



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-091

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 [REDACTED] School District

Appearances:

Law Offices of Neal H. Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

Keane & Beane, P.C., attorneys for respondent, Stephanie M. Roebuck, 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 Eagle Hill School (Eagle Hill) for the 2009-10 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Eagle Hill (Tr. p. 641; Parent Ex. L). Eagle Hill is an out-of-state private school which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student has cognitive skills in the average to high average range with "better-developed" nonverbal skills compared to verbal skills (Dist. Ex. 29 at p. 14). Academically, the student exhibits deficits in reading decoding and written language skills (Dist. Exs. 29 at p. 16; 43 at p. 4). As a young child, the student received occupational therapy (OT), speech-language therapy, and the services of a special education teacher through the Early Intervention Program (Tr. pp. 568-69). While attending nursery school, the student continued to receive OT, speech-language therapy and the services of a special education

itinerant teacher (SEIT),¹ provided to the student through the Committee on Preschool Special Education (CPSE) (Tr. pp. 23-24, 565-66, 569; Dist. Exs. 28 at p. 1; 29 at p. 14). Between ages three and four, the student exhibited significant difficulty with speech production and was evaluated by a developmental pediatrician, who offered a diagnosis of childhood apraxia of speech (Tr. pp. 570-71; see Dist. Ex. 28 at p. 1).

In May 2006, respondent's (the district's) Committee on Special Education (CSE) found the student eligible for special education services for his upcoming kindergarten school year as a student with a speech or language impairment (Tr. p. 24). During summer 2006, the student received twice weekly services from both his former SEIT and his speech-language therapist (Tr. pp. 574-76). During the 2006-07 school year, the student's kindergarten special education program consisted of a combination of "special class and inclusion classes," and a continuation of OT and speech-language therapy (Tr. p. 24). The special class was composed of a combination of eleven kindergarten, first grade and second grade students; a special education teacher; a teacher assistant (TA); and a teacher aide (Tr. pp. 35, 573). The hearing record reflects that the student received "primary instruction" for reading and language arts in the special class setting, but that he received social studies and science instruction in a general education kindergarten class accompanied by an adult from the special class (Tr. pp. 24, 573-74; see Dist. Ex. 49 at p. 1). The student's mother stated that her son exhibited distractible behaviors while in the general education setting, but overall, he "did wonderful" in his kindergarten program (Tr. pp. 574, 576-77; see Dist. Exs. 44 at p. 1; 48).

At the commencement of the 2007-08 school year, the student's special education program was similar to the program he had received during kindergarten (Tr. p. 578; Dist. Ex. 49 at pp. 1-2). In fall 2007, as part of a reevaluation of the student, the district conducted psychological, educational, OT and speech-language evaluations; updated his social history; obtained copies of his medical health records; reviewed his report card and teacher report; and conducted a classroom observation (Tr. pp. 24-26; Dist. Exs. 40-47). In the school psychologist's social history, the student's father reported that the student's social performance had improved, that the student "ha[d] friends everywhere he [went], "and that he had observed improvements in all of the student's academic areas (Dist. Ex. 46).

According to the school psychologist's September 2007 psychological evaluation report, the student was "adorable" and "verbose," and he exhibited "distractive, over-active and impulsive" behaviors (Dist. Ex. 44 at pp. 1, 5). The student's reading skills - particularly his difficulty in remembering letter sounds - were a concern, as were his weaknesses in word retrieval and phonological awareness (id. at pp. 1, 4). The school psychologist also reported that the student exhibited "great difficulty staying on task and persevering when tasks became demanding," and that he needed "constant encouragement and re-focusing to try his best" (id. at pp. 1-2). The school psychologist indicated that pervasive articulation errors at times affected the student's ability to be understood; however, his speech was generally intelligible (id. at p. 2). An administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV)

¹ The Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

yielded verbal comprehension, working memory, and processing speed index scores representing "little scatter" and falling within the average range of cognitive functioning (id. at pp. 2, 4). According to the school psychologist, the student's WISC-IV perceptual reasoning score was within the "above" average range (id.). She explained that the student was better able to display his intelligence when responding to visual stimuli than when answering verbal questions (id. at p. 4).

Regarding the student's social/emotional functioning, the school psychologist indicated that the student was a "social and related child" who had developed close peer and adult relationships (Dist. Ex. 44 at p. 1). She reported that upon initial entry into school, the student exhibited some "defiant and oppositional" behaviors, but those behaviors quickly abated once he had acclimated to the school and its routines (id. at pp. 1, 3). According to the school psychologist, the student easily met the social demands of the "large" kindergarten class (id. at p. 1). He was also reported to enjoy school, including his inclusion in general education classes, and was developing friendships (id. at pp. 1, 3). The evaluation report noted further that the student continued to require constant teacher assistance and encouragement to persevere and complete tasks, and that he exhibited overacted and distracted behaviors (id. at p. 3). In an effort to explore the possible presence of an attention deficit hyperactivity disorder (ADHD), both the student's father and his teacher completed the ADHD Rating Scale and the Behavior Assessment System for Children (BASC) forms, which indicated that the student met the criteria for a diagnosis of an ADHD at school but not at home (id. at pp. 1, 3-4).

In consideration of the "gains that ha[d] been attained in all areas of cognitive, social, and academic functioning," the school psychologist characterized the student's program as "successful" and recommended that it continue (Dist. Ex. 44 at p. 5). She indicated that due to the student's poor phonological awareness, reading fluency, and word attack skills, a multisensory approach should be used and that "the small instructional group of his special class" would continue to be beneficial to the student (id.). She also recommended using strategies proven successful with students with attention needs, repeating and rephrasing instructions and directions for the student, and incorporating a high success ratio into reading instruction prior to advancing to the next lesson (id.).

