



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-034

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

Appearances:

Asher, Gaughran LLP, attorneys for petitioners, Julie Gaughran, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Lisa S. Rusk, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Windward School (Windward) for the 2007-08, 2008-09, and 2009-10 school years. Respondent (the district) cross-appeals from the impartial hearing officer's determination that the statute of limitations did not bar the parents' request for tuition reimbursement for the 2007-08 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending Windward (Tr. pp. 998, 1007, 1403-04). 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 hearing record reveals that the student exhibits cognitive abilities "well within the average range," and a slow rate of information processing (Tr. p. 57; Dist. Ex. 29 at pp. 5, 14). He demonstrates weaknesses in expressive language skills characterized by difficulty with oral and written language skills and word retrieval problems (Tr. p. 57; Dist. Ex. 16 at p. 3). The student has a diagnosis of a mild auditory processing disorder and he exhibits weaknesses in auditory comprehension and auditory memory for longer pieces of information (Dist. Ex. 9 at p. 4; Parent Ex. T). He benefits from additional time to produce written work and from the use of a word processor (Dist. Ex. 9 at pp. 2-3). The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that as a young child, the student experienced hearing loss requiring insertion of "tubes," and that he also experienced a speech-language delay (Tr. pp. 1260-61, 1415). He received speech-language therapy via the early intervention program (EI), and subsequently received speech-language therapy and occupational therapy (OT) from the district through the Committee on Preschool Special Education (CPSE) (Tr. pp. 1261-62). Prior to kindergarten, the student's CPSE OT and speech-language therapy services were discontinued and the parents obtained private speech-language therapy for their son that continued during his kindergarten year (Dist. Ex. 30 at pp. 2-3; Parent Ex. U at p. 4). The student attended the district's kindergarten program, where he received "non-designated" OT services and pull-out reading intervention services that addressed phonemic awareness; letter identification, recognition and production; taught concepts of print; enhanced reading comprehension; and reinforced high frequency words (Tr. pp. 1262-63; Dist. Exs. 15 at p. 1; 36; 37; 38). At the end of kindergarten, it was reported that the student had exhibited "steady progress in improving his phonemic awareness skills," and continued reading support services in first grade was recommended (Tr. p. 1266; Dist. Ex. 38). During first grade, the student received twice weekly OT and daily reading intervention support (Dist. Ex. 30 at p. 3). Also during first grade, the parents obtained one hour per week of private tutoring services for the student (Tr. p. 1270). He was referred to the school's child study team due to his slow acquisition of reading skills, resulting in a recommendation that the student undergo a speech-language evaluation, which subsequently identified a need for articulation therapy (Tr. pp. 1267-70; Dist. Ex. 30 at p. 3; Parent Ex. S). A June 2003 "End of Session" first grade reading intervention program report indicated that the student's ability to apply reading strategies and his rhyming skills progressed, and he was described as a "cooperative hard working student who always trie[d] his best" (Dist. Ex. 39). Results of a September 2002 administration of the Primary Intervention Reading Assessment indicated that the student responded correctly to 79 out of 213 items, and that he achieved 188 out of 213 correct test items on a subsequent June 2003 administration (*id.*). It was recommended that the student undergo a rescreening of skills in fall 2003 (*id.*).

In August 2003, prior to the student's second grade school year, a private psychologist conducted a psychological evaluation of the student (Dist. Ex. 30). The private psychologist administered a number of assessments measuring the student's cognitive, attention, memory, language, visual perceptual, visual motor, academic, and social/emotional skills (*id.* at pp. 1-14). The private psychologist described the student as "social" and "friendly," and she ruled out "any social or emotional disturbance" with her testing (*id.* at p. 14). The private psychologist's evaluation report identified the student's areas of strength as general reasoning ability for both visual-spatial and linguistic information, and noted that his scores on "various measures of intellectual ability were within the average range" (*id.* at pp. 14-15). Listening comprehension and visual recall skills were variable depending on the task (*id.* at p. 15). The student's expressive language skills were characterized by difficulty organizing what he wanted to say, his rate of speech was often slow, and he exhibited word finding and rapid naming difficulties (*id.*). The private psychologist indicated that the student exhibited oral-motor difficulties that affected his rapid speech production, and also fine-motor deficits that resulted in fatigue with writing (*id.*). The student's academic skills were reportedly "variable" in that his math reasoning skills were "solid" and his spelling skills were "close to grade level," but his "paper and pencil math test score was below grade level" (*id.*). The private psychologist reported that the student's

reading comprehension skills were "one year below grade level, despite good pre-reading skills when tested in isolation," and she commented that the student had not attained the level where his reading skills were "automatic and integrated" (*id.*). The private psychologist further reported that the student's writing skills were "extremely compromised" (*id.*).

In her report, the private psychologist commented that most of the work the student completed during the evaluation was "effortful" for him, despite his "solid average intellectual ability" (Dist. Ex. 30 at p. 15). She offered that the student's "overall slow rate of processing" would interfere with his ability to process information and with his expressive and written language skills (*id.*). The private psychologist concluded that significant discrepancies existed between the student's reading comprehension, math computation, writing, listening comprehension and oral expression skills compared to his cognitive abilities, indicating "severe learning disabilities in language areas" (*id.*). Her report provided numerous recommendations, including that the student be classified as a student with a learning disability and that he receive "individualized support for listening and reading comprehension," a small class setting, speech-language therapy, OT, private tutoring, and "extra instruction in math," as well as a variety of classroom modifications such as preferential seating; information pre-taught, repeated and presented at slow rate; written assignments; and extended time on tests (*id.* at pp. 16-17). A central auditory processing evaluation was also recommended (*id.* at p. 16).¹

The hearing record reflects that the parents provided the private psychological report to the principal of their son's school, who initiated a referral of the student to the Committee on Special Education (CSE) (Tr. pp. 1274-77). On October 20, 2003, the CSE convened for the student's initial review (Parent Ex. U). The October 2003 CSE determined that the student was eligible for special education services as a student with a learning disability and recommended that for the remainder of the 2003-04 school year (second grade), he receive four 45-minute sessions of consultant teacher direct services, one individual 30-minute session of OT per week, and two 30-minute group speech-language therapy sessions per week (*id.* at p. 1). Also during second grade, the parents obtained two one-hour sessions of private tutoring per week; one focusing on reading skill and another providing general academic assistance, due to their concern about their son's progress (Tr. pp. 1278-84).² According to a June 2004 individualized education program (IEP) progress report, the student had mastered the majority of his short-term objectives in the areas of reading, writing, speech-language and motor skills (Parent Ex. V). Comments contained in the student's second grade report card indicated that he demonstrated progress academically and socially (Parent Ex. W).

During the 2004-05 school year (third grade), the student received 40 minutes of daily consultant teacher direct services in the general education classroom, one 30-minute session each of push-in and pull-out group speech-language therapy, and one 30-minute session per month of

¹ The hearing record reflects that on September 17, 2003, a private audiological and auditory processing evaluation of the student was conducted, resulting in the diagnosis of a "mild auditory processing disorder" (Tr. pp. 1272-73; Parent Ex. T).

² A March 2004 math evaluation conducted by a district special education teacher due to the student's mother's concern about her son's math ability, yielded scores "in the average to the well above average range of functioning" when compared to same age peers (Dist. Ex. 11).

OT consultation services (Parent Ex. X at p. 1).³ He continued to receive private tutoring services and his mother commented that his progress in reading during third grade was "very slow" (Tr. p. 1289). Information obtained by the CSE in April 2005 indicated that the student was "motivated" and that he used strategies for reading, writing, and organizational tasks (Parent Ex. AA at p. 5). His teachers reported that the student was making steady progress and that his reading skills had improved (*id.*). Vocabulary development was identified as an area of continued need, and the April 2005 CSE noted that the student processed information very slowly, which affected his reading comprehension, writing, and oral comprehension (*id.*). In June 2005, the student's special education teacher reported that the student had mastered all of his IEP short-term objectives in the areas of reading, writing, and speech-language skills (Parent Ex. Y).

For the 2005-06 school year, the student continued to receive the same special education program as during the prior school year (compare Parent Ex. X at p. 1, with Parent Ex. AA at p. 1). The student's mother stated that during fourth grade, her son received three to four hourly sessions of private tutoring services per week (Tr. p. 1307). Information gathered by the CSE in May 2006 indicated that the student struggled to sustain mental energy, but that breaks were helpful in completing tasks (Parent Ex. CC at p. 6). Additionally, weaknesses in auditory and visual processing speed affected classroom performance, and he needed additional time to respond both verbally and in writing (*id.*). The May 2006 CSE further noted that the student's word retrieval difficulties affected his oral and written expression skills (*id.*). In May and June 2006, the student's teachers reported that the student had exhibited progress both socially and academically during that school year (Parent Exs. BB at p. 1; CC at p. 6). It was further reported that the student's reading decoding and comprehension improved, as did his willingness to attempt new things and participate in class (Dist. Ex. 28; Parent Exs. BB at p. 1; CC at p. 6).

Over three dates in early September 2006, the private psychologist conducted a private psychological reevaluation of the student, which included assessment of his cognitive, attention, memory, language, visual perception, grapho-motor, academic, and emotional skills (Tr. pp. 1316-17; Dist. Ex. 29). The private psychologist reported that the student was motivated during testing and that he exhibited no difficulty adjusting to the demands of the evaluation (Dist. Ex. 29 at p. 3). She noted that, although the student's ability to maintain attention had improved, his "pace of work" remained slow, and he exhibited difficulty with receptive and expressive language skills (*id.* at pp. 3-4). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension index score of 106 (66th percentile), a perceptual reasoning index score of 102 (55th percentile), a working memory index score of 102 (55th percentile), a processing speed index score of 88 (21st percentile), and a full scale IQ score of 102 (55th percentile) (*id.* at p. 17). The private psychologist commented that these scores represented improvement in the student's cognitive verbal and language skills, and a "significant" improvement in the student's perceptual reasoning abilities compared with his August 2003 Wechsler Intelligence Scale for Children-Third Edition (WISC-III) test results (*id.*

³ According to the special education teacher who provided the student's third grade consultant teacher direct services, those services involved her working with the student on his goals in a small group in the general education classroom, and with the classroom teacher planning how goals and instruction would be addressed (Tr. pp. 1463, 1468-71).

at p. 4). The private psychologist's report identified the student's strengths in the areas of general fund of information, social reasoning and judgment, attention, and math problem solving skills (id. at p. 14).

Administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded the following subtest standard scores (percentile): word reading, 93 (32nd); reading comprehension, 94 (34th); pseudoword decoding, 95 (37th); numerical operations, 100 (50th); math reasoning, 116 (86th); spelling, 81 (10th); written expression, 91 (27th); listening comprehension 96 (39th); and oral expression 86 (18th) (Dist. Ex. 29 at p. 19). According to the private psychologist, the student's writing skills were significantly affected by "on-going weaknesses in grapho-motor skills" (id. at p. 12). The private psychologist offered that the student's scores on language-based academic subjects such as reading, writing and spelling were lower than his math skills, and she characterized his reading decoding, sight word vocabulary, accuracy, and reading comprehension skills as "almost two years below current grade placement" (id. at p. 11). She described the student's oral reading as "slow" and characterized by many errors (id.). Language testing revealed that the student had difficulty with phonological processing and processing speed (id. at pp. 8-9). The student continued to exhibit the need for increased time to formulate verbal responses, and difficulty with rapid naming and word retrieval (id. at pp. 9-10). The private psychologist reported that the student met the criteria for a diagnosis of "double deficit dyslexia," which she stated involved difficulty with both decoding and phonological processing, and also fluency and rapid naming (Tr. p. 882; Dist. Ex. 29 at pp. 12, 14). The private psychologist further determined that the student met the criteria for a diagnosis of a significant language disability, as measures of his expressive and receptive language skills remained "significantly below average" and well below his cognitive evaluation scores (Dist. Ex. 29 at pp. 10, 14).⁴

The private psychologist acknowledged in her report that the student had made "slow steady progress in all areas over the past three years," including "two years of progress in the past three years" in reading; however, she reported that the student continued to exhibit slow processing of information, difficulty with phonological awareness and naming, and problems with manual dexterity (Dist. Ex. 29 at pp. 12, 14). In response to the student's "severe form of Dyslexia, or reading disability," the private psychologist indicated that the student needed "at least one hour daily of direct reading instruction using a multi-sensory systematic phonics-based approach such as Orton Gillingham" (id. at p. 14). Due to her belief that this type of support was "usually not available in the public school setting," the private psychologist recommended "in the strongest possible terms" that the parents consider placing their son in a "special education setting where he will receive the right kind and intensity of direct instruction in reading and spelling" (id. at pp. 14-15). The private psychologist indicated that "after one to three years at a special education school," the student would be ready to transition back into a "mainstream educational setting" (id. at p. 15). The private psychologist referenced four private special education schools in her report, including Windward (id.). The psychological report also provided recommended program modifications, and recommendations for OT and private tutoring services (id. at pp. 14-15).

⁴ Although the private psychologist indicated that her evaluation of the student "rule[d] out an emotional disturbance," she determined that the student's profile supported a diagnosis of a mild anxiety disorder (Dist. Ex. 29 at pp. 12-13).

On September 26, 2006, the student's mother completed the student's application for admission to Windward for the following school year (2007-08) (Tr. pp. 1350-51; Parent Ex. II).

During the 2006-07 school year (fifth grade), the student received consultant teacher direct services daily for 40-minute sessions, and one 40-minute session per 4-day cycle of consultant teacher indirect services (Parent Ex. CC at p. 1). He also received one 30-minute session each of push-in and pull-out group speech-language therapy (*id.*). Notations on the student's 2006-07 IEP indicated that his consultant teacher services addressed written expression and reading comprehension skills, and that his language needs were best met in the context of both small group push-in and pull-out environments to allow for generalization of skills learned (*id.*). Program modifications included reteaching of materials, additional time to complete tasks, check for understanding, provision of "think time" to allow for information processing and answer formulation, a copy of class notes, and access to word processing (*id.* at p. 2). Testing accommodations included test location with minimal distractions, answers in test booklet, clarify directions/simplify language, extended time, breaks, and alternate location to access word processing (*id.* at p. 1). During the 2006-07 school year, the student worked on IEP annual goals and short-term objectives in the areas of reading, writing, math, and speech-language skills (*id.* at pp. 7-8). In addition, the district's reading specialist provided the student with instruction in the literacy extension program, which she described as a 40-minute general education class that met every other school day and was designed to specifically teach reading skills and strategies (Tr. pp. 420, 424-25). The literacy extension class contained 20-24 students and the student participated in the program throughout the school year (Tr. p. 425). The student's mother stated that, during the 2006-07 school year, the student received four hours per week of private tutoring services, which addressed general education subjects and reading skills, and he also received private OT services (Tr. p. 1358).

On September 28, 2006, a district occupational therapist conducted an OT evaluation of the student at the parents' request (Dist. Ex. 15 at p. 1). Administration of the Beery-Buktenica Developmental Test of Visual-Motor Integration yielded scores in the average range on assessments of the student's visual-motor, visual perception, and motor coordination skills (*id.* at p. 2). The student's handwriting speed assessed in a 1:1 setting was within grade-appropriate norms (*id.*). The student's keyboarding speed was appropriate for students at the beginning of fifth grade; however, the occupational therapist noted that the student should work on keyboarding speed in order for that to be a functional skill (*id.*). Direct OT services were not recommended, but the report provided suggestions for classroom accommodations (*id.* at p. 3).

Over three days in October 2006, a district speech-language pathologist conducted an evaluation of the student (Dist. Ex. 16). At that time, the student was receiving two 40-minute sessions of speech-language therapy to address his expressive and receptive language needs (*id.* at p. 1). The speech-language pathologist commented that, despite progress observed during the prior school year in the areas of understanding and using language, identifying the main idea and "predicting skills," the student continued to need support for word finding and retrieval deficits and expressive verbal and written language skills (*id.*). Administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) to the student yielded subtest standard scores of 90-105 (25th to 63rd percentile), which were in the average range with the exception of one subtest (formulated sentences: standard score 86, 18th percentile, low average range) (*id.* at

p. 2). CELF-4 composite core language, receptive language, expressive language, language content, and language memory standard scores of 92-96 (30th to 39th percentile) were also in the average range (*id.*). Administration of the listening comprehension subtest of the Oral and Written Language Scales, the Peabody Picture Vocabulary Test-III, and the Expressive Vocabulary Test yielded standard scores of 96-104 (39th to 61st percentile), which were within the average range (*id.*). The speech-language pathologist concluded that the student's overall receptive and expressive language skills were in the low average to average range and that he exhibited many strengths in his ability to follow directions, recall sentences, and in his language comprehension and expressive and receptive vocabulary skills (*id.* at p. 4). Although the student frequently requested repetition during listening tasks, he "performed very well" even when repetition was not permitted (*id.*). The speech-language pathologist reported that the student demonstrated expressive language weaknesses characterized by word retrieval deficits and reduced language formulation skills, noting that he was observed to use strategies such as description during episodes of word finding difficulties (*id.*). The student was observed to use frequent sentence revisions, start utterances over, and use "vague" terms and "fillers" such as "uhm," "like," and "stuff" (*id.* at pp. 3-4). He presented with functional social pragmatic language skills (*id.* at p. 4).

In October 2006, the district's special education teacher conducted an educational evaluation of the student's academic achievement skills (Dist. Ex. 10). Administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III) yielded the following subtest standard scores (percentile): letter-word identification, 96 (38th); reading fluency, 93 (32nd); story recall, 108 (70th); understanding directions, 103 (58th); calculation, 103 (57th); math fluency, 98 (45th); spelling, 90 (25th); writing fluency, 116 (86th); passage comprehension, 90 (26th);⁵ applied problems, 162 (>99.9th); and writing samples, 102 (54th) (*id.* at p. 3). The special education teacher reported that, based on these results, the student's oral language skills were "average" compared to same age peers, as were his broad reading, math calculation, and broad written language skills (*id.* at pp. 2-3). The student's ability to apply academic skills was high, and his academic fluency skills were in the average range (*id.*).

Also in October 2006, the school psychologist conducted a psychological evaluation of the student (Dist. Ex. 17). In her report, the school psychologist noted that the student initially had difficulty adjusting to and learning the routines of fifth grade at the middle school and developing a "cognitive map of the building," but that at the time of the evaluation, appeared to be more comfortable with school (*id.* at pp. 1, 6). The school psychologist reported that the student participated in one or two sessions per month of an "informal small group" where he expressed that he would welcome assistance with becoming more organized (*id.* at p. 6). Administration of the Reynolds Intellectual Assessment Scales (RIAS) to the student yielded a verbal intelligence score of 97 (42nd percentile), a nonverbal intelligence score of 109 (73rd percentile), a composite memory score of 109 (73rd percentile), and a composite intelligence score of 102 (55th percentile); all scores were in the average range (*id.* at p. 3). The school psychologist reported that the student's verbal aptitude was not as well developed as his nonverbal aptitude (*id.* at p. 6). The school psychologist's report contained cognitive evaluation

⁵ A September 2006 administration of the Scholastic Reading Inventory, described as a "standardized assessment" used by the district to monitor reading comprehension skills, yielded a score in the 17th percentile (Dist. Ex. 27).

results from the August 2003 and September 2006 private psychologist's evaluation reports, which the school psychologist reported were "comparable" to those reflected by current cognitive testing (id. at pp. 2-4). Administration of the Bender Visual-Motor Gestalt Test, Second Edition to the student yielded a score in the 25th-30th percentile, characterized by the school psychologist as within the average range (id. at pp. 3, 5). The student was noted to exhibit some difficulty appropriately spacing reproductions on paper and with the speed of cursive writing (id. at pp. 5-6). Print handwriting skills were reportedly age appropriate (id.).

