



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-005

**Application of the SCARSDALE UNION FREE SCHOOL DISTRICT, for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability**

**Appearances:**

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

Law Offices of Regina Skyer and Associates, attorneys for respondents, Jaime Chlupsa, Esq. of counsel

### DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that respondents' (the parents') son is eligible for special education programs and services as a student with an other health impairment (OHI) and ordered it to reimburse the parents for tuition costs at the Eagle Hill School (Eagle Hill) for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Eagle Hill, an out-of-State private school which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 667; see 8 NYCRR 200.1[d], 200.7). Eagle Hill is a school for students six to sixteen years old with average to above average intellectual abilities who have language based learning disabilities, and about half of whom present with an attentional deficit (Tr. pp. 543-44). The student has received diagnoses of a primary attention disorder and executive function weaknesses (Tr. p. 136; Dist. Ex. 13 at p. 8). The student has exhibited deficits in fine motor development (handwriting) and visual motor coordination (Dist. Ex. 2 at p. 2). The hearing record reflects that the student attended a district school from kindergarten through third grade (Dist. Ex. 30 at pp. 3, 38). During the 2004-05 school year when the student was in kindergarten, and continuing through the 2007-08 school year when the student attended third grade at a district school, the student received accommodations and services under section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-

796[1] [1998]; 34 C.F.R. § 104; see Dist. Exs. 1; 7; 11; 12; 20). The student's eligibility for special education and related services as a student with an OHI is in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In October of the student's kindergarten year (2004-05), the student began receiving speech-language therapy once per week to address dysfluency and syntactic errors, and academic support twice per week in the learning resource center to address deficits in pre-reading skills, including difficulty identifying numbers and letters (Tr. pp. 617, 621; see Dist. Ex. 1 at p. 2).<sup>1</sup> On March 25, 2005 a section 504 committee met for a review of the student's kindergarten performance, found the student eligible for section 504 services, and recommended individual occupational therapy (OT) services once per week for 30 minutes (Dist. Exs. 1 at pp. 1, 2; 2 at p. 2).

The section 504 committee subsequently met on October 24, 2005, at the beginning of the student's first grade year (Dist. Ex. 7 at p. 1). The student's eligibility for section 504 services continued and the committee recommended an increase in OT to one individual 30-minute session and one 30-minute session per week in a group of 4 (id.). The student's continued participation in a parallel reading program<sup>2</sup> was reflected by the recommended resource room services of four 30-minute sessions per week in a group of 6 (id.).<sup>3</sup> The section 504 committee also recommended one 30-minute speech-language therapy session per week (id.).

On October 26, 2006, the section 504 committee met for a review of the student's progress and to plan for the student's 2006-07 second grade year (Dist. Ex. 11 at p. 3). The section 504 plan reflected that the student's handwriting remained illegible, that his dysfluency had increased and now fell into the category of stuttering, and that he presented with some language processing concerns (id.). The student exhibited an increase in confidence and by teacher report, had done well in the parallel reading program (id.). The section 504 committee determined that the student continued to be eligible for section 504 services due to significant delays in fine motor development and visual motor coordination, and recommended OT services twice per week individually for 30 minute sessions as well as parallel reading services four times per week in the resource room and speech-language therapy services once per week for 30 minutes in a group of

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<sup>1</sup> Testimony by the district director of special education indicated that the school provided "building level services" to students with mild delays, through the learning resource center, speech-language therapy, counseling, and health related services without going through any "formalized process" such as developing an individualized education program (IEP) or section 504 accommodation plan (section 504 plan) (Tr. p. 33). He further testified that the school provided support to students who fell below the 40th percentile even though the students might be within the average range of functioning (Tr. p. 35).

<sup>2</sup> The hearing record reflects that six children from the first grade that the teachers believed would benefit from a more intensive reading program were selected to participate in the parallel reading program which utilized the Lindamood-Bell methodology (Tr. p. 252). The program met at the same time as the general education reading classes and was taught by the special education learning resource center teacher (id.).

<sup>3</sup> Testimony by the district's director of special education indicated that the learning resource center is also referred to as the resource room (Tr. p. 42). Both terms will be used interchangeably in this decision.

5 (id. at p. 1). A notation reflected that the student's language needs would be explored further and that everyone on the committee, including the parents, agreed with the plan (id. at p. 3).<sup>4</sup>

According to the student's mother, after the October 2006 section 504 meeting had ended, the district's speech-language pathologist referred her to an expert on stuttering and the student began receiving private speech-language services in November 2006 (Tr. pp. 623-25).

In April 2007, the student underwent a private OT evaluation (Dist. Ex. 14). Administration of the Bruininks-Oseretsky Test of Motor Proficiency (BOT-2) revealed age equivalent scores of 5-6 to 5-7 years in fine motor precision and 5-4 to 5.5-years in fine motor integration, indicating a delay of 2-7 to 3-0 years in fine motor control; age equivalent scores of 8-0 to 8-2 years in manual dexterity and 7-3 to 7-5 years in upper-limb coordination, indicating a delay of 2 months to 1-1 years in manual coordination; age equivalent scores of 4-0 to 4-1 years in bilateral coordination and 4-8 to 4-9 years in balance, indicating a delay of 3-5 to 4-4 years in body coordination; and age equivalent scores of 8-0 to 8-2 years in running speed and agility and 4-6 to 4-7 years in strength (full knee), indicating a delay of 2 months to 3-8 years in strength and agility (id. at p. 1). Administration of the Beery-Buktenica Developmental Test of Visual Motor Integration-Fifth Edition (VMI) revealed that the student scored at the 12th percentile (low average range) (id. at p. 2). The student's scores on the supplemental visual perception test indicated skills at the 2nd percentile (very low range) and his performance on the motor coordination test yielded a score at the 1st percentile (very low range) (id.). The OT evaluation report also indicated that the student's mother completed the Sensory Profile (id.). The evaluator concluded that the student had difficulty with a variety of "etch-manuscript" areas and noted concerns regarding various fine motor skills, motor planning, sensory processing issues, and coping skills (id. at p. 3). To address these deficits, the evaluator recommended two 45-minute individual OT sessions per week including direct intervention-remediation, a therapeutic listening program, use of the "Willbarger Protocol" and accommodations as needed; consultation to parents, private therapeutic and education staff; a specific writing program consistent with the school's writing program, and included writing paper; and reevaluation for eligibility for school-based OT (id.).

