The University of the State of New York
The State Education Department
State Review Officer

No. 07-009

Application of the BOARD OF EDUCATION OF THE BARKER 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:
Hodgson Russ, LLP, attorney for petitioner, Ryan L. Everhart, Esq., of counsel

Law Office of H. Jeffrey Marcus, attorney for respondents, H. Jeffrey Marcus, Esq. and Jason H. Sterne, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Barker Central School District (district), appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' son and ordered it to reimburse respondents for their son's tuition and book expenses at the Gow School (Gow) for the 2005-06 school year, as well as to pay Gow the balance of the full tuition price not paid to the school by respondents. Petitioner also appeals from that portion of the decision of the impartial hearing officer which ordered petitioner to reimburse respondents for the cost of a privately obtained reading evaluation. The appeal must be sustained in part.

Respondents' son was 15 years old and attending ninth grade at Gow at the time the impartial hearing was requested on May 9, 2006 (Parent Ex. C at p. 1; Parent Ex. J[1] at p. 1; Dist. Ex. 23). Gow has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a learning disability (see 34 C.F.R. § 300.8[c][10];[1] 8 NYCRR 200.1[zz][6]) is not in dispute in this appeal.

[1] 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 relevant events occurred prior to the effective date of the new regulations. However, for convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

The student has severe delays in reading and written language and also has identified deficits in math which affect his ability to perform numerical operations and mathematical reasoning (Parent Ex. C at p. 2; see also Dist. Ex. 33 at pp. 3-5). Administration of the Wechsler Intelligence Scales for Children – 4th Edition (WISC-IV) in December 2003 yielded a full scale IQ score of 90, with composite scores in verbal comprehension and perceptual reasoning in the average range and composite scores in working memory and processing speed in the low average range (see Dist. Ex. 33 at p. 3). The student is classified as a student with a learning disability in reading, math, and written language (Dist. Ex. 33 at p. 1). He has difficulty with handwriting (Dist. Ex. 3 at pp. 1, 3; Dist. Ex. 33 at p. 4). He also has a diagnosis of an attention deficit hyperactivity disorder (ADHD), inattentive type (Dist. Ex. 33 at p. 1). The student's educational history is described in Application of the Board of Education., Appeal No. 05-067, issued August 28, 2005, and will not be repeated in detail in this decision.[2]

Respondents' son attended petitioner's Barker Middle School during the 2004-05 regular school year when he was in the eighth grade (see Parent Ex. I). The student's educational program during that period included regular education classes in English language arts, social studies, math, science, health, general music, art, technology, and physical education (id.). The student's special education program included 15:1 special classes in both specialized reading and math (Dist. Ex. 33 at p. 1; Tr. pp. 271-73, 307, 345). Petitioner also provided the student with daily full-period direct consulting teacher services in his English language arts class (see Dist. Ex. 33 at p. 1; Tr. pp. 272, 307, 345). The record indicates that petitioner also provided push-in occupational therapy once a week for 30 minutes and pull-out occupational therapy once a week for 30 minutes (Dist. Ex. 33 at p. 1). The record further indicates that petitioner provided the student with a number of program modifications and accommodations including close-proximity seating, modified assignments or extended time to complete assignments, the opportunity to remain for tenth period to receive additional assistance, "assignments checked in agenda for neatness/accuracy," the "[o]pportunity to run errands/teacher helper activities requiring movement," access to books on tape for content area courses and book reports, an exemption from the eighth grade English language arts spelling test and use instead of lists at the student's instructional level, and learning vocabulary through auditory means (Dist. Ex. 33 at p. 1). The record indicates that petitioner additionally provided numerous testing modifications to respondents' son including state and local tests read as allowed by regulations, modified classroom tests as needed, extended time to complete tests, the use of a scribe or word processor to record answers, the use of a scribe for state and local tests for test questions requiring complete sentences for answers, a separate testing location, the use of arithmetic tables, and one additional reading of the listening section on state and local tests (Dist. Ex. 33 at pp. 1-2). In summary, it appears that while there was no explicit testimony that petitioner and respondents agreed to implement all or significant parts of the 2004-05 recommended IEP (see Dist. Ex. 2), petitioner provided respondents' son with the special education programs and services recommended or set forth in that IEP (see Dist. Ex. 33 at p. 1; Tr. pp. 271-73, 307, 345; see also Dist. Ex. 2 at pp. 5, 6, 12, 13).

On February 4, 2005, while the student was in the eighth grade, an occupational therapy evaluation was conducted as part of his reevaluation (Dist. Ex. 3). The resulting evaluation report

[2] On November 21, 2005 respondents appealed Application of the Board. of Education., Appeal No. 05-067, and that matter is pending in the United States Court for the Western District.

noted that the student had been receiving occupational therapy services to address visual-motor deficits which affected his handwriting (Dist. Ex. 3 at p. 1). The evaluator reported that the student's handwriting had improved in the past year (id.). Administration of the Beery-Buktenica Test of Visual-Motor Integration (VMI) yielded a standard score of 96, which was in the 39th percentile and indicates average age-level skills (id.). Results indicated improvement since administration of the VMI in May 2004, when the student achieved a standard score of 66 (Dist. Ex. 2 at p. 2). On the Motor Free Visual Perception Test, the student's standard score of 109 was at the 75th percentile and indicated functioning in the high average range (Dist. Ex. 3 at pp. 1-2). A handwriting observation conducted by the evaluator identified difficulties in formation of cursive letters, which the evaluator noted was not an automatic skill for the student, and which required a great deal of cognitive effort (Dist. Ex. 3 at p. 2).

Administration of the Pediatric Examination of Educational Readiness at Middle Childhood (PEERAMID 2) identified the student's difficulties with the manipulation of language sounds, which correlated with weak decoding (id.). Identified areas of strength included the ability to retrieve verbally stored information and the ability to follow multi-step commands using short-term and active working memory (id.). The PEERAMID 2 also identified slow motor speed on paper and pencil tasks, with print more legible than cursive writing, and "favorable" visual discrimination skills (id.). The evaluator recommended that the student receive occupational therapy services and indicated that consultation with classroom teachers and with the student's parent was necessary to address difficulties with handwriting and organization (Dist. Ex. 3 at p. 3).

In June 2005 a psychological evaluation was conducted as part of the student's reevaluation (Dist. Ex. 33). The evaluation report included review of a February 15, 2005 administration of the Wechsler Individual Achievement Test – Second Edition (WIAT-II), which yielded subtest standard scores of 44 in word reading, 67 in reading comprehension, 78 in pseudoword decoding, 83 in numerical operations, 89 in math reasoning, 55 in spelling and 91 in listening comprehension (Dist. Ex. 33 at pp. 3-4). These scores compared favorably with results of a May 2003 administration of the WIAT-II, when the student achieved subtest standard scores of 40 in word reading, 56 in reading comprehension, 69 in pseudoword decoding, 76 in numerical operations, 96 in math reasoning and 56 in spelling (Dist. Ex. 33 at p. 6).

