



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-128

Application of a STUDENT SUSPECTED OF HAVING 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 Regina Skyer and Associates, attorneys for petitioners, Abbie Smith, 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 Villa Maria Education Center (Villa Maria) for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determinations that the district violated the child find provisions of the Individuals with Disabilities Education Act (IDEA) and that its May 2009 section 504 accommodation plan (section 504 plan) for the student was insufficient. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Villa Maria, an out-of-State private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 20, 673; see 8 NYCRR 200.1[d], 200.7). The district had offered the student pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-796[I] [1998]), a section 504 plan for the 2009-10 school year (see Dist. Ex. 12).

With regard to the student's educational history, the hearing record reflects that the student was determined to be eligible to receive special education programs and related services as a student with a speech or language impairment in kindergarten (2003-04) and that he remained so through fourth grade (2007-08) (Tr. pp. 21, 35, 414-15, 346, 390, 522; Dist. Exs. 30

at pp. 1-2; 38 at pp. 1-7; 41 at pp. 1-7; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]). On March 18, 2008, a subcommittee of the district's Committee on Special Education (CSE) determined that the student was no longer eligible for special education services as a student with a disability (Dist. Ex. 30; see 8 NYCRR 200.4[c][3], [d][1][iii]). The minutes of the March 18, 2008 CSE subcommittee meeting stated that the parents agreed that the student was no longer eligible to receive special education programs and related services, but expressed concern about the student's continued need for support and accommodations by the teacher, and indicated that they would request a section 504 plan for the student for the 2008-09 school year, when the student would be in the fifth grade (Dist. Ex. 30 at p. 2).¹

On May 29, 2008, the district's section 504 committee convened to determine the student's eligibility for a section 504 plan for the 2008-09 school year due to concerns that the student required accommodations to function at grade level and that his anxiety and tendency to become overwhelmed negatively affected his academic performance (Dist. Ex. 28 at p. 2). The May 2008 section 504 committee included the district's elementary school principal, who was the committee chairperson; a school psychologist; a psychology intern; a special education teacher; a regular education teacher; and the student's mother (id.). The May 2008 section 504 plan was based on a November 5, 2007 physical evaluation; a February 1, 2008 educational evaluation; a February 5, 2008 speech-language evaluation; a February 15, 2008 psychological evaluation; a February 15, 2008 social history; a March 7, 2008 report card; and March 14, 2008 "district assessments" (id. at pp. 2, 3; see also Dist. Exs. 31; 33; 35).

The May 2008 section 504 plan noted that the student's classroom teacher reported that the student was making good progress with accommodations that the teacher provided on an informal basis (Dist. Ex. 28 at p. 2). According to the section 504 plan, the student was reading at or above grade level in all areas and displayed a strong vocabulary, excellent sight word recognition, and literal and inferential comprehension (id.). The student's math skills were at grade level, but his daily performance was affected by his anxiety and inability to sustain effort without adult support, and the student had difficulty memorizing facts (id. at pp. 2-3). The section 504 plan indicated that the student performed better when the teacher was able to "calm him, prompt, and encourage him" (id. at p. 3). The section 504 plan indicated that the student's ideas when writing were above grade level and that spelling was a relative weakness (id.). The student's reading, math, and writing assessments were discussed during the meeting and it was noted that all assessment results met standards for the student's grade level (id.). The section 504 plan indicated that the student had improved with his on-task behaviors; that he responded well to redirection; and that his approach to task had improved; that his anxiety could affect his performance as he would sometimes resist working on tasks until the teacher was able to calm and redirect him; and that he would respond correctly to more difficult work items while struggling with easier tasks (id.). The section 504 plan further indicated that socially, the student was well-liked and that he cooperated with peers (id.).

The May 2008 section 504 plan reported that the student's recent evaluations were discussed during the meeting and that all language subtest scores were in the average to above

¹ The parents did not challenge the March 2008 CSE subcommittee's determination to declassify the student at the end of the 2007-08 school year (Tr. pp. 216, 612).

average range; broad reading, math, and written language subtest scores were all within the average range (Dist. Ex. 28 at p. 3). It also stated that off-task behaviors were noted during testing and that all test scores should therefore be construed with caution (*id.*).² The section 504 plan indicated that the student's IQ fell within the high end of the average range and reported a relative weakness in quantitative reasoning, which was determined to be in the low average range (*id.*). The section 504 plan also indicated that results of the Behavior Assessment Scale for Children, Second Edition (BASC-II) completed by the student's teacher were reviewed with "at risk" behaviors noted with respect to attention, withdrawal, adaptability, study skills, and learning problems (*id.*). In addition, "clinically significant" behaviors of anxiety, depression, and somatization were reported (*id.*).³ The section 504 plan indicated that the student's mother reported at the meeting that the student did not function well academically at home, in that he often did not remember assignments or how to do the work (*id.*).

The district's May 2008 section 504 committee, including the student's mother, determined that the student had a mental and/or physical impairment in the area of "learning" which adversely affected his appropriate participation in academic activities and agreed that the student was in need of a section 504 plan for the 2008-09 school year (Dist. Ex. 28 at pp. 1, 3). The section 504 committee provided that the student would participate in the same State or local assessments that are administered to general education students (*id.* at p. 1). Recommended program modifications, accommodations, and supplementary aids and services set forth on the May 2008 section 504 plan, included refocusing and redirection; checking for understanding; flexible scheduling; breaks during extended testing; extended time (1.5) on testing; and providing cues, prompts, and frequent check-ins to keep the student on task (*id.* at pp. 1-2).

The student attended a general education fifth grade class during the 2008-09 school year (Tr. pp. 112, 535). Commencing in October 2008, the student received academic intervention services (AIS)⁴ in math two times per week on a pull-out and push-in basis, as well as once a week after school (Tr. pp. 124-25, 203, 134-36; *see* Dist. Exs. 10; 24). In January 2009, the student began receiving small group AIS in writing, three to four times per week (Tr. pp. 186-87; *see* Dist. Ex. 9). Also in January 2009, the parents began to provide the student with one hour per week of private help for writing (Tr. pp. 559-60; Parent Ex. C at p. 3). In February 2009, the student began receiving pull-out instruction in spelling in a group of three, one time per week

² The district's February 11, 2008 educational evaluation, which recorded the results of the Woodcock-Johnson III Tests of Achievement, reported that "all test results should be construed with caution due to periodic off task behaviors" (Dist. Ex. 33 at p. 1). The district's March 2008 psychological evaluation and updated social history advised that "[t]est results appear to be valid due to the standard administration of the tests and [the student's] compliance completing all of the tasks" (Dist. Ex. 31 at p. 3).

³ Testimony by the student's mother indicated difficulties with getting the student to go to school during the 2008-09 school year, but that those difficulties had improved from prior years because the student had a "real bond" with the fifth grade teacher (Tr. p. 563). The student's mother also testified that the student experienced stomachaches and headaches in the fifth grade; that it was difficult getting him out the door to school; and that "he was embarrassed by all the help he needed," "didn't feel very good about himself," and "really thought he was very dumb" (*id.*).

