



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-072

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

Law Offices of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq. and Jason H. Sterne, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, G. Christopher Harriss, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2008-09 school year was appropriate. The appeal must be dismissed.

At the commencement of the impartial hearing, the student was attending a general education fifth grade class at one of the district's public schools (Tr. pp. 113-14, 117; Parent Ex. A at p. 1). The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][10]; 8 NYCRR 200.1[zz][6]).

The student has attended public school since kindergarten and began receiving academic intervention services (AIS) from the district in third grade (Parent Ex. D-8 at pp. 2, 4). During the 2007-08 school year (fourth grade), the parent obtained three private evaluations of the student (Parent Exs. D-8 at pp. 5-6; D-11). Reportedly, the evaluation reports indicated that the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD), that his level of intellectual functioning was in the average to high average range, and that he exhibited difficulty with reading comprehension and writing proficiency, for which he received six sessions of private tutoring (Parent Exs. D-8 at pp. 5-6; D-10 at p. 2). The parent indicated that her son generally

performed well on standardized and classroom tests, and during the 2007-08 school year, he achieved a performance level of "3" on the New York State Testing Program (NYSTP) mathematics and English language arts (ELA) examinations (Parent Exs. D-8 at p. 2; F; F-1).<sup>1</sup> However, by the end of fourth grade, the parent, and by report the student's teacher, expressed concerns about the student's reading, writing and spelling skills (Parent Ex. D-8 at pp. 2-5). In June 2008, at the conclusion of his fourth grade school year, a request was submitted for the student to receive accommodations in the form of extended time for tests under Section 504 of the Rehabilitation Act (Parent Ex. D-9). Also in June 2008, for the upcoming school year, the district offered the student "extra academic help" four days per week for approximately 37-minute sessions prior to the beginning of the school day (Parent Ex. H-18). For one month in summer 2008, the student received private, daily one-hour 1:1 reading tutoring services from an instructor who used the Wilson Language System (Wilson) approach, described in the hearing record as a structured, multisensory reading program (Tr. p.173; Parent Exs. D-1 at p. 3; D-8 at p. 5; H-17).<sup>2</sup>

Over two dates in August 2008, a pediatric neuropsychology fellow and a neuropsychologist conducted a private neuropsychological evaluation of the student (Parent Ex. D-8). The evaluators reported that the student was focused, worked carefully on tasks, and worked at a good pace during the evaluation (*id.* at p. 6). At times, while working independently, the student was observed to be off-task, although he was easily "re-engaged" with verbal prompting (*id.* at pp. 6-7). The evaluators also reported that the student was "somewhat impulsive" at times, but again was easily redirected when prompted (*id.* at p. 7). Administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) yielded an overall IQ score in the average range, a verbal IQ score in the high average range, and a nonverbal IQ score in the average range of intellectual functioning (*id.*). The student achieved scores in the average to superior range on measures of his attention and executive functions, with mild difficulty in planning, organization and independent task persistence noted (*id.* at pp. 8-10). Assessment of his verbal and visual memory skills resulted in the majority of scores within the average to high average range of functioning, with one subtest score (design memory) in the borderline range (*id.* at pp. 10-11). The student exhibited difficulty with fine-motor skills and with tasks that required him to copy complex designs, draw connected geometric figures after a delay, and recall a copied complex figure (*id.* at pp. 9, 11-12).

The student's performance on measures of his receptive language skills was in the average range and the evaluators reported "no notable difficulty with complex expressive and language skills (verbal output), and basic conversational abilities were intact" (Parent Ex. D-8 at p. 11). Administration of academic achievement assessments yielded overall writing and math scores in the average range, with the exception of a writing fluency subtest, in which the student achieved a score in the borderline range (*id.* at pp. 13-14, 16). The student's reading skills were in the low average range, with "relative difficulty" noted in the areas of "foundational reading skills," reading rate, and reading fluency (*id.* at pp. 13, 16). Projective assessments of the student's

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<sup>1</sup> During the 2006-07 school year (third grade), the student achieved performance levels of "3" (mathematics) and "2" (ELA) (Parent Exs. F at p. 1; F-1 at p. 1).

