



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-016

**Application of a STUDENT 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 Kingston City School District**

**Appearances:**

Family Advocates, Inc., attorneys for petitioners, RosaLee Charpentier, Esq., of counsel

Shaw, Perelson, May, and Lambert, LLP, attorneys for respondent, Jeffery Schiro, Esq., of counsel

### DECISION

Petitioners (the parents) appeal from a decision of an impartial hearing officer which determined that the educational program and services that respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2008-09 school year was appropriate and denied the parents' request for an order placing their daughter at a different public school and reimbursing them for privately obtained reading services. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending fourth grade in a 12:1+1 integrated general education setting at the district's elementary school (Tr. pp. 37-38; Dist. Ex. 6 at p. 1). The student's July 23, 2008 individualized education program (IEP) for the 2008-09 school year also recommended program modifications/accommodations; related services of counseling, occupational therapy (OT) and speech-language therapy; and the services of a full-time 1:1 teaching assistant (TA) (Dist. Ex. 6 at pp. 1-2). The student has received diagnoses of an attention deficit disorder, predominantly inattentive type (ADD); a pervasive developmental disorder, not otherwise specified (PDD-NOS); and a communication disorder, NOS (Dist. Ex. 5 at p. 10). Her overall cognitive abilities are in the severely impaired range, although she exhibits relative strengths in expressive vocabulary and the ability to use visual cues (*id.* at pp. 7-8, 20). Her academic achievement skills are at a prekindergarten to kindergarten level and she exhibits word finding and comprehension difficulties (*id.* at pp. 8-9, 24-25). The student's social and pragmatic language skills are delayed, in part due to her difficulty with attention and expressive language, and problems interpreting subtle social cues (*id.* at pp. 9-10). She is administered medication to address her attention difficulties (Dist. Ex. 17 at p. 1). The student's eligibility for special

education programs and services as a student with autism is not in dispute in this appeal (8 NYCRR 200.1[zz][1]; 34 C.F.R. § 300.8[c][1]; see Tr. pp. 32, 35, 779).

The hearing record reflects that at the age of three, the student exhibited difficulties with speech-language development (Tr. pp. 386-87). During the 2003-04 school year, the Committee on Preschool Special Education (CPSE) placed the student in a full-time special class program where she received special education instruction and related services of OT and speech-language therapy (Tr. pp. 387-88; Dist. Ex. 70 at p. 1). In May 2004, the CSE convened for an initial school-age review of the student and determined that she was eligible to receive special education services as a student with multiple disabilities (Dist. Ex. 65). For her kindergarten school year (2004-05), the CSE recommended placement in an 8:1+2 special class with OT and speech-language therapy services (id. at p. 1). The student attended an extended school year (ESY) program in summer 2005, as recommended by the CSE (Tr. p. 405).

In September 2005, a neuropsychologist conducted a private neuropsychological evaluation (Tr. p. 398; Dist. Ex. 52). The student's overall levels of cognitive functioning were estimated to be in the borderline range, with significant discrepancy between her overall knowledge base and her ability to process information consistently (Dist. Ex. 52 at p. 3). Although the neuropsychologist reported that the student's language skills were "functional" and that she often demonstrated good pragmatic skills, the neuropsychologist indicated that she also exhibited impaired phonemic awareness and auditory processing skills (id. at pp. 8-10). It was reported that the student's basic attentional capacities were impaired and that she had difficulty modulating arousal levels (id. at p. 9). Although the student's academic skills were "emerging," the neuropsychologist reported that she exhibited difficulty with reading, writing, and math (id. at p. 10). Emotionally, the student was capable of reciprocally engaging with adults and peers; however, language difficulties limited her ability to effectively interact with peers (id.). The findings of the evaluation indicated to the neuropsychologist that the student was not mentally retarded and that her difficulties resulted from a variety of concerns, including attention and language problems (id. at p. 11). At the time of the evaluation, the neuropsychologist reported that diagnoses of an ADD and a communication disorder, NOS "seemed to best characterize [the student's] difficulties" (Dist. Exs. 5 at p. 1; 52 at p. 11).

In first grade, the student continued attending an 8:1+2 special class and received OT and speech-language therapy services (Dist. Ex. 57 at p. 1). The student's mother indicated that the private neuropsychologist recommended administration of medication to improve the student's attention skills and over the course of the student's first grade school year, a variety of medication trials were conducted (Tr. pp. 398-402). The student attended an ESY program in summer 2006 (Tr. pp. 405-06).

In second and third grade, the student received academic instruction in an 8:1+1 special class, as well as related services of OT and speech-language therapy (Dist. Exs. 4 at p. 1; 31 at p. 1; 37 at p. 1; 44 at p. 1). She was integrated with her nondisabled peers for library, music and physical education (Dist. Exs. 4 at p. 1; 31 at p. 1; 37 at pp. 1-2, 4). The student's mother reported that during second grade (2006-07), the student made some academic progress and enjoyed her mainstream experiences (Tr. pp. 406-10). During third grade (2007-08), the student had increased difficulty with her ability to focus and according to the student's mother, her reading skills did not progress (Tr. pp. 411-13, 418-20).

Over two dates in February and March 2008, a district school psychologist conducted a psychoeducational evaluation of the student as part of her triennial reevaluation (Tr. pp. 289, 420-21; Dist. Ex. 17). Administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) yielded the following composite standard scores: verbal comprehension 59, perceptual reasoning 51, working memory 62, processing speed 62, and a full scale IQ score of 49 (extremely low range of cognitive functioning) (Dist. Ex. 17 at p. 2). The school psychologist reported that although still below average, areas of relative strength for the student were her working memory and processing speed skills (id.). He opined that overall the student appeared to have better verbal skills than visual processing skills (id. at p. 3). Administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) yielded the following composite standard scores: reading 52, mathematics 43, writing 55 (id.). According to the school psychologist, the student exhibited limited academic skills and needed "much assistance" academically (id. at p. 4). Recommendations included repeating and explaining directions to ensure understanding, and a notation that "a review by a developmental ophthalmologist may be helpful" due to her difficulties with visual processing (id. at p. 5).

On March 3, 2008, a district occupational therapist conducted an OT evaluation of the student (Dist. Ex. 18). Following administration of a variety of assessments that measured the student's visual motor integration, motor coordination, visual perception, handwriting, sensory and ocular motor skills; the occupational therapist reported that the student's difficulty with letter recall and incomplete knowledge of the alphabet directly affected her independent reading and writing performance (id. at p. 3). It was reported that although the student was often distracted by external stimuli and required continual redirection, she exhibited improvement in her fine-motor skills (id.). The occupational therapist recommended continuation of the student's OT services (id.).