In an observation of the student in English class conducted on February 22, 2005 as part of the student's psychological evaluation, he was observed while other students were reading aloud (Dist. Ex. 33 at p. 2). The observer reported that the student appeared to be listening and, although he did not follow the reading in his book, he appeared to be following auditorily (id.). The observer described various activities engaged in by the student, such as cracking his knuckles and fidgeting in his chair (id.). The evaluator opined that the student displayed a need for movement, but indicated that he was not distracted by his own actions or by the actions of classmates (Dist. Ex. 33 at p. 3).

At the end of the 2004-05 school year, the student's final grades included 89 in English language arts, 84 in both math and science, 76 in social studies, 98 in technology, 97 in physical education, 93 in health, 92 in art, and 58 in music (Parent Ex. I). The student received a grade of 85 in his specialized reading class (id.). He achieved a score at performance level 1 on the New York Statewide Testing Program English Language Arts test given in January 2005 and a score at

performance level 2 on the New York Statewide Testing Program Mathematics test given in May 2005 (Parent Ex. F[12] at p. 1; Parent Ex. F[10] at p. 1).

Petitioner's Committee on Special Education (CSE) met on June 20, 2005, and again on July 5, 2005, for the student's reevaluation and annual review and to develop an individualized education program (IEP) for the 2005-06 school year, when the student would be in ninth grade (Parent Exs. C, C[1] at p. 1; Tr. pp. 172-73, 185, 297). Under "present levels" both IEPs stated that the student was currently "passing all his academic classes with support in both the consultant teacher classes" (Parent Ex. C at p. 2; Parent Ex. C[1] at p. 2). The CSE recommended continued placement in general education courses at petitioner's high school with direct consultant teacher services in math, social studies, science and English language arts (Parent Ex. C at pp. 12, 14, 16). The CSE also recommended that the student receive special class services in reading, occupational therapy consultation to address handwriting difficulties, and counseling on an as needed basis to address his learning disabilities and his ADHD (Parent Ex. C at pp. 6, 12-13, 16). The IEP developed by the CSE for 2005-06 included goals and objectives in reading, spelling and written language, mathematics, and motor tasks requiring handwriting, as well as various accommodations and modifications to assist the student with reading and writing and to allow for his participation in general education courses (Parent Ex. C at pp. 8-14). The CSE also recommended transition activities within the high school setting (Parent Ex. C at p. 15) and extended school year services for summer 2005 (Parent Ex. C at p. 16).

Both parents attended the CSE meetings (Parent Ex. C at p. 17). The CSE chairperson at the June 20, 2005 meeting testified that respondents did not object to the initial program recommendations made at that meeting (Tr. p. 304). He also testified that at the end of the June 20, 2005 meeting, the student's mother indicated that "[respondents] would need to think about it and discuss it with their lawyer" (Tr. pp. 304-05). The student's mother testified that at the end of the July 5, 2005 meeting she told the CSE chairperson that she had to think about the proposed services (Tr. pp. 215-16).

Pending at the time of the CSE meetings was the state-level review of respondents' previous appeal, which related to the IEP for the 2003-04 and 2004-05 school years and services for summer 2004 (Application of the Bd. of Educ., Appeal No. 05-067).

By letter dated July 15, 2005, entitled "Committee Recommendation for Continuation of Services," petitioner gave notice to respondents of the IEP recommended as result of the June 20, 2005 and July 5, 2005 CSE meetings and advised them that the IEP would be forwarded to the Board of Education for approval (Dist. Ex. 12). Petitioner encouraged respondents to contact petitioner if they had any questions about the notice, offered to "arrange a meeting to discuss any questions that [respondents] might have about the recommendation," and offered to provide them with "additional resources to contact to obtain assistance in understanding this information" (id.). Petitioner also referred respondents to "procedural safeguard notices previously provided "that explain your rights regarding the special education process" and offered to provide information relating to obtaining free or low cost legal representation (id.). In the letter petitioner also advised

respondents that "[t]his IEP will not be implemented until the legal proceedings presently pending are complete" and referenced state regulations at 8 NYCRR 2005.5(I) (sic) (id.).[3]

Also by letter dated July 15, 2005, entitled "prior notice," petitioner, by its director of instructional services (director), advised respondents that "pursuant to the recommendations of the [CSE] for the 2005-06 school year," "the [district] proposes to change" the student's educational placement in accordance with an IEP for that school year (Dist. Ex. 14). Also by letter dated July 15, 2005, entitled "prior notice," petitioner, by its director of instructional services (director), advised respondents that "pursuant to the recommendations of the [CSE] for the 2005-06 school year," "the [district] proposes to change" the student's educational placement in accordance with an IEP for that school year (Dist. Ex. 14). In addition to continuing the student's receipt of specialized reading instruction, occupational therapy, and classroom and testing accommodations and modifications, petitioners also proposed to provide direct consultant teacher services in the student's math, social studies, and science classes (id.). Petitioners also proposed 1:1 specialized reading instruction at Niagara/Olean BOCES, as well as reading intervention in all other classes provided by BOCES during the summer session (id.). The changes were proposed to provide "additional support in general education classes with regard to [the student's] reading deficits" (id.). The letter also stated that "[t]he proposed changes to [the student's] educational program will not be implemented until all legal proceedings pertaining to [the student's] 2004-05 educational program and placement are complete" (id.).

By letter dated July 25, 2005 petitioner's director advised respondents that he had received respondents' July 11, 2005 letter rejecting petitioner's proposed summer program (Dist. Ex. 15). Noting that the respondents had made no objection to the summer program during the July 5, 2005 CSE meeting, the director asked respondents to clarify the reasons why they rejected the summer program, offered to meet with respondents to "address any concerns" they had with the proposed placement and offered to discuss the possibility of discussing a "reading only" program option.

By letter dated August 16, 2005, respondents advised petitioner that they were "rejecting the proposed placement/program recommended by the [district] for the 2005/06 school year" and stated that they were "concerned that the district intends to implement a program that is not well designed to address [the student's] severe reading problems" (Dist. Ex. 17). The letter provided no further basis or facts for rejecting the recommended program. Respondents also advised petitioner that they "intend[ed] to place [the student] into (sic) the Gow school" and stated their "request that the [district] reimburse [them] for all costs and expenses associated with the placement" (id.). The letter did not indicate any concern with petitioner's statement that the recommended 2005-06 program would not be implemented during pendency of the ongoing litigation (id.).

