



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-018

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Cold Spring Harbor Central School District

Appearances:

Frazer & Feldman, LLP, attorneys for respondent, Laura A. Ferrugiari, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in seventh grade at 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. pp. 3043-45; Dist. Ex. 15 at p. 1; see 8 NYCRR 200.1[d], 200.7).¹ The student's eligibility for special education programs and services as a student with an other health impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The hearing record reflects that the student exhibited average to superior cognitive abilities; strong verbal language skills; and weaknesses in reading decoding, fluency, math fluency, and written expression/writing skills (Tr. pp. 71-75, 736-37, 1554-55, 2519; Parent Exs. J at pp. 4-13; KK at pp. 2-4). The student received diagnoses including a disorder of written expression; a learning disorder not otherwise specified (NOS), which included "dyslexic tendencies," problems

¹ The hearing record indicates that Eagle Hill "is only approved by New York State on an individual, emergency placement basis" (Dist. Ex. 15 at p. 1). There is no allegation that such was the case in this appeal.

with working memory, and difficulties with information processing; an attention deficit hyperactivity disorder (ADHD) NOS; an anxiety disorder NOS; and a mood disorder NOS (Parent Exs. J at p. 14; KK at p. 4). He was characterized as "well-related" and "eager to please," and did not present behavioral or disciplinary difficulties (Tr. pp. 634-35, 735-36, 988-89, 1080, 1182-89, 1546; Parent Exs. J at p. 3; KK at p. 2).

The hearing record in the instant appeal is voluminous, containing over 4,300 pages of testimony and 130 exhibits. The parties' familiarity with the details of the student's educational history is presumed. As summarized here, the hearing record reflects that the student attended the district's elementary schools from kindergarten through the 2007-08 school year (sixth grade) (Dist. Ex. 8; Parent Ex. W at p. 2). The student's mother revealed that during first grade, the student was referred to the elementary school's child study team (CST), which determined that he was ineligible to receive special education services as a student with a disability; however, the student received "building level supports" such as pull-out counseling and speech-language therapy services (Tr. pp. 2038-39).

The student continued to receive building level supports during second grade, and in March 2004, the school psychologist referred him to the district's Committee on Special Education (CSE) (Tr. pp. 2040-41; Parent Ex. W). The CSE referral form revealed that the student had a diagnosis of an ADHD and exhibited difficulties working independently in the classroom, retaining math concepts, and decoding and comprehending written material (Parent Ex. W at p. 1). Additionally, the student became frustrated easily, exhibited organizational difficulties, and demonstrated limited socialization with peers (*id.*). According to the student's mother, the CSE determined that the student was eligible for special education services as a student with an other health impairment, and for the 2004-05 (third grade) and 2005-06 (fourth grade) school years, he received a general education program with resource room, speech-language therapy, counseling, and occupational therapy (OT) services (Tr. pp. 2041-42, 2044-45, 2049). The student's mother added that during summer 2006, the student received "support services" from the district (Tr. p. 2069).

During fifth grade (2006-07), the student received daily resource room services and one session per week of both individual and group speech-language therapy (Parent Ex. Z at p. 1). The student's mother apprised that during the 2006-07 school year, her son experienced difficulties with social interactions and increased academic demands (Tr. pp. 2058-60). In December 2006 and February 2007, respectively, the district conducted educational and speech-language evaluations of the student (Dist. Exs. 2; 3). An academic achievement assessment yielded scores in the average range of functioning, with the exceptions of reading fluency, math fluency and spelling, in which the student scored below average (Dist. Ex. 2). Results of language, vocabulary, and phonological awareness assessments confirmed that while the student exhibited "strong language abilities," his working memory skills and "auditory conceptualization of sounds" presented as areas of weakness (Dist. Ex. 3).

A January 2007 administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension index score of 121 (superior), a perceptual reasoning index score of 110 (high average), a working memory index score of 99 (average), a

processing speed index score of 91 (average), and a full scale IQ score of 109 (average) (Dist. Ex. 4 at p. 2).² The student's performance on an assessment of perceptual motor integration was "within age expectations," and he exhibited "well developed short term visual memory" (*id.* at p. 3). The school psychologist observed that during the evaluation, the student appeared to be "highly motivated to do well," and "worked slowly, checked his work and was reluctant to make mistakes" (*id.* at p. 1). She further reported that although conscientious, the student became frustrated and was quick to give up as tasks became challenging; however, he responded well to compliments regarding his willingness to persevere with difficult tasks (*id.*).

On March 1, 2007, the CSE convened for the student's annual review (Parent Ex. M). The student's speech-language pathologist and classroom teacher commented in the resultant individualized education program (IEP) that "[c]hallenges appear to create a heightened anxiety" for the student and that "[c]hallenges were noticed when work was difficult" (*id.* at p. 4). The district social worker reported that the student exhibited social progress with peers and that the student's "school anxiety" was being addressed in "his classroom, the resource room, and the therapy room," although the IEP did not provide specifics (*id.*). Subsequent to the parents' request that the student receive OT services, the district recommended that the student undergo an OT evaluation and agreed to reconvene to review the report and finalize recommendations for the upcoming school year (*id.* at pp. 4-5). The March 1, 2007 CSE recommended that the student receive daily pull-out resource room services and twice weekly group speech-language therapy in the classroom for the 2007-08 school year (*id.* at p. 1).

After the March 1, 2007 CSE meeting, the parents sought independent testing of their son (Tr. pp. 2064-65). On May 22, 2007, a clinical psychologist from the Eagle Hill Foundation Diagnostic Unit³ (the independent clinical psychologist) generated his neuropsychological evaluation report documenting findings from a private neuropsychological evaluation of the student conducted on April 5 and 12, 2007 (Tr. p. 2686; Parent Ex. J). The resultant report reflected that the initial independent clinical psychologist interviewed the parents and reviewed the student's March 1, 2007 IEP and testing conducted by the school district in December 2006

² The school psychologist noted that the student's full scale IQ score must be interpreted "cautiously" because of the significant discrepancies between the index scores, which were in the low average to superior range of cognitive abilities (Dist. Ex. 4 at p. 2).

