



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-005

**Application of the BOARD OF EDUCATION OF the [REDACTED]  
[REDACTED] School District for review of a determination of a  
hearing officer relating to the provision of educational services  
to a student with a disability**

### **Appearances:**

Keane & Beane, P.C., attorneys for petitioner, Stephanie M. Roebuck, Esq., of counsel

Asher, Gaughran LLP, attorneys for respondents, Rachel Asher, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Villa Maria Educational Center (Villa Maria) for the 2008-09 and 2009-10 school years. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending fifth grade at Villa Maria. Villa Maria 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 (Tr. pp. 1027, 1032; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

### **Background**

The hearing record reflects that as a young child the student received special education services through the Early Intervention Program and subsequently "preschool services" via an out-of-State district to address delays in receptive and expressive language skills; social and play skills; and attention difficulties (Tr. pp. 1111-14; Joint Exs. 4 at pp. 1, 3; 6 at p. 2). At age four the out-of-state district declassified the student, and his parents privately obtained one session

per week of private speech-language therapy to improve his concept knowledge, listening, auditory processing, and verbal expression skills (Joint Ex. 6 at p. 2).

The student began attending the district's kindergarten "inclusion" class program at the commencement of the 2004-05 school year, and received two sessions per week of "building level" group speech-language therapy (Tr. pp. 1116-17; Joint Exs. 4 at p. 1; 6 at p. 2; see Joint Ex. 1). In late June 2005, the student's mother requested that the district conduct a special education evaluation of the student; however in August 2005, the student's mother informed the district that the parents were pursuing private evaluations of the student scheduled for fall 2005 (Joint Exs. 97; 98; 99).<sup>1</sup>

In the 2005-06 school year the student began first grade in a general education setting, and received three 40-minute small group sessions of reading and writing support services per week (Joint Exs. 4 at p. 1; 7 at p. 1; 28). The student continued to receive two sessions per week of building-level speech-language therapy services (Tr. p. 1129).

Over four dates from September 15 through October 6, 2005, a clinical psychologist from the Soifer Center For Learning and Development (Soifer Center) conducted a private psychoeducational evaluation of the student at the parents' request, to ascertain the cognitive factors underlying the student's academic difficulties "so that [an] appropriate class placement c[ould] be obtained" (Joint Ex. 4 at pp. 1, 2, 11).<sup>2</sup> The evaluator reported that the student exhibited "a lot of trouble maintaining his attention and effort during testing," indicating that the overall quality of his test performance was "notably variable" as a result of his "attention problems" and difficulty using language to respond to questions (id. at pp. 3-4). Additionally, the evaluator noted that during the assessment, the student "became frustrated very easily, and was visibly distressed when he did not have an automatic answer in response to questions" (Joint id.). The evaluator administered numerous assessments measuring the student's cognitive, verbal, visual-perceptual, visual-motor, memory, attention, and academic skills, as well as his executive and emotional functioning (id. at pp. 2-10). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) to the student yielded the following index scores: verbal comprehension 75 (borderline), perceptual reasoning 100 (average), working memory 83 (low average), and processing speed 85 (low average), and a full scale IQ score of 82 (low average) (id. at p. 4). The evaluator reported that the student demonstrated strengths in visual reasoning abilities and "solid memory capacity;" with weaknesses in verbal reasoning, language expression and comprehension, and working memory skills (id. at p. 10). According to the evaluator, the student exhibited difficulty processing lengthy and complex verbal statements, and a limited attention span (id.).

The evaluator administered the Wechsler Individual Achievement Test – Second Edition (WIAT-II) to the student and he achieved the following subtest standard scores: word reading 77,

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<sup>1</sup> During summer 2005, the parents obtained the services of a private tutor who provided phonics instruction to the student (Joint Ex. 4 at p. 1).

<sup>2</sup> The director of the Soifer Center described the facility as "a private child development center that provides diagnostic and remedial services," as well as family and advocacy services, interpretation of records, and expert witness testimony (Tr. pp. 780-81).

spelling 91, reading comprehension 79, numerical operations 95, and math reasoning 105 (Joint Ex. 4 at p. 12).<sup>3</sup> In her report, the evaluator described the student's decoding skills as "very rudimentary" in that he lacked the ability to focus on an entire word and connect sounds to graphemes, which affected his pseudoword decoding ability (id. at p. 9). The student recognized and read "a few" sight words and in general matched single letters to their sounds (id.). According to the evaluator, the student's attention difficulties interfered with his willingness to perform reading tests, and his "severe distress" suggested to her that reading was a particularly difficult task for him (id.). The evaluator reported that the student's spelling skills were "similarly limited" and that he refused to produce a written approximation of sound blends that he had not memorized (id.). In mathematics, the student demonstrated a "good understanding" of concepts, although the evaluator indicated that the student would require "direct instruction to help him learn how to apply mathematic concepts and retain the sequence of steps necessary to systematically solve math problems" (id.). The evaluator indicated that the student was in "danger of academic problems due to his weaknesses in attention and language processing," concrete manner of thinking, limited ability to mentally manipulate and extract key information, and expressive language weaknesses (id. at p. 10).

Emotionally, the evaluator described the student as "fragile" due to his acute awareness of his "limited skill set" (Joint Ex. 4 at p. 10). He was observed to disengage from difficult tasks, and when pushed to continue, lacked adequate coping mechanisms to relieve his frustration (id.). According to the evaluator, the student's current regular classroom placement was of "extreme concern," as he lacked the ability to meet the "heavily language and reading based academic demands" (id.). The evaluator recommended "immediate placement in a more supportive setting," and the provision of direct instruction (id.). Additional recommendations included an evaluation of the student's attention by a pediatric psychiatrist, provision of remediation to improve the student's linguistic and metacognition skills, twice weekly language therapy and daily resource room instruction with Orton-Gillingham trained instructors (id. at p. 11). The evaluator also recommended reevaluating the student's school setting to determine if it provided him with "the support he need[ed] for his language based learning disability," including direct and intense instruction and a highly supportive, nurturing environment (id.). Application to a special education school was suggested (id.).

Over four dates between September 30 and October 14, 2005, a speech-language pathologist from the Soifer Center conducted a private evaluation of the student at the parents' request due to their concerns about their son's difficulties with phonics, basic reading, expressive language, and processing skills (Joint Ex. 6 at pp. 1, 11). The evaluator administered numerous assessments to the student, which measured his semantic knowledge, word retrieval, syntax, comprehension and language processing, memory, verbal reasoning and problem solving, discourse, and phonological awareness skills (id. at pp. 4-10). Consistent with the results of the private psychoeducational evaluation, the evaluator concluded that the student exhibited a "language processing disorder . . . at the most basic levels of semantic and syntactic knowledge and use, compounded by a concrete cognitive style, auditory processing and attentional difficulties as well as weak coping skills when confronted with language and learning challenges" (id. at p. 10). The evaluator recommended that the student receive three sessions per

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<sup>3</sup> The evaluator noted that the student was "unable" to complete the decoding subtest of the WIAT-II (Joint Ex. 4 at p. 12).

week of individual speech-language therapy to address weaknesses in the student's semantic organization, syntactic knowledge and use, language processing, organization for thinking and speaking, and phonological awareness skills (id. at p. 11). She further recommended that the student receive phonological awareness and reading instruction using the Orton-Gillingham approach (id.). In addition, the evaluator recommended a pediatric psychiatric evaluation to consider the possibility of medical intervention for the student's attention difficulties (id.). Regarding classroom placement, the evaluator's report indicated that it was "crucial that structure and a sequential, hierarchical, direct instructional approach that accommodates to [the student's] pace and learning needs must be available in his classroom setting in order for him to learn," adding that the educational setting should also provide the student with emotional support (Joint id.). The evaluator recommended the "investigation of alternate educational placements" that offered the features described above (id.).

On October 15, 2005, a speech-language pathologist/audiologist conducted a private auditory processing evaluation of the student (Joint Ex. 3). The evaluator described the student's attention ability as "variable," and reported that he became frustrated as the testing became difficult (id. at p. 2). The student's hearing was within normal limits in both ears, "with good discrimination in quiet but with difficulty discriminating speech in noise" (id. at p. 6). Following the administration of numerous assessments measuring the student's general auditory processing skills, and phonemic awareness, temporal integration, auditory comprehension, and short-term memory skills, the evaluator concluded that the student exhibited a "significant auditory processing deficit" (id. at pp. 3-6). Specifically, the student demonstrated deficits in auditory closure, figure-ground listening, and integration skills (id. at p. 6). The evaluator reported that the student's response "patterns" were associated with difficulties in reading accuracy, comprehension, short-term memory, distractibility, and receptive and expressive language skills (id.). The student's phonemic awareness skills, including decoding and synthesis, were below age and grade level, and his short-term memory skills were compromised for short and lengthier material (id.). The evaluator reported that the student's auditory comprehension skills were "surprisingly good" (id.). Although the parents' responses on a measure of their son's attention did not identify an attention deficit, the evaluator noted in her report instances of the student's difficulty maintaining attention, distractibility, and "fidgetiness" (id. at pp. 2, 5-7). The evaluation report further noted that "[s]ince the auditory system does not fully mature until age 7, some of what was observed could improve with maturation, time and intervention" (id. at p. 7). Due to the student's listening difficulties, the evaluator offered recommendations including: speech-language therapy to improve auditory processing skills; various classroom accommodations; a trial of a personal FM system;<sup>4</sup> reading instruction with a phonemic awareness approach; consideration of programs such as Earobics, Auditory Integration Training and Fast ForWord; an occupational therapy (OT) evaluation; and an evaluation of the student's attention (id. at pp. 7-8).

