



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-020

**Application of the BOARD OF EDUCATION 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:

Shaw, Perelson, May & Lambert. LLP, attorneys for petitioner, Michael K. Lambert, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Gow School (Gow) for the 2008-09 school year. The parent cross-appeals from the impartial hearing officer's determination which reduced her award of tuition reimbursement by 80 percent. The appeal must be sustained. The cross-appeal must be dismissed.

At the start of the impartial hearing, the student had completed ninth grade at Gow, a school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Gow is described as an all boys boarding school for students with language based learning disabilities (Tr. p. 476). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this proceeding (Dist. Ex. 7 at p. 1; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The student's educational history, as reported by the parent,¹ reflects that the student attended kindergarten and first grade in the district (Tr. p. 1701; Dist Ex. 14 at p. 1). The student reportedly exhibited "acting out" behavior, did not learn to read, and exhibited a "borderline attention deficit disorder" (Parent Ex. B at p. 2). The family then moved to another school

¹ In this decision, the term "parent" refers to the student's mother.

district where the student attended a district school for second grade (2001-02) and received services pursuant to an individualized education program (IEP) to address reading difficulties (Tr. p. 1701; Dist. Exs. 14 at p. 1; 42; Parent Ex. B at p. 2). The student attended a private special education school during third (2002-03), fourth (2003-04), and part of fifth (2004-05) grade (Tr. p. 1702; Dist. Ex. 14 at p. 1). The parent reported that the student did well in third grade; however, he regressed academically in fourth and fifth grade (Parent Ex. B at p. 2). In January 2005, the parent removed the student from the private special education school and enrolled him in an "intensive," 12-week program at Lindamood-Bell (Tr. p. 1704). The student completed the program in May 2005 and received tutoring from the private special education school for the duration of that school year (Tr. p. 1705). The family then moved back to the district, and at the start of the student's sixth grade year (2005-06), the parent enrolled the student in the district's middle school and referred the student to the Committee on Special Education (CSE) (Tr. pp. 1705-06; Dist. Ex. 42).

The CSE met on October 11, 2005 and determined the student was eligible for special education programs and services as a student with a learning disability (Dist. Ex. 3 at p. 1). The resultant IEP recommended inclusion science and social studies classes, a nonintegrated reading skills class, nonintegrated special classes for English and math, and a "skills" class (*id.*). The October 2005 IEP contained program modifications including the provision of class notes, modified assignments, and refocusing and redirection, as well as testing accommodations including extended time (1.5), alternative forms of recording, and tests read (except reading comprehension tests) (*id.* at pp. 1-2). The October 2005 IEP included annual goals and short-term objectives in the areas of reading, writing, mathematics, and social/emotional/behavioral skills (*id.* at pp. 4-5). The hearing record reflects that during the 2005-06 school year, the student generally made progress and received passing grades; however, he was challenged by encoding, performed better verbally than in writing, required frequent prompting to remain on task, and was inconsistent with class and homework completion (Dist. Exs. 24 at p. 2; 25-29; 30 at pp. 2-3; 52).

On June 2, 2006, the CSE met for the student's annual review and to develop an IEP for the student's seventh grade (2006-07) school year (Dist. Ex. 4 at p. 1). In addition to continuing its recommendations for special education programs from the previous IEP, the June 2006 CSE recommended counseling services of one 30-minute group (of 5) session every two weeks (*id.*). The June 2006 IEP included goals in the areas of study skills, reading, mathematics, and social/emotional/behavioral skills (*id.* at pp. 5-7). The hearing record reflects that the student attended the district's school for the 2006-07 school year, and that the parent reported that it was "the best year he had" (Tr. p. 1707).

The hearing record reflects that the CSE met on June 7, 2007 to develop an IEP for the student's eighth grade (2007-08) school year (Dist. Ex. 5 at p. 1).² The resultant IEP continued the special education programs from the preceding school year and changed the student's counseling services from one group session to one individual session every two weeks (*id.*). Annual goals in the areas of study skills, reading, writing, mathematics, and

² The June 2007 IEP reflected that the CSE had met previously on May 24, 2007, and because the meeting had gone on for a long period of time, the CSE agreed to "table" the meeting and reconvene to discuss options for services (Tr. p. 1585; Dist. Ex. 5 at p. 5).

social/emotional/behavioral skills were included in the June 2007 IEP, and the provision of a multiplication table was added to the student's existing accommodations (*id.* at pp. 2, 6-8). The June 2007 IEP reflected that the parent and teachers reported that during seventh grade (2006-07), the student had "shown tremendous growth in reading and [was] showing interest in other types of reading" (*id.* at p. 4).

The student began seeing a private licensed clinical social worker in June 2007, as a result of a referral by the district's school psychologist (Tr. pp. 220, 1587; Dist. Ex. 53 at pp. 58-61). The school psychologist referred the student for private therapy in order to address non-school related concerns that the student was bringing up during his school-based counseling (Tr. p. 1593). The licensed clinical social worker administered a battery of tests that ultimately resulted in the diagnoses of an attention deficit hyperactivity disorder (ADHD)-combined (inattentive and hyperactive), a generalized anxiety disorder, and an adjustment disorder with "some" anxiety (Tr. pp. 223-24). During the course of therapy, the social worker noted that the student had difficulty reading and writing (Tr. pp. 227, 232), was highly disorganized (Tr. p. 231), and was reluctant to go to school due to his feelings of inadequacy relating to school (Tr. p. 229). The social worker subsequently referred the parent to the New York University Child Study Center (NYU) for further testing (Tr. p. 233).