<sup>2</sup> The hearing record also refers to the "Wilson Language System" as the "Wilson Reading System" (Parent Ex. H-14).

social/emotional functioning reflected that the student did not report or display any emotional functioning difficulties at that time (id. at pp. 14-15).

Based upon information including current assessment results, parent and student reports, previous evaluation reports, academic records, and behavioral observations, the evaluators concluded that the student met the diagnostic criteria for a diagnosis of an ADHD, inattentive type; a specific reading disability; and a disorder of written expression (Parent Ex. D-8 at pp. 10, 14, 16). The evaluators' report provided multiple recommendations for the student including one hour per day of individualized remedial reading instruction using a multisensory approach, such as "Wilson" or "Lindamood-Bell," placement in a smaller classroom environment, various testing accommodations and program modifications, organizational/planning strategies, and study skill suggestions (id. at pp. 16-18).

At the commencement of the 2008-09 school year (fifth grade), the student received instruction in a general education classroom at one of the district's elementary schools (Tr. pp. 113-14, 117; Parent Ex. A at p. 1). By letter dated September 26, 2008, the parent requested that the district conduct a special education evaluation of her son (Parent Ex. H-15). By letter dated October 10, 2008, a special education teacher requested that the parent provide consent to allow the student to participate in an extended-day program that met four days per week, consisting of reading instruction using Wilson (Parent Ex. H-14; see Parent Ex. H-18).

At an October 30, 2008 meeting with district staff, including the assistant principal, social worker, special education teacher,<sup>3</sup> and school psychologist; the parent consented to allow the district's social worker to conduct a classroom observation of the student under the condition that the assistant principal or principal would also be present (Tr. p. 131; Parent Exs. C-1 at p. 1; B at p. 2; C-8). The parent's written consent for her son's initial special education evaluation indicated that she was opposed to her son being evaluated "other than the requirement to obtain the [individualized education program] IEP" (Parent Ex. C-8).

Over two dates in October and November 2008, the parent completed a social history interview (Parent Exs. D-1 at p. 2; D-2). The parent reported to the district social worker that placement of her son in a 8:1 resource room group for 40 minutes per day would not provide enough time for him to receive the help that he needed (Parent Exs. D-1 at p. 2; D-2 at p. 1). The parent further reported her concerns about the student's difficulty understanding directions and frustration with school work (Parent Ex. D-1 at p. 2). According to the social history report, the parent would "like to see [the student] helped in the [district's] public schools," but would "take another route" if needed (id.). The parent mentioned a particular public school, which she believed had smaller class sizes based on "the Wilson approach," and indicated her preference for placement of her son in a school that is "K-8 or K-12" (id. at p. 3). The social history report stated that it was explained to the parent that IEPs do not name specific methodologies and that a placement office determines the actual sites of the recommended program (id.).

On November 5, 2008 when the student was in the fifth grade, the student's regular education teacher prepared a report about the student's functioning in the classroom (Parent Ex. C-

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<sup>3</sup> The hearing record reflects that the titles "special education teacher" and "IEP teacher" were used interchangeably (Parent Exs. B at p. 2; B-1). For consistency in this decision, I will refer to the district's staff member as a "special education teacher."

10). In her report, the teacher estimated the student's reading decoding and reading comprehension skills to be at a "mid 4th grade level," listening comprehension skills at a "4th grade level," and math, oral language, social studies and science skills at a "5th [g]rade" level (id.). She further estimated the student's written language skills to be at a "[l]ate 4th-[e]arly 5th grade" level and reported that he exhibited "[g]rade appropriate" handwriting skills (id.). The regular education teacher described the student's class participation as "very active," and reported that he "[a]lmost always" completed assignments and homework, but that his organization of notebook/work "needs improvement" (id.). The regular education teacher's report indicated that the student needed to wear his glasses regularly, needed many prompts to follow directions, needed redirection when working independently, needed to improve his work pace and self-control, and that he became distracted (id.). The regular education teacher reported that the student was a pleasure to have in class, was polite and respectful, and loved to help his classmates "at the expense of his own work" (id.). Proximity control, positive reinforcements, nonverbal cues, and individual conferencing were strategies used by the regular education teacher with the student (id.). While she described the student's attitude and motivation as "[g]ood," the regular education teacher reported that he would benefit from counseling (id.).