A social history update dated October 21, 2006, completed by the student's mother, indicated that the student continued to struggle academically and that he needed additional support from the school to be successful (Dist. Ex. 14 at p. 1). The student's mother further informed the district that her son received private general education and reading tutoring, and also OT services (id. at p. 2).

According to the district's co-chairperson of the reading department, the district received the student's fourth grade New York State Testing Program (NYSTP) scores in October or November 2006, during his fifth grade school year (Tr. pp. 727, 849; see Tr. pp. 1306-07). The student achieved performance level designations of "3" (meeting learning standards) following the January 2006 administration of the NYSTP fourth grade English language arts (ELA) assessment and the March 2006 NYSTP fourth grade math assessment (Dist. Exs. 24; 25).

On November 9, 2006, a CSE meeting convened to review the results of the district and private psychological evaluation reports, with the private psychologist in attendance (Dist. Ex. 4 at pp. 5-6). CSE meeting information reflected in a subsequent IEP indicated that both the district and the private psychological evaluation reports were reviewed and considered at the November 2006 meeting, as were the October 2006 speech-language evaluation report and September 2006 OT progress summary, and that the student's teachers provided reports about the student's strengths in the classroom (id. at p. 6). The November 2006 CSE changed the student's classification from learning disabled to speech or language impaired, and made additions and changes to the student's goals (id.). No changes were made to the student's recommended special education program (compare Dist. Ex. 4 at p. 1, with Parent Ex. CC at p. 1).⁶

In November 2006, the district's reading specialist administered the Qualitative Reading Inventory-3 (QRI-3) to the student (Dist. Ex. 27). She described the QRI-3 as an informal assessment of reading accuracy and comprehension that the district used to determine academic intervention services (AIS) support (Tr. p. 432; see Tr. p. 273). According to the reading specialist, students read graded work lists that determined their ability to read words in isolation, then they read passages orally while deviations from print were noted (Dist. Ex. 27). Comprehension was measured by the students' ability to retell what was read and respond to specific questions about the passage (id.). The reading specialist reported that the student performed at a fifth grade instructional level on the graded word list section; he performed at a sixth grade instructional level on the reading accuracy section; and on the reading

⁶ A CSE subcommittee meeting convened on December 13, 2006, to review the change in the student's classification that resulted in changing student's classification back to learning disabled (Tr. p. 1326; Dist. Ex. 4 at p. 6).

comprehension section, he performed at an independent level on the sixth grade passage (Tr. pp. 433-34; Dist. Ex. 27).⁷

On March 10, 2007, the student's mother signed a 2007-08 enrollment contract with Windward, acknowledging that if the enrollment was cancelled on or after July 31, 2007, the parents would be obligated to pay the full annual tuition (Tr. pp. 1359-60; Parent Ex. JJ). The student's mother stated that during fifth grade (2006-07), she observed her son "crying and complaining about going to school," and that she did not see much of an improvement in his academic skills (Tr. pp. 1367-68).

On April 26, 2007, the CSE subcommittee convened for the student's annual review and to develop his 2007-08 (sixth grade) IEP (Dist. Ex. 5). The April 2007 CSE meeting was attended by the chairperson; the student's special education teacher, regular education teacher, and speech-language pathologist; a guidance counselor; and the parents (*id.* at p. 5). According to meeting notes maintained by the CSE chairperson of that meeting, the student's teachers reported that the student had a "great year" and that his reading comprehension and decoding skills were good (Parent Ex. KK at p. 2). For the upcoming school year, the April 2007 CSE recommended that the student receive two 40-minute 15:1 sessions per 4-day cycle of "skills seminar," described by the director of special education and related services (director) as a "resource room type program" taught by a special education teacher, which addressed students' IEP goals (Tr. pp. 47, 76-77; Dist. Ex. 5 at p. 1). The student's recommended program also included one session each of push-in and pull-out group speech-language therapy, and numerous program modifications and testing accommodations similar to those received during the 2006-07 school year (compare Dist. Ex. 5 at pp. 1-3, with Parent Ex. CC at pp. 1-2). The April 2007 IEP contained annual goals in the areas of written language and speech-language skills (Dist. Ex. 5 at pp. 6-7). The CSE chairperson's meeting notes indicated that the student's mother requested to review the district's determination not to offer her son reading services (Parent Ex. KK at p. 2). The student's mother stated that at the meeting, she requested reading intervention services for her son, which was denied by the district (Tr. p. 1368). Neither parent, both of whom attended the April 2007 CSE meeting, indicated to the April 2007 CSE that they were considering placement of the student at Windward for the upcoming school year (Tr. pp. 1443-44; Dist. Ex. 5 at p. 5).

In June 2007, the student's special education teacher prepared a report of the student's progress toward his IEP annual goals (Dist. Ex. 4 at pp. 7-8). The report indicated that by the third marking period, the student had achieved both of his reading annual goals, which related to using contextual clues to gain meaning from unfamiliar vocabulary words and expressing the main idea from written passages (*id.* at p. 7). In a June 2007 literacy extension program report, the reading specialist indicated that students worked on developing comprehension by "engaging in partner work" and discussions, involving probing questions, forming connections, and stating opinions using evidence from the text (Parent Ex. MM). Students also explored characterization, how characters were portrayed in text, and underlying themes (*id.*). The reading specialist reported that the student was working hard and making good progress, and that he usually came to class prepared and showed effort in his work (*id.*). She further reported that he worked hard to

⁷ The reading specialist described an "instructional level" as the level that students would be expected to read at with guidance and teacher support (Tr. p. 492).

collaborate with his partner, assumed some level of responsibility for his work, and usually submitted reading logs and in-class assignments in a timely and organized manner (*id.*). The reading specialist indicated that the student needed to "continue to challenge himself in his reading so he c[ould] continue to develop his abilities and grow as a reader" (*id.*). The student's 2006-07 report card reflected designations of "3" (regularly meets/sometimes exceeds requirements), and "4" (regularly exceeds requirements) in all areas of ELA, math, science, social studies, and Spanish as measured by his teachers (Dist. Exs. 20 at p. 1; 21).

The student's mother stated that in August 2007, she received the results of her son's fifth grade NYSTP ELA assessment that had been conducted in January 2007 (Tr. p. 1377; Dist. Ex. 26). The student achieved a performance level designation of "2" (partially meeting learning standards) (Dist. Ex. 26).⁸

By letter dated August 13, 2007, the parents provided the district with "ten days notice" of their intent to place the student at Windward for the 2007-08 school year (Parent Ex. OO at p. 1). The parents stated that "[n]otwithstanding multiple indications of serious unremediated learning deficits," the April 2007 CSE recommended an essentially similar program to student's program for the 2006-07 school year (*id.*). The parents also stated that the student's good grades did not reflect the student's skills or knowledge, but instead reflected the district's "long-standing effort to minimize the [student]'s serious academic difficulties" (*id.* at p. 2). The parents indicated that the only reason the student was able to remain in the district's school was because the parents provided him with four hours per week of private tutoring and services (*id.*). The parents stated that they had decided to place the student at Windward, where he could benefit from a program designed to meet his needs (*id.*). The parents also stated that they would be submitting a request for an impartial hearing (*id.*).

Subsequent to the August 13, 2007 letter to the district, the parents went on vacation (Tr. pp. 1441-43). The district attempted to schedule a CSE meeting for which the parents were unavailable, but on September 5, 2007, a CSE subcommittee was reconvened to review the student's special education program and the parents' August 13, 2007 letter (*id.*; Dist. Ex. 6 at p. 6). Attendees included the CSE chairperson, director, the student's fifth grade special education teacher, a second special education teacher, two regular education teachers, his speech-language pathologist, a school counselor, a school psychologist, and the parents (Tr. pp. 56, 550; Dist. Exs. 6 at pp. 5-6; 16 at p. 1). According to information contained in the resultant IEP, the student's teachers reported that he had made "great strides" both socially and academically during fifth grade and that the anxiety observed at the beginning of the 2006-07 school year had significantly decreased as the year progressed (Dist. Ex. 6 at p. 6). Reports presented to the September 2007 CSE indicated that during fifth grade, the student worked diligently, stayed focused on tasks, asked clarifying questions, enjoyed class discussions, used the computer for writing assignments and taking notes, and participated in large and small group activities (*id.*). The September 2007 CSE also noted that evaluation results reflected that the student's scores on academic testing were in the average range (*id.*). According to the September 2007 IEP, the parents reviewed their concerns about their son's reading decoding, handwriting and reading

⁸ The student achieved performance level designations of "3" (meeting learning standards) on the NYSTP grade five social studies assessment administered in November 2006 and the NYSTP grade five math assessment administered in March 2007 (Dist. Exs. 22; 23).

fluency skills, resulting in the September 2007 CSE's decision to modify the student's skills seminar program by increasing the frequency of support and decreasing the student-to-teacher ratio for the upcoming school year (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 6 at pp. 1, 6). The September 2007 CSE recommended that the student receive one 40-minute session of skills seminar every day, in a group of five students to one special education teacher (5:1) (Dist. Ex. 6 at p. 1). The September 2007 CSE continued to recommend the same level of speech-language therapy and annual goals that it had offered in April 2007 (compare Dist. Ex. 5 at pp. 1, 6-7, with Dist. Ex. 6 at pp. 1, 7-8), and added books on tape as a program modification (Dist. Ex. 6 at pp. 2, 6). The student's mother indicated that she requested that the district offer her son reading intervention services, which was denied (Tr. pp. 1383-84). According to the September 2007 IEP, the parents "expressed overall concern about their son's academic program" and reported that they had placed him at Windward (Dist. Ex. 6 at p. 6).