On March 28, 2008, a subcommittee of the CSE convened for the student's annual review and to develop her 2008-09 IEP (Dist. Ex. 14). Meeting attendees included the district's chairperson, an "intern," a speech-language pathologist, a social worker, a regular education teacher, an occupational therapist, the student's then current special education teacher, the school psychologist who conducted the March 2008 evaluation, and the parents (id. at p. 6). According to the CSE subcommittee meeting comments, the special education teacher reported that the student had made "small and minimal" academic gains, that she continued to function on a kindergarten level, and that she exhibited a decreased ability to stay focused and on task (id. at pp. 3, 6; see Tr. pp. 430-31). The school psychologist reviewed the student's updated testing results, noting a significant decrease in her full scale IQ score from prior testing (Dist. Ex. 14 at p. 6). The resultant March 28, 2008 IEP provided specific information regarding the student's reading, writing, and math skills and needs (id. at pp. 3-4). The results of recent speech-language, academic achievement, and cognitive testing were incorporated into the March 28, 2008 IEP (id. at p. 4). According to the CSE subcommittee meeting comments, the speech-language pathologist and occupational therapist reported at the meeting that the student had made minimal progress, and provided specific information about the student's level of functioning in their respective areas (id. at pp. 3-5). The special education teacher provided information about the student's management needs, noting that the student required a program with a small teacher-to-student ratio and minimal distractions, intensive supervision, individualized attention, a structured environment, and small group instruction (id. at p. 5). The CSE subcommittee recommended program modifications including refocusing/redirection, checking for understanding, additional time to complete tasks, preferential seating, and a modified math curriculum (id. at p. 2). The CSE subcommittee

developed annual goals for the student in the areas of reading, writing, mathematics, speech-language, and motor skills (id. at pp. 2, 6-10). According to the March 28, 2008 IEP, the CSE subcommittee discussed the "implications of the testing and the academic nature of [the student's] present class placement" (id. at p. 6). The CSE subcommittee recommended that the student participate in the "New York State Alternate Assessment for Students with Severe Disabilities," and placement in a full-time 12:1+2 "IEP" life skills special class program, as well as two group 30-minute sessions of OT and three group 30-minute sessions of speech-language therapy per six day cycle (Tr. pp. 8, 9, 82, 84-85, 91, 355; Dist. Ex. 14 at pp. 1-3, 6).<sup>1</sup> The CSE subcommittee also recommended one 30-minute session per month of social work intervention services (Dist. Ex. 14 at p. 1).

The student's mother stated that she attempted to contact the district regarding her concerns about the March 28, 2008 CSE subcommittee's program recommendation (Tr. pp. 751-59). At the end of May and the beginning of June 2008, the student's mother reported contacting other elementary schools within the district to determine what types of special education programs they offered (Tr. pp. 759-60, 813).

In a report dated June 25, 2008, the student's special education teacher provided the parents with a report of their daughter's progress toward her IEP annual goals (Parent Ex. C). Out of 35 annual goals, the student received designations of "NA" (Not Achieved) on five, "SP" (Some Progress) on nine, "PS" (Progressing Satisfactorily) on nineteen and "A" (Achieved) on two (id.). Teacher comments throughout the 2007-08 school year reflected that the student was "well-behaved" and "a pleasure to have in class," but that she had consistent difficulty with attention and focus that affected her progress (id. at p. 2; Parent Ex. D at p. 2).

By letter to the director of special education dated June 26, 2008, the parents informed the district that they did not agree with the proposed 2008-09 IEP or the findings contained in the March 2008 school psychologist's report (Parent Ex. F). The parents requested an independent psychoeducational evaluation, a profile of the 12:1+2 class, and an "emergency" CSE meeting to review the 2008-09 IEP (id.).

At the request of the parents, the private neuropsychologist conducted a neuropsychological evaluation of the student over the course of five days between May 22, 2008 and June 11, 2008 (Dist. Ex. 5).<sup>2</sup> The resultant evaluation report, dated July 2, 2008, indicated that the student was tolerant of the testing and exhibited "seemingly" reciprocal conversational speech; however, she was also highly distractible and had difficulty sustaining attention to tasks (id. at p. 3). The private neuropsychologist reported that due to the student's difficulties with verbal

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<sup>1</sup> The March 28, 2008 CSE subcommittee's 12:1+2 program recommendation is referred to in the hearing record as both a "life skills" and an "IEP" program (Tr. pp. 430-31; Dist. Ex. 14 at p. 6). The hearing record describes a "life skills" program as a program that "de-emphasizes" academics, and in which students usually complete alternate assessments to the New York State Regents Examinations and achieve IEP diplomas (Tr. pp. 453-54). According to the student's mother, immediately after the conclusion of the March 28, 2008 meeting and at a subsequent team meeting approximately one week later, the student's special education teacher stated that she disagreed with the 12:1+2 life skills program recommendation and recommended that the student continue in an 8:1+1 academically focused program (Tr. pp. 808-09).

<sup>2</sup> The private neuropsychologist also conducted the student's private neuropsychological evaluation in 2005 (Dist. Ex. 2 at p. 1).

comprehension and attention, test findings may have been an underestimate of her true abilities (id.). The private neuropsychologist opined; however, that the test results provided a "relatively valid estimate of current functioning" because problems that arose during testing appeared to reflect challenges that the student faced within her everyday life, which affected her ability to perform tasks (id.). The student's overall levels of intellectual functioning, as assessed by the Kaufman Assessment Battery for Children, Second Edition (KABC-II), were estimated to be in the borderline to severely impaired range, with "splintered skills" in virtually all domains (id. at pp. 3, 7-8, 19). While the student demonstrated a relative strength in her ability to acquire facts and use visual cues, she tended to be concrete in her thinking and exhibited significant problems integrating and generalizing her knowledge to solve problems (id. at p. 8). Administration of a variety of measures of the student's speech-language skills indicated that the student had significant difficulties with language, despite adequate word knowledge skills and an ability to listen and understand material read to her when provided with visual cues (id. at pp. 3-4, 8, 20). The student exhibited difficulties with word finding, comprehension, phonological processing, syntax, and verbal expression of her ideas (id. at pp. 3-4, 8). Her pragmatic language skills were described as "severely compromised" in that the student had difficulty "extrapolating her ideas beyond literal interpretations and concrete attributes" (id. at pp. 4, 8). The private neuropsychologist reported that the student's problems were exacerbated by inattention and poor organizational skills, particularly in complex, unstructured situations, and that she often required explicit feedback to perform at a minimal level of proficiency and to remain focused on task demands (id. at p. 8). The student's basic visuo-perceptual skills were described as "variable," and "ranged between average and severely impaired levels depending upon task demands" (id. at pp. 4, 20-22). The student had difficulty with visuospatial reasoning skills, coordination of unilateral hand movements, fine motor dexterity, and graphomotor skills (id. at p. 4).

