



# The University of the State of New York

## The State Education Department State Review Officer

No. 07-060

### **Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Scarsdale Union Free School District**

#### **Appearances:**

Mayerson & Associates, attorney for petitioners, Gary S. Mayerson, Esq., of counsel

Keane & Beane, P.C., attorney for respondent, Stephanie M. Roebuck, Esq., of counsel

#### **DECISION**

Petitioners appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition at Windward School (Windward) for the 2006-07 school year. Respondent cross-appeals from the impartial hearing officer's determinations that it failed to offer appropriate educational programs to the student for the 2005-06 and 2006-07 school years, that Windward offered an appropriate program to the student for those school years, and that petitioners' conduct in the development of the 2005-06 individualized education program (IEP) did not preclude an award of tuition reimbursement. The appeal must be dismissed. The cross-appeal must be sustained.

The student was attending Windward when the impartial hearing began in October 2006. Windward has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

The student's verbal abilities are in the high average range of cognitive functioning and her perceptual abilities are in the borderline range (Parent Ex. 23 at p. 3). Her greatest weakness is in the area of visual-perceptual processing and visual memory (*id.* at p. 7). The student's scores on tests measuring academic functioning are on the lower end of the average range, consistent with her overall intellectual functioning (*id.* at p. 3). Attention and emotional factors also influence the student's functioning (*id.* at p. 7). The student's classification and eligibility for special education programs and services as a student with a learning disability are not in dispute (8 NYCRR 200.1[zz][6]).

When the student entered elementary school in respondent's district for the 2000-01 school year, she received support services in the school's Learning Resource Center (LRC) in the areas of basic concepts and pre-reading skills (Dist. Ex. 45 at p. 1). During the 2001-02 school year, she experienced difficulty acquiring basic skills and continued to receive support in the areas of reading and mathematics (id.). The following school year, in January 2003, the student was classified and received support in the LRC for reading, writing and mathematics (Parent Ex. 45). She continued to attend school in respondent's district for the 2003-04 school year (Dist. Ex. 44 at p. 4).

A subcommittee of respondent's Committee on Special Education (CSE) met on June 30, 2004 to develop the student's IEP for the 2004-05 school year (Dist. Ex. 44). The CSE subcommittee recommended that the student continue to be classified as having a learning disability and that she receive daily resource room services (id. at p. 1). The student continued to attend school in respondent's district for the 2004-05 school year (Parent Ex. 20 at p. 5).

In an April 2005 report, the student's regular education teacher noted that the student was making slow, steady growth in her decoding skills (Parent Ex. 28 at p. 1). She further noted that comprehension was sometimes difficult for the student and described strategies that were used to assist the student, such as sequencing events to help the student recall important information and reinforcing comprehension skills through questioning techniques and repetition (id.). The regular education teacher indicated that grammar and appropriate usage presented a challenge for the student and that the spelling program was modified to better meet the student's needs (id. at p. 2). The regular education teacher also noted that mathematics was difficult for the student and that concepts were reinforced in the classroom and in the LRC (id. at p. 1).

Administration of the Stanford Achievement Test Ninth Edition (Intermediate 1, Form S, Abbreviated) in April 2005 yielded a reading vocabulary score in the 19th percentile and a reading comprehension score in the 52nd percentile (Dist. Ex. 41). The student's total reading score was in the 35th percentile and her total mathematics score was in the 23rd percentile (id.).

The CSE convened on May 4, 2005 (Parent Ex. 20). It reviewed the student's current levels of performance, noting that the student experienced the most difficulty in mathematics (id. at p. 5). It further noted that while written language continued to be a problem for the student and her comprehension abilities declined when presented with questions testing inferential reasoning, the student's performance on the New York Statewide Testing Program for English language arts (ELA) indicated that she had mastered the ELA skills expected of students in her grade (id.). The student's teachers indicated that the student demonstrated a lack of self-confidence that interfered with her class functioning and they expressed concern with the student's emotional functioning (id.). The student's mother indicated that she did not believe that her daughter had made progress during the year and expressed concern about the complexity of the material (id.). Petitioners indicated that their daughter required more attention than she had been receiving and inquired about whether her services could be increased (id.). They requested that additional testing be conducted and the CSE agreed to reconvene when the additional test results were available (id.).