⁴ The hearing record reflects that AIS are "any level of building level supports that are provided to all students depending on need" (Tr. p. 52).

(Tr. pp. 187-88).⁵

At the parents' request, in November 2008, a private speech-language pathologist evaluated the student "to update the status of his language skills, especially his written language abilities" and prepared a "language consultation summary" (Tr. pp. 540-41; see Dist. Ex. 21). The private speech-language pathologist described the student "as a bright youngster, friendly, and highly conversational" (Dist. Ex. 21 at p. 1). She indicated that the student continued "to display expressive language deficits that manifest in grammatical, organizational, and retrieval difficulties" (id.). She also indicated that while the student "does demonstrate some age appropriate use of higher level language," it "is often juxtaposed with language errors that compromise his intended meaning" (id.). The private speech-language pathologist also wrote that the student's written work was "below grade level," that the student was reading with comprehension at grade level, but that his "spelling skills for both phonetically regular and irregular words are far below age expectations" (id.). She recommended that the student receive a structured writing program and spelling remediation through an Orton-Gillingham methodology, and "language therapy to address word retrieval, organizational deficits, and word usage" (id. at pp. 1-2).⁶

On March 7 and 21, 2009, a private psychologist conducted a psychological update evaluation to assess the student's progress and to assist in appropriate educational and treatment planning for the student (Dist. Ex. 19 at p. 1). The resultant "initial" psychological evaluation update report revealed that administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) yielded subtest standard scores (and percentile ranks) of 109 (73) in word reading, a 91 (27) in reading comprehension, 103 (58) in pseudoword decoding, 84(14) in numerical operations, 87 (19) in spelling, and 74 (4) in written expression (id. at pp. 2, 4). Administration of the Wide Range Assessment of Memory and Learning – 2 (WRAML-2) by the evaluator yielded subtest scaled scores (and percentile ranks) of 11 (63) in story memory immediate recall and 10 (50) in sentence memory (id. at pp. 3-4). Administration of the Conners' Continuous Performance Test – II (CPT-II) by the evaluator yielded scores tending toward impulsivity (id. at pp. 2-4). The evaluator reported that behaviorally, the student presented as a socially interested and engaging boy (id. at p. 2). The evaluator further described the student as tending to display fluctuating motivation and frustration tolerance at times, particularly when faced with tasks that were more challenging for him, such as writing (id.). According to the evaluator, although the student tended to become inattentive, self-directed, and more tangential in his speech and thought processes when presented with challenges, he was able to continue working when provided with redirection, support, and encouragement (id.). The evaluator further described the student as tending to display "some difficulties" with impulsivity and impatience, specifically behaviors which were characterized as the student possibly interrupting or attempting to start working before instructions were completed; as well as a tendency to rush through tasks or saying "I don't know" if he could not immediately identify the answer (id.). The

⁵ Testimony by the student's fifth grade teacher indicated the additional AIS in spelling was given to the student by a provider who had time in her schedule and that the spelling services provided by the AIS provider was not "formalized" (Tr. pp. 187-88).

⁶ The hearing record indicates that the parent provided a copy of this report to the student's classroom teacher in January 2010 (Tr. p. 544).

evaluator reported that the referenced behaviors "were most prevalent when (the student) encountered tasks that were relatively harder for him" (id.). The evaluator also reported that when this occurred, the student benefited from the 1:1 structure inherent in the testing environment, both for "scaffolding of his attention" and to provide support and encouragement when he was faced with challenges (id.). The evaluator further reported that "[w]ith such support, [the student] worked well, displayed good motivation, and completed all task demands reliably" (id.). The evaluator also indicated that the student's parents had informed him that the student had recently began receiving AIS and private tutoring services (id. at p. 3). The evaluator indicated that in light of those formal interventions, he was recommending that the student return in early June for the evaluator to formalize his recommendations (id.).⁷

On May 28, 2009, the district's section 504 committee convened to address the student's sixth grade (2009-10) school year when the student was scheduled to go to a district middle school (Tr. p. 16; Dist. Exs. 12 at pp. 1, 2; 17). Section 504 committee members included the elementary school principal, who was the committee chairperson; a school district psychologist; the district special education teacher who worked with the student as his AIS provider in writing, who attended by telephone; the student's regular education classroom teacher; a guidance counselor from the district's middle school; the AIS provider who provided the student with informal AIS in spelling; the student's AIS math provider; a district learning specialist; and the parents (id. at pp. 1, 3, 7).

Among other individuals, the student's classroom teacher reported to the section 504 committee about the student's academic functioning (Dist. Ex. 12 at p. 2). According to the teacher, the student was reading at the beginning sixth grade level, which was essentially at grade level (id. at p. 4). He also reported that the student was able to decode at grade level; that the student had good comprehension; that the student had excellent ideas and could recite the components of an essay but had difficulty lengthening written assignments; that the student needed prompts to use his graphic organizer; that the student often became fatigued and overwhelmed and needed more time to complete tasks; and that if given adult support, the student was able "to produce more efficiently" (id.). In addition, the teacher reported to the committee that the student displayed difficulty focusing and attending in all settings, whether the setting was a large group, a small group, or one-to-one (id.).

The May 2009 section 504 committee determined that the student continued to be eligible for accommodations under section 504 on the basis that the student's learning was significantly affected by his attention difficulties and tendency to become overwhelmed and anxious by task demands in the classroom and on assessments (Dist. Ex. 12 at pp. 1, 3). The May 2009 section 504 plan included additional modifications and accommodations for the 2009-10 school year beyond those which the May 2008 section 504 committee had recommended for the student's 2008-09 school year. In particular, the student's section 504 plan for the 2009-10 school year set forth the following additional program modifications and accommodations: (1) that the student would be seated near the teacher; (2) that the student required additional time to complete classroom assignments; (3) that the student required the teacher to check in with the student at least two times during each period to insure understanding of materials and concepts; (4) that the

⁷ The hearing record indicates that the parents provided a copy of the March 2009 private psychological update evaluation to the principal of the student's school at the end of April 2009 (Tr. pp. 353-54, 562).

student should be provided with a copy of scaffolded class notes;⁸ (5) that the student required the use of graphic organizers to help organize his ideas in writing; (6) that the student should have access to the word processor to complete writing assignments and also benefits from using the spell/grammar check to help him identify errors in writing mechanics; (7) that the student needed examples of "Exemplary Writing Samples" and requires examples of "model" writing; (8) that the student needed to have a reduced number of problems on math assignments and that the student's math class assignments and homework should be modified for quantity; (9) that the student needed to have previously learned work incorporated into current on-going work; and (10) that the academic support center needed to be provided to the student two to three times per week for one period to help support writing in the content areas (id. at pp. 2-3).