The record reflects that respondents did not respond to petitioner's offers to meet and discuss respondents' concerns. The August 16, 2005 rejection letter was the first response from

[3] The pendency provision in state regulations is found at 8 NYCRR 200.5[m] and states in pertinent part that during the pendency of any proceeding conducted pursuant an impartial due process hearing or appeal to a State Review Officer, "unless the board of education and the parents otherwise agree, the student shall remain in the then current placement of the student."

respondents to petitioner's offers to meet and discuss respondents' objections to the proposed program recommendations (id.).

On August 28, 2005, I determined that petitioner's recommended summer 2004 program offered the student a free appropriate public education (FAPE) and that the IEP for the 2004-05 school year also was appropriate (see Application of Bd. of Educ., Appeal No. 05-067; see also Parent Ex. N at pp. 9-13, 13, 14). I also directed petitioner's CSE "to increase the level of intensive reading instruction and employ all appropriate resources and strategies to compensate for the inadequacies of the reading instruction provided in previous years" and ordered that the CSE reconvene to develop an intensive program of instruction in reading and written language, with accommodations and modifications which will allow the student to remain in the general education setting while his special education needs are addressed through individualized instruction (Parent Ex. N at p. 15).[4]

By letter dated August 29, 2005, petitioner's director responded to respondents' August 16, 2005 letter (Dist. Ex. 19). He wrote that respondents had not indicated at the July 5, 2005 CSE meeting that they had any objections to the CSE recommendations, summarized what the CSE had recommended for the 2005-06 school year, and asked for clarification as to the basis of respondent's belief that the recommended program was not well designed (id.).

The director wrote respondents another letter dated September 12, 2005 (Dist. Ex. 20). That letter stated that petitioner had previously written respondents and asked for specific reasons why they felt that the CSE's "proposed summer and 2005-06 school year program were not appropriate," advised respondents that they had not responded to those letters, and stated that it was "the district's position that it has offered an appropriate program for the 2005-06 school year and therefore, the district is not responsible for any costs associated with [respondents'] unilateral decision to enroll [their son] into [Gow]" (id.).

By letter dated September 22, 2005, respondents' attorney contacted the district's attorney regarding the basis for respondents' decision to place their son at Gow (Parent Ex. O[15]). The letter stated that respondents thought that their son needed "much more intensive services than the school has been providing," and that a State Review Officer had agreed that petitioner "should be providing more intensive services to make up for inadequacies from [the student's] program in prior years" (Parent Ex. O[15] at p. 1). The letter asserted that petitioner planned on implementing "the very same program" respondents had objected to during the previous impartial hearing, that they did not believe that this program "was sufficient to make up for the long history of inadequate services," and that they did not believe that the program in the current IEP was sufficient to make up for a "long history of failure" (id.). Respondents' attorney also objected to "the suggestion," in the September 12, 2005 letter from petitioner's attorney, that respondents were not cooperating,

[4] Application of the Board of Education, Appeal No. 05-067, was issued after the development of the IEP for the 2005-06 school year and after respondents unilaterally placed their son at Gow. Neither the July 5, 2005 IEP nor the unilateral placement at Gow for the 2005-06 school year were at issue in Application of the Board of Education, Appeal No. 05-067. The record does not indicate whether the parties convened a CSE meeting as directed by the decision and neither party raises implementation of the decision as an issue in the instant case. The record does not reveal that there is any impediment keeping the parties from convening a CSE meeting and reviewing the student's program consistent with Application of the Board of Education, Appeal No. 05-067.

stated that respondents had no choice but to place the student at Gow, and sought further comment from petitioner's attorney regarding the district's actions (id.). The letter did not indicate any concern by respondents about the 2005-06 IEP not being implemented during pendency.

By letter dated October 18, 2005 petitioner's director replied to respondents' attorney's letter (see Parent Ex. O[14]). The letter stated that respondents' attorney's letter was "a re-statement of arguments" presented at the earlier due process hearing and that a State Review Officer "determined that the [d]istrict has in fact sufficiently addressed [the student's] reading deficits, and offered him an appropriate educational program and placement" (id.). He also disagreed with respondents' claim that the 2005-06 IEP was the same program as the previous year's and indicated that it had "increased the amount of reading support that was offered to [the student], as well as continuing the specialized reading instruction, [and] the classroom and testing modifications" (id.).

By letter misdated January 3, 2005,[5] respondents' attorney wrote to petitioner's attorney and requested that petitioner pay for an independent evaluation of the student by a specific reading specialist and an independent evaluation by an educational specialist (Parent Ex. O[13]). Respondents' attorney requested that he be advised whether petitioner would pay for such evaluations, and asked that if petitioner were not going to pay that it "promptly appoint" an impartial hearing officer (id.). Counsel for respondents and petitioner thereafter exchanged correspondence relative to the requested independent evaluations (see Parent Exs. O[12], O[11], O[10], O[9], O[8], O[7], O[6]). In electronic correspondence dated January 15, 2006, respondents' attorney advised petitioner's attorney that the evaluation by the reading specialist would be going forward on January 20, 2006 and that petitioner should either "pay" or request an impartial hearing (Parent Ex. O[11]). The reading evaluation was conducted on January 20, 2006, a report was prepared, and payment was made by respondents (see Parent Exs. E, L).

Respondents' due process complaint notice, dated May 9, 2006, claimed that petitioner had failed to offer the student a FAPE for the 2005-06 school year (Dist. Ex. 23 at pp. 2-4). Respondents asserted that petitioner had not "offered" respondents the IEP resulting from the June 20, 2005 and July 5, 2005 CSE meetings and therefore did not offer the student a FAPE because petitioner had advised respondents that the IEP would not be implemented pending the resolution of the matters then currently under review by a State Review Officer, with the result being that petitioner had offered an inappropriate 2003-04 IEP. Respondents also asserted that the IEP developed at the June 20, 2005 and July 5, 2005 CSE meetings did not offer respondents' son a FAPE for the following reasons: (a) the CSE was not properly constituted, (b) the placement and program recommendation was "predetermined," (c) the student was not properly evaluated because the CSE did not provide the student with a reading evaluation or an assistive technology evaluation, and (d) the 2005-06 IEP did not properly address the student's needs relating to reading instruction, occupational therapy, assistive technology, or reading goals and failed to include an appropriate transition plan. Respondents' due process complaint notice also stated that Gow was an appropriate placement for the student and that the equities favored an award of reimbursement (Dist. Ex. 23 at pp. 4-5). Respondents also requested reimbursement of the costs of the

[5] It appears the letter should have been dated January 3, 2006.

independent reading evaluation and an order directing petitioner to pay for an independent educational evaluation (Dist. Ex. 23 at pp. 5-6).