On May 10, 2005, the student participated in the New York Statewide Testing Program for Mathematics and scored within performance level 2 out of 4 (Parent Ex. 25). On May 24, 2005, one of respondent's school psychologists observed the student in her classroom when the class was

transitioning into literature discussion groups (Parent Ex. 24). The school psychologist noted that the student appeared attentive to the book she was reading, but did not appear as interested or participatory as the other students (id.). The school psychologist further noted that the student was asked to read a word aloud and had some difficulty blending and sequencing the sounds as she decoded them (id.). When asked a question about the book, the student answered with an appropriate response and without hesitancy, however, she had some difficulty organizing the language of the response and performed better when guided by her teacher asking questions (id.). When other students read from the book, the student seemed to read along silently, was focused and was not distracted by the activity or low level noise in the classroom (id.). The psychologist indicated that the student was working with effort, but seemed to need more time than her peers (id. at p. 2).

The student was evaluated by a private psychologist in May and June 2005 (Parent Ex. 23). Administration of the Wechsler Intelligence Scale for Children-IV (WISC-IV) yielded a verbal comprehension composite score (and percentile) of 112 (79th), a perceptual reasoning composite score of 73 (4th), a working memory composite score of 97 (42nd), a processing speed composite score of 85 (16th), and a full scale score of 90 (25th) (id. at p. 3). The evaluator noted substantial scatter among the student's subtest scores, conveying a wide variability in the student's performance and functioning (id.). She also noted that the student demonstrated strong verbal reasoning skills and markedly weaker perceptual abilities (id.). The evaluator reported that during administration of the block design subtest the student rotated elements of the designs, shifted figure and ground elements, saw larger blocks of color than were in the model, and did not perceive the shapes of triangles (id.). She further reported that during administration of the matrix reasoning subtest the student was similarly confounded by the picture puzzle patterns (id.). She also reported that the student demonstrated difficulty discerning relevant from irrelevant visual information on the picture completion subtest (id.). On the arithmetic subtest, the student demonstrated difficulty retaining the details of word problems and seemed to perform random operations with the numbers she could remember (id.). The evaluator attributed the student's poorer performance on the arithmetic subtest to attention factors (id.).

Administration of the Wide Range Achievement Test 3 (WRAT 3) resulted in the student obtaining a reading standard score (SS) of 97, a spelling SS of 95, and an arithmetic SS of 97 (Parent Ex. 23 at p. 3). The evaluator indicated that the student's scores were on or about at grade level, on the lower end of the average range, and consistent with the student's overall intellectual functioning (id.). The evaluator further noted that the student had a limited sight word vocabulary for her age, and she attempted to use a phonetic approach to decode unfamiliar words, but her word attack strategies were not always successful (id. at p. 4). The evaluator reported that on the arithmetic test, the student made a few errors of inattention related to sign of operation and carrying/borrowing in subtraction (id.). She indicated that the student did not appear to have mastered division or the relationship between hours and minutes of time (id.).

Administration of the Gray Oral Reading Test yielded a total reading quotient of 88, a meaning cues score of 91, a graphic/phonemic cues score of 91, and a function cues score of 87 (Parent Ex. 23 at p. 4). The evaluator reported that the student read even the simplest material word by word (id.). Upon administration of selected subtests of the Detroit Tests of Learning Aptitude-Fourth Edition (DTLA-4), the evaluator concluded that the student had strong verbal abilities that were severely hampered by perceptual problems, and that when the student needed to

sequence visual information she processed very slowly and consistently rotated or reversed what she saw (id. at p. 5). In addition, the evaluator indicated that as a result of administration of the Wide Range Assessment of Memory and Learning (WRAML), it became apparent that the student's strength was as a verbal learner, and if required to learn visually presented material, the student would do best when that material was paired with verbal stimuli (id. at p. 6). The evaluator also indicated that auditory memory was more subject to interference from attention factors and to difficulties with sequential order (id.).

