speech and language objectives, and omit[ed] adequate procedures for measuring goals" (id.). The parents requested that the district provide them with a written response regarding how the current IEP goals "fulfill[ed] the above cited criteria" and indicated that upon receipt of the clarification, they would reconsider the 2008-09 IEP recommendations (id.).

By letter dated July 29, 2008 to the board of education, the parents stated that they had previously rejected the May 2008 IEP goals proposed for their daughter in their two prior letters, but that they would reconsider the district's recommendations following receipt of "appropriately adjusted and individualized IEP goals " (Joint Ex. 1B at p. 28).

A private psychological evaluation of the student was conducted over the course of five days beginning on May 23, 2008 and ending on July 31, 2008 (Joint Ex. 1B at pp. 55-80). Numerous assessments were administered to measure the student's cognitive, academic, language, phonological processing, visual motor, and attention skills (id. at pp. 58-77). Administration of the WIAT-II yielded the following subtest standard scores (percentile): word reading 88 (21), reading comprehension, 85 (16), numerical operations 77 (6), math reasoning 99 (47), spelling 98 (45), and written expression 91 (27) (id. at p. 67).²⁰ The private psychologist reported that the student's "intellectual status" was within the average range, but with significant

¹⁸ The parents requested that the district provide them with a written response as to how the proposed goals were individualized and backed by scientific research, and further requested that the district response include peer reviewed materials (Joint Ex. 1B at p. 24). Upon receipt of such materials, the parents indicated that they would reconsider the May 2008 IEP recommendations (id.).

¹⁹ The student achieved two out of three OT annual goals, and received a designation of "progressing satisfactorily" on the third annual goal (Dist. Ex. 4).

²⁰ The private psychologist testified that the results of her testing were "remarkably consistent" with the results of the district's assessments of the student's academic skills (Tr. pp. 2718-19, 2884).

variability among subtests, consistent with the presence of a learning disability (*id.* at pp. 69, 77). According to the private psychologist, the student's phonological processing and internal phonemic representation of language skills were within the average range and that the student had "benefited from the help she ha[d] received" (*id.* at p. 75). However, the private psychologist also reported that the student exhibited weaknesses in executive functions skills and pragmatic language skills due to weaknesses in language expression (*id.* at pp. 65, 70-71, 74). Measures of the student's ability to rapidly retrieve phonological information from long-term/permanent memory yielded a score at the 27th percentile, indicating that the student was unable to execute a sequence of phonological operations quickly; a skill that the private psychologist described as necessary to decode unfamiliar words (*id.* at pp. 66, 76). The private psychologist reported further that the results of projective testing reflected that the student was emotionally healthy, but that her learning difficulties posed a threat to her self-esteem (*id.* at pp. 76-77). The private psychologist also reported that the student met the "full clinical criteria for learning disability" and that measurements of the student's attention skills supported a working diagnosis of an "Attention-Deficit/Hyperactivity Disorder" (*id.* at pp. 72-73, 77). The private psychologist opined in the evaluation report that the student would be "unable to handle the Second Grade curriculum in a traditional classroom setting" and required an "integrated, specialized educational environment in which to learn," as well as intensive remedial support "in an individual or small-group setting with a learning specialist certified in special education methodology" and a "carefully structured and sequential curriculum to teach basic skills" (*id.* at p. 77).

In September 2008, the student began attending Windward for the 2008-09 school year (Tr. p. 3485).

By due process complaint notice dated September 29, 2008, the parents, through their attorney, requested an impartial hearing (Joint Exs. 1A; 1B). The parents asserted that the district's May 2008 IEP failed to provide the student with a free appropriate public education (FAPE) (Joint Ex. 1B at pp. 2, 12). The parents alleged, among other things, that the district failed to propose IEP goals that addressed the student's individualized needs and were based in "scientific research," the IEP failed to define the method of instruction that would be utilized in the recommended program, and the district had failed to implement the student's FM system in a timely fashion and use the FM system recommended by the private audiologist (*id.* at pp. 2, 6-7, 9, 11, 12). The parents also alleged that the district improperly discontinued the student's direct speech-language services, disregarded the parents' concerns expressed at the CSE meeting, and developed an IEP with an improperly composed CSE team (*id.* at pp. 7-8, 12).²¹ As relief, the parents requested that the district develop an IEP that reflects the student's disabilities, provides a multisensory reading program that is integrated into the student's entire curriculum, and provides speech-language therapy, OT, and PT as needed by the student (*id.* at p. 3). The parents also requested tuition reimbursement for the 2008-09 school year at Windward and reimbursement for costs associated with private evaluations and related services as well as attorneys' fees (*id.* at pp. 3, 12-13).

²¹ The parents did not specify in their due process complaint notice how the CSE was allegedly improperly composed.

