The University of the State of New York

The State Education Department
State Review Officer
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No. 09-060

Application of the BOARD OF EDUCATION OF THE PENFIELD CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Harris Beach PLLC, attorneys for petitioner, Alfred L Streppa, Esq., of counsel

Empire Justice Center, attorneys for respondents, Jonathan Feldman, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2008-09 school year was not appropriate. The appeal must be sustained in part.

At the time of the impartial hearing, the student had auditory and visual memory deficits that negatively affected his academic performance in all academic areas (Dist. Ex. 35 at pp. 1, 3). The student attended fifth grade in a 12:1+1 special education class in one of the district's elementary schools (id. at p. 1). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student began receiving special education services, speech-language therapy, occupational therapy (OT), and physical therapy (PT) services when he was 18 months old (Tr. p. 544; Parent Ex. F at p. 4). The student attended two years of preschool when he was three and four years old (id.). In June 2003, prior to entering kindergarten for the 2003-04 school year, the CSE declassified the student despite the parents' disagreement with the CSE's decision (Tr. pp. 544-45; Dist. Ex. 3 at p. 1; Parent Ex. F at p. 5). When the student was five years old, he entered kindergarten as a general education student in his home school within the district (Tr. p. 545; Parent Ex. F at p. 5). By March 2004, when the student was still in kindergarten, he was determined to be eligible for special education and related services as a student with a learning disability (id.). The hearing record reflects that early in the first grade

during the 2004-05 school year, the student began receiving academic intervention services (AIS) specific to reading instruction, a general education service available to all students (Tr. pp. 230, 380; Dist. Ex. 5).[1] The student also received resource room five hours per week, OT, and speech-language therapy (Parent Ex. F at pp. 1-2). The hearing record reflects that the student demonstrated significant academic delays with skills at approximately the pre-kindergarten level (Dist. Ex. 16 at p. 2).

During the 2005-06 school year when the student was in the second grade, the student received resource room support seven hours per week, OT one hour per week, and speech-language therapy two hours per week (Dist. Ex. 16 at p. 2; Parent Ex. F at p. 2). The hearing record reflects that the student's academic growth was slow (Tr. p. 546; Dist. Ex. 16 at p. 2). During the 2006-07 school year when the student was in the third grade, he attended a 15:1+1 special class program five hours per week for language arts, and he received resource room, OT, speech-language therapy, and extended school year (ESY) services that included speech-language therapy (Dist. Ex. 16 at p. 2; Parent Ex. F at p. 2). At that time, when in the general education setting for lunch, recess, and specials, the student followed school routines and excelled socially (Dist. Ex. 16 at p. 2). However, the hearing record reflects that when in the general education academic setting, a breakdown was observed in the student's self-confidence (id.). Due to significant academic delays, the student required much support in the general education setting, which affected his self-esteem as a learner (id.). The hearing record reflects that the student did not participate in class discussions without significant prompting, he would try to cover or hide his work, and he did not self-advocate (id.). The student continued to exhibit significant academic delays, and progressed in reading from a beginning first grade level to a mid-first grade level (id.).[2] The hearing record reflects that the student required pre-teaching and multiple repetitions with "visuals" for all auditory information and curriculum content presented to him, directions "chunked" to help him remember, modifications to the curriculum, and small group specialized instruction (id. at p. 7; Dist. Ex. 18 at p. 3).

On April 26, 2007, the CSE convened for the student's reevaluation review and to develop an individualized education program (IEP) for the student's 2007-08 school year (Dist. Ex. 21 at p. 1). The hearing record reflects that for the 2007-08 school year when the student was in fourth grade, he attended a 12:1+1 special education class at a different elementary school within the district and received a 15:1+1 special class program five hours per week for language arts, resource room, and speech-language therapy (id.; Parent Exs. F at p. 2; G at pp. 1-2). The student attended ESY services in a 12:1+1 special education class four hours per day within the district and received

[1] The hearing record reflects that the student received AIS from first grade through fifth grade (Tr. p. 9; Dist. Exs. 20; 24 at pp. 1-4; 25 at pp. 1-2; 39A at pp. 1-4).