A personality assessment revealed that the student acknowledged her struggles in school and felt burdened by the work she had to complete (Parent Ex. 23 at p. 6). She was aware that she was slower to process information than most of her peers, and had incorporated this into her self-concept (id.). The evaluation report indicated that the student expressed that she did not feel valued among her classmates and felt left out of things (id.). Sadness and worry about school were noted (id.).

The evaluator indicated that the student struggled in school, largely due to the interference of perceptual processing deficits (Parent Ex. 23 at p. 7). The evaluator opined that although respondent offered special education services for the student, those services presented in the context of the mainstream classroom life were not adequate for her (id.). The evaluator indicated that the student's "needs in the classroom are significant and continuous cutting across all subject areas and therefore all aspects of her day" (id.). The evaluator suggested that the student receive a highly individualized teaching program that emphasized multisensory learning approaches in the classroom and plenty of 1:1 attention, in the presence of other children who have similar learning needs, so that she could see herself as part of a community of learners (id.).

The evaluation report indicated that the student had been accepted by a private school (Parent. Ex. 23 at p. 1). The evaluator indicated that the private school was the right kind of placement for the student at that time, so that she could eventually transfer back into respondent's school district with a strong sense of her own value and abilities (id.).

In a June 2005 speech and language initial assessment conducted by respondent, administration of the Clinical Evaluation of Language Fundamentals - Fourth Edition (CELF-4) yielded a core language SS (and percentile rank) of 97 (42), a receptive language SS of 93 (32), an expressive language SS of 103 (58), and a language memory SS of 90 (25) (Parent Ex. 22 at p. 1). Administration of The Listening Test yielded a total test SS of 103 (39) (id.). The student's scores on four out of five subtests were within the average range of ability when compared to same age peers, except on the reasoning subtest, where the student's score was in the low average range (id.).

The evaluator summarized assessment results, indicating that the student's comprehension and use of language fell within the average range when compared to same age peers (Parent Ex. 22 at p. 3). She indicated that the student was able to generate age-appropriate sentences that were grammatically and semantically correct and could identify and describe relationships among words (id.). She also indicated that the student's receptive language was slightly weaker than her expressive language (id.). The evaluator noted that the student was not always able to discriminate between essential and non-essential information and that she might struggle with more complex and lengthy language (id.). She further noted that the student seemed to perform better on tasks

that broke down orally presented information into manageable parts (id.). The evaluator recommended that the student be encouraged to ask for a repetition of information to improve overall processing of orally presented information (id.).

A June 13, 2005 progress report for the goals and objectives listed on the 2004-05 IEP showed that the student had mastered objectives related to capitalization and punctuation, and had made some progress or was progressing satisfactorily toward the remainder of the objectives (Parent Ex. 21). Comments on the student's 2004-05 final report card indicated that she showed slow steady progress in her reading skills and that math basics continued to show growth with a "differentiated" curriculum (Parent Ex. 32).

The CSE reconvened on June 14, 2005 for the student's annual review and to develop her program for the 2005-06 school year (Parent Ex. 20). Comments from the CSE meeting indicate that petitioners were advised that the additional parent member was unavailable (id. at p. 5). They were asked if they wanted to have the CSE meeting rescheduled and they indicated that they wished to proceed as they had their private psychologist present (id.). Comments further indicate that the private psychologist reviewed the results of her evaluation, the classroom teacher described how differentiated instruction was provided, and petitioners expressed concerns about the modifications their daughter was receiving (id.). The CSE revisited the option of a special class, which, comments note, petitioners had rejected at the previous CSE meeting (id. at p. 6). Comments also note that petitioners inquired about the other students in the recommended class and whether they could observe the class (id.). Comments provide that "[a]fter further discussion, the CSE recommended the special class and reviewed the goals and objectives" (id.).

By letter dated June 17, 2005 to petitioners, respondent's director of special education provided a profile report of students attending the special class recommended for petitioners' daughter (Parent Ex. 19). In a June 20, 2005 letter, petitioners advised respondent's director of special education that the proposed special class was inappropriate (Parent Ex. 18). They indicated that their daughter would be the only girl in the class and that their daughter's learning profile was different from the other students in the class (id.).