The hearing record reflects that the parent contacted NYU for the student's initial intake on October 30, 2007 (Tr. p. 846; Dist. Ex. 55 at p. 6). In November 2007, the parent and the student's reading skills class teacher completed behavioral checklists and rating scales as part of the student's evaluation (Parent Ex. II at pp. 18-25, 26-30, 31-37, 38-42, 43-50). The parent also provided information in a "Life History Questionnaire" and in the completion of an "Intake Interview Form" (Dist. Ex. 55 at pp. 27-49; Parent Ex. II at pp. 6-13). The student also completed behavioral self reports (Parent Ex. II at pp. 51-64).

On four days beginning on January 17, 2008 and ending on February 4, 2008, the student underwent a neuropsychological and educational evaluation by a pediatric neuropsychologist and the clinical director of the Institute for Learning and Academic Achievement at NYU (Parent Ex. B at p. 1). Behavioral observations noted during the evaluation included that the student was friendly, cooperative, and worked diligently on all tasks presented; however, variability was noted with regard to the student's attentiveness and arousal level throughout the assessment (*id.* at p. 2). The resultant report indicated that the student performed within the average range on overall measures of intellectual functioning and achieved a full scale IQ score of 90 (*id.* at pp. 11, 17).³ Although his verbal comprehension and expression were within the average to high average range and his nonverbal reasoning skills and auditory working memory were in the average range, the student demonstrated significant weaknesses on tasks that required visual-spatial construction and graphomotor speed (*id.* at p. 11). With regard to language, the student demonstrated a strong vocabulary and word knowledge, but was slow to retrieve word labels (*id.*). The report reflected that while the student had adequate skills for learning and recalling well-organized verbal material, he displayed significant weaknesses in his ability to learn and retain unstructured verbal information as well as difficulty learning, recalling and retaining

³ The student's full scale IQ score was reported to be 92 in the body of the evaluation; however, the test data summary sheet included in the evaluation reflected that the student's full scale IQ score was 90 (Parent Ex. B at pp. 3, 17).

visual information that was complex, that was presented without a prompt or cue to encourage him to memorize the information, and that required visual-motor integration to reproduce the information that he was attempting to remember (id. at p. 12). The evaluator reported that the student appeared to "learn new material most effectively when that information [was] organized in a meaningful way, when he [had] repeated exposures to that information and when it [was] contextualized" (id.). With regard to attention, the report reflected that the student's inconsistent ability to focus and sustain his focus contributed to his problems learning new information (id.). The report further reflected that the student had problems controlling the direction of his thought, inhibiting impulsive responses, planning ahead, and initiating tasks, and that his problems with arousal and alertness "reflect the problems with executive functioning, which are frequently observed in children with [ADHD]" (id.).

With regard to academic achievement, the report reflected that the student's performance on the Woodcock Johnson Tests of Achievement, Third Edition (WJ-III ACH) yielded standard scores in the low range in reading fluency (72) and writing fluency (74), and in the low average range in math fluency (80) (Parent Ex. B at p. 20). The student's performance on the Wechsler Individual Achievement Test (WIAT-II) yielded standard scores in the very low range in word reading (55) and spelling (60), the low range in numerical operations (73), the low average range in pseudoword decoding (83) and math reasoning (89), and the average range in reading comprehension (94) (id.). The evaluator reported that despite weaknesses in these areas, the student was attempting to understand what he read and to apply his knowledge of concepts when solving functional math problems (id. at p. 12). Additionally, the report reflected that the student had been experiencing discontent and feelings of inadequacy related to his academic struggles, incidents of anxiety, and a higher level of stress and frustration than his peers (id.).

The report concluded that the student's pattern of difficulties was consistent with the following diagnoses: a reading disorder; an ADHD-combined type; a developmental coordination disorder; a disorder of written expression; and a learning disorder-not otherwise specified (NOS) characterized by slow processing speed, poor word retrieval, and weaknesses in verbal and nonverbal learning (Parent Ex. B at p. 13). The report reflected recommendations to address aspects of the student's "cognitive and emotional profile" that included, among other things, placement in a special education class within a special education school, numerous accommodations, strategies to enhance the student's ability to learn and retain information, daily 1:1 work with a remediation specialist, occupational therapy (OT), a homework/helper/tutor, and psychopharmacological interventions to address attention weaknesses and managing distress (id. at pp. 13-15).

The hearing record reflects that shortly after the testing was completed, the parent met with the NYU evaluators and reviewed the test results (Tr. p. 1831). The parent then began looking for alternative placements for the student (id.). In February and March 2008, the parent requested that the district send the student's transcripts and school records to several non-approved private schools, including Gow (Dist. Ex. 43 at pp. 1-4).

According to the parent, she completed an application to Gow during February or March 2008 (Tr. p. 1862; Parent Ex. G at pp. 21A-21H). The parent and the student subsequently visited Gow on April 23, 2008, and during the visit, the student underwent an admissions

assessment as part of the admissions process (Tr. pp. 1862-63; Dist. Ex. 54 at p. 33A-B). The parent was notified by letter dated April 28, 2008 that the student had been accepted to Gow for his upcoming ninth grade year (2008-09) (Dist. Ex. 54 at p. 25A). The letter indicated that the parent needed to sign and return the enrollment reservation contract with the nonrefundable registration fee by May 13, 2008 in order to accept Gow's offer for the upcoming school year (id.).

On May 1, 2008, the student's eighth grade math and English teacher completed forms for Gow, which provided the private school with information regarding the student's ability to function in these classes (Dist. Ex. 54 at pp. 22A-B, 23A-B). The teacher indicated that the student's strengths included that he demonstrated excellent working memory and great listening comprehension and that he was a polite and personable student (id. at pp. 22A, 23A). The teacher indicated that, although the student had excellent expressive language skills, his greatest needs in English included that he had trouble organizing his thoughts on paper and struggled with grammar and sentence structure (id. at p. 22A). He indicated that the student enjoyed reading in class, was able to keep up with reading assignments in class, and was able to recall the main idea and details (id.). With regard to math skills, the teacher indicated that the student needed to "internalize basic math skill[s]" (multiplication and division), that he had trouble with abstract concepts, and that he benefited from direct instruction and breaking down of concepts into smaller steps (id. at p. 23A). The teacher indicated, among other things, that the student responded well to constructive criticism, was an eager participant who worked well with supervision, was easily distracted and occasionally disruptive, and that he needed "some support," and demonstrated poor organizational skills (id. at pp. 22B, 23B).