Also on November 5, 2008, the social worker, accompanied by the principal, conducted a classroom observation of the student (Parent Ex. D-5). Observation of the student occurred in a classroom of approximately 30 students; with one classroom teacher, one reading teacher, and a paraprofessional who was assigned to another student (id.). The observation took place during an independent reading session, and according to the social worker's report, the student appeared focused on his reading, without exhibiting "wandering" attention (id.). The student reportedly complied with teacher redirections and participated in the classroom discussion about what he had read (id.).

On November 6, 2008, the district sent to the parent and private neuropsychologist a corrected invitation to the upcoming CSE meeting, which included the parent's correct address and the correct meeting time (Parent Exs. C-1 at p. 1; C-7). On November 12, 2008, the assistant principal, regular education teacher, special education teacher, social worker, and school psychologist convened a "preconference" meeting (Parent Ex. C-1 at p. 1).

A CSE convened for an initial review of the student on November 13, 2008 (Parent Ex. B). Attendees included the principal, who acted as the district representative, an assistant principal, a school psychologist, a social worker, a special education teacher, the student's regular education teacher, and the parent (Parent Ex. B at p. 2).<sup>4</sup> The resultant IEP reflected that the private neuropsychologist participated in the meeting by telephone (Tr. pp. 256-57; Parent Ex. B at p. 2). The hearing record reflects that the student's initial CSE meeting lasted approximately 1 1/2 hours, during which the CSE discussed the student's needs with the parent and private neuropsychologist, who also discussed her evaluation report (Tr. pp. 213, 256-57, 259; Parent Exs. C-3; C-4; C-5). The CSE determined that the student was eligible to receive special education services as a student with a learning disability, and for the remainder of the 2008-09 school year, recommended placement in a 12:1 collaborative team teaching (CTT) program (Parent Exs. B at pp. 1-2; C).

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<sup>4</sup> The hearing record reflects that the student's regular education teacher signed in at the November 13, 2008 CSE meeting on the line designated for an additional parent member (Parent Exs. B at p. 2; C-10).

The parent indicated that on November 13, 2008, she visited the "recommended 12:1:1 class" and in a subsequent letter to the CSE, provided reasons why the placement observed was inappropriate for her son (Parent Ex. H-10). Specifically, the parent reported that the recommended class was overwhelming and distracting, already had 13 students in it, the other students appeared to have behavioral needs, and the teachers indicated that they had not been "trained to work with dyslexic children" (*id.*). In her letter, the parent indicated that "the appropriate learning environment for [her son] would be in a small, highly structured class" where he would receive support (*id.*). By letters dated November 17 and 18, 2008, the parent indicated that her son needed Wilson because it was "one of the methods he had over the summer which was helpful" (Parent Exs. D-2; D-3).

The CSE informed the parent of the specific location of the proposed CTT program by letter dated November 19, 2008, which the parent received on November 20, 2008 (Dist. Ex. 3; Parent Ex. C-1 at p. 2). By letter dated November 24, 2008, the special education teacher informed the parent that she had amended one of the annual goals contained in the student's November 13, 2008 IEP to include use of a multisensory reading approach to improve the student's decoding skills (Parent Exs. B-1; B-2 at p. 9).

By letter dated December 8, 2008, the parent informed the district that she was rejecting the recommended placement (Dist. Ex. 1; Parent Ex. H-3). The parent indicated that she was obtaining additional evaluations of the student and would share the results with the CSE, at which time she would "be happy to meet with the CSE to discuss [the student's] educational needs" (*id.*). The parent indicated that "[f]or the moment, [the student] should stay where he is" (*id.*). The hearing record reflects that the social worker stated that the district renewed its offer to provide the student with Wilson instruction, but the parent declined to accept that service (Tr. pp. 142-43, 156). By letter dated December 15, 2008, the parent requested a copy of the student's "CSE file" (Parent Ex. H-2).<sup>5</sup>

In a letter dated January 9, 2009, the principal of the student's school informed the parent that "since [the student] is not entitled to any special education services currently, he will not receive any testing modifications on the upcoming state examinations," and further advised her that if the parent wanted to request "testing modifications," the forms enclosed with the letter had to be completed and submitted (Parent Ex. H-1).