[2] Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student conducted by the district in March 2007 yielded a full scale IQ score of 89, in the low average range (Dist. Ex. 16 at pp. 3, 5). The student possessed average verbal reasoning skills and low average non-verbal reasoning ability (id. at pp. 1-3, 5, 7). Academic achievement testing also completed in March 2007 revealed that the student's reading and writing skills were below average for his age (id. at p. 7; Dist. Ex. 17). Speech-language testing, also conducted in March 2007, revealed language processing skills primarily in the low average range with some skills in the below average range and a few in the high average range for the student's age (Dist. Ex. 18 at pp. 1, 3). An OT reevaluation report conducted in March 2007 recommended that OT be discontinued, but that informal OT consultation be available to the student as needed for up to ten hours per year (Dist. Ex. 19 at pp. 1-3).

speech-language therapy services (Parent Ex. F at p. 2). The April 26, 2007 IEP indicated that based on formal academic testing conducted in March 2007, the student's reading skills were at the end of the first grade level[3] and his math calculation skills were at the end of the second grade level (Dist. Ex. 21 at p. 3).

On March 25, 2008, a subcommittee of the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year when the student would be in fifth grade (Dist. Ex. 33 at p. 1). The CSE subcommittee recommended a 12:1+1 special education class in the same elementary school within the district as the previous school year (id.). The CSE subcommittee recommended related services of speech-language therapy two times per week for 30 minutes in a group of two students, and OT consultation to classroom staff and parents for up to ten hours per year as needed to support any fine motor or sensory motor concerns that might arise (id. at p. 2). Recommendations included modifying all fourth and fifth grade curricula as the student's academic skills were at the end of first grade to the middle of second grade level,[4] reteaching of materials using frequent drill and repetition with visual cues and multisensory instruction, and pre-teaching of material (id.). Recommended testing accommodations were to administer tests in a small group, extended time (1.5), simplify language in directions, and entire test read, except for tests that measure reading ability (id.). The student was determined to be eligible for ESY services and speech-language therapy (id. at pp. 1, 11).

On May 20, 2008, a subcommittee of the CSE reconvened for a program review (Dist. Ex. 34 at p. 1). No changes were made to the March 25, 2008 IEP (compare Dist. Ex. 34, with Dist. Ex. 33). The May 20, 2008 CSE subcommittee meeting minutes reflected that the parents discussed their concerns regarding the student's lack of progress in reading with the rest of the CSE subcommittee, which the CSE chairperson described as "slow growth" (Dist. Ex. 34 at p. 11). The CSE subcommittee meeting minutes reflected that the CSE subcommittee recommended that the parents seek an independent reading evaluation (id. at pp. 5, 12).[5] The CSE subcommittee meeting minutes further indicated that the district would complete an assistive technology evaluation and a comprehensive reading assessment (id. at p. 12). The CSE subcommittee also recommended a "lunch bunch" group to address the student's social-emotional concerns (id. at pp. 5, 12).

Although the hearing record offers minimal information regarding a September 5, 2008 CSE meeting, it reflects that the CSE convened on that date at the request of the parents for a program review (Tr. pp. 135-36; Dist. Ex. 35 at p. 5). The hearing record reflects that the September 5, 2008 meeting was tabled in order for the CSE to gather more information regarding the student (Dist. Ex. 35 at p. 5).

[3] The hearing record reflects that during the 2007-08 school year when the student was in fourth grade, he received no specialized reading instruction (Tr. pp. 386, 452-53).

[4] The student's present levels of academic performance per the March 25, 2008 IEP indicated that the student's reading skills at the time of the IEP were at the mid-first grade level for decoding and comprehension (Dist. Ex. 33 at p. 3).

