



The University of the State of New York

The State Education Department State Review Officer

No. 07-081

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

Appearances:

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

DECISION

Petitioner, the Board of Education of the Scarsdale Union Free School District, appeals from the decision of an impartial hearing officer which ordered petitioner's Committee on Special Education (CSE) to arrange for independent neuropsychological and psychiatric evaluations, and retained jurisdiction over the matter. The appeal must be sustained.

On the date of the impartial hearing, the student was attending Windward School (Windward) (Tr. p. 191; see Joint Ex. 1; 2). Windward has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

During first grade, the student was identified as a student with a learning disability (LD) and provided with aide support in the classroom, along with learning resource center services five times per week (Tr. pp. 193-94; Joint Ex. 13 at p. 1). The student was evaluated and prescribed medication for an attention deficit (Joint Ex. 11 at p. 2). Special education services continued in second grade, where the student received Orton-Gillingham reading instruction daily in the resource room as well as an aide in the classroom (Joint Ex. 13 at p. 1). In addition, the student received private occupational therapy services as well as occupational therapy support in school (Tr. pp. 195-97; Joint Ex. 13 at p. 1). The student's academic progress in second grade was reportedly limited by behavioral issues (Joint Ex. 11 at p. 1). During second grade, the student was described as a reluctant learner who often resisted work and seldom completed assignments (id.). Petitioner continued to offer the student resource room services and classroom aide support for third grade; however, respondents decided to enroll the student in Windward (Joint Exs. 11 at p. 1; 13 at pp. 1-2).

On June 10, 2005, the CSE met for the student's annual review and to develop an individualized education program (IEP) for the 2005-06 school year (Joint Ex. 19 at pp. 1, 4-5). A representative from Windward participated in the CSE meeting and indicated that the student continued to have difficulty working through word problems, was slow to complete math calculations, and could use support relative to his social skills (id. at pp. 4-5). The CSE questioned the student's continued need for special education, noting that the student's test results suggested that he had mastered the skills needed to meet the curriculum requirements set forth by petitioner and the state (id.). However, the CSE also questioned the student's ability to perform skills consistently and therefore recommended that the student continue to be classified as having a learning disability and receive resource room services 40 minutes per day (id. at p. 5). According to the CSE meeting minutes, the student's ability to attend had improved with the addition of medication and the CSE believed that the student no longer required an aide (id. at pp. 4-5).

In preparation for the student's triennial evaluation, petitioner conducted a series of evaluations beginning in October 2005. Among the evaluations performed were a psychological evaluation (Joint Ex. 11), educational evaluation (Joint Ex. 13), and a classroom observation (Joint Ex. 12). To assess the student's cognitive abilities, petitioner's school psychologist administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). The student's test performance yielded the following standard scores (and percentiles): verbal comprehension 132 (98), perceptual reasoning 121 (92), working memory 107 (68), processing speed 88 (21), and full scale IQ 119 (90) (Joint Ex. 11 at p. 3). The psychologist reported that intra-scale variability was evidenced on the processing speed domain with the student's laborious approach to the coding task lowering his overall score (Tr. pp. 362-64; Joint Ex. 11 at p. 4). However, the psychologist noted that while there was some variability within the student's cognitive profile, the student could clearly appreciate higher-level relationships and he exhibited a wide range of acquired knowledge (Joint Ex. 11 at p. 8). She concluded that both the student's verbal and non-verbal reasoning skills were well developed (id.). To measure the student's academic levels, the school psychologist administered the Wechsler Individual Achievement Test - Second Edition (WIAT-II) (id. at p. 4). The psychologist reported that the student's overall performance fell within the average to superior range on the core composites of reading (SS 94), mathematics (SS 103), written language (SS 94) and oral language (SS 128); however, within the composites variability was evidenced (id. at p. 5). According to the psychologist, the student demonstrated strong comprehension skills (SS 110), adequate decoding skills (SS 93), and slightly below average word reading skills (SS 87) (id.). The student demonstrated appropriate age and grade level achievement in mathematics (numerical operations SS 98, math reasoning SS 109), and in written language the student demonstrated a relative strength in written expression (SS 101) and a relative weakness in spelling (SS 89) (id.). The psychologist characterized the student's oral expression skills as exceptional (id.).