In a letter dated May 19, 2006, petitioner denied each of the claims in respondents' request for a hearing (Dist. Ex. 27). By notice of motion dated June 12, 2006, petitioner requested that respondents' due process complaint notice be dismissed and that summary judgment be granted to it on the bases that (a) respondents' due process complaint notice was not "ripe for review," as it did not present a live case or controversy concerning the student's pendency placement because of respondents' commencement of a federal court action with respect to Application of the Board of Education., Appeal No. 05-067; (b) the allegations in the due process request were the same as those which were then being considered in respondents' federal court action; and (c) all relevant undisputed facts established that respondents' requests with respect to the independent evaluations had no merit (see IHO Ex. 2). By notice of motion dated June 26, 2006, respondents cross-moved for summary judgment with respect to the claims set forth in their due process complaint notice and objected to petitioner's motion (see IHO Ex. 2). The impartial hearing officer subsequently issued an interim decision and an amended interim decision denying petitioner's motion as well as respondents' cross-motion.

The impartial hearing was held on October 10, 11, and 12, 2006. In a decision dated December 22, 2006, the impartial hearing officer concluded that respondents prevailed on their allegation that petitioner did not offer the student a FAPE, "in that [petitioner] failed to offer the 2005-06 program" (IHO Decision, p. 10). The impartial hearing officer relied on petitioner's July 15, 2005 letter to respondents which stated in relevant part that "[t]his IEP will not be implemented until the legal proceedings presently pending are complete" (Dist. Ex. 12); petitioner's July 15, 2005 "prior notice" letter to respondents, which stated in relevant part that "[t]he proposed changes to [the student's] educational program will not be implemented until all legal proceedings pertaining to [the student's] 2004-05 educational program and placement are complete" (Dist. Ex. 14); and on testimony at the impartial hearing from the student's mother, which the impartial hearing officer characterized as indicating that she had been "told on two occasions" by a staff person who was the student's teacher and the chairperson of the June 20, 2005 CSE meeting, "that nothing could be done about the [student's] 2005-06 program until the litigation regarding the 2004-05 school year was complete" (IHO Decision, p. 10). The impartial hearing officer also concluded that substantively petitioner's 2005-06 IEP denied the student a FAPE in that it did not provide the student with an appropriate program for reading instruction and transition services (see IHO Decision, pp. 11-15, 16).

The impartial hearing officer further found that the student's placement at Gow was appropriate (IHO Decision, p. 19) and that the equities did not require the denial of respondents' tuition reimbursement claim (IHO Decision, p. 20). The impartial hearing officer also granted respondents' request for reimbursement of the costs of the independent reading evaluation (IHO Decision, p. 22).[6]

Petitioner appeals the impartial hearing officer's determination "that the student was denied a FAPE because [it] failed to offer the 2005-06 program" (IHO Decision, p. 10). Petitioner asserts

[6] At the impartial hearing respondents did not pursue the request for a second evaluation, the independent "educational" evaluation contained in their due process complaint notice.

that it acted appropriately regarding the student's pendency placement as it was required to maintain the student's pendency placement until the underlying dispute was resolved. It further asserts that notwithstanding the student's pendency placement it properly conducted an annual review and prepared a proposed IEP for the 2005-06 school year. It claims that thereafter it made efforts to reach an agreement with respondents to implement the proposed IEP rather than continue the pendency placement. It argues that despite its efforts respondents rejected the proposed placement, but that thereafter petitioner attempted to persuade them to reconsider. Petitioner asserts that respondents did not respond and that as a result petitioner was required to maintain the student in his pendency placement. On appeal, petitioner additionally claims that the impartial hearing officer improperly determined that the IEP for the 2005-06 school year did not appropriately address the student's reading needs, that the impartial hearing officer wrongly determined that petitioner failed to provide sufficient assistive technology, and that he incorrectly ruled that petitioner did not provide sufficient transition services to the student. Petitioner also appeals on the basis that the student's placement at Gow was not appropriate. Petitioner further appeals the impartial hearing officer's finding that it was required to pay the full amount of the student's tuition notwithstanding that respondents were obligated to pay much less, as well as the impartial hearing officer's order that petitioner pay for the costs of respondents' independent reading evaluation. Respondents request, in relevant part, that the impartial hearing officer's determination be upheld on review.

I will first address petitioner's appeal of the impartial hearing officer's determination with respect to respondents' claim for tuition reimbursement. The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[7] 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, 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. §§ 300.17 and 300.22; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). "The core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 126 S. Ct. at 532). A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). In Burlington, the court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP" (Burlington, 471 U.S. at 370-71; Application of a Child with a Disability, Appeal No. 06-121; see 20 U.S.C. § 1412[a][10][C][ii]).

[7] Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, et. seq.]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to IDEA 2004, unless otherwise specified.

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, 427 F.3d at 192). 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]). 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]; see also 34 C.F.R. § 300.513[a][1]). Under the IDEA, if a procedural violation is 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]). 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]; see also 34 C.F.R. § 300.513[a][3]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), 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 IDEA, however, does not require school districts to develop IEPs that maximize the potential of a student with a disability (Rowley, 458 U.S. at 197 n.21, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114, 300.116; 8 NYCRR 200.6[a][1]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

The pendency provisions of the 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 board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the child (20 U.S.C. § 1415[j]; N.Y. Educ. Law § 4404[4]; see 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]). Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Drinker v. Colonial Sch. Dist., 78 F.3d 859 [3d Cir. 1996]; Zvi D. v. Ambach, 694 F.2d 904 [2d Cir. 1982]). The purpose of the pendency provision is to provide stability and consistency in the education of a child with a disability (Honig v. Doe, 484 U.S. 305 [1987]). It does not mean that a child must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980], cert. denied, 449 U.S. 1078 [1981];

Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 04-064; Application of the Bd. of Educ., Appeal No. 99-90).

Under the IDEA, the inquiry focuses on identifying the child's then current educational placement (Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp 3d 354, 358-359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 06-062; Application of a Child with a Disability, Appeal No. 04-011; Application of the Bd. of Educ., Appeal No. 03-028; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073; Application of the Bd. of Educ., Appeal No. 97-82). The U.S. Department of Education has stated that a child's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481; see Mackey v. Bd. of Educ., No. 03-7860, 2004 WL 2251796, at *4 [2d Cir. Oct. 7, 2004]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Drinker, 78 F.3d at 867 [last functioning IEP]; Gregory K. v. Longview Sch. Dist., 811 F.2d 1307 [9th Cir. 1987]). In most cases, the pendency placement will be the last unchallenged IEP (Arlington Central School District v. L.P., 421 F. Supp. 2d 692 [S.D.N.Y. 2006]). Where there is a subsequent agreement between the parties during the proceedings to change the placement, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001], aff'd, 290 F.3d 476 [2d Cir. 2002]). Federal regulations on pendency specify that "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 34 C.F.R. § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement" (34 C.F.R. § 300.518[a]).

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029).