By letter dated October 10, 2008, the district's attorney responded to the parents' due process complaint notice denying the allegations raised therein (Joint Ex. 2 at p. 1). Specifically, the district asserted that the IEP developed for the student for the 2008-09 school year was appropriate and was reasonably calculated to provide the student with "meaningful educational progress" in the least restrictive environment (LRE), Windward was neither appropriate nor in the LRE, and equitable considerations did not support the parents' claim for reimbursement (id. at pp. 1-4). The response also stated the evaluations and reports that the CSE relied on in making their recommendations for the 2008-09 school year and the other program options that the CSE had considered (id. at p. 4). The district further contended that the parents were not entitled to compensatory education or services and that the private speech-language and psychological evaluation reports obtained by the parents were not available to the CSE at the May 8, 2008 meeting because the evaluations were conducted subsequent to that meeting (id.).

The impartial hearing began on February 10, 2009 and concluded on May 27, 2009, after seventeen days of testimony resulting in over 4,000 pages of transcript and over 100 pieces of documentary evidence (Tr. pp. 1, 297, 546, 792, 1057, 1323, 1591, 1825, 2161, 2405, 2593, 2995, 3275, 3551, 3782, 3861, 4091; IHO Decision at p. 1). On August 3, 2009, the impartial hearing officer rendered her decision (IHO Decision at p. 1). The impartial hearing officer determined that the district offered largely the same inappropriate program for the 2008-09 school year as it had in prior years, despite the student's lack of progress (id. at pp. 3, 55-58). She also found that the program recommended for the 2008-09 school year lacked special education reading supports and that instead of utilizing the FM system recommended by the private audiologist, the district had substituted an inadequate and inappropriate FM system that did not assist the student (id. at pp. 3, 55). The impartial hearing officer also found that evidence from the private psychologist, the district's reading specialist, the district's first grade teacher, and the test assessments all illustrated that the student was failing to make academic progress at the district school, that the student's reading level was far below where it should have been based upon her intelligence, and that the "gap" between the student and her classroom peers was widening (id. at pp. 3, 55-58). Based on the above, the impartial hearing officer determined that the program recommended for the student in the May 2008 IEP for the 2008-09 school year did not offer the student a FAPE (id. at p. 3).

The impartial hearing officer further found that the program offered by Windward was appropriate because the student demonstrated substantial improvement in reading and in her ability to generalize and utilize her reading skills in "academic and non-academic areas" (IHO Decision at pp. 3, 58). The impartial hearing officer also found that since attending Windward, the student was enthusiastic about school and reading, stopped resorting to avoidance tactics, and was "once again an outgoing girl" (id.). The impartial hearing officer determined that because the student had progressed both academically and socially, and her self-confidence and self-esteem had improved, the parents' placement of the student at Windward did not constitute a violation of LRE considerations (id. at p. 62). Lastly, the impartial hearing officer found that the parents' cooperation with the district in developing an appropriate program warranted a finding that equitable considerations supported the parents' reimbursement claim (id.). The impartial hearing officer ordered reimbursement for all tuition, costs, and expenses paid for by the parents to Windward for the student's 2008-09 school year (id. at p. 3).

The district appeals, and asserts that the impartial hearing officer incorrectly determined that: (1) the district's recommended 2008-09 program in the May 2008 IEP failed to provide special education reading supports; (2) the district's recommended 2008-09 program was the same inappropriate program that had been provided during prior years; (3) the district's FM system was inadequate and inappropriate; and (4) the district's Wilson Foundations program was inappropriate. The district asserts that the impartial hearing officer erred in relying upon the information and opinions provided in the report and testimony from the private psychologist and in the report from the private speech-language pathologist because this information was not available to the CSE at the time of the May 2008 CSE meeting. The district also asserts that the impartial hearing officer ignored the district's evidence regarding the student's progress, relied upon statistically unreliable grade level equivalents in evaluating the student's standardized test results, and was too focused on determining whether the student was "closing the gap" between the student's reading level and the reading levels of her non-disabled peers. Moreover, the district asserts that the impartial hearing officer incorrectly interpreted testimony from the district's reading specialist and first grade teacher, incorrectly stated the CSE's rationale for the student's classification change, incorrectly stated that the private psychologist had diagnosed the student with "double deficit" dyslexia, and had erred in allowing the self-serving and unsubstantiated testimony of the parents' experience with the district regarding the student's siblings. The district asserts further that the impartial hearing officer erred in finding that Windward was appropriate because the parents failed to provide sufficient evidence to establish that Windward provided a program that addressed the student's needs as no one from Windward testified at the impartial hearing and the student was not receiving OT or using an FM system at Windward. Regarding equitable considerations, the district asserts that the parents failed to provide the legally required written notice to the district that they were rejecting the May 2008 IEP and were placing the student at Windward at public expense, and further, failed to send the reports of the private psychologist and private speech-language pathologist to the district.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE. The parents assert that the district's May 2008 IEP for the 2008-09 school year failed to provide any special education reading supports and was largely the same inappropriate program that was provided in prior years. The parents also assert that the district's claim that progress was reflected in the student's report cards, teacher progress reports, and DIBELS and DRA assessments, was rebutted by the private psychologist, the private speech-language pathologist, and also by the results of the student's standardized test results. The parents also assert that the district's use of Wilson Foundations was inappropriate for the student and further that the district substituted an inadequate and inappropriate FM system that did not assist the student. According to the parents, Windward was appropriate to meet the student's attention and reading needs because Windward provided small class settings and a specialized language intensive curriculum and methodology that are embedded in every topic area. Regarding equitable considerations, the parents assert that the district has refused to acknowledge that the student did not progress in the district's programs and further assert that the parents have cooperated with the district.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. 2009]; R.R. v. Scarsdale Union Free Sch. Dist., 2009 WL 1360980, at *9 [S.D.N.Y. May 15, 2009]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; see also 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007];