On December 8, 2005, the Committee on Special Education (CSE) convened for an initial review of the student (Joint Ex. 15). According to the resultant individualized education program (IEP), the student's regular education teacher, reading teacher, and speech-language

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<sup>4</sup> According to the district speech-language pathologist, FM systems are "designed to maximize speech output and minimize background noise for students," and depending on the student's needs, are either "surround sound" or personal units (Tr. pp. 650-51).

therapist provided information to the CSE regarding the student's performance in their respective areas (id. at p. 4). The director of the Soifer Center attended the meeting and reviewed the results of the fall 2005 private psychoeducational, auditory processing, and speech-language evaluations (Joint Ex. 15 at p. 4; see Joint Exs. 3; 4; 6). Additionally, the CSE considered the October 2005 social history, classroom observation reports, and a December 2005 district reading services report, which indicated that the student had made "very limited progress" with the support offered (Joint Ex. 15 at pp. 4-5; see Joint Exs. 2; 5; 7; see also Joint Ex. 28). The student's reading teacher further reported that the then-current reading services were not meeting the student's needs, and that he needed "more individualized instruction that [wa]s appropriately paced, in keeping with his learning style" (Joint Ex. 7 at p. 2). The CSE determined that the student was eligible to receive special education and related services as a student with a learning disability, and recommended placement in 15:1 inclusion class,<sup>5</sup> with a daily, 90-minute 12:1+1 language arts special class (Joint Ex. 15 at p. 1). The CSE also recommended two 30-minute sessions per week of group speech-language therapy within the student's language arts special class (id. at pp. 1, 4).

On February 2, 2006, a subcommittee of the CSE (CSE subcommittee) convened to review the results of a January 2006 district OT evaluation (Joint Ex. 16; see Joint Ex. 8). The CSE subcommittee recommended that the student receive two 30-minute group OT sessions per week to address postural weaknesses, poor endurance, and weak graphomotor skills (Joint Exs. 8 at p. 3; 16 at p. 1). At the meeting, the parent requested and the district agreed that the student undergo a trial of an FM "headset" during afternoons while in the general education classroom, and that the district speech-language pathologist contact the student's "outside therapist" to coordinate services (Joint Ex. 16 at p. 4). The parents informed district staff that they had begun to administer medication to the student to address his attention deficit disorder (ADD) (Joint Ex. 96 at p. 9).<sup>6</sup>

In May 2006, the CSE subcommittee reconvened for the student's annual review and to develop his second grade IEP (Joint Ex. 17). The CSE subcommittee reviewed the results of a March 2006 district administration of the Metropolitan Achievement Test (MAT) and an April 2006 district administration of the Developmental Reading Assessment (DRA) (Tr. p. 251; Joint Ex. 17 at pp. 3-4). According to the resultant IEP, the special education teacher reported that the student had made a "nice adaption" to the class, and his reading and phonological awareness skills had improved (Joint Ex. 17 at p. 4). In writing the student produced "basic simple sentences," and the regular education teacher reported improvements in the student's math skills (id.). The speech-language pathologist noted the arrival and trial of the student's FM sound field system (id. at pp. 1, 4). The IEP noted that the student was administered medication "to improve his ability to focus" (id. at p. 1). For the 2006-07 school year, the CSE subcommittee

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<sup>5</sup> The hearing record described the inclusion class model as it existed at the district's elementary school at that time as a class providing support to students classified by the CSE (Tr. p. 110). The hearing record reflected that the inclusion class model included a regular education teacher and a special education teacher; and that the special education teacher addressed the needs of the students within the inclusion class model during the regular education teacher's instruction by intervening when a student needed assistance such as clarification or simplification of directions (Tr. p. 111)

<sup>6</sup> The parent testified that a pediatric neurologist offered her son a diagnosis of an attention deficit disorder and prescribed medication (Tr. pp. 1126-27).

recommended placement in a 15:1 inclusion class; a daily, 90-minute 12:1+1 language arts special class; and a daily 45-minute 12:1+1 math special class (*id.*). The student also received two 30-minute sessions of group OT per week, and three 30-minute sessions of speech-language therapy per week (*id.*). During the student's second grade school year, the parents obtained private tutoring services from the student's first grade special education teacher (Tr. p. 1137).

In March 2007, the CSE subcommittee reconvened for the student's annual review and to develop his third grade IEP (Joint Ex. 20).<sup>7</sup> According to the resultant 2007-08 IEP, the special education teacher reported that the student exhibited "improvement in all areas due to his diligence and work habits and comprehension skills" (*id.* at p. 5). A March 2007 district administration of the DRA yielded performance at Level 20/24, which the CSE subcommittee noted was an increase from the student's DRA performance at Level 6 the previous year (*id.* at pp. 3-4). The student continued to exhibit difficulty with written language and writing, illustrated by teacher reports and his performance on a March 2007 district administration of the MAT (*id.* at pp. 3-5). The student's mathematics skills were described as "generally on grade level," and "average;" confirmed by MAT results (*id.*). The IEP noted that the student could be "very sensitive to certain comments which suggest[ed] that he might not be good at something," indicating that he could also "react sharply, by acting sad, when he d[idn't] understand something during class instructions" (*id.* at p. 5). The CSE subcommittee discussed the student's need for a smaller FM system to minimize distractions, and agreed to conduct a trial of an in-the-ear personal FM unit (Tr. p. 126; Joint Ex. 20 at p. 5; *see* Joint Ex. 116). The IEP included annual goals in the areas of reading, writing, mathematics, social/emotional/behavioral, speech-language, and motor skills (Joint Ex. 20 at pp. 6-11).

For the 2007-08 school year, the March 2007 CSE subcommittee recommended placement of the student in a daily, 90-minute 12:1+1 language arts special class (Joint Ex. 20 at p. 1). In both science and social studies classes, the CSE subcommittee recommended that the student receive two 40-minute sessions per week of 6:1 direct consultant teacher services (Joint Ex. 20 at p. 1). One 40-minute session of indirect consultant teacher services in both science and social studies per week was also recommended (*id.*). The CSE subcommittee did not modify its 2006-07 OT and speech-language therapy recommendations; but included an individual, monthly consult by a teacher of the hearing impaired in the student's 2007-08 IEP (*compare* Joint Ex. 17 at p. 1, *with* Joint Ex. 20 at p. 2). During summer 2007, the student attended a private special education school's summer program (Tr. p. 1137).<sup>8</sup>

While the student attended the third grade during the 2007-08 school year, his former second grade special education teacher became his private tutor (Tr. p. 1141). The hearing record reflected that the parents and both of the student's regular and special education teachers frequently communicated during the course of the 2007-08 school year (Joint Exs. 36; 38; 40-60; 62; 64-76; 78-82; 151). In October 2007, the student's mother informed district staff that the

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<sup>7</sup> In the district, kindergarten through second grade students attend the elementary school, while students in third through fifth grade attend the "intermediate" school (Tr. p. 93).

<sup>8</sup> In June 2007 the parent informed the CSE chairperson that the student had begun using the personal FM unit in the classroom, which worked "wonderfully" for him (Joint Ex. 96 at p. 21). At the parents' request, the district allowed the student to use the personal FM unit during his summer 2007 attendance at a private summer camp (Joint Ex. 96 at p. 24).

student was complaining about going to school and that it was too hard for him (Joint Ex. 43 at p. 1). The parent expressed her concern about the student's growing anxiety, and that although the medication for his ADD had been changed, it would take time to become effective (id.). She inquired about classroom accommodations and group therapy the district could offer to support the student (id.). The regular education teacher responded that he had not observed a change in the student, but that he was willing to meet with the parents at their request (Joint Ex. 44).

In November 2007, the special education teacher documented the student's DRA performance at an independent Level 20, and at an instructional Level 24 (Joint Exs. 84; 85; 89).

In December 2007, the parents questioned the regular education teacher as to whether the student had been provided with testing accommodations during a mathematics test, and also whether he required a smaller math class due to his auditory processing difficulties (Joint Ex. 48). The regular education teacher indicated that the student had been provided with test accommodations, and that he would notify the parents of upcoming tests (id. at p. 1).

In January 2008, the parents expressed to district staff their concern about the level of support the student was receiving in his "mainstream" math class (Joint Ex. 49). According to the parents, their son was expressing a "tremendous amount of anxiety about the math class," due to the absence of additional staff in the classroom to repeat and clarify concepts for the student, and to provide small group instruction opportunities (Joint Exs. 49; 70). Although the parents acknowledged that the student's mathematics skills were "too high" to be placed in a special class, the lack of assistance in the mainstream math class was "unacceptable" to them (Joint Ex. 49). The parents characterized the student's consultant teacher services in science and social studies as "ideal," and requested that the district offer consultant teacher or teacher assistant services in the student's mainstream math class (id.). The parents informed the district that they were asking their son's private tutor to focus sessions "exclusively" on math (id.).

