



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 10-046

**Application of the BOARD OF EDUCATION OF THE
PELHAM UNION FREE SCHOOL DISTRICT for review of a
determination of a hearing officer relating to the provision of
educational services to a student with a disability**

Appearances:

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

Pamela Anne Tucker, P.C., attorneys for respondents, Pamela Anne Tucker, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Eagle Hill (Tr. pp. 21, 461, 552, 811-12; Dist Exs. 51 at p. 1; 55 at p. 1; Parent Ex. K at p. 2).¹ Eagle Hill is 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 (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (Tr. p. 21; Dist. Ex. 55 at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student's overall cognitive functioning is in the average range and he demonstrates a number of reading behaviors associated with a severe reading

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

disability (Dist. Ex. 46 at pp. 6, 11). The student has difficulty using phonics to decode unfamiliar words, his sight word vocabulary is described as weak, and he exhibits weak reading comprehension skills (*id.*). The student also demonstrates difficulty with spelling (*id.* at p. 12). Regarding the writing process, the student has difficulty organizing his thoughts, developing his ideas, remembering what he wants to say, and determining how to spell words (*id.*). The student's math calculation skills are within the average range (*id.*). The hearing record reflects that although the student is self-conscious about his reading and academic difficulties, he displays stamina and perseverance for difficult academic tasks when he works individually or in a small group with a trusted adult (Dist. Ex. 55 at p. 4).

The hearing record reflects that the student entered the district as a kindergarten student for the 2003-04 school year and received building level speech-language and reading services during kindergarten and first grade (2004-05) (Tr. pp. 39, 111-12, 718, 720-21; Dist Exs. 11 at p. 3; 46 at p. 1).

During the 2005-06 school year when the student was in second grade, he began attending resource room to receive additional building level reading and writing instruction and was referred to the Committee on Special Education (CSE) for evaluation by the elementary school building level instructional support team (IST) (Tr. pp. 29-31, 39, 365-66; Dist. Exs. 5 at pp. 1-2; 6; 9 at pp. 1-2). The CSE convened on December 21, 2005 for an initial referral meeting regarding the student, determined the student eligible for special education services as a student with a learning disability, and developed an individualized education program (IEP) for him based on a December 5, 2005 speech-language evaluation, a December 4, 2005 teacher report, a July 15, 2005 medical health record, a December 5, 2005 educational evaluation, a December 8, 2005 report card, a December 14, 2005 classroom observation, and a December 19, 2005 social and developmental history (Tr. pp. 32-38, 40-45; Dist. Ex. 2 at pp. 1-8; *see* Dist. Exs. 10 at pp. 1-3; 11 at pp. 1-5; 12; 13; 14; 15 at pp. 4; 16 at pp. 1-7; 17 at pp. 1-5).²

The December 21, 2005 IEP included committee meeting information comments that described the student as a second grader who was referred to the CSE due to "significant difficulties in language processing" and a "great deal of difficulty acquiring reading skills" (Dist. Ex. 2 at p. 4). The IEP noted weaknesses in the student's auditory memory and visual motor integration, as well as multiple articulation errors (*id.*). The CSE recommended special education resource room services five times per week and group speech-language therapy two times per week, both in a special location (Tr. pp. 49-50; Dist. Ex. 2 at p. 1). The CSE also recommended preferential seating, modeling and repetition, directions read/clarified, modified spelling, and questions read/clarified and developed 10 annual goals and 60 corresponding short-term objectives to address the student's needs (Tr. pp. 50-51; Dist. Ex. 2 at pp. 1, 4-8).

While the student was still in second grade, a subcommittee of the CSE convened on April 3, 2006 for an annual review and to develop the student's IEP for the 2006-07 school year (Tr. p. 52; Dist. Ex. 19 at p. 1). Testing conducted in February 2006 reflected that the student displayed

² A psychological report indicating that testing occurred over three days between December 7, 2005 and December 14, 2005, appears in the hearing record as Dist. Ex. 17 in duplicate.

an average rate of progress in math, but a below average rate of progress in reading (Tr. p. 55; Dist. Ex. 19 at p. 3). The student was described as a second grader with significant difficulties in language processing who had a great deal of difficulty acquiring reading skills "despite much support," was easily distracted, had frequent "melt-downs" when overwhelmed, and was "resistive to intervention" (Dist. Ex. 19 at p. 4). The IEP reflected the student's auditory memory weaknesses, multiple articulation errors, and visual motor integration weaknesses (id.). The CSE subcommittee recommended continuing resource room services (5:1) one time daily in a separate location (Tr. pp. 53-54; Dist. Ex. 19 at pp. 1, 4). Related services recommendations included individual psychological consultation twice per month and weekly individual and group speech-language therapy (Dist. Ex. 19 at pp. 1, 4). Recommended program modifications in the April 2006 IEP remained the same as those in the December 2005 IEP (Tr. p. 53; compare Dist. Ex. 2 at p. 1, with Dist. Ex. 19 at pp. 1-2, 4). The CSE subcommittee recommended additional testing accommodations of a flexible setting, extended time (1.5), directions read and clarified, and directions read for everything other than a reading test if it would change the content of the reading test (Tr. pp. 54-55; Dist. Ex. 19 at pp. 2, 4). The IEP contained 22 measurable annual goals that addressed the student's needs specific to study skills, reading, writing, and mathematics (Dist. Ex. 19 at pp. 5-8). Based on the school psychologist's concerns regarding the student's tendency to become overwhelmed with the school experience and shut down, and in conjunction with its recommendation for psychological consultation, the CSE subcommittee also developed three goals specific to the student's frustrations, anxiety, and coping skills (Tr. pp. 379-80, 382-83; Dist. Ex. 19 at pp. 8-9).