The hearing record reflects that in a telephone conversation on May 11, 2007, the student's mother informed the district that the student had begun to receive private OT services (Dist. Ex. 11 at p. 3). She also indicated that the private occupational therapist would contact the district's occupational therapist once per month by telephone or e-mail to ensure communication between the two (id.).

A private psychoeducational evaluation of the student was conducted over a six day period beginning on April 12, 2007 and ending on May 16, 2007 (Dist. Ex. 13). The private evaluation report reflected behavioral observations including that the student presented as a personable and friendly boy; who however, had difficulty sustaining attention and remaining still throughout the testing sessions (id. at p. 3). The private evaluation report also reflected that he often persisted with tasks and did his best to remain cooperative (id.). Administration of the Wechsler Intelligence

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<sup>4</sup> The progress reports that the October 26, 2006 section 504 plan was based on were not included in the hearing record and according to the plan, two of them were dated subsequent to the meeting (see Dist. Ex. 11 at p. 3).

Scale for Children-Fourth Edition (WISC-IV)<sup>5</sup> yielded a full scale IQ score of 89, indicating that the student functioned within the upper end of the low average range of intelligence (*id.* at p. 9). This score was comprised of an average verbal comprehension score of 98, a borderline perceptual reasoning score of 79, an average working memory score of 94, and an average processing speed score of 97 (*id.* at p. 3). The private evaluator indicated that it was unclear whether the student's lower performance in certain areas (such as with visual material) was due to the student's "relatively weak reasoning skills with such stimuli or [due to] restrictions in his ability to consistently focus on salient details and monitor his actions" (*id.*). The private evaluation report reflected that the student displayed evidence of a primary attention disorder with weak skills for executive functions and vulnerable language abilities, and that his problems with attention and organizational skills appeared to compromise his performance in various domains (*id.*). The evaluator indicated that as a result, the student's scores may be an underestimation of his actual intellectual potential (*id.*). The student's academic achievement was assessed in part by the administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II), which revealed standard scores in the low average range in numerical operations (86), and in the average range in word reading (99), pseudoword decoding (107), math reasoning (92), and spelling (108) (*id.* at p. 15). Administration of the Gray Oral Reading Tests (GORT-4) yielded percentile rank scores that placed the student's performance within the average range for rate (50th), accuracy (63rd), and fluency (50th), and within the low average range for comprehension (25th) (*id.*). With regard to emotional functioning, the student's responses to projective stimuli suggested limitations in his ability to fully manage and maintain control over demands with which he contended and that he was aware of his limitations, evidenced by the private psychologist's report that the student indicated "he [was] at his best when he can concentrate" (*id.* at p. 11). The private evaluation report reflected recommendations including exploring treatment options to address the student's attentional difficulties; educational therapy, OT, and speech-language therapy; monitoring of the student's emotional development; and sharing information regarding the student's learning needs with the school (*id.* at pp. 11-12).

On June 6, 2007, the section 504 committee met at the student's mother's request to discuss the results of the recent private psychoeducational evaluation report, which had found that the student met the criteria for a diagnosis of an attention deficit disorder (ADD) (Tr. p. 627; Dist. Ex. 12 at p. 2). The student's classroom teacher confirmed that the student often fidgeted, required refocusing, and frequently required reteaching of new concepts (Dist. Ex. 12 at p. 2). The resource room teacher reported that the student did not experience difficulty remaining on task in her smaller learning environment and that he was encouraged to sit on a therapeutic ball, which appeared to enhance his ability to attend (*id.*). The June 2007 section 504 plan reflected that the student's recent private OT evaluation indicated that the student exhibited notable deficits in fine motor skills, although he could execute letter formation when he worked slowly (*id.*). The OT report further indicated that the student's challenge was in integrating his skills when writing in the classroom and in not rushing while he worked (*id.*). The student's mother expressed concern that the student could be emotionally fragile and had begun to feel "different" than other children,

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<sup>5</sup> In the body of the evaluation report, the private evaluator indicated that the student was evaluated using the WISC-IV (see Dist. Ex. 13 at pp. 2, 3); however, on the summary of scores page, the private evaluation report reflected the Wechsler Intelligence Scale for Children-III (*id.* at p. 13).

and she voiced general concern regarding the student's stuttering (id. at p. 3). The committee determined that the student was eligible for section 504 services as the student's ADD and his fine motor impairment substantially limited his ability to attend, organize and execute writing tasks, which in turn adversely affected his appropriate participation in academic activities (id. at p. 1). For the student's upcoming 2007-08 third grade school year, in addition to continuation of the student's then current section 504 plan that included resource room services of 30 minutes per day four days per week in a group of 6, OT services of two individual 30-minute sessions per week and speech-language therapy for one 30-minute group of 5 session per week, the section 504 committee also recommended a classroom aide (5:1) three hours per day to assist the student with organization and the execution of writing tasks (id.). Program modifications were added to the student's section 504 plan including reteaching of materials, refocusing and redirection, checking for understanding, and preferential seating; testing accommodations were added including refocusing/redirection, flexible scheduling, special location, and a scribe (id. at p. 2). The section 504 plan reflected that the student's mother declined the recommended speech-language therapy services, that all members including the student's mother agreed with the plan for the upcoming 2007-08 school year, and that a meeting to review the student's progress would take place in October 2007 (id. at p. 3). The section 504 plan indicated that the committee's recommendations were based on an October 31, 2006 educational progress report, an October 31, 2006 OT progress summary, and an October 26, 2006 speech-language progress summary (id.).<sup>6</sup>

The student's report card dated June 15, 2007, reflected that although the student needed improvement in his appropriate use of time and attention in the classroom, he continued to make progress in academic areas (Dist. Ex. 16 at p. 1). Teacher comments indicated that the student required reteaching when new concepts were introduced, but was then able to work independently, and that he had difficulty with multi-step word problems, capitalization and punctuation, but was able to successfully put his thoughts down on paper (id.). The student's performance in the resource room reading program reflected that he had made "significant progress in all areas of reading" (id. at p. 3). The resource room teacher indicated that the student had increased his fluidity and comprehension and made good connections with the text on both literal and inferential levels, however, he needed some assistance in answering short answer questions or questions requiring critical thinking (id.).