On March 26, 2008, the CSE subcommittee convened for the student's annual review and to develop his 2008-09 IEP (fourth grade) (Dist. Ex. 21). Attendees included the CSE chairperson, both the student's special education teacher and regular education teacher, and the student's mother (id. at p. 5). According to the resultant IEP, at the meeting the special education teacher reported that the student had exhibited "great progress" in his ability to remain on task and focused (id.). She further reported that the student demonstrated "a lot of progress" in reading, in that he displayed "great decoding strategies;" long, fluent phrases; and good comprehension of the material he had read (id. at pp. 3, 5). Regarding writing, the IEP indicated that the student did not feel comfortable, needed support, at times avoided writing tasks, and expressed disappointment at writing time; however, with encouragement did "well" (id.). In mathematics, the student reportedly did well with math computations, but exhibited weaker skills with "word problem solving and the language of math" (id.). The IEP indicated that in the area of speech-language, the student's vocabulary skills were developing at a consistent rate, and that he continued to benefit from the use of graphic organizers and visuals when sequencing information from stories (id. at p. 3). The student required occasional prompts to aid his recall of answers to questions posed (id.). The March 2008 IEP indicated that the student was "a sensitive youngster who c[ould] be critical of himself and at other times need[ed] lots of support to stay engaged or try new tasks" (id. at p. 4). The parent informed the CSE subcommittee that the

student was under the care of a psychiatrist who managed the student's ADD medication, and who noted that the student "show[ed] some signs of anxiety" (*id.* at p. 5). The CSE subcommittee developed annual goals for the student in the areas of study skills, reading, writing, speech-language, and motor skills (*id.* at pp. 6-9).

For the 2008-09 school year, the March 2008 CSE subcommittee recommended placement of the student in a daily, 90-minute 12:1 integrated co-teaching (ICT)<sup>9</sup> English language arts (ELA)<sup>10</sup> class; and a daily, 60-minute 12:1 ICT math class (Dist. Ex. 21 at p. 1). The CSE subcommittee also recommended that the student receive two 30-minute sessions per week of group OT, and two 30-minute sessions per week of group speech-language therapy; and one 30-minute monthly consult by a teacher of the hearing impaired (*id.* at pp. 1-2). Program modifications included checking for understanding, refocusing and redirection, and reteaching of materials (*id.* at p. 2). Additionally, the CSE subcommittee recommended testing accommodations consisting of directions explained, directions read, extended time, tests read, and a special location (*id.*). Continued use of the student's FM system was also recommended (*id.*).

On March 30, 2008, the parent provided the district with consent to release the student's educational records including evaluation reports and IEPs to Villa Maria, and requested that their son's special education teacher complete an evaluation form for the private school (Joint Exs. 34; 74). By letter dated April 10, 2008, the director of special services sent the requested educational records to Villa Maria (Joint Ex. 123).

In April and May 2008, the special education teacher documented the student's DRA performance at an independent Level 38, and an instructional Level 40, respectively (Joint Exs. 86; 87; 89).

In a May 2008 letter to the parents, the student's private psychiatrist reported that the student met the criteria for diagnoses of an anxiety disorder, not otherwise specified (NOS); a mild attention deficit hyperactivity disorder (ADHD)-predominantly inattentive type; and a language processing disorder (Tr. p. 717; Joint Ex. 152). Additionally, the psychiatrist indicated that the student exhibited a low frustration tolerance and tended to demonstrate difficulty "adapting" (Joint Ex. 152). According to the psychiatrist, during the 2007-08 school year the student had difficulty adapting to the "part-time co-taught class" and as a result, became "demoralized and more anxious" (*id.*). Due to the student's difficulties, the psychiatrist

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<sup>9</sup> Integrated co-teaching services is defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

<sup>10</sup> I note that the district's IEPs distinguish between the student's placement in either "language arts" special classes, or "English/[l]anguage [a]rts" integrated co-teaching classes (Joint Exs. 15 at p. 1; 17 at p. 1; 20 at p. 1; 21 at p. 1; 22 at p. 1).

recommended placement in a "small, structured, supportive classroom setting next year, as opposed to a full-time co-taught class, to prevent his becoming even more demoralized and anxious" (id.).

By letter dated July 14, 2008, the parents informed the director of special services that they were placing their son at Villa Maria for the 2008-09 school year because of the "enormous difficulty" that the student had in school and the student's lack of progress (Joint Ex. 126). The parents further indicated that the student was "extremely unhappy in school," resulting in "deleterious psychological issues" (id.). The letter advised that the parents would seek reimbursement for the cost of their son's placement at Villa Maria (id.).<sup>11</sup>

The student attended Villa Maria during the 2008-09 school year for the fourth grade (Joint Ex. 175). The hearing record reflects that Villa Maria is a "private coed school for students who have learning disabilities" (Tr. pp. 1027, 1032). The student received instruction in reading, language, writing, mathematics, science, social studies, music/drama, art, physical education, religion/ethics, computer, and social development (id. at pp. 10-15). The student also received "push-in" and "pull-out" speech-language services (id. at p. 9). Villa Maria developed its own IEP annual goals and short-term objectives for the student in the areas of reading, written language, mathematics, social/behavioral, and gross/fine motor skills (Joint Ex. 14).

In preparation for the student's annual review, on April 21, 2009, the parents sent the director of special services a report of the student's private Soifer Center psychoeducational evaluation (Joint Ex. 9). The evaluation report indicated that over the course of three dates in July and one date in September 2008, a Soifer Center psychologist administered numerous assessments measuring the student's cognitive, visual-perceptual, visual-motor, attention, and academic skills; executive functions; and also his emotional functioning (id. at pp. 2-8). According to the evaluator, although overall the student remained "pleasant" during the evaluation; he also relayed his opposition to certain tasks and shared "the negative experiences he endured in school" (id. at p. 4). Administration of the WISC-IV yielded the following index scores: verbal comprehension 91 (average), perceptual reasoning 96 (average), working memory 102 (average), and processing speed 85 (low average); and a full scale IQ of 91 (average) (id.). The evaluator noted areas of relative strengths when the student reasoned with abstract visual material, abilities consistent with the results of prior testing (id.). She reported that although the student's language skills had improved "somewhat" since the 2005 testing, he continued to exhibit limitations in both expressive and receptive language skills (id. at p. 9). Specifically, the student's ability to understand complex grammar, produce well-formulated responses, retrieve words, and demonstrate a developed lexicon was limited (id.). According to the evaluator, the student's comprehension skill "varie[d]," and his grasp of verbal material declined when given lengthy material that included more complex syntactic forms (id.). Additionally, the student did not "efficiently use language to think abstractly, integrate information, or consistently think in broad terms" (id.). The student's verbal memory was "adequate" for contextual and rote information, with constraints noted as the volume of information increased (id.). The evaluator

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<sup>11</sup> During third grade the student participated in the New York State Testing Program in English language arts and mathematics (Joint Ex. 150). The hearing record does not indicate when the district received the results of these assessments, and whether the results were available to be considered by the March 2008 CSE subcommittee (see Tr. pp. 423-24, 596-97; see Joint Ex. 21 at p. 5).

described the student's visual-perceptual skills as "intact" and his visual memory as "sound" (*id.*). The evaluator noted that the student was administered medication to address his ADHD, and although his ability to sustain focus and attention had improved since the prior evaluation, "some limitations with [the student's] executive functions persist[ed]" (*id.* at pp. 7, 9). She further indicated that the student's "rather rigid cognitive posture" could affect his ability to problem solve and flexibly navigate more challenging experiences (*id.* at p. 9).

Administration of the WIAT-II to the student yielded the following subtest standard scores (percentile): word reading 91 (27), pseudoword decoding 92 (30), numerical operations 93 (32), math reasoning 105 (63) and spelling 83 (13) (Joint Ex. 9 at p. 13). Although the student's WIAT-II reading subtest standard scores were in the lower end of the average range, the evaluator described the student's reading skills as "relatively weak and below grade level" (*id.* at pp. 7, 13). More "extensive" testing of the student's reading skills indicated to the evaluator that the student had not "fully mastered basic decoding skills" resulting in "halting" reading of connected text (*id.* at pp. 7-9, 13). The student also exhibited "constraints" in reading comprehension and "weak" spelling skills (*id.* at pp. 8-10). The student was "highly resistant" to completing writing activities despite multiple presentations of writing tasks (*id.*). The student's ability to solve basic mathematical word problems when provided with visual prompts was "relatively strong," but his ability to compute addition and subtraction problems was "inconsistent," especially when the problems required regrouping (*id.* at pp. 8, 10).

Regarding the student's emotional functioning, the evaluator reported that the student's lack of skills to meet curricular demands had been "distressing for him, and appear[ed] to have eroded his self-esteem" (Joint Ex. 9 at p. 8). According to the evaluator, the parents reported that the student's psychiatrist identified their son's "anxieties as being secondary to his present academic placement" (*id.*). Additionally, the evaluator observed the student's feeling of frustration exhibited during test activities, and that he "lack[ed] adequate means for coping" with his academic struggles (*id.* at pp. 3, 7-8). The evaluator's recommendations included that the student receive "additional educational supports including remedial instruction for math, reading and writing;" language therapy to address expressive and receptive weaknesses; and monitoring of his emotional functioning (*id.* at p. 10).