The hearing record indicates that the student's mother referenced both the November 2008 language consultation summary and the March 2009 private psychological update evaluation at the May 2009 section 504 committee meeting (Tr. pp. 354-55, 408, 569; Dist. Ex. 12 at p. 4). During the meeting, the student's mother also advised the committee that she felt that the student had a learning disability and that the May 2009 section 504 plan "was not sufficient to meet the student's needs" (Tr. pp. 361, 569-71; Dist. Ex. 12 at p. 5). The committee chairperson advised the student's mother that she could refer the student to the district's CSE and explained the necessary steps if the parent wanted different types of support services, but stressed the importance of "having a plan" for the student when the student entered middle school (Tr. pp. 361-62, 571; Dist. Ex. 12 at p. 5). According to the section 504 plan, the parent then agreed to the plan (Dist. Ex. 12 at p. 5).⁹

In a July 22, 2009 telephone call, the student's mother advised the principal of the district's middle school that the student would be attending Villa Maria for the 2009-10 school year (Tr. pp 367, 580-81, 583). The student's mother also told the principal that she did not "trust" that the district's recommended May 2009 section 504 plan provided the student with the remediation in a small structured class for students with learning disabilities that she believed the student needed, and which the private psychologist recommended for the student in his March 2009 report (Tr. pp. 580-81, 583; see Tr. p. 342; Dist. Ex. 19).

An August 2009 addendum to the March 2009 initial psychological update report indicated that the parent had advised the psychologist that the student had made "some academic progress," but continued to display difficulties with math and writing (Parent Ex. C). The addendum to the report also indicated that the student's mother had reported to the psychologist that the student continued to have difficulty with both attention and anxiety that further impacted his learning (id. at p. 3). The evaluator reviewed the student's report card, May 2009 section 504

⁸ The hearing record indicated that "scaffolded" class notes were class notes that did not require the student to copy word-for-word; that keywords or key concepts would be left out so that the student would need to process the information and write down the key information; and that the intent was for the student to learn through listening and writing the key words (Tr. pp. 44-45).

⁹ The hearing record indicates that sometime in June/July 2009, the parents wrote to the chairperson of the May 2009 section 504 meeting to request that the sentence in the May 2009 section 504 plan that indicated that they had agreed to the plan be removed (Parent Ex. A; see Tr. pp. 366, 579). The parents indicated in their letter that the sentence "confuse[d]" their "statement and belief" that the May 2009 section 504 plan "was not sufficient to meet" the student's needs (Parent Ex. A).

plan, and work samples and concluded that they were consistent with what the parent had reported (id.). The evaluator also concluded that given the student's "limited progress," "persistent learning and attention difficulties," and the "negative impact" his difficulties were having on his emotional functioning, it was "imperative" to pursue more intensive services and placement (id. at pp. 3-4). The evaluator recommended that the student be placed in a small, structured, special education school to "bolster his skills and to give him the opportunity to work up to his cognitive and academic potential;" that the classroom needed to be set up for students with at least average cognitive potential and abilities who also need specialized attention in areas of difficulty; that the student needed a small structured classroom set up for students with language-based learning difficulties and that any larger environment would not be appropriate; and that the student required frequent opportunities for 1:1 interactions to ensure he received appropriate support and guidance (id. at p. 4).

In a letter to the district's CSE chairperson dated August 24, 2009, the parents advised that they would be placing the student at Villa Maria at the beginning of the 2009-10 school year and intended to seek funding for the student's placement from the district (Parent Ex. B at p. 1). Among other things, the parents stated that they believed that the student's needs required more than a section 504 plan and that the student "should have received an IEP" for the 2009-10 school year (id.). The parents also advised the district that they believed that the student required a small, structured classroom environment that could provide instruction for students with language-based learning disabilities (id.).

By due process complaint notice dated February 24, 2010, the parents, by their attorneys, requested an impartial hearing and sought reimbursement for the student's tuition at Villa Maria for the 2009-10 school year (Dist. Ex. 1). The parents asserted that the district denied the student a free appropriate public education (FAPE) under the IDEA because during the student's fifth grade year (2008-09), the district knew or should have known that the student may be a student with a disability and should have referred him to its CSE pursuant to the child find provisions of the IDEA (id. at p. 3). According to the parents, the district should have referred the student to its CSE upon receipt of the March 2009 private psychological update for a full evaluation to determine eligibility under the IDEA (id.). The parents further asserted, among other things: (1) that the student requires placement in a full time special education setting to address his needs; (2) that the student's fifth grade AIS services were inadequate and were not formalized on the student's 2008-09 section 504 plan; (3) that the accommodations on the 2009-10 section 504 plan were inadequate; and (4) that the "placement" of the student at the district's middle school for the 2009-10 school year was not appropriate and would not address the student's needs (id. at pp. 2-3). The parents also contended that Villa Maria was an appropriate placement for the student for the 2009-10 school year and that there were no equitable considerations that would bar tuition reimbursement for the student's attendance at Villa Maria (id. at pp. 2-4).

The impartial hearing began with a prehearing conference on March 31, 2009 and concluded on June 4, 2010, after four days of testimony (see Tr. pp. 1, 4, 261, 439, 656, 787; IHO Ex. 5). In a decision dated November 22, 2010, the impartial hearing officer found that the district violated the child find provisions of the IDEA by not referring the student to its CSE and that the district's failure to evaluate the student resulted in a denial of a FAPE (IHO Decision at pp. 93, 104). The impartial hearing officer concluded that the district had prior notice that the

student had been previously classified as a student with a disability and had received special education and related services under the IDEA for a number of years (id. at p. 93). The impartial hearing officer further concluded that the district had academic testing that was "discrepant" from prior district testing,¹⁰ and that although the student was receiving a number of "building level" interventions, he continued to struggle in the classroom with writing, spelling, and math (id.). The impartial hearing officer also concluded that the parents expressed concerns during the 2008-09 school year that the student had a learning disability; that the parents had obtained two private evaluations that they provided to the district; that the district's May 2009 section 504 committee did not consider those two evaluations; and that although the student's mother summarized one of the evaluations at the May 2009 section 504 committee meeting and also expressed concern at that meeting that the student had a learning disability, the student was not referred to the CSE for an evaluation (id. at p. 92). Further, the impartial hearing officer found that the district's failure to consider the results of the private evaluations provided by the parents significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and therefore rose to the level of a denial of a FAPE within the meaning of the IDEA (id. at pp. 92, 104; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The impartial hearing officer found that the district should have conducted testing "to rule out" the presence of a learning disability (IHO Decision at p. 92). She also found that the section 504 accommodations recommended for the student for the 2009-10 school year did not constitute "specially designed instruction" so as to require that the student be provided with an IEP (id. at pp. 93-94).