On May 13, 2008, the parent signed the enrollment reservation contract for the 2008-09 school year at Gow (Parent Ex. I at p. 2A).

In preparation for the student's upcoming May 20, 2008 annual CSE review, the student's social studies teacher completed a regular education teacher report dated April 14, 2008 (Dist. Ex. 32). The report reflected that the student was doing well in the class with a grade of 88, that he brought a wealth of outside knowledge to the class, and that he had "a great mind for [social studies]" (id.). The report also reflected, however, that the student had well-documented limitations regarding the written word, missed many homework assignments, and prepared poorly for exams (id.). The teacher opined that the student's grade should have been in the 90s, but due to these problems, it was not (id.). Additionally, the social studies teacher reported that the student exhibited immature behavior in the hall with peers and required "micromanaging" (close monitoring) so he would not fall behind in his work (Tr. p. 372; Dist. Ex. 32).

The student's earth science teacher also completed a similar report for the CSE dated May 13, 2008 (Dist. Ex. 35). The report reflected the student had a grade of 66, which the teacher reported was not representative of the work the student was capable of doing (id.). The earth science teacher further reported that the student was "sporadic" in his preparation for and participation in class, he exhibited poor attention, and he had difficulty with reading assignments and questions that required him to apply the principals learned (id.). The earth science teacher indicated that the student needed to work on his class participation, his focus during instruction, and his ability to seek help when needed (id.).

On May 20, 2008, the CSE met for the student's annual review and to plan for his ninth grade 2008-09 school year (Dist. Ex. 6 at p. 1). The CSE meeting was attended by a CSE chairperson, a school psychologist, a district special education teacher, a district regular education teacher, a "counselor," the parent, and an additional parent member (id. at p. 5). The parent provided the results of the private NYU evaluation which, as reflected on the IEP, were consistent with past testing completed by the district and reflected cognitive assessment results in the low average to average range (id. at p. 3). The May 2008 IEP further included the results of academic testing (February 4, 2008 WJ-III ACH) completed by NYU, which reflected that the student had generally maintained his previous levels of academic achievement and had increased his skills significantly in the area of passage comprehension (id. at p. 4). The May 2008 IEP reflected that, although the student's academic and attentional deficits continued, he had made progress in his inclusion and core classes and had also shown progress in his social skills and in handling conflict (id. at pp. 3, 5). The May 2008 CSE recommended that the student receive nonintegrated special classes in English, math, reading, science, and social studies four days in a four-day cycle with a 15:1 student to teacher ratio, and individual counseling services once every other week (Tr. p. 1485; Dist. Ex. 6 at p. 1). The May 2008 IEP included annual goals in the areas of study skills, reading, writing, mathematics, and social/emotional/behavioral skills (Dist. Ex. 6 at pp. 6-9). In addition to the student's previous accommodations, the May 2008 IEP recommended books on tape and access to a word processor, and further recommended an assistive technology assessment for fall 2008, which would be specific to the student's needs in the high school setting (id. at pp. 2, 5). The May 2008 IEP indicated that the parent would visit the high school to view programs and determine whether the recommended programs would meet the student's needs (id. at p. 5).

The parent visited the district high school to observe the self-contained reading, science, and social studies classes sometime in June 2008 before the completion of the school year (Tr. p. 1761). During the visit, the parent met with the special education department chairperson, shared the NYU report with her, and discussed with her the "different kinds of things [the district] could offer [the student] if he were to come [to the district high school]" (Tr. pp. 1204, 1761-62). The hearing record reflects that the discussion included, among other things, the parent's concern that the social studies class might not be challenging enough for the student and that it was too restrictive (Tr. pp. 1205, 1216).

At the end of the 2007-08 school year, the student's progress during eighth grade was reflected in a report card which indicated that he had achieved grades in the 80s and 90s in all subjects except earth science (Dist. Ex. 39 at p. 3). However, although the student's final grade in earth science was 65, the report card reflected that he passed the earth science regents exam with a score of 75 and received a fourth quarter grade of 70 (id.).

In July 2008, the special education department chairperson met with the assistant superintendent for student support services personnel and administration and other district staff regarding the concerns raised by the parent (Tr. pp. 1215, 1216) and developed recommendations to amend the student's May 2008 IEP, which included many of the recommendations from the NYU report (Tr. p. 1216; Dist. Ex. 45). The recommended amendments included the student's use of the "Kurzweil" and "Dragon" assistive technology programs; consultation with the

student's private therapist (social worker) and the educational evaluator from NYU by the school psychologist; general education classes in English and social studies with special education teacher support; learning skills resource room to reinforce the general education classes; the continuation of special math, reading, and science small group instruction classes; and the provision of more frequent counseling support for the student (Dist. Ex. 45). The assistant superintendent for student support services personnel and administration sent the parent an e-mail on July 25, 2008, which summarized the recommendations, indicated that the parent should call him to further discuss the recommendations, and stated that the CSE would convene prior to the opening of school (id.). The parent responded via e-mail on July 25, 2008, indicating that she still had concerns regarding science, math and reading, and requested that the assistant superintendent contact her to further discuss her concerns (id.).