The student's executive functioning was assessed using the Behavior Rating Inventory of Executive Function (BRIEF), a questionnaire that was completed by the student's father (id. at pp. 6-7). As rated by respondents, the student seemed able to regulate his behavior and emotions and appeared to have sufficient metacognitive strategies to self-manage tasks and monitor performance (id. at p. 7). Areas of concern reported by respondents related to the student's ability to remember multi-step directions and his need for assistance to stay on task (id.). To evaluate the student's attention/executive function and memory, the psychologist administered selected subtests of the NEPSY, a development neuropsychological assessment (id.). The psychologist reported that the student was "quite successful" on tasks that assessed the executive functions of planning, monitoring, self-regulation and problem solving (id.). The psychologist described the student's

overall performance with respect to memory as "superior" and noted that the student's visual memory skills appeared stronger than his auditory memory skills (id.). As assessed by the Beery Test of Visual Motor Integration (VMI), the student's visual motor skills were within the high end of the average range (id.). The student's responses on the scale referred to in the record as the "Measure of Self Concept," revealed adequate ego strength, a positive relationship with his family and a good understanding of his strengths and weaknesses (id.). The psychologist concluded that the student's performance on academic tasks related to reading, math, writing and verbal expression were generally consistent with age and grade expectations (id. at p. 8). She also noted improvement in the student's attending abilities and ability to self-regulate (id.). The psychologist opined that a mainstream classroom with access to learning center support and testing accommodations appeared to be an appropriate program for the student (id.).

In addition to formal testing, petitioner's school psychologist conducted an observation of the student in his language arts class at Windward (Joint Ex. 12). The psychologist's recorded observation detailed instances in which the student followed teacher instructions, responded to questions posed by the teacher, asked the teacher or aide to review his work, asked the aide to wait until he completed his work to check it, and volunteered to read aloud (id.).

In November and December 2005, an education evaluation was conducted by a special education teacher for petitioner (Joint Ex. 13). The evaluator reported that the student's test scores indicated that he had acquired basic reading skills for decoding and comprehension and was able to apply the skills to grade level passages (id. at p. 2). Administration of the Woodcock Johnson III - Tests of Achievement (WJ III ACH) yielded the following standard scores (and percentiles): letter-word identification 83 (13th percentile), reading fluency 94 (35th percentile), calculation 97 (41st percentile), spelling 91 (27th percentile), passage comprehension 105 (64th percentile) and writing samples 113 (80th percentile) (id. at p. 11). Based on the student's performance on the letter-word identification subtest, the evaluator concluded that the student was cognizant of initial and final sounds, but required continued instruction in decoding multi-syllabic words (id. at p. 3). In addition to the passage comprehension subtest of the WJ III ACH, the evaluator administered the Gates MacGinitie Reading Test (GMRT) to assess the student's reading comprehension skills (id. at p. 2). As measured by the GMRT, the student's ability to understand what he had read fell in the third stanine (13th percentile) (id. at p. 8). When the time limit to complete the subtest was doubled, the student's score improved to the sixth stanine (60th percentile) (id.). On the untimed passage comprehension subtest of the WJ III ACH, the student attained a standard score of 105 (64th percentile) (id. at p. 11). The evaluator noted that the student required additional time to decode (id. at p. 3). The evaluator reported that the student's need for additional time to complete reading assignments was substantiated by testing conducted by Windward (id. at pp. 3, 9). She opined that the student's pace and perseverance were significant and had implications for the student's classroom program (id. at p. 3). To assess the student's reading rate, fluency and accuracy, the evaluator administered the Gray Oral Reading Test, Fourth Edition (GORT-4) (id.). The student attained the following scaled scores (and percentiles): rate 6 (9th percentile), accuracy 8 (25th percentile), fluency 7 (16th percentile), comprehension 11 (63rd percentile) (Joint Ex. 31 at p. 1).¹ The student's oral reading quotient fell in the 34th percentile (id.). The evaluator reported that the student read "quite slowly" (Joint Ex. 13 at p. 4). She noted that the student's attention to

¹ The evaluator testified that due to a mathematical error in the scoring of the GORT-4 in her original report, she revised the student's scores in October 2006 in preparation for the impartial hearing (Tr. pp. 444-445, 447; see Joint Ex. 31).

punctuation was inconsistent and he labored over each word (id.). In addition, the evaluator stated that the student needed to sound out most words and relied on that as a decoding strategy (id.). The student's writing skills were assessed using the writing samples subtest of the WJ III ACH and the Stanford Writing Assessment-Narrative Prompt (id.). According to the evaluator, the student's spontaneous writing was sequenced and included some details (id.). The evaluator characterized the student's writing sample as simple and fairly organized but not well developed (id.). The student's spelling was described as weak (id.).