[5] The hearing record reflects that the student's mother indicated that the district was going to "take care of" the reading assessment (Tr. p. 609).

On September 15, 2008, the CSE reconvened for a program review and to resume the discussion that occurred during the September 5, 2008 CSE meeting (Dist. Ex. 35 at pp. 1, 5). The CSE recommended continuing the student's eligibility for special education services as a student with a learning disability and continuing the student in a 12:1+1 special class placement with two 30-minute group sessions per week of speech-language therapy (id. at pp. 1-2, 5). The CSE added to the student's IEP related services of individual counseling one time in a six-day cycle for 30 minutes, an individual assistive technology consultation for a total of ten hours over the course of one year, and OT consultation to classroom staff and parents up to ten hours per year as needed (id. at pp. 2, 5). The resultant September 15, 2008 IEP indicated that there was not a consensus at the CSE meeting as "some members including the parents" disagreed with the recommended placement, instead requesting that the CSE place the student at the Norman Howard School (Norman Howard), a State-approved private school (id. at p. 5). The September 15, 2008 IEP indicated that since there was not a consensus, the CSE chairperson, based on all the information presented, determined that the recommended district program would meet the student's needs and would offer the student opportunities for integration with disabled and non-disabled peers (id.). The IEP further indicated that a CSE meeting would be scheduled in November 2008 to review the student's progress (id.).

In a due process complaint notice dated October 2, 2008, the parents requested an impartial hearing (IHO Ex. I at p. 1). The parents' due process complaint notice alleged that the September 15, 2008 IEP could not provide the student with a free appropriate public education (FAPE), that placement at the Norman Howard could provide the student with a FAPE, that the district denied the student a FAPE for the past two school years, and that the district placed the student with other students who have dissimilar needs (id. at pp. 1-2). The parents requested that the impartial hearing officer order the CSE to place the student at Norman Howard, effective immediately (id. at p. 2).

An impartial hearing began on November 21, 2008 and concluded on January 28, 2009, after three days of testimony (IHO Decision at pp. 1-2). By decision dated April 22, 2009, the impartial hearing officer concluded that the district did not offer the student a FAPE for the 2008-09 school year (id. at p. 28). In support of this conclusion, the impartial hearing officer found, among other things: (1) that the district's program failed to address the student's reading deficiencies; (2) that the student failed to make meaningful progress;[6] and (3) that while placement in a 12:1+1 program was appropriate, the student's actual class was not appropriate[7] (id. at pp. 28-33).

The impartial hearing officer further concluded that the parents met their burden of proof to show that Norman Howard would be able to provide appropriate services for the student, but denied the parents' request for immediate placement at Norman Howard (IHO Decision at p. 34).

[6] The impartial hearing officer noted that the student's standardized test scores dropped from 2s to 1s during the relevant time period and that testimony indicated that such a drop suggested that the student had not been benefitting from instruction (IHO Decision at pp. 31-32). In addition, the impartial hearing officer noted that books were still being read with the student at the same level as two years earlier (id. at p. 32).

[7] The impartial hearing officer noted that there were eleven children in the student's class, with five different eligibility determinations and that the student was the only student in his class classified with a learning disability (IHO Decision at p. 33). Moreover, the impartial hearing officer noted that the student was at the very low end of reading levels in his class and there were other students with management and social needs requiring more attention than the student, who was more advanced socially than the other students (id.).