With respect to the parents' unilateral placement of the student at Villa Maria, the impartial hearing officer found that the parents had not shown that the student's placement at Villa Maria was appropriate (IHO Decision at p. 103). In particular, the impartial hearing officer concluded that Villa Maria provided the student with an intensity of reading services that his needs did not justify and also provided the student with assistance with initiating and maintaining social interactions that the student did not need (id. at pp. 101-02). She also concluded that Villa Maria was not the least restrictive environment (LRE) for the student (id. at pp. 102-03). The impartial hearing officer concluded that under the circumstances, it was not necessary to determine whether equitable considerations supported the parents' request for tuition reimbursement and therefore did not address that issue (id. at p. 103).

With respect to the parents' contentions that the district had violated section 504, the impartial hearing officer concluded that the hearing record did not show that the district had acted in bad faith or with gross misjudgment and that therefore relief pursuant to section 504 was not warranted for the district's failure to meet its child find obligations under the IDEA (IHO Decision at pp. 95-96, 104). With respect to the parents' assertions regarding the 2009-10 section 504 plan, the impartial hearing officer concluded that: (1) the implementation of the student's plan in a large, general education classroom was inappropriate due to the student's difficulties with focus, attention, and motivation; (2) the amount of time recommended for the

¹⁰ Specifically, the impartial hearing officer concluded that there were "some discrepancies" between the test results in the March 2009 private psychological evaluation and those from the district's spring 2008 triennial testing when the student had been declassified (IHO Decision at p. 92).

student's participation in the academic support center for writing was not appropriate; and (3) the section 504 plan was insufficient to meet the student's needs in math (id. at pp. 96-98, 105).

On the basis of her findings, the impartial hearing officer ordered, among other things, that the district arrange for a comprehensive independent evaluation of the student at public expense to determine whether the student possessed a specific learning disability and that the district's CSE, including the parents, reconvene to review the results of such independent evaluation and determine whether the student has a learning disability entitling him to classification and special education services pursuant to the IDEA (IHO Decision at p. 104). The impartial hearing officer also denied the parents' request for tuition reimbursement for the student's unilateral placement at Villa Maria for the 2009-10 school year (id. at p. 105).

The parents appeal that part of the impartial hearing officer's decision which found that Villa Maria was not an appropriate placement for the student. The parents assert that the student's unilateral placement at Villa Maria is appropriate for the student and provides him with educational benefits. They further assert that the student has made academic progress at Villa Maria and that it is not overly restrictive. Additionally, the parents assert that they fully cooperated with the district, that they provided notice to the district of the student's unilateral placement, and that there are no equitable considerations which would prohibit an award of tuition reimbursement. The parents request that the impartial hearing officer's determination dismissing their tuition reimbursement claim be set aside and that the district be ordered to reimburse them for the student's tuition at Villa Maria for the 2009-10 school year.

In an answer and cross-appeal, the district requests dismissal of the parents' appeal and denies the parents' allegations that Villa Maria was appropriate and that equitable considerations favor an award of tuition reimbursement. The district argues on appeal that the impartial hearing officer correctly found that the parents did not meet their burden to demonstrate the appropriateness of Villa Maria and, furthermore, asserts that Villa Maria is too restrictive for the student.

As for its cross-appeal the district argues that the impartial hearing officer erred in determining that the district did not provide a FAPE to the student because it failed to refer the student to its CSE. The district asserts that the impartial hearing officer did not apply the appropriate legal precedent as it related to its child find obligations. The district argues that there was not sufficient indication that the student was in need of special education services during the 2008-09 school year and that the relevant facts provided no reason for the district to consider a referral to its CSE.

The district also cross-appeals the impartial hearing officer's findings that the student's section 504 plan for the 2009-10 school year was insufficient. It contends that it provided adequate supports in the student's section 504 plan and requests a finding that the impartial hearing officer erred when she determined that the district's section 504 plan for the student for the 2009-10 school year was not sufficient.

In an answer to the district's cross-appeal, the parents request that the impartial hearing officer's decision be affirmed in relevant part. Regarding the district's contention that the

impartial hearing officer erred in finding that the district violated its child find obligations, the parents allege: (1) that the student exhibited significant needs and was not able to independently perform grade level tasks; (2) that the student was functioning below average and/or having difficulty in spelling, writing and math, notwithstanding the section 504 supports that he was receiving; and (3) that due to the level of accommodations and services that were required to be put in place during the 2008-09 school year, the district should have referred the student to its CSE for an evaluation. The parents further contend that the district was obligated to refer the student to the CSE given the results of the November 2008 and March 2009 private evaluations; the student's previous classification and receipt of special education services; his documented history of attention difficulties and anxiety in the classroom; the student's continued academic struggles, including those in writing, spelling, and math in fourth and fifth grade; and the student's lack of response to the building level services provided by the district. The parents also assert that the section 504 plan for the 2009-10 school year was not sufficient. As relief, the parents restate the request in their petition that the district be ordered to reimburse them for the full cost of the student's tuition at Villa Maria for the 2009-10 school year.

I will now turn to the standards of review relevant to this appeal.

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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).

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 Dept of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

I will initially consider the district's cross-appeal of the impartial hearing officer's findings that the student's section 504 plan for the 2009-10 school year was insufficient and not appropriate. New York State Education Law makes no provision for state-level administrative

review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims (Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 06-001; Application of a Child with a Disability, Appeal No. 05-111; Application of the Bd. of Educ., Appeal No. 05-108; Application of the Bd. of Educ., Appeal No. 05-033; Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 00-051; Application of a Child with a Disability, Appeal No. 00-010; Application of a Child with a Disability, Appeal No. 99-10). Therefore, I have no jurisdiction to review the portion of the impartial hearing officer's decision regarding the adequacy of the student's section 504 plan for the 2009-10 school year and, accordingly, I will dismiss that portion of the district's cross-appeal.

I will now consider the district's cross-appeal that the impartial hearing officer erred when she determined that the district violated its child find obligations by not referring the student to the district's CSE and thereby, denied the student a FAPE. The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008] aff'd 2010 WL 1049297 [2d Cir. March 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; Forest Grove, 129 S. Ct. at 2495; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400, n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; see 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (New Paltz, 307 F. Supp. 2d at 400, n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]; see Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of a Child Suspected of Having a

Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child Suspected of Having a Disability, Appeal No. 04-087; Application of the Bd. of Educ., Appeal No. 04-037; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child with a Disability, Appeal No. 02-092; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008] referencing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention programs (8 NYCRR 200.4[a]).

In this case, I find that the district met its burden of proof to show that it did not violate its child find obligation. The hearing record shows that the district had procedures in place to recommend students it suspects of being eligible to receive special education programs and services to its CSE for an evaluation and that district staff were trained regarding when referrals to the district's CSE should be made (see Tr. pp. 17-19; Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41). The student's fifth grade classroom teacher testified that during the time the student was in the fifth grade, he did not see a need to refer the student to the district's CSE (Tr. p. 169). The principal of the student's elementary school testified that the building committee that included herself, the classroom teacher, and the student's AIS providers did not consider referring the student to the CSE because the student was "making progress" and had "the right supports in place" (Tr. pp. 327-28). The district psychologist, who was a member of the May 2008 and May 2009 section 504 committees and who also reviewed the March 2009 private psychological update report, testified that he did not consider referring the student to the CSE and that he did not know of anyone else who considered making such a referral (Tr. p. 408). Further, and as discussed below, the hearing record reflects that the district provided the student with appropriate supports and instruction to address his continuing difficulties during fifth grade (2008-09), and that the student's level of educational progress during the 2008-09 school year was sufficient to show that the student did not need special education services and programs.

