



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-056

**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]**

### Appearances:

Goldstein, Ackerhalt & Pletcher, LLP, attorneys for petitioners, Jay C. Pletcher, Esq., of counsel

Hon. Michael J. Looby, Esq., Corporation Counsel, attorney for respondent, Alexander C. Collichio, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which denied their request for reimbursement for the cost of private speech therapy services for their son for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending kindergarten in a general education setting in one of the district's elementary schools (Dist. Ex. 26 at p. 1). The student has a diagnosis of childhood apraxia of speech (CAS) and exhibits reduced speech intelligibility, a significant expressive language delay, and a mild to moderate receptive language delay (Dist. Exs. 29; 39). Pursuant to his October 15, 2009 individualized education program (IEP) for the 2009-10 school year, the student was classified as a student with a speech or language impairment, and recommended to receive the related services of daily speech-language therapy and one session per six day cycle of occupational therapy (OT) services to address fine motor, visual perceptual and visual motor integration difficulties (Dist. Ex. 26 at pp. 1, 3). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; see Tr. p. 7).

At two years of age the student received home-based speech-language therapy through early intervention to address delays in expressive language and speech production skills (Tr. pp.

334-35; Dist. Ex. 60). The student's mother indicated that initially her son's progress with speech-language therapy was "extremely slow" and that she and her son's speech-language pathologist were concerned that he exhibited symptoms of CAS (Tr. pp. 336, 339; see Dist. Ex. 14 at p. 2). The hearing record defines CAS as

a neurological childhood (pediatric) speech sound disorder in which the precision and consistency of movements underlying speech are impaired in the absence of neuromuscular deficits (e.g. abnormal reflexes, abnormal tone). CAS may occur as a result of known neurological impairment, in association with complex neurobehavioral disorders of known or unknown origin, or as an idiopathic neurogenic speech sound disorder. The core impairment in planning and/or programming spatiotemporal parameters of movement sequences results in errors in speech sound production and prosody (Dist. Ex. 58 at pp. 1-2).

At that time, the student's speech-language pathologist utilized the Kaufman Speech Praxis Treatment Kit for Children (Kaufman Kit) to address the student's difficulty with speech-motor programming (Tr. pp. 284, 338; Dist. Exs. 37 at p. 2; 60 at p. 1). In September 2007, the student's speech-language therapy provider changed (Tr. p. 284, 336). The student's second speech-language pathologist initially used the Kaufman Kit with the student but after a "few months" of "very, very slow progress," began using the Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) approach to address his speech-motor needs (id.; Parent Ex. 14 at p. 1).<sup>1</sup> The hearing record defines the PROMPT approach as a "system of touch cues" applied by a speech-language therapy provider to a student's face, which provides tactile input, jaw stabilization, and manipulation of the tongue and lips (Tr. pp. 253-54). At the time she began working with the student, the PROMPT therapist described his speech skills as "very low," that he had "very few words, and the words he did have were not pronounced clearly," and that he used the same vowel-consonant combinations to represent many different words (Tr. pp. 255-56). She further described the student's difficulty with oral-motor movements for speech production, in that he exhibited poor jaw control, "groping" and "jaw sliding" (Tr. p. 256). Additionally, the student demonstrated difficulty with attention and focus during sessions, which the PROMPT therapist reported she had to "work through" prior to using the PROMPT approach (id.).

During the 2007-08 school year the student attended an integrated preschool program three half days per week as a "typical peer" and received speech-language therapy through the district's committee on preschool special education (CPSE) (Dist. Exs. 13 at p. 1; 14 at p. 1).<sup>2, 3</sup> The student's speech-language therapy program consisted of five sessions per week; two sessions provided by the PROMPT therapist that focused on the production of target sounds in different

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<sup>1</sup> This speech-language pathologist will herein be referred to as the student's "PROMPT therapist."

<sup>2</sup> At a point in time not identified by the hearing record, the student transitioned from early intervention services to the district's CPSE (Tr. p. 337; Dist. Ex. 13 at p. 1; Parent Ex. 14 at p. 1).

<sup>3</sup> The student also received music therapy services which were discontinued in July 2008 at the parents' request (Dist. Ex. 17).

positions of words using tactile prompts; and three sessions provided by another therapist that focused on improving the student's expressive language skills (Dist. Ex. 14 at p. 1; see Dist. Ex. 16).

In a November 2007 progress note, the PROMPT therapist reported that the student "tolerated the prompts well" and exhibited progress in his ability to coordinate breath support and vocalization to produce target phonemes (sounds) (Dist. Ex. 13 at p. 2). At that time, the student had begun to spontaneously combine words into two to six word phrases to communicate his wants and needs (id.). Following a review of the results from formal articulation and language testing conducted in December 2006 and a November 2007 informal language sample, the PROMPT therapist concluded that the student demonstrated both severely delayed speech production and expressive language skills (id. at p. 4). The PROMPT therapist indicated that continuing the student's services was "vital" to his continued progress (id.).

