



The University of the State of New York

The State Education Department State Review Officer

No. 07-078

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 Somers Central School District

Appearances:

Linda A. Geraci, Esq., attorney for petitioners

Keane & Beane, PC, 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 costs at the Windward School (Windward) for the 2006-07 school year. The appeal must be dismissed.

At the time of the commencement of the impartial hearing in January 2007, the student was 12 years old and enrolled in the sixth grade at Windward (Tr. pp. 26, 312). The record describes her as a delightful and engaging student, who is social and friendly (Joint Ex. 18 at p. 3). The student reportedly is of average cognitive ability (Tr. pp. 103, 279). She has a language-based learning disability, which affects her reading, decoding, written expression and spelling ability (Tr. p. 46). Math and reading comprehension are areas of strength for the student (Tr. p. 52; Joint Ex. 7 at p. 3). Her eligibility for special education services and classification as a student with a learning disability (LD) are not in dispute in this proceeding (8 NYCRR 200.1[zz][6]; see Tr. pp. 33, 46).

The student attended schools in respondent's district from kindergarten through the third grade (Tr. pp. 313, 326). Respondent's Committee on Special Education (CSE) convened on June 7, 2001, pursuant to an initial referral, to develop the student's program for the 2001-02 school year (second grade) (Joint Ex. 37). The resultant individualized education program (IEP) indicated that the student was eligible for special education services as a student with an LD (id. at p. 1). The CSE recommended placement in an inclusion class in respondent's district, with a special class for language arts and math for the 2001-02 school year (id.). The CSE also recommended related

services of speech-language therapy two times per week for 30-minutes in an inclusion setting (id.).

On April 22, 2002, respondent's CSE met for the student's annual review and to prepare her program for the 2002-03 school year (third grade) (Joint Ex. 36). Petitioners attended the meeting as did the private psychologist who had evaluated the student in March 2002 (id. at p. 3). The April 2002 IEP stated that while her overall functioning was in the average range, the student required language services to address language deficit areas (id. at p. 2). The resultant IEP also noted that the student had significant delays and that she required some subjects to be taught within a regular education environment, but with a small teacher-to-student ratio and minimal distractions in order to progress academically (id. at p. 3). Respondent's CSE recommended placement in a 12:1 inclusion science class and a 12:1 inclusion social studies class, as well as placement in a 12:1+1 special class for language arts and math (id. at p. 1). The CSE also recommended one weekly 30-minute session of speech-language therapy in a group in addition to two 45-minute sessions of speech-language therapy in a group to be delivered in a non-integrated location (id.). According to the April 2002 IEP, petitioners and the student's private psychologist at first opined that she required a more intensive language program, and as a result, the meeting was tabled in order to explore all possible options (id. at p. 3). Despite their earlier hesitations with respect to the proposed program, the April 2002 IEP noted that petitioners returned and agreed to the CSE's recommendation (id.).

On April 22, 2003, respondent's CSE met for the student's annual review and to develop her program for the 2003-04 school year (fourth grade) (Joint Exs. 34; 35). The April 2003 CSE proposed placement in a 15:1 inclusion science class, as well as placement in a 15:1 inclusion social studies class (Joint Ex. 34 at p. 1). A 12:1+1 special class was recommended for language arts and math (id.). The CSE also recommended twice weekly 45-minute sessions of speech-language therapy in a group in conjunction with one weekly 30-minute session of speech-language therapy in a group (id.). The student's teacher noted progress in the areas of sight words, written expression, listening comprehension and expressive vocabulary (id. at p. 3). The April 2003 IEP further described the student as "a consistently hard worker [who] has a good relationship with her peers" (id.). However, her teachers noted weaknesses in her reading comprehension, organization, decoding, and phonemic awareness (id.). Despite making progress in math computation, the student continued to struggle with math problem solving activities (id.). The April 2003 CSE also noted that the student's overall reading progress was "slow" (id.). Consequently, the April 2003 CSE determined that given the student's significant academic deficits, she required the support of an inclusion program with special class instruction in language arts and math; however, they felt that the support she received from the special education teacher in the science and social studies classes enabled her to participate with non-disabled peers in a productive manner (Joint Ex. 35 at p. 3). Petitioners did not accept the April 2003 IEP, and instead opted to send their daughter to Windward (Tr. p. 326).

Respondent's CSE reconvened on September 2, 2003 in response to an August 2003 letter from petitioners, in which they indicated that they intended to seek tuition reimbursement for their daughter's placement at Windward (Joint Ex. 35 at p. 1). Petitioners did not participate at the September 2, 2003 CSE meeting. The CSE recommended additional programmatic interventions be added to the student's IEP for the 2003-04 school year (id.). Respondent's CSE recommended placement in an 8:1 inclusion class for science and an 8:1 inclusion class for social studies for the

2003-04 school year (*id.* at p. 1). Respondent's CSE also proposed placement in a 12:1+1 special class for language arts and math as well as a 3:1 special class for reading (*id.*). The resultant IEP noted that the student's small class for reading would occur prior to the start of the day (*id.*). Additionally, respondent's CSE recommended the provision of a 1:1 aide to support the student in science and social studies (*id.*). Two 45-minute sessions of speech-language therapy per week in a group were also proposed as well as one additional weekly 30-minute session of speech-language therapy in a group (*id.*). The following testing accommodations were included: directions read and explained, questions to be read, and extended time (1.5) on tests (*id.*). Repetition of material was also added as a program modification (*id.* at pp. 1-2). The September 2, 2003 IEP noted that petitioners had chosen to unilaterally enroll their daughter at Windward for the upcoming school year (*id.* at p. 1). Pursuant to petitioners' request, respondent's CSE met on September 17, 2003 to review the student's program with petitioners, who were unable to attend the September 2, 2003 CSE meeting (Joint Ex. 11 at p. 4). At the September 2, 2003 CSE meeting, petitioners stated that their daughter would attend Windward during the upcoming school year (*id.*).

On May 5, 2004, respondent's Sub Committee on Special Education (sub-CSE) convened for the student's annual review and to develop the student's program for the 2004-05 school year (fourth grade) (Joint Ex. 33).¹ The resultant IEP indicated that petitioners had decided to unilaterally enroll their daughter at Windward (*id.* at p. 1). The May 2004 sub-CSE recommended placement in an 8:1 inclusion science class and an 8:1 inclusion social studies class (*id.*). Respondent's sub-CSE also proposed placement in a special 12:1+1 class for language arts and math (*id.*). A 3:1 special class for reading was also recommended (*id.*). In addition, a 1:1 aide would be provided to the student to support her in science and social studies (*id.*). Two weekly 45-minute sessions of speech-language therapy in a group of five were also recommended in addition to one weekly 30-minute session of speech-language therapy in a group (*id.*). Testing accommodations included directions to be read and explained, questions to be read, as well as extended time (1.5) on tests (*id.* at p. 2). Repetition of material was also added as a program modification (*id.*). The May 2004 IEP indicated that petitioners agreed to have the student evaluated by respondent's staff during the 2004-05 school year (*id.* at p. 3). The resultant IEP also noted that although respondent's CSE had requested evaluations from Windward, they had yet to be received at the time of the May 2004 CSE meeting (*id.*). Consequently, meeting members agreed to reconvene to review the evaluation results (*id.*).

A May 18, 2004 administration of the Stanford Diagnostic Reading Test yielded scores in the 13th percentile in vocabulary and the 51st percentile in comprehension, with a total score in the 33rd percentile (Joint Ex. 32 at p. 3). A May 26, 2004 administration of the Stanford Diagnostic Math test resulted in the 95th percentile in procedures; in the 83rd percentile in problems and with a total score in the 90th percentile (*id.*). A July 2004 administration of the Wide Range Achievement Test - 3 revealed scores in the 1st percentile in reading (decoding), the 5th percentile in spelling; and the 13th percentile in arithmetic (numerical operations) (*id.*).