As of the beginning of the 2008-09 school year, the district had determined that the student was not eligible to receive special education services as a student with a disability under the IDEA, but instead, was eligible to receive section 504 accommodations as a student with a disability that substantially limits one or more major life activity (Dist. Ex. 12 at p. 2). The student's May 2008 section 504 plan indicated "learning" to be the major life activity that

adversely affected the student's appropriate participation in academic activities (Dist. Ex. 12 at p. 2; see 34 C.F.R. § 104.3[j][2][ii]). The chairperson of the May 2008 504 committee, who was the principal of the student's elementary school, testified that the May 2008 section 504 committee determined the student to be eligible for a section 504 plan because although the student had made "great gains" in his learning, made progress, and passed State tests during fourth grade, at times he also became overwhelmed and anxious (Tr. pp. 310, 316). The principal further testified that the committee believed that the student needed supports and recommended a section 504 plan for the student (see Tr. p. 316).

Based on my review of the hearing record, I find that during the 2008-09 school year, the district provided the student with instruction that addressed the student's relative weaknesses, and with the supports provided by the district, the student met or exceeded expected State grade level standards and exhibited adequate functioning and progress in his general education fifth grade class (Tr. p. 52; Dist. Exs. 7; 8; 23). The hearing record reflects that during fifth grade, the district provided the student with building level services including AIS, which were described as tier two supports or interventions (Tr. pp. 15-16, 38-39, 51, 52-53, 57, 136-37, 180, 186, 187; Dist. Exs. 9; 10; 24). The assistant director for special education described the three tiers of instructional support in which the district trains its staff as part of the process leading up to possible referral of a student to the CSE (Tr. pp. 18-19). The assistant director for special education indicated that tier one intervention support would be provided to a student by the classroom teacher; that tier two intervention support would be provided to a student by either the classroom teacher, the academic intervention specialist, a reading specialist, or a special education teacher; and that the district would provide tier three intervention support, a "very intensive one-to-one daily intervention" as appropriate prior to making a referral to the CSE (Tr. pp. 15-16, 56-57). The assistant director for special education testified that what makes the difference in referring a student to the CSE or not, "is the data that supports [a] response to intervention and where the baseline is and where the data supports at the end of the intervention" (Tr. p. 57).

As discussed below, the hearing record indicates that the student was academically responsive to the academic intervention provided by the district and was making progress within the general curriculum. Further, the accommodations provided to the student in his general education fifth grade class were not specially designed instruction; the curriculum was not modified for the student;¹¹ the student was not receiving related services; and the accommodations set forth in the student's section 504 plan for the 2008-09 school year were common strategies that apply to all students in general, not just students with disabilities. The same can also be said for the accommodations recommended for the student in his 2009-10 section 504 plan (see Dist. Ex. 12).

The student's fifth grade classroom teacher testified that when the student first entered fifth grade in September 2009, "he was pretty much on grade level in most areas" academically (Tr. p. 115). The teacher characterized the student as a very strong reader; that reading was his greatest strength; that he read widely from a variety of genres; and that he enjoyed reading (id.).

¹¹ Although math homework and assignments were modified for quantity, the hearing record does not show that they were modified for content (Tr. pp. 176, 198).

The fifth grade teacher testified that the student was also very strong in social studies and was performing at grade level in science (*id.*).¹² However, the fifth grade teacher also testified that the student "struggled" in mathematics and writing (*id.*). The teacher testified that in math, although the student understood concepts presented, he had a difficult time retaining math facts, something that would result in errors in calculation that would "throw off" his final answer and cause him frustration (Tr. pp. 122-23). The teacher further testified that the student displayed anxiety when confronted with certain writing tasks, depending on his interest in the topic and willingness to participate in the task (Tr. pp. 51, 115-16). The fifth grade teacher described the student socially and emotionally as "a very typical" fifth-grader; that he adjusted quite well to the classroom environment; that he had a lot of friends; and that he "definitely" was a social boy who enjoyed interacting with other students in the class (Tr. p. 115).

The hearing record shows that a district learning specialist was responsible for overseeing the student's May 2008 section 504 plan (Tr. p. 136). The student's fifth grade teacher was responsible for providing the student with the services and supports set out in the student's May 2008 section 504 plan, including being aware of the student's test accommodations and helping to make sure that those accommodations were implemented (Tr. pp. 112, 114). At the beginning of the 2008-09 school year, the learning specialist worked in the fifth grade classroom with another student, but in conjunction with the classroom teacher, monitored the student and discussed interventions and strategies to use with him (Tr. p. 136).

The student's fifth grade teacher testified that by October 2008, the student was referred to the math AIS provider for push-in and pull-out math AIS instruction two times per week to address concerns raised by the teacher and the student's mother (Tr. pp. 124-25, 135, 184, 203; *see* Dist. Exs. 10; 24). The teacher also testified that he and the student's mother spoke frequently during the first month of school about some of the difficulties the student was having in math and about some of the stress the student was feeling at night specific to his math homework (Tr. p. 135). The teacher also recommended the student for after-school math AIS services because he believed it provided an opportunity for the teacher to spend extra time with the student in an area of need and would help address some of the student's difficulties with math homework (Tr. pp. 135-36).

The fifth grade teacher testified that by December 2008 and January 2009, the student's anxiety about writing appeared to have increased and he was "shutting down a little bit more with his writing" (Tr. pp. 136-37). In addition, the student's mother expressed concern about the student's writing (Tr. p. 137). The teacher and the parent met in December 2008, and in an effort to alleviate the student's anxiety and to address some of the difficulties that the student was having in writing, the two concluded that extra support in writing would be helpful for the student (*id.*). In January 2009, the learning specialist began to provide the student with AIS writing support (Tr. p. 137; *see* Dist. Ex. 9). The teacher testified that the learning specialist worked on paragraph structure in terms of developing a topic sentence with supporting details (Tr. pp. 137-38). He testified that he and the learning specialist began to see "slow steady gains"

¹² Testimony by the student's fifth grade teacher indicated that the student had "a passion" for social studies and enjoyed history (Tr. p. 120). He described the student as "in tune to it" when reading documents in preparation for social studies related essays (Tr. pp. 120-21).