³ This entity is also referred to in the hearing record as the Eagle Hill Diagnostic Clinic (the clinic) (*see* Tr. p. 2686). According to the clinic's director, the clinic and Eagle Hill were housed in separate buildings on the same campus, and were separate entities controlled by the same board of directors (Tr. pp. 2854-55). The clinic's director denied that he functioned as an employee of Eagle Hill, and maintained that "the school and the clinic, while on the same site, really do work independently of one another.... The clinic has nothing to do with admissions or enrollment, and none of us serve on any admissions or enrollment committee as part of the school" (Tr. pp. 2871, 2874-75). The independent clinical psychologist corroborated the independent functioning of the two entities, but acknowledged that "[i]n a partial sense, I was an employee of Eagle Hill insofar as the checks that I received were signed by the bursar at Eagle Hill, but technically I was an independent contractor. I wasn't being overseen by the school director or any of the teachers" (Tr. pp. 2686-88).

and January and February 2007 (Parent Ex. J at pp. 1-2).⁴ The independent clinical psychologist administered "a variety of neuropsychological, educational, language, and psychological tests" to the student, and characterized him as "well-related" and "extremely polite" during the evaluation (*id.* at p. 3). He described the student's participation in the assessment as "particularly hardworking" and "cooperative," noting that he was "easy to be with, and comfortably engaged in conversations" (*id.* at pp. 3-4). Emotionally, the student "mostly exhibited a happy, contented mood, and experienced no problems whatsoever with tolerating frustration or regulating his behavior" (*id.* at p. 4). The student informed the independent clinical psychologist that he had "good friends" and that writing tasks were difficult for him (*id.*). The independent clinical psychologist posited that the student displayed "good conceptual reasoning as well as adequate problem-solving and planning skills" during "executive tasks" (*id.*).

The independent clinical psychologist's "clinical impressions" of the student reflected that the student "expresse[d] his ideas effectively and reason[ed] well with verbal information," and he described the student's nonverbal and visuospatial skills as "robust" (Parent Ex. J at p. 11). He observed that the student's low average processing speed "st[ood] out as a pronounced area of relative weakness when compared to his other areas of strength," surmising that said weakness could prompt the student to feel "one step behind" his peers (*id.* at p. 12). He cautioned that the student's difficulties with "more complex visuospatial tasks as well as ones that feature demands for visuomotor integration" could potentially create subject-specific difficulties, particularly in math (*id.*). The independent clinical psychologist further theorized that the student's variable working memory skills may have contributed to his difficulties with reading and moving through tasks with multi-step instructions (*id.*). Assessment results prompted the independent clinical psychologist to deem the student's memory-related skills, including memory for rote and complex verbal information, and memory for visual information, as a "major area of concern" (*id.*). Although noting that the "quality of [the student's] attention mostly proved reliable" during the evaluation, the independent clinical psychologist referenced reports from home and school, indicating that to varying degrees the student struggled with regulating his attention in those settings (*id.*). He added that the student's wavering attention, coupled with "mild bouts of impulsivity," may "derail" his availability for learning and problem solving, and could "overlap" with inconsistencies and weaknesses in his executive functions skills (*id.* at pp. 12-13).

Academically, the independent clinical psychologist noted that the student "struggle[d] in many domains" with a "primary weaknesses cluster in the realm of language arts" including below average phonological processing skills that undermined his decoding and word attack skills (Parent Ex. J at p. 13). However, he qualified that the student had learned to compensate for those weaknesses, and was "therefore capable of reading with age- and grade-expected comprehension" (*id.*). He observed that the student's writing efforts bore "the mark of his phonologically based

⁴ The independent clinical psychologist's May 22, 2007 report apprised that in addition to resource room services and speech-language therapy provided for in the student's March 1, 2007 IEP, the student also received "counseling" at school and attended a group that "promote[d] social skills" (Parent Exs. J at p. 1; M at p. 2). The counseling services are not referenced in the March 1, 2007 IEP.

weaknesses given that he spells poorly when writing single words or composing text," noting that the student also struggled with grammar and the elaboration of ideas (id.). The independent clinical psychologist reported that the student also found the physical, mechanical act of writing so labor intensive that it rendered the "process of writing even more unappealing for him" (id.). He concluded that the student's "language-based learning skills, when considered globally, thus comprise a profile consistent with dyslexic tendencies" (id.). In math, the independent clinical psychologist commented that prior educational assessments of the student revealed weaknesses in math computation, calculations, and math fluency (id.). Academically, he surmised that the student was "significantly burdened with a host of complex neuropsychological and learning problems, and he require[d] an academically oriented special education setting to meet his learning needs" (id.).

The independent clinical psychologist measured the student's social and emotional functioning with the help of questionnaires completed by the parents, the student, the student's regular education teacher, and the independent clinical psychologist (Tr. pp. 2587-88; Parent Exs. J at p. 11; LL at pp. 1-4). The results, according to the independent clinical psychologist, depicted a student "burdened with meaningful clinical symptoms, but a child who nevertheless maintain[ed] his emotional equilibrium in school settings" (Parent Ex. J at p. 11). Neither the student's regular education teacher nor the independent clinical psychologist raised concerns of anxiety-related problems, depressive tendencies, or behavioral difficulties (id.). Nevertheless, the independent clinical psychologist opined that the student was "burdened with significant anxiety-related and depressive tendencies" and that he "harbor[ed] a substantial level of emotional distress" (id. at p. 13).

The independent clinical psychologist offered the student diagnoses of a disorder of written expression; a learning disorder, NOS, including dyslexic tendencies, problems with working memory, and difficulties with information processing; an ADHD, NOS; an anxiety disorder, NOS; and a mood disorder, NOS (Parent Ex. J at p. 14).⁵ He suggested that the student "would benefit from enrolling in a small, highly supportive, academically oriented special educational setting with a high teacher-to-student ratio that concurrently emphasizes academic and social development," and provided numerous recommendations regarding teacher interactions and modifications and also specific instructional strategies to assist the student (id. at pp. 14-19). He recommended psychotherapy to address the student's "anxiety-related and depressive tendencies," and suggested that the student receive school based related services on a 12-month basis (id. at p. 19).

On June 19, 2007 a CSE subcommittee convened to continue the student's annual review and to discuss the occupational therapist's assessment of the student's skills (Tr. p. 2064; Parent

⁵ In his report, the independent clinical psychologist indicated that the parents expressed concerns that the student exhibited "tics" (Parent Ex. J at p. 2). The independent clinical psychologist reported that he did not observe "fidgeting, tics, or stereotypies" during his evaluation of the student, but expressed the need to rule out a chronic motor tic disorder (id. at p. 4).

Ex. O). The hearing record reflects that the meeting was tabled to allow for the participation of the independent clinical psychologist (Tr. pp. 2064-65; Parent Ex. O at p. 1).

The student's final fifth grade report card included comments from his regular education and special education teachers advising that he was "an extremely capable student" and was "able to grasp new concepts when he set[] his mind to it" (Parent Ex. A). Comments further noted that the student's true abilities were not always reflected in his grades due to his inconsistency with completing assignments, despite modifications, due to "his difficulty with organization, focus and motivation" (id. at p. 1).