On October 6, 2004, respondent's sub-CSE reviewed the student's July 2004 report card from Windward and the results of standardized tests that had been completed in May and July

¹ I note that the record indicates that the student repeated either third or fourth grade at Windward. A February 2005 psychological evaluation of the student indicates that the student repeated the fourth grade at Windward (Joint Ex. 49 at p. 2), however, the student's mother testified that her daughter repeated the third grade at Windward (Tr. p. 372).

2004 (id. at p. 4). The October 2004 sub-CSE determined that the student had made uneven progress and that she continued to have difficulty with word retrieval skills, using simple outlines, math applications and developing more complex sentences (id.). It was further noted that the student's attention varied, but that she was easily redirected (id.).

A January 2005 progress report from Windward noted that the student was becoming a more fluent reader through the use of word lists, phrase lists, sentence lists and controlled text (Joint Ex. 24 at p. 5). The January 2005 progress report further indicated that the student sometimes read impulsively, which in turn caused her to misread words; however, the report stated that the accuracy of her decoding was substantially better when she would "track" the language with her finger (id.). The student frequently needed to be refocused and to be reminded to work more carefully (id.). During her writing class, she was learning brainstorming and outlining techniques to help her organize her thoughts prior to writing a paragraph (id.). The student's math teacher noted that the student had made nice progress during the semester, and that she had worked hard to commit her multiplication facts to memory (id. at p. 7). She had demonstrated an understanding of place value and could successfully solve addition, subtraction, multiplication and division problems (id.). The student's math teacher also observed that the student needed to be reminded to focus on the work being presented (id.).

A psychological evaluation of the student was obtained by respondent on February 23, 2005 (Joint Ex. 49). The evaluator described the student as cheerful, talkative, and easily engaged in the testing (id. at p. 2). She reported that the student expressed a strong wish to be returned by the next year to the grade she would have been in had she remained in the public school and that her friends who attend respondent's public school "want her to be with them, going to 6th grade together" (id.). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension score of 98, a perceptual reasoning score of 104, a working memory score of 97, a processing speed score of 85, and a full scale IQ score of 96, indicating that the student was functioning in the average range of cognitive ability (id.). The evaluator opined that due to the pronounced scatter among subtest scores, the student's full scale IQ score was less useful in understanding the student's true abilities than the specific subtest and domain index scores (id. at p. 3). The evaluator reported relative strengths in verbal reasoning and problem solving for real life situations, seeing patterns in symmetrical, visually presented materials, short-term memory for rote material, and sorting two or more familiar objects presented in pictures into classes or groups (id. at p. 5). The evaluator's recommendations included breaking down all new material and assignments into small units, drilling of new material, checking for understanding of oral or written directions, helping the student plan, organize, and edit work, allowing extended time and alternative settings for tests, using a calculator for math tests, encouraging positive "self talk" when the student encounters a challenge, and associating materials with her own experience (id. at p. 7).

The evaluator also conducted an educational evaluation of the student on March 11, 2005, which included formal testing, a behavioral observation, and a review of the student's educational files (Joint Ex. 15). Administration of the Wechsler Individual Achievement Test – Second Edition (WIAT-II) yielded standard (and percentile) subtest scores of 75 (5) for word reading, 116 (86) for reading comprehension, 79 (8) for pseudoword decoding, 83 (13) for numerical operations, 76 (5) for math reasoning, 77 (6) for spelling, 98 (45) for written expression, and 118 (88) for listening comprehension (id. at p. 2). The evaluator reported that the student's "uneven"

performance on the educational battery reflected significant discrepancies between processing strengths and weaknesses in auditory, visual, and language domains and opined that some of the compensatory strategies utilized by the student were highly effective while others were not (*id.* at p. 5). The evaluator noted that when reading, the student performed best when she could read aloud to hear mistakes and correct them, using familiar words surrounding the new ones to understand what she was reading (*id.*). The student's decoding skills were aided when words were presented in a meaningful context so that she could analyze and apply problem solving and social skills (*id.*). The evaluator also reported that the student did not exhibit automaticity in math and relied on her fingers (*id.*).

The evaluator made the following recommendations for the student: elimination of time limits on tests; reading directions to her as needed; picture and static cues to enhance understanding of new material; repetition and practice of new material presented in small increments; encouraging verbalization for all intellectual tasks; reading aloud whenever possible; asking her questions regarding comprehension at regular, short intervals during reading; encouraging her to write notes at intervals during her reading; and maximizing opportunities for creative writing to apply concepts and information in readings and classroom materials to tie them to her life experience (*id.* at p. 6).

On May 9, 2005, respondent's sub-CSE met for the student's reevaluation and annual review and to develop her program for the 2005-06 school year (Joint Ex. 9 at p. 1). Evaluation results were reviewed, and the May 2005 sub-CSE found that her performance on the March 2005 educational evaluation was "extremely uneven, reflecting significant discrepancies" (*id.* at p. 4). It was further determined that the student had evidenced minimal progress during the 2004-05 school year (*id.*). Respondent's sub-CSE recommended placement in an 8:1 inclusion science class and an 8:1 inclusion social studies class in respondent's district for the 2005-06 school year (*id.* at p. 1). Respondent's sub-CSE also proposed placement in a self-contained 12:1+1 class for language arts and math and a self-contained 3:1 class for reading (*id.*). Two weekly 45-minute sessions of speech-language therapy in a group of five were also recommended in addition to one weekly 30-minute session of speech-language therapy in a group (*id.*). Proposed testing accommodations included the following: directions to be read and explained, questions to be read, and extended time (1.5) on testing (*id.* at p. 2). Repetition of material was also added as a program modification (*id.* at p. 1). Respondent's assistant principal noted that although the student was easily distracted, she could be brought back to task (*id.* at p. 4). The May 2005 IEP described the student as a "slow processor," who could learn rules, but noted that she had difficulty integrating them into daily practice when decoding words (*id.*). Therefore, the sub-CSE concluded that the student's poor decoding skills interfered with her comprehension (*id.*). Lastly, the sub-CSE recommended a speech-language evaluation of the student (*id.*).

The hearing record reflects that for the 2005-06 school year, Windward decided to retain the student in the fifth grade (*id.* at p. 1). A June 2005 progress report from Windward revealed that the student had greatly improved her reading skills (Joint Ex. 24 at p. 5). Her language arts teacher also noted that the student's decoding and word attack skills had improved significantly, which enabled her to read orally with greater fluency (*id.*). In addition, the student's language arts teacher described her comprehension as "quite good," but noted that she had a more difficult time when she read silently (*id.*). The language arts instructor also observed that the student's attention deficits interfered with her availability in class (*id.*). She further noted improvement in the

student's written expression; however, the language arts teacher indicated that the student had difficulty sequencing her thoughts in a grammatically correct manner on paper (id.). The student's math teacher reported that although the student needed to be reminded about the procedures, she demonstrated an understanding of the concepts introduced (id. at p. 7). Her math teacher also observed that the student had difficulty staying focused, and missed explanation, which led to some confusion (id.).

