



# The University of the State of New York

The State Education Department  
State Review Officer

No. 07-001

**Application of the BOARD OF EDUCATION OF THE  
WEBSTER CENTRAL SCHOOL DISTRICT, for review of a  
determination of a hearing officer relating to the provision of  
educational services to a child with a disability**

**Appearances:**

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorney for petitioner, Susan T. Johns, Esq., of counsel

Joyce B. Berkowitz, Esq., attorney for respondents

## DECISION

Petitioner, the Board of Education of the Webster Central School District (district), appeals from the decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' son for the 2006-07 school year was not appropriate and ordered the CSE to reconvene and place the student at the Norman Howard School (NHS). The appeal must be sustained.

At the time of the impartial hearing in September 2006, the student was 11 years old and attending fifth grade at one of petitioner's elementary schools as his pendency placement (IHO Decision at p. 2).<sup>1</sup> The student's eligibility for special education programs and classification as a student with a learning disability are not in dispute in this appeal (see 8 NYCRR 200.1[zz][6]).

The student exhibits deficits in his receptive and expressive language skills, auditory processing skills, and working memory that affect his communication, written expression, and learning in all academic areas (Joint Exs. 27 at pp. 5, 11, 12-13; 37 at p. 6). The student is reported to meet the criteria for diagnoses of a developmental language disorder, a developmental reading

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<sup>1</sup> The pendency provisions of the Individuals with Disabilities Education Act (IDEA) and the New York State Education Law require that a child remain in his or her then current placement, unless the child's parents and the school district otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the child (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; see 34 C.F.R. § 300.518[a]). The student's pendency placement is not in dispute in the instant appeal.

disorder, a developmental math disorder, a developmental written language disorder, and an adjustment disorder with disturbance of emotion and conduct (Joint Exs. 27 at p. 26; 32 at p. 1).

Petitioner's CSE found the student eligible for special education programs and services as a student with a speech-language impairment in June 2000 and initiated special education services when he entered kindergarten in September 2000, at which time he received speech-language services in a small group three times per week (Joint Exs. 2 at p. 1; 36 at p. 1). In April 2001, the CSE recommended that the student receive direct occupational therapy (OT) two times per week and consultative OT one time per month, following an OT evaluation that revealed he demonstrated fine motor delays and gross motor delays (Joint Exs. 2 at pp. 2, 15; 3). Following the student's kindergarten year, the student participated during summer 2001 in a remedial program that incorporated reading, writing, and listening skills (Joint Ex. 2 at p. 15). For the student's first grade 2001-02 school year, he received speech-language therapy, OT, and reading intervention services (Joint Ex. 36 at p. 1). He was retained in the first grade for the 2002-03 school year (Sept. 14, 2006 Tr. p. 230; Joint Exs. 36 at p. 1; 43 at p. 1; 44 at p. 1). The student continued to receive speech-language therapy, OT, and reading intervention services for the 2002-03 and 2003-04 school years, as well as remedial math (Joint Ex. 36 at p. 1).

A psychological reevaluation of the student conducted in February 2003 indicated that the student was functioning in the low average range of cognitive ability as measured by administration of the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), which yielded a full scale IQ score of 81, a verbal IQ score of 78, and a performance IQ score of 87 (Joint Ex. 9 at p. 2). Results of projective testing were reported to be within normal limits for chronological age expectancy (id. at p. 3).

Petitioner's CSE convened on May 13, 2004 for the student's annual review and to develop his individualized education program (IEP) for the 2004-05 (third grade) school year (Joint Ex. 17 at p. 1). The student's present levels of academic achievement, functional performance and individual needs indicated that his passage comprehension skills as measured by the Woodcock Reading Mastery Test-Revised (WRMT-R) were in the average range; however, he exhibited inconsistent abilities on a daily basis (id. at p. 3). The student benefited from the use of visuals and manipulatives to process verbal information, which needed to be presented slowly with frequent comprehension checks and rephrasing of information (id.). He was motivated to complete activities but needed frequent redirection and repetition (id.). His expressive language skills were described as improving but still limited (id.). "Wait time" was essential for him to express his thoughts and he needed to be encouraged to use verbal skills in cooperative group work (id.). The student's written language skills were below average (id.). He had received support in remedial math during the 2003-04 school year and his current math skills were in the average range; however, he exhibited difficulty memorizing math facts and solving word problems (id. at pp. 3-4). The student's hand manipulation skills were reported to be age appropriate, as were his gross motor skills, which were determined to be an area of strength for him (id. at pp. 4-5). Petitioner's CSE recommended that the student be placed in the general education program except for language arts and writing which would be provided in a 15:1 special class (id. at p. 2). The student would receive remedial reading, speech-language support in the general education setting as well as the related services of OT in a small group and individual speech-language therapy outside the general education setting (id.).

Petitioner's CSE subcommittee reconvened on November 19, 2004 to amend the student's IEP to provide speech-language services five times per week outside the general education classroom, instead of three times per week outside the general education classroom and two times per week within the general education classroom (Joint Ex. 19 at pp. 2-3). The student was reported to be participating more in the classroom, raising his hand, and talking, and the CSE subcommittee determined that speech-language services delivered outside the classroom would provide additional small group support for his speaking, listening, and writing needs (id. at pp. 1-2). The record reflects that respondents were contacted and in agreement with this revision (Joint Exs. 19 at p. 2; 20 at pp. 1-4).

A March 2005 OT report indicated that the student received OT services one time a week in a small group to improve his graphomotor skills and refine his cursive writing skills (Joint Ex. 21). The occupational therapist reported that the student's written work continued to improve in legibility; he demonstrated excellent cursive handwriting as well as appropriate spacing and sizing of words and letters (id.). The student consistently produced age appropriate written work and retained learned skills (id.). The occupational therapist recommended discontinuation of OT services (id.).

Petitioner's CSE subcommittee convened on April 1, 2005 for the student's annual review and to develop his IEP for the 2005-06 (fourth grade) school year (Joint Ex. 23 at p. 1). The student was reported to have weak reading comprehension skills, difficulty expressing his thoughts, and difficulty completing written assignments without additional time and teacher support (id. at pp. 1, 3). His participation in classroom discussion was limited (id. at p. 5). He did not seek clarification of information (id.). Results of the administration of the Developmental Reading Assessment (DRA) indicated that the student's instructional reading level was at the middle of second grade, and he exhibited difficulty reading at a beginning third grade level (id.). Administration of the Key Math-Revised in February 2005 yielded a total test score in the 21st percentile (id.). Although he had received remedial math support, the student demonstrated difficulty understanding mathematical concepts and continued to struggle with daily assignments and unit tests (id.). The CSE subcommittee recommended that the student participate in general education with support for science and social studies, receive consultant teacher support services for English language arts in a group of 15:1, special class reading in a group of 15:1, and special class math in a group of 15:1 as well as individual speech-language therapy five times per week (id. at p. 3).

