The University of the State of New York

The State Education Department
State Review Officer
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No. 11-058

Application of the BOARD OF EDUCATION OF THE [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:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Garrett L. Silveira, Esq., of counsel

Law Office of Andrew K. Cuddy, Esq., attorneys for respondents, Andrew K. Cuddy, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter for the 2010-11 school year and ordered it to provide the student with 100 hours of reading services and to consider the student's need for extended school year (ESY) services. The parents cross-appeal from that portion of the impartial hearing officer's decision which determined that the district offered an appropriate educational program to their daughter for the 2009-10 school year and denied their request for reimbursement for privately obtained tutoring services for that school year. The appeal must be sustained. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was in fifth grade attending a district school (Tr. pp. 37, 484). According to the hearing record, the student had received a diagnosis of dyslexia and exhibited deficits in decoding, fluency, encoding, writing skills, math fluency, memory skills, and auditory processing, yet functioned at an average to above-average level in all of her core academic classes (Tr. pp. 36, 88, 666, 835-36, 884; Dist. Exs. 1 at p. 1; 5 at pp. 8, 9; 10 at p. 9; 11 at pp. 3, 21). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (34 C.F.R. § 300.8[10]; 8 NYCRR 200.1[zz][6]).

Background

According to the hearing record, the student was initially evaluated by the Early Intervention Program (EIP) at the age of two years, after which she began receiving speech-language services (Dist. Ex. 10 at p. 3). In August 2003, the district Committee on Preschool Special Education (CPSE) classified the student as a preschool student with a disability and recommended speech-language therapy services twice per week (Dist. Ex. 10 at p. 3). In June 2004 twice weekly occupational therapy (OT) services were added (Tr. p. 484; Dist. Ex. 10 at p. 3). The student's mother advised that her daughter was declassified when she entered kindergarten, but was eventually reclassified as a student with a speech or language impairment (Tr. pp. 484-85; Dist. Ex. 11 at p. 1). She added that during the 2006-07 (first grade) and 2007-08 (second grade) school years, the student attended an inclusion class with a special education teacher, while in 2008-09 (third grade), she attended a general education classroom, receiving 45 minutes of assistance daily in reading, handwriting, and spelling in a Learning Lab, and utilized the "Earobics" computer program (Dist. Ex. 11 at p. 1).[1]

On January 30, 2009, while the student was attending third grade, a private speech-language pathologist conducted an auditory and language processing reevaluation[2] of the student (Dist. Ex. 11). The student's mother reported to the private speech-language pathologist that at the time of the evaluation, the student was attending a general education "whole language class," with an instructional emphasis on rote memory, and that the student no longer felt supported (id. at p. 1). Among the behavioral observations noted by the private speech-language pathologist were that the student was "cooperative and well related," that her attention was "basically good," although "[s]he became slightly distractible," and that "[s]he was responsive and tried her best (id. at p. 2).

The evaluation report reflected that although the student had no audiological pathology, she demonstrated some sound sensitivity to loud frequencies and, in noise, experienced some difficulty with word recognition in her left ear (Dist. Ex. 11 at p. 2). With respect to her auditory processing, while the student's performance on four of five auditory tests administered indicated at or above normal functioning without deficits in auditory processing, her total error score of 25 on the Staggered Spondaic Word Test (SSW) fell outside the criterion of 16, confirming an auditory processing deficit (id. at pp. 2-4). The private speech-language pathologist observed that the student's response to a dichotic listening task produced "[d]ecoding" and "[t]olerance [f]ading [m]emory" patterns associated with difficulties in reading accuracy, comprehension, short-term memory, figure-ground listening,[3] receptive and expressive language, and attention (id. at p. 3). The student's performance on the Clinical Evaluation of Language Fundamentals,

[1] The district's speech-language pathologist explained that the 'Earobics" program was "a computerized program that sequentially presents skill activities … to build what we call metalinguistic skills …" (Tr. pp. 371-72).

[2] The evaluating speech-language pathologist noted in her report that the student had previously been evaluated in November 2005 and May 2007 "when disorders of auditory and language processing, and phonological processing were identified" (Dist. Ex. 11 at p. 1).

[3] "Figure-ground listening" is defined in the hearing record as "the ability to isolate the important sound or signal when there is noise in the background" (Tr. p. 368).

Fourth Edition (CELF-4), used to assess receptive and expressive language, was, according to the evaluating speech-language pathologist, "excellent," with scores falling in the above average range for both receptive (84th percentile) and expressive (70th percentile) language skills, respectively (id. at pp. 4-7). The student achieved average scores in both oral expressive language narrative skills, as measured by the story construction subtest of the Detroit Test of Learning Abilities (DTLA-4), and speech production, as measured by the Goldman Fristoe-2 Test of Articulation (id. at p. 7). However, the evaluator's informal assessment of the student's articulation during conversation revealed vowel distortions, syllable reversal, and problems with multi-syllable words, which prompted the private speech-language pathologist to characterize the student's speech as akin to that of a younger student; she also commented that these deficits interfered with the student's intelligibility (id.).

Included among the private speech-language pathologist's recommendations were continuing classroom accommodations; including preferential seating, testing in a quiet area with directions read, re-read, clarified and explained; speech-language therapy to address figure-ground listening, speech discrimination, short-term memory, oral motor training, and speech production; utilization of a home version of the Earobics computer program to improve phonemic awareness and decoding; and possible implementation of a personal FM system or a classroom "soundfield" system to enhance the sound in the classroom (Dist. Ex. 11 at p. 8-9).

On February 4, 2009, pursuant to an agreement between the parents and the district, a private psychologist conducted a psychoeducational evaluation of the student in preparation for her triennial review (Tr. p. 485-87; Dist. Ex. 10 at pp. 1, 23). The resultant evaluation report revealed a family history of attention and language deficits and dyslexia (Dist. Ex. 10 at p. 3). Behaviorally, the private psychologist observed that the student was an enthusiastic and interactive participant, attentive, persistent, and deliberate for most tasks (id. at p. 6). The private psychologist reported difficulty understanding the student at times due to her articulation (id.). Administration of the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV) yielded a full scale IQ of 110 (high average range) and a general ability index (an average of verbal and nonverbal index scores without the influence of speed or memory abilities) score of 122 (superior range) (id. at p. 24). These results revealed a relative weakness in the student's memory skills, demonstrated by her score in the low average range on the working memory index (id. at p. 9). However, subtest scores revealed very weak short-term memory skills (3rd percentile) countered by significantly stronger working memory skills (50th percentile) (id.). Administration of the California Verbal Learning Test-Children's Version (CVLT-C) revealed that the student's ability to remember a list of 15 words improved with each trial and repetition of test information, and her score, in the superior range, contrasted with her difficulty remembering strings of numbers or letters presented only once (id. at p. 10). The private psychologist opined that it was highly probable that "the repetition of the information helped to mitigate the impact of auditory processing issues, bringing [the student's] verbal memory performance to a level commensurate with her excellent verbal reasoning abilities" (id.).

In reading ability, the student's performance on the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) reflected variable standard scores and percentile ranks ranging from low average to average ranges of functioning on various subtests (Dist. Ex. 10 at p. 11). Her oral reading quotient on the Grey Oral Reading Tests-Fourth Edition (GORT-4) placed her in the

50th percentile, a score which the private psychologist noted was the by-product of two widely disparate scores in fluency (9th percentile) and comprehension (91st percentile) (id. at pp. 25-26). The student's performance on additional tests administered to determine the factors that influenced her reading skills, including the Comprehensive Test of Phonological Processing (CTOPP) and the Jordan Left-Right Reversal Test, suggested that the student experienced difficulties identifying reversed letters and numbers (1st percentile), performing phonological memory tasks (5th percentile), manipulating phonemes (9th percentile), retaining digits in her memory (9th percentile), and repeating phonologically complex words (9th percentile) (id. at p. 12). The private psychologist commented that although the evaluation results revealed that both phonological and visual processing weaknesses were interfering with the development of the student's reading fluency, the student often self-corrected her reading errors, and that her reading fluency on short sentences containing familiar words was "solid" (id. at p. 13). She added that the student's strong comprehension skills appeared to suggest that the student was developing proficiency as a reader; however, the student's intelligence and ability to discern word meanings through context cues compensated for her weak decoding skills (id. at pp. 13, 19). The private psychologist offered a diagnosis that the student had a reading disorder (id. at p. 13).