When the student was in third grade (2006-07), he worked with the district's school psychologist to develop a "feeling of competence about his knowledge base" regardless of his reading difficulties (Tr. pp. 381-86). The hearing record reflects that the school psychologist also consulted with the student's teachers to discuss incidences that arose and to brainstorm ideas to assist the student in acquiring better coping strategies (Tr. p. 380).

A district "Change Of Program Request Form" dated February 7, 2007 was completed by the student's third grade teacher (Dist. Ex. 26). The form stated that "despite an unprecedented amount of mentoring and services," the student displayed significant difficulties acquiring reading skills and an inability to process the fast paced language of the classroom (id.). Additionally, the teacher reported that when the student was overwhelmed he "lack[ed] the resil[i]ence to bounce back [and] accept interventions" (id.). The teacher stated that she was "requesting a change of program to better meet his needs [and] help him to be successful in the regular education setting" (id.). The form further reflected that the reason for the request was to "[i]ncrease [s]ervice" and that the parents had been notified (id.).

In response to the student's third grade teacher's aforementioned concerns, a subcommittee of the CSE convened for a program review regarding the student on February 26, 2007 (Tr. pp. 387-88; Dist. Ex. 23 at pp. 1, 5). The CSE subcommittee recommended that the student be included in the Foundations of Learning (FOL) program which would offer the student more intensive support in the general education classroom from a special education teacher by providing him with inclusion language arts, inclusion reading, and inclusion math instruction (12:1) daily for 30 minutes each in the general education class environment, and inclusion science and inclusion social studies three times per week for 30 minutes each in the general education class environment

(Tr. pp. 59-60; Dist. Ex. 23 at pp. 1, 5).³ The CSE subcommittee continued its April 2006 IEP recommendations for the student regarding resource room,⁴ psychological consultation, speech-language therapy, program modifications and supports, and testing accommodations (compare Dist. Ex. 19 at pp. 1-2, 5-9, with Dist. Ex. 23 at pp. 1-2, 5-9).

According to the hearing record, during third grade the student appeared aware of his struggles with reading and writing, at times becoming frustrated or overwhelmed and putting his head on his desk, crying, complaining of a stomachache, or saying he needed to go to the nurse because he did not feel well (Tr. p. 231). However, the hearing record also indicates that the student began to develop coping skills to deal with his frustration including providing "signals" to staff that he was overwhelmed or losing focus and requesting help from staff when necessary (Tr. p. 232). The hearing record also indicates that the student was doing well in the inclusion class in math, science and social studies, and that although he was significantly delayed in reading, he was responding to PAF instruction (Tr. p. 236).

On April 11, 2007, a subcommittee of the CSE convened for the student's annual review and to develop his IEP for the 2007-08 school year when he would be in fourth grade (Tr. p. 236; Dist. Ex. 29 at p. 1). The April 2007 CSE subcommittee recommended inclusion classes (12:1) for math, science and social studies, and special class (8:1+2) instruction for language arts and reading (Dist. Ex. 29 at pp. 1, 4). Related services recommendations were for individual counseling/consultation twice per month and small group (5:1) speech-language therapy twice per six-day cycle (id.). Recommended program modifications and supports and testing accommodations remained unchanged from the previous IEP developed on February 26, 2007 (compare Dist. Ex. 23 at p. 2, with Dist. Ex. 29 at p. 2). The CSE developed 21 annual goals to address the student's study skills, reading, writing, mathematics, speech-language, and social/emotional/behavioral needs (Dist. Ex. 29 at pp. 5-8).

A subcommittee of the CSE convened on April 17, 2008 for the student's annual review and to develop his IEP for the 2008-09 school year, when he would be in fifth grade (Tr. p. 249; Dist. Ex. 35 at p. 1). The CSE subcommittee recommended that the student participate in the FOL program through inclusion classes (12:1) for science, social studies and math, and special classes (8:1+2) for language arts and reading (Tr. p. 68; Dist. Ex. 35 at pp. 1, 4).⁵ The CSE subcommittee

³ The hearing record reflects that the FOL program consisted of inclusion classes wherein the special education teacher and a teaching assistant entered the general education classroom to modify instruction, homework, and testing, as well as to assist the student with classroom lessons and projects (Tr. p. 222). The hearing record further reflects that the February 2007 CSE subcommittee considered smaller FOL classes for the student, but decided that providing the student with more support in the classroom rather than pulling him out of class was an appropriate interim step in order to see if the extra support in the classroom would "bridge the gap" for him (Tr. p. 229).

⁴ The hearing record reflects that in resource room the student received supplemental instruction in reading using the Preventing Academic Failure (PAF) program (Tr. p. 228). The hearing record describes PAF as an Orton-Gillingham based methodology that is a multisensory sequentially presented reading program (Tr. pp. 113, 131, 174, 276, 347-48).

⁵ The hearing record reflects that at the time of the April 17, 2008 CSE subcommittee meeting, the district had formalized its policy that all district elementary level inclusion classes would be 45 minutes long (Tr. p. 154).

recommended an increase in the student's related services of individual counseling/consultation and individual speech-language therapy (Tr. pp. 398, 400; Dist. Ex. 35 at p. 2).⁶ The CSE subcommittee also recommended the addition of books on tape to the student's previously recommended program modifications and supports so that the student could access grade level textbooks and trade books, and continued the student's previously recommended testing accommodations (Tr. p. 70; Dist. Ex. 35 at p. 2). The April 2008 IEP included 12 annual goals (Dist. Ex. 35 at pp. 5-7).

The district sent the parents a letter dated September 18, 2008, entitled "Committee on Special Education Consent for Reevaluation" that advised the parents of an upcoming reevaluation of the student that the district planned to conduct (Dist. Ex. 42 at p. 1). The letter listed a variety of tests and assessments that were to be performed and specified that they would be provided at no cost to the parents (id.). The student's mother signed the form on September 20, 2008 (Dist. Ex. 43).