Also in September 2007, the district educational evaluator conducted an educational evaluation of the student (Dist. Ex. 43). The report revealed that the student presented as "verbal, lively and engaging," appeared to be comfortable in the test setting, responded easily to the evaluator's questions, and used age appropriate vocabulary (id. at p. 1). Behaviorally, the student was noted to be in "constant motion," carrying on a "steady stream of conversation," and becoming distracted by both visual and auditory stimuli (id.). The evaluator indicated that staying on a topic, listening carefully to directions, and completing tasks appeared to be difficult for the student (id.). The evaluator also noted that she understood the student's speech within the context of the testing, but that due to the presence of articulation errors, when the student spoke spontaneously about other subjects, his speech was more difficult to understand (id.). She opined that although the student could be refocused and redirected, he would "miss a lot of instruction in the classroom" without such intervention (id.).

An administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) to the student yielded the following reading subtest standard scores: letter-word

identification, 97 (42nd percentile); passage comprehension, 77 (7th percentile); word attack, 83 (13th percentile), sound awareness, 104 (61st percentile), and a basic reading skills cluster standard score of 89 (23rd percentile) (Dist. Ex. 43 at pp. 1, 6). The evaluator reported that the student's reading skills were at the "primer" or beginning first grade level and that he was beginning to acquire a sight word vocabulary, but that weak phonic skills prevented him from being able to analyze unfamiliar words (id. at p. 4). The student demonstrated an understanding of the concept of rhyming and knowledge of initial and final consonants, but he had not yet learned medial and vowel sounds (id.). The student achieved a standard score of 99 (46th percentile) on an administration of the WJ-III ACH applied problems mathematics subtest (id. at p. 2). According to the evaluator, the student exhibited the ability to solve problems involving counting, and an understanding of addition, subtraction, and "o'clock time" concepts (id. at p. 4). The student's performance on the WJ-III ACH spelling, 91 (28th percentile) and writing 101 (53rd percentile) subtests was also in the average range (id. at pp. 3-4). The evaluator also administered the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), which yielded a standard score of 93 (32nd percentile), which the evaluator described as "slightly below grade level expectations" (id.). The evaluator's report contained specific recommendations designed to improve the student's phonics skills for reading and spelling, and to improve his attention in the classroom (id. at pp. 4-5).

A September 2007 OT evaluation report indicated that the student was "cooperative and friendly and not easily distracted by any stimuli in the testing environment" and noted that the student's ability to focus on tasks had improved (Dist. Ex. 42 at p. 1). Based upon results of another administration of the VMI and the completion of the Short Sensory Profile by the student's teacher, the occupational therapist indicated that the student exhibited "fine motor deficits, graphomotor skills deficits as well as sensory processing deficits" (id. at pp. 1-3). The occupational therapist recommended that the student continue to receive two individual sessions of OT per week to focus on the annual goals that had been established for the 2007-08 school year (id. at p. 3).

Over two dates in early October 2007, the district conducted a speech-language evaluation of the student (Dist. Ex. 40). In her report, the speech-language pathologist described the student as a "sweet and friendly" child who worked hard and was cooperative (id. at p. 1). She also noted that the student worked slowly at times, required frequent breaks during testing, refocusing to complete tasks, and encouragement to persevere on tasks (id. at pp. 1, 4). Administration of formal assessments to the student, including the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4), which yielded a core language standard score of 102 (55th percentile), and the Expressive One Word Picture Vocabulary Test (EOWPVT), which yielded a standard score of 95 (37th percentile), led the speech-language pathologist to conclude that the student's expressive and receptive language skills were "within normal limits" (id. at pp. 1-3). The speech-language pathologist judged the student's articulation skills at the single word level to be "good," and the intelligibility of his spontaneous speech in known contexts to be "fair to good," but in unknown contexts to be reduced (id. at p. 3). The speech-language pathologist reported that the student's speech pattern was consistent with that of a child with a verbal apraxia (id.).

In October 2007, the student's special class teacher conducted a classroom observation of the student during his inclusion science class as he transitioned from an OT session (Dist. Ex. 47;

see Tr. p. 35). The report noted that the student asked what the task entailed and that he started and completed the task (Dist. Ex. 47). The report also noted that the student demonstrated difficulty changing tasks and required prompting to remain on task (id.).

October 2007 reports prepared by the student's regular education and special education first grade teachers and TAs indicated that the student possessed an understanding of the concepts covered in science, social studies, and math classes, but that his academic skills were "inconsistent" (Tr. pp. 33-35; Dist. Exs. 41; 45). In reading, the student sounded out words with support and "easily" asked for assistance when he was unsure (Dist. Ex. 45). Although the student allowed assistance from his teachers, he needed continual encouragement to complete reading tasks (id.). The student was reported to be doing "very well" using the Preventing Academic Failure (PAF) reading and writing program (Dist. Ex. 45; see Tr. p. 194). However, his teachers reported that his "inability to attend to tasks for extended periods of time continue[d] to impact his learning and retention of material," and that he could become disorganized while completing class work (Dist. Exs. 41; 45). The reports also noted that when the student became off task or faced a difficult task, he could exhibit "silly" and immature behaviors (id.). The reports also indicated that although he needed redirection when he worked independently, he also returned to his work promptly, asked for assistance when needed, and was able to correctly complete most activities (id.). The teachers reported that the student interacted appropriately with both peers and adults; exhibited the ability to share in a group and to take turns; and that he encouraged his peers when working together (id.).

On October 17, 2007, the CSE convened for the student's reevaluation review (Dist. Ex. 49). Due to the student's significant delays in phonological awareness and reading, the CSE changed the student's classification to a student with a learning disability (id. at p. 5). Following a review of the then-current evaluation and teacher reports, the CSE recommended that the student receive a special education program similar to the program that he had received during the prior school year (Tr. pp. 24, 578; Dist. Ex. 49 at p. 5). According to the October 17, 2007 individualized education program (IEP), the student received four sessions per six-day cycle of inclusion math and two sessions each per six-day cycle of inclusion social studies and science (Dist. Ex. 49 at p. 1). He was also provided with daily special class language arts and daily special class reading instruction (id.). Additionally, the student received one session of group counseling, two sessions of individual OT, one session of individual speech-language therapy, and one session of group speech-language therapy during the six-day cycle (id. at p. 2).

The hearing record reflects that the parents continued to obtain private speech-language therapy and special education teacher services for their son throughout his first grade school year (Tr. pp. 574-76, 579). According to the student's mother, the student did "very well," was "improving in every way," and was "happy" during first grade (Tr. p. 579).