(Tr. p. 137). Although the student still had anxiety and might occasionally shut down, he was provided with prompts and redirection to "keep him moving forward" (Tr. p. 138). Despite his anxiety and need for prompting and redirection, the teacher testified that the student "definitely began to make progress that he was able to apply to essays later in the year" (id.). With respect to the student's anxiety, the classroom teacher indicated that the anxiety was more evident for assignments that the student felt less comfortable with, but if asked to write about a topic he was interested in, the student was able to write with very little prompting (id.). In order to assist and support the student in getting started on a writing assignment, depending on the type of writing assignment and the student's preference, graphic organizers or "bulleting" his ideas was used in the classroom prior to the student writing a draft (Tr. pp. 138-39).

The hearing record also reflects that, as indicated below, data maintained by the district with respect to the student's learning demonstrated that in conjunction with the student's May 2008 section 504 plan and the additional AIS instruction provided to the student, during fifth grade, the student made educational progress and that he met or exceeded particular district assessments and earned scores of "3" or higher on all State examinations measuring student achievement with respect to learning standards.

With respect to math, a November 20, 2008 math assessment recording sheet indicated that the student obtained a total of 20 out of 38 points on the first of three math skill assessments administered to all fifth grade students (Tr. pp. 53, 126-28). The student's fifth grade teacher testified that the score of 20 was equivalent to "level 2" on the district's assessment rubric,¹³ which in turn was equivalent to "not yet meeting standards" (Tr. p. 128). Thereafter, a February 13, 2009 math assessment recording sheet for grade five indicated the student had obtained a total of 26 out of 38 points on the assessment, equivalent to "level 3" on the assessment rubric, which was equivalent to "meeting standards" (Tr. pp. 128-29; Dist. Ex. 20). The student's fifth grade teacher testified that the math skills tested in the February 2009 assessment were different than the skills tested in the November 2008 math assessment, but that math skills tend to relate to and build upon each other and that the student "definitely made progress from the first assessment to the second" (Tr. pp. 129-30). With respect to the math skills tested in the February 2009 assessment, the teacher described the student's performance as "typical" of the other students in his class (Tr. p. 129). A third district math assessment for grade five was conducted on June 2, 2009 (Tr. p. 130). The student obtained a total of 24 out of 38 points on the assessment, which was "level 3" on the assessment rubric, and was equivalent to "meeting standards" (Tr. pp. 128-29, 131; Dist. Ex. 13). The teacher testified that the student's performance on this assessment was average to a little below average in comparison to the rest of the class and that the assessment score "was in the realm of meeting standard grade" (Tr. p. 131).¹⁴

¹³ The teacher testified that the district did not use State assessment data for grading district assessments, but that it did try to mirror the grading criteria on district assessments based on how the State scores its assessments (Tr. pp. 141-42).

¹⁴ Testimony by the student's fifth grade teacher indicated that the skills assessed on the June 2, 2009 math assessment were different skills that were taught after the conclusion of the earlier assessment and therefore he was unable to comment on progress (Tr. pp. 130-31).

In addition to the district assessment results, the hearing record included a math student performance and progress review (SPPR) that was maintained by the classroom teacher between October 6, 2008 and May 11, 2010 to track interventions provided to the student (Tr. pp. 131-32; Dist. Ex. 15 at pp. 1-2). According to the teacher, the SPPR for math included a "fairly broad goal" that he worked on with the student in the math AIS after-school program,¹⁵ involving various algorithms related to calculation (Tr. pp. 132, 135). The SPPR indicated the date of data collection, what the teacher was doing with the student at the time of data collection, and the student's progress (Tr. p. 132). The teacher's comments on the SPPR document indicated that the student "had mastered the actual algorithms, meaning he knew the steps in the process for addition, subtraction, multiplication and division, but that his fact errors were getting in the way of him -- his accuracy on those" (Tr. p. 133; Dist. Ex. 15 at p. 1). Work samples attached to the SPPR consistently reflected the student's use of the strategies identified on the SPPR to be successful for the student, such as turning the page sideways to help the student keep place values aligned in certain math problems (Tr. p. 133; Dist. Ex. 15 at pp. 3-22).

Administration of the 2008-09 fifth grade State mathematics examination yielded a score of 678, equivalent to performance level 3, which meant "meeting the learning standard" (Tr. p. 140; Dist. Ex. 7 at p. 1). Test results reflected that for the five content and process strands of number sense and operations, algebra, geometry, measurement, statistics and probability, the student scored "above the target range" for all strands (Tr. pp. 143-44; Dist. Ex. 7 at p. 2). The student received all of the accommodations included in his May 2008 section 504 plan, including additional test time and a separate location (Tr. p. 141).

With respect to writing, the student's AIS provider testified that she and the student's fifth grade teacher developed a SPPR that included a writing goal related to fundamentals and basic skills involved in writing a cohesive paragraph (Tr. pp. 450, 453; Dist. Ex. 11 at p. 1). Review of the SPPR indicated that between February 23, 2008 and April 14, 2008, the student worked on pre-writing activities that practiced specific skills of making a list, understanding what made a good paragraph, writing supporting sentences, listing items for topic, drafting topic sentences, independently listing topics and items, and writing a paragraph (Dist. Ex. 11 at pp. 1-2). Evaluative criteria indicated that the student was able to complete each activity at least 80% of the time (id. at p. 1). Depending upon the activity, teacher comments indicated that the student benefited from strategies such as a teacher model, visual representations to explain the elements for creating a paragraph, talking about his ideas before writing, frequent "check-ins," extra examples, and reminders to check work for clarity (id. at pp. 1-2). Although this SPPR indicated that the student completed all activities presented, comments relative to areas of difficulty indicated that with respect to practicing writing supporting sentences, the student needed extra time and prompting; that with respect to independently listing topic items in order to write a paragraph, and that the student needed to work on grammar in sentences (id.). The AIS writing instructor's June 22, 2009 comments on the SPPR stated that the student's writing skills had

¹⁵ Testimony by the student's fifth grade teacher indicated the weekly one-hour after-school math instruction occurred in a small group of four to five students (Tr. p. 134). The teacher testified that the identified math goal was based on what he saw in the classroom (id.). The teacher indicated that "typically" a specific math skill would be instructed or reviewed during a session, but the instruction was individualized so that each student would be working on skills with which they struggled (id.).

improved "this year" and that he understands how to write a cohesive paragraph and essay; that he responded well to praise and encouragement; and that he benefited from frequent teacher check-ins (*id.* at p. 1). Review of the student's work samples attached to the SPPR reflected the skills addressed in the SPPR (*see id.* at pp. 3-17).