The district conducted a speech-language evaluation of the student on November 17, 2008 (Dist. Ex. 45 at pp. 1-14). The speech-language evaluation report described the student's behavior during testing as age appropriate (id. at p. 1). The evaluator indicated that the student appeared interested, motivated and attentive, and that he persevered with tasks that were difficult for him, performing to the best of his ability (id.). Administration of the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF – 4) yielded a core language score in the borderline range of functioning, a receptive language index score in the average range of functioning, an expressive language index score in the low range of functioning, and a language memory index score in the average range of functioning (id. at pp. 1-4, 9). The evaluator indicated that the student exhibited scattered language scores with strengths in the areas of receptive language and language memory (Tr. p. 445; Dist. Ex. 45 at p. 7). However, due to the student's comparatively lower scores in expressive language use, his core language score on the CELF - 4 fell within the borderline range (Dist. Ex. 45 at p. 7). The evaluator noted that an analysis of the student's scores revealed that he continued to struggle with basic language skills, particularly with the skills that supported decoding for reading (id.). Additional evaluative information reported included that the student's phonological skills were very weak despite intensive intervention in the phonological area (id.). The student's difficulty with discrimination of speech sounds affected his ability to accurately hear, perceive, process, remember, and associate sounds for purposes of decoding, and interpretation of grammatical prefixes and suffixes that provide additional meaning to words and change the meanings of sentences for both oral and written language (id.). The evaluator characterized the student's speech as generally intelligible with weakness in the representation of sequential sounds and the motor execution of the sequence (Tr. p. 446; Dist. Ex. 45 at p. 7). Late developing speech sounds were noted as emerging, but the student exhibited difficulty articulating multi-syllable words and complex sequences of speech sounds in words (Dist. Ex. 45 at p. 7). The evaluator indicated that the student continued to need intense multidisciplinary support in order to make gains in reading and language mediated areas of the curriculum, and recommended that the student continue to receive speech-language therapy (id.). The speech-language evaluation report included

⁶ The hearing record reflects that the purpose of increasing the student's speech-language therapy was to put "even more emphasis" on the phonemic aspects of reading (Tr. p. 400).

a list of suggested speech-language therapy activities that addressed expressive language and general phonological awareness strategies as well as phonological awareness and narrative skills (id. at pp. 12-13). An additional list of suggested classroom interventions contained strategies to support listening skills and phonological awareness, use of language form and structure, and language and memory (id. at p. 14).

The district conducted a psychological evaluation of the student on November 18, 2008 (Tr. p. 73; Dist. Ex. 46 at pp. 1-7). Behaviorally, the evaluator described the student as enthusiastic, pleasant, engaging, and cooperative (Dist. Ex. 46 at pp. 1, 6). The evaluator noted that a rapport was easily established with the student and that the student seemed comfortable in the testing situation, especially as testing progressed (id. at p. 1). The evaluator also noted that although in the past teachers had expressed concern over the student's tendency to have "meltdowns" when tasks were difficult for him, the student demonstrated a high tolerance for frustration and perseverance during the evaluation (id.). According to the evaluator, the student demonstrated a number of effective strategies such as verbal rehearsal and talking his way through challenging problems (id.). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC - IV) yielded results indicating that the student's overall cognitive functioning remained consistently in the average range when compared to results from previous testing three years earlier (Tr. pp. 73, 434; Dist. Ex. 46 at pp. 2, 6-7; see Dist. Ex. 17 at p. 2). The psychological evaluation report reflected that although the student's verbal skills had improved (from average to high average range) since the aforementioned previous evaluation, the student's nonverbal reasoning ability had decreased (from high average to average range) (Tr. p. 434; Dist. Ex. 46 at pp. 6-7; see Dist. Ex. 17 at p. 2). The student's working memory capacity, previously in the low average range, was in the average range at the time of the November 2008 psychological evaluation and his performance in processing speed remained in the average range (Tr. pp. 434-35; Dist. Ex. 46 at pp. 6-7; see Dist. Ex. 17 at p. 2). Administration of the Behavior Assessment System for Children - Second Edition (BASC- II) teacher rating scales⁷ revealed teacher ratings that were significant on many emotional dimensions, reflecting the student's sensitivity about his learning difficulties (Dist. Ex. 46 at p. 6). The psychological evaluation report indicated that "most significant" was the student's tendency to shut down when he felt that something was too hard for him (id.). The evaluator indicated that the student's behavior in the 1:1 testing situation was "markedly different" in that he displayed good problem solving strategies, persistence, and optimism about his ability to do well (id.). Recommendations included continued counseling to work on ways to deal with frustration and to help the student extend his ability to persevere in a 1:1 situation to small and large group settings (id.). In addition, further projective testing was recommended to better understand the student's emotional needs (id.).

By letter dated November 21, 2008, the district notified the parents that a CSE reevaluation review of the student was scheduled for December 17, 2008 (Dist. Ex. 44). The letter provided a list of expected attendees, a statement that the parents could be accompanied to the meeting by

⁷ The November 2008 psychological evaluation report indicated that the BASC - II parent rating scales were administered to gain an understanding of the academic, emotional, and behavioral difficulties that the parents observed in the student at home (Dist. Ex. 46 at p. 6). Although the information was reportedly returned too late to be included in the evaluation report, the evaluator noted that the parents' results were highly consistent with results from the BASC - II teacher rating scales (id.).

anyone of their choosing who had knowledge about or special expertise regarding the student, that the parents could submit evaluation information to be considered by the CSE, information about previous receipt of a procedural safeguards notice, and how the parents could obtain an additional copy of such notice if necessary (id.).