At the end of the 2004-05 school year, the student had met his IEP goals and corresponding objectives in the area of handwriting (Joint Exs. 22 at p. 1; 25 at pp. 2-3). He demonstrated varying degrees of progress ranging from limited to satisfactory in all other areas, with the exception of encoding words from his spelling curriculum, where he was reported to have demonstrated regression in the final reporting period (Joint Exs. 22 at pp. 1-3; 25 at pp. 2-4). Teacher comments indicated the student put forth good, but inconsistent, effort at tasks and was talking more; however, he continued to require many prompts and direct one-to-one teacher assistance (Joint Exs. 22 at pp. 1-3; 25 at p. 4).

Respondents subsequently obtained a private comprehensive pediatric developmental evaluation of their son that consisted of an educational evaluation, a communication assessment, and a pediatric neurodevelopmental evaluation (Joint Ex. 27). They submitted the evaluation reports to petitioner's school psychologist in September 2005 (id. at p. 1).

The educational evaluation was conducted on June 14, 2005, just prior to the student's tenth birthday and his completion of the third grade (id. at pp. 2-9). The communication assessment and the pediatric neurodevelopmental evaluation were conducted June 29, 2005 and July 18, 2005 respectively (id. at pp. 10-18, 19-22). An extensive battery of tests was administered including the Test of Word Reading Efficiency, Form A; the Gray Oral Reading Tests, Form A; the Comprehensive Test of Phonological Processing (CTOPP); the Kaufman Test of Educational Achievement-Second Edition, Form A; the Test of Written Language-Third Edition, Form X; the Oral and Written Language Scales (OWLS); the Test of Memory and Learning; the Woodcock-Johnson III Tests of Cognitive Abilities; the Peabody Picture Vocabulary Test (PPVT-III) (Form B); the Clinical Evaluation of Language Fundamentals-4 (CELF-4); the Test of Language Competence- Expanded Edition (TLC-E) ( Level 2); the Test of Word Knowledge (TOWK) (Ages 8-17); and the Connors' Parent Rating Scale (id. at pp. 23, 24-25).

The student demonstrated global delays in math, reading, and written expression, with skills typical for a student in middle of second grade to very early third grade (id. at p. 5). He exhibited specific deficits in the areas of efficient retrieval of information from long-term memory and decoding unfamiliar words (id.). The speech-language pathologist determined the student exhibited a moderate to severe receptive and expressive language impairment, particularly in areas of auditory language processing, and she opined that the student easily became confused in a "listening setting" (id. at p. 26). On neurodevelopmental testing, the student exhibited weaker visual-motor/pencil skills and difficulty on aspects of language such as retrieval and longer listening, as well as weaker auditory and short-term memory (id. at p. 23).

The evaluators determined that the student met the criteria for diagnoses of a developmental language disorder, a developmental reading disorder, a developmental math disorder, and a developmental written language disorder, and opined that the student's attention problems in school were "quite likely" secondary to his processing problems (id. at p. 26). The evaluators made numerous recommendations for instructional strategies and resources to address the student's needs, including consideration of a smaller, self-contained classroom placement because of his increasing needs, intensive speech-language services as well as speech-language consultation in the classroom, and intensive multisensory reading remediation instruction (id. at pp. 5-9, 12-18, 27).

Respondents privately enrolled the student in a summer reading program at NHS in July 2005 (Joint Ex. 52 at pp. 1-3). In a final report from NHS dated July 29, 2005, it was recommended that the student be provided with a multisensory, sequential, and explicit reading program with instruction in a small group of two to three students or instruction in a one-to-one setting (id. at p. 1). It was also recommended that he receive daily writing exercises (id. at p. 1).

On November 9, 2005, petitioner conducted an OT evaluation due to concerns about the student's fine motor, visual perceptual, visual motor, and handwriting skills (Joint Ex. 26 at p. 1). The evaluator reported that according to the student's mother, the student's handwriting had progressively worsened since dismissal from OT the previous school year (id.). Teacher reports indicated that the student's writing was difficult to read most of the time (id.). The student was observed in the classroom setting writing words from a story using paper containing a dotted midline (id.). The student's work was observed to be very neat and organized; however, it was reported to the evaluator that the student's writing became illegible following her observation (id.). The evaluator opined that activities incorporating handwriting required the integration of many

complex steps and skills such as short term memory, visual tracking, spelling, focusing, and auditory processing; as a result, legibility of handwriting could decrease as more effort and attention were focused in other areas (id.). The evaluator administered the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) and the Developmental Test of Visual Perception-Second Edition (DTVP-2) (id. at pp. 1-3). The student achieved a standard (and percentile) score of 89 (23) on the VMI indicating functioning in the low average range (id. at p. 2). Administration of the DTVP-2 yielded standard and (percentile) subtest scores of 9 (37) in eye-hand coordination, 10 (50) in position in space, 9 (37) in copying, 11 (63) in figure-ground, 12 (75) in spatial relations, 7 (16) in visual closure, 5 (5) in visual-motor speed, and 6 (9) in form constancy (id.). Based on assessment scores, the evaluator determined that the student was not in need of OT, and recommended that the student utilize paper with a dotted midline for all writing tasks and begin to use a keyboard for completion of written work when appropriate (id. at p. 3).

On December 16, 2005, the student's mother provided consent for petitioner to conduct a psychological evaluation, a speech-language evaluation, and a "reevaluation" of the student (Joint Ex. 28).

The speech-language evaluation was conducted on January 23, 2006 (Joint Ex. 29 at p. 1). Examination revealed oral structures adequate for speech production; however, the evaluator noted that the student held his tongue in a forward position at rest (id.). Formal assessment of articulation was determined to be unnecessary. Observation of the student's conversational speech indicated age appropriate skills in the areas of articulation, voice, and fluency (id.). Administration of the CELF-4 yielded composite scores that ranged from average (language content index) to mild delay (core language index, expressive language index, receptive language index) to moderate delay (language memory index, working memory index) (id. at p. 2). The evaluator recommended that the student receive speech-language services in an integrated group to provide the necessary carry-over of learned skills as well as speech-language services in a small group to provide development in the areas of articulation, language (expressive, receptive, and memory skills), and social language modeling (id. at p. 3).

Petitioner's school psychologist conducted the psychoeducational assessment of the student on three separate dates in January and February 2006 (Joint Ex. 30 at p. 1). Completion of a parent questionnaire by respondents revealed they were concerned that their son's auditory processing and attention problems hindered his ability to understand concepts (id.). Respondents also noted that the student had become increasingly frustrated with school and his self-esteem had declined (id.). Administration of the WISC-IV yielded a verbal comprehension index score of 81, a perceptual reasoning index score of 82, a working memory index score of 80, a processing speed index score of 78, and a full scale IQ score of 75, indicating the student was functioning in the borderline average range of intelligence (id. at p. 3). The evaluator also administered the Test of Nonverbal Intelligence-Third Edition (TONI-3), described as a language free measure of cognitive ability, which yielded a standard (and percentile) quotient score of 81 (10) determined to be in the low average range of cognitive ability (id. at pp. 3, 4). On the (VMI) the student achieved a standard (and percentile) score of 93 (32) indicating his visual motor integration skills were in the average range (id. at pp. 3, 4). The evaluator noted that the student worked carefully to make accurate reproductions of the figures he was given to copy (id. at p. 4). The evaluator reported that the student shared that he liked math but did not enjoy reading, writing, social studies, or science (id.). He described school as "boring" and indicated he wanted it to be over each day (id.). The student was achieving in the low average range in reading, math, and writing (id. at p. 5). The

evaluator recommended that the student's academic progress continue to be carefully monitored (id.). She also recommended use of a variety of strategies such as close teacher monitoring, preferential seating, positive reinforcement, pre-teaching of vocabulary words and concepts, frequent opportunities for practice and review, checks for understanding of directions, use of visual aids, demonstrative teaching, manipulatives, and highlighting of key words and phrases (id.).