On August 14, 2008, the parent e-mailed the assistant superintendent for student support services personnel and administration, indicating that she had received notification from his office regarding the scheduling of a meeting (Dist. Ex. 46). The hearing record reflects that the meeting convened on August 20, 2008 and was attended by the director for secondary special education, the special education department chairperson, the assistant superintendent for student support services personnel and administration, and the parent (Dist. Ex. 47). The results of the meeting were summarized in an e-mail from the assistant superintendent for student support services personnel and administration to the parent on the following day (id.). The e-mail stated that the student's 2008-09 IEP and the recommendations from the NYU report were discussed and that the parent was considering an out-of-district placement for the student to address his reading needs (id.). The e-mail further indicated that, as a result of the discussion, new recommendations "to strengthen [the student's] present IEP" were made, which were to be implemented "immediately upon [the parent's] approval prior to the CSE meeting that [would] be scheduled for the second week of school" (id.). The recommendations included that the student would be scheduled to attend a grade nine team of "co-taught" classes for all academics, a skills class for learning strategies, a resource room to assist him with homework, and a reading class utilizing a methodology other than the Wilson program (id.). It was also recommended that the student would receive the same classroom accommodations that were described in the NYU evaluation report, an assistive technology evaluation, the Kurzweil system, and regularly scheduled counseling services provided by a school psychologist who would also consult with the student's private counselor (id.). The e-mail further indicated that the resources of a "TA and homework support after school" would be provided, if needed (id.).

On August 28, 2008, the parent e-mailed the assistant superintendent for student support services personnel and administration and informed him that she was placing the student in a "more specialized and restrictive program" for the 2008-09 school year (Dist. Ex. 50 at pp. 1-2). She indicated that since the district was "just developing its customized programs for [learning disabled] students and [did] not have a completely integrated and structure[d] reading program other than Wilson [she did] not believe . . . her son [could] receive an adequate educational program" in the district (id. at p. 1).

The assistant superintendent for student support services personnel and administration responded to the parent's e-mail on August 28, 2008, thanked the parent for her response, and indicated that she could contact him at any time during the school year if she decided to

transition the student back to the district (Dist. Ex. 50 at p. 1). He reiterated that, although the parent had indicated that the district was "just developing its customized programs for [learning disabled] students," the district had been working with learning disabled students with similar learning needs for many years and that the district would "customize a research-based balanced literacy program for [the student]" (id.).

The hearing record reflects that the student attended Gow for the 2008-09 school year (Dist. Exs. 40 at p. 16; 41 at pp. 15-16; 51 at pp. 1-2; Parent Ex. L at p. 16). A "Student Advisor Report" dated September 25, 2008, summarized the student's participation at Gow for the first marking period of the 2008-09 school year (Dist. Ex. 40 at p. 16). The report reflected that the student had adjusted to the routine at the school, was setting goals for the marking period, and overall, had begun to make some gains academically and socially (id.).

On October 23, 2008, the CSE met to "update the IEP to reflect [the student's] current educational placement" (Dist. Ex. 7 at pp. 1, 5). The October 2008 IEP also reflected the August 2008 proposed program modifications to the May 2008 IEP (id. at pp. 1-2). The October 2008 CSE meeting was attended by a CSE chairperson/director of special education "secondary," a school psychologist, a district special education teacher, a district regular education teacher, the parent, and a "Psych Intern" (id. at p. 5). Although the student's family had chosen to place him at Gow for the 2008-09 school year, the district continued to recommend an in-district program, including consultant teacher services in an integrated classroom setting⁴ for social studies, science, English, and math two days per week (8:1); a nonintegrated reading skills class twice per week (8:1); a nonintegrated resource room four days per week (5:1); a nonintegrated special class skills four days per week (15:1); and one 30-minute individual counseling session every two weeks (id. at pp. 1-2, 5). The October 2008 IEP reflected additions to the program modifications and supports recommended in the May 2008 IEP, consisting of the provision of class notes prior to lectures, the modification of assignments by "compacting" when necessary, checking for understanding, preferential seating, and provision of the Kurzweil assistive technology system (id. at p. 2). The October 2008 IEP continued to include annual goals in the areas of study skills, reading, writing, mathematics, and social/emotional /behavioral skills (id. at pp. 7-9).

By due process complaint notice dated May 20, 2009, the parent alleged that the district was unable to provide an adequate education for the student, including necessary accommodations for the student that would enable him to attend college (Dist. Ex. 1 at pp. 1-2). The parent further alleged that the district refused to support the parent's request for reimbursement for the student's placement in a private specialized school (id. at p. 2). Specifically, the parent alleged that the student is acutely disabled, but has average to above average intelligence, which the district's program would not have been able to accommodate (id. at p. 5). The parent also asserted that the district's program lacked: (1) appropriate small classes for core subjects; (2) an integrated and specially trained faculty for severely dyslexic students; (3) sufficiently structured programs to provide an adequate education; (4) an emphasis on college advocacy and direction; (5) an alternative to the Wilson reading program, which had proved to

⁴ The hearing record reflects that the consultant teacher services in an integrated classroom that were recommended in the October 2008 IEP were also referred to as "co-taught" classes (see Tr. p. 1428; Dist. Exs. 7 at p. 1; 47).

be insufficient for the student's needs; and (6) an appropriate skills class to help the student develop appropriate study skills to overcome his disability (*id.* at pp. 5-6). The parent asserted that Gow provided the ideal environment and appropriate accommodations for the student to flourish and fulfill his academic potential (*id.* at p. 6). The parent further alleged that placement at Gow was necessary for the student to receive an adequate education and to receive appropriate accommodations for his disability (*id.*). The parent requested tuition reimbursement for the 2008-09 school year and the approval of reimbursement or payment for the 2009-10 school year at Gow (*id.*).