I will first address whether petitioner committed procedural error amounting to a denial of a FAPE when it advised respondents that the 2005-06 IEP would not be implemented during the pendency of litigation. I find in the negative. I do not agree with the impartial hearing officer that, on this record, "[respondents' son] was denied a FAPE because [petitioner] failed to offer the 2005-06 program" to respondents (see IHO Decision, p. 10). Here the record reflects that during the 2004-005 school year the student was provided special education services and was reevaluated. In addition, a CSE convened with respondents as active participants and a new program for the 2005-06 school year was recommended. The pendency provisisons of the IDEA and state law are designed to promote stability in educational programming for students during the course of litigation, although the parties are free to agree to change the pendency placement at any time. In

addition, the pendency provisions of federal and state law do not preclude a CSE from conducting an annual review of a child and recommending an appropriate program for the child.[8]

In this case, some correspondence and verbal information from petitioner to respondents did not explicitly state or indicate that pendency could be changed upon agreement of the parties. However, I note that petitioner's September 2005 procedural safeguards notice to respondents contained a full and complete statement of the student's rights under pendency (see Dist. Ex. 1 at p. 9). In addition, respondents previously had been provided with procedural safeguard notices which gave notice that the student's program could be changed upon agreement of the parties during pendency (see Dist. Ex. 44[a] at p. 6 of the record in Application of the Bd. of Educ., Appeal No. 05-067).[9] Further, respondents were represented by experienced counsel at the time of the June 20, 2005 and July 5, 2005 CSE meetings, and the record indicates that their counsel is well aware that respondents and petitioner may enter into an agreement to change the student's pendency placement (see e.g., Resp't Mem. of Law in Supp. of Cross-Mot. for Summary Judgment and in Opp'n to Pet'r Mot. for Summary Judgment and to Dismiss, at pp. 6-7). Nonetheless, the record does not show that respondents' made any attempt to discuss with petitioner whether it would agree to change the student's pendency placement for the 2005-06 school year. Further, respondents' August 16, 2006 letter to petitioner (Dist. Ex. 17), which was composed by their counsel (Tr. pp. 202-03), did not raise any objection or direct challenge to petitioner's previous statements that it would not implement the 2005-06 IEP that the CSE had previously developed and recommended. Moreover, the record reveals that respondents did not want, and in fact rejected, the very IEP which they claim was not properly offered to them. Respondents are claiming harm because they were not "offered" a program which they did not want. While petitioner could have more clearly advised respondents that pendency could be changed upon agreement of the parties, here there was no harm that rose to a level of a denial of FAPE.[10]

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[8] State Review Officers have determined that a district is obligated to take such actions during pendency (Application of a Child with a Disability, Appeal No. 99-13; Application of a Child with a Disability, Appeal No. 99-17; see also Town of Burlington v. Dep't of Educ. for Comm'r of Mass., 736, 773, 794 [1st Cir. 1984][pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law]; Lopez v. District of Columbia, 355 F. Supp. 2d 392, 400-01 (D.D.C. 2005); McMullen v. McKenzie, 1988 WL 60356 at *2 [D.D.C. June 2, 1988]; McAdoo v. McKenzie, 1988 WL 60367 at *2 [D.D.C. May 31, 1988]). Such actions are necessary in order to comply with the statutory requirements for drafting IEPs, to allow the IEP to be submitted in a timely fashion to the parents, and to provide evidence regarding what a board of education would have subsequently proposed (see Burlington, 736 F.2d at 794).

[9] Section 279.1(a) of the Regulations of the Commissioner of Education provides that the provisions of Parts 275 and 276 shall govern the practice on reviews of hearings for students with disabilities, except as provided in Part 279. Pursuant to section 276.6 of the Regulations of the Commissioner, the a State Review Officer may, in their discretion, in the determination of an appeal, take into consideration any official records or reports on file in the Education Department which relate to the issues involved in the appeal (Application of the Bd. of Educ., Appeal No. 02-070; Application of the Bd. of Educ., Appeal No. 02-072).

[10] I note that neither the impartial hearing officer nor the parties agreed on the child's pendency placement. Respondents assert that the last agreed upon IEP was the 2003-04 IEP in their correspondence; however, services were provided to the student during the 2004-05 school year apparently with the agreement and consent of respondents that provided additional services beyond what was contained in the 2003-04 IEP.

I find that petitioner's statements to respondents regarding the student's pendency rights do not rise to the level of a denial of FAPE in the circumstances of this case, specifically where respondents did not indicate an interest in obtaining the educational program set forth in the 2005-06 IEP and where the record indicates that respondents had actual or constructive knowledge of the full panoply of their rights under the pendency provisions of the IDEA.

Turning to the substantive program recommended for 2005-06, I disagree with the impartial hearing officer's conclusion that the IEP developed at the June 20, 2005 and July 5, 2005 CSE meetings did not recommend for the student an appropriate program for reading instruction and transition services. I further find that petitioner's IEP did provide the student with appropriate assistive technology. I have carefully reviewed the IEP developed by petitioner at its two CSE meetings, and for the reasons set forth below I find that the educational program set forth in that IEP is reasonably calculated to enable the student to receive educational benefits (see Rowley, 458 U.S. at 206, 207; Cerra, 427 F.3d at 192).[11]

The IEP developed at the June 20, 2005 and July 5, 2005 CSE meetings lists the student's third quarter grades, indicating that he was passing all academic courses (Parent Ex. C at p. 2). Under the section describing the student's academic present performance levels, the 2005-06 IEP notes results of the February 2005 educational assessment, which identified listening comprehension as an area of strength, demonstrated by the student's standard score of 91 on the listening comprehension subtest of the WISC-II and supported by teacher reports that the student is an "excellent auditory learner" and that he "retains a great deal of what he hears" (id.). The IEP again notes that the student's listening skills allow him to be an active participant in classroom discussions in English language arts, social studies and science (id.).

Information on the 2005-06 IEP regarding the student's present performance levels in reading reflect the progress he made in an "intensive reading instruction in a small group setting, which concentrates on phonemic awareness, application, and reading fluency" (Parent Ex. C at p. 3). The IEP describes areas of improvement, emerging skills and specific areas of concern, such as the student's tendency to reverse words and to substitute words that are similarly spelled (id.). Areas of concern are further described, as the IEP notes that the student is able to self-correct in context but does not self-correct words in isolation (id.). The IEP lists each vowel and consonant cluster that continues to present difficulty for the student and suggests practice of these sounds within the academic setting, which would allow the student to develop recognition of vocabulary relevant to content area courses (id.). The student's identified need to increase fluency, sight word recognition and use of context clues are consistent with the stated present performance levels, and are reflected in the very specific and detailed reading goals and objectives. The IEP contains a goal to address deficits in structural analysis, word recognition and decoding which includes each sound cluster identified as causing the student difficulty (Parent Ex. C at p. 9). The objectives for this goal reflect the Orton-Gillingham methodology, which the reading teacher testified she implemented as one of the strategies to teach decoding to the student (Tr. p. 277; Parent Ex. C at p. 9).