The student's special education teacher assessed his reading abilities over the course of two sessions in March 2006 utilizing the WRMT-R and the DRA 2 (Joint Ex. 33 at p. 1). The student was ten years and nine months old and enrolled in the fourth grade (id.). On the WRMT-R the student achieved standard (and percentile) scores of 99 (47) in the basic skills cluster, 99 (48) in the reading comprehension cluster, and 99 (46) in total reading, indicating his reading abilities were within the average range (id. at pp. 2-3). The student's subtest scores were all within the average range (id. at pp. 3-4). He achieved scores on the DRA 2 that his teacher determined to be at an instructional level equivalent to the fourth month of the third grade (id. at p. 4). The special education teacher noted that when assessed with the DRA 2 in November 2005, the student's instructional level in reading was at a first/second grade level (id.). His comprehension of text was at the sentence/paragraph level and his reading fluency was below 58 words per minute with 100% accuracy in second grade passages (id.). She reported that in November 2005 the student demonstrated fatigue and frustration when asked to read beyond a single page in a third grade level trade book, but in March 2006 he was reading third grade level trade books independently and his reading fluency was above 88 words per minute with greater than 96% accuracy (id. at pp. 4-5). The student's structured multisensory reading program had included the use of Preventing Academic Failure (PAF), Words Their Way, and Megawords (id. at p. 5). The special education teacher recommended that the student continue to receive instruction in a small group setting with direct instruction provided at his instructional level using structured multisensory programs such as PAF, Words Their Way, and Megawords (id.).

Petitioner's CSE chairperson received a letter dated March 18, 2006 from a clinical psychologist who had privately evaluated the student on March 7, 2006 for "psychological difficulties including anger, depression, poor self-esteem, and self-harming behaviors" and determined the student had met the criteria for an adjustment disorder with disturbance of emotion and conduct (Joint Ex. 32 at p. 1). The private psychologist reported in her letter that the student's mother described daily emotional breakdowns, lasting for at least an hour, during which the student would yell, throw items, and hit himself (id.). The letter further indicated that the student had nightmares and frequently talked about dropping out of school or wanting to die rather than attend school (id.). The psychologist opined that the student's current school environment had led the student to feel overwhelmed and extremely frustrated, resulting in negative feelings about school and his own academic abilities, and that like many children with learning difficulties, he showed no indication of his intense frustration and oppositional behavior at school (id.). The psychologist recommended that the student attend NHS in order to maximize his academic and personal success and expressed concern that without the recommended program, the student would evidence more severe emotional disturbances and eventually drop out of school (id.). She indicated in her letter that she would be continuing to provide services to the student and respondents (id. at p. 2).

Petitioner's CSE convened on April 11, 2006 for the student's annual review and to develop his IEP for the 2006-07 (fifth grade) school year, which is the subject of this appeal (Joint Ex. 37 at p. 4). In response to information provided by respondents, the student's classification was changed to learning disabled (Joint Exs. 27 at p. 1; 37 at p. 4). The student's levels of academic

achievement, functional performance and individual needs indicated that he had achieved significant growth in his reading abilities and he was reading trade books at a third grade level (Joint Ex. 37 at p. 6). However, he continued to have difficulty maintaining attention to task, was easily distracted, and required frequent prompts (*id.*). The student made little to no progress in his general education classes despite the support of a daily teaching assistant who worked with him and one other child (*id.*). The student struggled with concepts, vocabulary, the reading level of the text, following class discussions, and recalling pertinent facts and information (*id.*). His written language skills were below grade level; however, when given a subject he was able to formulate, capitalize, and punctuate sentences independently, with initial prompting he was able to modify nouns using adjectives and verbs using adverbs, and when given support to complete a graphic organizer he was able to transfer his notes into sentences and write from the organizer independently (*id.*). Although he had not yet mastered calculations, the student was performing in the average range in numeration, geometry, addition, subtraction, division, and problem solving (*id.*). When mathematical word problems were rephrased and simplified, the student could identify the operation(s) required to solve the problem with teacher encouragement and reassurance that he was proposing the correct solution (*id.*). Listening activities were stated to be difficult for the student and he required information presented in small amounts with cues to support processing (*id.* at p. 7).

CSE meeting notes indicated that respondents' attorney advised the CSE that respondents wanted their son to attend NHS and that "considerable discussion" took place regarding the student's placement for the 2006-07 school year (*id.* at p. 3). Respondents, as well as their attorney and the student's private clinical psychologist, discussed the student's negative view of petitioner's self-contained classroom, his desire to drop out of school, his low self-esteem, and the emotional impact of his placement in a large group such as a 15:1+1 special education classroom (*id.*). Petitioner's CSE recommended that for the 2006-07 school year, the student be placed in a 15:1+1 special class in one of the district's elementary schools and receive speech-language therapy in a small group three times per week (*id.* at p. 4). The CSE developed goals and corresponding objectives to address the student's needs in reading, writing, math, and speech-language (*id.* at pp. 9-11). The CSE also recommended that the student receive extended school year (ESY) services for summer 2006, consisting of speech-language therapy in a small group two times per week, to prevent documented regression of skills needed to accurately listen and maintain information (Joint Exs. 35 at pp. 1-3; 37 at p. 4).

By due process complaint notice dated June 29, 2006, respondents, through their attorney, rejected petitioner's proposed program and requested an impartial hearing (Joint Ex. 1).<sup>2</sup> They alleged that petitioner denied the student a free appropriate public education (FAPE) due to procedural and substantive deficiencies in the student's IEP, including: (1) petitioner's failure to assess the student's social and emotional status (*id.* at pp. 2-3); (2) failure to obtain consent for all assessments used for the student's reevaluation (*id.* at p. 3); (3) failure to assess the student's need for assistive technology (*id.* at pp. 3-4); (4) failure to give proper weight to respondents' concerns about the student's increasing "emotional pain" (*id.* at pp. 4-5); (5) failure to offer counseling to the student as a related service (*id.* at p. 5); and (6) failure to consider or offer parent training and counseling services to respondents (*id.*). Respondents further contended that the CSE's recommendation to place the student in a 15:1+1 classroom did not constitute the least restrictive

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<sup>2</sup> Petitioner did not receive the due process complaint notice until July 17, 2006 (Sept. 7, 2006 Tr. pp. 10-11).

environment (LRE) for the student (*id.* at p. 4). They requested that an impartial hearing officer order petitioner's CSE to place the student at NHS (*id.* at p. 2).