The student's math skills were assessed through administration of the concepts and applications subtest of the Stanford Diagnostic Mathematics Test (SDMT)-Free Response and the calculation subtest of the WJ III ACH (id.). On the concepts and applications subtest of the SDMT, the student attained a stanine score of 5 (40th percentile) (id. at p. 8). The evaluator reported that the student demonstrated an understanding of number systems and numeration, patterns, problem solving, graphs and tables, and measurement (id. at p. 4). The student was not always able to respond to specific problems during the test; however, re-reading the problems aloud after the test facilitated the student's understanding (id. at p. 5). On the calculations subtest of the WJ III ACH, the student scored in the average range (id.). Although the student was able to add and subtract basic problems without regrouping, the evaluator noted that the student's knowledge of basic facts was not automatic and he used his fingers to calculate answers (id.).

The evaluator noted that the student maintained focus and worked slowly and carefully throughout testing (id. at pp. 2, 5). She further noted that isolated decoding and spelling were more challenging for the student and that context facilitated the student's understanding (id. at p. 5). The evaluator cited reading fluency as an area of weakness for the student and recommended that he be provided extended time (1.5) for tests that involved reading, a special location for testing, and test directions read when the modification did not compromise the test (id.). The evaluator also opined that the least restrictive environment (LRE) should be considered for the student (id.). She construed the LRE to be a mainstream fourth grade program and suggested the possibility of a classroom aide and learning center support to teach and reinforce strategies for decoding, math problem solving, and explicit instruction in spelling (id. at p. 6). The evaluator also recommended that the student be provided preferential seating within the classroom and indicated that the student would benefit from additional time to complete reading assignments and/or having modified reading assignments (id.).

The student's first quarter Windward report card for the 2005-06 school year indicated that the student's performance was primarily "satisfactory" in language arts and science and primarily "good" in math and social studies (Joint Ex. 17).

The CSE convened on January 5, 2006 for the student's triennial review (Joint Ex. 7 at p. 2). Representatives from Windward participated by telephone (id. at p. 6). The IEP generated by the CSE reflected the results of petitioner's testing and indicated that the student was cooperative and attentive during test sessions, and that overall academic testing portrayed a youngster with average to above average skills, particularly when he was provided with additional time (id.). Petitioner's evaluators reported that the student's ability to read quickly was impaired by a delay in his decoding skills and noted that the student could not automatically recall basic math facts (id. at p. 5). According to the CSE meeting minutes, the student's private school teachers agreed with the evaluation results obtained by petitioner's staff (id. at p. 6). They described the student as one who required teacher assistance for much of what he did and opined that Windward, because of its

small class size, allowed this to occur (id.). The private school teachers reported that the student was cooperative, but could be distractible in class (id.). They indicated that writing was an area of weakness for the student and noted that he had difficulty organizing and sequencing his thoughts (id.). According to Windward staff, the student's penmanship deteriorated when left on his own (id.). The student's IEP goals and objectives were reviewed with the private school staff who indicated that the goals remained appropriate (id.). At the time of the CSE meeting, respondents indicated that the student was on a low dosage of medication which was helping him attend and focus on instruction (id.). The CSE's recommendations for the remainder of the 2005-06 school year were essentially the same as those made in June 2005, with the exception that the need for extended time on tests was reduced from double time to time and a half (compare Joint Ex. 19 at p. 2, with Joint Ex. 7 at p. 3). Respondents chose to keep the student at Windward for the remainder of fourth grade (Tr. pp. 209, 236).