On July 5, 2009, the district responded to the parent's due process complaint notice and asserted that the educational programs offered to the student in the May and October 2008 IEPs were reasonably calculated to meet the student's educational needs in the least restrictive environment (LRE) (Dist. Ex. 2 at p. 1). The district also noted that the parent's request for relief for the 2009-10 school year was premature (*id.*). The district further asserted that its recommended class sizes were appropriate and the student's program would have been delivered by highly qualified and certified staff with substantial experience meeting the needs of students with learning disabilities (*id.* at pp. 1-2). The district asserted that the recommended programs were highly structured and reasonably calculated to enable the student to make meaningful educational gains, including advancement toward college attendance (*id.* at p. 2).

An impartial hearing began on July 30, 2009 and ended on November 19, 2009, after eight days of testimony (IHO Decision at pp. 3-4). By decision dated January 20, 2010, an impartial hearing officer found that the "operative legal document" was the May 2008 IEP, not the October 2008 IEP, which was created after the student had been unilaterally placed at Gow (*id.* at p. 14). The impartial hearing officer also found that the district failed to prove that its program was reasonably calculated to confer educational benefits on the student and that the district failed to provide a free appropriate public education (FAPE) to the student (*id.* at pp. 15-18). Specifically, the impartial hearing officer found that there was little understanding of the student's needs at the May 2008 CSE meeting (*id.* at p. 16). The impartial hearing officer further found that the student's emotional experiences were secondary to his academic difficulties, yet his May 2008 IEP contained many more social/emotional goals than reading goals (*id.* at p. 17). The impartial hearing officer found that the district failed to address the student's need for a specialized school and that the student had made virtually no reading progress in the district's programs over time (*id.*). The impartial hearing officer further found that, although the district had "capable personnel," the district did not consider the parent's "new and different insights," which included placement in a specialized school (*id.* at pp. 17-18).

The impartial hearing officer found that Gow was appropriate to meet the student's needs, and was not overly restrictive (IHO Decision at pp. 18-19). The impartial hearing officer found that, although Gow was geographically distant from the student's home, it was the "best available placement" for the student (*id.* at p. 19). Thus, the impartial hearing officer found that the parent sustained her burden of proving that Gow was appropriate for the student (*id.*).

The impartial hearing officer reduced the parent's tuition reimbursement award by 80 percent because he determined that the parent did not provide notice to the district prior to making the unilateral placement (IHO Decision at pp. 19-20). However, the impartial hearing

officer noted that the district and the parent cooperated and worked together prior to the unilateral placement (*id.* at p. 20). The impartial hearing officer ordered the district to "provide tuition reimbursement for the 2008-09 school year at a rate of [20] percent of the receipted bills" (*id.*). The impartial hearing officer also ordered the district to provide reimbursement for the student's technology fee (*id.*). The impartial hearing officer declined to address the parent's request for tuition reimbursement for the 2009-10 school year because it was premature (*id.* at p. 2).

The district appeals and asserts that the impartial hearing officer improperly found that the IEP at issue was the May 2008 IEP and not the October 2008 IEP. The district further alleges that the hearing record supports the conclusion that the October 2008 IEP was appropriate. The district contends that the impartial hearing officer erred by: (1) concluding that the district's staff had little understanding of the student's educational needs and lacked appropriate training to meet his needs; (2) improperly allowing into evidence and basing his decision upon "facts" concerning issues not raised in the due process complaint notice; (3) overly relying upon the testimony of the private evaluators; (4) improperly determining that the district failed to address or rule out the student's need for a specialized school; and (5) improperly determining that the Gow School was appropriate. The district asserts that its program was reasonably calculated to enable the student to make educational gains, that it would have been implemented by highly qualified staff, and that it was in the LRE. The district alleges that the student's placement at Gow was both unnecessary and too restrictive, that the student was not receiving counseling there, and that the student was not functionally grouped. The district requests findings that the October 2008 IEP offered the student a FAPE and that Gow was inappropriate and unnecessarily restrictive.

In her answer, the parent alleges that neither the May 2008 IEP nor the October 2008 IEP would have provided the student with an appropriate program. The parent alleges that the student did not progress in terms of academics in the district's programs for his seventh and eighth grade school years. The parent further alleges that her due process complaint notice contended that both the May and October 2008 IEPs failed to provide the student with a FAPE, and that the district should have known that the student was severely impaired and had not progressed in its programs. The parent contends that the district could not provide an appropriate education for the student. The parent alleges that the district misled the parent by failing to recognize the severity of the student's disability and falsely reporting progress. The parent alleges that the student's high school IEPs only called for two days of specialized reading instruction per week rather than daily as he had received in the district's middle school. The parent asserts the student's IEP stated that assistive technology would be provided if needed, but the student required assistive technology. The parent further asserts that the IEPs were virtually the same from year to year, while the student made minimal progress. The parent asserts that the IEP did not incorporate a number of the NYU evaluation report's recommendations. The parent also alleges that the CSE never considered an out-of-district placement.

Regarding the placement at Gow, the parent alleges that the student made no progress at the district's middle school, and made great progress at Gow. The parent asserts that the student required a program that the district could not provide because the student's combination of disabilities is extremely rare. The parent asserts that she did not decide to unilaterally place the

student at Gow until late August 2008. The parent alleges that the student's grades at Gow are measured at grade-appropriate level, and are not modified like they were at the district's middle school. The parent asserts that the impartial hearing officer properly evaluated and weighed the testimony at the impartial hearing and that the impartial hearing officer's decisions that the district failed to offer a FAPE and that Gow was an appropriate placement for the student should be upheld.

The parent cross-appeals from the impartial hearing officer's 80 percent reduction of tuition reimbursement and asserts that it was "too severe a reduction for a minor procedural error." The parent further alleges that the district had sufficient notice of the student's private placement since it was aware that the student possibly would be placed at a private school as early as February 2008, when the district was asked to provide records to various schools. The parent asserts that the district was unable to accommodate the student's needs relating to assistive technology, small class size, and reading. Accordingly, the parent requests full tuition reimbursement.