[11] I have not considered respondents' arguments raised below that the IEP for the 2005-06 school year denied the student a FAPE because of the composition of the CSE that developed that IEP, and that petitioner failed to properly evaluate the student, because respondents did not appeal the impartial hearing officer's determinations on those issues.

The reading goal which states that the student will read a passage at the fourth grade level with 85 percent accuracy (see Parent Ex. C at p. 8) may be overly ambitious, given disagreement among evaluators regarding the student's present reading level. However, the increase in the student's standard scores in reading decoding, sight vocabulary and reading comprehension on the WIAT-II between May 2003 and February 2005 is encouraging and supports assertions by petitioner and by the student's reading teacher that the strategies implemented in his reading class are appropriate and effective. I also note that the objectives for this goal (see Parent Ex. C at p. 8) provide for levels of mastery beginning at 50 percent, which is a modest expectation and would allow the reading teacher to make a determination regarding the appropriateness of the goal within the first quarter of the school year and make adjustments if necessary. Equally ambitious is the recommended goal stating that the student will read a passage from a content area reading assignment, even though the mastery level for this goal is also established at 50 percent (Parent Ex. C at p. 9). However, this goal is preceded by two goals which aggressively address the CSE's recommendation that the student practice decoding sounds which he finds difficult by using content vocabulary (see Parent Ex. C at pp. 3, 8). Both of these goals contain extensive, highly detailed objectives which describe how the student would engage in activities involving vocabulary lists to be matched to word cards (see Parent Ex. C at p. 8).

The student's present performance levels in spelling and written language reflect his significant difficulty in these areas. The IEP states that the student's performance on the New Stanford Achievement Test indicates that he is spelling at approximately the 2.6 grade level (Parent Ex. C at p. 3). The IEP also describes in detail the student's specific difficulties with spelling, stating that he spells phonetically, is able to spell more words correctly in isolation than in sentences, and does not recognize past tense irregular verbs, adding a "t" rather than an "ed" when attempting to spell the verbs as past tense (id.). Specific information about the student's functional spelling skills is also included in the IEP, delineating the numbers, days of the week and months of the year which cause him difficulty, and noting the type of difficulty, such as his failure to capitalize days of the week (id.). The IEP contains a goal for functional spelling with objectives for spelling the names of days, months and numbers (Parent Ex. C at p. 10). The IEP identified the impact of the student's reading difficulties upon his ability to apply rules of capitalization, punctuation and spelling, and it addresses those difficulties with a spelling goal with five objectives for capitalization and punctuation (Parent Ex. C at pp. 4-5, 10).

The student's present performance levels in written language reflect the progress he made through implementation of accommodations and modifications. The student was able to use his strengths as an auditory learner and critical thinker by dictating assignments to a scribe and using a word processor to type them (Parent Ex. C at p. 4). Graphic outlines were used to assist the student in organizing and sequencing his ideas (id.), and it was noted that, with prompting, the student was able to demonstrate increased vocabulary skills by using more creative word choices (id.). The IEP states that the student has difficulty with writing fluency and needs to improve his use of transitions to improve fluency, and increase his use of details to support his main ideas (id.). It was noted that the student understood the process of editing and revising, but that he found the process difficult and frustrating (Parent Ex. C at p. 5). The IEP indicated that, to accommodate this difficulty, the student completed written assignments in shorter intervals, and that this strategy was successful (id.). The IEP includes a written language goal with five objectives (Parent Ex. C at pp. 10-11). The objectives for this goal address skills in proofreading and editing, and direct

the student's writing toward writing assignments for content area courses (id.). The measurement of progress for this goal is tied to the state writing rubric (id.).

Information regarding the student's math performance levels also was updated on the 2005-06 IEP, demonstrating progress despite the student's difficulties in this area. Specific calculation skills mastered are delineated, as are specific areas of difficulty, including calculation of fractions, converting fractions to decimals, solving problems including decimals, exponents, square roots and negative integers (Parent Ex. C at p. 2). The student's strengths and needs in math concepts also are articulated clearly on the IEP, which states that he is able to predict events using experimental or theoretical probability after direct instruction but has difficulty performing certain related calculations independently (Parent Ex. C at p. 4). The IEP describes the effectiveness of accommodations in math, noting that the student was able to perform certain calculations using a calculator after being reminded of rules for these calculations (id.). Identified math needs for improvement of calculation rate and accuracy, time and money skills, as well as math reasoning application skills, are consistent with the description of the student's present performance levels. Two math goals with a total of seventeen objectives provide highly detailed information about how each of these four areas of need were to be addressed (Parent Ex. C at pp. 11-12), and the direct services of a consultant teacher in math were recommended to assist the student (Parent Ex. C at p. 12).

In the social emotional domain, the student is described as polite, sociable and exhibiting increased maturity and focus upon his work in recent weeks (Parent Ex. C at p. 5). Although no specific social-emotional concerns were identified, the IEP recommended that the student have access to counseling on an as-needed basis to address any needs related to his learning disabilities or his ADHD (Parent Ex. C at pp. 6, 13). The student was to attend petitioner's high school for the first time in 2005-06 (see Parent Exs. C at p. 16; I), and this recommendation by the CSE afforded the student services if he needed them in this new environment.

In the physical domain, the present performance levels on the IEP reflect the student's progress in visual motor skills, as evidenced by his February 2005 performance on the VMI (Dist. Ex. 3 at p. 1; Parent Ex. C at p. 6). The student's need to develop strategies to accommodate for handwriting and organizational difficulties in the classroom is identified, and the IEP notes that the student had begun exploring keyboarding as an alternative to writing (Dist. Ex. 3 at p. 1; Parent Ex. C at p. 6). Consistent with the recommendations in the February 2005 evaluation report, occupational therapy services were recommended on a consultant basis to allow intervention and support through the development of strategies and modifications which could be applied in school and at home (see Parent Ex. 3 at p. 1; Parent Ex. C at pp. 6, 13). A handwriting goal included two objectives which afforded the student the option of writing or using a keyboard when organizing written material (Parent Ex. C at p. 12). Complementing this goal, the student's written language goal contains an objective for keyboarding (Parent Ex. C at p. 11). The statement of present performance levels for written language further elaborates upon the student's keyboarding skills, noting that he had become more independent in the use of a keyboard and was attempting to use a spell checker to correct errors, but that his poor word recognition skills impeded his ability to select accurate corrections (Parent Ex. C at p. 5).