A second SPPR also addressed writing and reflects instructional activities from April 4, 2009 to May 20, 2009 (*see* Dist. Ex. 14). The goal of this SPPR was for the student to apply his knowledge of writing cohesive paragraphs when developing a literary essay (*id.* at p. 1).¹⁶ Evaluative criteria indicated that the student was able to complete each of the SPPR activities, which included a summary of a book using who, what, and why; writing the first paragraph of a literary essay; writing the second paragraph of a literary essay; and writing a Memorial Day essay (*id.*). Depending upon the activity, different strategies worked for the student and included talking about what the student was going to write first, using notes from a graphic organizer, teacher support, and frequent teacher check-ins (*id.*). Although this SPPR indicated that the student completed all of the activities presented, comments relative to areas of difficulty indicated that in the book summary the student needed to add more details and that the student had difficulty with writing stamina in the writing of the second paragraph of his essay (*id.*). Testimony by the AIS writing provider indicated that the student needed more help with writing this literary essay than in any other assignment (Tr. pp. 473-74). Review of the student's work samples attached to this SPPR reflected the skills addressed in the SPPR (*see* Dist. Ex. 14 at pp. 3-22). Consistent with the testimony by the AIS writing provider about the editing process she engaged in with the student, review of the literary essay specific to the same book used in the summary exercise as noted above, reflected well constructed cohesive paragraphs with a topic sentence, supporting details, and an ending sentence and the provider indicated that the student typed the essay himself on a word processor and used the spell check and grammar check features on the word processor (Tr. pp. 476, 479, 501-03; *see* Dist. Ex. 14 at pp. 19-20). Review of the Memorial Day essay attached to the SPPR reflected the student's knowledge and opinions in an organized manner; an occasional spelling and/or grammatical error was noted, but the content of the essay was presented in a creative and organized manner and was expressed insightfully (*see* Dist. Ex. 14 at pp. 21-22). The teacher who provided the student with AIS assistance in writing testified that when writing about a topic in which he was interested or in which he had background knowledge, the student required little help from her other than structure to go back to the text for specific examples (Tr. p. 474). This AIS provider also testified that the student benefited from the work they did together; that the student completed presented activities; that he understood what comprised a cohesive paragraph, including a topic

¹⁶ The student's AIS writing provider testified that she and the student's fifth grade classroom teacher developed the second SPPR for writing to address the student's tendency to display anxiety and becoming overwhelmed during writing assignments and to build the student's confidence as a writer (Tr. p. 507). To address the student's anxiety and his tendency to feel overwhelmed, when working with him, the AIS writing provider assisted the student with frequent check-ins to make sure the student understood the assignment and expectations, broke down the task, provided him with positive reinforcement and encouragement, and provided the student with a performance dependent water break for a few minutes (Tr. pp. 507-08, 511). Further, the provider indicated that if the student put his head down on his desk or appeared to be daydreaming, she or the classroom teacher would re-explain the directions and expectations or give the student a "sentence starter" to give him a boost in getting started (Tr. pp. 511-12). The AIS writing provider indicated that the strategies were effective for the student (*id.*).

sentence, supporting details, and a concluding sentence; and that the student applied those skills in the literary essay (Tr. p. 479).

Administration of the 2008-09 fifth grade State English language arts (ELA) examination yielded a score of 693, which was equivalent to performance level 3 and meant that the student was "meeting the learning standard" (Tr. pp. 144-45; Dist. Ex. 8 at p. 1). Test results reflected that for the three content strands of language for information and understanding, language for literary response and expression, and language for critical analysis and evaluation, the student scored "above the target range" for all three strands (Tr. pp. 145-46; Dist. Ex. 7 at p. 2).¹⁷ The student was offered all of the accommodations included in the May 2008 section 504 plan; however, he did not use the accommodation for extended time (Tr. p. 145).

The hearing record contains additional information regarding the student's performance, including the student's 2008-09 report card for the fall, winter, and spring trimesters (Dist. Ex. 6 at pp. 1-6).¹⁸ In reading, the student's report card indicated that the student made consistent effort and growth throughout the school year (*id.* at pp. 1-2).¹⁹ The report card advised that the student was meeting standards for all three trimesters for "uses word attack strategies to decode accurately," "reads with fluency and expression," and "comprehends at an interpretative level" (*id.* at p. 2). It also showed progress from meeting standards to meeting standards "with distinction" from the first trimester to the third trimester for "comprehends at a literal level," and "demonstrates reading stamina" (*id.*). The report card also reflected that although the skill "reads independently from a variety of genres" was not applicable for the first trimester, the student was meeting standards with distinction in the second and third trimesters (*id.*).

In writing, the 2008-09 report card indicated that the student made inconsistent effort and growth throughout the school year (Dist. Ex. 6 at p. 3). Although the student remained at the level of partially meeting standards for "correctly spells words within own writing," and "edits writing" during the entirety of the 2008-09 school year, during that time, he progressed from partially meeting standards to meeting standards for "organizes ideas" and "develops ideas with supporting details" (*id.*). The report card advised that the student was meeting standards throughout the school year for "applies conventions of writing," "uses descriptive language," and "writes with 'voice'" (*id.*). Teacher comments included on the 2008-09 report card in regard to

¹⁷ Although testimony by the classroom teacher revealed that the fifth grade ELA examination primarily assessed reading comprehension and listening skills and contained "a minimal amount of writing," she testified that there was one question on part two of the examination that required the student to provide an extended answer and that the examinations "editing passage" on day two assessed grammar and punctuation (Tr. pp. 146-47). I note, however, that the results of the State assessment did not report the student's performance on those parts of the examination (Tr. p. 147).

¹⁸ The student's 2008-09 report card included a rubric whereby a grade of "1" was equivalent to "not yet meeting standards," a grade of "2" was equivalent to "partially meeting standards," a grade of "3" was equivalent to "meeting standards," and a grade of "4" was equivalent to "meeting standards with distinction" (Dist. Ex. 6 at p. 2).

¹⁹ The student's 2008-09 report card included a rubric where the student's teacher rated the student with respect to "effort" and "growth;" whereby a rating of "M" was equivalent to "minimal," a rating of "I" was equivalent to "inconsistent," and a rating of "C" was equivalent to "consistent" (Dist. Ex. 6 at p. 1).

ELA showed that the student made progress in writing from the beginning of the school year, and that by the end of the spring trimester the student made progress in his understanding of the structure of paragraphs and essays; that with support, the student was able to construct a well-written piece; and that the student benefited from using graphic organizers and rereading his written work to improve accuracy (id. at p. 4). The teacher further indicated that the student would "need continued support in this area ... as he moves on to sixth grade" (id.).

With respect to math, during the 2008-09 school year, the student's report card shows that the student made inconsistent effort and growth during the school year (Dist. Ex. 6 at p. 2). Although the student was only "partially meeting standards" during the school year for "Communications- shares and justifies mathematical thinking using appropriate organization, details, representations and terms in both written and verbal form;" and for "Problem Solving- uses estimation strategies to assess reasonableness of answers," "Number Sense and Operations- recalls basic math facts (+, -, x, ÷), computes accurately with whole numbers, computes accurately with fractions, decimals, and mixed numbers," the report card indicated that the student made progress and/or met standards in other skills and areas (see id.). In particular, for the problem solving skill of "solves problems using appropriate strategies," the student progressed from partially meeting standards in the first trimester to meeting standards in the second and third trimesters (id.). The report card also indicated that for the problem solving skill of "interprets problems correctly," the student consistently met standards during the school year (id.). The report card also showed that the student met standards in instruction on skills involving algebra,²⁰ geometry,²¹ measurements,²² and statistics,²³ during the second and third trimesters (id.).