On May 7, 2009, the parents sent to the director of special services, a report of the student's private Soifer Center speech-language evaluation (Joint Ex. 10). The evaluation report indicated that over three dates in August 2008, a Soifer Center speech-language pathologist administered numerous assessments measuring the student's semantic knowledge and word retrieval; syntactic knowledge and use; language processing and comprehension; verbal reasoning and problem solving; narrative and conversational; written language; and verbal memory (*id.* at pp. 3-7).<sup>12</sup> In the report, the evaluator indicated that the student's concrete and literal cognitive orientation "constrain[ed]" his ability to integrate information and adopt an abstract attitude towards the material (*id.* at p. 3). The student's auditory processing disorder affected him when he was required to process volumes of auditory information (*id.*). Additionally, the student became "easily frustrated" by cognitive and linguistic demands; lacked

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<sup>12</sup> The evaluation report indicated that the student's "overall voice quality was within normal limits," and that he was "generally an intelligible speaker;" although "[h]is language formulation difficulties negatively impacted his fluency, particularly during lengthier narratives and explanations" (Joint Ex. 10 at p. 7).

effective coping strategies; and "simply gave up" when tasks became too difficult (id.). The student exhibited average to low average ability on tasks measuring basic vocabulary and categorical knowledge, and small amounts of information in the context of simple syntax structure and test supports (e.g., multiple choice, pictures) (id. at pp. 7, 9-10). According to the evaluator, when information was not provided to the student in that manner, the "learning of new concepts and skills [was] more difficult" (id. at p. 7). The evaluator reported that "weaknesses in the student's semantic knowledge and use, syntactic knowledge and use, and organizational skills negatively affected [the student's] language formulation skills" (id. at pp. 5-6). These weaknesses also affected the student's language processing and comprehension ability (id. at p. 5). The evaluator described the student's verbal memory skills as "vulnerable," which to her was "not surprising," given his auditory processing disorder and attentional weaknesses (id. at p. 7). The student demonstrated a strong aversion to writing, and was consoled only when the evaluator told the student he did not have to write (id.). The evaluator recommended that the student continue at Villa Maria and receive "intensive" language therapy to strengthen specific areas of linguistic functioning (id. at p. 8).

On May 12, 2009, a district special education teacher conducted a 45-minute classroom observation of the student at Villa Maria during a math class consisting of three students and one teacher (Joint Ex. 12 at p. 1). The special education teacher observed the student volunteering answers, answering questions when called upon and with the group, and attending to the teacher during the lesson (id.). The student was also observed to work independently, complete math problems, follow verbal directions and redirect himself after losing focus (id. at pp. 1-2). The special education teacher indicated that the student appeared to exhibit adequate knowledge in the class, followed most directions, and interacted appropriately with peers (id. at p. 2). Although the student responded to redirection from his teacher, he was not observed to seek out assistance when needed (id.).

On May 13, 2009, the Villa Maria admissions office provided the district with copies of the student's January 2009 progress report on his Villa Maria IEP annual goal and short-term objectives and a January 2009 narrative mid-term report (Joint Exs. 11; 14). The student's Villa Maria IEP progress report indicated that the student exhibited "[s]atisfactory [p]rogress" toward the majority of his annual goals and short-term objectives (Joint Ex. 14). Narrative reports indicated that generally, the student exhibited progress in all subjects (Joint Ex. 11).

On June 11, 2009, the CSE subcommittee convened for the student's annual review and to develop his 2009-10 IEP (fifth grade) (Joint Ex. 22). Attendees included the CSE chairperson, a school psychologist, a special education teacher, a regular education teacher, a speech-language pathologist, and a "COTA"<sup>13</sup> (Joint Ex. 22 at p. 5). According to meeting information contained in the resultant IEP, the parents indicated that their son's "diagnoses remain the same: Language Based Learning Disability, Central Auditory Processing Disorder & Attention Deficit Disorder," and that he was currently prescribed medication for ADD (Joint Exs. 13 at p. 1; 22 at p. 5). The June 2009 IEP reflected that the CSE subcommittee reviewed the August and September 2008 Soifer Center psychoeducational and speech-language evaluation reports, the

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<sup>13</sup> Although not defined in the hearing record, the acronym "COTA" often refers to a certified occupational therapy assistant.

January 2009 Villa Maria mid-term progress report, and the May 2009 social history and classroom observation reports (Joint Ex. 22 at pp. 5-6).<sup>14</sup> The parent indicated to the CSE subcommittee that the student was receiving twice weekly speech-language therapy, but was not currently receiving OT at Villa Maria although she described the "entire writing process" as "hard" for the student (*id.* at p. 5). The CSE subcommittee discussed conducting additional speech-language evaluations of the student, indicating that it would mail a consent form to the parent and, upon completion of the evaluation, reconvene in fall 2009 to review the results (*id.* at p. 6).<sup>15</sup> The June 2009 IEP contains annual goals for the student in the areas of study, reading, writing, speech-language, social/emotional/behavioral, motor and computer skills (*id.* at pp. 6-9).

For the 2009-10 school year, the June 2009 CSE subcommittee recommended placement of the student in a daily, 90-minute 12:1+1 language arts special class; a daily 40-minute 3:1 reading special class, and a daily, 60-minute ICT math class (Joint Ex. 22 at p. 1). The CSE subcommittee also recommended that the student receive three 40-minute sessions of 8:1 direct consultant teacher services "weekly"<sup>16</sup> during his science and social studies "block" (*id.* at pp. 1-2). Additionally, the CSE subcommittee recommended the following related services, with all sessions 30 minutes in length: one individual counseling consult per week, one session per week of group OT, two sessions per week of group speech-language therapy, and one monthly consult by a teacher of the hearing impaired (*id.* at p. 2). The June 2009 IEP noted that the monthly consult by a teacher of the hearing impaired was to support the recommendation that the student use an FM system on a daily basis during the school day "[a]s [n]eeded." (*id.*). Program modifications included checking for understanding, refocusing and redirection, and reteaching of information; with testing accommodations that included directions explained and read, extended time, tests read, and a special location (*id.*).

On June 18, 2009 the student's mother visited an "example" of a co-taught math class and discussed her son's program recommendations with the school principal (Joint Ex. 176). In a July 16, 2009 letter to the director of special services, she informed the district that after "carefully considering [the June 2009 CSE subcommittee's] recommendations and visiting [the proposed school] in person, I do not feel that the program [the district is] offering will meet [the student's] academic and emotional needs" (Joint Ex. 132). The letter further indicated that the student would attend Villa Maria during the 2009-10 school year, and that the parents would be seeking reimbursement from the district for that placement (*id.*).

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<sup>14</sup> In May 2009, Villa Maria administered the Stanford Achievement Test Series, Tenth Edition, to the student (Joint Ex. 174). On or about June 5, 2009, Villa Maria prepared and sent to the parents, a final report describing the student's progress towards his 2008-09 Villa Maria IEP annual goals and short-term objectives (Joint Ex. 175). The hearing record does not indicate that the June 11, 2009 CSE subcommittee had these documents available to it for consideration (*see* Tr. pp. 145-46; Joint Ex. 22).

<sup>15</sup> The hearing record does not reflect that the district conducted a speech-language evaluation of the student subsequent to the June 2009 CSE subcommittee meeting.

<sup>16</sup> The June 2009 IEP indicated that at the school a "week occurs within a 6 day cycle," but that in "no instance w[ould] [the student] receive less than a total of two hours of consultant teacher services each week" (Joint Ex. 22 at p. 2).

During the 2009-10 school year the student received instruction in the following areas at Villa Maria: social development, reading, language, writing, mathematics, science, social studies, music/drama, art, physical education, health, religion/ethics, and computer (Joint Ex. 182 at pp. 2-7). The student also received "push-in" and "pull-out" speech-language services (id. at p. 1). Villa Maria developed IEP annual goals and short-term objectives for the student in the areas of reading, written language, mathematics, social/behavioral, and gross/fine motor skills (id. at pp. 8-15).<sup>17</sup>

### **Due Process Complaint Notice**

In a due process complaint notice dated March 25, 2010, the student's parents asserted that the district failed to provide the student with a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years (IHO Ex. i).

Regarding the student's March 2008 IEP, the parents asserted, among other things, that the program recommended by the CSE subcommittee, consisting of an ICT ELA class for 90 minutes per day, an ICT math class for one hour per day, and social studies and science classes without special education support, was "wholly insufficient" to meet the student's academic and emotional needs (IHO Ex. i at p. 6). In addition, the parents asserted that the student's March 2008 IEP failed to provide for appropriate "intensive direct instruction" in reading or writing, and that the sole intervention proposed by the CSE in the area of writing was "'encouragement'" (id. at p. 7). Other allegations by the parents included that the district relied on private evaluations from 2005; that the district did not conduct new evaluations; that the IEP did not address "shockingly depressed" 2008 MAT results; that the IEP indicated without basis that the student progressed "a lot" in reading; and that the student's IEP did not address that the student failed to meet "standards" on the New York State Testing Program in English language arts in March 2008 (id. at p. 6). In addition, the parents asserted, among other things, that while the CSE narrative asserted that the student was performing "well" in math, the student did not meet "standards" on the the New York State Testing Program in mathematics in March 2008 (id. at p. 7). Additional allegations by the parents included, among other things, that the IEP was misleading; that a Soifer Center assessment and the student's inadequate performance on the New York State Testing Program administered in March 2008 did not support the conclusion reflected in the student's June 2008 progress report on IEP goals that the student achieved the majority of his goals from the previous school year (id. at p. 8). In addition, the parents asserted that the student's "declining performance" from kindergarten through third grade demonstrated that the student's fourth grade March 2008 IEP was insufficient to meet the student's needs (id. at p. 10).