Walczak, 142 F.3d at 132; *E.G. v. City Sch. Dist. of New Rochelle*, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; *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]; *Tarlowe v. Dep't of Educ.*, 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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]; *T.Y. v. New York City Dep't of Educ.*, 2009 WL 3233811, at *3 [2d Cir. Oct. 9, 2009]). 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 law 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).

I now turn to an analysis of the appropriateness of the district's proposed 2008-09 program as recommended in the May 2008 IEP.

The hearing record reveals that the formulation of the May 2008 IEP occurred in a manner that adequately complied with procedural requirements. The CSE identified that the student had been offered a diagnosis of an auditory processing disorder and exhibited cognitive fluency weaknesses, difficulties with organization, and gross and fine motor skills weaknesses

(Dist. Exs. 1 at pp. 2-4; 23; Joint Ex. 1B at p. 30).²² Moreover, the May 2008 CSE also identified that the student presented with average cognitive, language and written expression skills, but was deficient in reading comprehension, numerical operations, processing speed, rapid recall of information, and working memory skills (Tr. pp. 2238-39; Dist. Exs. 1 at pp. 3-5; 7; 22; 27 at p. 1; Joint Ex. 1B at pp. 59, 69). The hearing record also reflects that the district repeatedly assessed during the 2006-07 and 2007-08 school years how the student's disabilities affected upon her academic achievement (Dist. Exs. 4; 6; 7; 8; 10; 15; 22; 24; 25; 26; 27; 30; 35; 36; 39; 41; 45; 48; 52; 53; 55; 78; 84; 85; 92; 93). The May 2008 IEP reflected that the CSE considered these assessments along with numerous other reports at the May 2008 CSE meeting (Dist. Ex. 1 at pp. 2-6).²³ The May 2008 IEP also revealed that the CSE considered the possibility of a general education setting for the student without any support services, but rejected this option because the CSE determined that the student's needs required more intensive support (*id.* at p. 6). The hearing record also reveals that the May 2008 CSE meeting occurred with significant participation from the district's employees, from the student's mother, and from the student's nanny and that the parents' counsel attended the meeting (Tr. pp. 370-71, 3072, 3423-29, 3435-36, 3439; Dist. Ex. 1 at pp. 5, 6).²⁴

The parents alleged in their due process complaint notice that the annual goals in the May 2008 IEP were not individualized for the student and did not address all of her areas of need (Joint Ex. 1B at pp. 24, 26, 28). The hearing record does not support the parents' contention; moreover, the issue has not been properly raised on appeal. Although the impartial hearing officer did not address this allegation in her decision; I have given the issue consideration. The May 2008 IEP contained three annual goals addressing the student's reading expression/fluency skills and reading comprehension skills; abilities identified by the district as areas of relative weakness compared to the student's average decoding abilities (Tr. pp. 497-98, 756-57, 1356-57, 2438; Dist. Exs. 22; 27 at p. 1; Joint Ex. 1B at p. 21). Although the parents' private psychologist opined that the student's reading goals were inappropriate because they were written for a second grader and the student was still at a first grade reading level (Tr. pp. 2670-76), the hearing record reveals that by May 2008, the student's WIAT-II reading subtest scores were in the average to low average range, and her functional classroom reading skills were at a mid to end of first grade level; therefore, the May 2008 IEP annual goals based upon second grade reading materials were appropriate (Tr. pp. 632-35, 1383-84; Dist. Ex. 37A). Further, the results from the student's first grade DRA reading assessments and testimony from the district's reading specialist all support

²² The hearing record also reveals that the CSE was aware that the student engaged in sensory seeking behaviors such as rocking and shifting in her seat (Dist. Ex. 1 at p. 5). The CSE also considered the student's social development and noted in the May 2008 IEP that the student was developing conflict resolution skills and that her class participation was appropriate (*id.*).

²³ The district was unable to incorporate the information contained in the evaluation reports from the student's private psychologist (dated July 30, 2008) and the student's private speech-language pathologist (dated May 21, 2008) because these reports were not available to the district until after the May 8, 2008 CSE meeting.

²⁴ Although the May 2008 CSE modified the student's speech-language services, I note that the hearing record reflects that the student's performance during the district's March 2008 speech-language assessment indicated scores in the average to superior range and that the district's speech-language pathologist testified that the student did not demonstrate "any need on any standardized assessment" (Tr. p. 155; Joint Ex. 1B at p. 40).

the appropriateness of the annual reading goals contained in the May 2008 IEP (Tr. pp. 495, 632-35, 734-35, 1164-83, 1197-98, 1383-84; Dist. Exs. 1 at pp. 3, 4, 5; 24; 28; 29, 37A; 38).