The hearing record reflects that the parents sought a second opinion because they believed it was unclear "how reflective [the private psychological evaluation report] was of [the student's] abilities" (Tr. p. 634; Dist. Ex. 17 at p. 1). The student subsequently underwent a private neurodevelopmental evaluation on June 19, 2007, by a developmental pediatrician and physiatrist (Dist. Ex. 17 at p. 1). Administration of the Kaufman Brief Intelligence Test, Second Edition (KBIT-2) revealed that the student's scores reflected average performance in both verbal and nonverbal (perceptual reasoning) areas, indicating no discrepancy between the two scores (id. at p. 4). Administration of the auditory processing subtest from the Test of Auditory Perceptual Skills-Revised (TAPS-R) yielded a standard score (96) in the average range (id. at pp. 4, 7). The private evaluator reported that dysfluencies were not evident during the session, but the student was noted to have an /r/ distortion and immature speech for his age (id. at p. 4). The student's

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<sup>6</sup> These reports are not included in the hearing record.

performance on the Written Expression Scale of the Oral and Written Language Scales (OWLS) yielded a standard score of 96 (id.). The private evaluator opined that although the student's score was in the average range, written expression did not come easily to him and that the student's written expression was disjointed and difficult to follow (id.).

Although the student's scores on formal testing reflected average performance in all areas tested, the private evaluator reported that a distillation of findings and observations made in prior reports and evaluations and by the student's teachers, speech-language pathologist, occupational therapist and parents, indicated that the student had an early history of "dyspraxia" (Dist. Ex. 17 at p. 5).<sup>7</sup> However, she further indicated that now that the student was school aged, the student was primarily affected by weaknesses in attention, organization and sequencing; handwriting difficulties; and language processing difficulties, especially for more abstract material with mild expressive language deficits for higher level language demands (id.). The private evaluator reported that despite these challenges, the student had demonstrated ability to meet academic standards given educational supports (id.).

Although the private evaluator "strongly urged" the parents to look into a private school with expertise in attentional and learning needs for the student for the September 2008-09 school year, she made recommendations for the student's third grade school year (2007-08) at the district school (Dist. Ex. 17 at p. 5). The private evaluator's recommendations included that in addition to resource room assistance in English language arts (ELA), the student should receive resource room for mathematics, continue private OT and speech-language therapy at the then current frequency, and receive the assistance of an aide in the classroom to address attentional issues and distractibility (id.). The private evaluator further recommended that the student be allowed to move around when "fidgety" and that the student be provided with clarification of lengthy directions, preferential seating close to the teacher, extended time on standardized tests, and keyboarding instruction to address handwriting issues (id. at pp. 5, 6). Recommendations were also made for after school tutoring to assist with study skills and homework, and an auditory processing dysfunction evaluation to rule out auditory processing as a factor affecting attention and focus at school (id. at p. 6).

On September 25, 2007 at the beginning of the student's third grade year, the student's private occupational therapist completed an OT update of the student (Dist. Ex. 19). The update reflected that therapy had focused on improving hand skills, handwriting, sensory processing, and motor planning skills and that the student had made significant improvements on all goals (id.). The update also reflected that the student had improved in coping skills and frustration tolerance and that he was more accepting of intervention and willing to try alternatives (id.). The student's sensory processing had also improved as exhibited by fewer overreactions and underreactions to sensory stimuli, which helped with the student's motor planning, behavioral organization, and

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<sup>7</sup> The private evaluator indicated that "dyspraxia" refers to a subset of children who have regulatory deficits, motor planning deficits, low muscle tone, reduced core strength, poor endurance, delayed acquisition of language, and difficulty with prolonged sitting resulting in fidgeting and distractibility (Dist. Ex. 17 at p. 5).

coping skills (id.). The private occupational therapist indicated that the student would be starting a cursive writing program to supplement the school program (id.).

On October 17, 2007, the section 504 committee met at the parents' request (Dist. Ex. 20 at p. 1). Discussion included among other things, that the student had made progress and was a hard worker but continued to have difficulty with fine motor coordination, handwriting, and drawing, and that these difficulties interfered with his success in the classroom (id. at p. 2). The parents noted that the student was receiving private OT and speech-language therapy and declined the OT and speech-language services offered by the district (id.). No changes were made to the student's recommended 504 services (compare Dist. Ex. 12 at p. 1, with Dist. Ex. 20 at p. 1).

By letter dated November 9, 2007, the parents requested a Committee on Special Education (CSE) review for their son and enclosed copies of the private neurodevelopmental, private psychoeducational, and private OT evaluation reports (Dist. Ex. 21). On November 15, 2007, the school psychologist completed a developmental history interview with the student's mother for the CSE (Dist. Ex. 31). The interview report reflected that the student's mother perceived the student's primary concern in school as his difficulty sustaining attention (id.). She indicated the student also had difficulty with expressing himself verbally and in writing, organization, and executing fine motor tasks, and that he had received diagnoses of "dyspraxia" and "dysfluency" (id.). The report also noted the student's mother's concern that the student's struggles in school were beginning to have a significant impact on his self esteem (id.).

On November 29, 2007, the district's school psychologist conducted a classroom observation of the student during math instruction in the student's general education classroom (Dist. Ex. 29 at p. 1). The psychologist noted that although the student was quiet, he appeared comfortable in the large classroom setting and was able to interact with peers (id. at p. 2). She further noted that the student was able to follow directions and work independently, but required reteaching and reviewing and that he responded well to teacher intervention (id.).

On December 7 and 10, 2007, the district's speech-language pathologist conducted an evaluation of the student as part of the parents' referral to the CSE (Dist. Ex. 28 at p. 1). The evaluation report reflected that administration of the Comprehensive Assessment of Spoken Language (CASL) yielded a core composite standard score of 123 (id.). The evaluator indicated that the student performed in the average to above average range on this battery of subtests, including receptive and expressive language tasks of form, usage, and content (id. at p. 4). Administration of the Test of Auditory Processing Skills-Third Edition (TAPS-3) yielded an overall standard score of 101, indicating that the student performed in the average range on tasks related to the perception of auditory cues (id.). The evaluation report also indicated that the student's articulation, intelligibility, and vocal features of prosody, tone and rate were judged to be good, although he presented with an undeveloped /r/ and vocalic /r/ distortion and occasionally used a soft volume (id. at p. 5). As test results were consistently in the average to significantly above average range, the evaluator concluded that the student did not meet "the eligibility criteria to receive classified speech[-]language services" (id. at p. 6). However, the evaluator opined that the scores were "semi reflective" of the student's functional performance in school as the student could appear "relatively less vested in using linguistic skills to navigate the classroom setting" and

had also demonstrated "difficulty sustaining focus and attention to language tasks in third grade" (id.).