As to the student's June 2009 IEP for the fifth grade, the parents' allegations included, among other things, that the district denied the student a FAPE based upon the CSE recommendation of an ICT "full size" math class, without addressing the student's auditory processing deficits, an "undefined 'special class'" for language arts and an "undefined 'special

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<sup>17</sup> In December 2009, and January and February 2010, the Soifer Center conducted a private academic skills evaluation, a classroom observation at Villa Maria, and a private language consultation; and reviewed the evaluative information with the parents (Joint Exs. 161; 162; 163; 179). In May 2010, Villa Maria administered the Stanford Achievement Test Series, Tenth Edition, to the student (Joint Ex. 180).

class" for reading (IHO Ex. i at p. 11). The parents asserted that the recommendation for an ICT class for math and all other subjects would not provide the time for the student to master components of the curriculum (*id.* at p. 12). In addition, the parents asserted that the CSE's failure to recommend an intensive Orton-Gillingham reading, writing, and phonics program was inappropriate for the student (*id.* at p. 11). The parents further asserted that, although the student's IEP indicated that the CSE was seeking an additional speech-language assessment, the district did not request consent for the evaluation; and that the district failed to reference or review the Soifer speech-language evaluation which had been provided one month earlier (*id.*). Moreover, the parents asserted that during a visit of the proposed program by the student's mother, she was told that the language arts class did not include Wilson reading or writing instruction; that it was a "watered down version of the curriculum" provided in the general education language arts class; and that it was described by the principal as a "short" period of instruction with a "lengthy" time for "independent" work, which did not meet the student's needs (*id.*). In addition, the parents asserted that Villa Maria provided an appropriate educational program for the student (*id.* at pp. 12-14). As relief, the parents sought an order directing, among other things, reimbursement for tuition and all costs related to the student's placement at Villa Maria for the 2008-09 and 2009-10 school years, and reimbursement of all expenses related to the student's independent evaluations conducted by the Soifer Center in 2008 and 2009. (*id.* at p. 15).

### **Impartial Hearing Officer Decision**

On May 24, 2010, an impartial hearing convened and concluded on August 17, 2010, after six days of testimony (Tr. pp. 1-1231). In a decision dated December 8, 2010, the impartial hearing officer concluded that the district did not offer the student a FAPE for the 2008-09 and 2009-10 school years (IHO Decision at pp. 16-27).<sup>18</sup> As to the 2008-09 school year, the impartial hearing officer found that the student's IEP did not accurately reflect the student's present academic achievement, functional performance, or individual needs (*id.* at p. 24). The impartial hearing officer also found that the recommended ICT program was not appropriate to meet the student's needs, referring to the student's language processing disorder, attention difficulties, and weak coping skills (*id.*). In addition, the impartial hearing officer found that the student's annual goals were not comprehensive and several of the goals were not measurable (*id.*).

The impartial hearing officer's findings included, among other things, that the program developed by the March 2008 CSE did not "address the student's educational needs in a manner that [was] consistent with the evaluations and assessments of the Soifer Center" and the student's psychiatrist (IHO Decision at pp. 21-22). The impartial hearing officer also determined that the student needed a "small, structured, supportive class in which he could receive direct instruction from a specialized teacher with children who had similar needs" and that the district failed to show that the recommended program "was designed to provide the intense level of intervention the student required given his learning deficits" (*id.* at p. 23). In addition, the impartial hearing officer indicated that it was "inexplicable why the special education program in language arts

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<sup>18</sup> The impartial hearing officer also denied the parents' request for reimbursement for independent educational evaluations (IEEs) (IHO Decision at p. 33). This part of the impartial hearing officer's decision is not at issue on appeal.

offered the student during third grade, was removed from his fourth grade IEP" (*id.*). In support of her decision, the impartial hearing officer also found that the student's work product from school, results of State assessments, and a private evaluation were not consistent with the levels and abilities reflected in the student's IEP (*id.* at pp. 18, 19).

In addition to finding that an ICT placement did not meet the student's needs, the impartial hearing officer noted that although speech-language evaluations recommended intense therapy, the CSE reduced the frequency of speech-language therapy from three times per week to two times per week without explanation, and that it was not clear why counseling was not offered to address the student's anxiety and why social/emotional goals were removed from the student's IEP (IHO Decision at p. 24).

As to the 2009-10 school year, the impartial hearing officer found that although the June 2009 CSE recommended small self-contained classes for language arts and reading, the program was "insufficient to meet this student's needs for remediation and direct instruction in math, reading and writing" (*id.* at pp. 26-27). In support of her decision, the impartial hearing officer cited testimony of the student's mother, indicating, among other things, that, during the parent's observation of the proposed class, the special class for reading had eight to ten students, and concluded that such a ratio was not consistent with the 3:1 ratio recommended in the student's IEP (*id.* at p. 26). In support of her decision, the impartial hearing officer also determined that a ninety minute special language arts class, with only 20 minutes of direct instruction, was insufficient to meet the student's needs for remediation, and this information about the class was based upon a conversation between the student's mother and the principal on the date of the mother's observation (*id.* at pp. 26-27). In addition, the impartial hearing officer found that the CSE recommendation for the ICT classroom for some subjects was "inappropriate," because of the student's "language processing disorder, attention difficulties and significant learning deficits" (*id.* at p. 27). Also, the impartial hearing officer found that the majority of the student's goals for the 2009-10 school year were "identical" to the goals included in the student's 2008-09 IEP and that one of the identified goals was achieved in the third grade, based upon a progress report (*id.* at p. 26).

The impartial hearing officer further concluded that Villa Maria was an appropriate school for the student, finding that it "offered a placement in a small structured class in a supportive special education classroom with a low student to teacher ratio and individualized attention" (IHO Decision at pp. 30-31). In addition, the impartial hearing officer found that equitable considerations did not preclude or limit an award of tuition reimbursement (*id.* at p. 32). Consequently, the impartial hearing officer directed the district to reimburse the parents for the costs of the student's tuition at Villa Maria for the 2008-09 and 2009-10 school years.

### **Appeal for State-Level Review**

The district appeals, asserting that the impartial hearing officer's decision that the district did not provide the student with a FAPE for the 2008-09 and 2009-10 school years was legally and substantively deficient. The district asserts that the program recommended for the 2008-09 school year offered personalized instruction with sufficient support services to permit the student to benefit educationally, and that the student would have benefitted from participation in a

regular class environment. Moreover, the district asserts that the recommended program took into consideration the findings and recommendations of all evaluations and reports submitted to the CSE as well as the student's teachers and related service providers. The district asserts that the impartial hearing officer ignored testimony and findings of the CSE regarding the 2008-09 program that demonstrated that the student was capable of succeeding in the ICT classroom and that the student would benefit by participating in and contributing to the regular class environment along with his grade-level peers. The district further asserts that the impartial hearing officer placed too much emphasis on other evidence and testimony. The district maintains that the program recommended by the March 2008 CSE meaningfully addressed the student's needs and was appropriate based upon the information known to the CSE at that time and the student's progress during the prior school year.

As to the 2009-10 school year, the district asserts that the impartial hearing officer improperly determined that the program developed by the district did not provide the student with a FAPE. The district asserts that the student's program was based upon updated information provided to the CSE and the student's recent evaluations. The district further asserts that after developing goals for the student based upon information before the CSE at the time, the district recommended a program for the student that included more small self-contained classes and continued special education support during the day. The district noted the support of a special education teacher to modify the student's instruction as needed in the student's ICT math class and that in science and social studies, the student would have received the support of a special education teacher in his mainstream classes. As to related services, the district noted the continued recommendations from the prior IEP as well as the addition of a counseling consultation to address the student's social/emotional needs. The district asserts that the program recommendation was designed to provide the student with additional support in the areas needed, while continuing to expose him to a mainstream environment where appropriate.

In addition, the district asserts that the parents did not meet their burden of proof to show that Villa Maria was appropriate. The district specifically asserts that Villa Maria was unduly restrictive and did not provide educational instruction "specially designed or individualized" to meet the student's needs. Moreover, the district asserts that equitable considerations did not favor an award of tuition reimbursement as the parents intended to continue the student's enrollment at Villa Maria for the 2009-10 school year, regardless of the CSE recommendation.

In an answer, the parents assert that the impartial hearing officer properly found that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years. As to the 2008-09 school year, the parents assert that the impartial hearing officer properly found that the IEP failed to address the student's needs as described by evaluations, assessments, and teachers; that the CSE removed math and social/emotional/behavioral goals from the 2008-09 IEP without sound basis; and that the IEP failed to accurately set forth the student's then-current levels and abilities. As to the 2009-10 school year, the parents assert that the impartial hearing officer properly found that the IEP failed to offer programs and services that would meet the student's needs for remediation and direct instruction in math, reading, and writing; that the IEP failed to offer programs and services that would address the student's language processing disorder, attention difficulties, and significant learning deficits; and that the IEP included goals that were recycled from the previous school year. In addition, the parents asserted that the impartial

hearing officer properly found that Villa Maria was an appropriate educational placement for the student and that there are no equitable grounds that warrant reducing the parent's recovery of tuition reimbursement.

### **Applicable Standards**

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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]).

## Discussion

### District's Recommendation - 2008-09 School Year

Returning to the instant case, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2008-09 school year, in part due to the CSE recommendations of an ICT class for ELA, and a reduction in the frequency of speech-language therapy services (IHO Decision at pp. 21-22, 24). Upon review, I find that the hearing record supports the impartial hearing officer's findings regarding those aspects of the student's 2008-09 recommended special education program.

Since determining that the student was eligible for special education programs and related services in December 2005, the district recommended placement in a 12:1+1 language arts special class, due to his auditory processing, receptive and expressive language, written language, and reading needs through the 2007-08 school year (Joint Exs. 15 at p. 1; 16 at p. 1; 17 at p. 1; 20 at p. 1). The hearing record described the district's language arts special class as a "literacy block," in which a special education teacher provided reading and writing instruction using multisensory techniques to 12 students, with the assistance of a teaching assistant (Tr. pp. 189-90, 405-06). The special education teacher stated that the language arts special class used the "readers and writers workshop" model, in which she would provide a "mini-lesson" to the class and then between herself and the teaching assistant, would conference with students individually and "work on their skills" (Tr. pp. 340-41).