In July 2005, respondent's speech-language pathologist conducted a triennial speech-language evaluation of the student. The evaluator administered the Clinical Evaluation of Language Fundamentals 4 (CELF-4), the Peabody Picture Vocabulary Test-III A (PPVT-III A), and the Expressive Vocabulary Test (Joint Ex. 17 at p. 2). Results from the tests indicated that the student's overall language functioning was within the average range (id.). The student achieved a standard (and percentile) score of 101 (53) on the Peabody Picture Vocabulary Test (id.). On the Expressive Vocabulary Test, the student obtained a standard (and percentile) score of 90 (25) (id.). All but two subtest scores from the CELF-4 were within the average range (id. at p. 2). Weaknesses were noted in subtests measuring concepts and following directions (SS 5) and understanding paragraphs (SS 6) (id. at pp. 2-3). The student's performance also yielded results in the low average range on the receptive language subtest, as she obtained a standard (and percentile) score of 85 (16) (id. at p. 2). The evaluator noted these discrepancies in the student's abilities and recommended that she continue to receive language services to remediate her difficulties in the areas of concepts and following directions (id. at pp. 3-4). The evaluator also recommended that speech-language services be provided to the student for two sessions per week (id. at p. 4).

In a February 2006 progress report, the student's reading and skills teacher commented that the student was becoming a better reader and that she was improving her accuracy and fluency in the reading materials presented (Joint Ex. 26 at p. 2). The reading and skills teacher further reported that the student had learned many new patterns and strategies for syllabication, and that she was more consistently applying those strategies when reading unfamiliar words in context (id.). The student's comprehension was described as "good," despite some oral reading errors (id.). Her reading and skills teacher also stated that there were times when the student was inattentive in class and required refocusing (id.). The student's writing teacher indicated that the student had demonstrated improvement in her ability to use proper syntax and that she could create more elaborate sentences (id. at p. 3). Although the student had good ideas, which she enjoyed expressing on paper, the student's writing teacher observed that she often confused spoken language with what is expected in written language (id.). The student's math teacher described her as a "very energetic and enthusiastic student" (id. at p. 4). He also commented that the student had good computational skills with all four mathematical operations (id.). Although the student demonstrated a good grasp of the procedures associated with long division and solving one-step algebraic equations, her language difficulties continued to impede her ability to solve word problems on a consistent basis (id.). Her science teacher described the student's progress as "satisfactory" (id. at p. 5). The student's science teacher also observed that although the student became distracted at times, she quickly refocused (id.). Although the student's written work was usually complete, the student's science teacher stated that the student occasionally needed reminders to be more thorough (id.).

On March 9, 2006, respondent's assistant director of special services observed the student in an English Language Arts class at Windward (Tr. p. 79; Joint Ex. 46). The class featured a

dictation lesson incorporating blends found in the prefix, medial, and suffix of words (e.g., "ture" in "picture," "ow" in "plow," etc.) and a review of some research topics that had previously been introduced to the class (Joint Ex. 46). The evaluator noted that the student volunteered several times and correctly responded to questions that were posed (Tr. p. 79; Joint Ex. 46). The observer also noted that throughout the period, the student "seemed focused and attended to the lesson at hand" (Joint Ex. 46).

In April 2006, petitioners had their daughter evaluated by a private psychologist, who had previously evaluated the student in March 2002 (Joint Ex. 18 at pp. 1-2). The evaluator administered an extensive battery of tests and reported that administration of the WISC-IV yielded a verbal comprehension score of 108, a perceptual reasoning score of score of 102, a working memory score of 97, a processing speed score of 78, and a full scale IQ score of 95 indicating the student was functioning in the average range of cognitive ability, consistent with scores obtained four years earlier on the WISC-III (id. at pp. 4, 17).

The evaluator determined that the student's scores on subtests measuring attention did not support a diagnosis of an attention deficit disorder but were likely attributable to weaknesses in visual perception rather than failure to sustain attention to task (id. at pp. 5-6). The evaluator reported that the student's executive skills of planning and organization were developing and that she had impressive study skills, which indicated an astute self-awareness in her approach to work (id.). In regards to working memory, the evaluator determined that the student's scores indicated difficulty keeping track of simultaneous demands, which could affect her math computation and writing (id. at pp. 6-7). The evaluator found that the student's visual and auditory memory was strong if information was meaningful to her; however, her recall for unconnected or non-meaningful information such as symbols, letters, numbers, or lists of words was weak, even if such information was repeated (id. at pp. 7-8). He opined that this was indicative of a problem with processing rather than memory (id. at p. 8).

In the area of language, the student presented with discrete deficits in phonological awareness and naming, which affected her reading, learning, and oral expression (id. at p. 8). Although she achieved a score in the average range on a test the evaluator reported as the NEPSY Phonological Awareness Test, which tested her ability to segment sounds, the student's score on the Lindamood Auditory Conceptualization Test was at the third grade level (id.). The evaluator noted that the student had made "impressive progress" in reading, but was still delayed when compared to students of her age and cognitive ability, and her decoding skills were still slow and inaccurate (id.). The evaluator reported that the student struggled to access information in a timely fashion, tending to produce a lot of information, but little that was useful; however, she displayed good memory and listening comprehension for language that was meaningful, connected, and high in context (id. at pp. 8, 10).

The evaluator also reported that significant weaknesses were evident in the student's ability to accurately and rapidly perceive visual information (id. at p. 11). Although the student's score was in the borderline average range on one test of visual perception, which had no time limit (NEPSY Arrows test, SS 8), on visual perceptual tasks with time constraints, (matching symbols, numbers, and letters) the student's performance was significantly diminished (id. at p. 10). The evaluator opined that a student having such difficulty would have a much harder time with the rapid visual processing of letters that is required for fluent reading (id.).

The evaluator administered the Wechsler Individual Assessment Test - Second Edition (WIAT-II) which yielded standard (and percentile) scores of 73 (4) in word reading, 95 (37) in reading comprehension, 87 (19) in pseudoword decoding, 86 (18) in numerical operations, 92 (30) in math reasoning, 81 (10) in spelling, 80 (9) in written expression, and 106 (66) in oral expression (id. at p. 19).

The evaluator opined that the student required a program in which language modifications are seamlessly integrated into all areas of the curriculum and that she continued to need an intensive individualized curriculum emphasizing the automaticity of basic skills in math, spelling, writing, and reading mechanics (id. at pp. 14-15). The evaluator's recommendations included a continued emphasis on "overlearning" for reading and math facts, studying begun well in advance with frequent reviews, extra help in planning and organizing long range assignments, extra help in organizing and writing unified paragraphs and sentences, modification of densely formatted visual pages, use of a laptop computer and spell checker, and provision of extra time for reading, writing, and test taking (id. at pp. 15-16).

Respondent's sub-CSE met on May 22, 2006 for the student's annual review and to develop her program for the 2006-07 school year (sixth grade) (Joint Ex. 31). Petitioners and their attorney were in attendance, and a representative from Windward participated in the meeting by telephone (id. at p. 4). During the May 2006 CSE meeting, the Windward representative summarized the student's most recent progress reports (id.). After she reported on the student's progress at Windward, the Windward representative hung up the telephone and did not participate in the remainder of the meeting (Tr. pp. 82, 120, 606). Respondent's speech-language pathologist reported on the results of the July 2005 speech-language evaluation of the student (Joint Ex. 31 at p. 4). The May 2006 sub-CSE also reviewed the evaluation report of the private psychologist who evaluated the student in April 2006 (id. at p. 5). Due to the private psychologist's recommendation that the student be tested for a central auditory processing disorder (CAPD), the May 2006 sub-CSE agreed to table the meeting and reconvene in June 2006, pending the results of the CAPD evaluation (Tr. pp. 114, 362, 704; Joint Ex. 31 at p. 5).