With regard to mathematics, although the student's performance on the WJ-III ACH placed her in the average range of functioning overall, her math fluency (completing single digit math problems quickly) fell in the low average range (Dist. Ex. 10 at p. 13). The private psychologist explained that this disparity was not atypical of students with dyslexia, who often demonstrate difficulty with rapid retrieval of math facts, stemming from weakness in short term memory skills (id.).

In writing, the student's performance on the Test of Written Language-Third Edition (TOWL-3) fell in the average range (55th percentile) (Dist. Ex. 10 at p. 14). The private psychologist reported that the student's story, written in response to a picture presented to her, had an adequate flow, including age appropriate sentences that were simple and grammatically solid; she qualified that said story contained numerous spelling errors, which made the story difficult to understand and, according to the private psychologist, reflected the student's dyslexia and weakness in phonological processing (id.). The private psychologist acknowledged that while the student's writing was generally adequate, aside from spelling, it was far below what her verbal intellectual ability would suggest; however, she opined that the student did not meet the criteria for a disorder of written expression, although the student's dyslexia put her at risk for continued writing difficulties and her mild graphomotor weaknesses added to the student's difficulty with writing tasks (id. at pp. 14-15).

Although the parents expressed concerns regarding the student's social/emotional functioning, the private psychologist denied that their daughter exhibited an anxiety disorder, although acknowledging that the student's academic issues likely contributed to her sense of vulnerability; she suggested that the student "would likely benefit from working with a professional who would help provide emotional support, and more importantly, teach [her] ways to decrease worry and feel good about herself" (Dist. Ex. 10 at p. 20). The private psychologist offered 14 recommendations, including, among other things: 1:1 specialized intervention to address weaknesses related to her dyslexia, preferably implemented by a reading specialist

trained in the Orton-Gillingham[4] methodology with a focus on phonological and visual processing; a smaller classroom environment with more supports or a classroom with a special education teacher; increased focus on writing skills; speech-language therapy; OT; counseling services; provision of books on tape; a keyboard for written tasks; use of a speech recognition program; and classroom accommodations such as previewing text, extended time for standardized tests, preferential seating near the teacher, and repetition of information (id. at pp. 21-22).

On February 25, 2009, the parents forwarded follow-up correspondence to the district referencing two purported outstanding requests for information, made in September 2008 and December 2008, regarding the specific program utilized by the district for instructing students with dyslexia and the specific training in such program received by district staff (Parent Ex. LL). On March 17, 2009, the parents forwarded another follow-up letter to the district reiterating their information request (Parent Ex. EEE).[5] This letter referenced a February 17, 2009 telephone conversation between the parents and district staff during which staff purportedly provided them with the name of the program used by the district to instruct students with dyslexia and an assurance that all staff charged with its implementation had received the requisite training, information which the parents maintained was "inconclusive, misleading and not true" (id.).[6] On March 24, 2009, the parents advised the district in writing that they would arrange for a privately retained "certified [Orton-Gillingham] teacher" to participate at the student's next scheduled CSE meeting (Parent Ex. DDD).

On May 8, 2009, a CSE subcommittee convened to conduct the student's annual review and develop the student's individualized education program (IEP) for the 2009-10 school year (fourth grade) (Parent Ex. F at p. 2). In attendance at the meeting were the committee chairperson, the student's regular education and special education teachers, the district speech-language pathologist, school psychologist, an additional special education teacher, the private psychologist who completed the student's February 2009 independent psychoeducational reevaluation, a family friend/ Orton-Gillingham practitioner, and the parents (Dist. Ex. 10; Parent Ex. F at p. 8; see Parent Ex. DDD).[7] The hearing record reflects that the CSE subcommittee considered the matters discussed during the May 8, 2009 annual review, a March 17, 2009 social

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[4] "Orton-Gillingham" methodology is described in the hearing record as "a philosophy, method of teaching reading specifically for dyslexic students but certainly will work for anyone" and "a multi-sensory approach, and by that it means visual, auditory, kinesthetic and tactile," that is "structured and sequential," that "starts with the simple and goes to the complex," that "is delivered as fast as it can be but as slow as it must be," and that is "totally diagnostic prescriptive learning" (Tr. pp. 764, 769-70).

[5] In this letter, the parents ascribed a date of "February 28th" to their previous information request; however, the only information request letter bearing a February 2009 date is the parents' February 25, 2009 letter (compare Parent Ex. LL at p. 1, with Parent Ex. EEE).

[6] In the March 17, 2009 letter, the parents appear to assert that the December 2008 information request was a written request; however, the hearing record does not contain a copy of any request consistent with this description (see Parent Ex. EEE at p. 1).

[7] The hearing record indicates that the family friend/Orton-Gillingham practitioner ultimately provided the student with private Orton-Gillingham tutoring (Tr. pp. 473-74). For purposes of clarity this individual will be referred to as the student's private Orton-Gillingham tutor throughout the remainder of this decision.

history, a February 25, 2009 classroom observation, the February 4, 2009 psychoeducational assessment, the January 30, 2009 auditory and language processing reevaluation, and an August 5, 2003 medical evaluation in developing its recommendations (Parent Ex. F at pp. 9-10; see Dist. Exs. 10; 11).

The May 8, 2009 IEP reflected that the private psychologist reviewed the results of her report as discussed above, noting the student's average to above average cognitive ability, that the student's pattern of scores with regard to the memory realm was similar to children with auditory and phonological processing weaknesses, and that the student was dyslexic (Parent Ex. F at p. 9). The private psychologist suggested that the focus of the student's remediation should be on decoding and spelling (including writing), and that specific remediation should include "multi-sensory sequential systematic phonetic based instruction such as Orton-Gillingham instruction" to address the student's deficits (id.).

The CSE subcommittee changed the student's classification to a student with a learning disability, and recommended placing the student in a general education setting, with a 45-minute per day special class in reading in a 2:1 setting; consultant teacher services (indirect) to support ELA skills, once per week for one hour; related services consisting of a speech-language consultation, once per week for 15 minutes per session; program modifications/accommodations consisting of checking for understanding, a copy of class notes, preferential seating, reteaching of materials, preteaching of new vocabulary in all content areas, and access to a counselor; assistive technology consisting of the Earobics program access to a word processor, and an amplification system; team meetings once per week for 15 minutes per session to discuss strategies for educating the student; testing accommodations consisting of extended time (1.5), directions explained, and spelling requirements waived; and extended school year (ESY) services consisting of special education itinerant teacher services, three times per week for one hour per session in a 1:1 setting to prevent regression of ELA skills (Tr. p. 485; Parent Ex. F at pp. 2-4; 9). The May 8, 2009 IEP also contained 18 annual goals, addressing the areas of study skills, reading (sight word recognition, syllabication, decoding), spelling, writing (paragraph content, spelling, punctuation, spacing), mathematics (math facts), social/emotional/behavioral skills, keyboarding, and maintenance of previously learned skills (Parent Ex. F at pp. 10-13). The May 2009 CSE subcommittee commented that it considered a co-teaching placement with a special class for reading/ELA and "speech," but ultimately rejected this option as overly restrictive, and denoted an OT evaluation as a follow-up task (id. at p. 10).