The private neuropsychologist reported that the student's executive functioning skills, which included attention/concept formation and judgment, were "severely compromised" by inattention and difficulty with planning, organizing, shifting mental set, and modulating her responses (Dist. Ex. 5 at pp. 4, 8, 22). The student's working memory skills were impaired and she was unable to "screen out" distracting information (id. at pp. 4-5, 8). The neuropsychological evaluation report indicated that the student's learning and memory skills were variable and dependent on the student's ability to focus on task demands and pertinent details (id. at pp. 5, 8, 22-24). Although inattention and sequencing difficulties diminished the amount of information she learned, the private neuropsychologist reported that the student benefitted substantially from explicit opportunities for structured learning (id. at pp. 5-6, 8). Administration of the Wide Range Achievement Test-4 (WRAT-4) and the Kaufman Test of Educational Achievement, Second Edition (KTEA-II) indicated that the student's academic performance was significantly below "current instructional grade levels" in all basic academic skills (id. at pp. 8, 24-25). The private neuropsychologist reported that the student had not "made substantial progress beyond Kindergarten level of instruction" and that her reading decoding skills had not progressed since the prior evaluation in 2005 (id. at p. 6). Although the student was able to identify randomly presented letters and the phonemic sounds associated with them, she had difficulty blending sounds to read words phonetically and exhibited an extremely limited sight word vocabulary (id.). The student wrote/copied individual letters and independently wrote her name, but did not spontaneously spell other words (id.). In math, the student was able to count tangible items, identify shapes, and discriminate single digit numbers and relative sizes (id.). Her basic arithmetic skills were extremely poor; she had not mastered many basic mathematical concepts and was

unable to solve problems in written format (id. at pp. 8-9). The private neuropsychologist indicated that some of the student's difficulties were related to her working memory deficits and her inability to conceptualize arithmetical operations presented symbolically (id. at pp. 6, 8-9).

To assess the student's general emotional and adaptive functioning, the private neuropsychologist used self reports, parental and teacher reports, clinical interview/observation, standardized measures of emotional cognition, and fantasy-based measures; including specific assessments used to identify features of autism (Dist. Ex. 5 at pp. 6, 25-29). The private neuropsychologist reported that the student exhibited difficulty maintaining relationships due to her difficulties with expressive and pragmatic language skills, interpretation of subtle social cues, and attention skills (id. at pp. 7, 9). According to the private neuropsychologist, the student demonstrated many of the neurocognitive and social difficulties characterized by autism spectrum disorders, and she determined that the student's profile was consistent with PDD-NOS (id. at p. 9). The private neuropsychologist concluded that although the student's overall cognitive skills were "splintered and inconsistently developed," she demonstrated strengths in "virtually all cognitive domains" (id.). Despite significant delays in academic skills, "absolute scores" that depicted overall cognitive functioning to be in the severely impaired range, and language/social difficulties that restricted her ability to function adaptively, the private neuropsychologist did not believe "a classification of mentally retarded best characterizes the problems that [the student] exhibits" (id. at p. 10). The student received diagnoses of a PDD-NOS, an ADD-predominately inattentive type, and a communication disorder-NOS, and the private neuropsychologist suggested that the CSE consider classification of the student as a student with autism (id.).

The private neuropsychologist's report contained numerous recommendations for the student's educational programming, including specific instructional modifications and accommodations, use of multisensory instructional techniques, social skills training, continuation of speech-language therapy and OT, and parent/staff training (id. at pp. 10-18). She recommended that the student be placed in a "flexible" special education program where she would receive direct supportive services from trained professionals who used multisensory teaching methods (id. at p. 10). The private neuropsychologist recommended that the student be provided with opportunities to interact with "neurotypically average" peers in integrated settings such as art, music, and physical education (id. at pp. 10-11). She indicated that the student required 1:1 paraprofessional aide services, especially in integrated settings (id. at pp. 11-12).

By letter to one of the district's staff in the special education department, dated July 14, 2008, the student's mother stated that she had contacted the district for information regarding special education programs and requested that the district provide class profiles for second through fifth grades, including "curriculums, ratios, if they are self contained or integrated/inclusion" ... "if they are push in or pull out, the methodologies utilized in teaching and if there is TA support" (Parent Ex. G). The student's mother indicated in the letter that she had "also contacted the elementary schools within [the district] requesting same" and listed the specific schools and people she had contacted (id.).

On July 23, 2008, the CSE subcommittee convened at parental request for a review of the student's educational program (Dist. Ex. 6). Attendees included the CSE chairperson, a social worker, two special education teachers, a regular education teacher, a school psychologist, a speech-language pathologist, an additional parent member, and the parents (id. at p. 9). The CSE subcommittee reviewed the July 2008 neuropsychological evaluation report and following the

recommendation of the private neuropsychologist, changed the student's classification to a student with autism (id. at pp. 1, 9). According to the resultant July 23, 2008 IEP, the CSE subcommittee changed the student's placement recommendation to a 12:1+1 integrated program with full-time 1:1 TA services, based upon the private neuropsychologist's recommendation and parental request (id. at pp. 1-2, 9). The CSE subcommittee's recommendation included as a program modification access to a computer, twice weekly group counseling services, one session per month of parent counseling and training, and team meetings, which had not been previously recommended in the March 28, 2008 IEP (compare Dist. Ex. 6 at pp. 1-2, with Dist. Ex. 14 at pp. 1-2). According to the July 23, 2008 IEP, the parents requested intensive multisensory services for their daughter, but did not want her to participate in district assessments (Dist. Ex. 6 at p. 9). According to the July 23, 2008 IEP, the CSE subcommittee agreed to increase the student's speech-language therapy services, and reconvene after the multisensory reading teachers had determined ways to meet the student's needs based upon information in the July 2008 neuropsychological evaluation report (id.). The July 23, 2008 IEP reflected that the CSE subcommittee also agreed to reconvene after the first month of school to determine if the student's needs were being met (id.).<sup>3</sup>

By letter dated July 24, 2008, the student's mother requested that the district provide her with a copy of the July 23, 2008 IEP and the contact information of attorneys who participated in impartial hearings (Parent Ex. H). The following day, the district sent the parents a copy of the "Notice to Parents of Procedural Safeguards" (Parent Ex. M). In August 2008, the parents began exploring special education program options offered by a different public school district (Tr. pp. 819-20).