In a June 2006 progress report from Windward the student's writing teacher reported that "since [the student's] decoding has improved significantly, her writing has begun to reflect her newly acquired skills" (Joint Ex. 27 at p. 3). Her writing teacher also indicated that the student continued to need work on varying sentence structure and using transitions and sentence starters (id.). It was also reported that the student could produce a simple well-constructed paragraph (id.). With teacher assistance, the student was able to recognize and understand her errors; however, she could not revise her work independently (id.). The student's reading teacher observed that the student was reading with greater accuracy, fluency, and expression (id. at p. 2). In addition, her reading teacher commented that the student's decoding of multisyllabic words had significantly improved (id.). She described the student as "an active reader, who asks questions to monitor her understanding of the text" (id.). Her reading teacher also stated that the student was able to make inferences and appropriate predictions (id.). The student's math teacher stated that the student did especially well in the fractional unit, and that she showed a good grasp of solving fractional concepts in all four mathematical operations (id. at p. 4). Nevertheless, the student continued to struggle in solving multi-step word problems on a consistent basis (id.). Her social studies teacher noted that the student came to additional review sessions during her free time and that during class she often volunteered to read aloud (id. at p. 5). She further indicated that the student utilized the

strategy of looking back in the text to answer questions accurately and that she also applied note-taking techniques during lessons (*id.*). According to the student's science teacher, the student generated and organized a substantial amount of informative notes (*id.* at p. 6).

On June 7, 2006, the student received an auditory processing evaluation to determine if auditory processing deficits were contributing to her learning and reading difficulties and to obtain recommendations for additional programs or strategies available to assist the student academically (Joint Ex. 20 at pp. 1-2). The evaluator reported that the student presented as a "well related" and cooperative youngster with a phonological processing disorder, auditory comprehension deficits, and a language processing disorder exhibited by word retrieval impairment (*id.* at p. 6). The evaluator described the student's basic auditory processing skills as "good" (*id.*). The student's hearing was determined to be within normal limits bilaterally with good discrimination in quiet and noise (*id.* at pp. 6-7). The evaluator determined that based on results from administration of the SCAN C (Revised) and the Staggered Spondaic Word Test (SSW), the student did not exhibit an auditory processing deficit (*id.* at p. 7). Results obtained from administration of the Phonemic Synthesis Test and the Lindamood Auditory Conceptualization Test revealed that the student's ability to blend sounds was at the level expected for her age and grade but that her decoding skills were one year below grade level (*id.* at pp. 4-5, 7). The evaluator reported that the student exhibited difficulty manipulating sounds within words which revealed discrimination difficulties and opined that she was not yet proficient with the code for reading but exhibited significant progress from three years ago (*id.* at p. 7).

Administration of the concepts and following directions subtest of the Clinical Evaluation of Language Fundamentals 4 (CELF-4), which assessed the student's ability to follow oral directions, yielded a standard (and percentile) score of 10 (50), placing the student in the average range of ability (*id.* at p. 5). The evaluator described the student's performance on the rapid automatic naming (RAN) subtest of the CELF-4 as "slow and inaccurate," suggesting difficulty with word retrieval and symptomatic of a language processing impairment, however she did not provide a score (*id.* at pp. 6-7).

The evaluator determined the student exhibited deficits in temporal processing (speed of processing), auditory comprehension, word retrieval, and phonemic awareness and she recommended placement in an educational setting with a small student-teacher ratio; speech-language therapy one time per week to work on phonemic awareness, auditory comprehension, and word retrieval; books on tape to stimulate the auditory feedback loop; and word games such as Password, Scattergories and the Simon Auditory Patterning Game to improve temporal processing (*id.* at p. 7).

On June 20, 2006, respondent's sub-CSE reconvened to develop the student's program for the 2006-07 school year (Joint Ex. 7). The student's mother attended the meeting with her attorney (*id.* at p. 5). Although a Windward representative was invited to the June 2006 meeting, no one from Windward took part (Tr. p. 121; Joint Ex. 7 at p. 5). Respondent's sub-CSE reviewed the results of the CAPD evaluation (Joint Ex. 7 at p. 5). The June 2006 sub-CSE described the proposed program to the student's mother, and by telephone, respondent's reading teacher described the reading component to the proposed program (Tr. p. 993; Joint Ex. 7 at p. 5). For the 2006-07 school year, respondent's sub-CSE recommended a 12:1+1 program with inclusion classes in science and social studies, special classes in English, math and reading, and enrollment

in the Learning Center (*id.* at p. 1). The sub-CSE also recommended twice weekly 39-minute sessions of speech-language therapy in a group of five in addition to one 1:1 39-minute session of speech-language therapy per week (*id.*). In order to assist with the student's transition, the sub-CSE recommended counseling on an "as needed" basis (*id.* at p. 2). The student would also receive support from a special education teacher in her science and social studies classes (*id.*). Recommended program modifications included the following accommodations: repetition of material, preferential seating, checking for understanding, directions read/clarified, questions to be read and books on tape (*id.*). The student would also receive the following testing accommodations: directions to be read and explained; questions to be read; and extended time (1.5) on tests (*id.*). Additionally, the student would be able to take her tests in an alternate location with minimal distractions (*id.*). With respect to other program options, the June 2006 sub-CSE considered the regular classroom setting with support services, such as related services, consulting services and a resource room program; however, it determined that the student required a more intensive program in order to address her specific educational needs (*id.* at p. 6). The June 2006 sub-CSE also opined that a special school would be an overly restrictive setting for the student (*id.*). Lastly, annual goals were developed in the following domains: study skills, reading, writing, mathematics, and speech-language skills (*id.* at pp. 6-9). Meeting notes revealed that the student's mother expressed hesitation with the proposed program and the June 2006 IEP further indicated that petitioners had chosen to unilaterally enroll the student at Windward (Tr. p. 97; Joint Ex. 7 at pp. 1, 5).

By letter dated July 31, 2006, the student's father notified respondent's superintendent of schools that petitioners planned to enroll their daughter in the sixth grade at Windward for the 2006-07 school year (Joint Ex. 3 at p. 2). The student's father explained that petitioners were not satisfied that the proposed program would meet their daughter's special education needs (*id.* at p. 1). The student's father stated that the proposed program was "not focused and designed in a like manner to the Orton-Gillingham program she [was] receiving at the Windward School" (*id.*). He further described the recommended program as "similar to the previous, ineffective program she attended during her last two years of school at Somers" (*id.*).

By letter dated August 7, 2006, respondent's CSE Chairperson sent a copy of the draft goals discussed during the June 2006 sub-CSE meeting to petitioners for their review prior to finalization of the June 2006 IEP (Joint Ex. 44).

By letter to respondent's CSE Chairperson dated August 14, 2006, the student's father acknowledged receipt of the proposed goals and indicated that he forwarded the draft goals to petitioners' attorney for review (Joint Ex. 5). He also asked a number of questions regarding the proposed program and further stated that petitioners "would like very much for [their] daughter to return to the Somers School District, when she is ready or when [respondent] is able to provide the adequate education for [their] daughter" (*id.* at p. 2). In an undated letter, respondent's CSE Chairperson responded to the student's father's August 14, 2006 inquiry regarding the proposed program and provided further information about the program (Joint Ex. 6). The CSE Chairperson also reiterated that it was respondent's position that it could education provide an appropriate educational program for the student in respondent's school (*id.* at p 2).

By letter dated August 31, 2006 to petitioners, respondent's CSE Chairperson scheduled a CSE meeting on September 12, 2006 to review the student's proposed program (Joint Ex. 57). On

September 11, 2006, through their attorney, petitioners cancelled the September 12, 2006 CSE meeting (Joint Ex. 58).