A February 2006 progress report from Windward indicated that the student was "consistently" or "usually" able to demonstrate many language arts skills (Joint Ex. 6). The report also highlighted those areas in which the student required assistance including the ability to read and spell multi-syllable words; utilize age appropriate grammar; summarize and recognize the main idea of a story; make inferences, predictions and draw conclusions based on materials read; recall sequence and important details of a story; read a passage and answer questions orally; and read a passage and write answers to questions (id. at pp. 3-4). The report further indicted that the student required assistance with producing supporting details and a conclusion when given a topic sentence; using an outline to organize ideas when given a topic; producing a paragraph based on an outline; demonstrating proofreading and editing skills; and revising written work (id. at p. 5).

The student's third quarter report card from Windward for the 2005-06 school year indicated that the student's performance in language arts had improved across all areas, including his ability to use word attack skills, read fluently, demonstrate correct spelling, and write complete and varied sentences (Joint Ex. 25). The report card reflected improvement in the student's effort in mathematics but also reflected a decrease in the student's ability to understand mathematical concepts and compute accurately (id.).

The CSE reconvened on June 1, 2006 for the student's annual review (Joint Ex. 3). Staff from Windward participated in the CSE meeting via telephone (Tr. p. 217; Joint Ex. 3 at p. 5). The CSE meeting minutes indicated that during the 2005-06 school year the student had shown progress in language arts; however, he continued to have difficulty with writing (Joint Ex. 3 at p. 6). According to the meeting minutes, the student was able to write a one paragraph response but needed assistance organizing his thoughts (id.). The minutes also indicated that the student used lined paper for all written tasks and graph paper helped the student organize his math calculations (id.). The student's math skills were cited as a relative strength (id.). Windward staff indicated that the student could become anxious when new material was introduced and that the anxiety interfered with the student's performance and could be observed in his behavior (id.). Windward staff opined that the student should return to Windward for the 2006-07 school year as he needed to further develop his skills in reading fluency and writing (id.). In addition, Windward staff suggested that the student required a small class setting to address his distractibility and need for redirection (id.). Respondents agreed with the assessment and recommendations of Windward staff (id.). The meeting minutes indicated that the student's goals and objectives from the previous year were reviewed with Windward staff and modified (id.). The CSE recommended that the student continue to be classified as having a learning disability and receive resource room services

daily for 40 minutes (id. at p. 2). In addition, the CSE recommended that the student receive individual occupational therapy one-on-one once weekly for 30 minutes to address the student's handwriting difficulties and counseling once weekly in a group of five for 30 minutes to address the student's anxiety (id. at pp. 2, 6). Program modifications, accommodations and supplementary aids and services, and testing accommodations remained the same as in the January 2006 IEP (compare Joint Ex. 3, with Joint Ex. 7). The student's IEP included annual goals related to study skills (attending); decoding, fluency and comprehension; spelling and written expression; solving word problems and rote memorization of basic math facts; coping with anxiety; and handwriting and keyboarding (Joint Ex. 3 at p. 9).

By due process complaint notice dated September 15, 2006, respondents requested an impartial hearing seeking tuition reimbursement for their placement of their son at Windward for the 2006-07 school year (Joint Exs. 1; 2). Respondents alleged that petitioner failed to offer their son a free appropriate public education (FAPE)² because the program petitioner offered their son for the 2006-07 school year did not meet his special educational needs (id.). An impartial hearing commenced on December 21, 2006 and concluded on March 9, 2007, after four days of testimony (IHO Decision at p. 1).

By final decision dated June 4, 2007, the impartial hearing officer determined that respondents did not meet their burden of persuasion (IHO Decision at p. 9). He also determined that he could not "find" for either petitioner or respondents based on the evidence presented at the impartial hearing (id.). He noted that the matter ended after the fourth day of the impartial hearing, and found that both parties had a "full opportunity to present their case" (id.). The impartial hearing officer ordered petitioner's CSE to arrange for an independent neuropsychological evaluation and an independent psychiatric evaluation (id.). He also retained jurisdiction over the matter stating that he would rehear the matter after the new evaluations had been conducted, and after the CSE and the student's parents had met and discussed the appropriate classification, placement and related services for the student (id.).