On September 7, 2007 and October 9, 2007, the CSE reconvened to complete the student's annual review for the 2007-08 school year (Dist. Ex. 1).⁶ Attendees at both meetings included the CSE chairperson/director of special education and pupil services (the director), the principal, the school psychologist, both the student's fifth grade regular education teacher and his special education teacher, the student's sixth grade special education teacher, one of the student's sixth grade regular education teachers, the student's occupational therapist,⁷ the district speech-language pathologist, an additional parent member, the district's attorney, the parents, and the parents' advocate; the independent clinical psychologist participated telephonically (Tr. pp. 234, 2070; Dist. Ex. 1 at pp. 4-5). The hearing record reflects that the attendees reviewed the May 22, 2007 neuropsychological evaluation report, including its recommendations, and that the student's teachers and parents discussed his strengths and weaknesses (Tr. pp. 745-46, 2082-87; Dist. Ex. 1 at pp. 5-7). At the conclusion of the two meetings, the CSE recommended a special education program for the remainder of the 2007-08 school year consisting of twice daily sessions of resource room, with one session focusing on reading instruction using the Wilson Reading Program (Wilson) and on writing skills, and one session focusing on math instruction; related services⁸ consisting of OT once per week for 30 minutes per session in a 1:1 setting; program modifications consisting of a positive reinforcement plan, repetition of directions, preferential seating, modified homework assignments, use of a study guide and a weekly social skills class; and testing accommodations consisting of extended time (1.5), flexible location, directions read and explained, questions read, word bank, and use of a calculator (Tr. pp. 1168-69; Dist. Ex. 1 at pp. 1-2, 5-7).

⁶ The IEP contained in the hearing record bears a date of September 7, 2007; however, the student's mother contended that the CSE meeting occurred on September 17, 2007 (compare Dist. Ex. 1 at pp. 1, 4, with Tr. p. 2070). In his exhibit list, the impartial hearing officer ascribed the September 7, 2007 date to the subject IEP (IHO Decision at p. 65). I refer to the September 7, 2007 date in this decision.

⁷ According to the hearing record, the student's OT service provider was not a district employee, but worked for a third party provider under contract with the district (see Tr. pp. 3703-04).

⁸ Although listed on the September 7, 2007 IEP document (see Dist. Ex. 1 at p. 1), both the student's sixth grade special education teacher and his speech-language pathologist testified that the fall 2007 CSEs discontinued the student's speech-language therapy services in lieu of providing two sessions of resource room services per day (Tr. pp. 1161, 1165-66, 1171, 3651-52, 3656-59; see Dist. Ex. 1 at p. 6).

During sixth grade, the hearing record reflects that student worked toward achieving annual goals in the areas of study skills, reading, writing, mathematics, motor and social/emotional skills (Dist. Ex. 1 at pp. 8-11). The school psychologist apprised that in addition to the presence of the principal during lunch and recess, she observed and interacted with the student during lunch and recess "very frequently several days a week for a greater part of the year" to assist him with social interactions and improve his social skills (Tr. pp. 1617, 4045-47).

The hearing record reflects that in October 2007, the parents met with the director to discuss potential alternative placements for the student, including self-contained settings, and that the parents began exploring potential private schools (Tr. pp. 753-55, 2089-91; Dist. Ex. 25; Parent Exs. P; NN; OO). According to the director, after a number of "approaches" by the parents, on January 9, 2008 he forwarded correspondence to three area public school districts advising that the CSE was "looking for a placement for the 2008-09 school year" and providing the student's September 7, 2007 IEP (Tr. pp. 754-57; Parent Exs. B; C; D). By the end of January 2008, two of the area public school districts responded that they did not have an appropriate placement for the student (Parent Exs. E; F). On March 13, 2008, after observing the student in the resource room, the director of special services from the third area public school contacted by the district commented that the student appeared to be "much higher functioning than our self contained students," and concluded that the "verbal and academic abilities he displayed would not make him appropriate for our placement" (Dist. Ex. 5). She added that "[the student] impressed me as a student that would benefit from being in an inclusion program where his social skills would continue to develop" (id.).

According to the student's mother, the student struggled academically and socially during the 2007-08 school year (Tr. pp. 2091-2102, 2428-65, 2911-13, 2936-43; Parent Exs. T; BB; CC).⁹ On March 21, 2008, the parents signed an enrollment agreement reserving a seat for the student at Eagle Hill for the 2008-09 school year and paid a non-refundable registration deposit (Dist. Exs. 16; 17). By letter dated April 2, 2008, the student's mother informed the director that Eagle Hill offered her son placement in its 2008-09 program and that she had "reserved that seat" to ensure its availability in September 2008 for the start of the student's seventh grade school year (Dist. Ex. 6). The letter further apprised that the parents scheduled an evaluation of their son to be conducted by the "[c]linic [d]irector of Eagle Hill School" and assured that they would forward results of that assessment to the district (id.).¹⁰

⁹ Comments from the student's teacher in December 2007 listed on his sixth grade report card revealed that the student was "learning to meet the demands of sixth grade" and that "[h]is modified curriculum allow[ed] him to be more successful in class" (Dist. Ex. 10). She further noted that district staff was "continuing to monitor all academic areas" and the student's social development (id.).

¹⁰ The student's mother testified that she forwarded the Eagle Hill clinic director's neuropsychological reevaluation report to the successor district director on July 2, 2008 (Tr. p. 2489; Parent Ex. KK at p. 1). The district denied that it ever received this report (Tr. pp. 213-14).

On May 15, 2008, the CSE subcommittee convened for the student's annual review and to develop an IEP for the student's seventh grade school year of 2008-09 (Dist. Ex. 12). Attendees included a new CSE chairperson/director of special education and pupil services (the successor director),¹¹ a special education teacher from the district's junior high school,¹² the school psychologist, the student's fifth grade regular education teacher, three of the student's sixth grade regular education teachers, the student's special education teacher, a junior high school guidance counselor, the parents, and their advocate (Tr. pp. 217-18; Dist. Exs. 12 at p. 5; 13).

The May 15, 2008 IEP indicated that, in addition to the student's IEP progress report (Dist. Ex. 8), sixth grade report card (Dist. Ex. 10), and the independent clinical psychologist's May 22, 2007 report (Parent Ex. J); the CSE considered the results of numerous standardized tests in arriving at its recommendations including: the February 8, 2007 administrations of the Gray Oral Reading Test (GORT) and Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH); the January 19, 2007 administration of the Lindamood Auditory Conceptualization (LAC); the January 11, 2007 administration of the WISC-IV; the December 4, 2006 administration of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4); the November 27, 2006 administrations of the Expressive Vocabulary Test (EVT) and Peabody Picture Vocabulary Test – Third Edition (PPVT-III); the March 21, 2006 administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI); and the February 7, 2006 administrations of the Developmental Test of Visual Perception-Adolescent and Adult (DVTP-A) and selected subtests of the Test of Visual-Perceptual Skills – Revised (TVPS-R) (Dist. Ex. 12 at pp. 3-4, 7; see Tr. pp. 226, 230-31).