On November 7, 2007 and December 13, 2007, the district's special education resource room teacher assessed the student's academic achievement (Dist. Ex. 27 at p. 1). Administration of the Stanford Diagnostic Reading Test yielded percentile ranks of 43 in comprehension (average range), 82 in phonetic analysis (high average range), and 92 in vocabulary (very high range) (id.). Administration of the Stanford Diagnostic Mathematics Test revealed percentile ranks of 38 in concepts and application (average range), 84 in computation (high average range), and a total score percentile rank of 53 (average range) (id. at p. 2).<sup>8</sup> To assess the student's writing abilities, the resource room teacher administered the Metropolitan Achievement Test, Seventh Edition Form S in writing (MAT-7) (id.). The student's performance yielded a percentile rank of 45 (average range) and also reflected an analytic score based on a scale of 1-4 as follows: a content development score of 2 indicating that the student's writing included adequate supporting ideas with some details; an organizational strategies score of 3 indicating that the student's writing was fairly well organized with no digression from the main idea; a word choice score of 2 indicating the student used a fair choice of words with no variety; a usage score of 2 indicating the student's use of grammar was fair; and a writing mechanics score of 2 indicating many spelling errors and repeating of words or leaving out words (id. at pp. 2-3). The special education resource room teacher noted that the student's initial written response to the story prompt provided to him was immature with no details, but when asked to write another story about the same picture, the student was able to independently produce a piece that was "much better than before," included "a beginning, middle and an ending" and although the piece was short, "what [was] there [was] good, only underdeveloped" (id. at p. 2). She further noted that with regard to the student's participation in the resource room, the student had "proven that he [had] the skills and the ability to succeed in the third grade but lacked the motivation to do so" (id. at p. 3). She reported that she had difficulty inspiring him to put forth the "slightest amount of effort" and that regardless of the task presented, the student's first reaction was to ask if he had to complete all of it, if he had to write the answers, and if she could read it for him (id.). She opined that the student's passive learning made it difficult for him to be available for learning and to access the prior knowledge to build upon (id.).

On December 17, 2007 by letter, the CSE informed the parents that an initial eligibility determination meeting had been scheduled for January 8, 2008 (Dist. Ex. 24). The letter stated that the parents had "previously received a Procedural Safeguards Notice" and instructed that if the parents needed an additional copy, they should contact the district (id.). It further stated that if the parents had any questions or concerns, they should contact the district (id.).

The hearing record reflects that at some point during the 2007-2008 school year, the student's third grade teacher prepared a summary of the student's performance at the student's

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<sup>8</sup> I note that these scores indicated the results of the student's performance on a retest that took place a few days after the initial test date (Dist. Ex. 27 at p. 2). The evaluation report reflected that during the first testing attempt, the student was uncooperative, often not even looking at the questions before answering; therefore, the resource room teacher retested the student a few days later (id.).

mother's request (Tr. p. 448).<sup>9</sup> The teacher indicated that the student worked hard and had shown "substantial growth" since the beginning of the year, had made meaningful relationships within the class, and was well liked by his peers (Parent Ex. A). He further indicated that the student had understood most of the math concepts presented thus far, although he required assistance to complete more complex word problems and often sought out assistance before attempting to solve problems independently (*id.*). The teacher indicated that the student required redirection to maintain his attention particularly when a concept was introduced for the first time, although when engaged and focused, the student was quite capable (*id.*). With regard to reading skills, the teacher indicated that the student enjoyed reading, was confident when answering multiple choice questions, and had shown "much improvement" in comprehension skills; however, when responding to literature orally or in writing, the student utilized a limited vocabulary, had difficulty presenting his thoughts, and often left out key words or details (*id.*). The student's effort in the general education classroom and the learning resource center were described as inconsistent and it was reported that the student often did not want to attend the learning resource center; therefore, he often did not "show his best work" when there (*id.*).

On January 8, 2008, the CSE convened for an initial eligibility determination meeting (Dist. Ex. 25). Attendees at the meeting included the CSE chairperson, the school psychologist who had completed the November 29, 2007 classroom observation, the student's special education resource room teacher, his regular education teacher, the district's speech-language pathologist, an additional parent member, and the parents (*id.* at p. 1; Dist. Ex. 26). The CSE reviewed the student's history and, among other things, the April 12, 2007 private psychological evaluation and the June 19, 2007 private neurodevelopmental evaluation provided by the parents, the recent district speech-language and resource room evaluations, the student's December 2007 report card, and the September 2007 private OT update (Dist. Ex. 25 at p. 2). The eligibility meeting comments reflected that the CSE committee agreed that, overall, the student had "well-developed skills" academically; however, when the student's attention and energy were lacking, the student had difficulty performing to his ability (*id.*). The resource room teacher reported that the student had become increasingly resistant to attending the resource room, the parents indicated that the student felt "stigmatized" because of the need to leave the student's general education class to go to the resource room, and the student's classroom teacher agreed that going to the resource room "impacted [the student's] self esteem" (*id.*). However, the classroom teacher indicated that when in the classroom, the student worked hard, was socially accepted, and felt confident about himself (*id.*). The CSE determined that the student did not demonstrate a "significant disability" and was therefore not eligible for special education services; however, he was still eligible for services and accommodations through a section 504 plan (*id.*). As the student's reading skills had improved, the CSE recommended a decrease in resource room services to two times per week to address the student's writing deficits (*id.*). The CSE also recommended continuation of the student's aide to support him in the general education classroom and OT services (*id.*).

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<sup>9</sup> Although Parent Exhibit A is dated January 4, 2007 (see Parent Ex. A), the hearing record indicates that the report was prepared by the student's third grade teacher during the student's third grade year (2007-08) (Tr. p. 448; Dist. Exs. 17 at p. 1; 19; 20 at p. 1).

The hearing record reflects that the student participated in the New York State Grade 3 ELA examination in January 2008, and the New York State Grade 3 Math examination in March 2008 (Tr. pp. 441-42; Dist. Ex. 34). The student received a performance score of Level 3 (in the average range) on both exams (Tr. p. 442; Dist. Ex. 34).