In its answer to the parent's cross-appeal, the district requests dismissal of the parent's cross-appeal and asserts that the cross-appeal does not comply with the pleading requirements set forth in State regulations. The district further denies that it was unable to meet the student's needs and asserts that its recommended program was appropriate to meet the student's needs. The district asserts that it did not receive the required notice that the parent would be seeking reimbursement for the student's unilateral placement. The district further argues that the lack of proper notice supports denying the tuition reimbursement award in its entirety.

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]; 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).

A student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in

regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

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).

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

Turning to the merits of the appeal, the hearing record reveals that the district proposed significant program modifications to the May 2008 IEP prior to the start of the 2008-09 school year. As noted above in more detail, the hearing record reflects that the district's staff and the parent continued to review the student's program and consider other options for the student because, after viewing the recommended high school programs, the parent had concerns regarding the recommended self-contained classes (Tr. pp. 1207-08, 1316, 1317, 1870). Thereafter, the parent and district's staff discussed modifications to the student's recommended program several times via e-mail and in person, and agreed to modifications of the student's offered program in August 2008, prior to the beginning of the 2008-09 school year (Tr. pp. 1207-1211, 1316-17; Dist. Exs. 45; 46; 47; 49; 50 at pp. 1-2). But for the parent's unilateral placement of the student at Gow, the modifications to the May 2008 IEP would have been implemented by the district at the beginning of the 2008-09 school year (Dist Exs. 47; 49; 51; see Cerra, 427 F.3d at 193-94). Accordingly, the district's August 20, 2008 proposal to modify the program offered in the May 2008 IEP was the program offered by the district prior to the start of the 2008-09 school year.⁵ The district subsequently convened the October 2008 CSE to document the student's placement at Gow and to formalize the August 2008 offered program (Dist. Exs. 7 at pp. 1-2, 5-6; 47). Thus, the October 2008 IEP superseded the May 2008 IEP and the August 2008 offered program. The October 2008 IEP incorporated all of the modifications in the August 2008 offered program, except that it did not include an assistive technology evaluation specific to the high school and did not specify that the district's counselor would consult with the student's private therapist (compare Dist. Ex. 7, with Dist. Ex. 47).

Next, the hearing record supports the district's assertion that the impartial hearing officer erred by making findings regarding the student's IEP goals and the absence of a class profile for the district's recommended class (IHO Decision at p. 17). The hearing record reveals that the issues of the student's IEP goals and class profile were not raised in the parent's due process complaint notice (see Dist. Ex. 1). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended at least five days prior to the impartial hearing with an impartial hearing officer's permission (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *6-*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; see also A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 215-216 [D. Conn. 2006] aff'd, 2007 WL 3037346 [2d Cir. October 18, 2007]; A.B. v. San

⁵ For purposes of this decision, the term "August 2008 offered program" will be used to refer to the district's August 20, 2008 offer of program modifications to the May 2008 IEP.

Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Application of the Bd. of Educ., Appeal No. 09-103; Application of a Student with a Disability, Appeal No. 09-066; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-102; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065). Thus, I find that these issues have not been properly raised and I decline to address them.

The district next asserts that the impartial hearing officer erred by determining that it had little understanding of the student's needs and did not offer the student a FAPE (IHO Decision at pp. 16-18). The hearing record supports this assertion. As discussed in detail below, the hearing record reveals that the October 2008 IEP was appropriate and was reasonably calculated to provide educational benefits to the student. The hearing record also reflects that, in addition to having the recent NYU neuropsychological evaluation before them (Dist. Ex. 7 at p. 6),⁶ the October 2008 CSE included the participation of the special education teacher from the high school whose classroom the parent had visited and with whom she had discussed the student's needs and the NYU evaluation report (Tr. pp. 1204-09). As noted above, the parent previously met with this high school special education teacher and other district staff in August 2008 to discuss changes to the student's recommended program of self-contained classes and to consider other options that would allow for a less restrictive and more academically challenging program (Tr. pp. 1206-08). The hearing record reflects that the chairperson at the October 2008 CSE meeting also attended the August 2008 meeting with the parent, and participated in discussion regarding the student's programming and how to meet his needs (Tr. pp. 1206-08; Dist. Ex. 7 at p. 5). As such, both of these October 2008 CSE members had a current and detailed understanding of the student's needs. To address the student's identified needs in reading decoding and comprehension, math calculations, written expression, attention, organizational skills and social/emotional/behavioral skills, and to accommodate the student's strengths in verbal (auditory) comprehension skills, verbal reasoning skills, vocabulary skills and memory skills, the October 2008 CSE recommended consultant teacher services for social studies, science, English, and math in an integrated classroom two times per week; a nonintegrated reading skills class twice per week; a nonintegrated resource room four times per week; a nonintegrated special class skills four times per week; and individual counseling services once every two weeks (Dist. Ex. 7 at pp. 1-4, 6-9).

A careful review of the hearing record reveals the extent of services that would have been provided by the August 2008 offered program and the October 2008 IEP. Testimony by the special education department chairperson who taught a resource room class during the 2008-09 school year, indicated that the resource room teacher consulted with the regular education teachers, provided assistance with homework completion, provided "pre-teaching and reteaching," and worked on "skills development, note taking," and organization (Tr. pp. 1196, 1201, 1209). The hearing record reflects that resource room services were "another significant layer of support" and were not typically provided at the high school level in addition to the

⁶ Although the NYU neuropsychological evaluation report indicated that the student was tested in January and February 2008, the May and October 2008 IEPs reflected the date of the neuropsychological report as May 16, 2008 (compare Dist. Exs. 6 at p. 6; 7 at p. 6, with Parent Ex. B at p. 1).

special class skills, which was provided to all students who received consultant teacher services (Tr. pp. 1385-86, 1387).