In order to address the student's weakness in organizational skills, the May 2008 CSE developed two annual goals to ensure that the student would select appropriate materials for classroom activities and participate in clean-up after activities had concluded (Dist. Ex. 1 at p. 6). To address weaknesses in writing, the district developed annual goals for the student to improve capitalization and punctuation skills (*id.* at p. 7). To address weaknesses in the student's math skills, the CSE developed annual goals to address subtraction skills and word problem skills (*id.* at pp. 7-8). To address weaknesses in fine motor and balance skills, the CSE developed five annual goals (*id.* at p. 8). The hearing record indicates that the annual goals contained in the May 2008 IEP addressed the student's areas of need and were measurable.

Turning next to the recommended general education class, the district's second grade teacher who would have taught the student during the 2008-09 school year testified that her general education class consisted of eighteen students, two of whom had IEPs (Tr. p. 1848). She further testified that the class curriculum met New York State standards (Tr. p. 1897).²⁵ She testified that every morning, the class had approximately 30 minutes of reading instruction. (Tr. p. 1697). The teacher testified that Wilson Foundations was utilized to work with spelling, handwriting, phonics, and strategies to address reading fluency (Tr. pp. 1694, 1702-04, 1734-36). The class also had a 30-minute writing instruction period that occurred every morning (Tr. p. 1697). The teacher testified that both the reading and writing instruction incorporated small group instruction (Tr. pp.1694-96). The hearing record reflects that the teacher provided one hour of math instruction daily (Tr. pp. 1696-98, 1753). The students had one 45-minute session of either social studies or science (Tr. pp. 1696-98). The teacher testified that small group instruction was also utilized during the social studies or science instruction, and reading was often a component (Tr. p. 1696). The teacher testified further that she utilized a three-part framework during her instruction where she first connected the students to something that was previously learned, then she instructed and practiced a new concept with the students, and lastly she allowed the students to try the new concept by themselves (Tr. pp. 1731-32).

The second grade teacher also testified that she coordinated with the reading specialist to determine when to schedule the students' reading sessions and also to discuss progress (Tr. p. 1854). Every week she had a 40-minute meeting with the resource room teacher to discuss the students who had IEPs (Tr. pp. 1864-65). The teacher testified that curriculum, implementation strategies, student work, and assessment results were discussed at those meetings (*id.*). The second grade teacher also provided several examples of strategies that she might have employed in her classroom to meet the goals contained in the student's May 2008 IEP (Tr. p. 1953). For the student's math goal involving subtraction, the teacher indicated that she would have used significant repetition and practice, pneumonic devices, and graph paper (Tr. pp. 1954-56). For

²⁵ Additionally, the teacher testified that the district was utilizing the services of an organization called "Litlife," which helped the district to develop a more individualized or differentiated instruction for its students while simultaneously complying with New York State guidelines (Tr. 1896-1900). The second grade teacher described Litlife's methodology as "Balanced Literacy" whereby reading, writing, spelling, handwriting, and literacy are taught in an individualized manner by taking assessment information from the students and using that information to differentiate instruction for each student (Tr. pp. 1949-50).

the student's study skills goals on the May 2008 IEP, she testified that she would have utilized reminders and organizing materials (Tr. p. 1959). For the student's writing goals, the teacher discussed the use of checklists to help remind the student about capitalization and punctuation (Tr. p. 1960).

The district contends that the impartial hearing officer improperly concluded that the district offered essentially the same inappropriate program for the 2008-09 school year as it had done in prior school years and in which the student had not progressed (IHO Decision at pp. 3, 55). A thorough and careful review of the documentary and testimonial evidence in this case reveals that the student made meaningful progress in reading during kindergarten and first grade in light of her disability, and that the program recommendations for the 2008-09 school year were reflected changes in the student's program that were reasonably calculated to enable the student to receive educational benefits in the LRE (see Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30-*32 [N.D.N.Y. Sept. 29, 2009]).

A review of the hearing record reveals that the district's recommended program in the May 2008 IEP differed from the programs proposed by the district in the student's prior IEPs for the 2006-07 and 2007-08 school years that are contained in the hearing record (compare Dist. Ex. 1, with Dist. Ex. 2, and Dist. Ex. 3). Notably, the May 2008 IEP reflected a change in the student's classification from a student with an other health impairment to a student with a learning disability (compare Dist. Ex. 1, with Dist. Ex. 2; see Dist. Ex. 5 at p. 2).²⁶ The May 2008 IEP also added resource room support to address the student's study skills, writing skills, and math skills (Tr. p. 490; Dist. Ex. 1 at pp. 1, 6-8). Furthermore, the May 2008 IEP added three 30-minute sessions of 8:1 reading instruction to be provided by one of two district reading specialists (Tr. pp. 494-95; Dist. Ex. 1 at p. 1). Additionally, the May 2008 IEP provided for additional program modifications including additional time to complete tasks and wait time to process directions/instructions, and testing accommodations including proctor cueing, direction clarification, special location, and extended time that were not included in the student's prior IEPs (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 2 at pp. 1-2, and Dist. Ex. 3 at pp. 1-2).²⁷ The May 2008 IEP also modified the CSE's recommendation of direct speech-language therapy and instead provided for a 30-minute speech-language consult one time per month (Dist. Ex. 1 at p. 1). The May 2008 CSE also developed new annual goals for the student in study (organizational) skills, reading, writing, mathematics, and motor skills (Dist. Ex. 1 at pp. 6-8). Based on the above, I disagree with the impartial hearing officer and find that the recommended program in the May 2008 IEP was not the same program that was recommended in prior school years.