On May 28, 2009, the parents wrote to the district requesting a CSE meeting and, among other things, the identification of the specific multisensory language instruction methodology that it would use with the student in the recommended program, and the qualifications of district staff charged with its implementation (Parent Ex. P at p. 1).[8] On June 10, 2009, the parents wrote to the student's third grade classroom teacher reiterating their request for multisensory instruction for their daughter to address the student's difficulty mastering multiplication and

[8] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. Regarding instances where multiple Parent exhibits were identical, only exhibits occurring earlier in the letter sequence were cited. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

division facts to memory (Parent Ex. ZZ). On July 1, 2009, the parents wrote to the district confirming a meeting scheduled on the following day with district staff to "find common ground to move forward" regarding the development of the student's educational program (Parent Ex. II).

On July 9, 2009 the district sent the parents a progress report relative to the student's 2008-09 school year (Parent Ex. W). The progress report reflected that by the end of the school year the student had achieved one goal and was progressing satisfactorily toward the remaining four annual goals (id. at pp. 2-3).

On September 16, 2009, the parents wrote to the district and requested copies of the class profiles for the student's general education classroom and special reading class recommended in the May 8, 2009 IEP (Parent Ex. HH). On September 18, 2009, the parents wrote to the district, disagreeing with its assessment that their daughter was reading at grade level, expressing dissatisfaction with the May 8, 2009 IEP goals and with the failure of the district to implement the student's IEP using the Orton-Gillingham methodology (Parent Ex. FF). The letter referenced multiple prior requests interposed with the district for information regarding program methodology and qualifications of district staff that allegedly remained outstanding (id. at p. 1; see Parent Exs. LL; EEE). The district responded on September 23, 2009 by providing the parents with the qualifications of their daughter's fourth grade teachers (Parent Ex. GG).

In October 2009,[9] the district conducted an OT evaluation of the student in order to assess the student's fine motor, visual motor, and sensory processing skills (Parent Ex. BB at p. 1). The evaluating therapist observed that the student demonstrated strength in visual motor, visual spatial, and motor coordination abilities, remarked that her hand skills and both manuscript and cursive letter formations were "integrated and functionally appropriate," and judged the student's sensory processing skills to be "grossly intact" (id. at p. 4). The evaluating therapist concluded that based on the information obtained from record review, interview with teaching staff, clinical observation, and the results of standardized testing, OT services for the student were not warranted (id. at p. 5).

On November 16, 2009, the CSE subcommittee convened to review the student's program (Dist. Ex. 5). In attendance were the district's director of pupil personnel services (director), a CSE chairperson, school psychologist, the student's special education reading/ELA teacher and regular education teacher, speech-language pathologist, occupational therapist, and the student's mother (id. at p. 8).[10] The hearing record demonstrates that in addition to the data considered by the May 2009 CSE subcommittee, the November 2009 subcommittee also considered the summary of the May 8, 2010 annual review and the November 16, 2009 OT evaluation report (compare, Dist. Ex. 5 at pp. 9-10, with Parent Ex. F at pp. 8-9; see Tr. pp. 106-

[9] The OT evaluation report contained in the hearing record indicates that the OT evaluation took place on October 13, 2009 and October 15, 2009, but does not indicate the specific date upon which the evaluation report was issued (see Parent Ex. BB at p. 1). Elsewhere in the hearing record, the district references the date of November 16, 2009 as the date of the OT evaluation (see Dist. Exs. 5 at p. 9; 6 at p. 8). For the purpose of consistency, in this decision, I will reference November 16, 2009 as the date of the OT evaluation report.

[10] Although identified as a "Speech/Language Therapist," the hearing record reveals that this individual is licensed as a speech-language pathologist (Tr. p. 356).

07; Parent Ex. BB). The CSE subcommittee continued the student's classification as a student with a learning disability, and recommended a 12-month educational program identical to that recommended in the May 8, 2009 IEP, with identical annual goals (compare, Dist. Ex. 5 at pp. 1-3, 7-13, with Parent Ex. F at pp. 2-4, 10-13).

Academically, the November 16, 2009 IEP reflected that based upon teacher assessments and work samples, the student was reported to be performing at grade level in all subject areas, an assertion that was challenged by the student's mother, who contended that the weaknesses identified in the February 4, 2009 psychoeducational evaluation established that her daughter was not functioning at grade level (Dist. Ex. 5 at p. 8; see Dist. Ex. 10). District staff commented that overall, the student was improving and functioning at grade level despite her weaknesses, and that she appeared "happy and well adjusted in her classroom and across school settings" while exhibiting a good self-concept (Dist. Ex. 5 at p. 8). The student's mother expressed concern that the annual goals that were developed during the May 8, 2009 annual review meeting were not delineated on the resultant IEP, requested that the annual goals be made more specific and that the student receive consultant teacher services across all subject areas, and maintained that the student's reading/ELA teacher was not receiving adequate support to meet the student's needs; she also "requested professional development for the teaching staff" (id.). The student's reading/ELA teacher disagreed with the mother, and the subcommittee decided that after securing parental consent, the reading/ELA teacher would contact those professionals with whom the parents were consulting to personally discuss the student's program, after which the parents would be free to request another CSE meeting with the consultants present (id.).

On November 19, 2009, the district forwarded correspondence to the parents enclosing consent forms to be executed by the parents to enable the district to speak directly with the evaluating psychologist who performed the February 4, 2009 psychoeducational evaluation, the student's private Orton-Gillingham tutor, and a "fellow" from the Academy of Orton-Gillingham Practitioners and Educators (Dist. Exs. 10; 12; Parent Exs. F at p. 8; AA). On January 4, 2010, the district sent the parents a follow-up request (Dist. Ex. 13).

The parents acknowledged receipt of the district's follow-up consent request on January 5, 2010, and, without referencing their intentions with respect to the district's request for consent, the parents enumerated their concerns with the November 16, 2009 IEP, including contentions that the student was not reading at grade level; the annual goals contained in the IEP were not "accurate and aggressive enough" in consideration of the findings of the parents' consultants; and that the May 8, 2009 IEP did not reflect the substance of what was agreed to during the annual review meeting (Parent Ex. H). The parents also renewed their previous request for a copy of the student's class profile, and for disclosure of "the name of the person responsible for creating and interpreting the IEP annual goals and objectives following the [a]nnual [r]eview" (id. at p. 1). On January 25, 2010, the district responded, furnished the requested information to the parents, and made a third request for parental execution of the consent forms (Dist. Ex. 14). The hearing record reflects that the student continued to attend the district middle school for the remainder of the 2009-10 school year pursuant to the November 16, 2009 IEP (see Dist. Exs. 7; 8).

On May 10, 2010, the school psychologist issued an annual review summary with regard to the student's counseling that detailed the student's periodic interaction with the school

counselor called for on the November 16, 2009 IEP (Dist. Ex. 9; see Dist. Ex. 5 at p. 2). The school psychologist noted that the student was seen individually on a monthly basis, but more often if the need arose (Dist. Ex. 9). She added that although the student did not initiate contact with the counselor, she "eagerly attend[ed] counseling sessions and, once there, initiated conversations about problems and concerns" (id.). She added that the student was "friendly and interact[ed] properly with peers and adults," that she "express[ed] self-confidence with regard to many academic and social skills," and that "she [felt] supported by her special education services" (id.).

Additionally on May 10, 2010, the CSE subcommittee convened for the student's annual review to develop the student's educational program for the 2010-11 school year (fifth grade) (Dist. Ex. 6). In attendance were the director, CSE chairperson, school psychologist, the student's special education reading/ELA teacher, the district's speech-language pathologist, the student's regular education teacher, and the parents (id. at p. 7). The hearing record reflects that in addition to the data considered by the November 2009 CSE subcommittee, the May 2010 subcommittee also considered the information gleaned from the May 2010 CSE meeting and the May 10, 2010 counseling annual review summary when formulating the student's May 2010 IEP(Dist. Ex. 6 at p. 8; see Dist. Ex. 9).