Testimony by the high school special education teacher, who provided consultant teacher services and taught special class skills and reading skills, indicated that the special class skills classroom utilized both of the special education teachers who provided consultant teacher services in the integrated classrooms (Tr. pp. 1385-86). As a result, the teachers "know what the assignments are, what the tests are, what the curriculum is, what's going on, who is learning," what the due dates are, when tests are scheduled, and they "can support [the students] in the special class later in that day" (Tr. pp. 1386, 1390). She further testified that the two teachers provided assistance to students in test preparation, "reteaching, preteaching, breaking things down into parts, chunking materials, modifying assignments and tests as needed," helping students become better organized, and teaching students different kinds of skills to address weaknesses that they are displaying (Tr. pp. 1202, 1390). With regard to the consultant teacher services that she provided in the integrated setting, the special education teacher testified that her services depended on the lesson the regular education teacher was providing (Tr. p. 1387). During a lecture, she may assist and monitor students, making sure they are not distracted, that they are focused, taking notes and are involved in the class; however, during a group lesson, she interacted more, assisting, monitoring, probing with questions, guiding, offering additional examples and doing "whatever it takes" (Tr. pp. 1387-88).

With regard to reading, the high school special education teacher testified that she would have given the student a pretest to determine where his significant deficits were and to identify his specific phonemic difficulties (Tr. p. 1384). She further testified that his deficits would then be addressed by developing any missing skills through practice (*id.*). She concluded that there was "no way a student couldn't benefit" from the reading skills program and the additional practice time for reading (*id.*). The special education department chairperson testified that the district began using a computer program called "Reading Plus" during the 2008-09 school year that addresses reading fluency, reading comprehension, and vocabulary development, and was designed to develop silent reading (Tr. pp. 1203-04, 1347). The special education teacher indicated that students can access this program from a computer in school and work on their own while under her supervision, and can also access the program at home as homework to benefit from additional practice (Tr. p. 1347).

The August 2008 offered program and the October 2008 IEP also recommended additional program modifications and accommodations for the student, including the provision of a copy of class notes prior to lectures, modification of assignments by compacting as necessary, books on tape, access to a word processor, checking for understanding, and preferential seating (Dist. Exs. 7 at p. 2; 47; Parent Ex. B at p. 13). The August 2008 offered program and the October 2008 IEP also reflected that the Kurzweil assistive technology system would be made available to the student (Dist. Exs. 7 at p. 2; 47). The director of secondary special education during the 2008-09 school year testified that the Kurzweil system is a "comprehensive system of support" that allows students to use its options based on their needs (Tr. p. 122). She indicated that the system has the ability to read word by word or sentence by sentence, can highlight word by word, define words, and has the capability to produce an outline from text that is scanned into the program (Tr. pp. 122-23). The hearing record also reflects that the "Dragon" program, which

is a "speech to writing program," in which a person speaks into a computer and the computer then writes for them, was also available to assist the student with his writing (Tr. pp. 1217, 1218, 1230, 1420, 1421; Dist. Ex. 45). I note that the student's October 2008 IEP included nine of the ten accommodations that were recommended by the NYU evaluation report (compare Dist. Ex. 7 at p. 2, with Parent Ex. B at p. 13; see Dist. Ex. 47).⁷

As noted above, the hearing record supports that in previous years, the student made academic progress in a similar program, which included both integrated and nonintegrated settings (Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1; 52). The student's eighth grade report card indicated that he had achieved strong grades (80s to 90s) over the course of that school year, in English, math, reading, and social studies (Dist. Ex. 39 at p. 3). The report card also reflected that the student's eighth grade science course was a Regents level course, that the student was able to pass the earth science Regents exam with a score of 75, and that he received a fourth quarter grade of 70 (id.). Testimony by the student's regular education social studies teacher indicated the student participated in the class with approximately 22 other students, that he was "impressed with [the student's] intelligence," and that the student was "definitely able to express ideas, nuanced ideas and he was really good at speaking his mind, telling us what he thought" (Tr. pp. 351, 364). He testified that the student displayed a grasp of and interest in historical events such as war, and that the student discussed the "weaponry in World War II to a level not necessarily needed" for an eighth grade class (Tr. p. 352). He further testified that the student occasionally participated in the debate club and that he was able to discuss topics "on a very high level" (Tr. p. 364). For example, he stated that the student "knew the issues" in the 2008 election and could "really break them down for you" (Tr. p. 364). The social studies teacher testified that the student would write down his ideas in bullet points and then "verbally expand on the information he had written down" (Tr. p. 366). He also testified that the student received a score of 91 on the eighth grade New York State social studies exam (Tr. p. 368).⁸ The social studies teacher stated that, based on the student's performance in his eighth grade course, the student would "absolutely" be successful in a ninth grade social studies inclusion class (Tr. p. 369).

In addition, I find that the hearing record does not support the impartial hearing officer's conclusion that the student had made no meaningful progress over time with regard to reading (IHO Decision at p. 17). The hearing record reflects that based on a comparison of the student's scores on the WJ-III ACH administered in February 2007, and his scores in February 2008, using the same assessment tool, the student maintained his overall achievement level from seventh to eighth grade when compared to same age peers, indicating a growth of one year (Dist. Ex. 6 at p. 4). Specifically, a comparison of the student's scores on a February 2007 administration of the WJ-III ACH with his scores on like subtests of the WJ-III ACH administered in February 2008, indicate that the student achieved similar scores on the letter-word identification, math calculation, math fluency and spelling subtests, and that the student had made significant progress in the area of passage comprehension, increasing his standard score by 21 points (id. at

⁷ Extended break time during tests was not included in the October 2008 IEP (compare Dist. Ex. 7 at p. 2, with Parent Ex. B at p. 13).