Moreover, even if the hearing record revealed that the program recommended for the 2008-09 school year in the May 2008 IEP was largely the same as during the student's prior school year IEPs, a review of the hearing record reflects that the student made adequate progress

²⁶ The hearing record reveals that the May 2008 CSE changed the student's classification because the student demonstrated weaknesses in cognitive fluency, math, and reading decoding (Tr. pp. 2222-26, 2429; Dist. Ex. 5).

²⁷ The school psychologist testified that the program modifications and testing accommodations included in the May 2008 IEP were designed to address the student's weaknesses in cognitive fluency skills (Tr. pp. 2328-30).

during the prior school years and that the program recommended for the 2008-09 school year in the May 2008 IEP was appropriate to meet the student's needs in the LRE.

The hearing record reflects that the parents had concerns regarding the student's articulation skills, memory skills and interest in alphabet activities prior to her entry into the district's kindergarten program (Tr. pp. 2481-90). According to an October 2006 kindergarten screening, the student identified 17 out of 26 upper-case and 16 out of 26 lower-case letters, and recognized 1 sight word and 2 letter sounds (Tr. pp. 420, 423-25; Dist. Exs. 43; 47 at p. 2). Based on the student's performance on the screening, the district's reading specialist subsequently provided three 20-minute, small group, building-level reading intervention sessions per week to the student, which continued for the remainder of the school year (Tr. pp. 420-21, 425-26). The reading specialist testified that she has a Masters degree in elementary education and a "dual doctorate in psychology and reading," with approximately ten years of experience as a reading teacher and four years of experience as a first and second grade teacher (Tr. pp. 406-09, 411). She is certified in New York State in elementary education and reading (Tr. p. 411). The reading specialist testified that she had completed the training in Wilson Foundations and the DIBELS provided by the district (Tr. pp. 411-12, 579-80). She also completed a year long "comprehensive certification process" in the use of Orton-Gillingham techniques, described in the hearing record as phonics-based approaches using multisensory methods and providing a systematic, sequential approach to learning how to read (Tr. pp. 412-13, 416-17). The reading specialist testified that her sessions with the student during kindergarten focused on building her phonemic awareness skills using Wilson Foundations (Tr. p. 425). The reading specialist testified further that Wilson Foundations has a lot of similarities and is under the big "umbrella" of Orton-Gillingham methods, also offering a "systematic approach" using multisensory techniques, some of which are used during Orton-Gillingham instruction (Tr. pp. 416-19). The hearing record describes Wilson Foundations as "a systematic phonetic approach to teaching beginning reading skills," using researched and validated multisensory methods (Tr. p. 413). Examples of multisensory techniques included using magnet letter tiles to form letters, "skywriting," tapping out the sounds of phonemes and words, writing in a tray of sand or shaving cream, using gel boards and whiteboards, and singing (Tr. pp. 413-15).

The reading specialist testified that by the end of the 2006-07 school year, the student had exhibited "terrific progress," in that she identified all upper and lower-case letters and recognized all letter sounds, "which is what we expect for kindergarten" (Tr. p. 430; Dist. Ex. 47 at p. 2). Additionally, the student recognized 16 sight words (Dist. Ex. 47 at p. 2). DRA results indicated that in May 2007, the student's independent reading was at a "Level 1," her instructional reading was at a "Level 2," and she was considered to be an "emergent" reader (Tr. p. 443; Dist. Ex. 39). The reading specialist described the DRA as a "scientifically researched fluency, comprehension and accuracy" assessment tool used by classroom teachers to monitor student progress (Tr. pp. 445-46). She testified that teachers use the DRA to make notations about students' accuracy, common error patterns in their reading and how they retell a story, and to assess how students view themselves as readers (Tr. p. 446).

In October and November of the student's first grade school year (2007-08), the reading specialist assessed the student using the PM Benchmark system, described in the hearing record as a "research-based, running-records system to assess a child's fluency, accuracy and

comprehension," similar to the DRA; and with the DIBELS, described as a "one-minute, timed, oral reading assessment of a student" that monitors progress in reading accuracy, fluency, and comprehension (Tr. pp. 450, 581, 829-30). During the October 2007 administration of the DIBELS, the student achieved five WRC and according to November 2007 PM Benchmark results, read at a "Level 5," guided reading level "D" (Tr. pp. 478-79; Dist. Ex. 43).²⁸

According to testimony, the student's first grade teacher had approximately 21 years of experience teaching first grade in the district, with additional years of experience teaching kindergarten and second grade (Tr. pp. 1007-09). She has a Masters degree in early childhood education and is permanently certified in New York State as a regular education teacher for grades K-6 (Tr. p. 1331). The first grade teacher testified that she was trained in administering the DRA and had been administering it for approximately ten years to all of her students (Tr. pp. 1201-02). Results of the student's DRA conducted in October 2007, indicated that the student's independent reading level was a "2," her instructional reading level was a "3," and she was considered an "emergent" reader (Tr. p. 1136; Dist. Ex. 38 at pp. 1-8).