By letter dated January 16, 2009, the student's teacher described her concern to the parent about the student's recent increased distractibility and missing homework assignments (Parent Ex. H).

In a due process complaint notice dated January 20, 2009, the parent, through her attorney, stated that she was "not in agreement with the 2008-2009 IEP, services, placement and program as recommended by the CSE" and requested an impartial hearing (Parent Ex. A at pp. 1-2). The parent alleged that the district failed to provide the student with a free appropriate public education

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<sup>5</sup> Also on December 15, 2008, a private occupational therapist conducted an occupational therapy (OT) evaluation of the student (Parent Ex. D). Following informal and standardized test administration, the occupational therapist reported that the student exhibited "poor pencil grip," decreased upper extremity strength, and deficits in visual perceptual abilities (*id.* at p. 5). The occupational therapist recommended that the student receive 20 sessions of OT to address the specific long and short-term goals provided in the report (*id.*).

(FAPE) for the 2008-09 school year because: (1) the district did not offer placement in a program that would adequately address the student's unique needs; (2) the district's placement office failed to find an appropriate placement for the student; (3) the November 2008 IEP did not address the student's academic, social, physical and management needs, and did not implement the necessary services to address the student's learning disorder of written expression and dyslexia; (4) the student requires a phonetically based, multisensory approach to improve his decoding skills, such as Lindamood-Bell, which was not included on the student's November 2008 IEP; (5) the district failed to consider the private neuropsychological evaluation report at the CSE meeting; (6) the district failed to develop and implement measurable goals and objectives; (7) there are no evaluation procedures or identification of staff responsible to implement the goals indicated on the November 2008 IEP; (8) the November 2008 IEP failed to indicate accurate academic levels of performance; (9) the parent was not properly notified of the CSE meeting; and (10) the social history report contained several errors, which the parent attempted to correct (*id.* at pp. 2-3). The parent requested an annulment of the current IEP, the provision of an appropriate IEP and placement, the provision of a Lindamood-Bell reading assessment and reading program, and the payment of attorney's fees (*id.* at p. 3).

By letter dated January 26, 2009, the CSE offered the parent an alternative location for the proposed CTT program (Dist. Ex. 5). However, the parent did not accept the proposed program and the student remained in his general education class (Tr. pp. 67, 237).

An impartial hearing began on March 24, 2009 and concluded on April 2, 2009, after two days of testimony (IHO Decision at pp. 1-3). By decision dated May 26, 2009, the impartial hearing officer concluded that the district offered the student a FAPE for the 2008-09 school year (*id.* at pp. 8-10). In support of this conclusion, the impartial hearing officer found that: (1) the district complied with the procedural requirements of the Individuals with Disabilities Education Act (IDEA) in the preparation of the November 2008 IEP; (2) the November 2008 IEP was reasonably calculated to enable the student to receive educational benefits; (3) the goals were clearly specified in the November 2008 IEP; (4) the district offered a CTT program and offered the student two placements where the student would receive the Wilson reading program, both of which were refused by the parent; (5) the parent wanted the student to remain in his general education classroom and refused to allow the student to participate in the Wilson program when the district offered it to him; (6) while the parent was not obligated to accept the offered placement, it was disingenuous to argue that no placement was made and no reading program offered; (7) although the November 2008 IEP did not mention the Wilson program by name, it provided for the student to receive multisensory reading intervention, Wilson is such a program, which was available to the student at the offered placements; (8) the parent claimed that she wanted the student to be taught Wilson only by a qualified teacher, and that is why she rejected the offered placements; however, the Wilson teacher at the offered placement was qualified to teach Wilson; (9) the offered placement was in the least restrictive environment (LRE); and (10) the 12:1 class was appropriately rejected as too restrictive for a student with grade level standardized test scores in reading and math since the students in such a class are generally two to three levels below grade level (*id.*). The impartial hearing officer denied the parent's requests that the November 2008 IEP be annulled, that the CSE reconvene to develop a new IEP, and that the student receive Lindamood-Bell reading instruction (*id.* at p. 10).