The student attended Windward during the 2007-08 school year (Tr. p. 1385; Parent Ex. M). The hearing record describes Windward as providing instruction to students who possess average to above average cognitive skills and exhibit a "language learning disability" that affects reading, writing, spelling, and expressive and receptive language skills (Tr. pp. 1001-02). Windward also offers small class sizes of approximately 12-13 students who are grouped according to similar needs in the areas of reading, writing, and math (Tr. pp. 1002-03). Teacher assistants are provided in all reading and writing classes (Tr. p. 1003).

On February 3, 2008, the student's mother signed an enrollment contract with Windward for her son's attendance during the 2008-09 school year (Parent Ex. QQ at pp. 5-6).

During a February 2008 Windward classroom observation conducted by the district's CSE chairperson, the student was observed in a class of nine students, one teacher, and one teacher assistant (Parent Ex. M at p. 2). The CSE chairperson reported that the student volunteered to read aloud and did so accurately, and that he also correctly answered a question posed by the teacher (id.). Her report indicated that the student correctly completed independent work related to the classroom activity, and that she observed him following classroom routines (id.).

On May 12, 2008, a CSE subcommittee convened for the student's annual review and to develop his IEP for the 2008-09 (seventh grade) school year (Dist. Ex. 7). Attendees included the CSE chairperson who had conducted the student's February 2008 classroom observation, a district special education teacher, a district regular education teacher, the student's mother, and by telephone, the student's Windward social studies teacher (Tr. p. 1388; Dist. Ex. 7 at p. 5). According to information contained in the resultant IEP, the student's mother reported that her son made progress and was very happy at Windward (Dist. Ex. 7 at p. 5). The Windward teacher reviewed the student's progress and indicated that he had made many strides academically and socially (id.). Areas of need included cursive writing, organizing thoughts, composing answers, and retrieving words (id.). It was reported that the student exhibited improved reading decoding and comprehension; however, he continued to need prompting and support in those areas (id.). The student's written language skills reportedly improved (id.). According to the May 2008 IEP, the CSE subcommittee reviewed the student's programs, services, goals and accommodations, recommending a special education program consistent with the program offered in the

September 2007 IEP (compare Dist. Ex. 6, with Dist. Ex. 7). The student's mother indicated that, although she supported some aspects of the recommended program, she was concerned that the district did not determine that her son needed the additional reading support she was requesting (Tr. pp. 1388, 1391; Dist. Ex. 7 at p. 5).

Prior to the commencement of the 2008-09 school year, the parents notified the district of their intention to continue their son's placement at Windward (Tr. pp. 281-82). On August 18, 2008, the CSE subcommittee reconvened to discuss the parents' concerns (Tr. pp. 282, 284; Dist. Ex. 8). Attendees included a CSE chairperson, a district special education teacher, a district regular education teacher, a district reading teacher, the student's mother, and by telephone, a representative from Windward (Dist. Ex. 8 at p. 6). The August 2008 CSE reviewed the June 2008 Windward reports and a May 20, 2008 reading evaluation report that had not been available to the May 2008 CSE (Tr. pp. 284-85).⁹ According to information contained in the resultant IEP, the Windward representative discussed the student's inconsistent performance in decoding multisyllabic words, "discerning the saliency of text," and with reading fluency, which was consistent with Windward's submitted evaluative material (Dist. Ex. 8 at p. 6). It was reported that the August 2008 CSE reviewed the student's present levels of performance and recommended goals, adding four annual reading goals to the IEP (id. at pp. 6, 8). For the 2008-09 school year, the August 2008 CSE recommended that the student receive two 40-minute 5:1 sessions of reading instruction services per week, to be provided in a separate location; daily 40-minute 5:1 sessions of skills seminar;¹⁰ and one 40-minute session each per week of push-in and pull-out speech-language therapy (id. at p. 1). The student's mother disagreed with the recommendations, asserting that the student required five days per week of reading instruction (Tr. pp. 1391, 1393-94; Dist. Ex. 8 at p. 7). According to the August 2008 IEP, the district responded that the student's program delivered reading services within his general education classrooms and through his special education services, and also expressed concern about pulling the student too frequently from academic classes (Dist. Ex. 8 at p. 7). The August 2008 CSE stated its belief that the student's annual goals could be addressed by the student's recommended program, to which the student's mother expressed her concern regarding her son's need for more support (id.).

The student attended Windward during the 2008-09 school year (Parent Ex. QQ at pp. 4). On February 5, 2009, the student's mother signed an enrollment contract with Windward for her son's attendance during the 2009-10 school year (id. at pp. 8-9).

On May 12, 2009, the CSE subcommittee convened for the student's annual review and to develop his 2009-10 IEP (Dist. Ex. 9). Attendees included a CSE chairperson, a district special education teacher, a district regular education teacher, a district speech-language pathologist, the student's mother, and by telephone, a Windward teacher (id. at p. 6). According to information contained in the resultant IEP, the student's mother reported that her son

⁹ The hearing record does not contain June 2008 Windward reports or a reading evaluation report dated May 20, 2008.

¹⁰ The May 12, 2008 IEP and subsequent IEPs appear to use the terms "skills seminar" and "resource room" interchangeably (Dist. Exs. 7 at p. 1; 8 at p. 1; 9 at p. 1). For consistency in this decision, I will use the term "skills seminar" unless otherwise noted.

completed work independently and was progressing well (*id.* at p. 7). The Windward teacher indicated that the student was a "respectable, hard working student with a positive approach to learning," and that he advocated for himself, was diligent in homework completion, and applied strategies learned in class to his independent work (*id.*). The Windward teacher further reported that guidance, repetition and review of strategies benefitted the student, and that reading comprehension, elaboration of written expression and application of math strategies required adult support (*id.*). For the 2009-10 school year, the May 2009 CSE recommended that the student receive three 40-minute 12:1 sessions per week of consultant teacher direct services in each of the student's ELA, science, math, and social studies classes; four 30-minute sessions of consultant teacher indirect services per month; daily 40-minute 5:1 sessions of skills seminar; two 40-minute 5:1 sessions per week of reading instruction services; and three 30-minute group speech-language therapy sessions per week (*id.* at pp. 1-2). The student's mother requested that her son receive more reading intervention services than the district had recommended (Tr. pp. 1398-99).

The student attended Windward during the 2009-10 school year (eighth grade) (Tr. pp. 998, 1007). In addition to other classes, the student has been receiving approximately two 45-minute sessions per day of reading and writing instruction, and a study skills class focusing on organization for writing assignments (Tr. pp. 1008-10).¹¹

By due process complaint notice dated September 3, 2009, the parents, through their attorney, alleged that despite early indications of the student's severe reading disability, the district failed to provide the student with adequate services (Dist. Ex. 1 at p. 3). The parents also alleged that in the absence of direct reading instruction from the district, they hired private reading tutors for the student (*id.*). The parents asserted that they had the student evaluated in 2006, prior to the start of the student's fifth grade school year, and that the 2006 evaluation report noted that the student met the criteria for "double deficit dyslexia" and recommended extra support in reading and language (*id.*). The parents further asserted that the private evaluator recommended a multisensory reading program, such as Orton-Gillingham in order for the student to "catch up" (*id.* at pp. 3-4). The parents asserted that the district refused to acknowledge that the student is dyslexic and requires appropriate reading instruction (*id.* at p. 4).

In their due process complaint notice, the parents alleged that the student's 2007-08 IEP did not provide for direct reading instruction, nor did it contain any reading goals (Dist. Ex. 1 at p. 4). The parents also asserted that the student's 2007-08 IEP "was essentially a reprise of the abysmal program the [d]istrict had recommended for the previous year" (*id.*). The parents stated that they followed the private evaluator's advice and placed the student at Windward so that he could learn how to read (*id.*).

The parents next asserted that the student's 2008-09 IEP failed to provide him "with an appropriate placement and support" (Dist. Ex. 1 at p. 4).

¹¹ The hearing record contains a private psychoeducational evaluation report dated subsequent to the May 12, 2009 CSE meeting (Parent Ex. Q).

The parents then alleged that the student's 2009-10 IEP provided vague references to the district's belated offer of reading assistance (Dist. Ex. 1 at p. 5). The parents asserted that the student's 2009-10 IEP included direct consultant teacher services, but the parents were not informed of what type of instruction this service would consist of, nor of the qualifications and training of the staff providing it (id.). The parents also asserted that the 2009-10 IEP finally provided for reading instruction, but it did not specify a methodology (id.). The parents further alleged that the 2009-10 IEP did not specify the needs and reading levels of the other students in the group of five (id.). The parents contended that the student remains dyslexic and requires more than two 40-minute sessions of reading instruction twice per week (id.). The parents also asserted that the 2009-10 IEP failed to accurately state the student's present levels of performance (id. at pp. 5-6).

In their due process complaint notice, the parents alleged that the student's IEPs for all three disputed school years failed to include "a statement of the special education and related services and supplementary aids and services, based upon peer-reviewed research," and thus, failed to provide the student with a free appropriate public education (FAPE) (Dist. Ex. 1 at p. 6). The parents also asserted that the student was progressing at Windward, which was an appropriate placement (id. at pp. 6-7). The parents requested reimbursement for the student's tuition costs at Windward for the 2007-08, 2008-09 and 2009-10 school years (id. at p. 7).

On September 15, 2009, the district, through its attorneys, responded to the parents' due process complaint notice (Dist. Ex. 2). The district asserted that it had available resources and programs for the student to meet his needs and that it had offered him a FAPE for the 2007-08, 2008-09 and 2009-10 school years (id. at p. 1). The district further stated that Windward was not recommended by the CSE because it is a self-contained school for students with learning disabilities and was too restrictive for the student (id.). The district listed the evaluations and reports that it relied upon when formulating the student's IEPs (id. at pp. 1-3). The district asserted that the student made significant progress at the district during the 2006-07 school year and had not demonstrated a need for reading goals or specialized reading instruction for the 2007-08 school year (id. at pp. 2-3). The district stated that after one year of instruction at Windward, the student's then-current reading levels indicated a need for specialized reading instruction, thus, the district offered the student small group reading instruction two times per week and four reading goals were added to the student's 2008-09 IEP (id. at p. 3). The district asserted that, for the student's 2009-10 IEP, it continued to recommend reading instruction, and recommended consultant teacher services in mainstream classes based upon the student's then-current needs (id.). Finally, the district asserted that the parents' challenge to the 2007-08 IEP was untimely and should be dismissed by the impartial hearing officer (id.).