During summer 2008, the parents contacted a private reading instructor who on August 25, 2008, after a review of the student's prior evaluation reports, informally assessed the student's reading skills (Tr. pp. 650, 696-97; Dist. Ex. 1). Subsequently, the private reading instructor provided the student with four 30-minute sessions of multisensory reading services per week until October 31, 2008, and four 50-minute multisensory reading sessions per week beginning on November 1, 2008 (Tr. pp. 660, 666, 706, 724).

By letter dated August 20, 2008, the parents filed a due process complaint notice asserting that the district failed at both the March 28 and July 23, 2008 CSE subcommittee meetings to offer the student a free appropriate public education (FAPE) (Dist. Ex. 2). With regard to the July 23, 2008 IEP, the parents alleged, among other things, that the district did not offer multisensory reading instruction to the student; the CSE subcommittee composition was improper; the goals created were inappropriate; and none of the district's CSE subcommittee members could answer questions pertaining to the proposed placement (id. at pp. 2-5). By letter to the director of special education, dated August 18, 2008, the parents amended their due process complaint notice to inform the district that they were making arrangements for their daughter's private placement at a different public school district in an "appropriate class" and were seeking "full tuition reimbursement" and transportation (Dist. Ex. 1).<sup>4</sup> The amended due process complaint notice also informed the district that the parents intended to hire a reading specialist to provide the student

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<sup>3</sup> The hearing record does not indicate that the CSE subcommittee reconvened.

<sup>4</sup> Although the parents' amended due process complaint notice is dated "August 18, 2008," it appears to refer to the August 20, 2008 due process complaint notice as the original complaint (compare Dist. Ex. 1, with Dist. Ex. 2). This discrepancy was not clarified in the hearing record (see Tr. pp. 14-15).

with a minimum of three sessions per week of reading instruction and informed the district of the cost of the reading instructor (id.). Lastly, the amended complaint informed the district that the parents had retained an attorney (id.).

By letter dated August 28, 2008 to the director of special education, the parents requested that the "hearing office" contact them immediately to discuss the student's pendency placement (Parent Ex. K). In the letter, the parents further requested that the "hearing officer" contact them and identify where the student should attend on the first day of school (id.). The letter stated that at the July 23, 2008 CSE subcommittee meeting, it was stated that "there was no pendency" (id.).

By letter to the CSE chairperson dated August 30, 2008, the private neuropsychologist provided an addendum to her July 2008 neuropsychological evaluation report (Parent Ex. I). In the letter, the private neuropsychologist reiterated the presence of substantial academic delays despite the student's ability to learn, as demonstrated by her expressive vocabulary skills and "the specific benefits observed when provided with multisensory cuing in systematically, structured multisensory learning situations" (id. at p. 1). The private neuropsychologist opined that the student could learn to read and write fluently; however, she required intensive remedial teaching in all academic areas using a structured, sequential multisensory program that would also accommodate her need for continuous practice, a slower learning style and consultations with the speech-language pathologist (id.). She recommended placement of the student in a "language-rich classroom, which offers all of the fundamental aspects of a diploma-bound academic program," and that the student receive intensive, supplemental supports both within the classroom and after school (id. at p. 2). The private neuropsychologist stated that it was critical that the program provide the student with opportunities to be included in less-restrictive educational classroom placements alongside nondisabled peers (id.). She concluded the letter by indicating that "it may be that appropriate placement can only be accomplished by enrolment [sic] in an alternative public or private setting that can devote more time to [the student's] individual needs for academic programming" (id.). The letter stated that any alternative placement would "need to meet basic criteria that allow alignment with the State's academic standards" (id.).

By letter dated September 2, 2008, the district responded to the parents' due process complaint notice (see 8 NYCRR 200.5[i][4]), denied the allegations contained in the parents' due process complaint notice and alleged that the district had offered the student a FAPE for the 2008-09 school year (Dist. Ex. 3).

On September 9, 2008, an impartial hearing convened. The first day of hearing addressed the issue of the student's pendency program (Tr. pp. 1-102). By decision dated September 11, 2008, the impartial hearing officer issued an interim order of pendency, finding that the district's program developed at the July 23, 2008 CSE subcommittee meeting was the student's pendency program (IHO Interim Order at p. 2).

The impartial hearing resumed on September 24, 2008, and after a total of four days, ended on November 11, 2008. In a decision dated January 9, 2009, the impartial hearing officer made the following determinations: (1) that the district offered the student a FAPE for the 2008-09 school year; (2) that the district "followed all state requirements and that no procedural violations have occurred" in regard to the student's July 23, 2008 IEP; (3) that the parents had made a "unilateral decision to identify" a different public school district as an appropriate placement; (4) that the parents were not entitled to reimbursement for the private reading services because they

"refused to allow any further testing" of the student; and (5) that the parents failed to meet their burden to show that their proposed placement at a different public school would be appropriate for the student (IHO Decision at pp. 10-12).<sup>5</sup>

The parents appeal, contending that the impartial hearing officer erred in finding that the district had offered the student a FAPE for the 2008-09 school year and in denying the parents' request for an order placing the student at a different public school and for reimbursement for the private reading services. The parents argue, among other things, that the July 23, 2008 CSE subcommittee was improperly composed, which denied the parents the opportunity to participate in the decision making process; that the July 23, 2008 IEP does not state that the student requires multisensory instruction and does not contain goals to address the student's needs; and that the program offered to the student by the district is inappropriate. The parents further argue that the impartial hearing officer erred in determining that the parents did not cooperate with the district and that they refused to consent to additional testing for the student. As relief, the parents' request the annulment of the impartial hearing officer's decision in its entirety and a determination that the district denied the student a FAPE. The parents further request a determination that the parents' proposed program at a different public school is appropriate and an order for "an immediate change in placement" to that school. Lastly, the parents seek reimbursement for the costs of the student's private reading services during the 2008-09 school year.

The district answers, asserting that the impartial hearing officer's decision should be upheld in its entirety. The district asserts that the parents "unreasonably" refused to consent to additional testing of the student, that the CSE subcommittee had sufficient evaluative information upon which to make its recommendations, that the parents' request that the student be placed in another public school should be denied as a matter of law, that the parents have failed to show that their requested program could meet the student's special education needs, that the district is providing the student appropriate instruction in reading, and that the parents have failed to show that the private reading services they obtained address the student's special education needs.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

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

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<sup>5</sup> The impartial hearing officer's decision is devoid of any specific cites to transcript pages and only provides two cites to exhibit numbers (IHO Decision at p. 9) that were used to support his conclusions. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, transcript pages and relevant exhibit numbers should be cited with specificity. State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). The impartial hearing officer is cautioned to comply with State regulations and cite to specific transcript pages and exhibit numbers, in order to demonstrate that the hearing record supports his decisions.