On May 20, 2008, the section 504 committee met for the student's annual review and to plan for the student's fourth grade year (2008-09) (Dist. Ex. 36 at p. 1). The student's general education classroom teacher indicated that the student had shown improvement in all academic areas, although his attention continued to interfere with his performance, particularly during group lessons (*id.* at p. 2). The teacher also noted that the student put great pressure on himself to perform, which caused him to become anxious and immediately seek out adult assistance (*id.* at p. 3). The student's special education resource room teacher who had been seeing him twice per week for support in reading comprehension and writing reported similar findings regarding the student's achievement (*id.*). She indicated that the student's performance on the Stanford Abbreviated Comprehension Test yielded a percentile rank of 61 (average range) and his performance on the Stanford Open-Ended Test yielded a percentile rank of 80 (high average range) (*id.*).<sup>10</sup> The resource room teacher indicated that the student's "primary issues" continued to be attention and maturity, although he was currently presenting as more mature and as a "more vested learner" (*id.*). She further noted that the student did not like coming to the resource room because he always felt that he was missing something in the general education classroom (*id.*). The parents reported that the student had discontinued medication to address his inattention because it made him more irritable (*id.*). The student's private psychologist indicated that he believed that the student's prior private testing reflected that the student had a "non-verbal learning disability" and also voiced the parents' concern that the student would have greater problems organizing school projects that required more long-term planning as he moved into fourth grade (*id.*).

The 504 committee determined that the student continued to be eligible for section 504 services, noting the adverse effect of the student's ADD and fine motor deficits on his ability to appropriately participate in academic activities, and further noted the student's tendency to become anxious when initiating new tasks (Dist. Ex. 36 at p. 1). The 504 committee recommended that the student continue to receive resource room services of two 45-minute sessions per week in a group of 6, aide support three hours per day (5:1), two 30-minute individual OT sessions per week, and one 30-minute speech-language therapy session per week in a group of 5 (*id.*). The section 504 plan noted that the resource room teacher would monitor the student's organizational skills with regard to long-term school projects and his homework to ensure his understanding (*id.* at p. 3). The section 504 plan indicated that although the student continued to meet the criteria for both OT and speech-language therapy, the parents declined the services and chose to provide them privately (*id.*). The section 504 plan reflected that all members of the committee, including the parents, were in agreement with the plan for the upcoming 2008-09 school year and that further

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<sup>10</sup> The May 20, 2008 section 504 plan indicated that the committee based their recommendations on an educational progress report and a teacher progress summary, both dated May 20, 2008, as well as an OT progress summary dated October 17, 2007; however, these are not contained in the hearing record (Dist. Ex. 36 at p. 3).

discussion with the parents would take place regarding the student's academic performance after the start of the 2008-09 school year (id.).

On June 19, 2008 by letter, the parents informed the district that the student would not be attending the district's school for the 2008-09 school year and that he would be attending Eagle Hill (Dist. Ex. 38). The parents stated in their letter that while they "appreciate[d] the efforts the [district] community ha[d] made on [the student's] behalf since [k]indergarten," the student continued to struggle academically and he "lag[ged] behind his classmates" (id.). In a letter dated August 20, 2008, the parents, through their attorney, advised the district that they were unilaterally placing the student at Eagle Hill for the 2008-09 school year and that they intended to seek funding for the placement from the district (Parent Ex. L). The parents further stated that they rejected the district's "refusal to provide [sic] mandated special education services" in accordance with an individualized education program (IEP) and further rejected the placement "proposed by the [d]istrict at the last meeting discussing [the student's] special education needs]" (id.).

In a due process complaint notice dated June 5, 2009, the parents, through their attorney, alleged that the district failed to offer their son a free appropriate public education (FAPE) for the 2008-09 school year (Dist. Ex. 40 at p. 1). The parents specifically asserted that the district's decision to provide accommodations under a section 504 plan, rather than to classify the student and provide him with an IEP under the Individuals with Disabilities Education Act (IDEA), was inappropriate under both the IDEA and Section 504 and deprived the student of a FAPE under both statutes (id. at p. 2). The parents further asserted that the accommodations recommended by the committee under section 504 (a paraprofessional to work with the student in the classroom and resource room twice per week) would not help the student become more independent and were a "crutch" that would cause the student to "shut down" when academic requirements increase (id.). Also, the parents asserted that the district's speech-language therapist lacked familiarity with stuttering and the district's occupational therapist was unable to provide adequate services for the student (id.). The parents asserted that although the section 504 plan indicated that they were in agreement with the recommended accommodations, "they informed the 504 [c]ommittee that they did not agree with the [d]istrict's refusal to provide IEP mandated service" (id.). The parents further asserted that they informed the 504 committee that the recommendation for the reduction of resource room services was not appropriate to meet the student's needs (id.). The parents asserted that the student required "placement in a full time special education setting that is able to address his academic issues" (id.). As relief, the parents sought reimbursement of the tuition paid to Eagle Hill for the 2008-09 school year (id.).

The parties proceeded to an impartial hearing on September 24, 2009, which concluded on October 9, 2009, after four days of proceedings (Tr. pp. 1, 201, 366, 519). In a decision dated December 21, 2009, the impartial hearing officer found that the district failed in its "[c]hild [f]ind" responsibilities under the IDEA (IHO Decision at pp. 26-27).<sup>11</sup> The impartial hearing officer determined that because the student had been receiving services of resource room four times per week, OT two times a week, and speech-language therapy one time per week under a section 504 plan beginning during the 2006-07 school year (second grade); the district knew or should have

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<sup>11</sup> See 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111; 8 NYCRR 200.2(a)(7).

known at that time that the student may be a student with a disability under the IDEA (id. at p. 26). In addition, the impartial hearing officer noted that by the 2007-08 school year (third grade), an aide, program modifications, and test accommodations had been added to the student's section 504 plan (id. at p. 27). The impartial hearing officer concluded that the level of special education programs and services needed for the student to learn and function in the classroom merited a referral to the CSE for an evaluation for eligibility under the IDEA and that the 2007 private psychoeducational report provided "more than ample" evidence that the student should have been referred to the CSE for an evaluation under the IDEA (id.).

The impartial hearing officer also found that the district's failure to classify the student as a student with a disability and find the student eligible for special education services as a student with an OHI under the IDEA denied the student a FAPE (IHO Decision at pp. 27-31). The impartial hearing officer stated that the private psychoeducational report and the private neurodevelopmental evaluation provided sufficient information to classify the student as a student with an OHI (id. at p. 28). The impartial hearing officer added that the "conditions" described in both private evaluations had an impact on the student's performance in the classroom, citing the increasing levels of special education services, program modifications and test accommodations provided by the district under section 504, including provision of an aide to assist the student and "special 1:1 teacher assistance" in the general education classroom (id.). The impartial hearing officer concluded that "[b]ut for these services ... [the student] would have been lost and unable to function academically. Even with the services, [the student] plainly struggled in class" (id.). The impartial hearing officer found it significant that while passing his classes, the student was suffering from anxiety in school and a decline in self-esteem and confidence (id.). The impartial hearing officer opined that the student "should not have to endure such feelings in order to progress from grade to grade as a regular education student" (id. at p. 31). The impartial hearing officer further concluded that the district's section 504 plan was not an appropriate substitute for an IEP (id. at pp. 28-29).