An undated report card for the student reflected that by the end of the first marking period for the student's fifth grade year, he had met the criteria for "Meets Standards" for some skills specific to art, music, and physical education and the criteria for "Partially Meets Standards" for some skills specific to reading (decoding, vocabulary development, handwriting, written composition, listening, and speaking); for some skills specific to math (number sense and operations, problem solving, reasoning and proof, communication, and connections); for some skills specific to science, social studies, technology, art, and music; and for all behaviors specific to learning behaviors (engagement, respect, responsibility, and organization) (Dist. Ex. 48 at p. 1).⁸ The report card reflected that the student was "Not Meeting Standards" in reading for fluency, comprehension, and reading engagement (id.). Several skills specific to mathematics, science, social studies, and technology were denoted as "Not Assessed" (id.).

The district conducted an educational evaluation of the student on December 2, 2008, administering the Woodcock-Johnson Tests of Academic Achievement – Third Edition (WJ-III ACH) and the Test of Written Language – 3rd Edition (TOWL-3) (Dist. Ex. 46 at p. 8). The resultant educational evaluation report indicated that the student presented as friendly, conversational, and engaging during the evaluation (id. at p. 11). The student was responsive to the examiner's interview questions, engaged in some conversation, appeared comfortable in the test setting, asked questions for confirmation but generally understood all directions, demonstrated good motivation and persistence on tests, was attentive and focused, and was easily refocused if occasionally distracted (id.). The report indicated that the student had made progress and demonstrated skills which he did not have when he was initially evaluated (Tr. p. 444; Dist. Ex. 46 at p. 11). However, the student continued to demonstrate a number of reading behaviors associated with a severe reading disability (Dist. Ex. 46 at p. 11). Although the student reportedly benefited from the support he received in school, he continued to exhibit difficulty using phonics to decode unfamiliar words and his sight vocabulary was weak (id.). The student's weak reading comprehension skills were described as "largely impacted" by weak decoding skills (id.). The report described reading as "not an automatic skill" for the student as it required "a lot of effort and energy for him to use his skills he ha[d] been taught" (id.). The student's math calculations skills were reportedly within the average range and the student knew the operations he would be expected to know for his grade, but his inattention to operation signs resulted in some errors which reduced his overall score (id. at p. 12). Word problem solving skills appeared to be one of the student's strengths, which he benefited from having read to him (id.). He demonstrated good numerical reasoning skills, understood the problems, set them up correctly, and performed accurate calculations (id.). The report indicated that spelling, which was highly correlated with decoding,

⁸ The report card contains a rubric reflecting the "Academic Performance Level for Elementary Standards" as follows: "4" is equivalent to "Meets Standards w/Distinction;" "3" is equivalent to "Meets Standards;" "2" is equivalent to "Partially Meets Standards;" "1" is equivalent to "Not Meeting Standards;" and "NA" is equivalent to "Not Assessed" (Dist. Ex. 48).

was weak on both a formal spelling test and in the student's writing sample (id.). Although the student constructed a brief writing sample, he was unable to develop his ideas into a story (id.). The report characterized the student's process of writing as "not com[ing] easily or automatically" and indicated that the student had difficulty organizing his thoughts, developing his ideas, remembering what he wanted to say, and figuring out how to spell words (id.). The evaluator opined that with more structure and pre-writing activities than could be allowed on formalized testing, it was likely that the student would be more successful with writing (id.). The report included a variety of specific strategies suggested to address the student's need for an increased sight word vocabulary and to improve his reading comprehension skills, expressive writing mechanics, spelling skills, and productivity in writing (Tr. p. 78; Dist. Ex. 46 at pp. 12-14).

On December 2, 2008, a district special education teacher conducted a 30-minute observation of the student in his fifth grade classroom during a language arts lesson (Dist. Ex. 49 at p. 1). The classroom observation report described the student as attentive during the lesson presented and indicated that the student responded to the teacher's questions, asked the teacher how to spell a word, worked cooperatively in a group of three without teacher assistance, and took a leadership role in brainstorming ideas and that the student's written notes did not represent the details he and other group members contributed during discussion (Tr. pp. 82-83; Dist. Ex. 49 at pp. 1-2). The student also asked for permission to go to the bathroom during the lesson and his teachers reported that needing to leave the room frequently was a common routine for him (id.).

The district's psychologist interviewed the student's mother for a social history on December 10, 2008, as part of the student's triennial review (Dist. Ex. 50). In response to questions pertaining to the student's mother's perception of changes in the student's performance, the social history triennial review form indicated that she responded that the student was socially a little more outgoing and that she perceived the student academically as more willing to use skills and strategies to attack a problem (id.).

The CSE convened for the student's reevaluation review on December 17, 2008, when he was in fifth grade (Dist. Ex. 40 at p. 1). The resultant December 2008 IEP included results of the reevaluations discussed above (id. at pp. 3-5). The IEP indicated that current evaluations found that while the student scored in the average range of intellectual skills, reading and writing continued to be difficult areas for him, that the student's difficulties with decoding affected his performance across all content areas, and that math skills were a relative strength for the student although his fluency was weak (id. at p. 5). The IEP further indicated that the student made a great deal of progress in receptive language skills, but he continued to require support to work on his expressive language (id.). The student's teachers reported to the CSE that the student was making progress academically but was not yet performing on grade level (id.). The IEP indicated that the student appeared to be more willing to accept help and try difficult tasks, but he could become upset easily and this could affect him socially (id.). The CSE recommended integrated co-teaching classes in math (12:1), science (12:1), and social studies (12:1) and special class language arts (8:1+2) and reading (8:1+2) (id. at pp. 1, 5). Related services recommendations continued individual counseling/consultation and individual speech-language therapy (id. at pp. 1-2, 5). Recommended program modifications, accommodations, and testing accommodations continued as per the April 2008 IEP (compare Dist. Ex. 40 at p. 2, with Dist. Ex. 35 at pp. 1-2). An additional

reading goal was added to the goals developed by the April 2008 CSE subcommittee and continued by the December 2008 CSE (compare Dist. Ex. 40 at pp. 6-8, with Dist. Ex. 35 at pp. 5-7).