On February 12, 2008 a speech-language pathologist from a pediatric hospital conducted a private "formal evaluation regarding childhood verbal apraxia" (Dist. Ex. 14). Results of an administration of the Kaufman Speech Praxis Test indicated to the evaluator that the student's speech-motor planning and sequencing abilities were severely delayed for his age, and her report listed the "several significant characteristics of [CAS]" that were either observed or reported during the evaluation (id. at p. 1). The evaluator reported that she observed the student attempting to use PROMPT techniques on himself during the evaluation, which she commented was "nice to see as he [was] clearly thinking about his speech skills and reminding himself of what he need[ed] to do to produce certain sounds" (id.). Assessment of the student's oral-motor skills revealed the presence of oral apraxia, characterized by his difficulty producing sequences of nonspeech oral-motor movements such as lip puckering/retraction upon request (id. at p. 2). The evaluator concluded that the student exhibited oral apraxia and "a severe functional communication disorder with characteristics consistent with a diagnosis of [CAS]" (id.). She opined that the student's prognosis for continued improvements in verbal speech development was "favorable with continuation of intensive intervention using a motor-speech approach" (id.). She recommended that the student continue to receive five sessions per week consisting of a combination of PROMPT and "traditional" speech-language therapy through the CPSE (id.).

During the 2008-09 school year, the student attended a general education preschool class at the district's elementary school (Tr. pp. 343-44). On December 10, 2008 the CPSE convened to conduct the student's annual review and to prepare his IEP (Parent Ex. 5). The CPSE recommended a continuation of two 30-minute sessions per week of individual occupational therapy (OT) to improve his fine motor, visual perceptual and visual motor integration skills; one 60-minute per week individual home-based speech-language therapy session; four 30-minute sessions per week of individual speech-language therapy provided in an early childhood setting and one monthly 30-minute "team consult" (Dist. Ex. 18; Parent Ex. 5 at pp. 1-2).<sup>4</sup> The hearing record reflects that the PROMPT therapist provided the student's weekly home-based therapy session, which focused "strictly on speech production" using the PROMPT approach (Tr. pp. 264-67; Parent Ex. 5 at pp. 1-2). Another speech-language pathologist provided the four weekly

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<sup>4</sup> The PROMPT therapist was considered the student's "service coordinator" and was responsible for sharing information with the student's other speech-language pathologist in order to incorporate each other's goals into the therapy sessions (Tr. pp. 268-70).

30-minute sessions, which primarily focused on improving the student's expressive and pragmatic language skills (Tr. pp. 265-68; Dist. Ex. 18; Parent Ex. 5 at pp. 1-2).

In January 2009, the PROMPT therapist prepared a statement regarding the student's "pattern of regression in skills" observed over breaks in service, and her recommendation that the student receive extended school year (ESY) services during summer 2009 (Dist. Ex. 20). The hearing record reflects that the student received CPSE speech-language therapy ESY services during summer 2009 (Dist. Ex. 55 at pp. 66-70; Parent Ex. 6 at p. 1).

The student's mother stated that in spring 2009 she began calling the CPSE office to discuss her son's transition to the Committee on Special Education (CSE), and in July 2009 spoke to the district's director of special education (Tr. pp. 345-46). According to the student's mother, the director of special education informed her that the district was "backed up" and was trying to hold meetings first for students with "severe needs" (Tr. pp. 346-47). The student's CPSE services concluded on August 31, 2009 (Parent Ex. 5 at p. 1). The parent contacted the district again in late August/early September 2009 and received a call from the CSE chairperson on or about September 8, 2009, informing her that the CSE was in the process of scheduling a meeting (Tr. pp. 347-48). At the commencement of the 2009-10 school year, the student attended one of the district's elementary schools in a general education kindergarten class (Tr. p. 350). By letter dated September 10, 2009 the district requested and the parents provided consent to conduct cognitive, speech-language and achievement assessments of the student (Dist. Ex. 21).

In a letter dated September 12, 2009 to the CSE chairperson, the PROMPT therapist indicated that she had been working with the student since 2006 while he was receiving early intervention services, and throughout the time he had received services through the CPSE (Parent Ex. 14 at p. 1). She reported that her therapy focused on using the PROMPT approach, which she described as "a dynamic tactile method of treatment for motor speech disorders which capitalizes upon touch pressure, kinesthetic and proprioceptive cues," developed for the treatment of "verbally apraxic children" (*id.*). According to the PROMPT therapist, the PROMPT approach had been "highly effective in helping [the student] to develop improved coordination and control over his jaw, lips and tongue, and ha[d] enabled him to develop more intelligible speech" (*id.* at p. 2). The letter included specific information about the target sounds and oral movements addressed during therapy sessions and acknowledged that although the student had exhibited "significant gains as a result of the PROMPT approach," he continued to require remediation (*id.*). The PROMPT therapist identified the speech-motor skills the student needed to improve in order to produce target sounds, and for the upcoming school year recommended that the student continue to receive one 60-minute session per week of speech therapy using the PROMPT approach (*id.*).