By motion dated September 23, 2009, the district requested that the impartial hearing officer dismiss the parents' tuition reimbursement claim for the student's 2007-08 school year as untimely under the statute of limitations as set forth in the Individuals with Disabilities Education Act (IDEA) (Dist. Ex. 3).

On October 8, 2009, the impartial hearing officer denied the district's motion to dismiss the parents' claim regarding the 2007-08 school year as barred by the statute of limitations (IHO Ex. 1 at p. 3). The impartial hearing officer determined that the parents' claim for tuition

reimbursement regarding the 2007-08 school year was timely and would be considered at the impartial hearing (id. at pp. 2-3).

An impartial hearing began on October 15, 2009, and ended on January 29, 2010, after eight days of testimony (IHO Decision at p. 2). By decision dated March 19, 2010, the impartial hearing officer found that the district offered the student a FAPE for the 2007-08, 2008-09, and 2009-10 school years (id. at pp. 13-15). Specifically, the impartial hearing officer found that the 2007-08, 2008-09 and 2009-10 IEPs clearly indicated the student's "condition" and academic needs for the respective school years (id. at p. 7). The impartial hearing officer determined that there was no dispute that all the required parties were present at past CSE meetings and that "all procedural due process rights were afforded the parent[s]" (id. at p. 8). The impartial hearing officer found that no one at the impartial hearing took exception to any of the program recommendations for the student's 2009-10 school year (id. at p. 9). The impartial hearing officer determined that, although placement and the amount of reading instruction were contested, the student was otherwise being provided with an appropriate program to address his needs (id.).

The impartial hearing officer also found that the student's fifth grade (2006-07) teacher was a "well-versed expert in reading and well-aware of [the student's] needs" in fifth grade (id. at pp. 9-10). In contrast, the impartial hearing officer found that the parents' expert witness, the private psychologist, "repeatedly failed to justify her most important conclusions in the specifics of her testimony," and that her failure to observe the student at the district's school and her lack of understanding of the districts' reading program and academic support system undermined her objections to the district's reading program (id. at p. 11). The impartial hearing officer further found that he could not believe the student's mother's testimony that she would have enrolled the student in the district had it offered reading instruction five days per week, because she had already accepted the private psychologist's opinion that Windward was the only viable setting for the student to be successful and that she believed that the district had failed to meet the student's needs for the previous four years (id. at p. 12). The impartial hearing officer determined that, although the parents asserted that the student "thrives" at Windward and has made progress, it is likely that the student would have also progressed had he remained in the district's program (id.). The impartial hearing officer found that the district's program would have addressed the student's specific academic needs for each of the three school years at issue (id. at pp. 13-14). The impartial hearing officer noted that although the parents believed that the student's IEPs were deficient with regard to reading instruction and methodology, the district's program for each school year was appropriate and would likely have educationally benefitted the student (id. at p. 14).

The impartial hearing officer further determined that Windward was not in the least restrictive environment (LRE) for the student (IHO Decision at p. 13). The impartial hearing officer found that there was nothing in the hearing record to demonstrate that the student received speech-language therapy at Windward nor how Windward was addressing the student's language deficits (id. at p. 14). The impartial hearing officer also determined that the student's expressive and receptive language deficits were not addressed at Windward (id.). The impartial hearing officer further determined that the hearing record did not indicate that the student required placement in a full-time special education setting such as Windward because the

student's ability to function in a mainstream setting with appropriate supports was well established prior to the 2007-08 school year (id.).

The parents appeal, and assert that the impartial hearing officer erred by making findings that were contrary to the hearing record. Specifically, the parents allege that the student required intensive private tutoring while enrolled in the district's school, which demonstrates that the district's program was not appropriate for the student. The parents further assert that the student did not progress in the fifth grade curriculum in each of his classes because he was reading at a third grade level when he entered fifth grade. The parents argue that the impartial hearing officer erred by ignoring evidence demonstrating that the student struggled with reading in fifth grade. The parents further allege that the impartial hearing officer disregarded the student's reading deficits and did not acknowledge that the student's 2007-08 IEP was deficient because it did not contain any reading goals. The parents assert that the impartial hearing officer improperly relied upon the testimony of the student's third grade teacher, which was irrelevant to the school years at issue in this case.

The parents further allege that the impartial hearing officer: (1) discounted the testimony of the student's reading and writing teacher at Windward; (2) ignored the 2009 private evaluation, which reflected that the student made progress in reading comprehension, spelling, and writing; (3) disregarded the testimony of the private psychologist; (4) ignored the IDEA's requirement for the IEPs to include "a statement of special education and related services . . . based upon peer-reviewed research to the extent practicable;" and (5) dismissed the testimony of the parents' witnesses. The parents also allege that the district failed to offer the student an appropriate education for all three school years. The parents assert that the goals were not responsive to the student's needs and that in May 2009, the district failed to address goals at the CSE meeting. The parents further allege that the May 2009 CSE meeting was interrupted several times. The parents argue that the private psychologist deemed the recommended levels of reading instruction in the 2008-09 and 2009-10 IEPs to be insufficient, and that the private psychologist recommended the Orton-Gillingham method, which is a peer-reviewed, scientific approach, to address the student's reading disability. The parents argue that the private psychologist testified that in order for a reading disabled student to "close the gap" in reading ability, such student must receive 90 minutes of instruction per day. The parents also allege that Windward does not deny the student an education in the LRE.

In its answer, the district asserts that the student's 2007-08 IEP did not contain reading goals since the student's special education needs did not require them. Specifically, the district argues that, in October 2006, all of the student's reading scores were in the average range and the student was on grade level in reading at the end of fifth grade. The district alleges that the impartial hearing officer's determination that the student was an interested, enthusiastic, capable student is supported by the hearing record.

Regarding the impartial hearing officer's determination to give little credit to the private psychologist, the district asserts that: (1) the private psychologist never saw or evaluated the student after September 2006, nor did she speak to any of his fifth grade teachers; (2) the district's witnesses rebutted the private psychologist's testimony regarding the special education and services the student received in the district, the type of reading instruction received, and the

amount of progress he made in decoding and fluency; (3) the testing conducted by the private psychologist revealed that the student's word reading, reading comprehension, and pseudo-word decoding were in the average range; (4) the private psychologist's lack of training in reading and special education, her failure to observe the student in an educational setting, her failure to discuss the student with any of his past or present teachers, her lack of knowledge about the district's programs and the student's programs at the district, and her mislabeling and misinterpretation of standardized test scores are all bases for giving little credit to her testimony; (5) the private psychologist's own reports contradicted the use of Orton-Gillingham, and three district witnesses who hold reading certifications testified that Orton-Gillingham would not be appropriate for this student; and (6) the district's witnesses were consistent and credible.

The district also alleges that: (1) a decline in the student's reading test scores while at Windward supports a finding of a lack of progress; (2) the parents' allegations regarding the goals being unresponsive to the student's needs, the 2009-10 CSE's failure to address goals, and the interruptions during the 2009-10 CSE meeting are beyond the scope of the appeal; (3) reading instruction was added to the student's 2008-09 and 2009-10 IEPs based upon the student's then-current needs; and (4) the recommended level of reading instruction was appropriate for the student's needs. As an affirmative defense, the district asserts that the parents' petition was not timely served.

In its cross-appeal, the district asserts that the impartial hearing officer erred by not dismissing the parents' tuition reimbursement request for the 2007-08 school year because it was barred by the statute of limitations. The district argues that the parents' claim accrued in May 2007, when they received the student's April 2007 IEP, which was for the student's sixth grade (2007-08) school year. The district further alleges that although the parents contended that they would have kept the student at the district's school had the district offered daily reading instruction, the following actions by the parents do not support their contention: (1) by letter dated August 13, 2007, the parents stated their objections to the April 2007 IEP, advised the district of their intent to place the student at Windward, and stated that they would be requesting an impartial hearing through their attorney; (2) on March 15, 2007, the parents paid a \$2,500 deposit to Windward and signed an enrollment contract, which stated that the parents would become obligated for the full tuition amount of \$38,400 after July 31, 2007; and (3) the parents sent Windward their first monthly payment of \$3,764 by check dated July 23, 2007, and their second monthly payment by check dated August 23, 2007.

In their reply, the parents assert that their claims for the 2007-08 school year were timely raised in their due process complaint notice. The parents also argue that their petition was timely served.

As an initial matter, the district asserts that the parents' petition should be dismissed because it was not timely served. According to State regulations, a petition for review must be personally served within 35 days from the date of the impartial hearing officer's decision to be reviewed (8 NYCRR 279.2[b]). State regulations also provide that if the impartial hearing officer's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (*id.*). In this case, the impartial hearing officer's decision was dated March 19, 2010 and

was mailed to the parents (IHO Decision at p. 15; Pet. ¶ 89; Ans. ¶ 5). The district argues that the parents received the impartial hearing officer's decision on March 22, 2010, and that the parents' petition should have been served within 35 days from that date. However, as discussed above, State regulations specify that when an impartial hearing officer's decision is mailed, the date of mailing and four days subsequent thereto are excluded when computing the time period to timely serve a petition. Thus, the last day for the parents to timely serve their petition was on April 28, 2010, and the parents served their petition on April 27, 2010.¹² Accordingly, the petition was timely served.

Two purposes of the 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

¹² As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065).

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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

The parents allege that despite evaluative data showing the student's reading deficits, the district's 2007-08 IEP failed to offer direct reading instruction and failed to include any reading goals (Dist. Ex. 1 at p. 4). The impartial hearing officer disagreed and determined that the district "sustained its burden to demonstrate that it was fully prepared to provide a FAPE for the challenged school years" (IHO Decision at p. 13). As discussed more fully below, the hearing record supports the impartial hearing officer's determination that the district offered the student a FAPE for the 2007-08 school year by its program as recommended in the student's September 2007 IEP, which did not include reading instruction as a service (Dist. Ex. 6).