In addition to the special education teacher and teaching assistant, twice weekly the speech-language pathologist "pushed-in" to the language arts special class and provided "speech support" connected to the language arts lesson (Tr. pp. 406-07). While in the language arts special class, the speech-language pathologist provided both instruction to a "small cohort" of students designated for that service, and whole class instruction (Tr. pp. 408-09). The special education teacher who provided the student's third grade special class language arts instruction testified that the student received two sessions per week of "push-in" speech-language therapy in the language arts special class (Tr. pp. 334, 339). She further testified that the speech-language pathologist "worked on skills that applied to language arts and, really, integrated them" (Tr. p. 344).

The hearing record described the recommended ICT placement as a special education teacher working alongside a regular education teacher in the classroom of approximately 22 to 24 students throughout the school day (Tr. pp. 132, 392).<sup>19</sup> The director of special services indicated that the ICT placement was a "partnership" between the two teachers, in that they shared the responsibility of planning and providing instruction to the students (Tr. p. 132). The special education teacher testified that students in the ICT ELA class are not pulled out for language arts instruction, rather, they are participants in the classroom all day, "just as any other

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<sup>19</sup> The student's third grade teachers testified that in addition to the presence of a special education teacher and a regular education teacher, the ICT classes also provided teaching assistant services (Tr. pp. 391-92, 535-36). However, the presence of a teaching assistant in the ICT classes was not indicated in the director of special service's testimony regarding the composition of those classes, nor were teaching assistant services identified in the student's March 2008 IEP (Tr. p. 132; Joint Ex. 21).

student" (Tr. pp. 391-92). While the ICT class also used the workshop model described above, the hearing record reflected that according to the student's IEP, there were only two teachers in the room to implement that mode of instruction to the class of up to 24 students; rather than a special education teacher, a teaching assistant, and twice weekly, a speech-language pathologist for 12 students as in the language arts special class (Tr. pp. 340-41, 392-93, 408-09; Joint Ex. 21 at p. 1).

The special education teacher testified that the March 2008 CSE subcommittee recommended placement of the student in the ICT ELA class due to his "displeasure" at being pulled out for special class language arts instruction, and due to his "on grade level" reading skills (Tr. p. 394). The hearing record reflects that the student exhibited progress in his reading skills during third grade while in the language arts special class (Tr. pp. 362-68; Joint Exs. 21 at p. 3; 32, 84-87; 89; 167 at p. 2). However, given the student's continuing needs in other areas affecting language arts skills, the evidence viewed as a whole does not support the CSE subcommittee's recommendation for placement in the ICT ELA class, with a reduction of one group speech-language session per week. The hearing record reflected that at the end of the 2007-08 school year, the student continued to exhibit needs in the areas of reading unfamiliar text and standard vocabulary; applying spelling skills in writing; using conventions of writing; using writing to convey ideas; writing expository text in a clear and organized manner; and reading and organizing information from non-fiction texts (Tr. pp. 389-91, 515-17; Joint Ex. 32). The special education teacher testified that the student exhibited difficulty organizing his thoughts for written language assignments and that he "resisted" completing writing assignments during third grade (Tr. pp. 424-28). Furthermore, the student's difficulty with writing affected his performance in math class (Tr. pp. 510-11). The March 2008 IEP indicated that the student needed support in the area of writing, that writing was not an area in which he demonstrated comfort, and that he would often avoid any writing task (Joint Ex. 21 at p. 3). The March 2008 IEP reflected results of the March 2007 MAT administration, specifically that the student achieved a sound and print subtest score in the 6th percentile, and a spelling subtest score in the 8th percentile (*id.* at p. 4).

The March 2008 IEP indicated that the student exhibited a "significant auditory processing deficit [and] expressive and receptive language delays" . . . "which inhibit[ed] participation in the general education curriculum" (Joint Ex. 21 at p. 3). The hearing record reflected that no speech-language pathologist attended the March 2008 CSE subcommittee meeting, and that the director of special services' testimony did not explain the reason for the reduction from three group speech-language therapy sessions per week to two (Tr. pp. 210-11; Joint Ex. 21 at p. 5). The March 2008 IEP does not indicate whether the student's twice weekly speech-language therapy sessions would be provided in the ICT ELA class as it was in third grade, or in a separate location (Joint Ex. 21). As stated above, the student continued to exhibit deficits in areas of language arts that were addressed by speech-language therapy, and the reduction of that service, in conjunction with the recommendation for the ICT ELA class, did not offer an appropriate level of special education support to the student given his ongoing reading, written language, receptive language, and auditory processing needs.

In addition to the reduction of special education support in language arts and speech-language therapy services, upon review, I find that the March 2008 CSE subcommittee did not

recommend that the student receive special education services to support his science and social studies instruction (Joint Ex. 21). During third grade, the student received both direct and indirect consultant teacher services in science and social studies (Joint Ex. 20 at p. 1). The hearing record indicated that during the 2007-08 school year, the special education teacher or the teaching assistant provided direct, "push-in" support, and implementation of accommodations to approximately 6 identified students during science and social studies instruction in the general education setting (Tr. pp. 336-37, 508-09, 576-77). According to the third grade regular education science and social studies teacher, the special education teacher created graphic organizers for the identified students based on their needs, to supplement the regular education teacher's instruction (Tr. pp. 503-04, 577-78). The special education teacher also "check[ed] in" with identified students during instruction to review content area vocabulary (Tr. p. 578). During small group instruction, the special education teacher provided review and accommodations to identified students (*id.*). Additionally, during monthly "inclusion" meetings, the third grade special education and regular education teachers discussed specific program accommodations for the student including preferential seating, and preview and review of material (Tr. pp. 578-79). The third grade regular education teacher stated that he and the special education teacher had the opportunity to speak about the student "on a daily basis," due to the special education teacher's presence in his class (Tr. p. 579).

The third grade regular education teacher testified that the student demonstrated his understanding of science and social studies concepts at a grade appropriate level (Tr. pp. 528-29; Joint Ex. 32). He further testified that the March 2008 CSE subcommittee did not recommend any special education services in social studies and science for the 2008-09 school year because the student was "progressing at grade level" (Tr. p. 535). When testifying about the composition of the student's fourth grade science and social studies classes, the regular education teacher indicated his understanding that the classes would consist of a regular education teacher, and either a special education teacher or teaching assistant (Tr. pp. 535-36). However, the student's March 2008 IEP does not indicate the presence of a special education teacher or teaching assistant during social studies and science instruction; services which as explained above assisted the student in achieving grade level abilities in those classes during third grade (Joint Exs. 21; 32). The hearing record does not provide support for the removal of special education supports in science and social studies classes, in conjunction with the reduction of language arts support and speech-language therapy as described herein. In view of the evidence above, I find that the hearing record supports the conclusion that the district did not provide adequate support for the student in the March 2008 IEP to reasonably address his identified needs and thereby did not offer the student a FAPE for the 2008-09 school year.

Having determined that the district did not offer a FAPE to the student for the 2008-09 school year, I must now consider whether the parents have met their burden of proving that Villa Maria was appropriate to meet the student's needs during the 2008-09 school year.

### **Applicable Standards – Unilateral Placement**

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at

129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

## Parents' Unilateral Placement – 2008-09 School Year

The hearing record reflected that Villa Maria is a full-time day school, state approved by Connecticut, to provide special education programs to approximately 84 students in kindergarten through ninth grade, who possess average cognitive ability and exhibit learning disabilities (Tr. pp. 1032-34). Most of the students who attend Villa Maria demonstrate language processing difficulties, many exhibit some anxiety, and a "few" have been offered a nonverbal learning disability diagnosis (Tr. p. 1033). Villa Maria offers 60-minute daily "remedial classes," including reading, language, and math; and 40-minute classes including social studies, science, and writing (Tr. pp. 1034-35). Music, art and physical education classes are also offered (Tr. p. 1076). All 21 teachers at Villa Maria have received Connecticut certification in special education (Tr. p. 1035).

The hearing record showed that in general, teachers at Villa Maria provide instruction using a multisensory approach, and specific programs such as the Lindamood-Bell Phoneme Sequencing Program, Visualizing and Verbalizing, the Merrill Linguistic Reading Program "Get Set," Voyages in English, Loops and Other Groups, and Progress in Mathematics (Tr. pp. 1040-42; Joint Ex. 175 at p. 9). In addition to modifying textbooks, teachers also create some of their own materials (Tr. p. 1042).

A social worker provides each class with one 40-minute session per week of social skills instruction, and the education director testified that the social worker was "always available" to students who need that service (Tr. pp. 1035-36). Social skills instruction entails helping students develop good peer interaction and problem solving skills, and recognizing emotions (Tr. pp. 1039-40).

The hearing record further reflected that Villa Maria speech-language pathologists provide one 30-minute session per week of "push-in" services to students in their language classes, and additional "pull-out" services to selected students in groups of two (Tr. pp. 1036-38, 1040). Students receive pull-out instruction based upon teacher or speech-language pathologist referral or parent request, and are paired by similarity of age and disability (Tr. p. 1039).

The education director testified that prior to the student's enrollment, she reviewed his evaluation reports and district IEP, and that he attended a two-day school visit (Tr. p. 1048). The education director testified that based on the student's information, Villa Maria was appropriate for the student, due to his below grade-level reading and writing skills, and attention and processing difficulties (Tr. p. 1048). During the two-day school visit, the Villa Maria teachers "felt [the student] was a good candidate," and that "he would fit in very well with the other students [t]here" (Tr. p. 1049).