The hearing record reflects that in February 2009, updated testing using the Wide Range Achievement Test 4 (WRAT 4) yielded subtest standard scores (SS) (percentile) of 106 (66) in math computation, SS 82 (12) in spelling, SS 79 (8) in word reading, SS 87 (19) in sentence completion, and a reading composite SS 81 (10) (Tr. p. 93; Dist. Ex. 55 at p. 4).

The student's report card containing information through the second marking period of fifth grade⁹ reflected that the student met the criteria for "Meets Standards" for listening in English language arts (ELA), number sense and operations in mathematics, geometry, basic computer skills, learning behaviors of engagement, respect, responsibility and organization, demonstrating appropriate behavior in art and music, performance skills in music, and all areas listed for physical education (Tr. p. 92; Dist. Ex. 59 at p. 1).¹⁰ The student met the criteria for "Partially Meets Standards" in all other academic skills listed on the report card except for reading fluency and reading comprehension, areas in which the student was "Not Meeting Standards" (Dist. Ex. 59 at p. 1). Several skills specific to math, science, social studies, and technology were denoted as "Not Assessed" (id.).

In a report dated February 11, 2009, the student's fifth grade teacher identified the student's strengths as listening comprehension, mathematical thinking, creative writing ideas, and "diligence" and his weaknesses as decoding, comprehension of text read independently, and writing (spelling, mechanics, off topic) (Dist. Ex. 58). The teacher reported that although the student was working very hard and had made "nice progress" in all areas academically, his reading abilities were well below grade level (id.). The report reflected that the student was gaining confidence in his ability to use math facts but had not yet memorized them (id.). The teacher noted in the report that the student's logical thinking skills in math and his ability in responding to text heard rather than read independently met grade standards (id.). The student reportedly demonstrated improvement in his organization and study skills (id.). In the classroom, the student regularly had his materials and found necessary books in his desk with ease (id.). The teacher report indicated the student "depend[ed] heavily" on the teaching assistant for all studying and long-term assignments (id.). According to the report, the student had his "high and low" days in regard to social interactions (id.). Some days the student was reportedly engaged with peers and other days he kept to himself (id.). The report further reflected that the student approached and spoke with teachers confidently and had been agreeable to working at school with all of his teachers (id.).

A subcommittee of the CSE convened on April 14, 2009 for the student's annual review and to develop his IEP for the 2009-10 school year when he would be in sixth grade and transitioning to the district's middle school (Dist. Ex. 55 at pp. 1, 5). Attendees were the CSE

⁹ The report card is undated (see Dist. Ex. 59 at pp. 1-2). The April 14, 2009 IEP indicated the date of the report card was "02/10/2009" (Dist. Ex. 55 at p. 5).

¹⁰ The report card contains the same rubric as noted in the report card for the first marking period (Dist. Exs. 48 at p. 1; 59 at p. 1; see FN 8 herein).

subcommittee chairperson, the school psychologist, the educational evaluator, the special education teacher from the middle school, the student's FOL special education teacher, a psychology intern, the guidance counselor, another of the student's special education teachers, the student's regular education teacher, a speech-language therapist, and the parents (Tr. pp. 221, 632; Dist. Exs. 55 at p. 5; 56; 57).¹¹ The April 2009 CSE subcommittee continued the student's eligibility for special education services as a student with a learning disability and recommended placement in the district's middle school with integrated co-teaching classes (12:1) for language arts, math, science, and social studies, each four times per six-day cycle for one hour in the regular class (Dist. Ex. 55 at pp. 1-2, 5). Related services recommendations were for individual counseling/consultation once biweekly for 30 minutes in a special location/regular class and individual speech-language therapy once per six-day cycle for 30 minutes in an integrated location and twice per six-day cycle for 30 minutes in a special location (*id.* at pp. 2, 5). Additionally, the CSE subcommittee recommended support for school personnel on behalf of the student to consist of a monthly 45-minute team meeting (*id.* at p. 2). The IEP developed by the CSE subcommittee indicated that the student would receive additional reading instruction by the building level reading teacher using an Orton-Gillingham based program (*id.* at p. 5). The CSE subcommittee added a program modification/accommodation recommendation for a copy of class notes as needed to the supports previously recommended for the student (*id.* at p. 2; *see* Dist. Ex. 40 at p. 2). Recommended testing accommodations remained the same as in the previous IEP (*compare* Dist. Ex. 55 at p. 2, *with* Dist. Ex. 40 at p. 2).

The hearing record reflects that as the April 2009 CSE subcommittee meeting appeared to be concluding, the parents informed the committee that they were rejecting its recommendations and would be unilaterally placing the student in a private school (Tr. p. 106). Subsequently, by letter dated April 26, 2009, the parents thanked the director of special education, district staff, and the student's teachers for their "time and effort" on behalf of the student, but stated that they disagreed with the "plan and curriculum" offered by the district for the forthcoming school year (Tr. p. 108; Dist. Ex. 72).¹² The letter stated that based upon the student's status at that time, his progress to date as discussed at the April 2009 CSE subcommittee meeting, and what the parents believed to be the student's immediate and long-term educational and developmental needs, the parents would be placing the student at Eagle Hill for the 2009-10 school year (*id.*).¹³ The parents further indicated in the letter that they would be seeking reimbursement from the district for the tuition and fees associated with that placement (*id.*).