Petitioner appeals the impartial hearing officer's decision, contending that the impartial hearing officer improperly retained jurisdiction over the matter, misinterpreted testimony and evidence, and issued rulings on issues not in controversy. Petitioner further contends that the impartial hearing officer stated in his decision that respondents had not sustained their burden of proof and, therefore, the impartial hearing officer should have dismissed their claim for tuition reimbursement. Petitioner requests that the impartial hearing officer's decision be annulled in its

² 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]).

entirety and seeks a de novo review of the evidence and determination of the merits by a State Review Officer.

In its answer, respondents argue that petitioner should be held in default as it did not follow the impartial hearing officer's order to conduct independent evaluations. Respondents further contend that petitioner's request for a de novo review by a State Review Officer is without legal basis, however, respondents also request that a State Review Officer make a determination that respondents did not provide a FAPE and order petitioner to reimburse respondents for the cost of tuition at Windward for the 2006-07 school year.³

Turning first to petitioner's assertion that the impartial hearing officer improperly retained jurisdiction over this matter, an impartial hearing officer must base his decision "solely upon the record of the proceeding before the impartial hearing officer" (8 NYCRR 200.5[j][5][v]). There is no authority for an impartial hearing officer to reopen a hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16). This is especially true where one party objects, as petitioner does here; (see, e.g., Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 03-105; Application of the Bd. of Educ., Appeal No. 03-022; Application of a Child with a Disability, Appeal No. 01-057; Application of the Bd. of Educ., Appeal No. 99-77; Application of a Child with a Disability, Appeal No. 96-45). In this case, the impartial hearing officer issued a final decision after concluding that both parties had an opportunity to present their cases and that respondents did not meet their burden of persuasion. The impartial hearing officer ordered that subsequent to his decision, additional evaluations take place, a CSE reconvene and consider those evaluations, and that the underlying due process dispute be returned to him for review. While it is permissible for an impartial hearing officer to order both evaluations and the reconvening of a CSE, it was not permissible for this impartial hearing officer to do so in a final order while retaining jurisdiction to review the subsequent evaluative data and considerations of the CSE. I further note that while the impartial hearing officer could have requested an independent evaluation "as part of the hearing" (8 NYCRR 200.5[j][3][viii]) he did not do so in this instance. Accordingly, the impartial hearing officer erred by retaining jurisdiction over the matter. I further find that such retention would be in contravention of the rotational selection process mandated by applicable state statute and regulations (see Educ. Law § 4404[1]; 8 NYCRR 200.5[j][3][i]; 8 NYCRR 200.2[e][1]; 8 NYCRR 200.2[b][9]). Also, under state and federal regulations, absent a bona fide extension, a due process hearing must be completed within 45 days of the receipt by the board of education of a request for a hearing or after initiation of the hearing by the board (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Accordingly, any future request for a due process hearing by either the parent or the district is subject to the rotational process identified by state regulations.

Petitioner further asserts that the impartial hearing officer ruled on issues that were not before him. I agree. Respondents filed a hearing request claiming that their son was denied a FAPE and seeking tuition reimbursement at Windward for the 2006-07 school year (Joint Exs. 1;

³ Respondents contend that petitioner's memorandum of law should be disregarded in its entirety because it exceeds the permissible number of pages for such memoranda. I have reviewed petitioner's memorandum of law and find that it is within the page limit prescribed by state regulations (8 NYCRR 279.8[5]).

2). Respondents did not assert, in either their due process complaint notice or at any point during the impartial hearing, that they were disputing their son's classification. However, in his decision, the impartial hearing officer questioned the student's classification as a student with an LD and ordered the CSE to conduct additional testing (IHO Decision at pp. 8-9). During the impartial hearing, the impartial hearing officer asked two of petitioner's witnesses whether they felt that the student's classification of LD was appropriate (Tr. pp. 559-60, 608-610). Both witnesses testified that they believed that the student was appropriately classified as a student having an LD (*id.*). No other information was garnered at the impartial hearing regarding the student's classification. Under the 2004 amendments to the IDEA, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the original request is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). At least initially, the party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Board of Educ., 2007 WL 2695643 [C.A.7 Ill. September 17, 2007]). In this case, the parties do not dispute that the impartial hearing officer addressed the student's classification and that this issue was not raised by the parties. Accordingly, I will annul those portions of the impartial hearing officer's decision that directed relief with respect to issues that were not raised by the parties.