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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 student, 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]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 student 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 student 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 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Application of the Dep't of Educ., Appeal No. 08-017; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

First, I will address the parents' assertion that their daughter was denied a FAPE because the July 23, 2008 CSE subcommittee was not properly composed, which denied them the ability to ask questions and significantly impeded their opportunity to participate in the decision making process regarding the provision of a FAPE. Specifically, the parents allege that the July 23, 2008 CSE subcommittee failed to "share basic information regarding the specifics of the proposed setting," and that there was no one present at the July 23, 2008 CSE subcommittee meeting who had "direct knowledge" about the proposed placement. The impartial hearing officer found that there were no procedural violations that denied the student a FAPE (IHO Decision at pp. 10-11).

The hearing record shows that the parents requested the July 23, 2008 CSE subcommittee meeting to discuss multisensory instruction and program options for their daughter in light of their disagreement with the March 28, 2008 CSE subcommittee's recommendation that the student attend a life skills program, and to review the July 2008 private neuropsychological evaluation report (Tr. pp. 283-84, 753, 762-63). The director of special education testified that the purpose of the July 23, 2008 CSE subcommittee meeting was to discuss the student's program (Tr. p. 309). Attendees at the July 23, 2008 meeting included the CSE chairperson, a social worker, two special education teachers, a regular education teacher, a school psychologist, a speech-language pathologist, an additional parent member, and the parents (Dist. Ex. 6 at p. 9). The CSE subcommittee did not include members who had information about the proposed program. In unrefuted testimony, the student's mother testified that the CSE subcommittee was unable to answer questions regarding the proposed placement and that no one from the proposed placement attended the meeting (Tr. pp. 763, 766-77). The student's mother further testified that the parents rejected the proposed 2008-09 program, in part because they did not know enough about it, and they believed that the recommended program change from the March 28, 2008 12:1+2 self-contained life skills recommendation to the July 23, 2008 12:1+1 integrated setting did not appear to them to be "thought out or planned" (Tr. p. 773). The director of special education testified at the impartial hearing that at the conclusion of the July 23, 2008 CSE subcommittee meeting she believed that the recommended program was a "work in progress" and that the CSE would need to reconvene to make "further adjustments" (Tr. p. 311). The hearing record shows that the student had attended either an 8:1+1 or an 8:1+2 self-contained program since kindergarten (Tr. pp. 40,

78, 397; Dist. Exs. 4; 37; 57; 65). The hearing record further shows that the July 23, 2008 CSE subcommittee did not consider any options beyond the 12:1+1 integrated class at a specific district elementary school, yet, the CSE subcommittee did not include members who were knowledgeable about the proposed district program (Tr. pp. 617-18, 764-65, 774, 786). Under the circumstances of this case, I need not decide whether a procedural violation occurred which significantly impeded the parents' opportunity to participate in the decision making process and thus denied the student a FAPE because, for the reasons set forth below, the July 23, 2008 IEP denied the student a FAPE on substantive grounds.

Turning to the parents' substantive arguments regarding the July 23, 2008 IEP, the parents allege that the student was denied a FAPE because: (1) the annual goals do not address the student's needs and are not measurable; (2) the IEP lacks classroom testing accommodations, a recommendation for a multisensory teaching environment, and specialized reading instruction; and (3) the proposed program is inappropriate for the student.

In regards to the goals, the majority of the student's annual goals contained in the March 28, 2008 IEP in the areas of reading, writing, mathematics, speech-language, and motor skills were retained in the July 23, 2008 IEP (compare Dist. 6 at pp. 11-14, with Dist. Ex. 14 at pp. 6-10). The July 23, 2008 CSE subcommittee also added annual goals to the student's IEP in the areas of study and social/emotional/behavioral skills (Dist. Ex. 6 at pp. 10, 14). The CSE subcommittee developed annual goals in the areas of need identified by the July 2008 neuropsychological evaluation report (Dist. Ex. 5). A review of the proposed annual goals reveals that they are measurable, provide the requisite specificity to enable the student's teachers to understand the CSE subcommittee's expectations, and include evaluative criteria, procedures, and schedules to measure the student's progress over the course of the 2008-09 school year (Dist. Ex. 6 at pp. 10-14). Therefore, I find that the student's annual goals contained in the July 23, 2008 IEP are measurable and address the student's areas of need. However, I note that the July 23, 2008 IEP does not contain any short-term objectives. I remind the district that for students who participate in the New York State alternate assessment, the IEP "shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]), and going forward, the district should comply with the regulations.

Regarding the lack of classroom testing accommodations, the hearing record reveals that during the prior 2007-08 school year the student was designated to participate in State and district-wide testing and that she was provided with testing accommodations on her IEP (Dist. Ex. 4 at p. 2). However, the July 23, 2008 CSE subcommittee determined that the student would participate in the New York State alternate assessment and that testing accommodations were not required for the student for the 2008-09 school year (Dist. Ex. 6 at p. 3). The director of special education testified that because the student was designated to participate in alternate assessments and receive a modified curriculum, the special education teacher would modify the student's classroom tests (Tr. pp. 347-48); however, this was not reflected on the student's IEP. I remind the district to comply with the State regulations requirement that classroom testing accommodations, if applicable, shall be included in the student's IEP (8 NYCRR 200.4[d][2][vi]).

Turning to the appropriateness of the district's proposed special education placement at the time the July 23, 2008 IEP was developed, the director of special education testified that at the July 23 2008 meeting, the CSE subcommittee believed that the IEP developed for the 2008-09

school year provided many of the recommendations offered by the private neuropsychologist in her July 2008 evaluation report, including a change of classification to autism, offering a "more integrated" program than the student had previously received, increasing the amount of speech-language therapy, and the provision of 1:1 TA services (Tr. pp. 294-97, 302-05). However, as further described below, a careful review of the hearing record, and in particular the July 2008 private neuropsychologist's recommendations, reveals that the program offered by the district for the 2008-09 school year was not reasonably calculated to confer educational benefits to the student.