On September 14, 2009 a district "education specialist," who was also employed by the district as a CSE subcommittee chairperson, conducted the student's educational evaluation (Dist. Exs. 21 at p. 2; 23). The evaluator indicated that the student presented with severe speech-language delays, "especially in the area of articulation" (Dist. Ex. 23 at p. 2). She made reference to the student's receipt of therapy using the PROMPT approach during the previous school year, reporting that he had "responded well to the [PROMPT] program" (*id.*). The educational evaluation report reflected the classroom teacher's statement that although the student was "friendly," "cooperative" and interacted well with peers, she was "concerned about

[the student's] articulation and speech production delays" (*id.* at p. 3). During a classroom observation of the student, the evaluator reported that "it was very difficult to understand [the student's] response" to a question posed to him about a recently completed task (*id.*). After completion of the Woodcock-Johnson III Tests of Achievement and the Bracken Basic Concepts Scale-Revised, the evaluator reported that the student did not "display behaviors that interfere[ed] with learning or disrupt[ed] the educational process" and that when compared to same age peers, he performed at a grade appropriate level (*id.* at p. 5). The evaluator recommended that the student should receive "ample opportunity to access the general education kindergarten curriculum," noting that the CSE would determine his eligibility for speech-language and OT services (*id.*).

On September 15, 2009 a district school psychologist conducted the student's psychological evaluation (Dist. Ex. 24). The resultant report reflected the student's history of receiving speech-language therapy, noting the use of the PROMPT approach to address his CAS diagnosis (*id.* at p. 1). The school psychologist reported that although the student's "articulation difficulties were noted, his speech at the word level was generally intelligible," but that "his connected speech was difficult to understand when the context was not known" (*id.* at p. 2). Following an administration of the Differential Abilities Scale-Second Edition, the school psychologist reported that the student's cognitive abilities fell "within the average range overall" and that his visual spatial and visual motor skills fell within the borderline range, noting that OT services had been recommended (*id.* at p. 3).<sup>5</sup> The school psychologist relayed that in a telephone conference with the student's mother on September 22, 2009, the parent expressed to her an interest in the student receiving daily speech-language therapy, and a "strong interest" in the student continuing to receive "his specialized [PROMPT] therapy services" (*id.* at p. 4).

On September 17, 2009 the district's teacher of the speech and hearing handicapped (speech therapist) conducted assessments of the student's articulation and language skills (Dist. Ex. 39). In her report, the speech therapist reiterated that the student had a diagnosis of CAS and that he had "used the PROMPT system" (*id.*). An administration of the Goldman-Fristoe Test of Articulation (GFTA) to the student, which assessed his ability to correctly produce target sounds in varying positions of words yielded 44 errors, resulting in a score below the first percentile (Tr. pp. 167-69; Dist. Ex. 39). The speech therapist estimated the student's intelligibility of connected speech to be at approximately 20 percent in a known context, and reported that his "severely delayed sound production skills [were] interfering with communication in the classroom" (Dist. Ex. 39). An administration of the Oral and Written Language Scales revealed to the speech therapist that the student's receptive and expressive language skills were mildly to moderately delayed (Tr. pp. 169-72; Dist. Ex. 39). The speech therapist opined that the student required "intensive intervention" to gain skills and recommended daily speech-language therapy consisting of three 30-minute group and three 30-minute individual sessions of speech-language therapy every six day cycle (Tr. pp. 173-74; Dist. Ex. 39).

On September 24, 2009 a CSE subcommittee convened for a "[r]evaluation CPSE to CSE [r]eview" meeting (Dist. Ex. 26).<sup>6</sup> Attendees included the CSE chairperson who had

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<sup>5</sup> On September 16, 2009 an occupational therapist prepared a consultation report of her review of the student's December 10, 2008 preschool OT report, resulting in a recommendation for one individual session of OT per six-day cycle (Dist. Ex. 25).

<sup>6</sup> When asked why the student's CSE meeting was not conducted prior to the beginning of the school year, the