In addition, the impartial hearing officer found that the general education classroom recommended for the 2008-09 school year was too large, noting that the private neurodevelopmental evaluation recommended a private school with expertise in attention and learning issues (IHO Decision at p. 30). The impartial hearing officer further found that the recommended resource room program was not appropriate for the student because of his resistance to leave the general education classroom, that the failure to modify that program constituted a denial of a FAPE, and that although the student had anxiety in school, counseling was not recommended (id.).

In addition, the impartial hearing officer found that Eagle Hill was appropriate (IHO Decision at pp. 31-34). The impartial hearing officer noted that the parents followed the recommendations contained in the private neurodevelopmental evaluation, which was for a private school setting with expertise in attention and learning needs (id. at pp. 32-33). The impartial hearing officer further found that Eagle Hill addressed the student's needs in a small class setting, that the curriculum at Eagle Hill was research based and individualized for each student, and that the student made significant progress there during the 2008-09 school year (id. at pp. 33-34). As to least restrictive environment (LRE) considerations, the impartial hearing officer found that the student's need for a small class and special education program and strategies "far outweigh[ed]"

the benefit to the student from interaction with nondisabled peers, especially because the student was not succeeding in the district's general education program and required increasing amounts of special education supports (id. at p. 34).

In addressing the equities, the impartial hearing officer found that the parents had cooperated with the IEP process and that equitable considerations favored an award of tuition reimbursement; therefore, he granted the parents' request for tuition reimbursement at Eagle Hill for the 2008-09 school year (IHO Decision at pp. 35-36).

On appeal, the district asserts that the impartial hearing officer improperly determined that the student was eligible for classification under the IDEA. Regarding the related services, modifications and accommodations received by the student under section 504, the district asserts that such services do not automatically render the student eligible for special education classification under the IDEA and that the recommended services constitute services that are normally provided under section 504. The district also asserts that the finding of the impartial hearing officer does not take into consideration testimony and documentary evidence indicating that the student was responding to the interventions provided under the section 504 plans and was progressing. The district further asserts that the private psychoeducational report supports the district's position. The district contends that while it was noted in that report that the student should receive OT and speech-language therapy services and that his educational plan should include an aide, learning center and accommodations such as extended time, the impartial hearing officer failed to acknowledge that the student was provided with those accommodations through the section 504 plan. The district further asserts that in his determination, the impartial hearing officer noted the student's "weak expressive language skills and grapho-motor problems," but failed to acknowledge that the district continued to recommend speech-language therapy and OT and that the parents refused such services.

The district also asserts that the impartial hearing officer ignored that the student was meeting State standards for his grade and that in standardized testing, the student received average to above average scores in the areas of reading, writing, and math. The district asserts that the impartial hearing officer ignored objective evidence regarding the student's alleged anxiety and self-esteem in determining that the student should be classified. Also, the district asserts that the impartial hearing officer improperly determined that Eagle Hill was appropriate for the student. The district contends that no evidence was presented at the impartial hearing as to the academic or cognitive profile of the students in the classes at Eagle Hill for grouping purposes, the student was not provided with counseling by a school psychologist at Eagle Hill, the evidence did not establish that the curriculum was research based, the parents did not present evidence to demonstrate that the educational instruction at Eagle Hill was designed to meet the student's needs, and the evidence demonstrated that Eagle Hill was too restrictive. In addition, the district asserts that the equities do not favor the parents.

In an answer, the parents assert that the impartial hearing officer properly decided that the district's failure to classify the student as a student with a disability denied the student a FAPE, that the district violated its child find obligations, that the student should have been classified as a student with a disability at the January 8, 2008 CSE meeting, that the student's section 504 plan

was not appropriate and not an adequate substitute for an IEP, that Eagle Hill was appropriate, and that the equities favor the parents.

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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). 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]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \* 36 [finding that a CSE was "obligated to recommend the least restrictive environment in which [a student] could make meaningful progress")].

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), 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). Also, a FAPE must be available to an eligible student who needs special education and related services even though the student is advancing from grade to grade (8 NYCRR 200.4[c][5]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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).

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). In order to be classified, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special

services and programs (34 C.F.R. § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Board of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36). Also, a FAPE must be made available to an eligible student who needs special education and related services even though the student is advancing from grade to grade (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]).

A child with a disability having an OHI, pursuant to federal regulations, means "a child evaluated . . . as having . . . an other health impairment . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a][1]). OHI, in turn, is defined as:

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that--

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

(34 C.F.R. § 300.8[c][9]; see 8 NYCRR 200.1[zz][10]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at \*9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; C.B. v. Dep't of Educ., 2009 WL 928093

[2d Cir. April 7, 2009]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]; see also K.M. v. Wappingers Cent. Sch. Dist., 2010 WL 451046 [S.D.N.Y. Feb. 9, 2010]; A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist., 2010 WL 126034 [E.D.N.Y. Jan. 8, 2010]).

Turning to the instant case, a thorough review of the hearing record reflects that under the circumstances presented in this case, the impartial hearing officer was correct in his determination that the district should have found the student eligible under the IDEA for special education programs and services as a student with an OHI at the January 2008 CSE meeting (see IHO Decision pp. 26-28). Although I agree with the impartial hearing officer's conclusion, I do so on different grounds.