During the 2008-09 school year the student received one hour each of reading, language, and math instruction in classes composed of three students and one teacher (Tr. pp. 1054-55). The education director testified that during reading instruction the student was grouped with two other students who exhibited decoding and comprehension weaknesses (Tr. pp. 1088-89). The student's language group consisted of two other students with writing and expressive language difficulties (Tr. p. 1089). The student's daily writing class, three science and social studies

classes per week, and one weekly social skills class consisted of five students and one teacher (Tr. pp. 1054-55). The student also participated in art, music, physical education and religion classes, which were "larger" in size (Tr. pp. 1054, 1076). Also during the 2008-09 school year, the student received both one push-in and one pull-out speech-language therapy session per week (Tr. pp. 1036, 1056; Joint Ex. 175 at p. 10).

The education director testified that prior to the beginning of the school year, teachers read student files and become familiar with their needs (Tr. p. 1058). At the beginning of the school year, teachers administer language, reading, and math assessments to students and from the results, develop IEPs specifying "objectives [the teachers] believe they need to work on with each child" (Tr. pp. 1058, 1090-91). Teachers "constantly" assess student progress throughout the school year, via student work samples, class work, home work, and testing (Tr. pp. 1056-57, 1093-94). Teachers also generate IEP and narrative progress reports twice during the year (Tr. pp. 1056-57; Joint Ex. 175). The student's 2008-09 Villa Maria IEP offered annual goals and short-term objectives, specific to the student's needs, in the areas of reading decoding and comprehension, vocabulary identification, expressive language, written language, mathematics, social/behavioral, and gross/fine motor skills (Joint Ex. 175 at pp. 2-8).

The education director testified that while at Villa Maria the student had "done very well," and exhibited "slow," but "steady progress" (Tr. p. 1049). The student's June 2009 Villa Maria IEP annual goal progress report indicated that in all areas measured, the student demonstrated at least "satisfactory progress" toward the annual goals/short-term objectives (Joint Ex. 175 at pp. 2-8; see Tr. pp. 1059, 1061, 1063). The student "mastered" some short-term objectives relating to expressive language, reading comprehension, and mathematics skills (Joint Ex. 175 at pp. 3, 5-6). January and June 2009 narrative progress reports reflected that overall the student was an active participant in his classes, that he demonstrated the ability to "handle" his frustrations in a more appropriate manner, and that he exhibited progress (Joint Exs. 11; 175 at pp. 11-16). In their respective reports, the student's Villa Maria teachers provided specific examples of what skills the student worked on during the school year, and of his progress (id.).

In June 2009 the Villa Maria speech-language pathologist prepared a progress report detailing the language areas she addressed with the student during push-in and pull-out sessions, such as expanding vocabulary skills; understanding and using antonyms, synonyms, multiple meaning words, verbal analogies, and figurative language; improving grammar and syntax skills; increasing social communication skills; and improving comprehension and expressive language skills (Joint Ex. 175 at p. 10). Her progress report provided information about the student's abilities in the areas addressed, and in many instances, provided specific accuracy levels related to each skill area (Joint Ex. 175 at p. 10; see Tr. p. 1064). The speech-language pathologist further reported that the student actively participated in push-in sessions, and benefitted from the combination of push-in and pull-out services (Joint Ex. 175 at p. 10).

The hearing record indicated that OT services are available at Villa Maria; however, during the 2008-09 school year the student did not receive OT as his parents "opted not to have him pulled" to participate in that service (Tr. p. 1092; Joint Ex. 22 at p. 5). The education director testified that Villa Maria teachers received "professional development from the occupational therapist, and they incorporate[d] a lot of multisensory strategies in the handwriting

classes" (Tr. p. 1092). Information in the hearing record from the 2008-09 school year does not indicate that the student's lack of OT services affected his academic performance (see Joint Exs. 11; 14; 175).

Regarding the district's contention that Villa Maria is "too restrictive," while parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]). I find that in light of the needs of this particular student, LRE considerations, in this instance, do not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at Villa Maria for the 2008-09 school year was appropriate.

Based on the foregoing evidence, I find that the parents demonstrated that the program at Villa Maria offered educational instruction specially designed to meet the unique needs of the student for the 2008-09 school year (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

I now turn to the issue of whether equitable considerations favor of an award of tuition reimbursement. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

Upon review, I find that no issues have been raised regarding equitable considerations for the 2008-09 school year in this case, and a review of the hearing record does not reveal any equitable considerations that would bar tuition reimbursement to the parents for the 2008-09 school year; therefore, the necessary inquiry is at an end (Mrs. C. V. Voluntown Bd. of Educ.,

226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-039).

Accordingly, I find that the hearing record supports a conclusion that Villa Maria was appropriate to meet the student's needs during the 2008-09 school year and I will not disturb the impartial hearing officer's decision to grant the parents' request for tuition reimbursement for the 2008-09 school year.

### **District Recommendation - 2009-10 School Year**

I will next review the determination by the impartial hearing officer that the district failed to offer the student a FAPE during the 2009-10 school year. Initially, I note that part of the impartial hearing officer's decision relied upon the description of the recommended program by the student's mother, which was based upon a visit to the assigned school and discussion with the principal (see IHO Decision at pp. 26-27). The impartial hearing officer determined that the mother's observation of eight to ten children in the reading class was not consistent with the 3:1 ratio recommended in the student's IEP (see IHO Decision at p. 26). The impartial hearing officer's decision also concludes that a 90-minute language arts special class, with only 20 minutes of direct instruction, was insufficient to meet the student's needs for remediation, and this information about the class was based upon the conversation between the student's mother and the principal on the date of the mother's observation (see IHO Decision at pp. 26-27). In essence, such allegations by the parents that the program was not appropriate and findings by the impartial hearing officer raise the question of whether the district would have appropriately implemented the student's IEP had the parents decided to place the student in the district's recommended program; however, the district has never had the opportunity to implement the student's IEP because the student did not enroll in the recommended program or attend the district school for the 2009-10 school year. A district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). An IEP is implemented if the student is enrolled in a district's recommended placement (see generally Application of a Student with a Disability, Appeal No. 08-005; Application of a Child with a Disability, Appeal No. 07-043). Upon review of a claim that a district has failed to implement a student's IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007). It has been held that a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs.,

535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). (10-013). In this case, the district proposed an IEP for the student; however, the district did not have the opportunity to implement the student's IEP as a result of the parents' decision not to enroll the student in the district's school. Therefore, it would be highly speculative to determine the degree to which the student may or may not have made educational progress had he attended the district school, even if, assuming for the sake of argument, the district staff would have deviated from the student's IEP (see Application of the Bd. of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 10-103). Moreover, I do not find persuasive evidence in the hearing record that the district would have deviated from the student's IEP.

Upon review of the hearing record, I find that the June 2009 IEP accurately reflected the student's present levels of performance as articulated in the evaluative information available to the CSE subcommittee at the time the IEP was formulated, that it included annual goals consistent with the student's needs as identified in that information, and that it recommended a program consistent with those needs in the least restrictive environment.

As stated above, the June 2009 CSE subcommittee reviewed and considered the August and September 2008 Soifer Center psychoeducational and speech-language evaluation reports, the January 2009 Villa Maria mid-term progress report, and the May 2009 social history and classroom observation reports (Tr. pp. 146-47; Joint Ex. 22 at pp. 5-6). The resultant June 2009 IEP included standardized reading, academic achievement and cognitive test results, and findings from the September 2008 Soifer Center psychoeducational evaluation report (Joint Ex. 22 at pp. 3-4). The IEP indicated that the student's verbal, nonverbal reasoning, and working memory skills were within the average range; with processing speed an area of relative weakness in the low average range (Joint Exs. 9 at p. 4; 22 at p. 4). The student's present levels of academic and functional performance reflected that the student's reading skills "remain[ed] relatively weak and below grade level," that his reading rate was "slow," and that his understanding of narrative material was at a third grade instructional level, with his grasp of expository material at a second grade instructional level; information consistent with his September 2008 Soifer Center reading assessment results (Joint Exs. 9 at pp. 7-10, 13; 22 at p. 3). In writing, the IEP indicated that the student exhibited "weak" spelling skills and that he was resistant to composing a writing sample; consistent with the September 2008 Soifer Center evaluator's findings (Joint Ex. 9 at pp. 8-10; 22 at p. 3). Regarding mathematics, the IEP indicated that the student's skills were "relatively strong" when solving word problems with visual prompts, that at times he counted aloud or on his fingers to solve problems, and that his ability to compute addition and subtraction problems was "inconsistent;" information contained in the 2008 Soifer Center evaluation report (Joint Exs. 9 at pp. 8, 10; 22 at p. 3). Additionally, the June 2009 IEP indicated that the student "require[d] special education services to address deficits in auditory processing, as well as expressive and receptive language. He require[d] special education to address his academic needs in the areas of reading and writing" (Joint Ex. 22 at p. 3).

The June 2009 IEP social development present levels of performance reflected that the student could become easily frustrated, and that he did not always use "coping strategies;" information reflected in both the August 2008 Soifer Center speech-language evaluation report and the September 2008 Soifer Center psychoeducational evaluation report (Joint Exs. 9 at pp. 4,

8-9; 10 at p. 3; 22 at p. 4). The IEP further indicated that the student required assistance to implement strategies to "deal" with his frustration (Joint Ex. 22 at p. 4). The IEP physical development present levels of performance reflected that the student's ability to integrate his visual-motor skills was in the "low range;" that while at Villa Maria he received typing and keyboard instruction, and learned to produce "some" cursive letters; and that his handwriting was legible (Joint Exs. 11 at pp. 2, 4; 22 at p. 5). The June 2009 IEP indicated that the student needed OT services focusing on cursive writing and keyboarding skills (Joint Ex. 22 at p. 5). Additionally, the IEP noted that the student was administered medication "to improve his ability to focus" (id. at p. 1).