The May 2010 CSE subcommittee continued the student's classification as a student with a learning disability and recommended a 10-month educational program consisting of a general education placement, with a special class in reading in a 2:1 setting; consultant teacher services (indirect) to support ELA skills (writing and spelling) across the curriculum, once per week for one hour; program modifications consisting of checking for understanding, a copy of class notes, preferential seating, reteaching of materials, preteaching of new vocabulary, and use of an amplification system; assistive technology services consisting of access to a word processor and a computer-based instructional program to reinforce ELA skills; and testing accommodations consisting of extended time (1.5), directions explained, and spelling requirements waived (Dist. Ex. 6 at pp. 1-3, 7-8). The May 10, 2010 IEP also contained 11 annual goals addressing the areas of study skills, reading, and writing (id. at pp. 9-10). The hearing record demonstrates that the May 10, 2010 CSE subcommittee considered two potential alternatives to the recommended program: a general education setting without support services, which it ultimately rejected because it determined that based upon her current academic functioning, a more intensive setting was required to address the student's needs; and a co-teach class with special class instruction in reading/ELA, which it ultimately rejected as overly restrictive (id. at p. 8).

The May 2010 CSE subcommittee developed a statement of present levels of performance in the areas of academic achievement and functional performance, social/emotional performance, and health and physical development (Dist. Ex. 6 at pp. 3-7). The May 10, 2010 IEP documented discussion of the student's current functioning, with the district maintaining its position that based upon work samples, observations, and benchmark assessments, the student had progressed in and was performing at grade level in all subject areas (id. at p. 7). However, the parents continued to disagree, adhered to their view that based on deficits identified through the February 4, 2009 psychoeducational reevaluation, the student was not performing at grade level (id.). The May 2010 CSE subcommittee recommended continuation of the student's indirect consultant teacher services and special class for ELA, as well as continuation of the

program modifications and accommodations (except for access to a counselor), assistive technology, and testing accommodations enumerated in the November 16, 2009 IEP (compare, Dist. Ex. 5 at pp. 1-3, 7-9, with Dist. Ex. 6 at pp. 1-3). The May 2010 CSE subcommittee agreed with the parents that the student required a multisensory learning style and that she should not be pulled out for special class ELA instruction during the time that ELA instruction was conducted in the general education classroom (Dist. Ex. 6 at p. 8). The May 10, 2010 IEP noted that the CSE subcommittee agreed that the student's annual goals were appropriate and that she was ineligible for ESY services because regression had not been observed (id.).

At the conclusion of the student's 2009-10 school year, the district issued an end of year progress report documenting her progress in fourth grade (Dist. Ex. 8).[11] The report reflected that the student had achieved 13 of 18 annual goals, and was progressing satisfactorily toward the remaining 5 annual goals (id.). The student's final fourth grade report card evidenced that the student met State learning standards in 43 of 49 total areas reviewed, while she partially met State standards in two areas (spelling correctly in written work and applying a variety of strategies to solve math problems), and needed improvement in math fluency with single digit facts (Dist. Ex. 7).

Due Process Complaint Notice

On June 18, 2010, the parents filed a due process complaint notice alleging, among other things, that the district failed to provide the student with a free appropriate public education (FAPE) based on the IEP developed at the November 16, 2009 and the May 10, 2010 CSE meeting (Dist. Ex. 1). More specifically, the parents alleged that the student was denied a FAPE because: (1) the district failed to implement an appropriate educational program that addressed the student's "reading disability;" (2) the district failed to implement specific methodologies, including Orton-Gillingham, to address the student's needs; (3) the CSE subcommittee failed to develop appropriate goals and the goals were not "meaningful" or "measurable;" (4) the district's recommended educational program failed to provide staff appropriately trained in Orton-Gillingham and the Preventing Academic Failure (PAF) programs; (5) the CSE subcommittee failed to consider the recommendations of outside evaluators; and (6) as a result of the district's failure to provide appropriate special education services during the 2009-10[12] school year, the parents were forced to retain a private reading tutor during winter 2009-10 to provide Orton-Gillingham instruction to the student (id. at pp. 1-4).[13] The parents sought an order from an impartial hearing officer directing the district to: provide an appropriate IEP to the student; provide Orton-Gillingham based instruction taught by adequately trained staff; provide 1:1 ESY

[11] Dist. Ex. 8 is a 6 page document, but the pagination lists pages "2" through "7" (see Dist. Ex. 8).

[12] The due process complaint notice did not reference the May 8, 2009 IEP, and instead referenced only the November 16, 2009 IEP (see Dist. Ex. 1 at p. 1). Accordingly, for the purposes of this appeal, I consider the November 16, 2009 IEP to be the only IEP at issue relative to the allegations pertaining to the student's 2009-10 school year.

[13] The parents' due process complaint notice did not clearly delineate which claims pertained to which school year (see Dist. Ex. 1; see also Dist. Ex. 2). However, it appears that many of the alleged IEP deficiencies relate to the 2009-10 school year since the parents noted in their complaint that they had not yet received the May 2010 IEP (Dist. Ex. 1).

services in Orton-Gillingham designed and taught by a "'certified'" Orton-Gillingham instructor; and reimburse the parents for private reading services obtained by them (id. at pp. 4-5).

On June 24, 2010, the district responded to the parents' due process complaint notice (Dist. Ex. 2). Initially, the district noted that it was unclear from the due process complaint notice whether the parents were challenging the 2009-10 IEP or the 2010-11 IEP (id. at p. 1). The district's response then stated that "[a]ssuming, for the sake of this response only, that the complaint challenges both the 2009-10 and 2010-11 IEPs," the programs in those IEPs were reasonably calculated to enable the student to make meaningful educational gains in the least restrictive environment (LRE) (id.). More specifically, the district argued that: (1) both IEPs provided appropriately for consultant teacher services to support the student's ELA skills; (2) the district was not required under federal or State laws and regulations to either specify a particular methodology on the IEP or to implement a specific methodology; (3) the May 2010 CSE subcommittee discussed the student's math annual goals during the annual review; (4) the May 10, 2010 IEP provided speech-language services sufficient to address the student's speech-language needs and confer upon her meaningful educational benefit; (5) the May 2010 CSE subcommittee properly determined that the student did not require ESY services during summer of the 2010-11 school year; (6) the November 16, 2009 IEP recommended an educational program reasonably calculated to enable the student to receive meaningful educational benefit; (7) the November 16, 2009 IEP contained appropriate and measurable annual goals; (8) the district staff responsible for implementing the recommended programs under both the November 16, 2009 and May 10, 2010 IEPs were qualified and trained; (9) the CSE subcommittees considered the recommendations of outside evaluators during the development of both the November 16, 2009 and May 10, 2010 IEPs; and (10) it was unnecessary for the parents to obtain private tutoring services for the student, and the parents failed to apprise the district of their decision to obtain these services and their intention to seek reimbursement prior to obtaining such services (Dist. Ex. 2).

Impartial Hearing Officer Decision

An impartial hearing convened on September 20, 2010, and concluded on February 16, 2011 after six days of proceedings (IHO Decision at pp. 39-41). On May 2, 2011, the impartial hearing officer issued a decision in which he determined that: the program recommended by the district in the November 2009 IEP was appropriate and consequently denied the parents' reimbursement claim for the student for the 2009-10 school year (id. at pp. 24-31). The impartial hearing officer then determined that the program recommended by the district in the May 2010 IEP was not appropriate for the student for the 2010-11 school year, and consequently ordered the CSE subcommittee to reconvene relative to the 2010-11 school year and to: (1) provide Orton-Gillingham instruction to the student for ten weeks, two hours per day, five days per week for a total of 100 hours; (2) amend the May 2010 IEP to include instruction using a "multi-sensory, sequential, systemic Orton-Gillingham based instructional methodology;" (3) reconvene and consider the student's need for speech-language therapy, counseling, and books on tape; (4) reconvene and add annual goals addressing the student's reading fluency, math fluency, and speech, and to consider adding annual goals regarding spelling if they were determined to be appropriate; and (5) reevaluate the student for ESY services for summer 2010 (id. at pp. 32-38).