Petitioner also contends that the impartial hearing officer erred in ordering it to arrange for further independent evaluations of the student. I agree. The impartial hearing officer appeared to grant relief that was not sought by respondents because he did not feel he could render a decision on the evidence he had before him (IHO Decision at p. 9). The hearing record in this case is complete; encompassing four days of testimony, documentary evidence presented by both parties and written memorandums of law submitted by the parties at the conclusion of the impartial hearing (Tr. pp. 1-733; Joint Exs. 1-31).⁴ Both parties were represented by counsel at the impartial hearing. Neither party contends that they were deprived of a full and fair opportunity to litigate the matter. Furthermore, the impartial hearing officer found in his decision that "parents and school district have had full opportunity to present their case" (sic) (IHO Decision at p. 9). He also asserted that "Parent petitioners did not meet their burden of persuasion," indicating that he had enough evidence to determine at least that matter (*id.*). After a thorough review of the hearing record, I conclude that the impartial hearing officer had sufficient testimonial and documentary evidence before him to render a decision in this case on the merits. Furthermore, the hearing record does not show that the evaluations performed by petitioner were inadequate, nor did respondents challenge the adequacy of the evaluations. Based on the above reasoning, I will annul the impartial hearing officer's order that petitioner arrange for an independent neuropsychological and psychiatric evaluations and reconvene the CSE to discuss an appropriate placement and program for the student. I will now examine the record and render a decision on the merits of the case.

⁴ I note that a review of the hearing record shows that all exhibits entered into evidence at the impartial hearing were marked as "joint exhibits" and were not marked sequentially. I remind the impartial hearing officer to mark all exhibits entered into evidence sequentially.

Petitioner asserts on appeal that it offered the student a FAPE for the 2006-07 school year. The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 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, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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). 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 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 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]).

The IEP developed by petitioner's CSE on June 1, 2006 indicated that the student was experiencing mild difficulty applying the skills he had learned on a consistent basis (Joint Ex. 3 at p. 1). According to petitioner's school psychologist, the student's performance on the WISC-IV revealed a relative weakness for the student in the area of processing speed (Tr. p. 363). During testimony the psychologist opined that the student's processing speed score was artificially depressed by the coding subtest, which is a timed visual motor task (Tr. pp. 363-64). She suggested that in the classroom, a student with this type of weakness could potentially take longer to copy things from the board (Tr. p. 364). The student's performance on the remaining WISC-IV indices was in the average or above average range (Joint Ex. 11 at p. 3). The student's academic skills were assessed by both petitioner and by Windward staff (Joint Exs. 9; 11; 13; 31). Although many of the student's standardized test scores fell within the average range or above, test results also revealed weaknesses in the student's decoding (Joint Ex. 13 at p. 3), reading fluency (Joint Exs. 13 at pp. 4, 5; 31 at p. 1), reading comprehension (Joint Exs. 9 at p. 2; 13 at pp. 2, 8), and spelling (Joint Exs. 9 at p. 1; 11 at p. 5; 13 at p. 4). Testing also revealed that with extended time the student was able to score significantly better on measures of reading comprehension (Joint Exs. 9 at p. 2; 13 at pp. 2-3, 8). With regard to the student's deficit in reading fluency, petitioner's special education evaluator suggested that the student would benefit from additional time to complete reading assignments and/or have modified reading assignments (Tr. p. 454; Joint Ex. 13 at pp. 3, 6). The evaluator also indicated that petitioner's recommended classroom setting allowed for students to work at different paces (Tr. pp. 454-56). With regard to the student's decoding weaknesses, the special education evaluator opined that it would not affect the student in the classroom because he used context and experience when reading (Tr. pp. 461-62). Petitioner's psychologist testified that during her observation of the student at Windward, the student was for the most part, engaged during instruction and asked for clarification when needed (Tr. p. 374). She noted that the student followed directions fairly well and was fairly independent in the classroom environment (Tr. pp. 374, 413, 417).

Respondents did not present testimony from the student's teachers at Windward or from Windward's administrators at the impartial hearing. However, according to meeting minutes, Windward staff who participated in the June 1, 2006 CSE meeting indicated that the student continued to have difficulty expressing himself in written format and that he needed assistance organizing his thoughts (Joint Ex. 3 at p. 6). Windward staff further indicated that the student had difficulty with the mechanical aspects of writing, which slowed him down (id.). Windward staff also indicated that the student could become anxious when new material was introduced, which interfered with his performance (id.). They opined that the student required a small class setting to address his distractibility and need for redirection (id.). According to petitioner's special

education evaluator, Windward staff reported that the student required additional time to acquire new skills in math (Tr. p. 471).