A review of the information considered by the January 8, 2008 CSE supports a finding that the student was eligible at the time of the CSE meeting for classification as a student with a disability (see Dist. Ex. 25 at p. 2). As noted herein, the May 2007 private psychoeducational report indicated that the student displayed evidence of a primary attention disorder and that his problems with attention and organizational skills compromised his performance in various domains, possibly resulting in an underestimation of his actual intellectual potential (Dist. Ex. 13 at p. 3). The private psychoeducational evaluation report indicated that during the evaluation, the student frequently had difficulty maintaining focus and concentration and in order to facilitate his attention to the tasks presented, the evaluator provided structure to the testing session by giving the student a schedule that included the tasks to be completed, as well as a schedule for breaks and rewards (*id.* at p. 7). The private evaluator indicated that the structure seemed to help maintain the student's focus more efficiently and that otherwise, he was fidgety and demonstrated significant difficulty remaining seated, could not consistently sustain his attention, focus on important details, plan and organize his actions, or carefully monitor or regulate his performance (*id.* at pp. 3, 7, 10). The private evaluator also indicated that when the student was administered the Conners Continuous Performance Test-II, his scores were "highly significant as matching a clinical group of children his age with identified attentional problems (99[th] percentile)" (*id.* at p. 7). Although the student was initially eager to participate in the continuous performance task, the private evaluator reported that his attention waned after approximately five minutes; he protested, inquired as to when the task would be over, pecked haphazardly at the keyboard without looking at the screen, and often interrupted with irrelevant conversations or vocalizations (*id.*). The private psychoeducational report also reflected the parents' responses on the Conners Rating Scale-Revised Long Version, which indicated among other things, an elevated T score (65) for cognitive problems/inattention (*id.* at pp. 8, 16). The parents' responses also indicated that the student had difficulty completing homework "very frequently," was restless in a "squirmy" sense, had a short attention span, was disorganized, and only attended if the task was something he was very interested in (*id.* at p. 8). Although the student's second grade teacher's responses did not rate his behaviors with the same level of significance, when asked to describe behaviors that the student engaged in that caused difficulty/concern in school, his teacher indicated that the student was "easily distracted" to the extent that it "cause[d] work to be left incomplete" (*id.*). The private evaluator opined that some of the student's behaviors may have been exaggerated by sensory problems as well and recommended a consultation with a pediatric neurologist or pediatric psychiatrist to consider options to address the student's attentional difficulties (*id.* at pp. 8, 11; Dist. Ex. 17 at p. 2).

The hearing record also reflects that the student's attentional needs were further identified in a second private evaluation that was before the January 2008 CSE (Dist. Exs. 17 at p. 1; 25 at p. 2). In the June 19, 2007 private neurodevelopmental evaluation, the evaluator concluded that one of the student's primary areas of deficit was his weakness in attention and organization (Dist. Ex. 17 at p. 5). The evaluator concurred with the school plan to support the student with resource room services for ELA and suggested resource room for mathematics as well (id.). She further concurred with the recommendation for a classroom aide to address the student's attentional issues and distractibility and as noted in detail herein, made recommendations for classroom and testing accommodations to address the student's attention deficits (id. at pp. 5-6).

Also before the January 2008 CSE was a November 2007 educational evaluation report completed by the student's resource room special education teacher (Dist. Exs. 27 at p. 1; 25 at p. 2). This report reflected that although the student scored within the average range on the academic achievement tests presented, he demonstrated poor "depth of processing," which she described as the ability to explain the "what or why" of his thinking, to manipulate information and think about how it relates to the story and the world, and his ability to go beyond the surface meaning of information and make a connection (id. at p. 3). She indicated that this was "common with children with attention issues" (id.). The resource room teacher indicated that the student's depth of processing influenced how he processed information and "[a]s the processing depth diminishes, details and connections become increasingly vague" (id.). She further indicated that this could contribute to the student's lack of attention to detail, his short-term memory, and his ability to study and retain facts (id.). The resource room teacher reported that "[a]n engaged mind takes in new material and calls up relevant preexisting facts and ideas" and that "[c]ontrol over this activity is an essential part of attention;" however, "[t]his process of active learning is not available for [the student]" and as a result, the student "has difficulty connecting to new information especially since most does not have relevance to him. He does not elaborate and often over relies on rote answers" (id.). The resource room teacher concluded that although the student has the skills and ability to learn, his passive learning made it difficult for him to be available for learning or to access and build upon his prior knowledge (id.).

In determining that the district should have classified the student as eligible under the IDEA for special education programs and services as a student with an OHI at the January 2008 CSE meeting, I note that the comments section of the January 8, 2008 CSE eligibility determination meeting reflected that the CSE was aware of the student's "significant issues with attention and executive functioning" that were revealed in the May 2007 private psychoeducational report and the CSE further noted that "as a result, [the student] was approved to receive aide support in the classroom" (Dist. Ex. 25 at p. 1).

Moreover, the student's third grade teacher reported at the June 2007 section 504 meeting that in the classroom the student often fidgeted, required refocusing, sought additional help from adults in the room, and frequently required reteaching of new concepts; statements that corroborate the findings presented in the private psychoeducational evaluation report (Dist. Ex. 12 at p. 2). Testimony by the student's third grade teacher indicated that the student would lose focus or attention in class during an activity, but mainly during large group instruction when the students were seated in the front of the class and the teacher modeled what he wanted the students to do (Tr. pp. 428-29, 457). The teacher stated that when the student had a problem with material

presented to the whole group, he would work with the student in a small group or 1:1 and that this was "very common" when introducing a "new concept" or "something [the student] had never seen before" (Tr. p. 473). The teacher also testified that the student required reteaching weekly (Tr. p. 468).

The student's third grade teacher further testified that he addressed the student's attentional needs by using verbal and physical prompts, such as calling the student's name and tapping him on the shoulder, and that if the inattention persisted, he would prompt the student to get up, move around, stretch, get a drink or sit in a chair (Tr. p. 429). He stated that the aide in the classroom would sometimes sit "right next to" the student and provide this type of prompting (Tr. p. 430). The teacher testified that the aide was also there to assist the student when he had difficulty initiating his work and that the aide would work 1:1 with the student when he was unable to understand what was presented (Tr. pp. 431-32, 41). The teacher also indicated that the student would at times independently seek out the aide for assistance (Tr. p. 464). The teacher testified that he also provided small group and 1:1 instruction as needed at a separate table in the classroom (Tr. pp. 431, 465).

Regarding the resource room services received by the student during third grade (Tr. p. 445; Dist. Ex. 12 at p. 2), the student's resource room teacher testified that she taught the student in a group of two students (Tr. p. 272). To address the student's needs, the resource room teacher testified that her instruction differed from that in the student's general education classroom because she utilized a different reading methodology in which she presented "explicit instruction" as opposed to the balanced literacy program used in the student's general education classroom (Tr. p. 240). The resource room teacher further testified that for writing, in addition to the basic Windward writing program,<sup>12</sup> she implemented a visualizing and verbalizing program that teaches students how to visualize, describe what they are visualizing, and then put it into expressive writing (Tr. pp. 269, 270). She added that the program had a definite progression, that it was for students who have "attentional issues," and that it addresses organizational skills and strategies (Tr. p. 270). The resource room teacher also testified that she tried to integrate what went on in the general education classroom into her own classroom as much as she could and that she was in constant contact with the other teachers (Tr. p. 271).

The hearing record further reflects that due to the student's attention deficits, he took the third grade State ELA test "away from the class in an area where he would be free of distraction" and that during third grade, he was also afforded other testing accommodations including refocusing/redirection, flexible scheduling, special location, and a scribe (Tr. p. 443; Dist. Ex. 12 at p. 2). The student also received program modifications including reteaching of materials, refocusing and redirection, checking for understanding, and preferential seating (Dist. Ex. 12 at p. 2).