An impartial hearing commenced on September 7, 2006 and concluded on September 14, 2006, after four days of testimony. On November 20, 2006, the impartial hearing officer issued her findings of fact and decision. The impartial hearing officer placed the burden of proof on respondents (IHO Decision at p. 14). She found that respondents demonstrated that petitioner committed various procedural errors that amounted to a denial of FAPE (*id.* at p. 15). Specifically, the impartial hearing officer found that petitioner failed to (1) assess the student's emotional needs (*id.* at pp. 15-16); (2) obtain written consent from respondents for all the assessments used in the reevaluation process (*id.* at p. 15); (3) conduct an assistive technology evaluation (*id.* at pp. 16-17); (4) give proper weight to respondents' concerns about the student's placement (*id.* at pp. 17-18); and (5) consider the student's declining emotional state while attending petitioner's schools (*id.* at pp. 18-19). The impartial hearing officer determined that petitioner deprived respondents of the opportunity to meaningfully participate in the development of their son's IEP (*id.* at p. 15). She also concluded that petitioner substantively denied the student a FAPE "because the IEP is not reasonably calculated to enable [the student] to receive educational benefits in the LRE" (*id.* at p. 19). She determined that respondents established that NHS is appropriate and the LRE for the student (*id.* at pp. 20-21). On November 30, 2006, the impartial hearing officer ordered that the April 11, 2006 IEP be annulled and that petitioner's CSE "promptly" reconvene to develop a new IEP that places the student at NHS.<sup>3</sup>

This appeal ensued. Petitioner seeks a reversal of the impartial hearing officer's findings, and requests that the impartial hearing officer's decision and subsequent order be annulled. Petitioner argues, among other things, that the impartial hearing officer erred in finding (1) that respondents did not have an opportunity to meaningfully participate at the April 11, 2006 CSE meeting; (2) that petitioner committed procedural violations that amounted to a denial of FAPE; (3) that respondents showed that the student would not derive meaningful educational benefit at the CSE's recommended placement; and (4) that NHS is appropriate and the LRE for the student. Petitioner asserts that the impartial hearing officer based her decision on speculation and parental preference. Petitioner further argues that the impartial hearing officer erred in ordering the CSE to place the student at NHS without first considering and rejecting other less restrictive placements.

Respondents deny petitioner's assertions, argue that the impartial hearing officer correctly found that they proved numerous procedural and substantive violations, and request that the impartial hearing officer's decision and order be affirmed in its entirety.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see *Schaffer v. Weast*, 546 U.S. 49, \_\_\_, 126 S. Ct. 528, 531 [2005]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-81, 200-01 [1982]; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. §

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<sup>3</sup> The November 30, 2006 order is contained in an email from the impartial hearing officer to the attorneys for both parties and the email indicates that the order was inadvertently left out of the November 20, 2006 decision (Pet. Ex. 2).

300.17;<sup>4</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).<sup>5</sup> The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S.Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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 (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]). Pursuant to the IDEA, when procedural violations are alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. School Dist., 2007 WL 210093, at \*2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

Both the Supreme Court and the Second Circuit have noted that the IDEA does not, itself, articulate any specific level of educational benefits that must be provided through an IEP (Rowley, 458 U.S. at 189; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 122, 130 [2d Cir. 1998]), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak,

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<sup>4</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all the relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

<sup>5</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

142 F.3d at 132). Thus, a school district satisfies the FAPE standard "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130; see also Perricelli, 2007 WL 465211, at \*15), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). 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 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3d Cir.1995)."

In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also Bay Shore Union Free Sch. Dist. v. T., 405 F. Supp. 2d 230, 239-40 [E.D.N.Y. 2005]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both state and federal regulations require that when considering a placement in the LRE, school districts place the child as close to his home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the child or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

Turning first to the procedural claims raised in the instant case, I disagree with the impartial hearing officer's conclusion that petitioner committed various procedural errors that rose to the level of a denial of FAPE. For the reasons set forth below, I find that respondents failed to demonstrate that any procedural error impeded their son's right to a FAPE, significantly impeded their opportunity to participate in the decision making process surrounding the provision of FAPE to their son, or caused a deprivation of educational benefits.

There is no showing that any procedural error impeded respondents from participating in the formulation of their son's IEP. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and state regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]). In deciding whether parents were afforded an opportunity to participate in the development of their child's IEP, courts have considered the extent of the participation (Cerra, 427 F.3d at 193 [finding meaningful parental participation when the student's mother attended numerous CSE meetings and a CSE meeting transcript reflected that she "participated actively" in the development of her daughter's IEP and was "frequently consulted for input about the CSE's proposed plan"]; Perricelli, 2007 WL 465211, at \*14-15 [finding no denial of a meaningful opportunity to participate when the student's mother was in "frequent contact" with teachers and school officials, "active[ly] participat[ed]" at her daughter's CSE meetings, and questioned the CSE about documents that she did not understand]; Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d. 366, 378-79 [S.D.N.Y. 2006] [finding that the school district's failure at the time of the CSE meeting to have completed an annual report concerning the student's progress toward goals and objectives did not deprive the parents of meaningful participation where the parents attended the CSE meeting and admitted that they were informed of the information to be contained in the report]; see also Paoletta v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006] [finding no denial of a meaningful opportunity to participate when the parents were involved in the development of the IEP, had a "special education representative," and visited the school recommended by the school district]; A.E. v. Westport Bd. of Educ., 2006 WL 3455096 [D. Conn. Nov. 29, 2006]).

In the instant case, respondents' private psychologist, who evaluated the student in March 2006, sent a letter to petitioner's CSE chairperson on or about March 18, 2006 describing the student's "negative feelings about school" and recommending that the student be placed at NHS (Joint Ex. 32). By letter dated March 30, 2006, respondents requested that their attorney and the student's private clinical psychologist participate at the April 11, 2006 CSE meeting, and they declined the attendance of a parent advocate (Joint Ex. 34). Respondents attended the April 11, 2006 meeting, along with their attorney and the student's private clinical psychologist (Joint Ex. 37 at p. 2). The minutes from the CSE meeting reflect that respondents, their attorney, and the private psychologist expressed their concerns about the student's emotional state and requested that the student be placed at NHS for the 2006-07 school year (id. at p. 3; see also Sept. 7, 2006 Tr. pp. 50-51, 56). The student's mother testified that the private psychologist adequately described to the CSE the student's emotional state and frustration with school (Sept. 14, 2006 Tr. p. 277). The April 11, 2006 CSE minutes also reflect that there was "considerable discussion" about the student's placement at NHS verse placement in a district 15:1+1 classroom (Joint Ex. 37 at p. 3). The student's private clinical psychologist testified that at the April 11, 2006 CSE meeting, respondents discussed the student's needs and their belief that the student would do better at NHS (Sept. 13, 2006 Tr. p. 118). She also testified that respondents' attorney advocated against the student's placement in a 15:1+1 class (Sept. 13, 2006 Tr. p. 119). The psychologist did not believe that anyone on the CSE precluded respondents or their attorney from presenting their points of view, and she testified that the CSE considered the concerns raised by respondents and their attorney (Sept. 13, 2006 Tr. pp. 119-20; see also Sept. 7, 2006 Tr. pp. 65-66). She also testified that she was able to communicate her opinion to the CSE and that the CSE listened to her opinion (Sept. 13, 2006 Tr. p. 115). Based on the foregoing, I find that the record indicates that respondents

were not denied the opportunity to meaningfully participate in the development of their son's IEP for the 2006-07 school year.