At the beginning of the 2007-08 school year due to concerns about the student's dictation and phonemic awareness skills, the district provided the student with four 30-minute sessions per week of building-level reading intervention services provided by the reading specialist (Tr. pp. 434-43; Dist. Ex. 30). The reading specialist provided the student's building-level reading services in a separate location in a group with three other students; primarily using Wilson Foundations "with a comprehension piece" (Tr. pp. 441-42). She testified that during first grade, the student's phonics (word) work had a "sequential, systematic approach" using multisensory techniques (Tr. p. 443). In addition to the phonics work, the reading specialist addressed reading comprehension needs using guided reading level trade books with the students and specific comprehension strategies from the "Strategies that Work" text (Tr. pp. 443-45). The reading specialist testified that reading comprehension instruction focused on answering the five "wh" questions and learning to identify the main idea of the story (Tr. p. 444).

In addition to the reading services provided by the reading specialist, the hearing record reflects that the first grade teacher provided the student with daily reading instruction using the "Houghton Mifflin" program, described as a "research-based, structured reading program;" incorporating the "phonics of word work," and having the "scope and sequence of teaching the letters and letter sounds" (Tr. pp. 496, 1025-26, 1110-21). The student's daily "language arts block" consisted of a shared reading time, consisting of the teacher reading aloud from a book while the students followed along in their own books; writing activities in response to the shared reading; phonics, spelling, and handwriting lessons; independent reading time; and guided reading group instruction (Tr. pp. 1112-17). The first grade teacher described guided reading groups as small groups of students who received direct instruction to address specific, shared reading difficulties (Tr. pp. 1481-82, 1484). The first grade teacher testified that after lunch, she conducted a "read-aloud," in which she read books to the students and they discussed facets of the books including the styles of the authors and illustrators, and the students read chorally (Tr.

²⁸ The hearing record reflects that results of the student's November 2007 PM Benchmark assessment were recorded as both guided reading level "B" and "D" (Tr. pp. 450, 478-79; Dist. Exs. 36; 40 at p. 3; 42 at p. 1; 43). As documented on the actual PM Benchmark recording form contained in the hearing record, in November 2007, the student had achieved a guided reading level "D" (Tr. pp. 478-79; Dist. Exs. 40 at p. 3; 42 at p. 1).

pp. 1117-19). The hearing record also reflects that the first grade teacher integrated multisensory methods into the classroom reading program (Tr. pp. 496, 1476-78, 1668-69).

The district's speech-language pathologist and reading specialist provided documentary and testimonial evidence of the progress the student made throughout the 2007-08 school year in reading skills (Tr. pp. 264-65, 446-49, 452, 454-55, 466-69, 482-84; Dist. Exs. 29; 36; 37A; 38; 40; 41; 43; 44; 48 at pp. 5-6; 50; 52). Specifically, the reading specialist testified that in January 2008, the student's DIBELS WRC count was up from five in October 2007 to ten; and in April 2008 the student's DIBELS WRC count was up to twenty-nine, which she described as "beautiful progress" (Tr. p. 447; Dist. Ex. 52). She further commented that for the student's DIBELS WRC count to improve from five to twenty-nine in one school year showed that according to the results of that assessment, the student "really grew in her words read correctly," and "her fluency rate was improving throughout the first-grade year" (Tr. pp. 449, 466-69; Dist. Ex. 29). February 2008 PM Benchmark results indicated that the student had progressed from November 2007 results ("Level 5," guided reading "Level D"), to a "Level 6," guided reading "Level D;" and in May 2008, to a "Level 9," guided reading "Level F," which according to the reading specialist "showed growth" (Tr. pp. 478-79; Dist. Exs. 40 at p. 3; 42 at p. 1). The reading specialist stated that the student's instructional reading level would have been a "G" or "H" at that time; consistent with the first grade teacher's findings based on her assessment of the student's performance (Tr. p. 451; Dist. Ex. 37A; see Tr. pp. 469-71; Dist. Ex. 36). According to the reading specialist's testimony, the student's performance on Wilson Foundations unit tests indicated that she was "internalizing the strategies and using them, and she knew how to answer the questions on the quizzes," and the reading specialist was "very pleased with [the student's] progress using the Foundations program in first grade and [the student's] growth" (Tr. pp. 452-54, 483-84; Dist. Exs. 43; 44). April 2008 comments from the reading specialist's progress note indicated that the student "appear[ed] happy" in the small reading group, she "always" participated, added "wonderful connections" to what the group discussed and although she exhibited off-task behaviors, made "fabulous progress" in reading during first grade (Dist. Ex. 41). In spring 2008, the reading specialist described the student as an "independent reader" whose reading strategy and comprehension skills progressed from a "beginning" designation to a "developing" designation; meaning that the "skill or behavior [is] applied with some independence" (Dist. Ex. 50). She further stated that she observed the student reading aloud from guided reading books during small group instruction and that she was "very pleased" with the student's reading progress during first grade as reflected on her report card (Tr. pp. 454-55, 635-36).