The hearing record reveals that the student's reading skills improved throughout his tenure in the district.¹³ Administration of the Gates-MacGinitie Reading Tests, Fourth Edition to the student by the district in September 2004, April 2005, and March 2006 show improvement in the areas assessed: vocabulary and comprehension (Dist. Ex. 28). Specifically, the student's September 2004 (third grade) vocabulary score was in the 2nd percentile and his comprehension score was in the 26th percentile (*id.* at p. 1). By March 2006 (fourth grade), the student had achieved a vocabulary score in the 40th percentile and a comprehension score in the 47th percentile, scores which the reading specialist testified were in the average range and reflective of "consistent progress" (Tr. pp. 436-37; Dist. Ex. 28 at p. 3).

The student's performance during fifth grade supports the September 2007 CSE's recommendations for the 2007-08 school year. The student's September 2006 privately administered WIAT-II reading subtest scores were in the average range:¹⁴ word reading (32nd percentile), reading comprehension (34th percentile), and pseudoword decoding (37th percentile) (Dist. Ex. 29 at p. 19). His performance on all subtests of the district administered October 2006 WJ-III was in the average to above average range, including reading subtests such as letter-word identification (38th percentile), reading fluency (32nd percentile), passage comprehension (26th percentile), and story recall (70th percentile) (Tr. pp. 60-61; Dist. Ex. 10 at p. 3). These results were consistent with the district reading specialist's November 2006 QRI-3 results, which placed the student's reading skills at a fifth to sixth grade level (Tr. pp. 61-62, 432-35; Dist. Ex. 27). The reading specialist, who provided the student's fifth grade literacy extension program, stated that her assessment of the student was that his reading skills were on grade level (Tr. p. 437).

¹³ I note that during elementary school, the student received private general education and reading tutoring services; however, the hearing record does not include information about the nature of the tutoring services provided, nor does it show how much of the student's progress could be attributed solely to the private tutoring (Tr. pp. 1408-12, 1414).

¹⁴ The director, who testified that he had administered the WIAT-II many times and that he had taught students and staff at the university and district level how to administer that assessment, stated that according to the WIAT-II manual, standard scores (percentile) between 90-110 (25th – 75th) were in the average range (Tr. pp. 1539-40). I note that the private psychologist, who evaluated the student in September 2006 and characterized the student's word reading and reading comprehension standard scores of 93 and 94 as "low average," testified that she did not know what the publisher of the WIAT-II considered to be the average range (Tr. pp. 1196, 1198; Dist. Ex. 29 at p. 19). The director testified that the WIAT-II manual describes "low average" as a discrete category of subtest scores in the range of 80-90 (Tr. p. 1540).

She testified that during the 2006-07 school year, although the student exhibited some difficulty with reading fluency, his comprehension skills were "remarkable" and he demonstrated the ability to manage the curriculum from her class (Tr. pp. 420, 424-25, 435-36; Dist. Ex. 19 at p. 5). The reading specialist further testified that from conversations she had with the student's other teachers, including his special education teacher, he was able to manage the fifth grade curriculum (Tr. pp. 436, 439). During the 2006-07 school year, the reading specialist did not request that the student receive reading intervention as a related service because in her opinion, the student was receiving the reading support he needed through the literacy extension program and within the context of the classroom (Tr. pp. 439, 542-43). The director testified that based upon his reading of the student's "file," the student did not require individualized reading instruction during the 2007-08 school year (Tr. p. 81). Although the co-chairperson of the reading department, who did not provide any direct services to the student, testified that including annual reading goals would have been appropriate, she also testified that the student's annual reading goals would have been addressed in his speech-language therapy and skills seminar and that the student did not require reading as a separate service on his IEP (Tr. pp. 806-08, 846-49).

The student's fifth grade special education teacher, who provided consultant teacher direct services, testified that she addressed the student's 2006-07 IEP reading annual goals in his social studies and ELA classrooms (Tr. pp. 550-53). She testified that, although the student "started out very quiet," by November 2006, he had acclimated to the middle school environment and was "actually very enthusiastic about school" (Tr. pp. 554-55; Dist. Ex. 12). In her opinion, during the 2006-07 school year, the student demonstrated progress in his reading comprehension and written language skills, which she monitored using teacher reports, interacting with the student, and looking at his completed assignments (Tr. pp. 555-56). By the end of the 2006-07 school year, the student had achieved his reading comprehension and vocabulary IEP annual goals, and was "progressing satisfactorily" toward his written language annual goals (Tr. pp. 555-56; Dist. Ex. 4 at pp. 7-8). The special education teacher testified that she consulted with the student's content area regular education teachers on a daily basis and that they saw "an interested, enthusiastic and capable student who demonstrated in the classrooms [that] he was accessing the curriculum" (Tr. p. 557). The hearing record reflects that the special education teacher's testimony is consistent with October 2006 and April 2007 reports generated by the student's fifth grade teachers and the student's fifth grade report card (Dist. Exs. 18; 19; 20).¹⁵ It further supports the impartial hearing officer's finding that the district offered the student a FAPE for the 2007-08 school year in that the student did not require reading intervention as a service on his IEP at the time that it was formulated.

Turning to the student's recommended 2007-08 special education program, the director, who is also certified by New York State as a school psychologist, teacher of reading, and special education teacher, and is licensed by New York State as a psychologist, testified that he attended the student's September 2007 CSE meeting (Tr. pp. 53-54, 56). He described his understanding of the student's deficits as difficulty with oral and written expression and a history of a slow rate

¹⁵ Although prior to the student's fifth grade school year the private psychologist characterized the student's reading skills as being at an approximate third grade level and opined that fifth grade curriculum reading material would have been too challenging for him, for the reasons stated herein, this assertion was not supported by the hearing record (Dist. Ex. 29 at pp. 11, 15).

of information processing and sensory motor functioning (Tr. p. 57). To address the student's areas of need, the director testified that the September 2007 CSE offered, among other things, a daily skills seminar class and two sessions per week of speech-language therapy (Tr. pp. 75-76; Dist. Ex. 6 at p. 1). The skills seminar was built into the student's daily schedule; therefore, he would not miss any academic classes (Tr. p. 76). The director stated that the change from the consultant teacher model to the skills seminar model was in response to the parents' concerns that the student needed to receive direct instruction outside of the classroom (Tr. p. 77).

The hearing record reflects that the skills seminar class is similar to resource room services in that the student would receive instruction provided by a special education teacher to address his IEP annual goals in a location outside of his general education classes (Tr. pp. 76-77; Dist. Ex. 6 at p. 1). The September 2007 IEP contained annual goals addressing the student's written language needs, including goals to improve his use of graphic organizers, his paragraph organization skills, and his ability to revise written assignments (Dist. Ex. 6 at p. 7). The director testified that there was a "tremendous" amount of consultation between the skills seminar special education teacher and student's regular education teachers, so that the special education teacher was aware of the student's daily progress, performance, and what tasks were presented (Tr. p. 77).

In addition to the skills seminar, the September 2007 CSE recommended that the student receive one session each of push-in and pull-out group speech-language therapy services (Dist. Ex. 6 at p. 1). According to the September 2007 CSE, "the student's language needs c[ould] best be met in the context of both a small group outside of the classroom and in the classroom environment to allow for generalization of skills learned" (*id.*). The September 2007 IEP recommended offering the student additional time to allow for "input and output processing," and the use of visuals along with auditory presented material (*id.* at p. 4). Annual goals contained in the September 2007 IEP addressed the student's needs in the areas of expressive language skills, word retrieval difficulties, and auditory comprehension skills (*id.* at pp. 7-8).

The director further testified that other aspects of the program in the September 2007 IEP were recommended to support and assist the student in the general education setting (Tr. pp. 78-79). Specifically, the September 2007 IEP offered additional time to complete tasks, access to word processing, a copy of class notes, and "think time" to support the student's slow rate of information processing (Tr. p. 78; Dist. Ex. 6 at p. 2). The September 2007 IEP directed the student's teachers to check the student's understanding as he may have needed directions or questions repeated and/or clarified (Dist. Ex. 6 at p. 2). Testing accommodations provided for in the September 2007 IEP included test administration in an area with minimal distractions, clarified directions, simplified language, extended time, and an alternate location to access word processing (*id.* at p. 3). Within the present levels of performance, the September 2007 IEP noted the student's weakness in written language skills and indicated that using graphic organizers was "very helpful," further noting that his written responses improved with the use of teacher prompts and scaffolded questions (*id.* at pp. 3-4). The September 2007 IEP indicated that the student had exhibited school-related anxiety in the past, and recommended that the teacher monitor him for signs of anxiety (*id.* at p. 5). To help the student produce legible handwriting, the September 2007 IEP provided for additional time to complete writing tasks, use of a word

processor for note taking and written responses of more than three sentences, and additional space on math worksheets for computation (id.).

The director testified that the recommended 2007-08 special education program was appropriate for the student and would have met his needs in the LRE (Tr. p. 79). He described the recommended program as providing the student with "full access to non-disabled peers," enabling the student to participate in and fully access the general education curriculum, and that there was "every indication" that the student could benefit from that level of instruction (id.). The director testified that the student's teachers had reported that he was able to function in the general education classroom, which the director described as a "rich instructional environment," and that the methodology provided in both the student's general and special education programs was "well tailored" to meet his needs (Tr. pp. 79-80).

For the reasons described herein, the hearing record supports the impartial hearing officer's conclusion that the program recommended for the 2007-08 school year was reasonably calculated to confer educational benefits and offered the student a FAPE in the LRE (IHO Decision at p. 14).