I also find that the impartial hearing officer erred in concluding that respondents were deprived of meaningful participation in the IEP developmental process because petitioner's CSE did not assess the student's social-emotional status or "give proper weight" to the parents' preference for their son's placement at NHS (see IHO Decision at p. 15). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see Sch. for Language and Communication Development v. New York State Dep't of Edu., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella, 2006 WL 3697318, at \*1). The IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). In this case, where the record indicates that respondents, their attorney and the student's private psychologist attended the April 11, 2006 CSE meeting, that they discussed the student's emotional status and respondents' preference for NHS, and that the CSE considered and listened to respondents' concerns, there is no basis to find that petitioner "ignored" respondents' concerns or failed to afford respondents the opportunity to participate in the development of their son's IEP merely because respondents disagree with the CSE's recommended placement.

As to respondents' preference for NHS, the student's father testified that when he observed NHS, he saw the homeroom, a reading and writing classroom, a science classroom with many aquariums, a music room where students were building an instrument, a multimedia room, and a photography room (Sept. 14, 2006 Tr. pp. 216-17). The student's father further testified that he did not pay much attention to the content of the instruction in the classes he observed and that he was "looking more at seeing the facilities," opining that NHS "just seemed to be much more enriched" (Sept. 14, 2006 Tr. pp. 194, 219). The record also indicates that petitioner is familiar with NHS; the director of pupil services has observed classes at NHS and at the time of the impartial hearing, there were 11 district students attending NHS (Sept. 13, 2006 Tr. pp. 167-68).

I also find for the reasons stated below that respondents have not showed that the April 11, 2006 IEP is procedurally inadequate due to petitioner's failure to obtain proper parental consent for the student's reevaluation, assess the student's social-emotional status, or conduct an assistive technology evaluation.

A reevaluation of the student is required if the school district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant reevaluation" or upon request of the child's parents or teacher (20 U.S.C. § 1414[a][2][A][i]-[ii]; see 34 C.F.R. § 300.303[a], 8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at \*10-11). Unless otherwise agreed to by the parent and the school district, a reevaluation must be conducted at least once every three years and not more than once per year (20 U.S.C. § 1414[a][2][B]; see 34 C.F.R. § 300.303[b]; 8 NYCRR 200.4[b][4]). Prior to conducting a reevaluation, a CSE must provide notice to the parents that describes the evaluation procedures the CSE proposes to conduct (20 U.S.C. § 1414[b][1]; see 34 C.F.R. 300.503) and obtain parental consent for the reevaluation (20 U.S.C. § 1414[c][3]; see 34 C.F.R. § 300.300[c], 8 NYCRR 200.5[b][1][i]). Parental consent is not required to review existing data or administer a

test that is administered to all students where consent is not required (34 C.F.R. § 300.300[d][1][i]-[ii]; 8 NYCRR 200.5[b][1][i][a]). "[T]he reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]; see also Perricelli, 2007 WL 465211, at \*11).

On December 16, 2005, the student's mother signed a consent form for petitioner to evaluate the student (Joint Ex. 28). She provided consent for a psychological evaluation, a speech-language evaluation, and a "reevaluation" (id.). Petitioner conducted a speech-language evaluation on January 23, 2006 (Joint Ex. 29) and a psychoeducational assessment of the student on three separate dates in January and February 2006 (Joint Ex. 30). In March 2006, the student's special education teacher assessed the student's reading skills using the WRMT-R, DRA 2, and in April 2006 administered the Key Math (Joint Exs. 33; 37 at p. 7). Petitioner's director of pupil services testified that petitioner administered the DRA 2 to all the district's elementary school students (Sept. 7, 2006 Tr. pp. 54-55). She also testified that the WRMT-R is administered to all special education students at the student's elementary school to determine functioning levels (Sept. 7, 2006 Tr. p. 55) and petitioner administers the Key Math to all students who receive AIS or special education services (Sept. 7, 2006 Tr. p. 74).

At the April 11, 2006 CSE meeting, discussion occurred regarding the student's emotional state and frustration with school (Joint Ex. 37 at p. 3; see also Sept. 7, 2006 Tr. pp. 50-51, 56). Petitioner's director of pupil services testified that all of the staff at the meeting who worked directly with the student expressed that they had not had similar experiences with the student and that the student presented as a "happy child," somewhat immature but not "stressed" or unhappy (Sept. 7, 2006 Tr. p. 51). Petitioner's school psychologist testified that staff working with the student reported to her that he performed well in school and they interpreted his behavior at home as a consequence of the faster pace of instruction at school causing an overload of auditory information (Sept. 7, 2006 Tr. p. 133). The student's special education teacher testified that the student was perhaps somewhat more "silly" than his peers but accepted by them (Sept. 7, 2006 Tr. p. 163). She had no reason to believe that he had emotional problems (id.). She further testified that she knew that school was difficult for the student; however, he did not give any indication of being upset – "there were no tears, there was no can't do it, I'm dumb" that she observed in school (Sept. 7, 2006 Tr. p. 184). Respondents had related one incident to her about the student being upset at home, where he banged his head and referred to himself as "stupid" (Sept. 7, 2006 Tr. p. 163). The student's speech-language pathologist testified that she and other district staff attending the CSE meeting were surprised to learn of the student's behavioral problems at home because they were not seeing such behavior in school, and that she had not been apprised of the student's behavioral difficulties at home prior to the April 11, 2006 CSE meeting (Sept. 8, 2006 Tr. p. 212). The student's general education social studies and science teacher testified that the student exhibited reluctance to do the work in class by sitting low in his seat and trying to be "invisible," but the general education teacher did not consider this a "behavior problem" (Sept. 8, 2006 Tr. p. 283). The teacher further testified that respondents had articulated concerns to him indicating the student came home in tears, that homework was problematic, and that the student considered himself "a dummy" (Sept. 8, 2006 Tr. pp. 284, 287). The general education teacher modified the student's homework per respondents' request (Sept. 8, 2006 Tr. p. 289).

Under the circumstances of this case, I disagree with the impartial hearing officer's conclusion that respondents' December 16, 2005 written consent for a "reevaluation" that resulted

in the use of assessments to measure the student's reading skills amounted to a denial of FAPE or deprived respondents the opportunity to meaningfully participate in the development of their son's IEP (see IHO Decision at p. 16). I note that the student's mother consented in writing to a "reevaluation" in addition to a psychological evaluation and a speech-language evaluation (Joint Ex. 28). At no time did respondents request clarification about the specific testing assessments that petitioner planned to use in the student's reevaluation or request that a particular assessment be used or avoided. The student has been receiving special education services since kindergarten and has received numerous evaluations, including the WRMT-R and the Key Math in prior years (see Joint Exs. 7 at p. 8; 12 at p. 7; 16 at pp. 7-8; 17 at pp. 5-6; 19 at pp. 7-8; 23 at p. 5). Federal and state regulations provide an exception to the parental consent requirement for assessments administered to all students (see 34 C.F.R. § 300.300[d][1][ii]; 8 NYCRR 200.5[b][1][i][a]) and here the record indicates that the DRA 2 was administered to all of petitioner's elementary school students (Sept. 7, 2006 Tr. pp. 54-55). As to the WRMT-R and Key Math assessments that petitioner administered to other special education students (Sept. 7, 2006 Tr. pp. 55, 74), given the circumstances of this case, I find that petitioner's failure to delineate the WRMT-R and Key Math in the consent form signed by the student's mother did not rise to a denial of FAPE.