In spring 2008, the student's special education teacher informed the student's mother that the district was not going to offer the same kindergarten, first grade and second grade special class that the student had attended, and further, that the students who were entering second grade would be placed in a general education class with a specific teacher known to the student's mother (Tr. pp. 35, 573, 579-84). According to the student's mother, the special education teacher thought the general education class placement could "work," and informed her that if it did not, then the student's mother "[could] always have a review" (Tr. p. 584).

An April 29, 2008 teacher report indicated that the student displayed appropriate knowledge of material in large group settings, but that he required teacher assistance to be successful at independent work (Dist. Ex. 37). The teacher also reported that the student exhibited appropriate social skills with peers and adults, and that he enjoyed working in a group, but that his attentional issues affected his overall organization and often caused him to become "off task" (id.).

On April 30, 2008, the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 34). The CSE recommended that the student receive one 60-minute session per day of language arts instruction in a 12:1+1 special class and one group session of counseling, two individual sessions of OT, and one session each of individual and group speech-language therapy per six-day cycle (id. at pp. 1-2). The student's mother accepted the recommendations contained in her son's IEP (Tr. pp. 586-87).

In June and July 2008, the student continued to receive private speech-language and special education teacher services (Tr. pp. 588-89).

At the commencement of the 2008-09 school year, the student received the special education program and services recommended in his April 2008 IEP, with the addition of a TA, who provided support in the student's general education classes for one hour in the morning and one hour in the afternoon (Tr. pp. 55-56).² The hearing record reflects that the student exhibited difficulty adjusting to second grade at the commencement of the 2008-09 school year (Tr. pp. 55-56, 297, 589-94; Dist. Ex. 21). The student's mother and his regular education teacher reported that the student cried, expressed an inability to perform many school tasks, was unfocused, and was unorganized (Tr. pp. 297, 590; Dist. Ex. 21). The student's mother also stated that during extracurricular activities, the student did not want to engage in "anything that posed any challenge" (Tr. p. 592).

An October 2008 administration of the Developmental Reading Assessment (DRA) by the student's second grade regular education teacher indicated that the student was at a Level 6, which she characterized as a kindergarten level (Tr. pp. 290-91, 294-95; Dist. Ex. 51 at p. 1). On October 22, 2008, the student's mother met with her son's regular education teacher and his special education language arts teacher to discuss the student's difficulties (Tr. pp. 190, 592-96; Parent Ex. M).

Following the October 2008 meeting with the student's teachers, the student's mother obtained a private neurodevelopmental reevaluation of the student, which occurred on November 5, 2008 (Tr. p. 600; Dist. Ex. 28).³ According to the developmental pediatrician's evaluation report, the parents reported that their son was a "[v]ery social and happy child," and despite his continued progress in speech and language skills, he continued to exhibit persistent

² The CSE chairperson testified that although it was not contained in the student's IEP, the student received the TA services to provide additional support due to his attention difficulties (Tr. pp. 55-56).

³ The neurodevelopmental reevaluation was conducted by a developmental pediatrician and a speech-language pathologist (Dist. Ex. 28 at pp. 4-5).

misarticulations and used immature grammar and syntax when conversing (Dist. Ex. 28 at p. 2).⁴ The parents also reported they were "gravely concerned about his current classroom placement; the class size [was] too big and [that] setting [was] not providing him with the individualized supports he need[ed] to learn to read and succeed academically" (id.). In addition, the evaluation report indicated that the parents expressed concerns that the student's self-esteem and confidence were suffering and indicated that he no longer wanted to read at bedtime, requesting instead that his parents read to him (id.).

An administration of the Kaufman Brief Intelligence Test, Second Edition (KBIT-2) yielded a verbal standard score of 101 (53rd percentile), a nonverbal standard score of 112 (79th percentile), and an IQ composite standard score of 108 (70th percentile) (Dist. Ex. 28 at p. 3). The student's verbal and nonverbal abilities standard scores were reported to be in the average range, with a relative strength in nonverbal skills (id.). The student's performance on selected expressive and receptive language subtests of the Comprehensive Assessment of Spoken Language (CASL) was in the average range (id.). Despite the continued presence of specific phonological processes observed in the student's speech, the developmental pediatrician judged his speech intelligibility to be "good" (id. at p. 2).

Selected subtests of the Emerging Literacy and Language Assessment (ELLA) were also administered to the student in order to obtain "a qualitative assessment of the [student's] reading skills" (Dist. Ex. 28 at p. 3).⁵ Based upon the student's reading performance, the developmental pediatrician concluded that the student's "reading/decoding rate, accuracy and fluency" were "poor; he read slowly, paused between words, cluttered words together, and omitted word endings and entire words from sentences" (id. at p. 4). The developmental pediatrician determined that the student "qualifie[d] for a diagnosis of dyslexia, a reading disorder characterized by impairments in phonological processing" (id.). The evaluation report also noted that the student continued to demonstrate hypotonia, postural instability and fine motor/graphomotor incoordination (id.). The developmental pediatrician further reported that the student's signs of an ADHD, including "fidgety behavior," needed to be monitored (id.). She opined that the student was "suffering" both academically and emotionally because of his acute awareness of his limitations (id.).

In her recommendations, the developmental pediatrician stated that the student was "an excellent candidate for a specialized, private school with a small class size that utilize[d] a multisensory approach to learning, and ha[d] expertise in teaching children with reading and writing disorders" (Dist. Ex. 28 at p. 4). She advised the parents to obtain a neuropsychological evaluation of the student and to apply to some "specialized private schools" for the 2009-10 school year (id. at p. 5). For the remainder of the 2008-09 school year, the developmental pediatrician indicated that the student needed a "full day placement in a special education

⁴ The developmental pediatrician had previously evaluated the student, most recently in October 2007, and found him at that time, to be "at risk for a reading disorder (dyslexia)" (Tr. pp. 600-01; Dist. Ex. 28 at p. 1). The November 5, 2008 neurodevelopmental reevaluation report indicated that the developmental pediatrician was "impressed" with the how the student's speech and language skills had progressed since October 2007 (id. at pp. 2-3).