conducted the student's educational evaluation, the school psychologist who had conducted the student's psychological evaluation, a district social worker, the student's regular education kindergarten teacher, a district special education teacher, the district speech therapist, and the student's mother (Tr. pp. 348-50; Dist. Exs. 23 at p. 5; 24 at p. 4; 26 at p. 4; 61). During the meeting, the student's mother discussed the student's diagnosis of CAS and past speech-language therapy history, including his therapy that used the PROMPT approach (Dist. Ex. 61). The CSE subcommittee discussed the student's progress using the PROMPT approach and some of the information contained in the September 12, 2009 letter from the PROMPT therapist (*id.*). The speech therapist reviewed the results of her September 17, 2009 assessment of the student's articulation and language skills, and her recommendation that the student receive daily speech-language therapy (*id.*).<sup>7</sup> The September 24, 2009 CSE subcommittee determined that the student was eligible to receive related services as a student with a speech or language impairment, and for the 2009-10 school year recommended that he receive three 30-minute individual and three 30-minute group sessions of speech-language therapy per six-day cycle (Dist. Exs. 26 at p. 1; 61). The CSE subcommittee further recommended one individual session of OT services per six-day cycle (*id.*). While the student's mother agreed to the recommendation that her son receive daily speech-language therapy at school, she expressed her disagreement with the CSE subcommittee's decision not to continue the speech therapy the student was receiving with the PROMPT therapist (Tr. pp. 316-17, 351-52; Dist. Ex. 61).<sup>8</sup> The CSE chairperson responded that the CSE subcommittee was not able to recommend a methodology; it could only recommend services available within the district (Tr. pp. 317-18; Dist. Ex. 61). She provided the student's mother with information regarding how to appeal the CSE subcommittee's decision to the director of special education (Dist. Ex. 61; see Tr. p. 345).

In a letter dated September 24, 2009 to a district CSE chairperson, the student's mother appealed the CSE subcommittee's decision to "disallow PROMPT therapy" (Dist. Ex. 30; see Dist. Ex. 27 at p. 2). The letter described the student's history of speech-language therapy, his diagnosis of CAS, and the circumstances under which the student began receiving speech therapy from the PROMPT therapist (Dist. Ex. 30). The student's mother indicated in her letter that the PROMPT approach had been "highly effective" for the student and reported that he had demonstrated "steady, documentable progress utilizing this approach in conjunction with traditional speech therapy to address his language goals" (*id.*). While acknowledging the effectiveness of the PROMPT approach for her son, the student's mother indicated that he continued to require intervention to improve his speech production skills (*id.*). She further expressed her concerns about the effects of the student's speech production skills on his ability to interact with peers and on his academic skills (*id.*). The student's mother requested that the student continue "to follow the path of treatment which has shown positive, documentable results

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CSE chairperson testified that the student's speech-language evaluation was not completed in time for the CSE to convene any sooner (Tr. pp. 309-10).

<sup>7</sup> Additionally, the kindergarten teacher reviewed the results of the educational assessments she had conducted with the student, and discussed his fine motor needs and his tendency to exhibit distractibility in the classroom (Dist. Ex. 61). The CSE chairperson reviewed the results of her September 14, 2009 educational evaluation of the student and the September 16, 2009 OT consultation report (Dist. Ex. 61).

<sup>8</sup> The district commenced the student's speech-language therapy services on September 25, 2009 (Tr. p. 174). Subsequently, the student's mother informed the district's speech therapist that she was privately providing the student with the services of the PROMPT therapist (Dist. Ex. 38 at p. 2).

and is highly regarded as the research-based best practice for children with Apraxia of Speech" (id.).

On October 8, 2009, a speech-language pathologist from the district's "central" CSE (CSE speech-language pathologist) prepared a report of her review of the student's records, conferences with the kindergarten teacher, speech therapist and school psychologist, and her classroom observation of the student (Dist. Ex. 29). The report provided a summary of the student's early intervention and preschool speech-language therapy services, the diagnosis of CAS, and the recommendations stemming from the September 24, 2009 CSE meeting (id. at p. 1). In her report, the CSE speech-language pathologist reiterated specific information from the speech therapist's September 17, 2009 assessment, the PROMPT therapist's September 12, 2009 progress letter and the November 26, 2008 annual review progress report, concluding that "[the student] continues to exhibit severely delayed speech production skills, mildly delayed receptive language skills, and severely delayed functional expressive language skills" (id. at p. 2-3). During an observation of a small group activity, the CSE speech-language pathologist reported that the student presented as "friendly," and attempted to verbally interact with peers and adults (id. at p. 3). She characterized the student's verbal expression skills as using sentence structures of limited length, complexity and content, with delays in age appropriate morphology and syntax noted (id.). The CSE speech-language pathologist reported that the student's expressive language skills were "negatively impacted by significant delays in speech production" (id.). The intelligibility of the student's spontaneous speech in an unknown context to an unfamiliar listener was judged to be "poor," and the report outlined the variety of speech sound omissions, substitutions, distortions and phonological processes he exhibited (id.). The CSE speech-language pathologist concluded that the student's articulation and language delays were "negatively affecting his ability to be an effective communicator within the classroom and community," and hindered his ability to express himself (id. at p. 4). She cautioned that delayed speech production skills "may negatively impact the development of sound to symbol associations," a precursor to the skills needed for reading and spelling (id.). The CSE speech-language pathologist reported that she concurred with the speech therapist that "intense speech/language therapy is warranted at this time," and she did not alter the September 24, 2009 CSE subcommittee's speech-language therapy recommendations (compare Dist. Ex. 26 at p. 1, with Dist. Ex. 29 at pp. 3-4).