By due process complaint notice dated October 10, 2006, petitioners commenced an impartial hearing alleging that respondent failed to offer the student a free appropriate public education (FAPE) (Joint Ex. 1). Petitioners contended, among other things, that the June 2006 IEP was inadequate because the proposed program failed to take into consideration the student's need for placement in small classes to address her severe dyslexia, and that the June 2006 IEP was not sufficiently individualized and intensive enough to allow the student to make meaningful progress in her identified areas of disability, i.e., reading, written expression, math calculation and spelling (id. at p. 2). Petitioners requested tuition reimbursement for their daughter's schooling at Windward for the 2006-07 school year (id. at p. 3).

On January 8, 2007, an impartial hearing convened, and after six days of testimony, concluded on March 20, 2007. By decision dated June 5, 2007, the impartial hearing officer found that respondent offered the student a FAPE for the 2006-07 school year (IHO Decision at p. 24). The impartial hearing officer determined that petitioners failed to establish the existence of any procedural irregularities that impeded their right to meaningfully participate in the creation of their daughter's IEP for the 2006-07 school year (id. at pp. 19-20). Specifically, she found that petitioners and a representative of Windward were invited to each of the CSE meetings, and that petitioners attended both meetings with their attorney (id.). She noted that the Windward representative who took part in the May 2006 CSE meeting by telephone could have remained on the telephone for the duration of the meeting had she wished to do so (id.). In addition, the impartial hearing officer concluded that there was insufficient evidence to support a finding that the program proposed by respondent was predetermined (id. at p. 20).

The impartial hearing officer also found that petitioners failed to establish during the impartial hearing that the June 2006 IEP was substantively deficient, thereby resulting in a denial of a FAPE to the student (id. at pp. 21-24). She concluded that the June 2006 IEP identified the student's special education needs and addressed them (id. at p. 21). Despite petitioners' contention that the proposed program was inadequate because it did not include three periods of Orton-Gillingham instruction per day and integration of this teaching method in slowly-paced, language modified subject-area classes, the impartial hearing officer determined that the evidence did not demonstrate that the student required three daily periods of Orton-Gillingham instruction in order to learn (id. at p. 22). She noted that if a class became too "fast paced" for the student, either the special education teacher or teaching assistant could address the issue within the classroom or in the Learning Center (id. at pp. 22-23). Next, the impartial hearing officer found that the evidence failed to support petitioners' argument that the proposed program was inadequate because the student had previously been enrolled in an inclusion program in respondent's school during her second and third grade years in which she did not progress (id. at p. 23). She further noted that the program recommended in the June 2006 IEP was far more intensive than the earlier programs (id.). The impartial hearing officer also stated that the student was "not the same that she was in second and third grades," further finding that she had made "tremendous progress at Windward" (id.). With respect to petitioners' assertion that the student would have been inappropriately grouped with other students in respondent's proposed program, the impartial hearing officer found that the student would have been grouped with students who shared similar cognitive abilities and social and emotional needs, and had similar deficits; such as in decoding, spelling and writing (id.).

Lastly, the impartial hearing officer found that the goals set forth in the June 2006 IEP addressed the student's educational needs, as revealed by extensive testing described in the evaluation reports (*id.* at p. 21). Although petitioners contended that the goals were inadequate and the mastery levels were inappropriately low, the impartial hearing officer determined that they agreed to consider draft goals for their daughter, and had the opportunity to request the revision of any goals with which they disagreed (*id.* at pp. 23-24). With respect to mastery criteria, she opined that there was nothing objectionable about setting the mastery level of some goals at 70 percent (*id.* at p. 24).

This appeal ensued. On appeal, petitioners claim that the impartial hearing officer demonstrated bias. They also allege a number of procedural and substantive infirmities with regard to the June 2006 IEP. Petitioners further maintain that the program at Windward is tailored to meet their daughter's special education needs, and that equitable considerations weigh in favor of tuition reimbursement for the 2006-07 school year. Respondent submitted an answer with affirmative defenses, requesting that petitioners' appeal be dismissed in its entirety.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see *Schaffer v. Weast*, 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[d];² see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).³

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 v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the

² 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 herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

³ 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]).

first instance" had it offered the child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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 [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 at 419 [S.D.N.Y. Jan. 9, 2007]).

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 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). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same

school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S.Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Initially, I will address petitioners' claim that the impartial hearing officer demonstrated bias against petitioners. After reviewing the entire impartial hearing transcript, including the impartial hearing officer's interaction with the parties and the text of her decision, I find no evidence to support petitioners' contention that the impartial hearing officer acted with bias or prejudice against petitioners. Although petitioners disagree with the conclusions reached by the impartial hearing officer, that disagreement does not provide a basis for finding actual or apparent bias by the impartial hearing officer (Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).

Having determined that the impartial hearing officer did not demonstrate bias against petitioners, I now turn to their procedural and substantive arguments that respondent failed to offer their daughter a FAPE during the 2006-07 school year.

Petitioners claim that they were denied an opportunity to meaningfully participate in the creation of their daughter's IEP for the 2006-07 school year, in part, because a representative of Windward did not participate in formulating the student's June 2006 IEP. I disagree. The record establishes that although she did not participate in the June 2006 CSE meeting, a Windward representative was invited to both the May and June 2006 CSE meetings (Tr. pp. 121, 615; Joint Ex. 7 at p. 5). The Windward representative took part in the May 2006 CSE meeting by telephone (Joint Ex. 7 at p. 5). During the May 2006 CSE meeting, the Windward representative reported on the student's progress (Tr. pp. 118, 771; Joint Ex. 7 at p. 5). Neither petitioners nor their attorney asked her any questions regarding the student (Tr. p. 605).⁴ The record also reveals that the Windward representative was not asked to leave the meeting and, had she wished, could have remained on the phone for the duration of the CSE meeting (Tr. pp. 82, 606). Furthermore, I agree with the impartial hearing officer's finding that the record does not reveal that petitioners or their attorney objected when the Windward representative hung up the phone and effectively departed from the meeting (IHO Decision at p. 20). Based on the foregoing, the record fails to support petitioners' assertion that they were deprived of an opportunity to actively participate in the formulation of the student's program because respondent failed to involve a Windward representative in the development of the June 2006 IEP.

Petitioners next assert that respondent withheld pertinent information about the proposed program from them, which in turn, interfered with their ability to make an informed decision about their daughter's placement. In particular, they maintain that respondent failed to furnish them with class profiles until the commencement of the impartial hearing. As expressed in greater detail below, I disagree. The record shows that in response to petitioners' August 14, 2006 letter,

⁴ I note that at the time of the May 2006 and June 2006 CSE meetings, petitioners were represented by a different attorney than their present counsel (Joint Ex. 7 at p. 5).

respondent offered to provide petitioners with a specific class profile (Joint Ex. 6 at p. 1). However, it is not clear from the record whether petitioners pursued this offer. The Second Circuit has held that the "District was not obligated to provide student profiles for [the child's] special education classes, particularly when they did not yet exist" (Cerra, 427 F. 3d at p. 194; see Application of a Child with a Disability, Appeal No. 06-115). Moreover, neither the IDEA nor Article 89 of the Education Law require a school district to prepare a class profile or to provide a class profile to parents within a certain time frame (see Application of a Child with a Disability, Appeal No. 07-028). Accordingly, respondent's failure to provide to petitioners with a class profile prior to the impartial hearing did not deprive the student of a FAPE (see Application of a Child with a Disability, Appeal No. 05-095).