From kindergarten through third grade, the student attended one of the district's 8:1+1 or 8:1+2 special class programs (Dist. Exs. 4; 31; 37; 44; 57; 65). In September 2005 at the beginning of first grade, the private neuropsychologist described the student's academic achievement skills as "emerging" (Dist. Ex. 52 at p. 10). Although she had difficulty with segmenting and blending sounds to read phonetically and had a limited sight word vocabulary, the student's ability to decode letters and words was in the average to low average range, and she was able to identify letters and individual letter sounds (id. at pp. 4-5). The student was able to write many individual letters heard, although she had not mastered writing all of the letters of the alphabet (id. at p. 5). At that time, the student's math skills were "essentially" at a prekindergarten level (id.). Narrative progress reports from the 2006-07 and 2007-08 school years reflected statements that the student "made progress in reading and spelling," was "doing well in spelling and reading," was "able to identify more sight words each week," and demonstrated "nice growth" in her math skills (Parent Exs. B at p. 2; D at p. 2). Reports regarding the student's progress toward IEP reading, writing, and math annual goals revealed designations of either "some progress" or "progressing satisfactorily" (Parent Exs. A at pp. 2-4; C at pp. 3-5).<sup>6</sup> However, academic achievement assessments conducted by the district in March 2008 and by the private neuropsychologist in July 2008 revealed that the student possessed "limited" academic skills, and that the student had not made "substantial" progress beyond the kindergarten level of instruction (Dist. Exs. 5 at p. 6; 17 at p. 4). In July 2008, the private neuropsychologist concluded that the student's basic reading decoding skills had not significantly improved since her prior evaluation in September 2005 (Dist. Ex. 5 at p. 6; see Dist. Ex. 52 at p. 2). The July 23, 2008 CSE subcommittee acknowledged that the student's academic performance was "significantly below current instructional grade levels in all basic academic skills" (Dist. Ex. 6 at p. 4). In addition, both the special education teacher's progress reports from the 2007-08 school year and the private neuropsychologist's July 2008 report indicated that the student had significant difficulty with attention that affected her instruction (Dist. Ex. 5 at pp. 3-5, 7-8; Parent Ex. D at p. 2; see Dist. Ex. 17 at p. 1).

Despite the student's significant academic delays, attention problems, and minimal progress observed while instructed in the district's self-contained 8:1+1 or 8:1+2 classes, the July 23, 2008 CSE recommended a full-time 12:1+1 integrated program with full-time 1:1 TA services for the student (Dist. Ex. 6 at p. 1). While it is apparent that the July 23, 2008 CSE subcommittee attempted to implement the private neuropsychologist's recommendation for exposure to nondisabled students "in an integrated setting," the private neuropsychologist's recommendation was for integration "in areas that [the student] performs well," and she provided examples of settings such as physical education, art, and music classes (Dist. Ex. 5 at p. 11). The July 23, 2008 IEP recommends that the student be integrated for the entire school day (Dist. Ex. 6 at p. 1). The

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<sup>6</sup> The student achieved one annual goal in the area of writing during the 2006-07 school year (Parent Ex. A at p. 3).

July 23, 2008 IEP is devoid of specific services to remediate the student's significant math, written language, and reading deficits, despite identification of the need for such services (Dist. Exs. 5 at p. 11; 6; 11 at p. 4).<sup>7</sup> Further, the IEP only identifies a modified curriculum for math, despite the CSE subcommittee's knowledge of the student's significant reading delay (Tr. pp. 187-89, 292-94; Dist. Ex. 6 at p. 2). Although the July 23, 2008 IEP offered the student the services of a full-time 1:1 TA, given the student's academic and attentional needs, the hearing record does not support the conclusion that the student would receive educational benefit from placement in integrated settings of up to 29 students for academic instruction (see Tr. pp. 131-32).

Finally, I note that the student's special education teacher testified at the impartial hearing about her concerns at the commencement of the 2008-09 school year that the student's placement in the integrated science and social studies classes was inappropriate, and that the student was not grouped with students of similar academic levels during the non-integrated portion of her school day (Tr. pp. 212-13, 221-25).

Based on the above, I find that the impartial hearing officer incorrectly determined that the district offered a FAPE to the student, and I will remand the case back to the CSE in order to develop an IEP for the student for the remainder of the 2008-09 school year that complies with the IDEA, federal and State regulations regarding short-term objectives for students designated to participate in the alternate assessments; that assesses the student's need for classroom testing accommodations and recommends such accommodations if appropriate; considers the use of multisensory teaching methods,<sup>8</sup> and recommends a program which will appropriately address the student's significant reading and math needs. I remind the district that both the federal and State regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services (8 NYCRR 200.6; see 34 C.F.R. § 300.115[a]). The school district must consider all available placements on the continuum which may be appropriate to meet the student's needs, including but not limited to,

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<sup>7</sup> While I note that the district's implementation of the July 23, 2008 IEP under pendency includes 1:1 instruction of the student in English language arts (ELA) and math, this service was not offered at the time the July 23, 2008 IEP was developed (Tr. pp. 176-77). Further, the district argues that it is providing the student with "appropriate instruction in reading." The district's special education teacher testified that she provided daily reading instruction to the student and used a program entitled "Explode the Code," described as a "systematic phonetic program" that is "repetitious" (Tr. pp. 135, 153-54). Explode the Code focuses on phonetics and comprehension (Tr. p. 136). The special education teacher testified that as of September 24, 2008, the student recognized 7 out of 20 kindergarten-level sight words and had begun writing and "working" with the letters of those words (Tr. p. 143). The director of special education testified that every other day the student was receiving 20 minutes of direct multisensory reading instruction from one of the district's multisensory reading teachers (Tr. pp. 339-40). The hearing record does not provide information about the type of multisensory instruction being used by the district or indicate that the level of service provided by the district addresses the student's significant reading needs.

<sup>8</sup> Although an IEP must provide for specialized instruction in a student's areas of need, a CSE is not required to specify methodology on an IEP and the precise teaching methodology to be used by a student's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46). However, the district should consider whether the student in this case would benefit from the use of multisensory instruction based upon her progress demonstrated in the private multisensory reading instruction services, as discussed below.

Board of Cooperative Educational Services (BOCES) programs, appropriate programs in other districts, and approved private schools.