On October 15, 2009 the CSE convened to review the parents' appeal of the September 24, 2009 CSE subcommittee's recommendation regarding their son's speech-language therapy services (Dist. Ex. 31; see Tr. pp. 121, 125). Attendees included the coordinator of the central CSE, who participated at the meeting as the CSE chairperson, a district psychologist, the CSE speech-language pathologist who had conducted the October 8, 2009 observation of the student, the student's speech therapist, a special education teacher, the student's kindergarten teacher, an additional parent member and the parents (Tr. pp. 121, 125; Dist. Ex. 31 at p. 4; see Dist. Ex. 29 at p. 4). At the outset of the meeting, the parents established that the purpose of the meeting was to review the September 24, 2009 CSE subcommittee's decision to not continue the student's "PROMPT therapy" (Parent Ex. 18). The CSE reviewed the format of the student's preschool speech-language services, in that the four 30-minute sessions per week primarily focused on addressing the student's language needs with some focus on improving his articulation skills, and the once weekly 60-minute session focused on addressing his speech production skills using the PROMPT approach (id.). The CSE speech-language pathologist reviewed the speech therapist's September 17, 2009 assessment results and her October 8, 2009 observation of the student in the

classroom, noting that the student exhibited a severe articulation and a severe expressive functional language difficulty (id.). The speech therapist reported to the CSE that she had conducted 14 sessions with the student since the initiation of speech-language therapy at the district, and that during those sessions she had noted improvement in the student's ability to produce the targeted sound (id.). The speech therapist explained her rationale for the target sound she selected to work on with the student, and described the methods used in therapy to achieve his goals (id.). The CSE reiterated the September 24, 2009 recommendations regarding the student's speech-language therapy services, and discussed the rationale for group therapy sessions (id.). The CSE speech-language pathologist expressed her belief that the services offered to the student were more "intense" than the student's PROMPT services because the speech therapist was addressing the student's articulation needs on a daily basis (id.). The student's mother expressed her concern that the speech-language therapy the student received in preschool also addressed his CAS needs on a daily basis, and that the district was observing progress because the services of the PROMPT therapist had continued (id.). The CSE speech-language pathologist explained that the district had many treatment approaches available to it that were appropriate to use with students with a diagnosis of CAS, to which the student's mother described the research she had conducted regarding CAS and various treatment approaches, and her conclusion that the PROMPT approach was "the best approach to take" and "the most appropriate for [the student's] education" (id.). The CSE chairperson responded that the district would not put a specific program on an IEP because there were multiple programs available to the district's teachers (id.). The student's mother stated that "PROMPT" did not necessarily need to be on the student's IEP, but reiterated her request that the services of the PROMPT therapist continue (id.). The CSE responded that the district would not pay for services outside of the district when it believed that it had "somebody competent enough to provide the service at the intense level" required, even though it might not be using the specific program desired by the parent (id.). The CSE stated its belief that appropriate services were being offered to the student (id.).

In a letter dated November 19, 2009 to the CSE chairperson of the October 15, 2009 meeting, the parents informed the district of their disagreement with the CSE's recommendations, specifically, its "failure to provide appropriate speech/language therapy designed to address the needs of a child with Apraxia" (Parent Ex. 13). The parents further advised the district that they would obtain the services of the PROMPT therapist for their son and seek reimbursement for those services from the district (id.).

On December 3, 2009, the parents, through their attorney, filed a due process complaint notice wherein the parents asserted that the district failed to provide appropriate speech-language services to their son (Parent Ex. 1 at p. 4). The parents also asserted that the speech-language services being offered to their son were not provided by a therapist with the sufficient background, training and experience in working with students with apraxia (id.). The parents further asserted that the district failed to utilize an appropriate, research based methodology for working with students with apraxia (id.). Finally, the parents asserted that the decisions made by the CSE were made outside of and prior to the CSE meeting (id.).

By letter dated December 14, 2009, the district answered the parents' due process complaint notice, wherein it denied (1) that the student was not offered a free appropriate public

education (FAPE);<sup>9</sup> (2) that it failed to provide the student with appropriate speech-language services; (3) that its speech therapist lacked sufficient background, training and experience in working with CAS; (4) that it failed to use an appropriate, research based method of working with children diagnosed with CAS; (5) that the CSE decisions were predetermined; and (6) denied any remaining factual or legal assertions.

An impartial hearing commenced on February 23, 2010 and concluded on February 24, 2010. During the impartial hearing and in a post hearing brief the parents raised the issue that the district could not have offered their son a FAPE because the district did not have an IEP in place at the beginning of the school year (Tr. pp. 143-45). The district opposed the introduction of the issue at the impartial hearing (Tr. pp. 143-44, 228).