⁵ The developmental pediatrician's report indicated that the ELLA was not administered in its entirety due to time constraints, therefore, standard scores were not obtained (Dist. Ex. 28 at p. 3).

classroom with a teacher trained in the Orton-Gillingham method or a comparable multisensory reading program" (*id.*). She opined that the student was not learning to read in his current "inclusion" class, which was inappropriate to meet his educational needs (*id.*). Additional recommendations included continuation of the student's in-school speech-language therapy and OT services, and the private services the parents were obtaining for their son (*id.*).

Following the November 5, 2008 private neurodevelopmental reevaluation, the parents obtained the services of an educational consultant who advised them to "keep all of [their] options open" regarding alternative placements for their son (Tr. pp. 601-02). According to the student's mother, they needed to obtain a neuropsychological evaluation of the student in order to apply to schools outside of the district (Tr. pp. 602-03; *see* Dist. Ex. 27). By letter dated November 14, 2008, the student's mother informed the CSE chairperson⁶ that the student was undergoing psychoeducational testing, and she requested that the student's teachers complete questionnaires regarding his performance (Dist. Ex. 33).

Over five dates in November 2008, a clinical psychologist conducted a private neuropsychological evaluation of the student (Dist. Exs. 29; 30).⁷ The clinical psychologist interviewed the student's parents, reviewed previous evaluation reports and school records, and had discussions with several of the student's service providers (Dist. Ex. 29 at pp. 2-5). An administration of the WISC-IV to the student yielded verbal and full scale IQ scores in the average range of cognitive functioning, and a performance IQ score in the high average range (*id.* at p. 7). These results were consistent with the student's October 2007 performance on the WISC-IV (*id.*). Additionally, the clinical psychologist indicated that the student's basic visual perceptual and visual problem solving skills were "intact," but that his visual memory skills were "weak" (*id.* at p. 11).

Results of an administration of the WJ-III ACH and the Phonological Awareness Test-Second Edition (PAT 2)⁸ indicated to the clinical psychologist that "[d]espite significant academic intervention, [the student was] performing below expectation in reading and writing skills" (Dist. Ex. 29 at p. 10). The student's WJ-III ACH broad reading standard score of 82 (12th percentile) and brief writing standard score of 85 (16th percentile) were "significantly weaker" than his overall broad mathematical skills standard score of 103 (58th percentile) (*id.* at pp. 10, 19). The clinical psychologist indicated that the student was "most certainly struggling in reading despite significant improvements over the past year," and continued to require intensive, individualized instruction to strengthen his literacy-based skills (*id.* at pp. 10-11). The clinical

⁶ The CSE chairperson is also identified in the hearing record as the director of special education and the assistant superintendent for pupil personnel services (*see, e.g.*, Tr. pp. 17-18; Dist. Exs. 2 at p. 5; 11 at p. 4; 31; 32). Due to her role as the CSE chairperson of the April and June 2009 subcommittee meetings that resulted in the IEP in dispute, and for ease of identification within this decision, I will refer to her as the CSE chairperson.

⁷ The hearing record contains two reports related to the student's November 2008 neuropsychological evaluation: a December 8, 2008 draft, and what appears to be a final version (Dist. Exs. 29; 30). The December 8, 2008 draft version was available to, and considered by, the December 2008 CSE subcommittee, and as such, I will cite to that document in this decision (Tr. pp. 60-62; Dist. Ex. 29).

⁸ The clinical psychologist reported that she attempted to administer the Gray Oral Reading Test-Fourth Edition to the student, but that he became "extremely frustrated and upset" and therefore that test administration was discontinued (Dist. Ex. 29 at p. 10).

psychologist reported that the student's graphomotor difficulties affected his ability to form letters, and that writing was laborious for him and took a great deal of time (*id.* at p. 11). The student achieved a WJ-III ACH spelling subtest standard score of 89 (23rd percentile) and a WJ-III ACH writing samples standard score of 85 (16th percentile) (*id.* at pp. 11, 19). The clinical psychologist characterized the student's functioning in reading and writing as "significantly below expectation," and reported that he qualified for a diagnosis of a reading disability (*id.* at p. 16). Although the student's basic mathematical skills were considered by the clinical psychologist to be an area of strength, she reported that the student's ability to apply such skills with fluency was weaker (*id.* at p. 11).

In the social and emotional domain, the clinical psychologist described the student as a "warm, sweet child, who [was] well related and capable of forming strong relationships with others" (Dist. Ex. 29 at p. 13). According to the clinical psychologist, results of psychological testing indicated that the student experienced emotional stress and showed signs of low self-esteem, anxiety, and frustration primarily in the academic realm (*id.* at pp. 13, 16). She reported that the student felt overwhelmed by academic demands and emotions (*id.* at pp. 13-14). Although characterized as an otherwise "psychologically healthy and well-adjusted child," the clinical psychologist opined that without intervention for his areas of learning difficulty, the student was at risk for more significant emotional problems in the form of low self-esteem and anxiety (*id.* at p. 14).

The clinical psychologist recommended "immediate and intensive remediation in a small, nurturing classroom environment in a special education school placement so that he [could] establish a solid foundation in basic literacy skills" (Dist. Ex. 29 at p. 16). She indicated that, ideally, the student's class size should be less than 12 students and his teachers should be trained in an Orton-Gillingham approach to reading instruction (*id.*). She opined that the student could not function in a mainstream setting because his learning delays, language delays, and attention difficulties interfered with the acquisition of basic skills and that the student required teaching methodologies and individual instruction tailored to reduce his anxiety and frustration (*id.* at pp. 16-17). The clinical psychologist recommended continuing the speech-language and OT interventions offered in the student's IEP as well as the privately obtained services, seeking medical consultation for attention difficulties, offering specific testing accommodations, and encouraging the student to engage in extracurricular activities (*id.* at pp. 17-18).