The student's 2008-10 report card also indicated that the student was meeting standards for all social studies skills except one, and that in this skill, the student was meeting standards with distinction (Dist. Ex. 6 at p. 3). The report card also indicated that the student consistently displayed effort and growth in this subject area (id.). Further, administration of the November 2008 fifth grade State Social Studies examination yielded a final score for the student of 86, equivalent to performance level 4, which meant that the student's performance demonstrated that he was "meeting standards with distinction" for fifth grade (Tr. pp. 147-48; Dist. Ex. 23).²⁴ The hearing record indicates that meeting standards with distinction meant that the student showed evidence of superior understanding of contents, concepts, and skills required for elementary-

²⁰ In algebra, the student's 2008-09 report card reported that the student "recognizes, uses and correctly represents patterns, relations and functions" (Dist. Ex. 6 at p. 2).

²¹ In geometry, the student's 2008-09 report card reported that the student "recognizes and applies properties of geometric shapes and relationships among geometric shapes" (Dist. Ex. 6 at p. 2).

²² In measurements, the student's 2008-09 report card reported that the student "measures with appropriate methods and tools" (Dist. Ex. 6 at p.2).

²³ In statistics, the student's 2008-09 report card reported that the student "collects, organizes and displays data," and "draws conclusions and makes predictions from data" (Dist. Ex. 6 at p. 2).

²⁴ The November 2008 fifth grade State Social Studies examination report form indicated that the examination's components included multiple choice questions, constructed response items, document-based questions, and an essay (Dist. Ex. 23).

level achievements in each of a learning standards and key ideas assessed in social studies and that the student showed evidence of superior ability to apply the social studies content, concepts, and skills required for entering intermediate-level academic environments (Tr. pp. 145-46; Dist. Ex. 23). The classroom teacher testified that in taking this State examination, the student was offered all of the accommodations included in the May 2008 section 504 plan; that the student took the majority of the examination in the regular classroom; and that the student's use of a separate testing location and extended time in order to complete the essay portion of the examination only required an extra five or six minutes to complete the essay (Tr. pp. 148-49; see Tr. pp. 141, 145). The classroom teacher also testified that the student's performance on the November 2008 fifth grade State Social Studies examination was one of the higher scores in the class (Tr. p. 149). As indicated above, the student's fifth grade teacher testified that the student had "a passion" for social studies, loved history, and was "in tune to it" when reading documents in preparation for writing essays related to social studies (Tr. pp. 120-21).

In science, the student's 2008-09 report card indicated that the student made consistent effort and growth throughout the school year (Dist. Ex. 6 at p. 3). The report also card reflected that the student was meeting standards for skills related to science (*id.*). The student's fifth grade classroom teacher testified that upon entering fifth grade in September 2008 the student was at grade level in science (Tr. p. 115). When asked to describe how the student functioned in science during the 2008-09 school year, the teacher testified that the student was a grade level student; that he asked a lot of questions; and that he was very curious (Tr. p. 121).

With respect to instruction in both science and social studies, the student's fifth grade teacher testified that instruction in these subjects consisted of a combination of teacher-guided assignments and independent work (Tr. pp. 121-22). The fifth grade teacher also testified that during independent instruction, the student "typically needed a start" in order to "get him going" on the independent work (Tr. p. 122). The teacher testified that the student displayed "a lot of tactics to avoid starting an activity" (*id.*). The fifth grade teacher testified that once the student "got going" on the independent assignment, he was able to work for about 10 minutes before requiring redirection to get back to task, and that the teacher was able to redirect the student to task (*id.*).

Based on the evidence in the hearing record, as discussed above, I find that despite the student's displayed difficulties with some aspects of writing, spelling, and math calculation, the evidence in the hearing record demonstrates that the student progressed in the general education curriculum with the accommodations provided by the district in its May 2008 section 504 plan,²⁵ and that during the fifth grade, the student met or exceeded particular district assessments and all State standards for all academic subjects during the 2008-09 school year (Dist. Exs. 7 at p. 1; 8 at p. 1; 13; 20; 23; 28 at pp. 1-3). Further, I find that the hearing record does not support the conclusion that the accommodations in the student's May 2008 section 504 plan constituted

²⁵ These supports included refocusing and redirection; checking for understanding, and testing accommodations of which made provision for providing breaks during extended testing, extended time (1.5), completion of tests in alternate setting when necessary, frequent check-ins and reminders to use the provided modifications. and reducing the number of items in assignments so that the student would not become overwhelmed (Dist. Ex. 28 at pp. 1-2)

special education within the meaning of the IDEA, particularly that it was specially designed instruction to meet the student's unique needs (34 C.F.R. § 300.39 [a][1], [3]; 8 NYCRR 200.1[vv], [ww]; see A.P., 572 F.Supp.2d at 225 [explaining that not every student who has a disability needs special education and related services]). The student was not enrolled in a special class; he did not have special education teachers (see Dist. Ex. 28).²⁶ Additionally, the student did not receive related services. Furthermore, none of the accommodations required that the student's assignments be individualized in content to meet his individual needs or that the general education curriculum be modified. To the contrary, all of the accommodations set forth in the student's May 2008 section 504 plan were strategies that apply to students in general, not just students with disabilities. I also note that from a social and emotional perspective, the classroom teacher described the student as "a very typical" fifth-grader; that he adjusted quite well to the classroom environment; that he had a lot of friends; and that he was "definitely" a social person who enjoyed interacting with other students in the class (Tr. p. 115). In summary, since evidence shows that the district had procedures in place for identifying students suspected of having a disability that required special education under the IDEA and there was no reason for the district to suspect that the student required special education, I find that the district was not obligated to refer the student to the CSE and did not violate its child find obligation.

In light of my determination that the district has met its burden to show that it has complied with the IDEA's child find provisions, which was the basis of the parties' dispute and the impartial hearing officer's conclusion that the district failed to offer the student a FAPE, I will annul that portion of the impartial hearing officer's decision that the district failed to offer the student a FAPE for the 2009-10 school year will dismiss the parents' appeal of the impartial hearing officer's decision which found that Villa Maria was not an appropriate placement. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated November 22, 2010 which determined that the district violated its child find obligation and failed to refer the student to the CSE for evaluation as a student suspected of having a disability; failed to offer the student a FAPE pursuant to the IDEA; must conduct an independent evaluation; and, must reconvene the CSE are hereby annulled.

Dated: Albany, New York
March 7, 2011


JUSTYN P. BATES
STATE REVIEW OFFICER

²⁶ Although the student's AIS writing provider was State certified in special education, the hearing record, indicates that the position in which she was providing the student with services was as a "learning specialist" (Tr. pp. 450-51; Dist. Ex. 9).