The impartial hearing officer noted that Norman Howard is a State-approved school (id.). In addition, the impartial hearing officer found that Norman Howard provided services tailored to meet the student's special education needs because: (1) Norman Howard uses the Wilson Reading program (Wilson), which is a multisensory reading program; (2) the teachers at Norman Howard have extensive training in Wilson and students receive Wilson instruction 50 minutes daily in either 2:1 or 1:1 classes; (3) a "Wilson type" program was recommended for the student; (4) it was undisputed that the student needs a multisensory program; and (5) the class at Norman Howard would include higher functioning children than the district's class (id. at pp. 34-35). The impartial hearing officer noted that there was "no real objection" to the program at Norman Howard and that she did not find support in the hearing record for the district's assertion that the student may have difficulty transitioning from the district's program to Norman Howard (id. at pp. 34-36). The impartial hearing officer also rejected the district's contention that Norman Howard was not appropriate because it was a more restrictive environment than the district's program (id. at pp. 34-35).

The impartial hearing officer ordered the placement of the student at Norman Howard for the 2009-10 school year and directed that the student remain in his then current placement, which she had determined to be inappropriate to meet his needs, for the remainder of the 2008-09 school year (IHO Decision at p. 37). The impartial hearing officer further ordered the district to reconvene a CSE meeting, take all necessary steps to place the student at Norman Howard for the 2009-10 school year, and modify the student's IEP to indicate that the district's program and placement is an interim placement effective until June 30, 2009 (id. at pp. 37-38).

This appeal ensued. The district appeals the impartial hearing officer's decision finding that the district did not offer the student a FAPE. The district contends, among other things, that the impartial hearing officer misinterpreted and mischaracterized the evidence at the impartial hearing and improperly relied upon testimony of the student's mother and the parents' witnesses. According to the district, the September 15, 2008 IEP and reading program that it offered to the student were appropriate, the student was appropriately grouped in the district's class, and the student made meaningful progress in the district's program. The district further contends that the impartial hearing officer erred in finding that Norman Howard was an appropriate placement for the student because it was not the least restrictive environment (LRE) and that she erred in ordering the district to place the student at Norman Howard for the 2009-10 school year. The district attaches additional evidence to its petition.

In their answer, the parents request that the impartial hearing officer's decision and order directing the district to place the student at Norman Howard be upheld because the district failed to demonstrate that it offered the student a FAPE for the 2008-09 school year. The parents object to the district's additional evidence attached to its petition and attach their own additional evidence to their answer.

The district filed a reply dated June 9, 2009 objecting, among other things, to the parents' additional evidence attached to their answer. By letter dated June 11, 2009, the parents requested that a State Review Officer reject the district's reply other than the portion of the district's reply addressing the parents' offer of additional evidence because such exceeds the permissible scope of a reply under the State regulations. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6; see Application of a Student with a Disability, Appeal No. 09-

034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-046). In this case, the parents do not aver any procedural defenses. Accordingly, I will accept and consider the reply only to the extent that it responded to the additional documentary evidence served with the parents' answer (see Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-036; Application of a Student with a Disability, Appeal No. 08-031; Application of a Student with a Disability, Appeal No. 08-028; Application of a Student Suspected of Having a Disability, Appeal No. 08-002).

The district attached an exhibit to its petition and the parents attached an exhibit to their answer for consideration as additional evidence. Both parties object to the acceptance of the other's exhibit. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, I decline to consider the additional documentary evidence submitted by both parties because, although it was not available at the time of the impartial hearing, it is not necessary in order to render a decision in this appeal.

Two purposes of the Individuals with Disabilities Education Act (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 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 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; 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 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 Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; 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).

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 law 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).

Returning to the decision below, I concur with the impartial hearing officer's decision that the reading program recommended in the September 15, 2008 IEP was not reasonably calculated to meet the student's needs and that the IEP did not offer the student a FAPE for the 2008-09 school year. Like the impartial hearing officer, I find for the reasons set forth below that the September 15, 2008 IEP did not sufficiently address the student's core educational limitations in reading, specific to decoding.