Petitioners further maintain that their ability to make an informed decision with respect to their daughter's placement was hindered because respondent failed to share critical aspects of its proposed program with them. The record does not afford a basis for their assertion. First, the record reveals that petitioners attended the May 2006 meeting with their attorney and that the student's mother attended the June 2006 meeting with counsel (Tr. p. 191; Joint Ex. 7 at p. 5). The student's mother testified that when she left the June 2006 CSE meeting, she had additional questions about the program; however, the record shows that her attorney had advised her not to ask any questions during the meeting (Tr. pp. 380, 621). Despite her attorney's advice, the student's mother asked a number of questions concerning her daughter's program during the meeting (Tr. p. 838). As detailed below, the record reflects that respondent made concerted efforts to provide petitioners with sufficient information to enable them to participate in the decision making process surrounding the provision of a FAPE to their daughter. The student's mother testified at the impartial hearing with respect to obtaining information about her daughter's program that she has "always had a good pathway to anybody" in respondent's district (Tr. p. 384). The student's mother further testified that she has always been able to talk to anyone in respondent's school district (id.). During the June 2006 CSE meeting, although respondent's special education teacher could not describe the students that would be in her class during the upcoming school year, she was able to discuss the types of students she was teaching at that time (Tr. p. 840). She further explained the model of how the inclusion classes work (Tr. p. 878). Respondent's special education teacher also advised petitioners that there was a social studies and science textbook, which was used primarily as a resource (Tr. p. 879).

In addition, in August 2006, in response to a letter from the student's father to respondent's superintendent, the CSE Chairperson invited the student's mother to attend an informal meeting with respondent's reading teacher and encouraged her to bring the student, so that the teacher could meet the student and answer any additional questions about the proposed program (Tr. pp. 98, 181, 1079). During this meeting, the student's mother asked some clarifying questions about how the program was run and how the instruction would be delivered (Tr. p. 183). The reading teacher and respondent's CSE Chairperson advised her that the student's reading class would be comprised of nine to twelve children, and that these students' needs would be similar to those of her daughter (Tr. p. 389). Lastly, by letter dated August 7, 2006, respondent's CSE Chairperson sent a copy of the draft goals listed in the student's proposed IEP, for which she sought review and comment from petitioners (Tr. p. 175; Joint Ex. 44). Under the circumstances presented herein, the record demonstrates that respondent encouraged petitioners to meet with respondent's staff and ask questions about the proposed program so that petitioners could make an informed decision with regard to their daughter's placement for the 2006-07 school year.

I now turn to petitioners' argument that their daughter's proposed program was impermissibly predetermined, thereby resulting in a denial of a FAPE. The impartial hearing officer found that there was insufficient evidence in the record to support a finding that the recommendation for the student's placement was predetermined (IHO Decision at p. 20). I concur. Conversations about possible recommendations for a child, prior to a CSE meeting, are not prohibited as long as the discussions take place with the understanding that changes may occur at the CSE meeting (see, e.g., Application of a Child with a Disability, Appeal No. 05-110; Application of a Child with a Disability, Appeal No. 05-076). It is well-settled that predetermination is not synonymous with preparation (Nack v. Orange City School District, 454 F.3d 604, 610 [6th Cir. 2006]). Additionally, a school district is not prohibited from suggesting a public school placement before testing is complete (see W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 [S.D.N.Y. 2006]). In the instant case, the record reveals that the June 2006 CSE developed its recommendations after two meetings, during which petitioners and their attorney were in attendance (Joint Exs. 7 at p. 5; 31 at p. 4). Petitioners contend that, notwithstanding their efforts to be heard, respondent's CSE would not listen to them. However, the record demonstrates that respondent's CSE sought petitioners' input in developing their daughter's program. For example, pursuant to their agreement, respondent's CSE Chairperson provided petitioners with a copy of the draft goals, so that they would have an opportunity to review them prior to finalizing the June 2006 IEP (Tr. pp. 175, 178). The record also reveals that respondent's CSE sought input from Windward (Tr. p. 122). Moreover, a review of the record indicates that respondent's CSE considered other program options prior to making its recommendation. The June 2006 CSE discussed a special class in math, due to the student's math skills and her lack of automaticity (Tr. pp. 123, 138). In light of petitioners' concerns about the pace of instruction, respondent's CSE also took the pace of the inclusion classes into consideration, in finalizing their recommendations (Tr. p. 139). Finally, the record shows that after considering a regular classroom setting with support services such as related services, consulting services and a resource room program, the CSE concluded that the student required more intensive services to address specific needs (Tr. p. 124; Joint Ex. 7 at p. 6). Given the circumstances presented herein, I agree with the impartial hearing officer's conclusion that petitioners failed to establish during the impartial hearing that their daughter's proposed program was predetermined, which in turn, denied her a FAPE.

In summary, petitioners failed to sustain their burden of persuasion that any procedural error significantly impeded them from meaningfully participating in the development of their daughter's IEP, impeded the student's right to a FAPE or caused a deprivation of educational benefits (see Cerra, 427 F.3d at 194).

I will now address petitioners' contention that the June 2006 was not reasonably calculated to meet their daughter's special education needs. As explained in greater detail below, I disagree with petitioners' assertion and find that the program proposed in June 2006 was individually tailored to meet the student's special education needs.

Petitioners first assert that, in light of the student's deficits in decoding, writing and spelling; the June 2006 IEP is insufficient to meet her needs. The record does not afford a basis for this assertion. The record indicates that petitioners' private psychologist opined that the student required a program in which language modifications are seamlessly integrated into all areas of the curriculum and that she continued to need an intensive individualized curriculum emphasizing the automaticity of basic skills in math, spelling, writing, and reading mechanics (Joint Ex. 18 at pp.

14-15). The private psychologist's recommendations included a continued emphasis on "overlearning" for reading and math facts, studying begun well in advance with frequent reviews, extra help in planning and organizing long-range assignments, extra help in organizing and writing unified paragraphs and sentences, modification of densely formatted visual pages, use of a laptop and spell checker, and provision of extra time for reading, writing, and test taking (id. at pp. 15-16).

The program proposed for the student for the 2006-07 school year included 12:1+1 inclusion classes in science and social studies, special classes in English, math and reading, in addition to enrollment in the Learning Center (Joint Ex. 7 at p. 1). Twice weekly 39-minute sessions of speech-language therapy in a group of five were also proposed in addition to one 1:1 39-minute session of speech-language therapy per week (id.). Recommended program modifications and testing accommodations included the following accommodations: repetition of material, preferential seating, checking for understanding, directions read/clarified, questions read and books on tape (id.). The student would also receive the following testing accommodations: directions to be read/explained, questions to be read, extended time (1.5) on tests (id.). Additionally, the student would be able to take her tests in an alternate location with minimal distractions (id.).

Despite petitioners' claim that the proposed program was not of sufficient intensity, and therefore would not meet the student's identified needs in the areas of reading, spelling and writing, the impartial hearing officer found that the record reflects that the recommended two period block of reading and language arts could address the student's special education needs. I concur. First, although petitioners argue that an appropriate program for their daughter must include three periods of Orton-Gillingham instruction per day, so that she may learn and progress, the impartial hearing officer correctly determined that the record fails to support this claim. The reading and language arts class proposed for the student is scheduled for 80 minutes per day and comprised of 12 students (Tr. p. 991). Respondent's reading teacher uses the Wilson Reading Program, described as an Orton-Gillingham based reading methodology that uses a multisensory approach to teaching reading (Tr. pp. 986-87). Respondent's reading teacher also testified that within the class that was proposed for the student, she introduces sight words weekly and focuses on decoding of multisyllabic words in isolation and in context (Tr. pp. 996-99). She also testified that the spelling program is structured in the same manner and the student would be assessed weekly in these areas through a spelling test and through oral reading in class (Tr. p. 999). Within the reading and language arts class, the students read aloud from passages containing the multisyllabic words they are learning as well from literature novels to increase their fluency (Tr. pp. 999-1000). Students read both fifth and sixth grade novels to allow the teacher to monitor their comprehension and reading (Tr. p. 1000). Respondent's reading teacher testified that students are taught and tested weekly on root words including synonyms, antonyms, and multiple meanings of these words, which helps students with language processing and decoding (Tr. pp. 1001-02). Students in the class work on prewriting activities, graphic organizers, diagrams, and outlines and work individually with the teacher to revise and proofread their writing (Tr. p. 1008). When editing their own work, students identify and then look up words they think they have misspelled and are sometimes given assignments with misspelled words, which they must correct by using a spell checker, thesaurus, or dictionary (Tr. p. 1005). The record also demonstrates that respondent's reading teacher engages in constant communication with the students' other teachers and that she sometimes decides her curriculum based on a need identified by another teacher (Tr. pp. 1011-12).