Procedurally, the impartial hearing officer determined that the parents satisfactorily raised the issue of compensatory/additional services regarding both school years in their due process complaint notice, and consequently, their claim for provision of summer reading services was actionable; however, he also found that the parents did not satisfactorily raise the issues of the provision of speech-language and counseling services in the due process complaint notice, and consequently, dismissed those claims (IHO Decision at pp. 22-23). With regard to mootness for the claims pertaining to the 2009-10 school year, the impartial hearing officer concluded that allegations of procedural errors on the part of the district in the development of the 2009-10 IEP that did not result in a denial of a FAPE were moot, but to the extent that the parents sought additional or compensatory services for the alleged denial of a FAPE for the 2009-10 school year, the issues were not moot (id. at pp. 23-24).

Substantively, the impartial hearing officer found that the district offered the student a FAPE for the 2009-10 school year because although "vague," the inadequacy of the reading goals and objectives did not deprive the student of a FAPE (IHO Decision at p. 24). He also noted that the parents did not cooperate with the district in its effort to address alleged deficiencies in the annual goals (id.). The impartial haring officer also found that: (1) the November 2009 CSE subcommittee's decision to place the student in a general education class for LRE purposes was appropriate; (2) the lack of a specific methodology on the November 2009 IEP did not constitute a procedural violation depriving the student of a FAPE; (3) the evidence contained in the hearing record demonstrated that the student progressed academically in her placement during the 2009-10 school year; and (4) although the hearing record suggested that the student's progress in her greatest areas of need – namely reading decoding and fluency, spelling, and writing – were questionable, the student nonetheless benefited from the general education setting during the 2009-10 school year (id. at pp. 25-32).

With respect to the 2010-11 school year, the impartial hearing officer found that the district failed to sufficiently integrate the recommendations of the parents' professional consultants into the May 2010 IEP, most notably, for an Orton-Gillingham methodology to be "applied" to the student's reading program (IHO Decision at pp. 32-34). The impartial hearing officer further concluded that the annual goals contained in the May 2010 IEP suffered from the same deficiency as the prior school year's IEP, but that the deficiencies "bec[a]me more significant as the curriculum for the student more intensely challenge[d] her dyslexia" (id. at p. 34). Specifically, the impartial hearing officer determined that the May 2010 IEP lacked any math fluency annual goals, and reduced the number of spelling annual goals from the November 2009 IEP from five to one (id. at pp. 34-35). Finally, the impartial hearing officer determined that the district failed to properly evaluate the student for ESY services for summer 2010 (id. at pp. 36-37).

Appeal for State-Level Review

The district appeals the impartial hearing officer's determination that it failed to offer the student a FAPE for the 2010-11 school year. The district advances three principal arguments. First, it contends that the impartial hearing officer improperly determined issues that were not properly raised in the parents' due process complaint notice, namely, the lack of math fluency annual goals on the May 2010 IEP, and the award of compensatory Orton-Gillingham services,

which, the district asserts was not requested in the due process complaint notice. Second, the district maintains that the impartial hearing officer erroneously determined that the annual goals contained in the May 2010 IEP were inadequate. Specifically, the district counters that contrary to the finding of the impartial hearing officer, the May 10, 2010 IEP contained not one spelling goal, but five; furthermore, the district argues that the impartial hearing officer's determination was based upon a speculative assumption that the student would be facing more significant academic challenges during the 2010-11 school year, which was not supported by the evidence contained in the hearing record. Third, the district maintains that the impartial hearing officer erroneously determined that the district failed to properly evaluate the student for ESY services for summer 2010 because the evidence contained in the hearing record demonstrated that the student did not exhibit substantial regression during breaks from the recommended program. Furthermore, the district asserts that even if the student had been improperly evaluated, such a deficiency did not rise to the level of a deprivation of a FAPE. The district seeks an order annulling those portions of the impartial hearing officer's decision determining that it failed to offer the student a FAPE during the 2010-11 school year and that it failed to properly evaluate the student for ESY services for summer 2010.

The parents answer, generally denying the district's material allegations, and cross-appeal the impartial hearing officer's determination that the district offered the student a FAPE during the 2009-10 school year and his denial of the parents' claim for reimbursement for privately obtained Orton-Gillingham tutoring services for winter 2010. With respect to the district's 2009-10 IEP, the parents cross-appeal from the impartial hearing officer's conclusion that the annual goals contained in the November 2009 IEP were deficient, but did not rise to the level of a deprivation of a FAPE. The parents also challenge the impartial hearing officer's acknowledgement that the privately obtained Orton-Gillingham services were appropriate and his refusal to grant reimbursement. The parents seek an order annulling those portions of the impartial hearing officer's decision determining that the district offered the student a FAPE for the 2009-10 school year and denying the parents' claim for reimbursement for the privately obtained Orton-Gillingham tutoring services.

The district answered the parents' cross-appeal, generally denying the material allegations contained therein, and asserts that the impartial hearing officer properly determined that the program recommended in the November 2009 IEP was both procedurally and substantively appropriate for the student and afforded her a FAPE for the 2009-10 school year.

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

November 2009 IEP—Annual Goals

I will first address the parents' cross-appeal challenging the impartial hearing officer's determination that the annual goals contained in the November 2009 IEP were vague, but did not rise to the level of a deprivation of a FAPE (IHO Decision at p. 24).[14] Specifically, the impartial hearing officer characterized the reading goals contained in the November 2009 IEP as "vague with respect to intended progress" (id.). He further found that two of the reading goals lacked benchmarks by which to measure the student's progress, and that one of the reading goals was "woefully inadequate given the student's high intelligence and academic motivation" (id.). The impartial hearing officer then determined that "other reading goals [were] similarly deficient for similar reasons" (id.). However, he determined that these deficiencies did not rise to the level of denying the student a FAPE (id. at pp. 24-25). An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability and to enable the student to be involved in and make progress in the general education curriculum (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled

[14] I note that the parties to this appeal did not appeal or cross-appeal the determinations of the impartial hearing officer that: (1) the parents identified the issue of compensatory/additional services in the due process complaint notice and that their claim for provision of summer reading services was actionable; (2) the parents failed to raise the issues of the provision of speech-language and counseling services in the due process complaint notice; (3) the parent's allegations of procedural errors regarding the development of the November 2009 IEP that did not result in a denial of a FAPE had become moot; (4) the parents claim for additional or compensatory services for the alleged denial of a FAPE for the 2009-10 school year was not moot; (5) the November 2009 CSE subcommittee's decision to place the student in a general education class for purposes of the student's LRE was appropriate; (6) the parents failed to cooperate with the district in its effort to address alleged deficiencies in the annual goals contained in the November 2009 IEP; and (7) the lack of a specific methodology in the November 2009 IEP did not constitute a procedural violation depriving the student of a FAPE (IHO Decision at pp. 22-25, 27-28). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, these determinations of the impartial hearing officer are binding upon the parties and will not be reviewed in this decision.

review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]).

In this case, I note that the parties do not dispute that the November 2009 IEP contained an accurate description of the student's educational needs based upon the February 2009 triennial evaluation of the student (compare Dist. Ex. 5 at pp. 4-7, with Dist. Ex. 10). Accordingly, I will turn to whether the annual goals in the November 2009 IEP appropriately addressed those needs.

The November 2009 IEP contained 18 annual goals, addressing the areas of study skills, reading, writing, mathematics, social/emotional/behavioral skills, keyboarding skills, and spelling (Dist. Ex. 5 at pp. 10-13). Review of the student's annual IEP goals for the 2009-10 school year establishes that they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress or gauge the need for continuation or revision, and contained adequate evaluative criteria (id.). Each annual goal identified the specific skill the student was to achieve, the criteria by which the student's success toward achieving the skill was to be measured, the procedures that would be utilized by the special education teacher/counselor to evaluate the student's success, and how frequently the special education teacher/counselor was to measure the student's progress toward meeting the particular annual goal (id.). Additionally, the annual goals in the November 2009 IEP were directly aligned with the student's needs as described in the present levels of academic performance section in the IEP; specifically, her needs in memory skills, reading decoding, spelling of phonetically regular and high frequency words, paragraph writing, punctuation, keyboarding fluency, subtraction and multiplication facts, and self-esteem (compare Dist. Ex. 5 at pp. 4, 7, with Dist. Ex. 5 at pp. 10-13).