The parents filed a due process complaint notice dated June 16, 2009 (Dist. Ex. 1). The due process complaint notice contained multiple allegations relating to the student's educational

¹¹ By letter from the parents to the district's director of special education dated April 9, 2009, the parents indicated that they planned to tape the upcoming CSE meeting and that they wanted to waive the attendance of the "parent member representative" (Dist. Ex. 54).

¹² The parents did not specify the aspects of the "plan and curriculum" with which they disagreed (Dist. Ex. 72).

¹³ The parents did not specify what they believed to be the student's immediate and long-term educational and developmental needs (Dist. Ex. 72).

background (*id.* at pp. 2-4).¹⁴ The parents alleged, among other things, that the student failed to make any meaningful progress in the program provided by the district and that as a result,, the student developed a "rather severe self-esteem anxiety depression syndrome" (*id.* at p. 4). The parents further alleged that they had attended the CSE meeting for the 2009-10 school year and had not received a copy of the IEP (*id.* at p. 3). They stated that they would be placing the student at Eagle Hill and that the school was "designed specifically to meet the needs of a child with the specific profile [the student] exhibits" (*id.*). As relief, the parents requested that the district reimburse them for the cost of tuition at Eagle Hill and all related services and that the district provide transportation for the student to Eagle Hill (*id.*).

An impartial hearing convened on October 14, 2009 and concluded on January 28, 2010, after five days of testimony (Tr. pp. 1, 216, 430, 629, 844). The district called five witnesses and submitted 73 documents into evidence (Tr. pp. 25, 218, 362, 568, 632; Dist Exs. 1-40; 40A; 41-72). The parents called three witnesses, including the parents, and submitted 13 documents into evidence (Tr. pp. 716, 775, 846; Parent Exs. A-M). The impartial hearing officer submitted two documents into evidence (IHO Exs. 1-2).

In a decision dated April 12, 2010, the impartial hearing officer found that the district failed to offer the student a free appropriate public education (FAPE) for the 2009-10 school year, that the parents' unilateral placement of the student at Eagle Hill was appropriate, and that the district failed to meet its burden to show that equitable considerations weighed against reimbursement to the parents (IHO Decision at pp. 34-43).¹⁵

Specific findings made by the impartial hearing officer included that: (1) the district failed to establish that the student derived meaningful educational benefits from the IEPs recommended by the CSE leading up to the student's April 2009 IEP; (2) "as a result of the lack of meaningful progress in a self-contained FOL language immersed program, [and] as a result of the multiple evaluations, the [present levels of educational performance] and the established reading goals that were too high and writing goals that were not Wilson based, and the [least restrictive environment (LRE)] in the co-taught [r]eading class, 12-1 housed in a [g]eneral [e]ducation class of 25 students as recommended by the [d]istrict's CSE meeting of April 14, 2009 was not reasonably calculated to appropriately provide the student with the educational benefit in the [LRE];"¹⁶ (3) the self-contained classroom at the district's middle school was not appropriate for the student because it was composed of students functioning at a lower level than that of the student; (4) "the CSE's recommendation to place the student in the [co-taught] [i]ntegrated classroom because of the social emotional benefit the student would receive from participating in general educational classroom setting with his peers [was] inappropriate because it [was] unlikely that the student would be

¹⁴ References to pages of the due process complaint notice are based on the Office of State Review's own sequential pagination of the exhibit as filed with this office.

¹⁵ References to pages in the impartial hearing officer's decision are based on the Office of State Review's own sequential pagination of the decision as there are no page numbers on the decision that was submitted with the record on appeal.

¹⁶ The hearing record describes the Wilson reading program as systematic, multisensory instruction and an Orton-Gillingham approach (Tr. p. 167; Dist. Ex. 55 at p. 5).

reading at a level to be comfortable in a [co-taught] classroom" and it was not appropriate based upon the limited progress that the student achieved in the FOL; (5) the student progressed while attending Eagle Hill and the program at Eagle Hill which focuses on skill development in the student's areas of deficit was appropriate; (6) the student's April 2009 IEP and the comments of the CSE members do not reflect that the student's social/emotional development while in the "self contained looping class" had progressed to the level that the student would be "able to function to be able to learn" in the integrated co-taught class and the student "clearly achieved those goals" while attending Eagle Hill; (7) the parents' placement of the student at Eagle Hill was appropriate to meet the social/emotional needs of the student; (8) the LRE is not a bar to finding the parents' placement of the student at Eagle Hill to be appropriate for the student; (9) the parents' have raised the issue of the appropriateness of the student's IEP in a timely manner; (10) the parents made the student available for evaluation by the district; (11) the CSE was "legally comprised with the required members, however the student's primary deficit is reading [and] the [r]eading teacher was not present;" (12) the "goals [on the student's IEP] were boilerplate and would be modified at the [m]iddle [s]chool by the [m]iddle [s]chool [r]eading teacher if necessary;" (13) the failure of the parents to provide the CSE with a copy of an independent educational evaluation was not done in bad faith, but instead demonstrated a lack of understanding by the parents and the actions taken by the parents were not unreasonable; (14) the parents' act of paying a security deposit to hold the student's place at Eagle Hill was not in bad faith and was not unreasonable; and (15) the district failed to meet its burden to show that equitable considerations weigh against an award of reimbursement to the parents (*id.* at pp. 34-43).

The impartial hearing officer ordered the district to reimburse the parents for their unilateral placement of the student at Eagle Hill for the 2009-2010 school year (IHO Decision at p. 43).