In the management domain, the student is described as often displaying inattentive behavior yet able to recall what is being taught even when he appears to be off task (Parent Ex. C

at p. 7). This description is consistent with the observations of the school psychologist who conducted a classroom observation of the student for his reevaluation in February 2005 (see Dist. Ex. 33 at p. 2). The IEP describes the student as trying "hard at completing his assignments," and notes that he takes advantage of an optional tenth grade guided study period to obtain assistance with his homework from a teacher or paraprofessional (Parent Ex. C at p. 7).

The student's 2004-05 IEP contained nine specific and individualized recommendations to address the student's management needs (Dist. Ex. 2 at p. 5). These recommendations included strategies to assist the student with attention and focus, and described creative and individualized options, such as allowing the student to run errands or assist the teacher with activities that would allow appropriate movement within the classroom (id.). The 2005-06 IEP maintains these recommendations and includes five additional strategies, including pre-teaching and pre-reading, to increase the student's opportunities to improve his reading rate and to enhance his learning of content area vocabulary (Parent Ex. C at p. 7). These strategies, in conjunction with the intensive level of remediation available thorough recommended consultant teacher services, occupational therapy consultation and specialized reading instruction, as well as the extensive descriptions of the student's learning modalities and of strategies which were successful with the student in the 2004-05 school year, resulted in a thorough, detailed, comprehensive and highly individualized IEP which was reasonably calculated to provide opportunity for the student's continued success in the general education environment. The level of specificity in the descriptions of the student's present performance levels provides more than adequate guidance for the student's teachers to allow for implementation of the IEP goals and objectives in both the general education and special education environment.

Respondents have argued that the 2005-06 IEP is not appropriate because it does not provide appropriate instruction in reading throughout the day in the student's content area courses (Resp't Mem. of Law, at p. 9). I have already addressed this position in my previous decision with respect to respondents' son, in which I concluded that direct instruction in reading within a grade-level content course was not appropriate for a student whose reading level is significantly below the text for his grade level courses (see Parent Ex. N at p. 15). I find now that the 2005-06 IEP does in fact address the student's reading needs in these courses, but it does so in a manner that is more appropriate for a student at the high school level in a general education setting. Goals and objectives in reading, spelling and written language on the 2005-06 IEP are designed to utilize content area vocabulary within the specialized reading class (Parent Ex. C at pp. 8-11). Specialized instruction in writing is designed to allow the student opportunity to practice writing skills by writing paragraphs for his content area courses. While it would not be appropriate for the student to receive reading instruction at his present reading level while attending high school level courses, the instruction he would have received in his specialized reading class, as defined by the IEP and as described in testimony by the teacher who would have instructed him, was appropriate (Tr. pp. 274-81, 286-92; Parent Ex. C at pp. 3, 8-9, 13). This instruction would have increased his skills in reading and written language in a discreet environment and would have enhanced the extensive support the student would have received from the recommended consultant teacher services in content courses as well as from the recommended occupational therapy consultation services (Parent Ex. C at pp. 6, 7, 12-13). This combination of services and supports would have allowed the student to continue the progress he made through the services and supports provided in 2004-05, and would have allowed respondents' son to remain in the least restrictive environment.

I do not agree with the impartial hearing officer that petitioner's reading program is not appropriate. I find that the reading program set forth in the student's IEP is one that is reasonably calculated to enable the student to receive educational benefit. Contrary to the impartial hearing officer's conclusion (see IHO Decision, pp. 14, 15), the record does not show that the student cannot receive educational benefit from a reading program unless the student receives the entirety of the Orton-Gillingham program. Nor does the record indicate that respondent's son must receive reading instruction from a teacher certified in reading (see IHO Decision, pp. 14, 15) as opposed to a certified special education teacher in order for him to make meaningful progress in his reading skills. Further, the impartial hearing officer's conclusion that the reading program proposed in the 2005-06 IEP involves a reduction in the amount of time that the student would receive direct reading instruction, from 360 minutes a week to 180 minutes a week (see IHO Decision, p. 14), is not supported by the record (compare Dist. Ex. 2 at pp. 5, 13, with Parent Ex. C at p. 13). That reduction in time is accounted for by a reduction in class time for math instruction and not due to any reduction in class time available to the student for direct instruction in reading.

The impartial hearing officer states that the 2005-06 reading program is "not a more intense level of instruction in reading and written language" and that it is not a "1:1 tutorial" (IHO Decision, p. 14). The record shows that the receipt of direct reading instruction in a 15:1 class for 180 minutes a week, along with the modifications, accommodations, supplementary services, and direct consultant teaching services set forth in the IEP, are sufficient for this student to receive meaningful educational benefit. I have considered here the testimony of the student's reading teacher during the 2004-05 school year, as well as the identified amount of progress that the student has made in his reading skills and abilities during that 2004-05 school year. With respect to the student's current programming, as indicated in my previous decision, I found that "after receipt of the January 2004 report from respondents' private evaluator, the CSE developed a program for the student which addressed his deficits in reading, written language, and math, and that the IEP developed for 2004-05 further refined the appropriate program outlined in the February 18, 2004 IEP" (Parent Ex. N at pp. 14-15). Moreover, a comparison of the referenced IEPs in that decision with the IEP at issue here shows that the level of reading instruction and services set out in the 2005-06 IEP is the same or even greater than the level of reading services provided in those earlier IEPs. I find that the level of reading services provided to the student by the IEP for the 2005-06 school year is sufficiently intense to provide him with meaningful educational benefit as it relates to his reading needs and skills.

The impartial hearing officer also faults petitioner's program insofar as "nothing in the record suggests that [the student] was appropriately grouped with children of similar needs and abilities in [petitioner's] 15:1 reading class" (IHO Decision, p. 14). The impartial hearing officer accurately characterizes the record. However there is nothing in the record to suggest that respondents' son would not be appropriately grouped. Because respondents are challenging the adequacy of petitioner's program, the burden is on them to show that the student would not have been appropriately grouped in that class (see Schaffer, 126 S. Ct. at 536-37). They have not done so and there is no such evidence in the record. As a consequence, I find that there is an insufficient factual basis in the record for the impartial hearing officer's determination (Application of the Bd. of Educ., Appeal No. 00-073; Application of a Student with a Disability, 33 Ed. Dept. Rep. 712). I also note here that in support of their argument that their son is not appropriately grouped in his recommended reading class, respondents rely on nonspecific information with respect to the students in the reading class from the previous year (see Resp't Mem. of Law, at pp. 8, 9) and not

specific information regarding the needs and abilities of the students who would have been in the recommended 15:1 reading class during the 2005-06 school year. I also note that the issue of whether the student was appropriately grouped with children of similar needs and abilities in petitioner's 15:1 reading class was not raised in respondents' due process complaint notice (see Dist. Ex. 23), their opening statement at the hearing (see Tr. pp. 21-30), or during respondents' questioning of petitioner's employees during the hearing (see Tr. pp. 40-64, 78-84, 171-75, 183-89, 241-71, 291-92) and that the record was therefore not developed for the impartial hearing officer to properly consider and evaluate respondents' claim, which was first raised in their post hearing brief (see Parents Closing Br., at p. 10).