The parent appeals and asserts that the district denied the student a FAPE during the 2008-09 school year. Specifically, the parent contends that: (1) the impartial hearing officer erred by permitting the district to offer testimony regarding the Wilson program, which was not specified on the November 2008 IEP; (2) the impartial hearing officer erred by finding that the program offered by the district included the Wilson program, which was not specified on the November 2008 IEP; (3) the November 2008 IEP does not specify small group instruction; and (4) the district placed the student in a general education class for the 2008-09 school year where the student received no special education services. As relief, the parent requests additional services of 5 hours per week of 1:1 Lindamood-Bell to compensate the student for the district's denial of a FAPE.

In its answer, the district requests that the impartial hearing officer's decision be upheld and the parent's petition dismissed. The district contends that it offered the student a FAPE for the 2008-09 school year. In addition, the district asserts that the parent refused to consent to the district's initiation of special education and related services at two appropriate placements, and the parent also refused the district's offer of the Wilson reading program as an extended school day service in the student's general education program. The district further contends that when a parent does not consent to the receipt of special education and related services, the district shall not be considered to be in violation of the requirement to provide the student a FAPE. The district also alleges that even if it had failed to offer the student a FAPE, the parent failed to prove that additional services of Lindamood-Bell were appropriate, and equitable considerations would preclude an award of additional services. In the alternative, the district contends that if it is found that a FAPE was not offered to the student and that additional services are warranted, such services be provided by district personnel and not by Lindamood-Bell providers.

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 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, 118-19 [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).

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).

A student's recommended program must 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]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed

by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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).

After a thorough review of the hearing record, and for the reasons set forth below, I concur with the impartial hearing officer's conclusion that the district offered the student a FAPE for the 2008-09 school year (IHO Decision at pp. 8-10). As determined by the impartial hearing officer, the November 2008 IEP contained clearly specified goals and was reasonably calculated to enable the student to receive educational benefits in the LRE (id.).<sup>6</sup> The November 2008 CSE developed

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<sup>6</sup> I note that the hearing record contains multiple IEPs for the student dated November 13, 2008 (Parent Exs. B; B-2; B-3; B-4; B-5), yet is unclear as to which IEP is the final version (Tr. pp. 70-71, 138-39; Parent Ex. B-1). I further note that the petition does not specify which IEP is the final version (Pet. ¶¶ 8-9, 11, 14, 16-17); however, the district proceeds in its answer as if Parent Ex. B-2 is the student's final IEP (Answer ¶¶ 37, 41-43, 48, 50, 52, 55). The parent did not submit a reply to the district's answer to dispute that Parent Ex. B-2 was the final IEP.

annual goals and short-term objectives for the student in the areas of classroom self-monitoring, reading (literacy, reading decoding, comprehension and fluency), math, and written language (Parent Ex. B-2 at pp. 8-10). I note that many of the student's annual goals and short-term objectives focus on use of strategies and areas of need recommended by the private neuropsychologist in her report, and based on the information in the hearing record are appropriate to address the student's deficits (compare Parent Ex. B-2 at pp. 8-10, with Parent Ex. D-8 at pp. 17-18). The November 2008 IEP provided the student with the testing accommodations of separate location, extended time, directions read/reread, non-reading comprehension questions read aloud, and the availability of breaks as needed (Parent Ex. B-2 at p. 13).

In addition to the impartial hearing officer's findings and conclusions of law, I further note that the student's present levels of academic performance and learning characteristics contain specific information regarding the student's cognitive and academic skills from the August 2008 private neuropsychological evaluation report, including percentile scores achieved (compare Parent Ex. B-2 at pp. 3-4, with Parent Ex. D-8 at pp. 7-16). The November 2008 IEP reflects the private neuropsychologist's conclusion that the student exhibits writing and math skills "at expected levels," and that his reading skills were within the low average range (compare Parent Ex. B-2 at p. 3, with Parent Ex. D-8 at p. 16). The student's IEP also reflects the private neuropsychologist's finding that, although the measures of the student's executive functions were within or above expected levels in most areas, he exhibited difficulty with organization, planning, independent task persistence, and "mild behavioral inattention" (compare Parent Ex. B-2 at p. 3, with Parent Ex. D-8 at p. 15).