⁸ The student's eighth grade social studies teacher testified that the highest possible score on the New York State social studies exam is a level 4, and that a level 4 score ranges from 85 to 100 (Tr. p. 368).

p. 4). In contrast, the impartial hearing officer based his conclusion on a comparison of the student's scores on the results from three unrelated assessment tools, which included a 2002 administration of the Gray Oral Reading Test (GORT),⁹ the student's scores on one subtest of the WIAT-II (word reading) that was administered in February 2008, and one subtest of the WJ-III ACH (reading fluency) that was administered in February 2008 (IHO Decision at p. 17; see Tr. p. 812; Dist. Exs. 8; 31 at p. 20). I find that the probative value of the data provided by the WJ-III ACH over two consecutive years (February 2007 and February 2008) outweighs that which the impartial hearing officer relied upon to reach his conclusion regarding the student's reading progress. Thus, I find that the student made meaningful reading progress in the district's program (id.).

Accordingly, based on the student's prior success in a similar program, the additional resource room support, and the addition of assistive technology to assist the student with reading and writing tasks, I find that the hearing record supports that the August 2008 offered program and the October 2008 IEP were reasonably calculated to provide the student with educational benefits.

With regard to the impartial hearing officer's finding that the CSE failed to rule out the student's need for placement in a specialized school as recommended by the NYU report, the hearing record does not support that the student required a specialized school in order to receive educational benefits (IHO Decision at p. 17). Testimony by the two NYU evaluators indicated that the parent did not provide them with reports such as the student's prior or current IEPs, evaluations, or report cards, which would have reflected the student's program and his progress at the district, nor did the NYU evaluators speak with anyone at the district to discuss their evaluation results or possible "treatments in school" (Tr. pp. 866-67, 875-77, 1052-53). The NYU evaluators further testified that, in the absence of these reports, they relied on information provided by the parent (Tr. pp. 867-68, 1059). The hearing record reflects that the NYU evaluators believed, based on the parent's report, that the student had been in a mainstream placement and was receiving resource room services and testing accommodations, including a reader and a scribe, at the time of the evaluation (Tr. pp. 777, 876, 879; Parent Ex. B at p. 2). Further testimony by the clinical director at NYU indicated that had she known this was not an accurate understanding of the supports that the student was provided in the district program, she would have reflected "something different in her report" (Tr. pp. 879-80). Her testimony reveals, among other things, that had she been advised by the parent that the student was receiving a daily reading skills class in the district, she would have been of the opinion that it would have been a good service for the student to receive (Tr. pp. 880-81). Testimony by the pediatric neuropsychologist indicated in reference to his report, that he "tried to be careful in how he expressed the recommendations based on the fact the [he] didn't have a complete picture of all of the interventions that were being provided by the school" and that "in other situations where [he had] more certitude, [he] would write that [he believed] that a student require[d] that placement" (Tr. p. 1057). He also stated that he "tried to include in the recommendations, [his] caution about being overly certain about the kind of placement that [the student] required" (Tr. p. 1055). Although the impartial hearing officer concluded that it was the pediatric neuropsychologist's opinion that the student "was a boy whose pattern of results lead [him] to conclude that a

⁹ This test was administered when the student was in third grade and not residing in the district (Tr. pp. 1701-02, 1705; Dist. Ex. 8 at p. 1).

specialized school setting may be the most appropriate fit for [the student]" (Tr. p. 1026; IHO Decision at p. 17), the impartial hearing officer failed to note that the pediatric neuropsychologist went on to testify that he "didn't conclude that was the required placement [for the student], because [he] was not convinced that [he] knew it couldn't be provided in the public school setting" (Tr. p. 1026). The hearing record reflects that when asked if he believed contextual instruction could be delivered in a public school setting, the pediatric neuropsychologist responded that "a special education teacher would know how to help make the information more palpable" (Tr. p. 1110).

In addition, the hearing record reflects that the programs recommended in the August 2008 offered program and the October 2008 IEP were reasonably calculated to meet the student's needs in the LRE. The recommendations included in the August 2008 offered program and the student's October 2008 ninth grade IEP reflected programs similar to that reflected in his eighth grade IEP in that the student would have received a combination of special education services provided in both the general education environment (consultant teacher services for social studies, science, English, and math), as well as in nonintegrated settings (reading skills class, special class skills, and resource room) (compare Dist. Ex. 5 at p. 1, with Dist. Exs. 7 at p. 1; 47). While the October 2008 IEP recommended consultant teacher services twice per week in all core academic subjects, the August 2008 offered program and the October 2008 IEP also recommended resource room services four times per week to provide daily support to the student in these core subjects, in addition to its recommendation of special class skills that had also been provided to the student by his eighth grade IEP (compare Dist. Ex. 5 at p. 1, with Dist. Exs. 7 at p. 1; 47). I further note that the program changes recommended by the August 2008 offered program and the October 2008 IEP were in response to the parent's concern that the self-contained classes recommended in the student's May 2008 IEP did not offer the student a challenging academic program or opportunity for interaction with general education students, that the district was responsive to the parent's concerns, and that the parent meaningfully participated in the development of the August 2008 offered program and the October 2008 IEP (Tr. pp. 1207-08, 1316, 1317).

Based on the above, the hearing record demonstrates that the student did not require a specialized, boarding school to receive educational benefits and that his needs would have been appropriately addressed in the LRE by both the programs offered by the August 2008 offered program and the October 2008 IEP, thereby offering the student a FAPE for the 2008-09 school year.

Having found that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parent's placement at Gow 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).

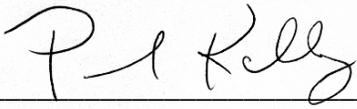
I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the impartial hearing officer dated January 20, 2010 is annulled.

Dated: Albany, New York
April 22, 2010



PAUL F. KELLY
STATE REVIEW OFFICER