I also find that the impartial hearing officer misconstrued 8 NYCRR 200.4(b)(5)(iv) in concluding that respondents were deprived of the opportunity to request additional tests because the consent form did not delineate the specific assessments that petitioner planned to use in the reevaluation (see IHO Decision at p. 16). The state regulation cited by the impartial hearing officer provides that if the CSE, and other qualified professionals as appropriate, determine that no additional evaluative data are needed, then a school district must notify the parents of its determination and apprise them of their right to request an assessment (8 NYCRR 200.4[b][5][iv]). This regulation is inapposite to instant case. There was no determination that additional evaluative data was not needed for the student's reevaluation. To the contrary, petitioner requested permission to conduct a psychological evaluation, a speech-language evaluation, and a "reevaluation" (Joint Ex. 28).

Respondents have not demonstrated that petitioner should have performed a social-emotional assessment of the student, or that failure to provide a social-emotional assessment deprived the student of educational benefit. Other than testimony from the student's general education teacher indicating that the student tried to appear "invisible" within the general education class, the record reveals little evidence of the student exhibiting behavioral difficulties in school or of social-emotional problems affecting his educational progress (Sept. 8, 2006 Tr. p. 283; Joint Ex. 33 at pp. 4-5). The general education teacher testified that he had consistent conversations with respondents regarding the student's behavioral difficulties at home; however, the record does not indicate that other staff working with the student were apprised by respondents of the severity of those behavior problems (see Sept. 7, 2006 Tr. pp. 51, 133, 163, 184; Sept. 8, 2006 Tr. pp. 212, 283-84, 290; Sept. 14, 2006 Tr. pp. 275-76). The student's mother testified that she had not shared a recording she made of the student's tantrum behavior with any school staff or with the private

clinical psychologist who was treating him (Sept. 14, 2006 Tr. pp. 246, 270; see Parent Ex. E).<sup>6</sup> She further testified that she had not asked the staff working with the student to have a counselor meet with him (Sept. 14, 2006 Tr. p. 276). I also note that the report of a private pediatric neurodevelopmental evaluation of the student, conducted in July 2005 and presented to petitioner in September 2005, indicated that the student's mother described the student as not generally anxious or sad, exhibiting less anger and fewer outbursts since the cessation of prescribed medication (Joint Ex. 27 at p. 20). As explained above, there is also no indication that respondents were denied the opportunity to meaningfully participate in the development of their son's IEP because of the lack of a formal social-emotional assessment. Moreover, respondents provided the CSE with the evaluation report of the student's private clinical psychologist (Joint Ex. 32). At the April 11, 2006 CSE meeting, the student's private psychologist discussed her report, which the student's mother considered "comprehensive" (Sept. 14, 2006 Tr. p. 277; see Joint Ex. 37 at p. 3). The student's mother testified that the psychologist provided the CSE with a "forthright and honest" picture of the student's emotional state (Sept. 14, 2006 Tr. p. 277) and the psychologist testified that she was able to communicate her opinion about the student's emotional state to the CSE and that the CSE listened to her opinion (Sept. 13, 2006 Tr. p. 115).

Likewise, the need for an assistive technology evaluation is not supported by the record. An assistive technology device is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a student with a disability" (8 NYCRR 200.1[e]). Respondents' due process complaint notice alleges that the student would benefit from assistive technology because of his "reticence to speak in sentences and his illegibility using age-appropriate paper" (Joint Ex. 1 at p. 6). The report from the speech-language evaluation conducted in January 2006 as part of the student's reevaluation indicates that the student's oral structures are adequate for speech production and that he demonstrates age appropriate skills in the areas of articulation, voice, and fluency (Joint Ex. 29 at p. 1). The April 11, 2006 IEP noted that the student writes legibly using "adaptive paper" (Joint Ex. 37 at p. 5), and the student's occupational therapist recommended the use of adaptive paper and suggested he begin to use a keyboard for completion of written work when appropriate (Joint Ex. 26 at p. 3). Adaptive paper is described in the record as paper with additional white space between ruled writing lines that include a dotted middle line (Joint Ex. 37 at p. 5; Sept. 8, 2006 Tr. pp. 245, 262). The record indicates that a journal with adaptive paper is used by all students in the proposed 15:1+1 placement, however it is not required (although it is always an option) for all writing activities (Sept. 8, 2006 Tr. pp. 263-64). Adaptive paper is used by students at NHS (Sept. 13, 2006 Tr. p. 172). Respondents did not show how the use of adaptive paper is inappropriate for the student. The record also reflects that the proposed 15:1+1 classroom contains three computers and two AlphaSmarts (Sept. 8, 2006 Tr. p. 244).<sup>7</sup> Students who have identified needs requiring the use of the computers or AlphaSmarts have access

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<sup>6</sup> On the first hearing date, petitioner's attorney noted her objections to the admission of respondents' audio recording of the student exhibiting a tantrum at home concerning homework (Sept. 7, 2006 Tr. p. 18). A discussion ensued about the relevance of the recording, and concluded with the impartial hearing officer indicating that she would allow the recording to be entered into the record if requested by respondents (Sept. 7, 2006 Tr. pp. 20-21). In her words, "I let in things that are irrelevant all the time, so irrelevant doesn't mean a whole lot to me." (Sept. 7, 2006 Tr. p. 21). I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

<sup>7</sup>AlphaSmarts are battery-operated word processors that will hold up to eight files or 800 pages of text. The text can then be uploaded to a word processing document on either a Mac or PC via a cable and sent to a printer.

to them whenever necessary and are able to bring the AlphaSmarts with them to other areas (Sept. 8, 2006 Tr. p. 245). Respondents have not provided any evidence showing how the absence of assistive technology deprived the student of a FAPE (see A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 177 [D.Conn. 2006]), or that the student requires assistive technology to meaningfully benefit from his education program.

Based on the information before me and absent any specific request from respondents, petitioner was not obligated to formally evaluate the student's social-emotional status or conduct an assistive technology evaluation as part of the student's reevaluation.

Next, I review the impartial hearing officer's conclusion that the placement recommended by petitioner's CSE was not reasonably calculated to enable the student to receive educational benefit in the LRE. The impartial hearing officer reached this conclusion after finding that (1) petitioner's CSE erroneously concluded that the student needed fewer transitions with greater staffing continuity; (2) petitioner's CSE erroneously concluded that the student was incapable of achieving; and (3) petitioner's CSE did not consider the student's emotional state while attending petitioner's school (IHO Decision at pp. 19-20). For the reasons set forth below, I disagree with the impartial hearing officer's findings and conclude that petitioner offered a FAPE to the student in the LRE for the 2006-07 school year.