The hearing record reflects that the first grade teacher administered the DRA to the student in October 2007, and April, May, and June 2008 (Dist. Ex. 38).²⁹ According to the testimony of the first grade teacher, by April 2008 the student had progressed from an independent reading "Level 2" to a "Level 6" (Tr. pp. 1164-74; Dist. Ex. 38 at pp. 9-11). Because of the student's April 2008 97 percent accuracy rate, the first grade teacher continued the student's DRA assessment in May 2008 (Tr. p. 1174). In May 2008, the student's performance at an independent "Level 8" indicated to the first grade teacher that during the

²⁹ The first grade teacher explained that the DRA was not usually administered until May; however, she administered it in April 2008 in anticipation of the student's annual review meeting (Tr. pp. 1164-65).

student's next assessment, a "Level 10," should be attempted (Tr. pp. 1174-75, 1182-83; Dist. Ex. 38 at pp. 16-18).³⁰ On June 3, 2008, the student's performance at an independent "Level 10" indicated to the first grade teacher that a "Level 12" could be tried (Tr. pp. 1183, 1192; Dist. Ex. 38 at pp. 19-21). On June 10, 2008, the student achieved 97 percent accuracy at a "Level 12" (Tr. pp. 1197-98; Dist. Exs. 38 at pp. 22-24; 39).

The student's June 2008 fluency score of "2" was described as reading "word by word, with some short phrases" (Tr. p. 1195; Dist. Ex. 38 at p. 22). The first grade teacher also commented that the student read "slowly" (Dist. Ex. 38 at p. 22). With the exception of reading fluency, the first grade teacher testified that the student demonstrated one year's worth of progress in reading during first grade, and that her cognitive fluency deficits affected her reading fluency skills (Tr. pp. 1354-57, 1373, 1380). The first grade teacher testified about the student's reading progress according to DRA results, indicating that the student "had made progress from an emergent reader to an early reader. It showed that she went from a Level 2, independent reading up to a Level 12. It showed that she had weaknesses in the area of applying skills independently and of fluency. It showed that her comprehension was very good" (Tr. pp. 1202-03). According to the first grade teacher, the results of her reading assessments of the student correlated with those of the reading specialist (Tr. pp. 1500-01, 1503).

Aside from the DRA, the first grade teacher testified that she measured the student's progress by looking at her 2007-08 IEP and classroom goals (Tr. pp. 1389-91, 1395-1401). She further testified that in her experience, the student was "reading and making progress" (Tr. p. 1345). Additionally, the first grade teacher provided extensive testimony about the student's reading progress as reflected on her report card (Tr. pp. 1013, 1019-29, 1058-63; see Dist. Ex. 48 at pp. 5-6).

Although the parents argue that the student did not demonstrate progress in fluency skills and that her rate of progress was not sufficient to keep up with her peers or "close the gap," I find that the hearing record supports the district's assertion that from the beginning to the end of the 2007-08 school year, the student exhibited meaningful progress in many areas of reading skills (see Tr. pp. 1379-80, 1385, 1388-89, 2342-46) and that comparing her rate of progress to that of general education peers is not dispositive of whether she was offered a FAPE (Application of the Bd. of Educ., Appeal No. 05-094), or whether she previously demonstrated adequate progress (see W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 145 [S.D.N.Y. 2006]; Viola v. Arlington Sch. Dist., 414 F. Supp. 2d 366, 383-84 [S.D.N.Y. 2006]).³¹

³⁰ The first grade teacher explained that different levels of the DRA are usually not administered to students on the same day and that after she completed the rest of her class, she continued to assess the student using higher DRA levels (Tr. pp. 1174-75).

³¹ I note that although the focus of the impartial hearing was on the student's reading skills and instruction, the hearing record reflects that the student exhibited progress in other academic and developmental areas during the 2007-08 school year (Tr. pp. 1064-1104, 1130-34, 1245-56; Dist. Exs. 30 at pp. 7-8; 48 at pp. 2-4, 7-13; 46). I further note that the first grade teacher testified that during the 2007-08 school year, the student "kept up" with a small group of other students described at the beginning of the year as "emergent readers" who also by the end of the school year achieved a DRA "Level 12" (Tr. pp. 1655-56; Dist. Ex. 37A).

I now turn to the district's contention that the impartial hearing officer incorrectly determined that the program recommended in the May 2008 IEP did not provide special education reading supports (IHO Decision at p. 3).

State regulations define "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs...in the area of reading" that are provided to a student with a disability who has "significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]; see Educ. Law §4401[2]). State regulations also provide that when specially designed reading instruction is included in the individualized education program, such instruction may be provided by a certified reading teacher (8 NYCRR 200.6[b][6]; see 8 NYCRR 80-2.7).