The May 2008 IEP reflected that at the conclusion of the meeting, which lasted 4 hours and 35 minutes,¹³ the CSE recommended a 10-month special education program consisting of a consultant teacher (co-teach)¹⁴ class four times daily for 42 minutes per session, a guided study class once daily for 42 minutes per session in a 5:1 setting, and a special reading class, once daily for 42 minutes per session in a 1:1 setting (Dist. Ex. 12 at p. 1). The CSE also recommended

¹¹ The director who had chaired the fall 2007 CSE meetings left the district in May 2008 (Tr. pp. 732, 734, 740-41). The successor director filled his position beginning in May 2008 and chaired the May 15, 2008 CSE meeting (Tr. pp. 58, 64; Dist. Exs. 12 at p. 5; 13).

¹² According to the hearing record, the junior high school special education teacher who participated in the May 15, 2008 CSE subcommittee meeting also served as the junior/senior high school CSE chairperson, and was familiar with programs at the junior high school (Tr. p. 218; Dist. Ex. 12 at pp. 5-6).

¹³ The hearing record reflects that staff from the junior high school and some of the student's teachers did not attend the entire May 15, 2008 CSE meeting; however, the student's sixth grade regular education homeroom teacher and his sixth grade special education teachers were present for the entire meeting (Tr. pp. 201-02, 214-23, 1305-07, 3735, 3743; Dist. Ex. 13; see Dist. Ex. 12 at pp. 5-7).

¹⁴ The district appears to use the terms "consultant teacher" services and "co-teach" program interchangeably (Dist. Ex. 12 at pp. 1-2). The hearing record describes the 2008-09 "co-teach" program recommended for the student as consisting of a special education teacher and regular education content area teachers providing instruction in general education classrooms (Tr. pp. 235-39, 242-43; Dist. Ex. 12 at p. 2; see 200.6 [g]).

related services consisting of counseling once per week for 42 minutes per session in a 1:1 setting, OT twice per week for 30 minutes per session in a 1:1 setting, and speech-language therapy twice per week for 30 minutes per session in a 3:1 setting; program modifications consisting of a positive reinforcement plan, repetition of directions, preferential seating, modified homework assignments, study guide, access to a word processor, and books on tape; testing accommodations consisting of extended time (1.5), separate location, word bank for "fill in the blank" tests, and use of computer; and extended school year (ESY) services consisting of a special reading class three times per week for one hour per session in a 1:1 setting, with program effective dates of July 7, 2008 to August 15, 2008 (Dist. Exs. 12 at pp. 1-2, 5-7; 13; see Tr. pp. 235-39, 246-48). The May 15, 2008 CSE also developed annual goals in the areas of study skills, reading, writing, speech-language, motor, and social/emotional skills (Dist. Ex. 12 at pp. 7-11). Comments on the May 15, 2008 IEP noted that elementary school staff familiar with the student, the junior high school special education teacher, and the successor director concurred that the CSE's recommendations were appropriate for the student, but that the parents and their advocate expressed concerns that the student's needs would not be met in the co-teach program (id. at pp. 6-7).

At the conclusion of the 2007-08 school year, the student's IEP progress report reflected that he demonstrated "some progress" toward one annual goal, was "progressing satisfactorily" toward thirteen annual goals, and had "achieved" six annual goals (Dist. Ex. 8 at pp. 8-12). June 2008 teacher comments contained in the student's 2007-08 report card posited that the student had "shown much growth this year" and had worked on his "independence and confidence," and expressed that "with support, [the student could] meet success in his academic endeavors" (Dist. Ex. 10). The student attended the district's ESY program during summer 2008 and received Wilson reading instruction (Dist. Ex. 14).

By letter dated July 16, 2008 to the successor director, the student's mother informed the successor director that the recommended program described to the parents at the May 15, 2008 CSE meeting was not appropriate for her son, and expressed her belief that he needed a "language based, self-contained program" (Parent Ex. ZZ; see Tr. p. 3010). The letter further advised that the student would attend Eagle Hill beginning in September 2008 (Parent Ex. ZZ). In a subsequent letter dated July 24, 2008, the student's mother formally rejected the May 15, 2008 IEP (Tr. p. 3016; Parent Ex. AAA).

The hearing record establishes that the student attended Eagle Hill as a five day per week boarding student during the 2008-09 school year (Tr. pp. 2311, 2361-62). The hearing record also describes Eagle Hill as a "language-based, remedial program" for approximately 230 students with learning disabilities (Parent Ex. DD at p. 1; see Tr. pp. 2313-15). During the 2008-09 school year at Eagle Hill, the student received instruction in literature, world history, writing, and math, and a language arts tutorial and speech-language therapy (Parent Exs. EE; FF; see Tr. pp. 2381-83, 2393-94, 2404-05).

On September 25, 2009, the parents, through counsel, filed a due process complaint notice alleging various procedural and substantive deficiencies in the May 15, 2008 CSE meeting and

resultant IEP (Parent Ex. G).¹⁵ Their allegations included: (1) that various members of the CSE, in particular, the guidance counselor from the recommended program and the successor director, were "unacquainted" with written reports provided by the parents and those generated by the district relative to the student, and therefore could not meaningfully participate in the CSE meeting; (2) that the independent clinical psychologist did not participate in the CSE meeting; (3) that the CSE knowingly elected to proceed with the meeting without the most recent neuropsychological profile of the student; (4) that several individuals were either not present at the CSE meeting (namely, the teacher of the recommended program, the student's speech-language therapist from his then current program, the student's occupational therapists from both his then current and recommended programs, and the director), or were absent for a substantial period of time during the CSE meeting (namely, the principal of the student's then current program, his language arts and social studies teachers from his then current program, and the guidance counselor from the recommended program), thereby preventing them from meaningfully participating in the CSE meeting; (5) that the CSE failed to discuss the student's social history, a classroom observation, report cards, and current test grades during the CSE meeting; (6) that the CSE failed to discuss OT or speech-language therapy goals for the 2008-09 school year; (7) that the CSE lacked an additional parent member; (8) that the CSE failed to discuss measures to be taken during the 2008-09 school year to prevent "bullying" of the student; and (9) that the parents did not receive a copy of the May 15, 2008 IEP until July 18, 2008, two months after the CSE meeting (*id.* at pp. 4-5).

The parents asserted that the district's recommended program for the student's 2008-09 school year was inappropriate to meet his needs, contending that the student required "a self-contained language based program in a non-public school in order to receive the benefits of instruction and make academic progress" (Parent Ex. G at p. 6). They further contended that the student required a residential program and posited that Eagle Hill provided such a program, was "reasonably calculated to confer educational benefits to [the student] and [was] an appropriate placement for [him] given his educational needs" (*id.*). They sought relief from an impartial hearing officer in the form of an order determining that: (1) the May 15, 2008 CSE meeting was procedurally and substantively deficient, resulting in a deprivation of a free appropriate public education (FAPE)¹⁶ to the student for the 2008-09 school year; (2) the May 15, 2008 CSE failed to offer an appropriate "program/placement" to the student for the 2008-09 school year; (3) Eagle Hill was an appropriate placement for the student, reasonably calculated to provide educational

¹⁵ The due process complaint notice also alleged deficiencies in previous CSE meetings conducted in fall 2007 and the September 7, 2007 IEP, which governed the student's previous school year (2007-08) (Parent Ex. G at pp. 2-3; *see* Dist. Ex. 1). However, the parents only seek relief relative to the 2008-09 school year in their petition.