A November 12, 2008 report from the student's regular education teacher indicated that the student possessed a "wealth of information" and enjoyed sharing facts that he had learned (Dist. Ex. 21). The report noted that although the student appeared to exhibit "great difficulty" remaining focused, he demonstrated that he was listening to the classroom discussions because he often interjected and later shared his comments with the teacher (*id.*). The regular education teacher indicated that reading and writing were challenging for the student, and that his decoding skills were at a beginning first grade level (*id.*). She also reported that due to difficulties with word retrieval during writing activities, she often scribed for the student (*id.*). The regular education teacher reported that the student experienced greater success and confidence during mathematics activities and when distractions were kept to a minimum (*id.*). According to the regular education teacher, although the student's initial transition to the regular classroom was "very difficult," more recently he appeared to be "much happier," asked for help, and positioned himself optimally in the room to complete copying tasks (*id.*). The regular education teacher

reported that guidance continued to be provided throughout the day to assist the student with staying on task and with boosting his confidence (*id.*). She also indicated that the student enjoyed playing with peers and had many friends (*id.*).

On December 8, 2008, a subcommittee of the CSE convened for a review of the student's program (Dist. Ex. 22).⁹ Attendees included the CSE chairperson, a CSE/CPSE chairperson, the student's speech-language therapist, both of the student's regular education and special education teachers, the district school psychologist, a psychology intern, and the parents (Dist. Ex. 22 at p. 5).¹⁰ The CSE subcommittee reviewed the November 2008 neurodevelopmental reevaluation report and the November 12, 2008 regular education teacher's report (Tr. pp. 55-58, 73; Dist. Exs. 21; 28). The parents shared their concerns about the student's reading disability and its affect on him emotionally (Dist. Ex. 22 at p. 5). Additionally, the student's speech-language therapist discussed what was being addressed in therapy, and commented that the student's attention was difficult to maintain during sessions (*id.*). The special education teacher reported that she had observed progress in the student's reading fluency and sight word vocabulary, but that he was not yet performing at a level expected of a student his age (*id.*). She recommended increasing the duration of the student's special class language arts and reading sessions to 90 minutes daily (*id.*). According to the CSE subcommittee meeting comments, the meeting was adjourned due to time constraints (*id.*).

On December 12, 2008, the CSE subcommittee reconvened to continue the student's program review (Dist. Ex. 22 at p. 5). At the meeting, the CSE subcommittee reviewed the draft of the private neuropsychological evaluation report and findings (Dist. Exs. 22 at p. 5; 29). According to the CSE chairperson, although the district's staff members of the CSE subcommittee agreed with the clinical psychologist's assessment of the student's academic needs, the information regarding the student's emotional status contained in the clinical psychologist's report was not consistent with how the student presented to his teachers and staff at school (Tr. pp. 61-69). The CSE chairperson also indicated that the December 12, 2008 CSE subcommittee discussed "a great deal" whether or not the student required the "small nurturing classroom in a special education placement" recommended by the clinical psychologist (Tr. pp. 69-70). The CSE subcommittee agreed that the student's attention difficulties affected his "accessibility" to learn, that he needed more direct support to improve his reading ability at a faster pace, and that he would benefit from the presence of a TA to provide support for his attention needs, as well as to provide encouragement, preteaching, and reteaching opportunities (Tr. pp. 72-73; Dist. Ex. 22 at p. 5). Following a review of the student's annual goals, for the remainder of the 2008-09 school year, the December 2008 CSE subcommittee recommended that the student receive one 45-minute session of special class language arts instruction daily and one 45-minute session of special class reading instruction daily, instead of the one 60-minute session of language arts instruction that was previously provided (Tr. pp. 75, 358-59; compare Dist. Ex. 34 at p. 1 with, Dist. Ex. 22 at pp. 1, 5). The December 2008 CSE subcommittee also added three hours of daily TA services to the student's general education classes (*id.*). The student's related services remained the same (Dist. Ex. 22 at p. 5).

⁹ The student's mother testified that in fall 2008, and throughout the remainder of the 2008-09 school year, the student was administered medication for his ADHD symptoms (Tr. pp. 607, 609-11).

¹⁰ The December 2008 IEP indicated that the student's father attended the CSE subcommittee meeting; however, the meeting sign-in document did not contain his signature (Dist. Exs. 22 at p. 5; 26).

The student's performance on a February 2009 administration of the DRA reflected skills at a Level 12, which the regular education teacher characterized as a first grade reading level (Tr. p. 306; Dist. Ex. 51 at p. 1). A February 9, 2009 administration of the Wide Range Achievement Test, Fourth Edition (WRAT-4) to the student yielded a word reading standard score of 96 (39th percentile), a spelling standard score of 92 (30th percentile) and a math computation standard score of 105 (63rd percentile) (Dist. Ex. 11 at p. 4).

A March 20, 2009 student report prepared by the student's special education and regular education teacher indicated that the student exhibited "[w]onderful growth in his ability to sustain focus," which had boosted his confidence and "facilitated his ability to participate more fully in all learning experiences" (Dist. Ex. 15 at p. 1). The report noted that the student received small group, multisensory instruction in reading, writing and spelling (id.). Mathematics continued to be an area of strength for the student (id.). The teachers' report also noted that the student could follow classroom routines, used classroom resources to work more independently, and readily partnered with his peers for collaborative projects (id. at p. 2).

On April 1, 2009 the CSE subcommittee convened to conduct the student's annual review and to develop his 2009-10 IEP (Dist. Exs. 11; 22 at p. 5). Aside from the absence of the student's father, the attendees at this subcommittee meeting were the same as at the prior December 8, 2008 subcommittee meeting (compare Dist. Ex. 11 at p. 4 with Dist. Ex. 22 at p. 5).

For the 2009-10 school year the CSE subcommittee recommended the student receive a daily 45-minute session of special class reading instruction, a daily 45-minute session of special class language arts instruction, two 60-minute sessions of integrated co-teaching science class per six-day cycle, and two 60-minute sessions of integrated co-teaching social studies class per six-day cycle (Dist. Ex. 11 at p. 1). Related services recommendations included: one 30-minute session of group (5:1) counseling, one 30-minute session of individual OT, one 30-minute session of group (3:1) OT, one 30-minute session of individual speech-language therapy and one 30-minute session of group (5:1) speech-language therapy (id. at p. 2). The related services also occurred on a six-day cycle (id.). The CSE subcommittee recommended program modifications, including refocusing and redirection, modeling and repetition, and visual prompts or cues (id. at pp. 2, 5). Recommended testing modifications included tests read, directions read and clarified, extended time, and flexible setting (id.). Annual goals were developed for the student in the areas of reading, writing, speech-language, social/emotional/behavioral, and motor skills (id. at pp. 5-8). During the meeting, the student's mother expressed that her son needed a more restrictive program (Tr. pp. 87-88).