As noted above, the applicable legal standard for determining the appropriateness of a school district's recommended program is whether the IEP was reasonably calculated to enable the child to receive educational benefit (Rowley, 458 U.S. at 203). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). "Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school" (W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y. 2006]).

A class profile of the 2006-07 proposed 15:1+1 class, consisting of five fourth graders and seven fifth graders, indicated that their instructional reading levels ranged from pre-first grade to fourth grade and their instructional math levels ranged from first grade to fourth grade (Joint Ex. 48). Respondents' son achieved a total reading cluster standard (and grade equivalent) score of 99 (4.5), in the average range, as measured by the WRMT-R in March 2006 (Joint Exs. 33 at pp. 2-3; 37 at p. 7). He achieved a total test percentile (and grade equivalent) score of 37 (4.3) as measured by the Key Math-Revised administered on April 3, 2006 (Joint Ex. 37 at p. 7).

The classroom staffing of the proposed 15:1+1 classroom is comprised of a special education teacher, a teaching assistant and a classroom aide (Sept. 8, 2006 Tr. p. 235). The teacher assistant supports classroom instruction and assists the special education teacher in preparing lesson plans (*id.*). The teacher aide supports the teacher and teaching assistant throughout the day and works with students on previously taught skills to ensure retention and generalization (Sept. 8, 2006 Tr. pp. 235, 243). Instruction in the classroom is typically provided in small groups of no more than four students (Sept. 8, 2006 Tr. p. 242). A speech-language pathologist and a social worker also work within the classroom on a regular basis in addition to providing any prescribed services from students' IEPs (Sept. 7, 2006 Tr. pp. 62-63; Sept. 8, 2006 Tr. p. 266). The speech-

language pathologist provides daily classroom support because the majority of the students in the proposed 15:1+1 class have language needs (Sept. 8, 2006 Tr. p. 236). The students have deficits in their receptive language and may exhibit difficulty listening to directions, understanding directions, or carrying out directions (id.). The students also have deficits in their expressive language and may exhibit difficulty indicating they have a question or clearly communicating information (id.). The speech-language pathologist plans lessons with the special education teacher to create multisensory activities that address academic skills as well as the student's language needs (Sept. 8, 2006 Tr. p. 237). Vocabulary words are pre-taught and the students are provided with strategies to make associations and connections in order to generalize what they have learned (Sept. 7, 2006 Tr. p. 119).

The classroom teacher testified that when teaching vocabulary words to the students, he typically selects words from the social studies and science curricula, presents the students with a picture of the words, writes a story using the words, reads the story aloud pairing a sound with the words, discusses with the students the meaning of the words, has the students select movements to represent each of the words, and has the students use the words in sentences (Sept. 8, 2006 Tr. p. 239). The classroom also provides opportunities for reteaching (Sept. 7, 2006 Tr. pp. 119-120). At various times throughout the day, such as waiting in the lunch line with students, classroom staff will make the movement chosen to represent a specific vocabulary word and students are required to identify the appropriate vocabulary word (Sept. 8, 2006 Tr. p. 240).

The speech-language pathologist comes into the classroom daily for one hour to participate in the reading and writing groups (id.). She works with specific students in the group and targets specific speech-language objectives from their IEPs to be addressed within the reading and writing activity (Sept. 8, 2006 Tr. pp. 240-41). A social worker conducts a weekly social skills group in the classroom (Sept. 7, 2006 Tr. p. 120; Sept. 8, 2006 Tr. p. 241). The social worker collaborates with the special education teacher and develops whole class activities to address identified problems such as immature behavior or difficulties at home (Sept. 8, 2006 Tr. p. 241). A role-play format is utilized and scenarios are acted out requiring the students to reflect on choices made and why (id.).

The special education teacher from the proposed 15:1+1 class testified that reading instruction is provided in small groups based on students' abilities (Sept. 14, 2006 Tr. pp. 293). The groups are flexible and are continuously monitored and reevaluated to ensure they continue to be appropriate for each student in the group (Sept. 14, 2006 Tr. pp. 294). The special education teacher described in detail how he would address the student's goals and objectives in reading that included use of word recognition and context clues to improve fluency; identification of implied information; increasing reading stamina; rules for word attack skills; and breaking multi-syllable words into syllables (Sept. 8, 2006 Tr. pp. 293-303). When teaching word problems in math, the teacher writes word problems in a manner that interests the students such as including their names and interests they have (Sept. 8, 2006 Tr. p. 307). Math word problems are worked on daily in the 15:1+1 classroom and the students are provided with much direct instruction, modeling, and practice (id.). Word problem vocabulary is hung up on a wall in the classroom so that students are able to recognize what operation to implement if they see words such as "sum," "difference," or "quotient" (Sept. 8, 2006 Tr. p. 308).

The general education curricula for grades four and five are followed in the 15:1+1 classroom (id.). The special education teacher testified that because the students in the classroom

learn at a slower rate, he focuses on ensuring the students acquire a strong understanding of the main points of each element of the curriculum (Sept. 8, 2006 Tr. pp. 329-30). Students in the 15:1+1 classroom are required to take New York State assessments (Sept. 8, 2006 Tr. p. 308). The teacher testified that, similar to the regular education classes, some students have received a score of three or more, indicating they are meeting the standard, on the English language arts (ELA), science, and social studies assessments, and some students have received scores below three and have not met the standard on those assessments (Sept. 8, 2006 Tr. pp. 308-09).

The special education teacher for the proposed classroom further testified that he addresses his students' organizational needs through the use of a "work board," which he described as a strategy from the St. John Fisher Literacy Program; a "cubby" system; "back and forth" folders; and time spent at the end of the day ensuring the students are organized prior to dismissal (Sept. 8, 2006 Tr. pp. 313-14). He also testified that he always tries to ensure that work sent home is at a student's independent reading level although some parent involvement is required (Sept. 8, 2006 Tr. pp. 306-07).

The student's special education teacher for the 2005-06 school year testified that she agreed with the recommended placement for the student because he was expressing frustration in his general education classes and not doing well in the content areas (Sept. 7, 2006 Tr. p. 165). In the general education classes, the student was not pulled out of the content area classes and did not receive the same level of one-to-one instruction (*id.*). The special education teacher testified that the integrative nature of the 15:1+1 classroom would benefit the student, especially because language was an area of need for him and a speech-language pathologist worked in the 15:1+1 classroom (*id.*).

The student's speech-language pathologist for the 2005-06 school year testified that she recommended the 15:1+1 class because it was a smaller group and due to the student's language deficits he requires the collaboration of the teacher and the speech-language pathologist (Sept. 8, 2006 Tr. p. 200). She further testified that the student requires teaching and re-teaching "through many different ways" and that the collaboration in the classroom was ideal for a student with his profile (*id.*). She also stated that as a result of the staff to student ratio in the classroom, several adults are focusing on the student, helping to develop his communication, and know when things break down for him (Sept. 8, 2006 Tr. pp 202-03). She opined that the 15:1+1 classroom staff was much more sensitive to auditory overload than the general education staff (Sept. 8, 2006 Tr. p. 203).