¹⁶ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

benefits to the student and therefore an appropriate placement for him given his needs; (4) the student required a computer due to his disability; (5) the parents at all times cooperated with the CSE; and (7) the parents were entitled to tuition reimbursement and reimbursement for expenses incurred in connection with the residential program at Eagle Hill for the 2008-09 school year and reimbursement for expenses incurred for a computer, "costs," transportation, and "fees" under 20 U.S.C. §1415(i)(3)(B)(C) (id. at p. 7).

On October 6, 2008, the district, through counsel, responded to the parents' due process complaint notice (Parent Ex. H).¹⁷ Generally, the district countered with six affirmative defenses, adducing that: (1) the program recommended in the May 15, 2008 IEP constituted a FAPE in the least restrictive environment (LRE); (2) the parents' allegations that the recommended program, placement, and/or services were inappropriate were speculative and/or without merit; (3) the parents failed to cooperate with the district and/or the CSE; (4) the parents' due process complaint failed to state a cause of action; (5) the parents' unilateral placement did not satisfy State and federal mandates of LRE, and the parents failed to allege facts sufficient to establish that the student required a residential placement; and (6) the parents' due process complaint notice failed to allege facts sufficient to establish their contention that the May 15, 2008 IEP denied the student a FAPE in the LRE (id. at pp. 7-8).

In refuting the parents' specific allegations, the district argued that: (1) while conceding that the district sent out information packets at the parents' request to three other local school districts, it did so "in an effort to assist the [p]arents in exploring their options regarding other public school programs;" (2) the CSE scheduled the May 15, 2008 meeting to accommodate the availability of the independent clinical psychologist, but that at the last minute, the psychologist was unable to attend the CSE meeting scheduled for his convenience, and that the CSE and the parents mutually agreed to proceed with the CSE meeting in his absence; (3) the parents did not forward the neuropsychological reevaluation report of the Eagle Hill clinic's director to the CSE, request an adjournment of the May 15, 2008 CSE meeting pending completion of the reevaluation, or request another CSE meeting to review additional data; (4) contrary to the recommendations of both the occupational therapist and the speech-language therapist, both of whom suggested that these services be discontinued, the May 15, 2008 CSE continued these services on the IEP and developed goals for each at the parents' request; (5) because the May 15, 2008 CSE meeting was a CSE subcommittee meeting, no additional parent member was required to be present; (6) the May 15, 2008 CSE meaningfully addressed the student's allegations of bullying through its recommended counseling services and specific goals contained on the IEP; (7) the May 15, 2008 IEP provided the student with a computer as an accommodation; and (8) the personnel identified by the parents in the due process complaint notice were either not required to attend the May 15, 2008 CSE meeting, or attended the CSE meeting and were available to answer questions (Parent Ex. H at pp. 2-6).

¹⁷ On November 6, 2008 the district also filed a one-page amendment to its October 6, 2008 response that modified one of its admissions to the due process complaint notice's allegations (see Parent Ex. I).

On December 9, 2008, an impartial hearing convened and concluded on October 27, 2009, after 22 days of testimony. On January 18, 2010, the impartial hearing officer issued a 67-page decision in which he dismissed the parents' due process complaint notice in its entirety (IHO Decision at p. 60). The impartial hearing officer reasoned that the district met its burden of proving that the May 15, 2008 IEP offered the student a FAPE for the 2008-09 school year because the program was reasonably calculated to enable the student to receive educational benefits (*id.* at pp. 50-58). The impartial hearing officer concurred with the director's description of the student's learning disabilities as "moderate" and concluded that the May 15, 2008 IEP "offer[ed] a more balanced approach to addressing these disabilities than the extreme residential placement advocated by the [p]arents" (*id.* at p. 50). He also opined that the co-teach aspect of the recommended program would have afforded the student exposure to mainstream students, while simultaneously allowing him to receive help from a special education teacher (*id.*). Additionally, the impartial hearing officer concluded that the student would have received the benefit of 1:1 teaching once per day in his reading class as well as an array of related services, including counseling, OT, and speech-language therapy (*id.*). He further determined that the May 15, 2008 IEP also would have afforded the student "many creative program modifications and testing arrangements" that would have addressed the student's academic and emotional needs (*id.* at p. 51).

In addressing the evidence presented by the independent clinical psychologist, the impartial hearing officer noted that the independent clinical psychologist admitted that he never recommended a residential placement for the student; acknowledged that the student would have derived some benefit from the co-teach program and the related services offered by the recommended district program; clarified that his recommendations were meant to "maximize" the student's potential; and advised that he never visited the recommended co-teach program (IHO Decision at pp. 52-53). Based in part upon the foregoing, the impartial hearing officer determined that the May 15, 2008 CSE reasonably relied upon the views of its school psychologist (who had known the student since second grade) and teachers who observed the student every day, over the clinical observations of the independent psychologists offered by the parents (*id.* at p. 54).

With regard to the bullying issue, the impartial hearing officer credited the testimony of the director, who acknowledged that bullying may have occurred, but believed that "the parents blew it out of proportion," and further testified that the recommended co-teach program would have benefited the student by doubling the level of adult supervision in the classroom (IHO Decision at p. 57). The impartial hearing officer also discounted audiotape evidence¹⁸ proffered by the parents during the impartial hearing as having no probative value because it was recorded before the recommended co-teach program was developed by the May 15, 2008 CSE, and

¹⁸ Although not raised in the due process complaint notice, the parents submitted audiotapes of telephone conversations between the student's mother and district personnel relating to the investigation of alternative placements for the student that were taped without the knowledge of the district. Over the district's objection, the impartial hearing officer admitted these audiotapes, and transcripts of same, into evidence during the impartial hearing (*see* Tr. pp. 2950-79, 3128-35, 3458-84; Parent Exs. III; III-1; JJJ; JJJ-1; KKK; KKK-1; MMM; MMM-1; NNN; NNN-1; OOO; OOO-1).

discounted the student's mother's testimony as to the "chaotic" conditions she observed during her two visits to the recommended co-teach program, finding the testimony of the district's witnesses more credible (id. at pp. 57-58).