On June 21, 2005, respondent's director of special education sent petitioners a letter advising them of the June 2005 CSE's recommendation for services and seeking their consent for services (Parent Ex. 17). In the letter, he summarized the events of the June 2005 CSE meeting with respect to the unavailability of the additional parent member and offered to have the CSE reconvene with a parent member present (id.).

In a letter dated July 12, 2005 to respondent's director of special education, petitioners identified discrepancies between the discussions at the May and June 2005 CSE meetings and the summary of those discussions reflected on the June 2005 IEP (Parent Ex. 15). They attached a June 30, 2005 letter from the private psychologist who accompanied them to the June 2005 CSE meeting which summarized her recollection of the meeting (Parent Ex. 16). Petitioners advised respondent's director of special education that they disagreed with the proposed program (id. at p. 3). They indicated that they had enrolled their daughter in a private school for the 2005-06 school year and that they would be filing a request for an impartial hearing to seek reimbursement (id.). Respondent's director of special education responded in a letter dated July 14, 2005 indicating that

he disagreed with many of petitioners' assertions and characterizations, and that he would attach petitioners' letter to the June 2005 IEP as an addendum (Dist. Ex. 26).

The student began attending Windward for the 2005-06 school year (Parent Ex. 6). On November 7, 2005, petitioners again advised respondent's director of special education that they believed that respondent's recommendation for their daughter for the 2005-06 school year did not appropriately address her special education needs (Dist. Ex. 24). They indicated that they had placed their daughter at Windward for the 2005-06 school year and requested an impartial hearing to consider the issue of tuition reimbursement (id.). Petitioners subsequently withdrew their November 7, 2005 due process complaint notice (Dist. Ex. 22).

The same private psychologist that evaluated the student in May and June 2005 met with the student on November 4, 2005 for a follow-up interview and to administer the WRAT 3 (Parent Ex. 14). The evaluator reported that the student's academic functioning appeared to be stable, in the low average to solidly average range (id.). She also reported that the student still presented as a somewhat anxious and fidgety child (id.). The evaluator indicated that the student appeared to be happy and that the student's demeanor was completely altered from when she had tested the student earlier in the year (id.). The evaluator noted that the student demonstrated a clear awareness about learning difficulties and conveyed a sense of relief and comfort at being able to be part of a group of children who shared some of the struggles that she had experienced in the classroom (id.).

On January 25, 2006, the student was observed by one of respondent's school psychologists at Windward during a reading and writing class as part of the student's annual review (Parent Ex. 9). The observer reported that the student appeared easily distracted by extraneous noise (id.). The student's teacher advised the observer that the student could be internally and externally distracted (id.).

In a February 2006 progress report from Windward, the student's reading/skills teacher reported that the student had difficulty with tasks that required inferential thinking (Parent Ex. 8). She indicated that skills such as drawing conclusions and making predictions would be areas of concentration during the following semester (id.). The student's math teacher reported that the student's work in class had been extremely variable (id. at p. 4). He indicated that at times the student's language difficulty strongly impeded her ability to solve a problem correctly (id.).

The CSE convened on June 7, 2006 for the student's annual review and to develop an IEP for the 2006-07 school year (Parent Ex. 4). It determined that the student was eligible to continue to receive special education services as a student with a learning disability (id. at p. 1). The CSE recommended that the student be placed in respondent's school with resource room services (5:1) four times per week for 45 minutes (id.). It further recommended that the student participate in all general education programs (id. at p. 2). Comments from the CSE meeting note that the placement recommendation was suggested to facilitate a move to a parallel class in the event the student experienced increased academic difficulty (id. at p. 5). Comments further note that if the student returned to respondent's schools for the 2006-07 school year, the CSE would reconvene after six weeks to review her program (id.). The IEP developed as a result of the June 2006 CSE meeting included annual goals to address the student's study skills, reading, writing, and mathematics needs (id. at pp. 6-9).

By electronic mail dated July 18, 2006, petitioners advised respondent's director of special education that they were unable to accept the June 2006 IEP (Dist. Ex. 8). In an August 3, 2006 response to the director of special education's request for an explanation of their disagreement, petitioners set forth their reasons for rejecting the June 2006 IEP (Dist. Ex. 2).