Turning to the 2008-09 school year, the hearing record supports the impartial hearing officer's determination that the district's August 2008 IEP would have offered the student a FAPE. The CSE chairperson of the August 2008 CSE subcommittee meeting testified that a May 20, 2008 reading evaluation report, a June 2008 Windward report, and the student's mother's and teacher's oral reports were considered at the meeting, and that this information had not been available to the May 2008 CSE subcommittee (Tr. pp. 283-85).¹⁶ Additionally, the August 2008 IEP reflected that the August 2008 CSE considered a May 6, 2008 reading report, the February 2008 classroom observation report, and the September 2007 reading evaluation results (compare Dist. Ex. 7 at p. 6, with Dist. Ex. 8 at p. 7). The CSE chairperson testified that the August 2008 CSE discussed the student's mother's concerns about her son's reading skills, and discussed the student's performance to date with the Windward teacher (Tr. p. 284). The chairperson testified that the basis for the changes made to the August 2008 IEP was the discussion about the Windward reports that had been submitted and the Windward teacher's report about the student as a learner (Tr. pp. 286, 322-23).

According to the August 2008 CSE chairperson, the committee discussed the types of accommodations the student required in order to not "fall behind" in content courses due to his reading difficulty (Tr. pp. 352-53). A comparison of the student's May 2008 IEP and August 2008 IEP revealed additions to the student's program modifications, present levels of performance, standardized test results, and management needs sections (Tr. pp. 285-86; compare Dist. Ex. 7 at pp. 2-5, with Dist. Ex. 8 at pp. 2-6). Specifically, the August 2008 IEP recommended that in the classroom, the student should be "provided with teacher prompts, prompt cards, or other effective reminders for him to independently apply decoding skills he has learned while reading appropriately assigned text" (Dist. Ex. 8 at p. 2). The August 2008 IEP recommended that during reading instruction, the student would require "access to decoding programs such as 'Lexia' to support the development of independent reading skills" (id. at p. 3).

¹⁶ I note that the hearing record does not provide information regarding the instruction provided to the student at Windward during the 2007-08 school year.

In skills seminar, it was recommended that the student have "access to word prediction software while typing assignments on the word processor to encourage greater development of encoding skills and to further expand written work" (*id.*). The student's August 2008 IEP present levels of performance reflected that he exhibited "weaknesses in the areas of reading decoding and comprehension" and that although Windward reports indicated that the student's reading decoding, comprehension and written language skills had improved during the 2007-08 school year, he was "performing below grade level" (*id.* at pp. 3-4). The August 2008 IEP further indicated that the student responded to a multisensory, phonetically-based reading program; and provided specific information about the student's reading decoding, comprehension, and fluency skills (*id.* at p. 4). Assessment results from September 2007 and May 2008 were included in the August 2008 IEP (Dist. Exs. 8 at p. 4; 33). Management needs added to the student's August 2008 IEP included providing materials on an appropriate reading level in order to promote retention of reading skills, including decoding and comprehension, and on an independent level in order to increase fluency skills (Dist. Ex. 8 at p. 6). The August 2008 CSE added reading goals to the student's IEP, which addressed his reading fluency, decoding, and comprehension skills (*id.* at p. 8).

The August 2008 CSE chairperson stated that the decision to offer the student reading instruction services for the 2008-09 school year developed after review of the Windward reports, discussion with the student's Windward teacher and the student's mother, and consideration of the decrease in the student's Stanford 10 reading comprehension score from the 26th percentile in September 2007 to the 18th percentile in May 2008 (Tr. pp. 311-15; Dist. Ex. 33; *see* Tr. p. 97). The co-chairperson of the reading department testified that during reading instruction, students are placed into groups based upon their needs, and that for this student; she surmised that the teacher would have used leveled texts at his independent level to promote reading fluency (Tr. p. 809). She further testified that during reading services, teachers typically provide instruction in word study to help students become more fluent with word recognition and decoding skills (Tr. pp. 809-10).

The August 2008 CSE chairperson testified that the basis for recommending two sessions per week of reading instruction for the 2008-09 school year came out of "extensive conversation about an appropriate recommendation for reading," and input from the both the district's reading teacher and special education teacher (Tr. pp. 287, 324-27). The August 2008 CSE chairperson acknowledged that the student's mother had shared with the committee her belief that the student required daily reading instruction, and that the CSE discussed whether that level of service would have been "appropriate or necessary" (Tr. p. 287). The August 2008 CSE chairperson testified that the August 2008 CSE discussed recommending twice weekly reading instruction for 40-minute sessions, and determined that the recommended level of service was appropriate to allow the student to participate in and not miss his general education classes (Tr. pp. 287, 326-27). She further testified that reading instruction occurred "deliberately" during reading service sessions, but that it also occurred throughout the day in the student's other classes and also in skills seminar (Tr. pp. 287, 291). The hearing record provides examples of how the student's reading goals would have been addressed in his general education classes (Tr. pp. 345-51). The August 2008 CSE chairperson testified that both the reading teacher and the special education teacher who participated in the August 2008 CSE meeting believed that the student would have been able to achieve the goals developed at the meeting with the provision of twice weekly

reading instruction (Tr. pp. 288, 324-27; see Tr. pp. 97-98). The reading specialist testified that the student's 2008-09 annual goals could have been met with twice weekly reading intervention services in conjunction with the other recommended special education services (Tr. p. 453). The district's reading department co-chairperson, who is also a reading specialist, opined that the reading instruction recommended in the student's 2008-09 IEP was sufficient "in light of skills seminar, speech and language therapy and what happens in the classroom in the context of the total program" (Tr. pp. 808, 810-11).

Regarding the type of reading instruction recommended, according to the August 2008 CSE chairperson, the district's reading teacher explained that the district would have provided a reading program "based on the standards and based on research-based approaches to reading" (Tr. pp. 288-89, 358-60). The August 2008 CSE chairperson testified that specific instructional approaches were not discussed during the meeting because that would have been based upon students' individual needs (Tr. pp. 289, 359). Additionally, she testified to her belief that the program offered in the August 2008 IEP was in the LRE for the student because the student would have been educated alongside typical peers in the classroom, he would have had access to general education content, and it would have provided him with the opportunity to generalize skills learned to the classroom setting (Tr. pp. 290, 332). She further testified that the student's general education peers would have been "good models for learning," would have had information to share with each other, and that the student possessed the cognitive and academic ability to benefit from exposure to them (Tr. pp. 367-68). Other than the student's mother's disagreement regarding the frequency of the student's reading instruction, the August 2008 CSE chairperson did not recall any other objection to the student's August 2008 IEP recommendations (Tr. p. 289). The hearing record reflects that the student's mother's testimony about what occurred at the August 2008 CSE meeting was generally consistent with the August 2008 CSE chairperson's testimony (compare Tr. pp. 282-93, with Tr. pp. 1391-96).

Regarding the recommended frequency of reading instruction, testimony from the private psychologist, who stated that she had not evaluated the student since September 2006, indicated that she believed that two sessions of reading instruction per week for the student during the 2008-09 school year would not have been adequate (Tr. pp. 961-62, 1173-74, 1193; Dist. Ex. 29). The private psychologist testified that in order to "close the gap," direct reading instruction needed to be "amplified and relentless" and provided to the student for at least one hour every day, with additional support offered in the areas of comprehension, oral expression, and vocabulary (Tr. pp. 962-63). Although the private psychologist indicated that the annual goals contained in the August 2008 IEP were "ok," she also stated that she did not believe that they were comprehensive enough, nor was direct instruction offered at a level that would allow the student to "catch up" to his peers (Tr. pp. 968-69). However, the hearing record supports the district's contention that its recommended program and services would have met the student's reading needs (Tr. pp. 285-86, 288-89, 291, 324-28, 453). I note that comparing the student's rate of progress to that of his general education peers is not dispositive of whether he was offered a FAPE (Application of the Bd. of Educ., Appeal No. 09-102; Application of the Bd. of Educ., Appeal No. 05-094), or whether he 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]). In addition, 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). Furthermore, the hearing record supports the impartial hearing officer's determination that the private psychologist's "lack of understanding of the school district's reading program or academic support system undermined her strong objections to the school district's reading program for [the student]" (IHO Decision at p. 11; Tr. pp. 729-32, 739-44, 751-54, 1182-85, 1204-08, 1469-73).

In their due process complaint notice, the parents stated their disagreement with the 2008-09 IEP as a failure of the district "to provide [the student] with an appropriate placement and support" (Dist. Ex. 1 at p. 4). The hearing record as a whole reveals that the dispute regarding the 2008-09 IEP related to the frequency of reading intervention services offered by the district (Tr. pp. 1391-96; Dist. Ex. 8 at p. 7). I note that during the impartial hearing, the parents did not dispute the remainder of the August 2008-09 IEP, and that the director testified that the 2008-09 recommendations for skills seminar and related services would have met the student's needs and was his LRE (Tr. pp. 98-99, 1391-96). Based on the foregoing, I find that the hearing record supports the impartial hearing officer's conclusion that the student was offered a FAPE for the 2008-09 school year.