To address those needs, the November 2008 CSE recommended use of academic management strategies such as: presenting information in context and in a structured format, repeating information such as key ideas and concepts, use of phonics-based strategies, use of a multisensory approach emphasizing visual and auditory modalities, breaking down directions into smaller units, repeating multistep directions, providing refocusing and redirection as needed, offering preferential seating, teaching verbal mnemonics, breaking down and simplifying tasks, using graphic organizers, outlines, a planner for homework/schedule, bookmark to help track while reading, and a highlighter to underline key concepts (Parent Ex. B-2 at pp. 4-5). I note that the majority of the strategies recommended by the November 2008 CSE were recommended by the private neuropsychologist in her evaluation report (compare Parent Ex. B-2 at pp. 4-5, with Parent Ex. D-8 at pp. 17-18).

I also note that the student's social/emotional present levels of performance in the November 2008 IEP contain information from the October 2008 teacher's report and the August 2008 private neuropsychology evaluation report (compare Parent Ex. B-2 at p. 6, with Parent Ex. C-10, and Parent Ex. D-8 at pp. 14-16). The November 2008 IEP reflected that the student got "along well with his peers and teachers" in the classroom, was "well-behaved," and overall did not exhibit social or emotional difficulties (Parent Ex. B-2 at p. 6). It also indicated that the student had difficulty focusing and could be easily distracted (id.). The CSE determined that the student's behavior did not seriously interfere with instruction and could be addressed by either the special

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Therefore, I will refer to Parent Ex. B-2 as the final version of the November 13, 2008 IEP for the purposes of this decision.

or regular education teacher, and recommended strategies such as in-class positive reinforcement, refocusing, and monitoring of the student's frustration levels (*id.*). The student's health and physical development present levels of performance reflected information from the August 2008 private neuropsychological evaluation report and a January 2008 ophthalmology evaluation report (compare Parent Ex. B-2 at p. 7, with Parent Ex. D-8 at pp. 4, 6, 16; and Parent Ex. D-10). The November 2008 IEP reflected that the student's medical history was reportedly unremarkable, that he wore glasses, and had been offered diagnoses of an ADHD, a reading disorder, and a disorder of written expression (Parent Ex. B-2 at p. 7).

Regarding the parent's assertion that the district failed to offer the student appropriate reading instruction, the hearing record reflects that on two occasions prior to the development of the November 2008 IEP, and in December 2008, subsequent to the development of the IEP, the district offered to provide the student with four approximately one hour sessions of Wilson instruction per week, which the parent declined (Tr. pp. 142-43, 156; Parent Exs. H-14; H-18). Given that the August 2008 private neuropsychologist's report recommended that the student receive reading instruction using a method such as Wilson, the parent indicated to the district in November 2008 that she would like the student to receive Wilson instruction, and stated that the student had been successful with Wilson instruction during summer 2008; I agree with the impartial hearing officer that it is unclear why the parent did not accept the district's offers of Wilson services for her son (Tr. pp. 107-08; Parent Exs. D-1 at p. 3; D-2 at p. 2; D-8 at p. 17; IHO Decision at pp. 8-9; see Parent Ex. C at p. 2).

Also, the student's regular education fifth grade teacher testified that she participated in the November 2008 CSE meeting and reported that the student was performing at grade level in reading and math, with a weakness in written language (Tr. pp. 113-14, 126-27). At the impartial hearing, the regular education teacher testified that the student continued to perform at grade level in reading, a statement based upon his performance on the NYSTP ELA and her "Teacher's College Reading Program" assessment of his skills (Tr. pp. 120-22, 126-27).

In the circumstances of this case, where the hearing record reflects that the regular education teacher's assessment of the student's reading performance revealed that he was approaching or at grade level in the classroom, evaluative data reflected reading abilities in the low average range, and the special education teacher at the proposed district placement, who was trained in Wilson, indicated that the student could have received small group Wilson instruction to address his reading weaknesses, I find that the district did not deny the student a FAPE by not including a "specialized reading program" in the November 2008 IEP (Tr. pp. 120-22, 126-27, 170, 172, 178-79; Parent Exs. D-8 at p.16; E at p. 1).