Although the impartial hearing officer concluded that there were no goals addressing the student's fluency on the November 2009 IEP (IHO Decision at p. 24), I disagree with that analysis. According to the evidence in the hearing record, assessment of the student's reading fluency was based on measurements of the student's reading rate and accuracy when reading passages aloud(Dist. Ex 10 at pp. 11-12, 25; see Dist. Ex. 20 at p. 4). Although the November 2009 CSE subcommittee noted the student's improvement in reading fluency, the November 2009 IEP included two annual goals specifically addressed increasing the student's ability to read or decode words, one goal which utilized a sight word recognition strategy to visually recall high frequency words, and one goal which utilized a syllabication strategy to decode words phonetically both of which addressed the student's reading fluency (Dist. Ex. 5 at p. 10).

Regarding the impartial hearing officer's conclusion that the annual goal in the November 2009 IEP that related to the student's maintenance of her ability to decode multisyllabic words was "not sufficiently aimed at academic progress" and "lacked a benchmark to measure progress" (IHO Decision at p. 24), the hearing record reflects that the IEP contained goals relating to maintenance and that these goals were appropriately designed for the student's ESY program during summer 2009 in order to prevent substantial regression, and were not designed as goals for the regular school year when new material would be introduced (Parent Ex. V at pp. 1-4; see 8 NYCRR 200.1[eee]).

Moreover, the evidence contained in the hearing record demonstrates that the district worked collaboratively with the parents and their private consultants in an effort to address the

parents' concerns regarding the student's annual goals in the November 2009 IEP. The testimony of the district's director confirmed that the purpose of the November 2009 program review was to discuss the annual goals that were contained in the May 8, 2009 IEP "[b]ecause at that time [the parents] had requested a meeting to discuss the goals for [the student]," and the parents did not believe that the goals were appropriate based on the outside evaluations or the student's functioning in school (Tr. pp. 40-41; see Dist. Exs. 10; 11). The director further explained that the November 2009 CSE subcommittee discussed the outside evaluation reports and "talked about [the student's] current functioning" (Tr. pp. 39, see Tr. pp. 43-45; Dist. Exs. 10; 11). The hearing record also reflects that the district attempted to secure parental consent to discuss the recommended program directly with the parents' private consultants, specifically, the psychologist who performed the February 4, 2009 psychoeducational evaluation, the student's private Orton-Gillingham tutor, and the fellow at the Academy of Orton-Gillingham Practitioners & Educators, and that parental consent was not ultimately provided (see Tr. pp. 45-48, 438-40; Dist. Exs. 5 at p. 8; 12; 13; 14).[15]

Based on the evidence above, I find support in the hearing record for the impartial hearing officer's assertion that "there was ample opportunity to modify the goals had the parents cooperated with the [s]chool [d]istrict in their efforts to address the issue"(IHO Decision at p. 25).

As no other allegations were raised in the parents' cross-appeal, I decline to modify the impartial hearing officer's decision relative to the 2009-10 school year.

2010-11 School Year—May 2010 IEP

I turn now to the district's appeal of the impartial hearing officer's determinations regarding the May 2010 IEP and his conclusion that the district failed to offer the student a FAPE. As noted above, the parents' due process complaint notice did not clearly delineate which allegations pertained to the 2009-10 school year and which pertained to the 2010-11 school year (see Dist. Ex. 1). The due process complaint notice does not contain any allegations in which the parents assert that May 2010 IEP was deficient (see Dist. Ex. 1). Pursuant to the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing or the other party otherwise agrees (20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i],

[15] The hearing record reflects that the district paid for both the January 30, 2009 auditory and language processing reevaluation and the February 4, 2009 psychoeducational evaluation; however, during the impartial hearing, the director testified that the district sought to obtain from or share information with the parents' private consultants which was outside the scope of the arrangements made previously and, therefore, the district sought parental consent for the release of additional information (Tr. pp. 110-13). Although unnecessary to reach this issue for purposes of this decision, I note that in some circumstances a district may need to obtain parental consent in order to access privately held records or, conversely, to release the student's educational records to a private consultant, and a parent's refusal to provide consent to the release of records is among the factors that may be considered relevant when determining the extent to which reimbursement relief is warranted (34 C.F.R. § 300.622; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67-68 [2d Cir. 2000]; W.C. v. Summit Bd. of Educ., 2007 WL 4591316, at *7 [D.N.J. 2007]).

[j][1][ii]; see Application of the Bd. of Educ., Appeal No. 09-054; Application of the Dep't of Educ., Appeal No. 08-131; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). In this case, there is no evidence that the scope of issues was expanded beyond those in the original due process complaint notice through an amended due process complaint notice or by the agreement of the district, therefore, the impartial hearing officer should not have proceeded to issues outside the complaint. Accordingly the impartial hearing officer's decision regarding the adequacy of the student's May 2010 IEP must be annulled. However, even if these issues had been properly raised, as further described below, the parent's claims would nevertheless fail.

Annual Goals

In its petition, the district argues that the impartial hearing officer erroneously determined that the annual goals contained in the May 2010 IEP were inadequate and rose to the level of denying the student a FAPE. As further discussed below, I find that the annual goals included in the May 2010 IEP were sufficiently linked to the student's educational needs as described in the present levels of academic performance contained in the IEP, and as reflected by teacher input documented in the comments section of the IEP (Dist. Ex. 6 at pp. 3-4, 6, 7-10).

Contrary to the assertion of the impartial hearing officer that the May 2010 IEP lacked annual goals addressing the student's needs in the area of reading fluency, a review of the IEP at issue reveals that it in fact contained three annual goals addressing the student's reading fluency (compare, IHO Decision at p. 34, with Dist. Ex. 6 at p. 9).

With regard to spelling, the impartial hearing officer determined that "[s]pelling goals on the 2010/11 IEP were reduced … to one goal…" (IHO Decision at p. 34; see Dist. Ex. 6 at p. 10). I note that this annual goal addressed the student's ability to carryover her ability to spell previously mastered personal sight words to her daily school work, which reflected continuity in the student's general education and special education instruction (Dist. Ex. 6 at p. 10). Furthermore, I note that contrary to the impartial hearing officer's assertion, the May 2010 IEP contained five additional annual goals also addressing the student's spelling needs, including: one annual goal addressing the student's ability to spell sight words in her independent writing; one annual goal addressing the student's ability to identify spelling errors in her own writing assignments; and three annual goals addressing identification of the appropriate rule for decoding specific types of words and then writing these orally presented words (an operation which would require the student to spell them) (IHO Decision at p. 34; Dist. Ex. 6 at pp. 9-10).

With regard to math annual goals in the May 2010 IEP, the impartial hearing officer determined that there were no math goals on the IEP "notwithstanding the student's report card indicating she needs improvement in all areas of math fluency" (IHO Decision at p. 35). However, the hearing record reflects that the student's regular education teacher advised during the May 2010 CSE meeting that the student "ha[d] improved in her fluency in mathematic[s] facts." (Dist. Ex. 6 at p. 7). Moreover, the student's end of year 2009-10 progress report of IEP goals reflected that the student had achieved both of her annual goals regarding subtraction facts and multiplication facts (Dist. Ex. 8 at pp. 4-5). The hearing record also establishes that although

the student's end of year 2009-10 report card reflected that the student "needed improvement" in fluency with single digit facts, the student continued to meet State learning standards in four areas of mathematics including "computes accurately," and she partially met State standards in the remaining area (Dist. Ex. 7).[16]

The director testified that the student's annual goals were discussed at the May 2010 CSE meeting; and were developed from her present levels of functioning, as discerned through classroom work, teacher and parent reports, benchmark assessments, and previous goals, with input considered from parents, teachers, and support staff (Tr. pp. 69-72). The director also testified that there was no parental objection to the annual goals at the May 2010 annual review meeting (Tr. pp. 71-72).