In a decision dated May 17, 2010 the impartial hearing officer concluded that the district had offered the student a FAPE for the 2009-10 school year (IHO Decision at p. 12). The impartial hearing officer determined that the issue of the IEP not being in place at the beginning of the school year was not raised in the due process complaint notice and as such, was not properly before him (*id.* at pp. 7-8). The impartial hearing officer also determined that the services offered to the student were appropriate (*id.* at p. 13), that the CSE relied on sufficient evaluative data (*id.* at p. 16), that the annual goals were not inappropriate (*id.*), and that the record did not support a finding that the student's present levels of performance were misrepresented on his IEP (*id.*). The impartial hearing officer also determined that the hearing record did not demonstrate that the district has an "unofficial" policy of never recommending the use of PROMPT therapy (*id.* at p. 17), or that the only services that could be considered by the CSE were those that were already available in the "building" (*id.* at pp. 12-13). Further, among other things, the impartial hearing officer determined that the CSE did not predetermine which related services the student was to receive for the 2009-10 school year (*id.* at p. 13), that the CSE's declination to identify a specific methodology in an IEP did not deny the student a FAPE or interfere with the parents' ability to participate at the CSE (*id.* at p. 14 ) and that the hearing record showed that the student was offered services utilizing "researched based methodology" to address the CAS (*id.* at p. 17). The impartial hearing officer also found that the district's policy requiring prior approval to place a student in a more restrictive environment was not inconsistent with the district's obligation to place a student in the least restrictive environment (*id.* at p. 14).

The parents appeal. The parents assert, among other things, the following: (1) that the impartial hearing officer erred when he determined that the claim of an untimely IEP was not properly before him; (2) that they were denied the ability to meaningfully participate in the development of their son's special education program because of district policies that limited the CSE's discretion in recommending the use of the PROMPT methodology; (3) that the CSE meetings did not include any service providers with knowledge of their son, and that the CSE failed to consider their son's progress using the PROMPT methodology; (4) that the district

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<sup>9</sup> The term "free appropriate public education" means special education and related services that-  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]).

failed to articulate a basis for changing the methodology by which speech services had been successfully delivered; (5) that the district failed to prove that the progress shown by the student in the period between the September and October 2009 CSE meetings was due to the district's services, rather than a combined result of the privately obtained PROMPT therapy and the district's speech-language therapy; (6) that the district's speech therapist was not qualified to provide the appropriate services; and (7) the parents further assert that the student requires the services of the PROMPT therapist, and that equitable considerations favor reimbursement for those services. As relief,, the parents request a State Review Officer (1) find that the district failed to offer the student a FAPE, (2) order the district to reimburse them for the costs of the PROMPT therapist's services that they privately obtained for their son during the 2009-10 school year, and, (3) order the district to continue to pay for the PROMPT therapist's services for the 2010-11 school year.

In its answer, the district denies the allegations contained in the parents' petition.

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 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 least restrictive environment (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).

Before I address the parents' claim that the services the district offered to the student were inappropriate, I will address two preliminary matters. The parents assert that the impartial hearing officer erred in his determination that the issue of the district failing to offer their son a FAPE by not having an IEP in place prior to the start of the school year was not properly before him because the parents did not raise the issue in their due process complaint notice. The district asserts that the impartial hearing officer properly determined that the parents were precluded from raising this issue during the impartial hearing. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]), or the original complaint is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; see Application of the Dep't of Educ., Appeal No. 07-059; Application of the Dep't of Educ., Appeal No. 07-046; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-139). The hearing record demonstrates that the parents' due process complaint notice did not raise the issue of timeliness of the student's 2009-10 IEP, that the original complaint was not amended per permission given by the impartial hearing officer, and that the district opposed the introduction of this issue at the impartial hearing (Parent Ex. 1 at p. 4). I find that the impartial hearing officer correctly concluded that the issue was not properly before him (Tr. pp. 143-44, 228).

The parents also assert that they were denied the ability to meaningfully participate in the development of their son's special education program because of district policies that limited the CSE's discretion to recommend the use of a specific methodology and utilize services outside of the building. According to the parents, the district engaged in predetermination because the district's CSE personnel noted during the meeting that the CSE was not allowed to recommend "PROMPT" on an IEP, even it was "appropriate" for the student (Parent Ex. 18). Here the hearing record demonstrates that the parents had a full and meaningful opportunity to participate in their son's IEP development during two CSE meetings even if the district came to a different conclusion regarding the use of the PROMPT method. While a district is not precluded from listing methodologies on an IEP, it is not required to do so unless the student's unique needs require incorporating a methodology onto the IEP. An IEP must provide for appropriate services in the student's areas of need. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (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. 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). In this case, the hearing record demonstrates that parent participation was not significantly impeded such that a FAPE was denied, and that the IEP was

reasonably calculated to enable the student to obtain educational benefit without the specific recommendation for the use of the PROMPT method. Therefore, I concur with the impartial hearing officer and find that the district's decision not to indicate a specific methodology did not render the IEP inappropriate.