On August 9, 2006, petitioners filed a due process complaint notice amending their June 22, 2006 due process complaint notice seeking tuition reimbursement for the 2005-06 and 2006-07 school years as well as "transportation relief" (Parent Ex. 1). With respect to the 2005-06 school year, petitioners listed numerous allegations including that respondent failed to ensure the full attendance of the mandated members of the CSE, engaged in impermissible "predetermination," that the proposed class was "skewed in terms of available peers," that the CSE failed to properly develop appropriate goals and objectives with petitioners' full participation, and that the "proposed classroom was not an appropriate placement to meet [the student's] unique and individual needs" (*id.* at pp. 3-5). For the 2006-07 school year, petitioners asserted that respondent "repeated a number" of the same "problems" (*id.* at p. 5).

The impartial hearing began on October 23, 2006 and concluded on March 1, 2007, after seven days of testimony. In November 2006, while the impartial hearing was pending, respondent's director of special education advised petitioners that the CSE was planning for their daughter's annual review and requested permission to conduct an observation of their daughter at Windward (Joint Ex. 1 at pp. 1, 5). In a letter dated December 5, 2006, petitioners advised respondent's director of special education that they would provide consent if respondent agreed not to testify about the observation or submit any documents in connection with such observation at the impartial hearing for the 2005-06 and 2006-07 school years (*id.* at p. 2). In a response dated December 18, 2006, respondent's director of special education requested that petitioners provide unrestricted consent (*id.* at p. 6). By letter dated February 16, 2007, petitioners granted unrestricted consent for additional information for the exclusive purpose of the annual review for the 2007-08 school year (*id.* at p. 7). During the impartial hearing, one of petitioner's witnesses testified that she observed the student at Windward in December 2006 (Tr. p. 1204). Respondent objected to testimony relating to the witness's observation. The impartial hearing officer permitted the witness to testify as a fact witness with the understanding that the issue of obtaining her opinion regarding the appropriateness of the private school would be resolved at a later time (IHO Decision at p. 46). The witness provided an opinion on direct examination (Tr. p. 1255), and was cross-examined (Tr. pp. 1260-83).

The impartial hearing officer rendered his decision on May 3, 2007. With respect to the 2005-06 school year, the impartial hearing officer found that the June 14, 2005 CSE was improperly composed due to the absence of an additional parent member and that the IEP developed by the invalidly composed CSE was a nullity (IHO Decision at p. 25). He also found that the discussion of placement impermissibly preceded the "flushing out" of the goals and objectives (*id.* at p. 28). In addition, the impartial hearing officer determined that the student was not an appropriate candidate for the recommended class when compared to the composition of the class contained in the class profile (*id.* at p. 30). He further found that the goals on the June 2005 IEP did not give any indication of where the student was expected to be one year from the date of the goal, and that such deficiency applied to all of the goals on the June 2005 IEP and deprived the student of an appropriate IEP for the 2005-06 school year (*id.* at p. 31). The impartial hearing officer also found that Windward was an appropriate placement for the student for the 2005-06

school year and that petitioners' conduct did not bar their claim for tuition reimbursement (*id.* at p. 35).

With respect to the 2006-07 school year, the impartial hearing officer found that the goals on the June 2006 IEP did not give any indication of where the student was expected to be one year from the date of the goal, that such deficiency applied to all of the goals on the June 2006 IEP and deprived the student of an appropriate IEP for the 2006-07 school year (IHO Decision at p. 37). He also found that Windward was an appropriate placement for the student for the 2006-07 school year (*id.* at p. 42), but that equitable considerations weighed against petitioners requiring dismissal of the tuition reimbursement claim for that school year (*id.* at p. 49).

Petitioners appeal from the impartial hearing officer's determination that equitable considerations weighed against them with respect to the 2006-07 tuition reimbursement claim because they declined to grant consent to permit respondent to observe their daughter at Windward during the 2006-07 school year.

Respondent cross-appeals from the impartial hearing officer's findings that the 2005-06 IEP was a nullity due to the lack of a parent member, that the CSE's recommendation for the 2005-06 school year was deficient, that the student was not appropriately grouped in the recommended special class for the 2005-06 school year, that the goals contained in the 2006-07 IEP were deficient, that petitioners demonstrated that Windward was appropriate for both school years and that petitioners' conduct in the development of the 2005-06 IEP did not preclude an award of tuition reimbursement.