She testified that she uses the Basic Writing Program, described as a method of teaching expository writing to students with language difficulties that structures the writing for students who have difficulty doing so for themselves (Tr. p. 989). Students using this program can work on single paragraph and multi-paragraph level writing concurrently; adding more detail and vocabulary to a single paragraph while simultaneously learning multiple paragraph composition structure (Tr. p. 1007).

In light of the foregoing, I agree with the impartial hearing officer's finding that the program recommended in the June 2006 IEP sets forth a program that addresses the student's identified special education needs, particularly in the areas of decoding, writing, and spelling.

Next, petitioners maintain that the recommended program, i.e., the inclusion classes, fails to provide the student with the small classes that she requires in order to learn. Regarding this assertion, the record does not contain sufficient evidence showing that the student can only learn or progress in a small sized class setting. On the contrary, as set forth below, the record reflects that as a result of a modified curriculum and continuous collaboration with respondent's general education teachers, the program proposed in the June 2006 IEP would provide the student with adequate support enabling her to make meaningful progress in this type of classroom setting. Respondent's special education teacher testified that the inclusion classes for social studies and science follow the New York State curriculum, which is presented to the special education students through multisensory approaches such as hands-on activities and visuals (Tr. p. 943). The special education teacher testified that both she and a teaching assistant would have been present in each of the student's inclusion classes and that they would also work with the student in the Learning Center to assist her in any of the content areas in which she had trouble (Tr. p. 779). In addition, respondent's special education teacher testified that she would preview any material that would be covered in the upcoming classes in the Learning Center, and that she would review and reinforce any concepts already learned (Tr. pp. 55, 794, 803).

The record also demonstrates how respondent's special education teacher interacts with the special education students and the regular education teachers in the inclusion classes (Tr. pp. 791-92). The special education teacher testified that the inclusion science class offers instruction through a hands-on approach (Tr. p. 793). She indicated that "guided notes" are used which she defined as a sheet of paper already in front of students with some information on it, which the students use to fill in the blanks while the information is discussed by the regular education teacher (id.). The record also reveals that the special education teacher and the teaching assistant walk around the room to make sure that all students are noting the correct information and understanding what the teacher is trying to teach (Tr. pp. 791-92). In addition, the record shows that if at any time respondent's special education teacher determines that students could not understand the material, she "would always jump in" (Tr. p. 792). She testified that "if there's something that [the regular education teacher] says and doesn't write down, I'm the first one to run to the board and write it down because I have a lot of students that have trouble spelling and don't know what he's talking about if it's not written down" (id.). Respondent's special education teacher further indicated that when the regular education teacher says something that might be confusing to the students, she would intervene and explain it in a different way (Tr. pp. 792-93). The special education teacher also testified that when students are having a particularly difficult time understanding a concept, she takes notes and then reviews that concept with students again in the

Learning Center (Tr. p. 793). She would then repeat the same activity in the Learning Center so that students can review it (id.).

Moreover, a review of the record indicates that respondent's special education teacher routinely collaborates with the regular education teachers (Tr. p. 821). For example, she testified that she plans with the science teacher in the morning and again in the afternoon (Tr. p. 819). In the morning, the science teacher advises her as to what will take place in class so she is able to make changes as needed, and they meet again in the afternoon so that she can provide him with feedback (id.). The record also demonstrates that collaboration occurs during the class as well, such that while the students are working on an activity, the science teacher might ask her if she thinks the students "got it" and whether something might need to be re-explained (Tr. p. 820). The regular education social studies teacher also provides respondent's special education teacher with the topics and concepts that he is planning to teach the following week (id.). She reviews his plans and tells him what she thinks should be added, or what items she should take the lead on, because the topic or concept is confusing and the students need more "step-by-step direction" (Tr. p. 821). In fact, during some inclusion classes, the record indicates that respondent's special education teacher teaches the lessons, because she has determined that the special education students require greater support (Tr. p. 822). When this situation occurs, the content area teacher becomes more of the support (id.). Where necessary, respondent's special education teacher further testified that she might modify tests (Tr. p. 820). She also indicated that she shares tasks, worksheets, and information with the regular education teacher to ensure that "the class is the best for the inclusion and regular education students" (id.). The special education teacher also stated that team planning occurs on a daily basis during the eighth period at which time she can discuss students' needs with their regular education teachers (id.).

Petitioner's private special education consultant testified that the pace of instruction and volume of information presented in the inclusion classes would "create pressure" and might overwhelm the student (Tr. pp. 293-94). As noted above, the impartial hearing record shows that respondent's special education teacher works closely with both the regular education teacher and the student's special class teachers to modify tests and materials, pre-teach concepts, and re-teach lessons as necessary to ensure each individual student's understanding within the inclusion classes. Accordingly, the record establishes that the inclusion program proposed in the June 2006 IEP was appropriate to meet the student's special education needs, inasmuch as it would have provided her with small group instruction within the larger mainstream class as provided by the special education teacher and teaching assistant, in conjunction with a modified curriculum, constant collaboration between the regular and special education teachers, and the Learning Center as additional supports.

Petitioners next argue that the Learning Center is not an appropriate component to the student's program, because if the inclusion classes met her special education needs, then the Learning Center would not be necessary. As set forth in greater detail below, I disagree. The special education teacher testified that the Learning Center is a place for students to practice information that was learned in the content areas and review it, as well as to re-teach concepts (Tr. p. 794). The Learning Center is also a place where students can preview information and teachers can make sure that they meet the goals on their IEPs (Tr. p. 803). The Learning Center is focused around the needs of the students (Tr. p. 804). The record also describes the Learning Center as "a safe place, where students might ask more questions" (Tr. p. 937). Within the Learning Center,

students are also taught to advocate for themselves and ask questions when they need help (Tr. p. 806). Through discussions and role play, students are taught in the Learning Center what to do if they don't understand a question in class, if they don't understand an assignment, or if they go home and have forgotten to write down an assignment; and are taught to make sure their teachers are aware that they are allowed extended time (Tr. pp. 806-07).

The impartial hearing officer found that in the event that a class was to become too fast-paced for the student, respondent's special education teacher or teaching assistant could address the issue within the Learning Center (IHO Decision at pp. 22-23). The record supports this finding. Specifically, when asked how she would address the student's writing disability in the inclusion classes, respondent's special education teacher testified that she would work on organizing and simplifying the process (Tr. pp. 784-86). In the Learning Center, students also learn about pre-writing and brainstorming, so that they can answer an extended response question (Tr. p. 785). Based on the foregoing, the record demonstrates that the Learning Center is an appropriate and necessary element of the program recommended by respondent's CSE, and is individually tailored to meet the student's special education needs.