Moreover, IDEA requires that the services to be offered a student, such that a FAPE is offered, are dictated by the student's needs, not by location of the services (Rowley, 458 U.S. at 203). If a student requires services that are not offered within a specific building, then, as a general rule, a district must ensure that the student has access to the services if such services are needed to afford a FAPE. I concur with the impartial hearing officer's determination that there is sufficient evidence in the record (e.g. Parent Ex. 18) to show that the CSE's offer of services was appropriately based on the student's needs (IHO Decision at p. 13; see W.S. v Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y.]["Nothing in IDEA compels the school district to look for private school options if the [district], having identified the services needed by the child, concludes that those services can be provided by the public school"]).

The hearing record also supports the impartial hearing officer's conclusion that the services recommended in the September 24 and October 15, 2009 IEPs offered the student a FAPE (Dist. Exs. 26; 31; IHO Decision at pp. 10-12). Both IEPs offered the student daily speech-language therapy; three individual 30-minute sessions per six-day cycle, and three group 30-minute sessions per six day cycle (Dist. Exs. 26 at p. 1; 31 at p. 1). Contrary to the parents' assertion that the CSE meetings did not "sufficiently" consist of individuals with knowledge of the student, the September 24, 2009 CSE subcommittee meeting consisted of the student's kindergarten teacher, and the school psychologist and the speech therapist who had both recently evaluated the student (Dist. Ex. 26 at p. 4). At the CSE subcommittee meeting, the student's mother reviewed the speech-language therapy services her son had received since early intervention, and the CSE subcommittee reviewed information about the student's progress from the PROMPT therapist's September 12, 2009 letter (Dist. Ex. 61). Members of the October 15, 2009 CSE meeting included the student's mother, the CSE speech-language pathologist who conducted the student's classroom observation, his kindergarten teacher, and the speech therapist (Dist. Ex. 31 at p. 4). Thus, the September 2009 CSE subcommittee and the October 15, 2009 CSE were composed of members who had knowledge of the student and also had available to them, information about the student's prior speech-language therapy services. The parents' appeal did not allege the inappropriateness of either the student's present levels of performance or his annual goals contained in the October 15, 2009 IEP.<sup>10</sup> The hearing record supports a finding that the description of the student's speech-language needs and the annual goals contained in the October 15, 2009 IEP were based upon the documentation available to the October 15, 2009 CSE and were appropriate for the student (Dist. Ex. 31; see Dist. Exs. 29; 39; Parent Ex. 14).

The student's speech therapist during the 2009-10 school year holds a Masters degree in education and is permanently certified by the State of New York as a teacher of the speech and hearing handicapped (Tr. pp. 162-63; Dist. Exs. 33; 35). She has been employed by the district for approximately 27 years and testified she has "vast experience" providing treatment to students with speech-language disorders (Tr. pp. 163-64). According to the speech therapist, providing articulation therapy to students was her "specialty," and for many years the majority of

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<sup>10</sup> The October 15, 2009 IEP superseded the September 24, 2009 IEP.

her caseload was composed of students with articulation disorders, including students with "apraxia" (Tr. pp. 164-65). In testimony, she described her understanding of CAS as a neurologically based "sound motor programming disorder" and stated that every year she has provided treatment to students exhibiting "symptoms" similar to those of the student (Tr. pp. 165-66). Following her September 17, 2009 assessment of the student, the speech therapist concluded that he required daily speech-language therapy focusing on improving sound production skills as well as expressive language skills (Tr. pp. 172-73, 191-92; Dist. Ex. 39). The speech therapist attended the September 24, 2009 CSE subcommittee meeting, reviewed her assessment report and recommendations, and developed the student's speech-language annual goals (Tr. pp. 204-05; Dist. Exs. 26 at pp. 4-5; 61). With the student's mother's approval, the student's speech-language therapy services commenced the following day on September 25, 2009 (Tr. p. 174; Dist. Ex. 61).

The speech therapist testified that when selecting a methodology, program or approach to use with a particular child "it has to be individualized" and based upon factors such as the student's motivation, and what sounds the student is able to produce and developmentally should be able to produce (Tr. pp. 180-82). To address the student's speech production skills during the student's individual therapy sessions, the speech therapist testified that she used portions of programs including the Kaufman Kit, which she stated was specifically designed to treat apraxia; Say and Do Sound Production; Lindamood Phoneme Sequencing Program and The Source for Apraxia in addition to speech production techniques she had developed over "many, many years" (Tr. pp. 177-80; Dist. Exs. 36; 37). The speech therapist testified that she used techniques such as having the student watch himself in a mirror and providing him with verbal and visual cues during speech production (Tr. pp. 178-79, 181-82, 191). The hearing record reflects that the purpose of the student's group therapy sessions was to carry over skills acquired during individual therapy sessions, expand the student's length of utterances and to have other students in the group provide models for each other (Tr. pp. 175-76, 192). Additionally, the speech therapist provided the parents with a "speech notebook" used as a means to communicate between home and school, and to provide additional practice activities to the student (Tr. pp. 176-77; Dist. Ex. 38).