In consideration of the foregoing, I find the impartial hearing officer's determination that the goals contained in the May 2010 IEP were inadequate was not supported by the evidence contained in the hearing record. I find that the evidence shows that the annual goals contained in the May 2010 IEP were consistent with the student's identified needs in the areas of study skills, reading, writing, spelling, mathematics, social/emotional/behavioral functioning, and motor skills as identified in the May 10, 2010 annual review summary, the May 10, 2010 counseling annual review summary, the November 16, 2009 OT evaluation, a March 17, 2009 social history, a February 25, 2009 classroom observation, the February 4, 2009 psychoeducational assessment, the January 30, 2009 auditory and language processing reevaluation, and an August 5, 2003 medical evaluation (see Dist. Exs. 6 at p. 8; 9; 10; 11; Parent Ex. BB).

Related Services

The impartial hearing officer concluded that the district's discontinuation of counseling and speech-language consultation services from the student's May 2010 IEP, rendered the recommended program insufficiently intensive to address the student's educational needs, finding that "[r]ather than intensify the special education program for [the student] at the [May] 10, 2010 CSE meeting … the CSE chose to weaken it" (IHO Decision at p. 34).

Counseling

The impartial hearing officer determined that counseling services were eliminated from the May 2010 IEP even though the student's private psychologist concluded that the student's difficulties from dyslexia would "intensify the student's learning challenges as the curriculum bec[ame] more difficult," which would increase the student's need for counseling services (IHO Decision at p. 34). However, the evidence does not support this determination. At the time of the student's May 2010 annual review, the school psychologist, who had provided the student's counseling during the 2009-10 school year, commented that the student's self-esteem was good, that she was aware that everyone had strengths and weaknesses, that she was able to identify her own personal strengths and weaknesses, that she expressed self-confidence with regard to many academic and social skills, and that she recognized that spelling was difficult for her but felt

[16] The academic rubric utilized for the 2009-10 report card was based on the four levels of the State Learning Standards (Dist. Ex. 7).

supported by her special education services; consequently, the school psychologist identified no social/emotional concerns requiring special education services at that time (Tr. p. 237; Dist. Exs. 6 at pp. 6-8; 9). The May 2010 IEP also reflected that although the student was happy to go to counseling sessions, she did not seek out the support (Dist. Exs. 6 at p. 8; 9).

The student's mother testified that it was "evident to anyone who is around her that [she] is somebody that needs to feel safe and then can really blossom," adding that in fourth and fifth grades, the student loved school, felt safe there, felt that the teachers were "very just" and made their classrooms appropriate for young people, and enjoyed the camaraderie with class and learning (Tr. pp. 492-93, 496). The director characterized the student as "a bubbly young lady who brings much to a classroom" and "has a great interest in school, … works very hard in school" and "wants to please" (Tr. p. 35). She added that the CSE subcommittee removed counseling from the May 2010 IEP because the student's needs, as then presented, did not warrant it (Tr. pp. 103-06). The student's fourth grade regular education teacher described her as "an ideal student that I would love to teach again" who "portrayed a lot of great characteristics" and "was very easy going, willing to do anything," "had a lot of self-confidence," and "participated greatly in all aspects of my classroom" (Tr. p. 160). The student's speech-language pathologist described the student as "a bright, friendly engaging child who is comfortable in the environment of our school" (Tr. p. 359). Additionally, the school psychologist revealed that she continued to see the student informally as needed, notwithstanding the discontinuation of counseling services in the May 2010 IEP (Tr. pp. 237-38), thereby affording the student continued access to counseling support when the student herself deemed it necessary.

The evidence contained in the hearing record supports that the student did not require continuation of counseling services at the time the May 2010 IEP was formulated, in order for the district's recommended program to be reasonably calculated to enable the student to receive educational benefits.

Speech-Language Consultation Services

With regard to the dispute over the discontinuation of the recommendation for speech-language consultation services for the 2010-11 school year, the student's fourth grade speech-language pathologist explained that during the 2009-10 school year, the student's speech-language consultation services consisted of the pathologist setting up the Earobics computer program, visiting the student's classroom weekly to monitor her performance in class, and adjusting the computer program to ensure that she was being challenged and was progressing (Tr. pp. 369-70). She added that she collaborated with the student's classroom teacher, which included discussing both the student's progress with the Earobics program and her classroom performance, to determine if the student was participating in class and socializing appropriately, or if the student's articulation was negatively affecting her classroom participation or socialization (Tr. p. 370). She noted that by mid-fourth grade, the student had mastered all but one discrimination task on the advanced Earobics program for adolescents and adults (Tr. p. 372). She also maintained that the student's teachers denied that the student's articulation interfered with her ability to be understood or adversely affected her participation in class, either socially or academically; and while teachers acknowledged to the speech-language pathologist that the student produced some sounds somewhat differently, they denied that her articulation

deficit influenced her spelling (Tr. pp. 370, 383-84, 410). She added that the student's teachers reported that the student willingly participated verbally in class, and that they observed that the student was happy and had friends at school (Tr. pp. 383-84). The speech-language pathologist afforded a detailed description of the May 2010 CSE subcommittee's deliberation leading to its decision to discontinue speech-language consultant services, opined that the level of speech-language services afforded to the student during the 2000-10 school year was appropriate, and denied that the student would have benefited from speech-language therapy during the 2010-11 school year (Tr. pp. 365-67, 384-89, 428-33).

The impartial hearing officer opined that the May 2010 CSE subcommittee discontinued the speech-language consultation and "substituted with a computer literacy program that appears to have nothing to do with the student's articulation issues" (IHO Decision at p. 34). However, the student's speech-language pathologist testified that because the student had "exhausted" the Earobics computer program and her articulation did not negatively affect her academically or socially, the CSE subcommittee's primary concern was the student's spelling deficit (Tr. pp. 384-85; see Tr. p. 619). Consequently, the speech-language pathologist explained that she suggested to the CSE subcommittee that a different computer program be used that would help the student with spelling rules and related spelling tasks, such as discriminating vowel digraphs (Tr. p. 385; see Tr. p. 619).

Based upon the foregoing, the student's level of need at the time of the May 2010 IEP was formulated it was not necessary to continue speech-language consultation. Therefore, I find the impartial hearing officer's determination that the student required a continuation of speech-language consultation in order to receive educational benefit from the district's recommended program, was not supported by the evidence contained in the hearing record.

Methodology

The impartial hearing officer determined that the May 2010 CSE subcommittee failed to adhere to the recommendations of the student's private psychologist and private Orton-Gillingham tutor, specifically, that "an Orton-Gillingham methodology [ ] be applied to the student's reading program" and that other remediations recommended, such as speech therapy, books on tape, extensive time in oral reading to apply to decoding, intensive work on spelling and handwriting, needed to be incorporated in the student's 2010-11 IEP (IHO Decision at pp. 33-34). The impartial hearing officer found that no methodology was specified on the May 2010 IEP, other than a multisensory approach (id. at p. 35). The impartial hearing officer further determined that the methodology employed by the student's 2009-10 special class/ELA teacher was not "a structured, systemic Orton-Gillingham program," as contemplated by the parents' private consultants, but rather was an "eclectic approach" that "did not result in adequate progress during the 2009/10 school year" (id.).

Initially, I note that generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a

Disability, Appeal No. 10-056; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

Additonally, the hearing record demonstrates that the student in the instant case received educational benefits as a result of the program implemented during the prior 2009-10 school year, which I note was based on the recommendation in the November 2009 IEP for "specific remediation that include[d] a multi-sensory sequential systematic phonetic based instruction such as Orton-Gillingham instruction," while the May 10, 2010 IEP recommended a "multi-sensory learning style" (compare Dist. Ex. 5 at p. 9, with Dist. Ex. 6 at p. 8).