This appeal ensued. The district alleges that the impartial hearing officer improperly determined that the program developed by the district for the 2009-10 school year did not offer the student a FAPE. Specifically, the district alleges that the student would have received 1:1 instruction using Wilson during the 2009-10 school year; that at the April 2009 CSE meeting, the parents told the CSE that they were rejecting the program and putting the student in a private school; that the parents started the admission process to Eagle Hill in September 2008; that the impartial hearing officer erred in basing his decision regarding the 2009-10 IEP on prior years' IEPs and recommended programs; and that the student progressed in the district's prior programs. It further alleges that the impartial hearing officer improperly determined that Eagle Hill was appropriate for the student because no testimony was provided by Eagle Hill staff; the impartial hearing officer gave undue weight to the parents' witness; and it was unclear how much speech-language therapy the student was getting at Eagle Hill. Lastly, the district argues that the impartial hearing officer improperly ruled that the parents' conduct warranted an award in their favor because the parents did not provide the student's 2007 private evaluation to the CSE until 2009, and the parents applied and paid non-refundable monies to Eagle Hill prior to the April 2009 CSE meeting.

In their answer, the parents deny many of the allegations contained in the district's petition and request that the petition be dismissed. The parents maintain that the district failed to offer the student a FAPE for the 2009-10 school year, that their unilateral placement of the student was appropriate, and that equitable considerations weigh in favor of an award of reimbursement.

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 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 least restrictive environment (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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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).

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

From the 2005-06 school year (second grade) through the 2008-09 school year (fifth grade), while attending school in the district, the student displayed behaviors consistent with a severe reading disability (Tr. p. 296; Dist. Exs. 2 at p. 4; 19 at p. 4; 23 at pp. 3, 5; 29 at p. 3; 35 at p. 3; 40 at pp. 3-5; 45 at p. 7; 46 at pp. 1, 11; 55 at pp. 1, 3-5). As the student's behaviors evolved to also reflect social and emotional struggles as a result of his perceptions of himself as a student with a learning disability, the CSE and CSE subcommittees made appropriate changes to the student's IEPs and intensified both his program and related services recommendations (Dist. Exs. 2; 19; 23; 29; 35; 40). By the time the April 2009 CSE developed the student's 2009-10 IEP, the

district had known the student for many years, understood the student's learning difficulties, and planned for the student's transition to the district's middle school taking into consideration the student's individual academic and social/emotional strengths and needs (Tr. p. 111; Dist. Exs. 2; 19; 23; 29; 35; 40; 55 at pp. 1-5).

The hearing record reflects that contrary to the determination of the impartial hearing officer, the April 2009 IEP was reasonably calculated to appropriately enable the student to receive educational benefits in the LRE. The April 2009 CSE subcommittee reviewed results of the student's 2008 and 2009 evaluations and reports, and the IEP developed by the CSE subcommittee reflected those evaluation results (Tr. pp. 686-87; Dist. Ex. 55 at p. 5). The April 2009 IEP reflected the student's academic, social/emotional, management, and physical present levels of performance consistent with those reports (Dist. Ex. 55 at pp. 3-5). Also consistent with the evaluation results and reports, the April 2009 IEP indicated that the student had significant delays in reading, decoding, written expression, spelling, and memory weaknesses that affected his ability to progress in the general education curriculum (id. at p. 3). The April 2009 IEP included the student's present levels of performance specific to his intellectual, academic, speech-language, reading, mathematics, and expressive writing needs (id. at pp. 3-5). In consideration of the student's present levels of performance in these areas, the April 2009 IEP indicated that the student needed to demonstrate the same persistence, flexibility, motivation, and range of strategies in a large class setting that he demonstrated in a 1:1 testing situation (id. at p. 4). The April 2009 IEP also indicated that the student benefited from adult support to help him organize his thoughts and stay on topic (id.). Furthermore, the April 2009 IEP reflected that the student benefited from a multisensory instructional approach to improve decoding, spelling, and reading comprehension (id.). Regarding writing, the April 2009 IEP indicated that the student needed reminders to apply proper mechanics that he had previously been taught, to follow written directions, and to demonstrate appropriate verbal communication skills, especially expressive language abilities (id.). Regarding social aspects, the April 2009 IEP indicated that the student needed to continue working on strategies such as "positive self-talk" and relaxation exercises when he felt anxious about academic demands, and to continue working on a more flexible and positive attitude about trying different strategies that might help him succeed (id.). The April 2009 IEP also indicated that the student needed to improve his visual-motor coordination (id.).¹⁷ Regarding the student's classroom management needs, the April 2009 IEP reflected that the student needed subjects such as reading and spelling to be taught in a small teacher-to-student ratio in order to progress academically, needed the additional support of special education services to be successful in the general education classroom, needed a flexible approach in order to address his anxiety, and needed to increase his frustration tolerance (id. at p. 5). The April 2009 IEP also included 15 measurable annual goals that addressed the student's reading, writing, speech-language, and social/emotional/behavioral needs (id. at pp. 6-8).

¹⁷ The April 2009 IEP indicated that the student's physical levels and abilities were within age appropriate expectations (Dist. Ex. 55 at pp. 4-5). The IEP reflected that in 2005, the student's performance on the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) was 1.7 years below his chronological age (id.). Testimony by the assistant superintendent of pupil personnel services indicates that she was unclear why this need appeared on the IEP because there was no new discussion regarding the VMI (Tr. p. 155).