The hearing record reveals that the student's May 2008 IEP recommended that the student receive 30 minutes of 8:1 reading instruction three times per week to be provided by one of two district reading specialists (Tr. pp. 494-95; Dist. Ex. 1 at p. 1). The district's reading specialist testified that she was New York State certified in elementary education and reading (Tr. p. 411). The hearing record further reveals that the recommended reading instruction would have consisted of Wilson Foundations provided by the reading specialist (Tr. pp. 574, 649). This reading instruction was to be provided in addition to the Wilson Foundations reading instruction provided by the student's classroom teacher (Tr. pp. 497, 1694, 1702-04, 1734-36). The reading specialist who worked with the student in kindergarten and first grade opined that three sessions per week of a pull-out reading program to address a "weakness" was, in her opinion, "exceptional for second grade," and testified regarding how the student's annual reading goals contained in her May 2008 IEP would have been implemented (Tr. pp. 495, 734-35). According to the reading specialist, the entire second grade at the district used Wilson Foundations daily in the classroom, in addition to the student's additional reading instruction services recommended in the May 2008 IEP (Tr. pp. 496-97, 1862-63).³²

Additionally, I note that the regular education second grade teacher of the proposed class testified that she has Masters' degrees in special education and reading, is certified in New York State in elementary education, reading, and special education, and has been an elementary classroom teacher for approximately 11 years (Tr. pp. 1674-76, 1690). She testified at length regarding how she provides students with instruction and assessment in reading, multisensory techniques used in the classroom, and her experience with Wilson Foundations (Tr. pp. 1692-95, 1702-41). After reviewing the student's May 2008 IEP, the second grade teacher opined that she "had a lot of experience with children who fit the description that I've read for [the student]. I have a background in special education. I have a background in reading." (Tr. p. 1176). The

³² The parents allege that providing the student with reading instruction using Wilson Foundations is inappropriate because, according to the nanny, that program "is a general education program . . . "specifically designed for a general education setting" and not designed for students with reading disabilities (Tr. pp. 4054-55). Literature contained in the hearing record indicates Wilson Foundations, in "addition to whole class instruction," can be used with "students who are in the lowest 30th percentile, those with specific areas of weakness or a diagnosed language disability;" recommending that those students "should work in small groups or 1:1 settings up to 30 additional minutes 3-5 times per week" (Parent Ex. K at p. 5). I further note that the hearing record indicates that the student exhibited success using Wilson Foundations during first grade (Tr. pp. 452-54, 483-84; Dist. Exs. 43; 44).

second grade teacher also gave extensive testimony regarding how she would have collaborated with the special education teacher who would have provided resource room services, the reading specialist and the speech-language pathologist; and how the student's IEP goals, program modifications and assistive technology services would have been implemented (Tr. pp. 1777-79, 1783-93, 1793-96, 1828-34, 1840-42, 1847-48, 1850, 1859-60, 1863-66, 1868-75, 1878). As such, I find that the district's recommended multisensory special education reading program contained in the May 2008 IEP was appropriate to address the student's reading needs.

I now turn to the district's assertion that the impartial hearing officer erred in determining that the FM system provided by the district was inadequate and inappropriate for the student (IHO Decision at p. 3).

The hearing record reflects that in November 2007, the district attempted to implement a personal, wearable FM system that had been recommended by the student's private audiologist (Tr. pp. 124-25; Dist. Ex. 13 at p. 2). According to the district's speech-language pathologist and first grade teacher, the district tried the personal, wearable FM system with the student but it "bothered" her, she played with the earbuds, the earbuds fell out, and "they didn't work" properly (Tr. pp. 124-25, 193-94, 1363-65). After these difficulties, the district decided to implement a classroom-wide FM system (Tr. pp. 197-99). Under the circumstances of this case, where attempts to utilize the personal earbud FM system recommended by the student's private audiologist proved to be problematic for the student, I find that the district's decision to switch to a different type of FM system was appropriate and there is nothing in the hearing record indicating that doing so deprived the student of a FAPE for the 2008-09 school year.

In conclusion, based upon the evidence in the hearing record, I find that the district's proposed regular education second grade class program and special education supports provided in the May 8, 2008 IEP would have met the student's needs at the time of the CSE's recommendation, and were reasonably calculated to confer educational benefits to the student in the LRE (Tr. pp. 2449-50, 2464-65; Dist. Ex. 1 at p. 6; Viola, 414 F. Supp. 2d at 382 citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). I therefore find that the district offered the student a FAPE for the 2008-09 school year.

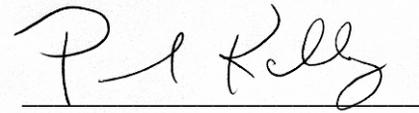
Having determined that the challenged IEP and program offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parents have established that the educational program at Windward was appropriate, and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have examined the parties' remaining contentions and find that they are either without merit, or that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled.

Dated: **Albany, New York**
 October 26, 2009

A handwritten signature in black ink, appearing to read "Paul Kelly", written over a horizontal line.

PAUL F. KELLY
STATE REVIEW OFFICER