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<sup>12</sup> The hearing record describes the Windward writing program as a "basic writing method" that includes a topic sentence, three supporting sentences, and a concluding sentence (Tr. p. 270). The student's resource room teacher testified that she used the Windward program to address the student's organizational skills and to assist him with organizing his thoughts (*id.*).

In conclusion, I find that under the circumstances of this case, given the broad array of supports and services that the student required in the district's program, the weight of the evidence supports a finding that at the time of the January 2008 CSE meeting, the student was eligible for special education programs and services as a student with an OHI under the IDEA and should have been classified as such by the district (see 20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]; 34 C.F.R. § 300.8[a][1], [c][9]; 8 NYCRR 200.1[zz][10]; see also Muller, 145 F.3d at 105 [finding that the district's section 504 plan "was not an adequate substitute" for devising an IEP for the student pursuant to the IDEA]). In this case, the hearing record reveals that the district did not meet its burden of demonstrating that at the time of the January 2008 CSE meeting, the student was not a student with a disability who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education (see Educ. Law § 4401[1], [2][k]). I therefore agree with the impartial hearing officer's conclusion that the student should have been determined to be eligible for special education and services as a student with an OHI at the January 2008 CSE meeting.

I will now consider whether the parents' placement of the student at Eagle Hill was appropriate for the 2008-09 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not by itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original] citing Frank G., 459

F.3d at 365 quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 [1982]). Parents are not held as strictly to the standard of placement in the least restrictive environment (LRE) as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105 [2d Cir. 2000]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Upon review of the hearing record, I find that the hearing record does not support the impartial hearing officer's determination that the parents sustained their burden to establish that Eagle Hill was appropriate to meet the student's special education needs (see Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007; Gagliardo, 489 F.3d at 112; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Dept. of Educ., Appeal No. 09-031; Application of a Student with a Disability, Appeal No. 08-019; Application of the Bd. of Educ., Appeal No. 05-081).

Initially, I find that the impartial hearing officer's determinations that the student was not "succeeding" in the district's school and therefore needed a small special education program, and that the student's "significant needs far outweigh[ed]" the benefit to the student from interaction with nondisabled peers, are not supported by the hearing record (see IHO Decision at p. 34).

Instead, the hearing record supports a finding that the student made progress in his third grade general education classroom and in the resource room with supports and services, as reflected in the student's report cards, the student's New York State ELA and math test scores, testimony by the student's teachers, and in the classroom observation of the student completed by the school psychologist (Tr. pp. 287, 452, 458; Dist. Exs. 29 at p. 2; 34; 35 at pp. 1, 2). After review, I conclude that, although the district erred by failing to classify the student as a student with a disability under the IDEA, the student was appropriately placed in a general education

classroom with special education supports and services described herein and that the provision of supports and services within the context of a general education program enabled the student to achieve educational progress and allowed the student the opportunity to interact with his non-disabled peers. Therefore, the student did not require a special education environment such as Eagle Hill, which provided no opportunity for the student to interact with nondisabled peers (Tr. pp. 543- 44).

When considering the restrictiveness of the parental placement, under the facts of the instant case, I conclude that the parents are not entitled to an award of tuition reimbursement based on the restrictiveness of Eagle Hill (see Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482 [S.D.N.Y. 2007]); W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; see A.H. v. New York City Dep't of Educ., 652 F. Supp. 2d 297, 301 (E.D.N.Y. 2009); S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 (S.D.N.Y. 2009); see also Application of a Child with a Disability, Appeal No. 99-54; Application of a Child with a Disability, Appeal No. 98-38; Application of a Child with a Disability, Appeal No. 98-18).<sup>13</sup> As discussed above, the hearing record in this case demonstrates that this student was and can be successful in a general education program with special education programs and supports (see Tr. pp. 287, 452, 458; Dist. Exs. 29 at p. 2; 34; 35 at pp. 1, 2). The hearing record in this case also demonstrates that the student benefitted from interaction with his nondisabled peers. The student's third grade regular education teacher testified that by the end of the year, the student had "opened up more," had become "more comfortable sharing in front of the class," and was "more outgoing" (Tr. pp. 435-36). In addition, he testified that in the general education classroom, the student was "accepted socially" and "his confidence grew substantially as the year progressed" (Tr. pp. 454, 472). He also testified that the student "liked being in that general ed[ucation] setting" (Tr. p. 446). A review of the hearing record indicates that the parents' unilateral placement at Eagle Hill was too restrictive for the student and moreover, it did not offer an educational program which met the student's special education needs in the area of

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<sup>13</sup> I also note that testimony by the former admissions director of Eagle Hill reflects that the student was not receiving OT at Eagle Hill (Tr. p. 595). Although testimony indicates that Eagle Hill provided a "motor training specialist" with a master's degree in adapted physical education (id.), the hearing record further reflects that the student needed OT to address fine motor deficits that affected his handwriting including legibility, sizing, line placement, speed and stabilization of the paper; and his hand skills including grasp, release, pressure and in-hand manipulation, as well as deficits in sensory processing and motor planning (Dist. Ex. 19). The hearing record does not show that the "motor training specialist" would have been an appropriate substitute to address the student's needs in the area of fine motor deficits. A parent's unilateral placement at a private school must provide "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction" (Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65; see Matrejek, 2008 WL 3852180, at \*2; Walczak, 142 F. 3d at 129; Green v. New York City Dep't of Educ., 2008 WL 919609, at \*7 (SDNY March 31, 2008); Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656 (SDNY 2005); Application of a Student with a Disability, Appeal No. 09-069; Application of the Dep't of Educ., Appeal No. 09-02; Application of the Bd. of Educ., Appeal No. 08-029; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-119; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-034; Application of a Child with a Disability, Appeal No. 07-022; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-127.

fine motor skills (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419).

Having determined that the parents failed to sustain their burden to establish that the Eagle Hill placement was appropriate, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parents' claim for tuition reimbursement (see Burlington, 471 U.S. 359; Gagliardo, 489 F.3d at 115; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

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

**IT IS ORDERED** that the impartial hearing officer's decision, dated December 21, 2009, is annulled to the extent that it determined that the parents sustained their burden to establish the appropriateness of Eagle Hill during the 2008-09 school year and ordered the district to reimburse the parents for tuition costs.

**Dated:**            **Albany, New York**  
                         **March 10, 2010**

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