Despite the student's diagnosis of dyslexia, the hearing record reveals that the student had learned to adequately compensate for her reading deficits. Specifically, the student's 2009-10 report card reflected that at the end of the school year, the student met State learning standards for all academic tasks listed on the report card except for "spells correctly in written work" and "applies a variety of strategies to solve [math] problems;" in both of these tasks, the hearing record confirms that she partially met State learning standards (Dist. Ex. 7). The hearing record further evidences that the student met State learning standards on her fourth grade (2009-10) State ELA and math assessments, and actually exceeded State learning standards on her fourth grade State science assessment (Dist. Ex. 15 at pp. 1-2). At the conclusion of the 2009-10 school year, the student had achieved 13 of her 18 annual IEP goals and was assessed as progressing satisfactorily on her remaining 5 goals (Dist. Ex. 8 at pp. 2-7). The hearing record also reflects that during the course of the 2009-10 school year, the student progressed from a level "Q" on the Fountas & Pinnell Benchmark Assessment System 2 in February 2010, to a level "S" in May 2010; according to the student's fourth grade regular education teacher, this performance demonstrated that the student was functioning at grade level (Tr. p. 190; Dist. Ex. 23 at pp. 1, 7). I also note that overall, the student's progress during the 2009-10 school year was consistent with her low average to average range performance on the WJ-III ACH administered in February 2009 (see Dist. Ex. 10 at p. 24).

Furthermore, the hearing record reflects that the student employed the reading strategies that she had been taught. For example, the private consultants who worked with the student commented that the student used "whole-word configuration" to read, that she had an excellent memory for whole sight words, and that she had been relying on this strength (Parent Exs. AA at p. 2; NNN). The private psychologist who conducted the student's February 4, 2009 psychoeducational evaluation opined that the student was able to perform to age expectations on standardized reading assessments in school because she possessed the ability to figure out meaning of text despite her errors, and that she used cues to derive meaning (Dist. Ex. 10 at p. 12; Parent Ex. Z). The student's fourth grade regular education teacher testified that the student monitored her own reading and self-corrected reading errors (Tr. pp. 188, 191, 207-08). The student's mother opined that the student used her intelligence, vocabulary, and "wits" to read; explaining that her daughter matched the beginning sounds of words and context to determine the proper word to fit into a sentence (Parent Ex. FF at p. 1).

Moreover, the student's special class/ELA teacher testified that she advised at the May 2010 annual review that the student had mastered some spelling patterns, was learning spelling rules through a multisensory approach, and that she personally had taught the student to self-correct her own writing errors (Tr. pp. 273-74, 276; Dist. Ex. 6 at pp. 7-8). She further testified that during the 2009-10 school year, the student progressed in spelling and writing, including using appropriate punctuation (capitalization and periods), a graphic organizer, and expanding sentence structure, including increasing details and typing final copies (Tr. pp. 271-73, 275). The student's special class/ELA teacher also added that she consulted with the student's regular education teacher to ensure that the student succeeded in the classroom setting (Dist. Ex. 6 at p. 8). The student's regular education teacher reported that the student improved from a level "O" to a level "S" on the benchmark assessment, that she became more confident in her reading, that she used her cues (such as meaning, structure and visual) to self-correct, and that she possessed very strong comprehension skills (Tr. p. 194).

In consideration of the foregoing, I find the determination of the impartial hearing officer that the district was required to specifically employ the Orton-Gillingham methodology in order to offer the student a FAPE was not supported by the evidence contained in the hearing record.

ESY Services for Summer 2010

The district alleges that the impartial hearing officer erroneously determined that it failed to properly evaluate the student before terminating the student's ESY services for summer 2010 (IHO Decision at p. 36). The district asserts that the evidence in the hearing record demonstrates that the student did not exhibit substantial regression during breaks from the recommended program; and that even if the student was improperly evaluated, this deficiency did not rise to the level of a deprivation of FAPE.

Pursuant to State regulations, students "shall be considered for [ESY/] 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see Application of a Student with a Disability, Appeal No. 09-088; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR

200.1[aaa]; see 34 C.F.R. § 300.106 [defining ESY]).[17]

In the case at bar, the impartial hearing officer concluded that the student's special education teacher from the 2009-10 school year applied an incorrect standard for measuring whether the student experienced substantial regression (IHO Decision at pp. 36-37). During the impartial hearing, the student's special education teacher stated that in order to demonstrate regression after a short break, the student would have had to misspell all of the spelling words that she had previously spelled correctly (Tr. pp. 304-11; see Dist. Ex. 22 at pp. 7-10). While I concur with the impartial hearing officer that the student's special education teacher used a standard for measuring substantial regression that did not comport with State regulations, the hearing record does not support a finding that the student would have experienced substantial regression requiring ESY services during summer 2010.

The student's special education teacher testified that she assessed the student for potential regression twice during the 2009-10 school year; once on January 5, 2010 after winter recess (an 18-day break), and once on March 1, 2010, after a 5-day break due to a snowstorm (Tr. pp. 282-83). Review of the student's work samples after the breaks suggests that the student maintained her previous spelling ability after the two breaks and exhibited no apparent loss of skills (Dist. Ex. 22 at pp. 7-11; see Tr. pp. 282-85). Furthermore, the student's regular education teacher testified that she did not observe any regression within the classroom setting during the 2009-10 school year (Tr. p. 171). I note also that a comparison of the benchmark assessments administered at the end of fourth grade (2009-10) and at the beginning of fifth grade (2010-11) demonstrate that the student maintained her oral reading performance at a level "S" on the Fountas and Pinnell Benchmark Assessment System 2, and maintained the same number of errors upon returning to school after the summer months (compare Dist. Ex. 16 at pp. 1-3, with Dist. Ex. 23 at pp. 1-3).

Furthermore, the hearing record does not reflect that the private consultants retained by the parents indicated that substantial regression was likely to occur. The impartial hearing officer correctly noted that the private psychologist who conducted the February 4, 2009 psychoeducational evaluation did not reach this conclusion in her evaluative report, nor did she express such an opinion during the impartial hearing (see Tr. pp. 823-901; Dist. Ex. 10; IHO Decision at pp. 36-37). Nor was such an opinion advanced in the hearing record by the private speech-language pathologist who conducted the January 30, 2009 auditory and language processing reevaluation; the student's private Orton-Gillingham tutor; or the parents' outside

[17] The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

> A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(http://www.p12.nysed.gov/specialed/publications/policy/esy/qa2006.htm).

consultant, a fellow at the Academy of Orton-Gillingham Practitioners & Educators (Parent Exs. AA at pp. 1-3; Z; see Tr. pp. 762-822; Dist. Ex. 11).

In consideration of the foregoing, I conclude that the impartial hearing officer's determination that the student was improperly evaluated for ESY services for summer 2010 is not supported by the evidence contained in the hearing record. Considered in its totality, the hearing record is bereft of evidence suggesting that the student required ESY services in order to prevent substantial regression (Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *12 [E.D.N.Y. Jan. 4, 2010]). Accordingly, I will annul the portion of the impartial hearing officer's decision determining that the district should evaluate the student for ESY services and reconvene the CSE with regard to the 2010-11 school year.

Conclusion

For the reasons described above, I find that the evidence shows that May 2010 CSE subcommittee's recommendation of a general education classroom with a special reading class was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2010-11 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). In addition, I find that the hearing record demonstrates that the district's proposed program was consistent with LRE requirements (see 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]). In view of the forgoing, I will annul the impartial hearing officer's May 2, 2011 decision relative to the 2010-11 school year.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that those portions of the impartial hearing officer's decision dated May 2, 2011 determining that the district failed to offer the student a FAPE to the student for the 2010-11 school year and directing the district to reconvene the CSE, and modify the student's program for the 2010-11 school year are annulled.

Dated: **Albany, New York**
July 7 2011

JUSTYN P. BATES
STATE REVIEW OFFICER