The September 15, 2008 IEP reflected no specialized reading instruction (see Dist. Ex. 35). Instead, the district provided the student with general education services (Tr. pp. 164-65, 189, 199-200, 313, 380, 382, 384-85). The impartial hearing officer found persuasive the parents' independent education specialist's determination that the reading program offered by the district was not sufficient to address the student's reading needs (IHO Decision at pp. 28-33). The parents' education specialist, who was characterized in the hearing record as "an expert in learning disabilities," testified that he received his doctorate in the "teaching and curriculum field area," that he was certified as a special education teacher, and that he had extensive experience working with students with reading or learning disabilities and in performing psychoeducational evaluations (Tr. pp. 622-25, 663). The education specialist met with the student's parents on multiple occasions, reviewed the student's complete educational record, met the student a few times and performed an informal assessment on one of those occasions, and attended two CSE meetings regarding the student (Tr. pp. 627-28, 658-60).

Referring to the student's 2007-08 IEP, the education specialist indicated that the student's IEP for fourth grade did not meet his needs, particularly regarding the student's primary disability in reading (Tr. pp. 636-37, 692; Dist. Ex. 21). The education specialist testified that in fourth grade, the student did not receive explicit reading instruction in core reading skills (Tr. p. 669). The district administrator for elementary special education also testified that the student did not receive specialized reading instruction during the 2007-08 school year (Tr. pp. 452-53). The education specialist indicated that he had attended the September 15, 2008 CSE and had "some input" into developing the IEP for the student's fifth grade (2008-09) school year (Tr. p. 638). However, the education specialist testified that the September 15, 2008 CSE did not make any substantial changes to the student's IEP that would address the student's severe reading disorder (Tr. pp. 643, 645). He also indicated that if provided with specialized reading instruction, it would be hoped and expected that the student would "come close to reaching grade level" for reading (Tr. pp. 667-68). Upon a review of the hearing record, I find that it supports the impartial hearing officer's conclusion that the student was not offered a FAPE for the 2008-09 school year because the September 15, 2008 IEP did not adequately address the student's reading deficits and therefore was not reasonably calculated to confer educational benefit.

I turn now to the appropriateness of the parents' proposed placement at Norman Howard. Norman Howard is a State-approved school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

Specific to the specialized reading instruction offered at Norman Howard, the co-head of Norman Howard testified that, "[t]he goal of the Norman Howard School is to remediate basic skill deficiencies in reading, writing, math and at the same time use alternative teaching strategies to provide grade-level content so that students can bypass those difficulties in order to acquire grade-appropriate information" (Tr. p. 698). At least two-thirds of the 131 students at Norman Howard have reading difficulties (Tr. pp. 699, 706). In addition to having access to a full array of academic coursework, all students in grades five through eleven participate in English language arts, as well as daily classes in reading and writing (Tr. p. 698). Norman Howard primarily uses the Wilson Reading system (Wilson) for students who need to work on their basic reading skills (Tr. p. 699). The co-head of Norman Howard described Wilson as a multisensory reading program where students have 50 minutes of daily reading instruction individually or in classes of 2:1 or 3:1 (Tr. pp. 699, 716). Consistent with the impartial hearing officer's findings of facts and decision, the hearing record reflects that Wilson systematically addresses phonemic awareness, phonics,

fluency, vocabulary development, and comprehension, and that students are required to master one level before they move on to the next (Tr. pp. 647, 699-700). The program uses visual, auditory, kinesthetic, and tactile methods for helping students learn phonology by manipulating sounds, tapping out sounds, recognizing words, and working on fluency in sentences and paragraphs (Tr. pp. 700-01). The co-head of Norman Howard further noted that the school maintains pre-and post-assessment data on all of their students specific to the students' word-attack skills, ability to decode nonsense words, and reading comprehension (Tr. p. 703).

In addition to Wilson, Norman Howard uses other programs for building fluency, vocabulary development, visualization and comprehension strategies, as well as a text-to-speech software for students to access grade-level text as they become less dependent on adults while they are learning to read (Tr. p. 704). Furthermore, Norman Howard offers a systematic curriculum addressing writing, whereby students in grades five through high school work on sentence, paragraph, and essay writing skills using consistent strategies (id.). Strategies used across content areas and grades include "thinking maps" that the hearing record describes as visual cognitive tools to help students understand how concepts are organized (id.).