The impartial hearing officer added that even if he determined that the district failed to offer an appropriate program, he would conclude that the parents failed to meet their burden of proving that Eagle Hill was an appropriate placement for the student during the 2008-09 school year (IHO Decision at pp. 58-59). He determined that Eagle Hill lacked mainstreaming opportunities for the student (id. at p. 58). He further found that the hearing record demonstrated that the student's educational disabilities were not severe enough to warrant the "extreme isolation" of a residential placement, insofar as neither of the parents' two expert witnesses recommended a residential placement for the student (id.). The impartial hearing officer also found that the level of services provided at Eagle Hill was actually lower than the level offered by the district's recommended program, in that the May 15, 2008 IEP recommended both speech-language therapy and OT twice per week, while at Eagle Hill, the student received only speech-language therapy once per week, and did not receive OT; he also noted that the student received no instruction in science or American History at Eagle Hill during the 2008-09 school year (id. at pp. 58-59).¹⁹ Next, the impartial hearing officer theorized that a small class size and a 1:1 setting did not, by themselves, support a claim for tuition reimbursement (id. at p. 59). Finally, the impartial hearing officer credited the testimony of district witnesses who opined that nothing was being done for the student at Eagle Hill that could not have been done in the district's recommended program (id.).²⁰

The parents, proceeding pro se, appeal the impartial hearing officer's decision, alleging five principal arguments. First, they maintain that the impartial hearing officer erroneously determined that the district satisfied its burden of proving that it offered the student a FAPE for the 2008-09 school year because: (1) the district lacked a special education program with small classes to offer the student and the recommended co-teach program was the most restrictive program available to offer the student; (2) despite the student's demonstrated need for pacing, the recommended program did not provide for breaks for the student, maintaining the same pace for all students; (3) except for modifying the student's homework, the recommended program failed to address the student's homework issues; (4) the recommended program failed to address the student's math needs; (5) the hearing record does not demonstrate how the recommended program would address

¹⁹ The hearing record confirms that the student did not receive science instruction during the 2008-09 school year at Eagle Hill (Tr. pp. 2382, 2393, 2404; see Parent Exs. EE; FF). Eagle Hill's special education teacher explained that the student was placed in a world history class in lieu of a science class because it is the school's practice for students to "switch back and forth, one year having science and then the next year having history or social studies of some sort, and then they go back" so that "students can have either a double reading period or a reading period and a study skills period instead of two content classes" (Tr. pp. 2381-83, 2393-94, 2404-05). The hearing record also establishes that the student previously took a world history class during his sixth grade school year in the district, and in fact repeated this class during seventh grade at Eagle Hill (Tr. pp. 2382-83, 2404-05; Dist. Ex. 10).

²⁰ The impartial hearing officer declined to consider the equities of the parents' reimbursement request, other than noting that "the [p]arents never made a written demand for tuition reimbursement, until they filed their due process complaint [notice]" (IHO Decision at p. 59).

the student's social/emotional issues, deficits, and needs; (6) the recommended program did not offer group counseling; (7) the recommended program was not language based; (8) the recommended program did not group students according to their abilities; and (9) the May 15, 2008 IEP did not include goals addressing pragmatic skills.

Second, the parents assert that the impartial hearing officer erroneously determined that the parents failed to meet their burden of proving that Eagle Hill was appropriate for the student for the 2008-09 school year because: (1) Eagle Hill is a small special education day and residential self-contained program utilizing a language based curriculum throughout the school day; (2) Eagle Hill utilizes an individual approach, teaching to each individual student's ability and skill level; (3) Eagle Hill groups students with comparable learning disabilities and needs, and according to their abilities, class year, and learning styles; (4) Eagle Hill faculty are specifically trained to teach special education students and the school is "approved by [the State] on an individual emergency placement basis;" (5) the student demonstrated growth and independent performance of homework at Eagle Hill; (6) the student was only at Eagle Hill for four nights per week for the duration of its ten-month program spending the rest of his time, including summer and holidays, at home with his family, with opportunities to interact with mainstream students both at home and at Eagle Hill; (7) the December 2008 and June 2009 Eagle Hill reports (Parent Exs. EE; FF) were prepared by the student's teachers at Eagle Hill and specifically describe the student's special education program and the methodologies used by the school; (8) the impartial hearing officer's determination is not supported by the weight of the evidence contained in the hearing record; and (9) the impartial hearing officer's conclusion that the student received a lower level of services at Eagle Hill than he would have in the recommended district program is erroneous because the hearing record establishes that the student received speech-language therapy twice per week, once in a social skills class and once in a collaborative literature class.

Third, the parents contend that with respect to equitable considerations, they verbally requested tuition reimbursement at the May 15, 2008 CSE meeting. Fourth, they maintain that contrary to the impartial hearing officer's determination, the audiotape evidence secured by the parents was produced after the district developed the recommended co-teach program and should be construed as an admission by the district that the May 15, 2008 IEP failed to confer a FAPE upon the student. Lastly, the parents allege that the impartial hearing officer exhibited bias, insofar as he allegedly failed to consider that no district witnesses either visited Eagle Hill before testifying during the impartial hearing that it was not an appropriate placement for the student, or observed the student in his sixth grade district program during the prior 2007-08 school year.

The parents seek an order from a State Review Officer: (1) annulling the impartial hearing officer's January 18, 2010 decision; (2) determining that the district failed to offer the student a FAPE for the 2008-09 school year; (3) determining that Eagle Hill was an appropriate placement for the student for the 2008-09 school year; (4) determining that the parents fully cooperated with the CSE; and (5) awarding full tuition reimbursement for the student's 2008-09 school year at Eagle Hill.

The district answers, raising five affirmative defenses. The district first counters that the impartial hearing officer correctly found that the May 15, 2008 IEP was appropriate and provided the student with a FAPE for the 2008-09 school year. Second, it argues that the impartial hearing officer correctly found that the parents' unilateral placement of the student at Eagle Hill was too restrictive and therefore not appropriate for the student for the 2008-09 school year. Third, the district asserts that the parents are not entitled to tuition reimbursement as they failed to give the district requisite notice that they rejected the proposed IEP and were placing the student at Eagle Hill at district expense. Fourth, it maintains that on March 21, 2008, the parents executed an enrollment agreement and paid a deposit of the student's tuition to Eagle Hill, paid a second tuition deposit in July 2008, months before filing their due process complaint notice on September 25, 2008, which was their first notice to the district that they were seeking tuition reimbursement. Fifth, the district contends that the parents do not assert a reason for a State Review Officer to substitute his judgment for that of the impartial hearing officer relative to the determinations of witness credibility. Lastly, the district asserts that the impartial hearing officer's decision comports with the Commissioner's regulations in all respects, in that he reviewed the testimony of each witness and the arguments of the parties, addressed each issue during the impartial hearing, and sets forth within the decision the reasons and factual basis for his determination with specific reference to the hearing record and statutory and case law.