The CSE recommended that the student receive resource room services for 40 minutes daily to address his academic needs (Joint Ex. 3 at p. 1). The IEP goals generated by the CSE addressed the student's identified academic needs related to decoding, reading fluency, and comprehension; spelling and written expression; solving word problems and rote memorization of basic math facts (*id.* at p. 9). At the impartial hearing, petitioner's special education teacher detailed how she would work on the student's IEP goals, including some strategies and materials that she would use (Tr. pp. 475-500). To address the student's weaknesses in syllabification, the teacher testified that she would systematically review the syllabification rules and then provide the student with follow up work using programs such as Mega Words and Lexia (Tr. p. 484). The teacher indicated that she would use the same programs to address the student's decoding weaknesses (Tr. p. 487). According to the special education teacher, the student's deficits in reading fluency would be addressed by reading aloud using choral reading and the reading of short plays, and through the use of a structured program involving timed drills (Tr. pp. 485, 487-88). The special education teacher stated that she would use brainstorming, graphic organizers and specifically frame writing assignments for the student to assist him in writing multi-paragraph essays (Tr. pp. 493-94). The teacher also reported that she would use a variety of multi-sensory activities to help the student learn basic math facts (Tr. p. 496).

Petitioner's witnesses reported that the student's classroom teachers would keep observational data regarding the student's attending abilities in order to address the IEP goals related to attending and refocusing (Tr. pp. 419, 475-82). In addition, the teacher would attempt to help the student recognize when he became distracted so that he could self-monitor his attending (Tr. pp. 480-81). To further address the student's attending difficulties and processing weaknesses, the CSE recommended the following program modifications, accommodations and supplementary aids and services: preferential seating; refocusing and redirection; repetition of direction and instructions; and teacher prompting and refocusing (Joint Ex. 3 at p. 2). In addition, the CSE recommended the following testing accommodations: extended time (1.5); questions read and explained; special location, flexible scheduling; and directions read and explained (*id.*). The CSE developed handwriting and keyboarding goals to address the student's handwriting difficulties and recommended that the student receive individual occupational therapy one time per week (*id.* at pp. 2, 10). To address the student's anxiety, the CSE developed goals related to identifying anxiety producing situations and demonstrating appropriate coping skills, and recommended that the student receive group counseling once per week (*id.* at pp. 2, 9). Although respondents' witness questioned the adequacy of the IEP goals at the hearing, the record indicates that they were drafted with input from Windward staff prior to the CSE meeting (Tr. pp. 472-74, 486, 489, 494, 510-12). In addition, the goals were reviewed and modified at the CSE meeting in which both respondents and Windward staff participated (Tr. pp. 474, 512; Joint Ex. 3 at p. 6) and there is no evidence that respondents objected to the goals at the time of the CSE meeting.

Respondents asserted in their due process complaint notice that petitioner's recommended program did not offer the student the appropriate level of support necessary for the student to make academic progress (Joint Ex. 2). While the hearing record shows that the student requires additional time to complete academic tasks both during testing and in the classroom (Tr. pp. 363-64, 454, 471; Joint Exs. 7 at p. 6; 9 at p. 2; 13 at pp. 2-3, 6, 8, 9), respondents did not establish the level of additional time the student needs in the classroom and whether the amount of time that the

student requires is beyond what the recommended classroom teacher could accommodate, nor did they sustain their burden in showing that the extended time for testing offered in the student's IEP was insufficient to meet his special education needs (Joint Ex. 3 at p. 3).

Based upon the hearing record before me, I find that the program recommended by the CSE on June 1, 2006 was designed to confer educational benefit upon the student. Having determined that petitioner offered the student a FAPE for the 2006-07 school year, I need not address the appropriateness of respondents' placement of the student at Windward or the equitable considerations in this case (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-030).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations or they are without merit.

THE APPEAL IS SUSTAINED.

**Dated: Albany, New York
September 19, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**