At the October 15, 2009 CSE meeting, the student's speech therapist reported that during the 14 sessions she had conducted with the student he exhibited progress and improvement (Parent Ex. 18; see Dist. Ex. 43).<sup>11</sup> As stated above, at the October 15, 2009 CSE meeting the speech therapist explained her rationale for the target sound she selected to work on with the student, and described the methods used in therapy to achieve his goals (Parent Ex. 18). I note that at the meeting, the parent did not object to the CSE's recommendations regarding the frequency or duration of the speech-language therapy services offered to her son at school (Parent Ex. 18). Although the speech therapist testified that she had not received formal training regarding CAS, the hearing record as a whole does not support the parents' allegation that the district's speech therapist lacked knowledge of CAS or that her selection of treatment methods was inappropriate.

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<sup>11</sup> While not dispositive, I note that subsequent to the October 15, 2009 CSE meeting, the district's speech therapist documented that the student exhibited progress toward his IEP goals through the time of the impartial hearing (Dist. Exs. 38; 40; 41; 42; 43).

A speech-language pathologist who testified on behalf of the district as an expert witness in the treatment of speech-language disorders stated that there were many approaches, methodologies, and programs available to treat students with CAS, and that there was no one specific methodology recommended by the American Speech-Language-Hearing Association (ASHA) (Tr. pp. 13-16, 21-25; see Dist. Ex. 57 at pp. 32-41). The hearing record reflects that a multi-sensory approach for the treatment of CAS was an "often-cited recommendation" and included the use of sign language, pictures, augmentative and alternative communication (AAC) systems, visual and verbal prompts and touch cues (Tr. pp. 21-22; Dist. Ex. 57 at p. 39). She further testified that it was essential that clinicians record data to determine if a student was exhibiting progress with the approach selected, and that many times experienced clinicians combined approaches (Tr. p. 22). She further stated that she had used the both the PROMPT approach and the Kaufman Kit with students and found the Kaufman Kit to be "very effective" (Tr. pp. 25-30, 34). As stated above, the speech therapist testified that the treatment approaches used with the student included use of the Kaufman Kit and visual and verbal prompts, and she reported that the student exhibited progress (Tr. pp. 177-79, 181-82, 191; Dist. Exs. 40; 43; Parent Ex. 18).

In testimony, the PROMPT therapist described the significant progress the student had exhibited since she began providing therapy to him (Tr. pp. 255-58). At the time of the impartial hearing, according to the PROMPT therapist, the student had developed "much more functional communication," and was putting words together and using full sentences (Tr. pp. 257-58). Although the student's speech was not intelligible to everyone all the time, the PROMPT therapist stated that the student could "get his basic needs met and he [could] communicate his thoughts much more easily now than he could [before]" (Tr. p. 258). A review of the hearing record reveals that two major differences between the PROMPT approach and the speech-motor programs and methodologies used by the district are the physical prompts the clinician provides to the student's face and the rationale used to select target sounds (Tr. pp. 25-28, 253-55, 261-62; Dist. Exs. 37; 56). The hearing record does not indicate the level of physical prompting the student continued to require in order to achieve his goals, nor is there information in the hearing record suggesting that the district's speech therapist could not have provided some type of physical prompting or touch cues to the student if she determined that to be an appropriate therapy technique (Tr. pp. 246-307; Dist. Exs. 37 at p. 10; 55; Parent Ex. 14). I note that the speech therapist did not indicate that the student required physical prompting in order to demonstrate progress during her therapy sessions (Tr. pp. 161-231; Dist. Exs. 38; 40; 41; 42; 43). Further, the speech therapist provided a basis for the target sound she initially selected for the student (Dist. Ex. 61). The hearing record reflects that following a discussion with the PROMPT therapist, the speech therapist continued to work on target sounds she determined to be appropriate for the student to be working on, and also began working on the target sound that the PROMPT therapist addressed during her therapy sessions in order to support the PROMPT therapist's goals (Tr. pp. 224-25; Dist. Exs. 38 at p. 16; 43; 61). While the hearing record shows that use of the PROMPT approach was beneficial to the student as a younger child, it does not reflect that given the student's current speech-language skills, he required the use of the PROMPT method in order to receive a FAPE. Based upon the hearing record that reflects the student's significant communication needs relating to his CAS, the district's recommendation for a six day cycle of daily speech-language therapy that focused on the student's sound production skills was appropriate to meet his needs (Tr. pp. 191-92). Based on the foregoing, the hearing record reflects that there were no procedural infirmities rising to the level of a denial of a FAPE

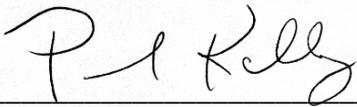
and that the district's offered program was reasonably calculated to enable the student to obtain educational benefits for the 2009-10 school year.

Having found that the district offered the student a FAPE, I need not reach the issue of whether the private services obtained by the parents were appropriate for the student for purposes of reimbursement and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have examined the parents' remaining contentions regarding the district's offered program and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
August 9, 2010



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