Petitioners filed an answer to respondent's cross-appeal. They reiterated their position that the impartial hearing officer's decisions and findings with respect to the 2005-06 school year should be affirmed and that his finding that equitable considerations precluded an award for tuition reimbursement for the 2006-07 school year should be reversed.<sup>1</sup>

First I will address respondent's cross-appeal. The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)<sup>2</sup> is to ensure that students with disabilities have available to them a free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; see *Schaffer v. Weast*, 546 U.S. 49, 51 [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,

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<sup>1</sup> In petitioners' reply memorandum annexed to their answer to respondent's cross-appeal, petitioners ask that I recuse myself. I have considered petitioners' request and find no basis for recusal (see 8 NYCRR 279.1).

<sup>2</sup> On December 3, 2004, 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]). Some of the relevant events in the instant appeal took place prior to the effective date of the 2004 amendments to the IDEA, and therefore the provisions of the IDEA 2004 do not apply. The newly amended provisions of IDEA 2004 apply to the relevant events that took place after the July 1, 2005 enactment date. Citations in this decision are to the newly amended statute unless otherwise noted.

provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];<sup>3</sup> see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>4</sup>

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]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15).

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<sup>3</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

<sup>4</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]).

The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that 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 Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Respondent appeals from the impartial hearing officer's determination that the June 2005 IEP was a nullity due to the absence of an additional parent member. Although not required by the IDEA (20 U.S.C. § 1414 [d][1][B]; see 34 C.F.R. § 300.344), New York State law requires the presence of an additional parent member on the committee that formulates a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Application of the Bd. of Educ., Appeal No. 05-058). New York law provides that membership of a CSE shall include an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). Parents have the right to decline, in writing, the participation of the additional parent member at any meeting of the CSE (8 NYCRR 200.5[c][2][v]).

No additional parent member attended the June 2005 CSE meeting. The record shows, however, that petitioners declined respondent's offer to reschedule the meeting at a time when a parent member could participate, though they did not make this declination in writing (Parent Ex. 20 at p. 5). I note that when respondent's director of special education advised petitioners in writing of the June 2005 CSE's recommendation, he again offered to have the CSE reconvene with a parent

member present (Parent Ex. 17). The record shows that the private psychologist who evaluated the student in May and June 2005 attended the June 2005 CSE meeting with petitioners during which she reviewed the results of her evaluation and made various recommendations (Parent Exs. 16; 20 at p. 4). In addition, petitioners questioned some of the goals and objectives and modifications were made (Parent Ex. 20 at p. 6). I note that petitioners are familiar with the CSE process and knowledgeable about IEP development (Tr. pp. 1030-31). Under the circumstances, the record does not demonstrate that the composition of the CSE resulted in a loss of educational opportunity for the student or infringed on petitioners' ability to participate in the CSE (see Mills, 2005 WL 1618765 at \*5).

Respondent also appeals from the impartial hearing officer's determination that the substantive discussion of placement at the June 2005 CSE meeting impermissibly preceded review of the goals and objectives for the 2005-06 school year. In determining the educational placement of a student, the school district must ensure that the placement is based upon the student's IEP (34 C.F.R. § 300.116[b][2]). The record shows that the CSE initially convened for the student's annual review for the 2005-06 school year in May 2005 (Parent Ex. 20). The record further shows that at that meeting petitioners were provided a CSE draft data form which included goals and objectives (Parent Ex. 27 at pp. 8-10). As noted above, when the CSE reconvened in June 2005, the private psychologist reviewed the results of her evaluation which included a program recommendation (Parent Exs. 20 at p. 5; 23). The CSE discussed the option of a special class placement and recommended that the student be placed in a special class (Parent Ex. 20 at p. 6). It also reviewed the goals and objectives and made slight modifications (*id.*). While there is information in the record that the June 2005 CSE discussed the option of a special class placement before reviewing the goals and objectives, the record demonstrates that the placement recommendation was based upon the student's IEP. I note that the CSE considered continuing the student in a regular class with supportive and resource room services, but did not believe that her needs could adequately be addressed with push-in services (Parent Ex. 20 at p. 2). I also note that in their July 12, 2005 letter to respondent's director of special education identifying discrepancies between the discussions at the May and June 2005 CSE meetings and the summary of those discussions reflected on the June 2005 IEP, petitioners do not raise concerns about the placement recommendation preceding the development of the goals and objectives (Parent Ex. 15).