Petitioners also claim that in developing the June 2006 IEP, respondent's CSE failed to take into consideration that the student had previously been enrolled in an inclusion program during her second and third grade years, in which she failed to progress, and, therefore, she was denied a FAPE for the 2006-07 school year. As described earlier in the student's educational history, the record does not afford a basis for petitioners' assertion. The impartial hearing officer correctly determined that while the program proposed by respondent for the student's 2006-07 school year bears similarities to the programs it proposed for the 2001-02 and 2002-03 school years; it is more intensive, including more reading support and the Learning Center component (IHO Decision at p. 23). Moreover, I agree with the impartial hearing officer's conclusion that the student was "not the same student she was in the second and third grades" (*id.*). A review of the hearing record shows that the student, although still in need of special education programs and services during the 2006-07 school year, demonstrated markedly increased skills and abilities in reading, math, and writing than she did at the time the CSE was developing her programs for the 2001-02 and 2002-03 school years. I agree with the impartial hearing officer's finding that the program recommended by respondent for the 2006-07 school year addressed the student's special education needs as they were presented at the time of the creation of the program at the CSE meetings (*id.*).

I now turn to petitioners' argument that the June 2006 IEP is deficient because respondent's CSE failed to appropriately group the student with other students who had similar special education needs. The impartial hearing officer found that the class profiles showed that the students attending the classes proposed for petitioners' daughter shared similar cognitive abilities, social and emotional levels as well as similar deficits in decoding, spelling and writing (IHO Decision at p. 23; Joint Ex. 41). I concur. The record also reveals that the special education teachers and administrators meet to look at students' test scores and all information regarding their needs and group students based on their needs (Tr. pp. 781-82). The grouping is primarily focused on needs that require special class reading and English because these are areas in which most students' exhibit difficulty (Tr. p. 782). The students are then grouped together, so that the reading teacher can focus on their specific needs in her class setting (*id.*). Additionally, respondent's reading teacher stated that in terms of reading and writing abilities, she opined that the student would be a "good fit" for her class (Tr. pp. 994-95). Respondent's reading teacher noted that the

student would fit in nicely with her students, who she described as "kind, with a lot of strengths" (Tr. p. 995). Like the student in the instant case, the students in her class have difficulties in decoding as well as expressive and receptive language, and also have comprehension skills in the average range (Tr. p. 996). Furthermore, respondent's reading teacher testified that she individualizes instruction within her class to meet the unique needs of each student (Tr. pp. 1045-47).

Progress reports from the student's 2005-06 school year at Windward indicated that the student had become a better reader and was reading with greater accuracy, fluency, and expression (Joint Exs. 26 at p. 2; 27 at p. 3). She had learned many new patterns and strategies for syllabication, was more consistently applying those strategies when reading unfamiliar words in context, and her decoding of multisyllabic words had significantly improved (Joint Exs. 26 at p. 2; 27 at p. 3). The student demonstrated improvement in her ability to use proper syntax, could create more elaborate sentences, and could produce a simple well-constructed paragraph (Joint Exs. 26 at pp. 2-3; 27 at p. 3). The student's writing teacher reported that "since [the student's] decoding has improved significantly, her writing has begun to reflect her newly acquired skills" but she continued to need work on varying sentence structure and using transitions and sentence starters (Joint Ex. 27 at p. 3). Her comprehension was described as "good," despite some oral reading errors (Joint Ex. 26 at p. 2.). She was described as "an active reader, who asks questions to monitor her understanding of the text" and she was able to make inferences and appropriate predictions (Joint Ex. 27 at p. 3).

I further note that a review of the class profiles contained in the record reveals that all of students in the special classes proposed for the student have full scale IQ scores in either the average (six students) or low average range (four students), demonstrate social emotional behaviors within age appropriate expectations, and are classified as learning disabled (five students) or speech impaired (five students) (Joint Ex. 8 at p. 1). Although direct comparisons between scores cannot be made due to the variety of assessment instruments used; assessment data and narrative descriptions of the students' educational levels and abilities, as well as testimony from respondent's reading teacher, generally reflect deficits primarily in the low average range for decoding, written language, and receptive and expressive language skills and average comprehension abilities (Tr. pp. 996, 1039; Joint Ex. 41). Under the circumstances presented herein, the record demonstrates that in light of her special education needs and abilities, the student would have been appropriately grouped with other students having similar needs and abilities.

I will now consider petitioners' argument that the mastery criteria for most of the reading and writing goals listed in the June 2006 is inordinately low and will not lead to improvement in the student's reading and writing abilities. The record does not afford a basis for this contention. Respondent's reading teacher testified that she relied on narrative progress reports from Windward to develop the student's IEP goals in reading and that she set the mastery criteria at levels that she thought were reasonable and would still allow the student to be successful (Tr. pp. 1070-71, 1077). The record also reflects that respondent would report on the student's progress toward meeting her annual goals four times per year through written reports (Joint Ex. 7 at p. 6). Moreover, a review of the current evaluative data as well as the 2005-06 progress reports from Windward provide sufficient persuasive evidence that the mastery criteria set for the student's reading and writing goals is reasonable (Joint Exs. 18; 26; 27). Additionally, the impartial hearing officer correctly found that petitioners agreed to consider draft goals for the student and had the opportunity to

request revision of any goals with which they disagreed (IHO Decision at pp. 23-24). In light of the foregoing, the record does not demonstrate that the mastery criteria for the reading and writing goals contained in the June 2006 IEP is inordinately low and would not lead to improvement in the student's reading and writing abilities.

Lastly, petitioners argue that the speech-language goals listed in the June 2006 IEP are inconsistent with their daughter's present levels of performance and that the manner in which they would be implemented is inappropriate. For reasons expressed below, I disagree. Testimony elicited from respondent's speech-language pathologist who evaluated the student in July 2005 indicates that her evaluation results were consistent with the results obtained in 2006 by petitioner's private psychologist and the evaluator conducting the independent auditory processing evaluation (Tr. pp. 708-09). The evaluating speech-language pathologist provided significant testimony about the relevance of each of the proposed speech-language goals and corresponding objectives on the June 2006 IEP (Tr. pp. 710-18). She testified that the goals developed for the student address her main deficit areas of language processing and language organization and retrieval, and incorporate the recommendations of petitioner's private psychologist and those of the evaluator who conducted the independent auditory processing evaluation (Tr. p. 740). The speech-language pathologist explained how the student's proposed goals and corresponding objectives address her needs in temporal and sequential concepts (Tr. p. 741). The speech-language pathologist who would have provided speech-language therapy to the student testified that she uses the Lindamood-Bell visualizing and verbalizing program with students who have processing problems and who have verbal expression deficits and expressive language weaknesses (Tr. pp. 952-53). She testified that the visualizing and verbalizing program would assist the student to develop compensatory strategies such as self-advocacy, re-auditorizing, self-vocalizing, or motor planning for the deficits identified by the private psychologist and the independent evaluator in their testing (Tr. pp. 955-56). In light of the foregoing, the record indicates that the speech-language goals contained in the June 2006 IEP are appropriate, inasmuch as they address the student's main deficit areas of language processing and language organization and retrieval skills, and I further find that the manner in which they would be implemented is appropriate.

Based upon the information before me, I find that the program proposed in the June 2006 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefit (Viola v. Arlington Central School District, 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] [citing to J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021). In light of the foregoing, I concur with the impartial hearing officer's conclusion, for the reasons set forth above, that respondent offered the student an appropriate program. Having determined that the challenged June 2006 IEP offered the student a FAPE, I need not reach the issue of whether Windward was

appropriate for the 2006-07 school year (Mrs. C. v. Wheaton, 916 F.2d 69, 66 [2d Cir. 1990]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
August 27, 2007

PAUL F. KELLY
STATE REVIEW OFFICER