On April 8, 2009, the parents signed an enrollment contract with Eagle Hill for their son's attendance during the 2009-10 school year (Parent Ex. K).

The student's performance on a May 2009 administration of the DRA reflected skills at a Level 16, which the regular education teacher characterized as at an end of first grade reading level (Tr. p. 306; Dist. Ex. 51 at p. 1).

In response to the mother's request, the CSE subcommittee reconvened on June 2, 2009 to review the student's 2009-10 special education program recommendations (Tr. p. 666; Dist.

Ex. 2; see Parent Ex. J). Attendees included the CSE chairperson, the district school psychologist, the student's speech-language therapist, both his regular and special education teachers, and his mother (Dist. Ex. 5). The regular education teacher discussed the student's improvement in his ability to focus and his performance on the May 2009 administration of the DRA (Tr. p. 310; Dist. Ex. 2 at p. 5). The June 2009 CSE subcommittee reviewed the student's annual goals and provided the student's mother with clarification of specific annual goals (Tr. pp. 89-91; Dist. Ex. 2 at p. 5). The student's mother expressed her belief that her son required a full-time special class placement, and the June 2009 CSE subcommittee comments reflected that following a long discussion about "the pros and cons of the suggestion" the CSE subcommittee ultimately rejected the proposal as too restrictive (Tr. p. 90; Dist. Ex. 2 at p. 5). The resultant June 2009 IEP recommended the same special education program that had been offered in the student's April 2009 IEP (Tr. p. 91; compare Dist. Ex. 2, with Dist. Ex. 11).

A June 22, 2009 IEP annual goal progress report indicated that the student had achieved two reading goals, was "progressing satisfactorily" toward the remaining two reading goals, was progressing satisfactorily on all three annual writing goals, had achieved one speech-language annual goal, was progressing satisfactorily toward the remaining two speech-language goals, had exhibited "some progress" toward his social/emotional annual goal, and had achieved all of his motor annual goals (Parent Ex. A). The student's final 2008-09 report card reflected that he was "partially meet[ing] standards" in the majority of areas related to reading, writing, and mathematics process (Parent Ex. B). The report card indicated that the student had "[met] standards" in the areas of mathematics content, science, social studies, technology, learning behaviors,¹¹ art, music, and physical education (id.).

During the 2009-10 school year, the student attended Eagle Hill, where he received instruction in language arts, mathematics, writing, oral language, and oral literature/social studies/science (Parent Exs. C-G; Q). He also received speech-language therapy (Parent Ex. R).

By due process complaint notice dated September 27, 2009, the parents' advised the district that they were requesting an impartial hearing (Dist. Ex. 1 at p. 1). The parents alleged that the IEP for the 2009-10 school year was both procedurally and substantively defective and failed to offer the student a free appropriate public education (FAPE) (id. at pp. 2, 6). They alleged further that the student required full-time special education in a small classroom setting and that the student-to-teacher ratios in the district's recommended program were too large (id. at pp. 2-4). The parents also alleged that the district's proposed program contained changing classroom settings, which would provide an unstable environment for the student and would hasten academic and emotional regression (id. at pp. 2-3, 6). The parents also alleged that the IEP failed to provide any assistive technology and did not provide an appropriate amount of social support (id. at pp. 3-5). The parents alleged further that placing the student with a general education population would leave him vulnerable to peer harassment (id. at p. 5). Moreover, the parents alleged that the June 2, 2009 IEP failed to provide specific, detailed and individualized goals; adequately describe why more restrictive program options were rejected; or provide how the student's progress would be reported (id. at pp. 5-6). The parents requested findings that the 2009-10 IEP was inappropriate, that it failed to provide a FAPE, and that the parents' placement

¹¹ In the area of learning behaviors, the student had partially met standards in the area of organization (Parent Ex. B).

at Eagle Hill was appropriate (id. at p. 6). The parents also requested that they be reimbursed for the student's tuition and related educational expenses and that the district be required to provide a valid IEP (id.).

In an undated response to the parent's due process complaint notice, the district denied that it had committed any substantive or procedural violations and asserted that it worked cooperatively with the parents (Dist. Ex. 10 at p. 2). The district asserted that the recommended program met the student's needs and could provide him with a FAPE in the least restrictive environment (id. at pp. 1, 2).

The impartial hearing began on January 21, 2010 and concluded on June 3, 2010 after five days (Tr. pp. 1, 183, 283, 406, 488, 683). On August 2, 2010, the impartial hearing officer rendered her decision (IHO Decision at p. 31). The impartial hearing officer determined that the district had sustained its burden to establish that it offered the student a FAPE for the 2009-10 school year (id. at pp. 27, 28, 31). She also found that the district had established that the 2009-10 program and IEP goals were appropriate to meet the student's needs and provided him with an appropriate placement in the least restrictive environment (LRE) (IHO Decision at p. 28). She found further that testimony from the teachers established that, had the student attended the district school, he would have been grouped with other students with similar needs and could have worked towards his IEP goals (id.).¹²

The impartial hearing officer also determined that the hearing record failed to establish the parents' claims that the student's progress at the district school during the 2008-09 school year was attributable to his being medicated and more manageable, and that he was able to stop taking medication as a result of his placement at Eagle Hill (IHO Decision at pp. 29-30). She also rejected the parents' conclusion that the student's difficulties at the district school at the beginning of the 2008-09 school year indicated that the district's program was inappropriate, noting that the student exhibited the same difficulties at the beginning of the 2009-10 school year at Eagle Hill (id. at p. 29). The impartial hearing officer also rejected the parents' claims that the student's continued reading delays, and his difficulties at home and during extra-curricular activities indicated that the district's program was inappropriate (id. at pp. 30-31). She noted that the student continued to have reading delays after attending Eagle Hill, and further, that the evidence in the hearing record established that the student made one year of progress both in the district's program in the 2008-09 school year and in Eagle Hill's program in the 2009-10 school year (id.).