In addition, respondent appeals from the impartial hearing officer's determination that the student was not an appropriate candidate for respondent's special class for the 2005-06 school year in light of her learning characteristics and social development. State regulations provide that students who are placed together for purposes of special education are to be grouped by similarity of individual needs, including social needs, and that the size and composition of special classes are to be based on the similarity of the individual needs of the students, including their levels of social development (see 8 NYCRR 200.6[a][3] and [g][2]; see also 8 NYCRR 200.1[ww][3]). As discussed below, the record does not show that the composition of respondent's special education class renders that recommended placement inappropriate. The record shows that the student's verbal abilities are in the high average range of cognitive functioning and her perceptual abilities are in the borderline range (Parent Ex. 23 at p. 3). The record also shows that attention and emotional factors influence the student's functioning (*id.* at p. 7). The June 17, 2005 class profile for the class recommended by respondent for the 2004-05 school year indicated that nine of the students enrolled in the class at that time were classified as having a learning disability (three students), an other health impairment (two students), a speech and language impairment (three

students), or an orthopedic impairment (one student) (Dist. Ex. 31 at pp. 1-2, 4, 6, 9-10, 12, 14, 17, 20). Several of the students' cognitive test results ranged from the average to superior range of cognitive ability (id. at pp. 2, 4, 7, 12, 13). Some of the students had attention difficulties (id. at pp. 2, 4, 12, 13, 14) and some needed small group instruction and supports such as graphic organizers, preplanning, sequential steps when writing paragraphs and stories, manipulatives, picture representation regarding math concepts, breaking down or "chunking" information into manageable steps, multisensory instruction, repetition and reteaching (id. at pp. 2, 4, 6, 7, 8, 9, 10, 11-13, 17-18, 20). Two of the students in the class were girls (id. at pp. 2, 20). The record does not show that the composition of the recommended class would result in petitioners' daughter being placed in a class composed of students of dissimilar needs. I find that the record does not demonstrate that respondent's proposed class was inappropriate for petitioners' daughter.

Respondent also appeals from the impartial hearing officer's determination that the goals included on the June 2005 IEP were deficient because they did not indicate a target achievement level against which progress could be measured (IHO Decision at p. 31). An IEP must include a statement of measurable annual goals (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]). The impartial hearing officer found that the June 2005 IEP contained sufficient information for understanding the student's present levels of performance (IHO Decision at p. 30). To address the student's identified needs, the June 2005 IEP contained annual goals and objectives in reading, writing, mathematics and social/emotional/behavioral needs (Parent Ex. 20 at pp. 6-8). The June 2005 IEP had two reading goals with a total of nine detailed objectives or benchmarks, two writing goals with a total of eight detailed objectives or benchmarks, one mathematics goal with 12 detailed objectives or benchmarks, and one social/emotional/behavioral goal with two detailed objectives or benchmarks (id.). Corresponding objectives further clarified the goals. Each objective specified a skill the child needed to demonstrate, and included percentage of accuracy required, as well as expected target dates (id.). For example, a reading goal to address word recognition and decoding skills has a corresponding objective specifying that the student demonstrate a specific decoding skill with 80 percent mastery evaluated by classroom and standardized tests assessed by the regular and special education teacher by June 15 (id. at p. 6). The goal to address mathematical concepts, reasoning and computation has a corresponding objective specifying that the student understand a specific mathematical concept with 70 percent accuracy evaluated by classroom and standardized tests assessed by the regular and special education teacher by June 15 (id.). While the annual goals on the June 2005 IEP should have included information about the level of performance expected to be reached by the student during the year the IEP was in effect, the objectives are specific and provide sufficient information to measure the student's performance (Application of a Child with a Disability, Appeal No. 07-022; Application of a Child with a Disability, Appeal No. 05-038). Under the circumstances, I am unable to find that any inadequacy in the annual goals rises to the level of a denial of a FAPE (see W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147 [S.D.N.Y. 2006]).