Next, I turn to the parents request for a determination that their proposed program at a different public school is appropriate and an order for "an immediate change in placement" to that school. The district asserts that the parents' remedy must be denied as a matter of law. In this case, I have found that the district's IEP did not offer the student a FAPE and have ordered an appropriate remedy, namely, that the CSE create a new IEP and recommend an appropriate program for the student for the remainder of the school year. The assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) recently noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [August 14, 2006]).<sup>9</sup> This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school is an administrative decision provided it is made in conformance with the CSE's educational placement recommendation (Letter to Veasey, 37 IDELR 10 [OSEP 2001]; Application of a Child with a Disability, Appeal No. 07-049). Here, the parents' request that I assign the student to a particular public school need not be addressed because a proper remedy for the denial of a FAPE has been ordered. Moreover, the student is not attending the parents' proposed public school placement (Tr. pp. 481, 484) and the parents do not cite legal support for their assertion that I have the authority to order a public school in another district to accept the student in this case.<sup>10</sup> For these reasons, I will not order the district to place the student into another public school district's program.

Having found that the district did not offer the student a FAPE, I will now address the

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<sup>9</sup> The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); 8 NYCRR 200.4(d)(2)(v)(b)(7).

<sup>10</sup> As noted by the district, the remedy of tuition reimbursement has been extended to parents who have unilaterally placed a student in a different public school and that school's program was determined to be appropriate (Application of a Child with a Disability, Appeal No. 07-070). However, in this case, the parents have not placed the student in the different public school and are not seeking tuition reimbursement.

appropriateness of the private reading services that the parents obtained for the student.<sup>11</sup> The hearing record shows that the student's private reading instructor has a Masters degree in special education "pending" with New York State, an "advanced teaching certificate for grades K through 6," and "extensive" training in the Orton-Gillingham method (Tr. p. 644).<sup>12</sup> She is certified by a private, national organization entitled the Academic Language Therapy Association (ALTA) as an academic language therapist (Tr. pp. 680-81; Parent Ex. L at p. 2). She has also received training in the Dynamic Indicators of Basic Early Literacy (DIBELS), and from 2002-08 worked for the district as an independent contractor providing multisensory reading instruction (Tr. pp. 644-45, 681; Parent Ex. L at p. 2). The private reading instructor testified that the parents contacted her during summer 2008 and after her review of prior testing conducted on the student, she concluded that the student's reading skills were at the kindergarten level (Tr. pp. 650-51, 697). On August 25, 2008, the private reading instructor conducted an informal pre-reading screening of the student to determine whether she exhibited phonemic awareness and the "alphabetic principle" skills that would allow her to participate in the Basic Language Skills (BLS) program (Tr. pp. 651, 660-61, 696, 722). At the time of the pre-reading screening, the student did not have complete alphabetic principle skills, in that she was able to identify approximately 20/26 letters, did not know all of the letter sounds, and had significant difficulty providing a word that began with a given sound (Tr. pp. 653-54). Regarding the student's phonemic awareness skills, the private reading instructor determined that the student was unable to recognize or generate rhymes, or segment sentences into words or words into individual sounds (Tr. p. 655). During the pre-reading screening, the private reading instructor asked the student to write upper and lower case letters to formulate a "baseline" of her writing skills (Tr. p. 656). The student was administered the first grade level DIBELS reading passage and asked to decode a list of "nonsense" words (id.). The private reading instructor testified that the student did not exhibit word attack skills to complete the DIBELS passage and her ability to decode the nonsense word list was "low" (id.). Based on her performance during the pre-reading screening, the private reading instructor determined that the student was "missing" some pre-reading skills, and recommended a pre-reading program entitled "Reading Readiness," which uses multisensory techniques (Tr. pp. 649, 656-57, 706). Subsequently, the private reading instructor provided the student with instruction in the Reading Readiness program four days per week for 30-minute sessions, which continued through the end of October 2008 (Tr. pp. 660-61). By the third week in the Reading Readiness program, the student began using a "controlled vocabulary reader," which consisted of reading concepts and "decodable text" the student had been exposed to (Tr. pp. 662-64, 725). The private reading instructor testified that the student acquired skills in the Reading Readiness program at a "very rapid rate" and that she retained the skills she learned (Tr. pp. 662, 664).

On October 31, 2008, the private reading instructor informally reassessed the student and determined that she had gained the pre-reading skills needed to begin the BLS program (Tr. pp. 661-62, 664, 700-03). The BLS program is described in the hearing record as a research-based "explicit, systematic, sequential, cumulative and multisensory" Orton-Gillingham approach to reading (Tr. pp. 642, 647; Parent Ex. O). The program is further described as a "comprehensive

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<sup>11</sup> I note that the impartial hearing officer did not determine in his decision whether the private reading services chosen by the parents were appropriate for the student.

<sup>12</sup> The hearing record describes the Orton-Gillingham method as using auditory, visual, and kinesthetic/tactile methods for reading, writing, and spelling instruction (Tr. p. 706; Parent Ex. O at p. 1).

language arts program" that addresses reading, writing, and spelling skills, and specifically, phonemic awareness, phonics, comprehension, vocabulary, and fluency (Tr. p. 647). The private reading instructor testified that the BLS program provides an equal amount of remediation in each area, but she individualizes the program to meet students' needs based upon the level of difficulty they exhibit in each area (Tr. pp. 709-10, 730). Each of the "sections" of instruction during a session is either three to five or approximately ten minutes in length (Tr. p. 668). The student's sessions include instruction in phonemic awareness and alphabetic principle as review, and reading, spelling, and oral language instruction (Tr. pp. 665, 726-27).<sup>13</sup> During each session, the student reads lists of words and sometimes sentences/stories (Tr. pp. 729-30). The private reading instructor also reads stories to the student and asks her to answer questions about them (Tr. p. 730). The private reading instructor administers a "mastery check" in all areas in which she provides instruction after approximately 20 lessons (Tr. pp. 671-72). If the student has not mastered a skill, the private reading instructor provides reteaching (Tr. pp. 671-72, 730). The private reading instructor began providing four 50-minute sessions of BLS instruction to the student per week in November 2008 (Tr. p. 666).

The private reading instructor testified that the student's cognitive evaluation scores did not preclude her from participating in the BLS program (Tr. pp. 716-18). She stated that there was nothing in the student's learning style that suggested a limited capacity for memorizing information, and that she exhibited "good" memory for sight words (Tr. pp. 670-71). The private reading instructor also stated that the student did not have difficulty with attention during instruction because the sessions are broken up into smaller sections, and that her participation was "good" (Tr. pp. 668-69, 674, 732-33). The private reading instructor testified that the student was "progressing through the program at a rate that I would expect her to," compared to other students that have been in the BLS program who exhibit similar learning characteristics (Tr. p. 666). At the time of her testimony on November 18, 2008, the private reading instructor stated that the student was "moving along very steadily in the program, I haven't had to re-do anything so far," and that the student was reading 24 words per minute in a controlled vocabulary reader (Tr. pp. 673, 732). She described the student's comprehension skills as "very good," and based solely on her ability to decode text without the use of visual or contextual clues (Tr. pp. 673, 729-30). The private reading instructor estimated the student's comprehension skills to be at a second to third grade level for material that is read to her (Tr. p. 729). The hearing record shows that the student requires intensive reading intervention. The July 2008 neuropsychological evaluation report recommended that the student receive an intensive multisensory reading program (Dist. Ex. 5 at pp. 11, 15), and the hearing record shows that the student progressed with the privately obtained reading services. Based on the information in the hearing record, I find that the parents established that the services of the private reading instructor identified and addressed the student's reading deficits, and that she demonstrated progress in the Reading Readiness and BLS programs administered by the private reading instructor.