Initially, I will address the parents' allegation of bias on the part of the impartial hearing officer. An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

The hearing record evidences that the impartial hearing officer expressed a willingness to accommodate the schedule of the parents' expert witness (see Tr. pp. 1920-21, 2109), allowed both sides to fully develop testimony through extensive direct and cross-examinations of witnesses,

allowed the parents to introduce audiotape evidence (see Tr. pp. 2950-79, 3458-90), and allowed both sides extensive oral argument on the record regarding evidentiary issues (see, e.g., Tr. pp. 3-28, 39-40, 187-95, 510-11, 3128-35, 2950-79). He also actively questioned witnesses produced by both parties (see Tr. pp. 1494-96, 2686-87, 3844-45). After reviewing the entire hearing record, I find that the evidence does not support the parents' contention that the impartial hearing officer was not impartial or acted in a manner that did not conform with federal and State regulations. Under the circumstances in this case, while the parents disagree with the conclusions reached by the impartial hearing officer, their disagreement does not provide a basis for finding that the impartial hearing officer acted with bias (Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 07-078; Application of a Child with a Disability, Appeal No. 06-102; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-3; Application of a Child with a Disability, Appeal No. 95-75).²¹

Turning to the merits of the case, two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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

²¹ Nor do I find the impartial hearing officer's crediting of the testimony of several district witnesses over that of the student's mother and the parents' expert witnesses to be evidence of bias (see IHO Decision at pp. 54, 56-57, 59). A State Review Officer gives due deference to the findings of credibility of the impartial hearing officer, unless the hearing record read in its entirety would compel a contrary conclusion (see Carlisle Area School v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Application of the Bd. of Educ., Appeal No. 09-087; Application of a Student with a Disability, Appeal No. 08-157; Application of the Dep't of Educ., Appeal No. 08-105; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-074; Application of the Dep't of Educ., Appeal No. 08-037; Application of the Bd. of Educ., Appeal No. 04-091; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 03-038; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-019; Application of a Child with a Disability, Appeal No. 97-73). Here, a review of the complete hearing record does not compel a contrary conclusion.

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]).

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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

A thorough and independent review of the hearing record shows that the hearing record supports the impartial hearing officer's decision in this case. The hearing record describes the district's recommended co-teach program as consisting of a special education teacher and regular education content area²² teachers providing instruction in general education classrooms (Tr. pp. 235-39, 242-43; Dist. Ex. 12 at p. 2). The regular education teacher served as the content specialist and the special education teacher provided supports for designated special education students placed in the class, and implemented IEP program modifications (Tr. pp. 236-37, 240). The recommended co-teach program allowed for small group work within the general education classroom (Tr. pp. 237, 4226). Typically, co-teach classrooms contained less than six special education students designated for that program, although there may have been other students with IEPs in the classroom (Tr. pp. 237, 4126-28). Students in the co-teach program also received a daily "guided study" period, similar to resource room, in which the special education teacher from the co-teach classes met with students to provide "carryover or the reteaching/preteaching that is needed" in connection with content area courses (Tr. pp. 237, 239, 244-46, 4087-88). In consideration of the student's continued need for reading and writing support, the May 15, 2008 CSE recommended one period per day of individual instruction in reading and writing provided by a special education teacher (Tr. pp. 246-47; Dist. Ex. 12 at pp. 1, 6). The hearing record reflects that the May 15, 2008 CSE described the recommended program to the parents, and that junior high school staff participated at the CSE meeting to provide information regarding program options and scheduling at the junior high school (Tr. pp. 218-19; Dist. Exs. 12 at p. 5; 13).

The May 15, 2008 CSE recommended that the student receive individual counseling to address his feelings of frustration and anxiety and to improve his coping and social skills (Tr. p. 247; see Dist. Ex. 12 at p. 1). The hearing record reflects that the May 15, 2008 CSE increased the recommended level of the student's OT services from that provided during the prior 2007-08 school year, from one to two individual sessions per week, which reflected the parents' concerns about their son's writing and typing skills (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 12 at pp. 1, 6). Additionally, the May 15, 2008 CSE recommended twice weekly individual speech-language therapy services for the 2008-09 school year, which had been discontinued in October 2007, in part due to the parents' concerns regarding the student's language-based deficits (Tr. pp. 3656-59; Dist. Ex. 12 at pp. 1, 6). Although the May 15, 2008 IEP reflected that district's staff did not have concerns about the student's regression, the CSE "acknowledge[d] the parents heightened concerns

²² The hearing record identifies the content area subjects in this case as math, science, social studies, and English (Dist. Ex. 12 at p. 2).

over current levels and outside report," and recommended consultant teacher ESY services to continue the student's reading program (Tr. p. 255; Dist. Ex. 12 at p. 6).

The evidence contained in the hearing record demonstrates that during the May 15, 2008 CSE meeting, the student's teachers and related service providers discussed the student's progress that they had observed during the school year and assessed his continuing areas of need and strengths in a meeting that lasted over 4 hours and 30 minutes (Tr. pp. 154-61, 204, 219-22, 226-29, 419-25, 440-41, 462-63, 944, 1593, 1766, 1980, 3260; Dist. Exs. 12 at pp. 5-6; 13; 46). According to the successor director, who also served as chairperson of the May 15, 2008 CSE, the student's IEP annual goals were reviewed and the resultant May 15, 2008 IEP reflected annual goals in the areas of study skills, reading, writing, mathematics, speech-language, motor, and social/emotional skills (Tr. pp. 230-35; Dist. Ex. 12 at pp. 7-11).

The student's sixth grade special education teacher explained how the May 15, 2008 IEP's annual goals would have addressed the student's unique needs, and opined that the student could have achieved those goals in the recommended district program during the 2008-09 school year (Tr. pp. 1318-24, 1330-31). She further clarified specifically how the May 15, 2008 IEP's recommended program modifications, including positive reinforcement to increase productivity, repetition of directions, preferential seating, modified homework, study guides, and access to a laptop computer at school; and its recommended program's testing accommodations, consisting of extended time, separate location, use of a word bank and use of a computer, would also have addressed the student's unique needs (Tr. pp. 1327-29; Dist. Ex. 12 at pp. 2, 6). The student's sixth grade special education teacher advised that she discussed the specifics of the recommended co-teach program with the district's junior high school teachers, after which she posited that it would have been an appropriate program for the student for the 2008-09 school year (Tr. pp. 1307-10, 1325-31). This opinion finds further support in the hearing record, most notably in the testimony of the student's sixth grade regular education social studies teacher and his sixth grade regular education language arts teacher (Tr. pp. 243-44, 260-62, 273-74, 530-32, 679-81, 703-04, 763-65, 974, 1022-26, 1103-04, 1118-19, 1144-47, 1325-27, 1597, 1901, 1910-12, 2000-02, 3820, 4020, 4097-98, 4273, 4357).