Although the impartial hearing officer noted that it was not necessary for her to determine whether the parents' placement of the student at Eagle Hill was appropriate to meet the student's needs, she did make a finding that the student made progress at Eagle Hill, but that Eagle Hill was too restrictive for the student (id.). She noted that the district's program had opportunities for mainstreaming which Eagle Hill lacked (id.). In conclusion, she denied the parents' request for tuition reimbursement (id.).

¹² In evaluating the evidence in the record the impartial hearing officer accorded more weight to the opinion testimony of the teachers who testified about the student at the hearing than to the opinions of the student's two private evaluators who had prepared reports in fall 2008 (IHO Decision at p. 29).

The parents appeal and assert that the impartial hearing officer erred in determining that the district's 2009-10 program offered the student a FAPE. Specifically, the parents assert that the impartial hearing officer erred in determining that the district's goals were appropriate. The parents assert that the district's proposed goals were vague because they failed to indicate how progress would be measured, and in the 2009-10 IEP, the district had eliminated an unachieved 2008-09 goal that had been designed to address the student's anxiety. The parents also assert that the impartial hearing officer failed to give appropriate consideration to the results and recommendations contained in the privately obtained evaluation reports. The parents further assert that the district's recommended integrated co-teaching class was too large for the student and did not provide special education students with sufficient individualized attention. The parents also assert that the impartial hearing officer failed to recognize that the district's removal of the TA services from the student's 2009-10 program deprived the student of the support that was vital to his progress. The parents also assert that the impartial hearing officer erred in determining that the student's medication was not the reason for his improved classroom behavior during the 2008-09 school year. Additionally, the parents assert that the impartial hearing officer erred in comparing the student's difficulties at the beginning of his 2009-10 school year with his difficulties during the 2008-09 school year, arguing that the student experienced difficulty at the beginning of the 2009-10 school year because he was suffering from the effects of an unsuccessful year at the district school in 2008-09.

With respect to the parents' unilateral placement, the parents assert that the impartial hearing officer erred in determining that Eagle Hill was too restrictive. The parents assert that the Eagle Hill program is appropriate because it: (1) is designed for students who have language-based learning disabilities; (2) has small special education classes; (3) provides reading remediation in each class; (4) uses a combination of teacher-prepared material and Orton-Gillingham materials; (5) provides a "callback" period to help students with organization, completing assignments, and preparation; (6) decreased the student's anxiety so that he could discontinue his medication and counseling; and (7) provided the student with the opportunity to interact with nondisabled students.

Finally, the parents assert that the impartial hearing officer erred in failing to discuss equitable considerations. The parents assert that the student's mother actively participated at CSE meetings, discussed her concerns with the district, sought the advice of private evaluators, investigated other schooling options, and visited the district's recommended placement. According to the parents, the district is barred from raising the issue of the parents' failure to provide written notice to the district of their intent to place the student in a private school at public expense ten business days prior to the student's removal because the district failed to raise this claim at the impartial hearing. The parents request that the impartial hearing officer's decision that the district offered the student a FAPE during the 2009-10 school year be reversed, that the 2009-10 program at Eagle Hill be deemed appropriate, and that equitable considerations support the parents' claim for tuition reimbursement. As a remedy, the parents request that a State Review Officer award them tuition reimbursement for the student's enrollment at Eagle Hill.

In their answer, the district seeks to uphold the impartial hearing officer's decision and to dismiss the parents' petition in its entirety. In the alternative, the district requests a denial of the parents' requested relief because they did not meet their burden to establish the appropriateness

of Eagle Hill, nor did they act in good faith during the CSE process. The district asserts that the decision to place the student in special classes for reading and language arts and in integrated co-taught classes for science and social studies was necessary to continue the progress that the student had made during the prior 2008-09 school year. The district asserts that its recommended program also offered a FAPE in the LRE. The district also asserts that the reading and language arts special classes were appropriate because they provided the student with needed reading remediation. According to the district, the small student-to-teacher ratio in the student's special reading and language arts classes and in his integrated co-taught science and social studies classes were also designed to address the student's attentional issues. Additionally, the CSE recommended counseling to address the student's self-esteem issues.

The district also asserts that the impartial hearing officer was correct to determine that the student would have been appropriately grouped with other students with similar needs. The district also asserts that the annual goals were appropriate and measurable, and that the parents were involved in the development of each of the annual goals developed at the CSE meeting. Moreover, the annual goals were designed to address the student's reading, writing, speech and language, social and emotional, and OT needs. Additionally, the student's special class teacher and the teacher of his integrated co-taught classes both testified as to the appropriateness of each annual goal and how each annual goal would be measured. The district further asserts that it is incorrect for the parents to assert that the absence of a TA during the student's 2009-10 mainstream classes made the program inappropriate because the integrated co-taught science and social studies classes provided assistance in the form of a special education teacher, and the student's mainstream math class contained a special education teacher who would have monitored his needs.

The district also asserts in the alternative that if the district's 2009-10 program failed to offer the student a FAPE, then the parent's Eagle Hill placement was not appropriate because it was too restrictive and the student would not have an opportunity to interact with nondisabled peers. The district also asserts that the private evaluators' recommendation that the student be educated exclusively with special education students is belied by the student's substantial progress in the district's 2008-09 program, which provided for mainstream exposure in math, science, and social studies.

Regarding equitable considerations, the district asserts that the parents' consultation with an educational consultant, their request that the student's records be sent to a private school prior to the CSE's program review, their signing of a contract with Eagle Hill just one week after the April 2009 CSE meeting and two weeks before they sent a letter to the district expressing their concerns about the recommended program to the district, all establish that they went into the CSE process with the intent to enroll the student at a private school. The district also asserts that the parents did not provide proper notice of their intention to place the student at Eagle Hill and their intent to seek reimbursement prior to the start of the 2009-10 school year.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C.