I have also reviewed the record with respect to the amount, degree, and type of improvement that respondents' son has made in reading during the 2004-05 school year in determining that the recommended 2005-06 program was appropriate. The record reveals that the 2005-06 program recommendations continued and expanded the 2004-05 school year services that enabled the student to achieve educational benefit. As indicated above, the record shows that respondents' son has made progress as a result of his direct reading instruction (see Parent Ex. 3 at p. 3; Tr. pp. 293, 294). The impartial hearing officer's conclusion that respondents' son has not made any improvement in reading is based on the results of the Fry reading test and characterizations with respect to that test. As discussed above, the record indicates that the student has made meaningful progress in his reading skills during the course of the 2004-05 school year even when not considering any results from the Fry reading test (see Dist. Ex. 33 at pp. 4, 6). Moreover, the student's results on the Fry test are not inconsistent with the other information in the record with respect to the student's progress in reading. Further, I find nothing regarding that test that would otherwise change my decision that the IEP for the 2005-06 school year was reasonably calculated to offer educational benefits.

I disagree with the impartial hearing officer's finding that the transition services recommended on the IEP for the 2005-06 school year were so insufficient as to result in a denial of FAPE for respondents' son (see IHO Decision, p. 16). The IEP delineates five transition activities, all to be carried out in petitioner's high school (Parent Ex. C at p. 15). The student was recommended for a high school program leading to a diploma, he was to meet with his ninth grade counselor to review vocational and career interests, and he was to be provided opportunities to participate in school and community activities (id.). Occupational therapy consultation services and instruction in functional reading and writing were reiterated in the description of transitional services (id.). While it will be necessary to expand upon these services as the student completes his high school education, and to revise them if he continues to progress in reading and written language at the rate he demonstrated in the 2004-05 school year, I do not find that the lack of specificity in the listed "coordinated set of transition activities" rises to the level of denial of a FAPE for this student, who was to begin his first year in high school under the 2005-06 IEP. I do however caution petitioner to ensure that it complies with the transition services requirements of 8 NYCRR 200.5 (d)(2)(ix).

I also disagree with the impartial hearing officer's determination that petitioner failed to provide the student with adequate assistive technology (see IHO Decision, p. 16). A board of education must provide those assistive technology devices which are required in order for a child to receive a FAPE (Application of the Bd. of Educ., Appeal No. 99-048). The IEP for the 2005-06 school year recommends the student be provided with assistive technology including a

calculator and books on tape (see Parent Ex. C at p. 13). The IEP also provides extensive accommodations and modifications to address the student's deficits in reading and written language, including copies of class notes, the use of a scribe, modified homework assignments, access to a tape recorder and tests read aloud (Parent Ex. C at pp. 13, 14). It also identifies the student's need to develop strategies to accommodate his handwriting deficits (Parent Ex. C at p. 6). Additionally, the IEP reports that the student has become more independent in the use of a keyboard and that he attempts to use a spell checker to correct errors (see Parent Ex. C at p. 5). Furthermore, the IEP contains a handwriting goal which includes two objectives which afford the student the option of writing or using a keyboard as well as a written language goal which includes an objective for keyboarding (see Parent Ex. C at pp. 11, 12). I find that assistive technology as well as the referenced goals and accommodations on the student's IEP are sufficient to allow the student to benefit from instruction without the need for additional assistive technology devices. I note that the IEP makes provision for occupational therapy consultation services in both the home and the school setting (Parent Ex. C at pp. 6, 13). This will further ensure that the student's additional assistive technology needs, if any, will be monitored and identified. For these reasons, I am not persuaded that respondents' son requires the Dragon Dictate (speech to text) program and his own Kurzwiel 3000 (text to speech) device in order for him to receive a FAPE. I note here that while the impartial hearing officer concluded that additional assistive technology should be provided, he also found that the absence of such devices did not deprive the student of a FAPE (IHO Decision, p. 16).

Based on the above facts and conclusions, I find that petitioner's IEP for the 2005-06 school year is reasonably calculated to enable the student to receive educational benefit and that respondents' son was not denied a FAPE for that school year. Having so determined, the necessary inquiry is at an end with respect to the claim for tuition reimbursement and there is no need to reach the issue of whether Gow was an appropriate placement (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d. Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 03-058).

I now turn to petitioner's appeal of the impartial hearing officer's determination to grant respondents' request for reimbursement for the cost of an independent evaluation by a reading specialist. If a parent requests an independent educational evaluation (IEE) at public expense, the school district must, without unnecessary delay, either ensure an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria. If the impartial hearing officer finds that a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502; 8 NYCRR 200.5[g]; Application of a Child with a Disability, Appeal No. 05-041; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

In this case, respondents requested at least twice that petitioner pay for an independent evaluation by a reading specialist (Parent Exs. O[13], O[11]). Also, on at least two occasions, respondents requested that petitioner either pay for the evaluation or request an impartial hearing (Parent Exs. O[13], O[11]). The evaluation has gone forward, the report is completed, and respondents have paid for it (Parent Ex. L). At the time of respondents' due process complaint notice setting forth their request to be reimbursed for payment for the evaluation, more than four

months had passed without petitioner indicating it would pay or requesting an impartial hearing contesting payment (see Parent Ex. O[13], Dist. Ex 23). The Office of Special Education Programs (OSEP) of the United States Education Department has advised that federal regulations provide that a child "must be assessed in all areas related to the suspected disability" and that the "[p]arents of a child with a disability have a right to seek at public expense an IEE if the parents disagree with the evaluation because they believe that the child has not been assessed in all areas related to the suspected disability" (Letter to Anonymous [OSEP March 29, 2000]). I find that the CSE should have either ensured that the evaluation was provided at public expense or initiated an impartial hearing in a timely manner to show that its evaluation was appropriate. Therefore, I find that there is no basis to deny or limit respondents' reimbursement claim for the independent evaluation which they obtained (Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 03-077; Application of the Bd. of Educ., Appeal No. 01-089) and I concur with the impartial hearing officer's decision granting respondents' request for payment.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that petitioner denied the student a free appropriate public education for the 2005-06 school year, awarded respondents tuition reimbursement, and ordered additional tuition payments directly to the Gow School; and

IT IS FURTHER ORDERED that petitioner reimburse respondents for the $1,050 cost of the independent reading evaluation.

Dated: **Albany, New York**
March 9, 2007

PAUL F. KELLY
STATE REVIEW OFFICER