Further, I find that the parent's argument that the impartial hearing officer erred by finding that the district offered the student Wilson instruction, which was not specified on the November 2008 IEP, is without merit. The hearing record reflects that the district had a multisensory reading program in place, which was appropriate to address the student's reading needs (Tr. pp. 81-82, 170-74, 178-79; Parent Exs. B-2; D-8 at pp.16-17). 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 (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; Application of a Student with a Disability, Appeal No. 09-058; Application of the

Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; 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).

In addition, I find that the student's written language, writing, and attention needs could have been met by the services detailed above that were offered in the November 2008 IEP and by the recommended CTT program. The regular education teacher's report indicated that the student "gets distracted" and "needs redirection," but that "proximity control, positive reinforcements, nonverbal cues, [and] individual conferencing" were helpful (Parent Ex. C-10). In addition, the social worker's classroom observation of the student in his general education classroom revealed his positive response to teacher redirection, participation in class discussions, and ability to work independently (Parent Ex. D-5). The school psychologist testified that the CSE recommended a CTT program for the student due to his weaknesses in writing and written language and because of his distractible and inattentive behavior (Tr. pp. 103-04). She stated that the CSE believed that having two teachers in the classroom with full-time support would be beneficial for a student with an ADHD (Tr. p. 104).

The hearing record describes a CTT program as having a special education teacher and a regular education teacher, in a class of up to 24 students (Tr. p. 71). Up to twelve students in the CTT class receive special education services, while the remainder are general education students (*id.*). The hearing record reflects that the students in the CTT classes proposed by the district on November 19, 2008 and January 26, 2009, were eligible for special education services as students with learning disabilities, speech or language impairments, or other health impairments (Tr. pp. 75-76; Parent Ex. C-2 at p. 2; Dist. Exs. 5; 6; 7).

Additionally, the CSE believed that due to the student's average to high average cognitive skills, it "wanted him to be in a General Education driven type of curriculum" (Tr. pp. 104-05). The hearing record reflects that the November 2008 CSE considered other programs for the student including general education only, and special education teacher support services (SETSS), which it determined would not address the student's academic delays or attentional and planning difficulties (Parent Ex. B-2 at p. 12). The CSE also considered placement of the student in a 12:1 special class, which was rejected as too restrictive (*id.*). I agree with the impartial hearing officer that the CSE appropriately considered and rejected a 12:1 special class as too restrictive (Tr. pp. 82-83, 109-111; Parent Ex. B-2 at p. 12; IHO Decision at p. 10). I find that the recommended program would have provided the special education and related services needed by the student, which would have been provided to the maximum extent appropriate to the student's needs with other students who do not have disabilities (20 § U.S.C. 1412[a][5]; 8 NYCRR 200.1[cc], 200.4[d][4][ii][b]).

The parent's assertion that the district failed to implement the student's November 2008 IEP is also without merit. The November 2008 CSE recommended placement of the student in a 12:1 CTT class for the remainder of the 2008-09 school year, and offered the parent two separate locations on November 19, 2008 and January 26, 2009 (Dist. Ex. 5; Parent Exs. B-2 at p. 1; C-2 at p. 2). The parent rejected these placement offers, and instead elected to keep the student in his regular education classroom (Tr. p. 67; Dist. Exs. 1; 5; Parent Ex. H-3). When a parent fails to

consent to the provision of special education and related services, the district will not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure of the district to provide the student with the special education and related services for which the parent refuses to or fails to consent (20 U.S.C. § 1414 [a][1][D][ii][III][aa]; 34 C.F.R. § 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]).

Finally, the parent requests "make-up services" of five hours per week of 1:1 Lindamood-Bell reading instruction to remedy the district's alleged failure to provide the student with a FAPE. 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 (see Newington, 546 F.3d at 123 [stating "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and we have held compensatory education is an available option under the Act to make up for denial of a free and appropriate public education"]; Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-025; Application of the Bd. of Educ., Appeal No. 08-060; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054). Having determined that the November 2008 IEP and the district's recommended program offered the student a FAPE, I find that the parent's request for additional services is without merit.

I have considered the parent's remaining contentions and find that I need not reach them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
August 21, 2009

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