§ 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]),

establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for 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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Upon an independent review and due consideration of the hearing record in this matter, I find that the impartial hearing officer, in a thorough and well-reasoned decision, correctly determined that the district offered the student a FAPE for the 2009-10 school year (see Cerra, 427 F.3d at 192; Application of a Student with a Disability, Appeal No. 09-049; Application of a Student with a Disability, Appeal No. 08-144). The impartial hearing officer accurately recounted the facts of the case, and set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 1-31). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence in support of her conclusions and properly supported her conclusions (id.).

Specifically, the hearing record shows that the 2009-10 IEP was developed by a properly composed CSE subcommittee (Dist. Exs. 2 at p. 5; 5; 11 at p. 4). The hearing record also reflects that the student's mother meaningfully participated at both 2009 CSE subcommittee meetings, focusing specifically on the student's proposed annual goals and whether he needed a more restrictive placement (Tr. pp. 83-85, 88, 90-91, 310, 666-67; Dist. Ex. 2 at p. 5). The hearing record further demonstrates that the CSE subcommittee recommended a program after it reviewed and considered the student's evaluative reports, achievement test results, progress during the prior year, annual goals, related services, classroom program modifications, testing

modifications, and after it considered other potential programs (Tr. pp. 77, 82-86, 89-91, 134-36, 310, 666-67; Dist. Exs. 2 at p. 2-8; 11 at pp. 3-8; see Dist. Exs. 15; 50 at pp. 12-17; 51).

As noted by the impartial hearing officer, the hearing record also reflects that the student "successfully participated in the program the school district offered to him in kindergarten, first and second grade" (Tr. pp. 78-79, 80-82, 145, 200-01, 204-09, 214-15, 305-07, 313-14, 348, 363-64, 367-68, 574, 579; Dist. Exs. 46; 51; IHO Decision at p. 27). During second grade, in response to the parents' and the regular education teacher's concerns that the student needed more support in his general education classes and additional reading instruction, the district increased the length of the student's daily special class language arts and reading instruction sessions and increased the amount of TA services provided to support the student in his general education classes (Tr. pp. 300-03, Dist. Exs. 21; 22; see Tr. pp. 55-56). The CSE chairperson, the student's special education teacher, his regular education teacher, and his TA all testified regarding the academic and social/emotional progress the student exhibited during second grade (Tr. pp. 78-79, 80-82, 145, 200-01, 204-09, 214-15, 227, 305-07, 313-14, 348, 363-64, 367-68).

The hearing record further illustrates that the CSE subcommittee's recommended program for the 2009-10 school year provided for daily 45-minute 12:1+1 special classes for both reading and language arts to address the student's reading and language deficits (Dist. Exs. 2 at p. 1; 11 at p. 1). The special classes were taught by a special education teacher, along with a TA (Tr. pp. 364-65, 415-16). The hearing record also reveals that a second TA was added to these special classes during the 2009-10 school year (Tr. p. 446). The proposed special classes utilized multisensory techniques, the PAF program, and would have grouped the student with other third grade students with similar skill levels (Tr. pp. 366, 414-15, 421-32). The hearing record also reveals that the IEP provided for two sessions of an integrated co-taught science class and two sessions of an integrated co-taught social studies class during the school's six day class schedule (Dist. Exs. 2 at p. 1; 11 at p. 1). These integrated co-taught classes provided mainstreaming opportunities for the student and also provided special education assistance in his deficit areas (id.). The integrated co-taught classes were modified to provide small group cooperative instruction, modified assignments, repetition and reteaching, and refocusing and visual prompts (Tr. pp. 239-40; Dist. Exs. 2 at p. 2; 11 at p. 2). Additionally, the integrated co-taught classes would have grouped the student with three other third grade special education students with similar skill levels (Tr. pp. 237-382). The hearing record also reflects that the special education teacher of the integrated co-taught classes provided an extra session of the integrated co-taught science and/or social studies class so that the students in these classes received five integrated co-taught classes during the six-day class cycle (Tr. pp. 239, 418). In addition, the student was to receive mathematics, library, gym, and art instruction in a general education setting (Tr. pp. 368, 470). Moreover, a special education teacher was also available to provide support for the student's general education mathematics class, if needed (Tr. p. 458). To address the student's speech-language needs, his motor deficits, and problems with his self-esteem, the district provided speech-language therapy, OT, and counseling respectively (Dist. Exs. 2 at p. 2; 11 at p. 2).

The hearing record also supports the impartial hearing officer's finding that the IEP annual goals developed for the 2009-10 school year were appropriate to meet the student's needs (IHO Decision at p. 27; Tr. pp. 435-41). The hearing record reveals that the student's teachers testified extensively about the purpose of the annual goals, how the annual goals met the

student's needs, how the annual goals related to the use of the PAF approach, how the annual goals would be implemented in the proposed third grade class, and how the annual goals would be measured (Tr. pp. 215-22, 228-35, 435-41). Additionally, the former director of Eagle Hill testified that the 2009-10 annual goals did not appear to be "out of proportion" to the student's needs and that there was no question that the student required annual goals in the areas of reading, writing, and speech-language (Tr. p. 542). Regarding the parents' contention that the district eliminated an unachieved 2008-09 annual goal designed to address the student's anxiety, the student's 2009-10 IEP includes two social/emotional annual goals that reflect the student's needs as identified in the evaluative data and teacher reports that were before the April and June 2009 CSE subcommittees, and further, yield the same outcomes as did the student's 2008-09 "anxiety" annual goal: that the student would develop the methods and coping strategies necessary to overcome the emotions generated by his academic difficulties (Dist. Exs. 2 at p. 5; 11 at p. 5; 28; 29).

Based on the foregoing, I concur with the impartial hearing officer's finding that the district's program recommendations in the student's 2009-10 IEP were reasonably calculated to confer educational benefits to the student, and thus, the district offered the student a FAPE in the LRE. In addition, the impartial hearing was conducted in a manner consistent with the requirements of due process and there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
October 21, 2010



ROBERT G. BENTLEY
STATE REVIEW OFFICER