The student's general education teacher for the 2005-06 school year testified that he was very familiar with petitioner's proposed 15:1+1 classroom and thought it was reasonably likely that the student would be more successful in that setting and, as a result of the increased individual attention, would have a reduction in anxiety and frustration (Sept. 8, 2006 Tr. pp. 285-86). The general education teacher also testified that, in his opinion, the student would initially have difficulty accepting the 15:1+1 classroom as a positive environment to be in and learn in (Sept. 8, 2006 Tr. p. 295).

Petitioner's CSE also discussed placing the student at NHS for the 2006-07 school year (Joint Ex. 37 at p. 3). NHS is a New York State approved school with which districts may contract to instruct students with disabilities and is a 12:1+1 setting (Sept. 13, 2006 Tr. pp. 134-35; see 8

NYCRR 200.7, 200.1[d]). It is located outside of the student's school district (Sept. 13, 2006 Tr. p. 159).

The director of education at NHS testified that all of the students at the school have difficulty meeting the academic demands of school and may have significant reading problems or difficulties with language processing or expressive language skills (Sept. 13, 2006 Tr. pp. 132-33). Additionally the students enrolled may have met the criteria for Asperger's syndrome, pervasive developmental disorder, or Tourette's syndrome, or they are students for whom the school experience is very anxiety provoking (Sept. 13, 2006 Tr. p. 133). She further testified that there were 12 students in the grade five/six program and they are "classified as being learning disabled or other health impaired," with the exception of one who "is classified as being autistic" (Sept. 13, 2006 Tr. pp. 133-34). The majority of the students in the five/six program exhibit deficits in working memory and processing speed and have reading deficits in basic reading skills (Sept. 13, 2006 Tr. p. 134). She stated that although the students have "pretty high levels of anxiety" and some had difficulty transitioning from one school activity to another, the students' social emotional problems are not the primary problems in their learning profiles (Sept. 13, 2006 Tr. p. 134). More than half of the students in the five/six program have full scale IQ scores below 100, as measured by the "WISC" (Sept. 13, 2006 Tr. p. 162). She further testified that the students' instructional reading levels ranged from early second grade to grade level, their math instructional levels ranged from third grade to grade level, and their independent writing skills ranged from "probably" second or third grade to fourth grade (Sept. 13, 2006 Tr. pp. 163-65).

Reading instruction at NHS is provided in groups no larger than three-to-one and instruction in math and writing is typically provided in groups no larger than five-to-one (Sept. 13, 2006 Tr. p. 136). These small groups are based on the students' skill levels and grade (Sept. 13, 2006 Tr. p. 137). All students receive daily instruction in basic reading skills or reading comprehension in addition to English language arts (ELA), math, writing, science, and social studies (Sept. 13, 2006 Tr. pp. 142-43). The education director testified that most of the time the literature introduced in the ELA class is related to what the students are studying in social studies because the students often struggle with the abstract concepts in social studies (Sept. 13, 2006 Tr. p. 143).

NHS uses a variety of instructional strategies such as "Framing-Your-Thoughts," a multisensory sentence and paragraph instructional model; "Thinking Maps," visual cognitive tools that are used across all content areas; "EMPOWER," an organizing process for expressive writing; and "anchored instruction," described in the record as a process for organizing and "looking at [information] from multiple ways" (Sept. 13, 2006 Tr. pp. 144-47). Students cover fewer units in curricula; however, they "go more in-depth" (Sept. 13, 2006 Tr. p. 147). NHS does not receive reports of the students' scores on New York State assessments (Sept. 13, 2006 Tr. p. 148).

NHS provides speech-language therapy and counseling to students; however, OT, physical therapy (PT), and assistive technology are arranged through students' school districts (Sept. 13, 2006 Tr. p. 137). The speech-language pathologists work both in and outside of the classroom setting with individual students or groups of students (Sept. 13, 2006 Tr. pp. 137-138). Within the classroom, the speech-language therapists provide instruction in test-taking and memory strategies and, often in collaboration with a counselor, address social and pragmatic skills (Sept. 13, 2006 Tr. p. 138).

Each student at NHS is also assigned a faculty advisor who is a current teacher of the student and who is responsible for communicating with the student's family, helping to facilitate the development of the student's IEP, ensuring the student's report cards and progress reports are entered into the school's database, and presenting the student's needs at team meetings (Sept. 13, 2006 Tr. p. 158). At the end of each day, students meet with their advisors to do homework or receive help with organization or content (Sept. 13, 2006 Tr. p. 158). Students can also receive homework support from teachers during lunch or be provided with a modified homework plan (Sept. 13, 2006 Tr. pp. 158-59).

Weekly, fifth and sixth grade students participate in a therapeutic horseback riding and horsemanship program that focuses on collaboration, problem solving, and relationship building (Sept. 13, 2006 Tr. p. 138). The school also has a variety of extracurricular activities such as intramural basketball, ski club, an art magazine, and an international cooking club (Sept. 13, 2006 Tr. p. 150).

After careful analysis of petitioner's and NHS's programs, I note that both programs offer similar multisensory instruction and provide the special education services needed by the student. However, NHS does not represent the LRE placement for the student. I find the proposed 15:1+1 program provides the special education services needed by the student, provides opportunities for the student to interact with nondisabled peers, and is the student's home school (see 8 NYCRR 200.1[cc]). Petitioner's CSE was not required to consider a more restrictive private school placement when it determined that it could meet the student's special education needs in a public school setting (see W.S., 454 F.Supp. 2d at 148). Respondents have not demonstrated the inappropriateness of petitioner's recommended program, and the impartial hearing officer's findings are not supported by the record. Regarding the impartial hearing officer's finding that petitioner's proposed program is substantively inappropriate because it did not address the student's emotional needs, I have previously concluded that the CSE considered the student's emotional state and afforded respondents an opportunity to participate in the development of their son's IEP. School district personnel overwhelmingly testified that the student did not exhibit behavioral difficulties at school, and the record reveals little evidence that social-emotional problems were affecting the student's educational progress (Sept. 8, 2006 Tr. p. 283; Joint Ex. 33 at pp. 4-5). However, based on respondents' concerns and the general education teacher's testimony that the student tried to appear "invisible" in the classroom, I encourage petitioner to provide the student with individual counseling to supplement the social work services provided in the classroom, in order to support him in the transition to petitioner's 15:1+1 classroom. Additionally, although the record does not indicate whether respondents formally requested parent counseling, their due process complaint notice alleges that petitioner failed to consider whether parent counseling and training would be appropriate (Joint Ex. 1 at p. 5). I therefore encourage the parties to discuss implementing parent counseling and training to assist respondents in understanding the special needs of their son and to help them with implementing positive behavioral strategies to address problems with the student's completion of homework.

In summary, any procedural errors asserted were either not supported by the record or did not rise to the level of a denial of FAPE. There is no showing that any procedural error impeded respondents from meaningfully participating in the formulation of their son's IEP (see Cerra, 427 F.3d at 193). I also conclude that petitioner's CSE's recommended program for the student and placement in a 15:1+1 classroom offered the student a FAPE in the LRE. Accordingly, I will annul the impartial hearing officer's decision and order in their entirety.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision and order are annulled in their entirety.

**Dated:** Albany, New York  
February 26, 2007

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