Regarding the 2009-10 school year, the hearing record supports the impartial hearing officer's determination that the district offered the student a FAPE. The district's speech-language pathologist, who attended the May 12, 2009 CSE subcommittee meeting, testified that during the meeting, she reviewed Windward reports, reports of the student's previous evaluations, and the student's 2008-09 IEP (Tr. pp. 689-92; Dist. Ex. 9 at pp. 6-7). She stated that during the May 2009 CSE meeting, the CSE chairperson asked the student's mother how her son was progressing, and that the CSE heard reports regarding the student's strengths and weaknesses from the Windward teacher (Tr. p. 694; Dist. Ex. 9 at p. 7). The May 2009 IEP reflected updated information compared to the August 2008 IEP (compare Dist. Ex. 8 at pp. 2-6, 8, with Dist. Ex. 9 at pp. 2-6, 8). Specifically, the May 2009 IEP added preferential seating (to increase student attention and minimize distractions), reteaching of materials (spiraling of information), scaffolding of questions, and using graphic organizers as program modifications for the student (Dist. Ex. 9 at pp. 2-3). The speech-language pathologist testified that these program modifications were discussed at the May 2009 CSE meeting, would have assisted the student in the general education setting, and would have been appropriate to implement upon the student's return to the district (Tr. pp. 699-700). Additional or modified testing accommodations in the May 2009 IEP included double the amount of extended time, and repetition of oral or tape recorded prompts (Dist. Ex. 9 at p. 3). The student's present levels of performance reflected then-current information from Windward, that the student usually applied decoding strategies and rules for syllable division, and that he paid attention to punctuation and applied spelling strategies during dictation (id. at p. 4). According to the May 2009 IEP, the student was noted to inconsistently read accurately for content, read fluently, and read with expression (id.). Reading needs included separating relevant from irrelevant information, making appropriate inferences based upon information presented, and skimming for information (id.). Annual reading goals were based upon the student's needs in the areas of reading comprehension, identifying the main idea and specific information, making inferences, and identifying relevant information (id. at p. 8).¹⁷

¹⁷ The May 2009 IEP also contained then-current information about the student's written language, math and speech-language skills and needs, and annual goals addressing those areas of need (Dist. Ex. 9 at pp. 4, 8-10).

The speech-language pathologist testified that the May 2009 CSE discussed a possible program for the student for the upcoming school year and reviewed annual goals (Tr. p. 694).¹⁸ For the 2009-10 school year, the May 2009 CSE determined that the student would receive consultant teacher direct services in the classroom, skills seminar, reading instruction, and speech-language therapy (Tr. pp. 694-95; Dist. Ex. 9 at pp. 1-2). The speech-language pathologist testified that the CSE chairperson explained the delivery of consultant teacher direct services, describing how the special education teacher provided special education instruction in the classroom and the importance of identifying the classes in which the consultant teacher would provide services (Tr. p. 695).

The May 2009 IEP reflected that the student would have received three 40-minute sessions per week of consultant teacher direct services in each ELA, science, social studies, and math class (Dist. Ex. 9 at p. 1). The director described consultant teacher direct services as a special education teacher providing support to students with disabilities in the classroom and also in the skills seminar (Tr. p. 101). The special education teacher was responsible for assisting students, adapting materials, ensuring instruction was designed in an appropriate way, and occasionally providing supplemental and supportive instruction (*id.*). Testimony from the speech-language pathologist and the director indicated that consultant teacher services were added to the student's May 2009 IEP because "we were told that [the student] may be returning to [the district] and we wanted to be sure he had enough support in the regular education classroom" (Tr. pp. 100, 696). Additionally, the May 2009 IEP offered four 30-minute consultant teacher indirect services per month (Dist. Ex. 9 at p. 1). The speech-language pathologist testified that with the consultant teacher indirect services, the special education teacher could have consulted with all of the student's regular education teachers, providing them with more strategies to use and keeping them updated on the student's progress (Tr. pp. 695-96). Regarding the 2009-10 school year, the speech-language pathologist testified that it was important for the student to have access to general education peers because it allowed him the opportunity to have age-appropriate models of certain skills, including the ability to ask for clarification, advocate for himself, follow a peer model, and take notes (Tr. pp. 700-01).

The director testified that based upon the reports from Windward available to the May 2009 CSE, the recommendation that the student receive twice weekly direct, pull-out reading instruction services was "sufficient" (Tr. pp. 103-04; Dist. Ex. 9 at p. 2). The reading specialist testified that the student's 2009-10 annual goals could have been met with twice weekly reading intervention services in conjunction with the other recommended special education services (Tr. pp. 453-54). The director further testified that "everybody" worked on students' annual goals, and the May 2009 IEP reflected that both the reading teacher and the special education teacher would have been responsible for evaluating the progress toward the student's reading annual goals (Tr. p. 101; Dist. Ex. 9 at pp. 7-8). Testimony from both the special education teachers who provided the student's third grade and fifth grade consultant teacher services reflected that reading instruction occurred in general education classes (Tr. pp. 550, 552-53, 555-57, 1468-72). The co-chairperson of the district's reading department testified how the student's reading goals could have been implemented during the 2009-10 school year, reflecting that instruction

¹⁸ The student's mother testified that the May 2009 CSE did not review the student's annual goals (Tr. pp. 1398, 1401-02).

occurred in both the classroom and during direct reading intervention sessions (Tr. pp. 754-59). The director testified that students' annual goals are also addressed during skills seminar (Tr. p. 76). Thus, the hearing record demonstrates how the student's reading needs would have been met in the general education, skills seminar, and direct reading instruction settings that were recommended for the student in the May 2009 IEP.

I note that administration of the Stanford 10 Reading assessment to the student on May 5, 2009, reflected a comprehension score in the 34th percentile (Parent Ex. N). Although the student's Stanford 10 Reading assessment vocabulary score was in the 22nd percentile, his "Total" score was in the 27th percentile (*id.*). The student's performance on the reading subtest of the Wide Range Achievement Test-IV in September 2008 was at the 25th percentile, and administration of the Gates-MacGinitie Reading Test to the student in September 2008 yielded a timed vocabulary subtest score in the 28th percentile, a timed comprehension subtest score in the 30th percentile, and a "Total" timed subtest score in the 27th percentile (*id.*). Although the private psychologist testified that for the 2009-10 school year she believed that twice weekly reading instruction was "not enough" for the student to "catch up as a reader," the hearing record does not show that by May 2009, the student's reading skills had decreased from the prior school year to the extent that in conjunction with his consultant teacher direct, skills seminar, and speech-language therapy services, he required more than the twice weekly reading instruction (Tr. pp. 969-70; Dist. Ex. 9; Parent Ex. N).

The speech-language pathologist testified that she recommended an increase of the student's speech-language therapy services from two 40-minute sessions to three 30-minute sessions per week at the May 2009 CSE meeting (Tr. p. 696; compare Dist. Ex. 8 at p. 1, with Dist. Ex. 9 at p. 2). She explained that her rationale for recommending the increase was to ensure that the student's speech-language needs would be met in the regular education classrooms in the event he returned to the district (Tr. pp. 696-97). She further explained that based on reports and discussion at the May 2009 CSE meeting with the Windward teacher, the student exhibited weaknesses in processing and with expressive and receptive language skills, and she believed that the student would have benefitted from both push-in and pull-out services (Tr. pp. 697-98). I note that the parents' due process complaint notice did not challenge the May 2009 CSE's recommendations regarding the student's speech-language therapy services (see Dist. Ex. 1).

With regard to the remaining allegations in the parents' due process complaint notice regarding the 2009-10 school year, although the parents alleged that the 2009-10 IEP did not explain the qualifications and training of the individuals providing direct consultant teacher services, State regulations do not require that information to be provided on an IEP (see 8 NYCRR 200.4[d][2]). Nonetheless, the director testified that the services the district provides are delivered by "highly qualified certified teachers" (Tr. p. 104; Dist. Ex. 1 at p. 5). In addition, although the parents alleged that the 2009-10 IEP was "silent as to what type of reading instruction it proposed for [the student]" (Dist. Ex. 1 at p. 5), the district was not required to identify a particular methodology in his IEP (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with at Disability, Appeal No. 09-058; Application of the Dep't of

Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46). The parents further alleged that the May 2009 IEP was silent as to the needs and reading levels of the other students in the student's proposed reading instruction group (Dist. Ex. 1 at p. 5). Although the director testified that the profile of the functional group the student might have been in would have been provided upon parental request (Tr. pp. 104-05), State regulations do not require that information to be provided on an IEP (see 8 NYCRR 200.4[d][2]). Even so, both the director and the co-chairperson of the reading department testified that students would have been grouped by similar needs during direct reading instruction (Tr. pp. 182, 809-10).

For the reasons stated above, the hearing record shows that the district sustained its burden to demonstrate that the May 2009 IEP would have offered the student a FAPE during the 2009-10 school year.

Lastly, the parents contend that the student's IEPs for the 2007-08, 2008-09 and 2009-10 school years failed to include a statement of the services based upon peer-reviewed research, thus denying the student a FAPE. Federal regulations require, in part, that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (20 U.S.C. § 1414[d][1]A)[i][IV]; 34 C.F.R. § 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). Official commentary to the federal regulations pertaining to section 1414(d)(1)(A)(i)(IV) of the IDEA states that the law

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

(Statement of Special Education and Related Services, 71 Fed. Reg. 46665 [Aug. 14, 2006]; see also Joshua A. v. Rocklin Unified Sch. Dist., 2009 WL 725157, at *2 [9th Cir. March 19, 2009]; Souderton Area Sch. Dist. v. J.H., 2009 WL 349733, at *10 [E.D. Pa. Feb. 11, 2009]).

Here, as described in detail above, the hearing record reflects that the CSE recommended programs based on the student's individual needs (see Dist. Exs. 6; 8; 9). Although the parents argue that the private psychologist's recommendations were based on peer-reviewed research, the

hearing record reveals that the district's recommendations were also based on peer-reviewed research (Tr. pp. 134-35, 142-49, 288-89, 358-59, 439-44, 738-44, 747-54; Dist. Ex. 40). The parents' preference for a different approach does not invalidate the appropriateness of the district's recommended programs (Souderton, 2009 WL 349733, at *10). Consistent with the impartial hearing officer's decision, I find that the district's recommended programs would have offered the student a FAPE.

Having found that the district offered the student a FAPE for the 2007-08, 2008-09 and 2009-10 school years, I need not reach the issue of whether the parents' unilateral placement of the student 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 the Bd. of Educ., Appeal No. 10-020; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

Lastly, the district argues that the impartial hearing officer erred by not finding that the statute of limitations barred the parents' tuition reimbursement claim for the 2007-08 school year. However, under the circumstances of this case, I need not reach this issue because, for the reasons set forth above, I agree with the impartial hearing officer's conclusion that the district offered the student a FAPE for the 2007-08 school year.

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 DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
May 27, 2010**



**PAUL F. KELLY
STATE REVIEW OFFICER**