Next, I will address the district's assertion that the parents should not be reimbursed for the costs of the private reading services based on equitable considerations. The impartial hearing officer determined that the parents' refusal to consent to the district's additional multisensory assessment of the student evidenced a failure to cooperate which forfeited their claim for

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<sup>13</sup> Although writing is part of the BLS program, as of the time of her testimony, the private reading instructor had not begun that portion of the program due to the student's significant needs (Tr. pp. 666-67).

reimbursement (IHO Decision at p. 11). The district asserts that the parents should be denied reimbursement for the costs for the multisensory instruction because the parents would not submit the student for necessary evaluations which precluded the district's efforts to determine whether such instruction was appropriate. The parents argue that they were not uncooperative, and objected to the "vague, ill-defined unspecific and perhaps redundant" testing suggested by the district.

Before administering tests or other evaluation materials to reevaluate a student with a disability, a school district must obtain informed parental consent (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]).<sup>14</sup> Informed consent from the parent is also required before the initial provision of special education and related services (34 C.F.R. § 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]). If the parent refuses to consent to the reevaluation, a school district may, but is not required to, pursue the reevaluation by filing a due process complaint notice and proceeding to an impartial hearing (34 C.F.R. § 300.300[a][3][i], [c][1][ii]; 8 NYCRR 200.4[a][8], 200.5[b][3]).

The district's director of special education testified that the parents' request for multisensory instruction was discussed at the July 23, 2008 CSE subcommittee meeting, but that at that time she could not address "the specific details" of such instruction (Tr. pp. 18-19, 44-46, 336-37). She explained that the July 23, 2008 CSE subcommittee did not come to a conclusion as to whether the student would receive multisensory instruction during the 2008-09 school year because the district's multisensory reading teachers, who were not present at the meeting, needed to conduct their own "baseline assessment" of the student (Tr. pp. 45-46, 300-01, 338). The director of special education testified that the need for a baseline assessment was "brought up" at the July 23, 2008 CSE subcommittee meeting, but that the parents did not consent to allow the district's multisensory teachers assess the student (Tr. pp. 46-47, 301). When asked whether the information supplied by the July 23, 2008 neuropsychological evaluation report was sufficient to make a recommendation regarding the student's need for multisensory instruction, the director of special education stated that she was not a multisensory instructor and she would rely on their expertise to make that determination (Tr. p. 46).

The student's mother testified that at the July 28, 2008 CSE subcommittee meeting, the district was unable to answer her questions regarding the need for additional multisensory testing or describe what testing would be administered (Tr. p. 770). She agreed with the director of special education that there was no one at the meeting who could "address what testing [the CSE] was talking about or why" (Tr. pp. 770-71, 773). The student's mother testified that the CSE subcommittee did not make a recommendation to conduct additional testing, that it was just a discussion, and that she never received a request to provide written consent to conduct additional testing (Tr. p. 771; see Tr. pp. 340-41).<sup>15</sup> The student's mother further testified that she did not

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<sup>14</sup> "Consent" is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[l]).

<sup>15</sup> While the director of special education testified that the district had provided a written consent form to the parents at the July 23, 2008 CSE meeting (Tr. p. 41), this form was not included in the hearing record.

refuse to allow her daughter to participate in the district's testing (Tr. pp. 621-24, 626, 770); however, she wanted more information regarding what kind of testing would be done and no one at the CSE subcommittee meeting could describe what kind of testing would be performed (Tr. pp. 621-22, 770-71, 797-98).

The hearing record does not reveal that the type of assessment that the district wanted to perform was one that required informed consent under federal and State regulations. The director of special education who participated in the July 23, 2008 CSE subcommittee meeting testified that the purpose of the assessment was to gauge how the teachers would implement that portion of the student's IEP requiring reading instruction (Tr. pp. 45-46, 300-01). The federal regulations provide that a screening of a student by a specialist to determine the appropriate instructional strategy shall not be considered to be an evaluation (34 C.F.R. § 300.302; see 8 NYCRR 200.5[b][1][i][a]). In addition, I note that the hearing record shows that during the 2008-09 school year, the district's multisensory reading teacher reviewed the student's "information" and began providing direct multisensory instructional services to the student during the 2008-09 school year despite a lack of consent by the parents (Tr. pp. 338-40). I find that in this case, the district was not precluded from determining whether the student required multisensory instruction because they did not obtain consent from the parents at the July 23, 2008 CSE subcommittee meeting and the equities do not preclude an award of reimbursement for services.

Based on the above, I will order reimbursement for the private reading services obtained by the parents. Furthermore, because the hearing record reveals that the student has not made progress in the district's reading program during prior school years, I will order, as additional services, that the district reimburse the parents for the private reading services through the end of the 2008-09 school year (see Application of the Dep't of Educ., Appeal No. 08-017).

I have considered the parties' remaining contentions and I do not need to address them in light of my decision herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated January 9, 2009 is hereby annulled to the extent that it found that the district offered a FAPE to the student for the 2008-09 school year and denied the parents' request for reimbursement for private reading services; and

**IT IS FURTHER ORDERED** that the district's CSE shall reconvene within 15 days of the date of this decision to develop an appropriate IEP and program recommendation for the student for the remainder of the 2008-09 school year in accordance with this decision; and

**IT IS FURTHER ORDERED** that, upon receipt of proof of payment, the district shall reimburse the parents for the cost of the private reading services. Payment for services provided up to the date of this decision shall be paid by the district within 45 days of receipt of proof of payment from the parents; and

**IT IS FURTHER ORDERED** that, unless the parties' otherwise agree, the parents shall provide proof of payment to the district on a monthly basis for private reading services provided after the date of this decision through the end of the 2008-09 school year and the district shall reimburse those costs within 45 days from receipt of proof of payment.

**Dated:**           **Albany, New York**  
                          **March 10, 2009**

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**ROBERT G. BENTLEY**  
**STATE REVIEW OFFICER**