The director of special services testified that the June 2009 CSE subcommittee developed the student's annual goals following a review of the information contained in the reports, and information from the teachers at Villa Maria (Tr. pp. 146, 49). The June 2009 IEP offered academic and speech-language annual goals designed to improve the student's: ability to focus and attend to activities when prompted; reading decoding, word attack, syllabication, reading fluency, reading comprehension, and verbal sequencing skills; capitalization and punctuation skills; written language skills; content area vocabulary skills; word retrieval strategies, and expressive language skills (Joint Ex. 22 at pp. 6-8). Regarding the student's social/emotional needs, the IEP provided annual goals to improve the student's ability to use strategies when frustrated, and his ability to seek out help when under stress (id. at p. 9). Additional annual goals focused on improving the student's visual tracking, cursive writing and keyboard skills, and also his ability to use computer programs (id.).

The impartial hearing officer indicated that the majority of annual goals contained in the 2009-10 IEP were identical to the student's fourth grade IEP annual goals (IHO Decision at p. 27). However, based upon the information before the June 2009 CSE subcommittee, the annual goals contained in the June 2009 IEP continued to address the student's ongoing attention, reading, writing, language, social/emotional and fine-motor needs (Joint Ex. 22 at pp. 6-9). I note that the hearing record does not indicate that the June CSE subcommittee had available or considered, the student's 2008-09 final Villa Maria IEP annual goal progress report (Joint Exs. 22 at pp. 5-6; 175). A review of the Villa Maria IEP annual goal progress report reflected that the student exhibited "satisfactory progress" but did not achieve, many annual goals and short-term objectives similar to those annual goals proposed by the district in the student's areas of need including: reading decoding, including multisyllabic words; word recognition skills, reading comprehension; vocabulary skills; expressive language skills; capitalization and punctuation skills; written language skills; ability to use strategies to "deal" with frustration; social/emotional functioning; visual tracking skills; cursive writing and keyboard skills; and the ability to use computer programs (compare Joint Ex. 22 at pp. 6-9, with Joint Ex. 175 at pp. 2-8). Therefore, the hearing record showed that at the conclusion of the 2008-09 school year, the student continued to exhibit areas of need addressed by the June 2009 IEP's annual goals.

I now turn to the special education program and related services recommended by the June 2009 CSE subcommittee. As stated previously, for the 2009-10 school year the June 2009 CSE subcommittee recommended placement of the student in a daily, 90-minute 12:1+1 language arts special class (Joint Ex. 22 at p. 1). The director of special services testified that the language arts special class was a "small, very structured environment, taught by a special

education teacher along with a teaching assistant," and composed of students "who needed very specific multisensory approaches to teaching" in the areas of reading and writing (Tr. pp. 152-53). According to the director of special services, the proposed language arts special class provided "all of the reading, writing, [and] language arts curricul[a] that [was] needed in a very individualized way" (Tr. p. 152). Additionally, the special education teacher of the proposed language arts special class used a research-based, multisensory approach to instruction (Tr. p. 153). The June 2009 CSE subcommittee also recommended that the student receive a daily 40-minute 3:1 reading special class, to provide "intensive remediation," particularly in the areas of reading decoding, rate and fluency (Tr. pp. 153-54; Joint Ex. 22 at p. 1). The director of special services also testified that the student would have been grouped with one or two other students with similar reading needs (Tr. p. 154).

At the June 2009 CSE subcommittee meeting, district staff recommended placement of the student in a daily, 60-minute ICT math class, consisting of a special education teacher, a regular education teacher, and students who "need[ed] a little bit of support but [were] able to succeed with the appropriate support of a special educator to modify the instruction in the classroom" (Tr. pp. 150-51; Joint Ex. 22 at p. 1). I note that the presence of a special education teacher in the student's math class was a service the parents had requested their son receive during the 2007-08 school year (Joint Ex. 49). The CSE subcommittee also recommended that the student receive three 40-minute sessions of 8:1 direct consultant teacher services "weekly" during his science and social studies "block" (Joint Ex. 22 at pp. 1-2). The director of special services testified that the direct consultant teacher services provided special education teacher support, such as clarifying or breaking down information, in those content area classes (Tr. pp. 151-52). I further note that the student had received direct consultant teacher services in science and social studies during the 2007-08 school year; which the parents characterized as an "ideal" model, and which enabled the student to achieve grade level understanding of concepts in those classes (Tr. pp. 528-29; Joint Exs. 32; 49).

Turning to the June 2009 CSE subcommittee's related services recommendations, the district speech-language pathologist testified that she reviewed the August 2008 Soifer Center evaluation report at the June 2009 meeting (Tr. p. 645; Joint Ex. 22 at p. 5). Based upon the results of that evaluation, the district speech-language pathologist testified that although the student required speech-language therapy, based on his test performance, which yielded average scores in some areas, he did not require "intensive" services as recommended in the Soifer Center evaluation report (Tr. p. 644; Joint Ex. 10 at pp. 8-10). Based upon the student's needs and in combination with the language arts special class and reading special class recommendations, the June 2009 CSE subcommittee recommended two sessions of group speech-language therapy per week (Joint Ex. 22 at pp. 1-2). The district speech-language pathologist testified regarding how the student's 2009-10 IEP speech-language annual goals related to his needs, and how they would have been implemented (Tr. pp. 646-50).

To address the student's social/emotional needs the June 2009 CSE subcommittee recommended one individual 30-minute counseling consult per week (Joint Ex. 22 at p. 2). The June 2009 IEP indicated that a psychologist was responsible for documenting the student's progress toward his two social/emotional annual goals, which as described above, addressed the student's need to develop and implement strategies to manage his frustration, and to seek out

assistance during times of stress (*id.* at p. 9). The student was also recommended to receive one 30-minute session per week of group OT, to improve visual tracking, graphomotor, and keyboarding skills, which in turn would "enhance his academic skills," especially in the area of writing (Joint Ex. 22 at pp. 2, 5; *see* Joint Ex. 11 at p. 4).

To support the student's auditory processing, language, and attention needs, the June 2009 CSE subcommittee recommended that the student use an FM system, and provided a monthly consult by a teacher of the hearing impaired to conduct "maintenance" of the FM unit (Joint Ex. 22 at p. 2).<sup>20</sup> The CSE subcommittee also recommended program modifications to be implemented throughout the school day; checking for understanding, refocusing and redirection, and reteaching of materials (*id.*). Testing accommodations to further support the student's processing and language needs included directions explained and read, extended time, tests read, and a special location for test administration (*id.*).

The proposed 2009-10 special education program provided the student with nonintegrated special education teacher support in a smaller environment in the subject areas most affected by his learning difficulties: reading and language arts (Joint Exs. 9; 10; 22). It further offered special education teacher support in an integrated setting in content areas such as math, social studies and science (Joint Ex. 22 at pp. 1-2). The director of special services testified that with appropriate special education supports, the student "could have handled the mainstreaming opportunities recommended and that it was "important" for him "to be around typical peers and to have the benefit of being educated with students of - - of all abilities, not just those who are learning disabled" (Tr. pp. 156-57). This special education program, in conjunction with the student's related services and program accommodations, was reasonably calculated to enable the student to receive educational benefits in the least restrictive environment.

Accordingly, based upon a careful review of the evidence contained in the hearing record, I disagree with the impartial hearing officer, and conclude that the district's recommended special education program and related services proposed for the 2009-10 school year were reasonably calculated to enable the student to receive educational benefit in the LRE (*Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 382 [S.D.N.Y.] citing to *J.R. v. Bd. of Educ. of the City of Rye Sch. Dist.*, 345 F. Supp. 2d 386 at 395 n.13 [S.D.N.Y. 2004]; *see Cerra*, 427 F.3d at 195; *see also Mrs. B.*, 103 F.3d at 1120; *Application of a Student with a Disability*, Appeal No. 10-103; *Application of a Student with a Disability*, Appeal No. 09-034; *Application of the Dep't of Educ.*, Appeal No. 08-045; *Application of a Student with a Disability*, Appeal No. 08-029; *Application of a Child with a Disability*, Appeal No. 07-030; *Application of a Child with a Disability*, Appeal No. 06-112; *Application of a Child with a Disability*, Appeal No. 06-071; *Application of the Bd. of Educ.*, Appeal No. 06-010; *Application of a Child with a Disability*, Appeal No. 05-021).

Having found that the district offered the student a FAPE in the LRE for the 2009-10 school year, I need not reach the issue of whether the private educational services obtained by the parents were appropriate for the student and the necessary inquiry is at an end (*Mrs. C. v.*

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<sup>20</sup> In addition, the district speech-language pathologist testified that she was "very familiar" with FM systems (Tr. pp. 650-51).

Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

### **Conclusion**

In sum, as to the 2008-09 school year, I find that the hearing record supports a finding that the district did not offer the student a FAPE; that the program at Villa Maria was appropriate for the student; and that the equitable considerations do not bar tuition reimbursement to the parents. As to the 2009-10 school year, I find that the hearing record supports the conclusion that the district offered the student a FAPE.

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

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated December 8, 2010 which found that the district failed to offer the student a FAPE for the 2009-10 school year and directed the district to reimburse the parents for the costs of the student's tuition at Villa Maria for the 2009-10 school year are annulled.

**Dated:** Albany, New York  
February 11, 2011

  
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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**