Furthermore, testimony by the co-head of Norman Howard indicated that she was familiar with the student's admission file and was part of the team that accepted the student; that the admissions coordinator met with the student when he visited the school; that the student presented with a profile that was similar to students at the school regarding language, reading and memory difficulties, and no behavior problems; that Norman Howard would be able to offer the student an appropriate education; and that the student was accepted to Norman Howard for the beginning of the 2008-09 school year (Tr. pp. 709-10, 713-14).

Therefore, I agree with the impartial hearing officer's determination that the parents sustained their burden to show that Norman Howard would be able to provide appropriate services and that Norman Howard offered services tailored to meet the student's special education needs (IHO Decision at p. 36). Based upon an independent review of the hearing record, I also agree with the parents that Norman Howard was the appropriate program for the student for the 2008-09 school year, and I agree that a change in his program to placement at Norman Howard for the 2008-09 would have been appropriate and should have taken place upon the issuance of the impartial hearing officer's decision.

The dispositive issues before the impartial hearing officer did not involve whether or not the student was offered an appropriate program for the 2009-10 school year. There was no evidence presented regarding the appropriateness of a program for the student for the 2009-10 school year. The impartial hearing officer therefore erred in ordering a program placement for a school year not yet in dispute. Accordingly, I will modify the relief awarded by the impartial hearing officer for the 2009-10 school year because it was outside the scope of the proceeding, as limited by the parents' due process complaint notice and because the award was premature (8 NYCRR 200.5[j][1][ii]). In their due process complaint notice, the parents requested that the impartial hearing officer find that the district failed to offer the student a FAPE for the 2007-08 and the 2008-09 school years (IHO Ex. I at p. 2). In addition, the parents requested that the impartial hearing officer immediately order placement of the student at Norman Howard during the 2008-09 school year (id.) and the hearing record reflects that Norman Howard had already

accepted the student for the 2008-09 school year (Tr. pp. 562-63, 713).[8] Based the foregoing, I find that the impartial hearing officer erred in not directing placement of the student at Norman Howard during the 2008-09 school year and in directing that the student continue in a placement that was inappropriate for him. I find that she also erred by prematurely awarding relief for the 2009-10 school year.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein. Finally, unless the parties otherwise agree, if the student's program for the 2009-10 school year is disputed through due process proceedings, the student's pendency placement is Norman Howard (see 34 C.F.R. § 300.518[d]; 8 NYCRR 200.5[m][2]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated April 22, 2009 that ordered the CSE to place the student at Norman Howard for the 2009-10 school year is annulled; and

IT IS FURTHER ORDERED that the CSE shall reconvene within 30 days to consider the student's program and educational placement for the 2009-10 school year in light of this determination; and

IT IS FURTHER ORDERED, unless the parties otherwise agree, that if the student's program for the 2009-10 school year is disputed through due process proceedings, the student's pendency placement is Norman Howard.

Dated: **Albany, New York**
July 1, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

[8] Further, I note that the impartial hearing was unnecessarily lengthy. I remind and caution the impartial hearing officer, as well as both parties in this matter, that it is incumbent upon the impartial hearing officer to only grant extensions consistent with regulatory constraints and to ensure that the record documents the reason for each extension (8 NYCRR 200.5[j][5][i]). In addition, regulatory requirements set forth specific factors that an impartial hearing officer must consider prior to granting an extension (8 NYCRR 200.5[j][5][ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

> (a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of a delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties (8 NYCRR 200.5[j][5][ii]).

The regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent a compelling reason or a specific showing of substantial hardship, a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, settlement discussions between the parties or other similar reasons" (8 NYCRR 200.5[j][5][iii]).