I have reviewed the June 2005 IEP and find that it accurately reflects the results of evaluations to identify the student's needs. I also have reviewed the content of the goals and objectives and find that they are appropriate and related to the student's needs. In addition, I have reviewed the June 2005 IEP recommendations and find that the recommended program offered appropriate special education services. I have considered petitioners' challenges to the June 2005 IEP and I am not persuaded that their daughter was not offered a FAPE for the 2005-06 school year.

The impartial hearing officer also found that the annual goals on the June 2006 IEP were deficient because they did not indicate a target achievement level against which progress could be measured. Pursuant to IDEA 2004, in addition to including a statement of measurable annual goals, an IEP must include a description of how the child's progress toward meeting the annual goals will be measured (20 U.S.C. § 1414[d][1][A][i][II], [III], see also 8 NYCRR 200.4[d][2][iii][b]). As with the June 2005 IEP, the impartial hearing officer determined that the June 2006 IEP sufficiently indicated the student's present level of performance based on information available at the time of the June 2006 CSE meeting (IHO Decision at p. 36). In order to address the student's identified needs, the June 2006 IEP contained annual goals in the areas of study skills, reading, writing, and mathematics (Parent Ex. 4 at pp. 6-9). Each goal contained a specific evaluation criterion, evaluation procedure and an evaluation schedule (id.; see 8 NYCRR 200.4[d][2][iii][b]). Evaluation Criteria is described in the IEP as how well and over what period of time the student must demonstrate performance (Parent Ex. 4 at p. 6). "Procedures to Evaluate Goal" is described in the IEP as the method that will be used to measure progress (id.).

Respondent's special education teacher who taught respondent's parallel curriculum classes as well as a learning resource center class and who was a push-in collaborative teacher for social studies testified about her understanding of what each goal was addressing and how she would present and assess individual goals for the student (Tr. pp. 1472-96). She testified that she would likely assess a reading goal involving multisyllabic words and syllable identification that had an anticipated success rate of 80 percent over five weeks by keeping a checklist, conducting an error analysis and recording missed words (Tr. p. 1480; Parent Ex. 4 at p. 7). Regarding the goal pertaining to the student's need to refocus without prompts when distracted (Dist. Ex. 13 at pp. 6-7), the special education teacher testified that the progression would be from needing lots of teacher support to needing less teacher support (Tr. p. 1478). She indicated that to assess the goal she would go into the student's mainstream class and do some recorded observations as well as ask the student's team for feedback (Tr. p. 1479). She indicated that she did not believe that study skill goals could be worked on in isolation, that they are worked on "with the content and in the context of the classroom," and are "recycled over and over again in different settings" (Tr. pp. 1478-79). Based upon the record before me, I find that the annual goals on the June 2006 IEP are measurable and include a description of how the student's progress toward meeting the annual goals will be measured during the year the IEP is in effect.

The impartial hearing officer indicated that despite his determination that the goals in the June 2006 IEP were deficient, the record demonstrated that the recommendations for the 2006-07 school year were otherwise appropriate. I have reviewed the June 2006 IEP and find that it accurately reflects the results of evaluations to identify the student's needs. I also have reviewed the goals and find that they are appropriate and related to the student's needs. In addition, I have reviewed the June 2006 IEP recommendations and find that the recommended program offered appropriate special education services. I have considered petitioners' challenges to the June 2006 IEP and I am not persuaded that the record demonstrates that their daughter was not offered a FAPE for the 2006-07 school year.

Based on the information before me, I find that petitioners have not prevailed with respect to the first criterion of the Burlington/Carter analysis for an award of tuition reimbursement for the 2005-06 and 2006-07 school years. Having so determined, the necessary inquiry is at an end and there is no need to reach the issue of whether Windward was an appropriate placement (see

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 have considered the parties' other contentions, including the arguments referenced by petitioners in footnote 8 of their petition, and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled.

**Dated:** Albany, New York  
September 24, 2007

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