The special education teacher of the recommended co-teach program, who observed the student during classes at Eagle Hill, explained how the May 15, 2008 IEP would have been implemented, clarifying how the recommended co-teach program would have specifically addressed his unique needs (Tr. pp. 4084-4101, 4242-46). Additionally, the hearing record is replete with testimony explaining how the district's recommended co-teach program, related services, modifications, and accommodations would have specifically addressed the student's unique needs, including: reading (Tr. pp. 1321-23, 3918-20); writing (Tr. pp. 416-19, 463-64, 583-84, 608-09, 3920, 4098-99); math (Tr. pp. 1323-24); social/emotional/behavioral (Tr. pp. 1600-02); study skills (Tr. pp. 1319-21); program support needs and testing needs (Tr. pp. 1327-29, 1923-24); small group instruction (Tr. pp. 1329-30); difficulty performing timed work (Tr. pp. 1730-32); difficulty processing verbal information (Tr. pp. 1927-28); difficulty with story memory recognition (Tr. pp. 1928-31); dyslexic tendencies, working memory difficulty, and difficulty with information processing (Tr. pp. 1740-53); effort (Tr. pp. 1901-02); self-confidence (Tr. pp. 1947-

48); frustration and distractibility (Tr. p. 1948); need for continuous prompting and cues (Tr. pp. 1903-06); withdrawal (Tr. pp. 2462-65); redirection (Tr. pp. 4100-01); homework issues (Tr. pp. 3938-39); and guided study (Tr. pp. 1848-50). The testimony of two district witnesses and the independent clinical psychologist confirms the CSE's incorporation of several of the independent clinical psychologist's recommendations into the student's recommended program (Tr. pp. 1510, 1515-17, 1945, 2301-08).

The hearing record reflects that the May 15, 2008 CSE referenced the independent clinical psychologist's May 22, 2007 neuropsychological evaluation report and a letter from another private psychologist²³ from whom the student had received treatment "for the past few months" prior to the CSE meeting and who recommended placement of the student in "an intensive, self-contained special educational setting that [could] address his complex neuropsychological, learning and emotional issues" (Tr. pp. 211, 325-26, 329-32, 389-90, 429, 487, 529-30, 602-03, 1507, 1596, 1783-84, 1790-99; Parent Ex. V; see Tr. pp. 2188-91; Parent Ex. J. at p. 14). While both professionals recommended a more restrictive placement of the student than the co-teach program recommended by the May 15, 2008 CSE, neither professional observed the student in the public school or had any direct contact with school staff to discuss the student's in-school performance, which, according to district staff, was an important part of the placement recommendation process (Tr. pp. 210-11, 1791, 2246-52, 2265-68, 2300, 2570-77, 3267).²⁴

Additionally, the independent clinical psychologist acknowledged his lack of familiarity with the specifics of the recommended co-teach program, posited that the student would have benefited from the related services provided for in the May 15, 2008 IEP, would "generally" have benefitted from the co-teach class and, could have benefitted from the individual reading instruction afforded by the recommended special reading class (Tr. pp. 2248, 2252-53). I also note that the May 15, 2008 CSE incorporated many of the independent clinical psychologist's

²³ This private psychologist did not testify during the impartial hearing.

²⁴ According to the hearing record, on April 30 and May 1, 2008, the parents obtained a private neuropsychological consultation for the student with the Eagle Hill clinic director (a pediatric neuropsychologist) that was ultimately memorialized in his June 24, 2008 neuropsychological consultation report (Parent Ex. KK at pp. 2-12). The clinic director reported that the student's overall language abilities fell within the average range, although his phonological deficits, lack of progress in reading comprehension skills, and poor reading decoding skills and fluency "clearly indicate[d] [d]yslexia" (id. at p. 4). The clinic director offered the student diagnoses of an ADHD inattentive type and a generalized anxiety disorder, and determined that he met the criteria for Tourette's syndrome (id.). His recommendations for the student included increased reading intervention services and placement of the student in "a specialized school for children with language-based learning disorders" (id.; see Tr. pp. 2832-38). The hearing record reflects that the clinic director's report was not available for consideration by the May 15, 2008 CSE, and that the parents neither requested that the CSE adjourn the meeting until the report was available, nor that it reconvene to discuss the additional data (Tr. pp. 127-30, 212-14, 469, 3008-09, 3255-56, 3260, 4271). Similar to the independent clinical psychologist, the clinic director neither observed the student in the district's sixth grade program, nor spoke with any district personnel regarding the district's programs, nor was he knowledgeable regarding the details of the recommended district program; however, he too posited that components of the May 15, 2008 IEP would have offered the student some educational benefit (Tr. pp. 2858-65, 2880-81, 2895).

recommendations from the May 22, 2007 neuropsychological evaluation report into the student's 2008-09 special education program (Tr. pp. 531-32, 1144-47, 1311-13, 1507; compare Dist. Ex. 12, with Parent Ex. J at pp. 14-19).

I note further that the impartial hearing officer concluded that the student achieved progress during his sixth grade school year (2007-08) while enrolled in the district's resource room placement (IHO Decision at pp. 55-56). I find that his determination is supported by the evidence contained in the hearing record, and further find that the program recommended for the 2008-09 school year offered services in addition to those offered during the 2007-08 school year to address the student's unique needs (Tr. pp. 154, 227-28, 277, 663-74, 911, 992-96, 1011, 1018-19, 1030-31, 1116-18, 1185-89, 1269, 1276-79, 1284, 1324-25, 1349-53, 1488, 1597-98, 1614-15, 1617-18, 1629, 1946-47, 1967-68, 1974-76, 3736-39, 3762, 3837).

Based upon an independent review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Moreover, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Student with a Disability, Appeal No. 09-144). Here, the impartial hearing officer accurately recounted the facts of the case, he set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2008-09 school year, and he properly applied the law to the facts of the case in reaching his determination that the parents were not entitled to reimbursement (IHO Decision at pp. 47-60). In determining that the student was offered a FAPE, the impartial hearing officer discussed that the offered IEP was consistent with State regulations pertaining to LRE requirements regarding the continuum of special education services insofar as he found the "co-teach program will allow the Student to interact with regular education students and receive the benefits of a rich mainstream curriculum while receiving help from a special education teacher . . ." (IHO Decision at pp. 49-50).²⁵ The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully weighed the evidence in support of his conclusions and properly supported his conclusions with citations to the hearing record (id.). In short, the hearing record demonstrates that the student was offered a FAPE in the LRE for the 2008-09 school year.

²⁵ In discussing the offered co-teach class in relation to the continuum of special education services, the impartial hearing officer cited and relied upon 8 NYCRR 200.6 and a guidance document produced by the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) dated April 2008 entitled "Continuum of Special Education Services for School-Age Students with Disabilities" (IHO Decision at p. 49).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 April 7, 2010

PAUL F. KELLY
STATE REVIEW OFFICER