Committee meeting information included in the April 2009 IEP indicated that the student would have been transitioning from elementary school to middle school in September 2009 (Dist. Ex. 55 at p. 5). The IEP reflected that "[a]fter careful discussion" the CSE subcommittee recommended the student receive integrated co-teaching classes for language arts, math, social studies, and science (*id.*). The IEP further reflected that for the 2009-10 school year, the student was recommended to receive additional reading instruction in the Wilson reading program, an Orton-Gillingham based approach provided by the building level reading teacher; counseling and speech-language therapy as related services; classroom modifications and accommodations including the addition of spelling waived and a copy of class notes as needed; and testing accommodations (*id.* at pp. 2, 5). Further, the April 2009 CSE recommended a monthly 45-minute team meeting regarding the student to support school personnel (*id.* at p. 2). The hearing record shows that the purpose of this meeting was to ensure that everyone who worked with the student, including the student's regular education teachers, special education teachers, reading teacher, and guidance staff, used the same techniques with the student, shared the student's strengths and weaknesses with each other, and was comfortable working with the student (Tr. pp. 103-04). The hearing record also reflects that when a special education student transitions to middle school, the parents are generally advised to meet with the middle school team early "so everyone is on the same page" (Tr. p. 104).

The hearing record shows that the April 2009 IEP addressed the student's needs and offered him opportunity to achieve educational benefits in the recommended program. The assistant superintendent of pupil personnel services testified that building level staff from the district's middle school went to the student's elementary school to discuss the specific individual needs of the student (Tr. p. 105). She further testified that as a result of that discussion, the building level staff believed the student's main area of deficit was in phonological awareness and decoding, and that Wilson would target his needs in those areas (*id.*). Her testimony also indicates that the middle school building level staff wanted the student to stay in an integrated co-taught language arts class because of the richness of the classroom content and the student's ability to join in classroom discussions, and that the student would appropriately "get something out of [the] lesson" with the availability of a special education teacher in the classroom in conjunction with implementation of his classroom accommodations and modifications (Tr. pp. 105-06).

Testimony by the district's middle school special education teacher, who would have instructed the student in the recommended sixth grade integrated co-teaching language arts class, reveals that the teacher attended the student's April 2009 annual review (Tr. pp. 638-39, 651). She testified that she was part of the transition team for sixth grade, and that the transition team attends annual reviews to make sure that it agrees with a students' suggested placement in order to make sure that the student receives the available programming and necessary modifications (Tr. p. 639). The middle school special education teacher further testified that in an effort to transition special education students from elementary school to middle school, the district has a program in the summer whereby students with special needs come to school for two or three days for a number of hours and receive a tour, have an opportunity to ask questions, have an opportunity to see what each of the four major classes is like, get their schedules, and learn about the middle school, student planners, and how to use combination locks to open their lockers (Tr. pp. 640-41).

Testimony by the assistant superintendent for pupil personnel services and the student's FOL special education teacher and the middle school reading teacher, reflects that the student had been screened in reading and that he would have received reading services in the middle school by a certified reading teacher and would have been explicitly taught the rules for word attack through systematic multisensory instruction of Wilson, similar to the multisensory instruction of PAF he received in elementary school and from which he had had benefited (Tr. pp. 167, 174, 347-48, 571-72, 574).

Testimony by the middle school reading teacher who screened the student in reading during fifth grade indicates that the screening test showed that the student was weak in decoding and sight vocabulary, and the teacher opined that the student would have been an appropriate student to receive Wilson (Tr. pp. 574-75, 577). Having reviewed the student's April 2009 IEP, the reading teacher opined that the student could have made progress in her program during sixth grade because he was a "bright boy," he was the "perfect candidate" for Wilson because "he [wa]s "bright and he [wa]s dyslexic," and that Wilson "was made for[] kids like that" (Tr. p. 584). The middle school reading teacher indicated that the student would have received reading instruction in Wilson within a 60-minute block four times per six-day cycle, most likely with one other student in the class (Tr. pp. 576-77). She indicated that all students who receive Wilson instruction also receive a reading comprehension class that is separate and apart from their Wilson reading class and their ELA class (Tr. pp. 593, 602-03). The reading teacher noted that Wilson includes an assessment for reading and spelling, as well as guidelines related to benchmarks for sub-steps and for when to advance in the program (Tr. pp. 577, 591). The reading teacher testified that she collaborates with the special education teachers on the assessment of students' progress toward their reading goals and that there would have been a program review for the student as necessary to adjust his IEP goals relating to reading instruction (Tr. pp. 578-80). She also testified that she "constantly" speaks with her students' special education teachers to share information and provide feedback to them and to make sure that what she is doing is carried over to the general education or special education classrooms (Tr. p. 585).

The middle school special education teacher described the integrated co-teaching model at the district's middle school and testified that the language arts, math, science, and social studies classes each consist of a certified special education teacher and a regular education teacher (Tr. pp. 634-35, 652-54, 668-69). She noted that the regular education and special education teachers typically plan together regarding what has to be covered in the curriculum, determining how they want to achieve covering the curriculum, and planning on how to differentiate instruction for all of the special education students (Tr. pp. 635-37). She also noted that one teacher usually teaches a concept while the other teacher walks around the classroom making sure everyone understands what is being taught, and that the special education teacher is often the teacher that provides the modifications and differentiates the instruction in the class (Tr. pp. 635). The special education teacher testified that depending on activities being conducted, different methods are utilized in the classroom including breaking the students into groups of two or three and having each group work with one of the teachers (*id.*). She testified that differentiation of instruction depends upon the students' needs and might include scaffolding, multiple modeling of examples, use of brainstorming, graphic organizers, and modification of assignments and homework (Tr. pp. 637-38). The middle school special education teacher testified that as a result of her attendance at the

April 2009 CSE subcommittee meeting, she got a sense of the student as a learner (Tr. p. 641). Regarding the goals included in the student's April 2009 IEP, the special education teacher provided specific testimony about her role in implementing and measuring progress on several of the reading and writing goals (Tr. pp. 642-50). She recalled that at the annual review meeting, the parents were concerned about the student's transition to the middle school and that she personally assured them that she was very comfortable with the recommended program because she was confident about what is done in the middle school and that the regular education and special education teachers have a close working relationship where they "constantly" discuss the students and make changes as quickly as necessary when appropriate (Tr. pp. 650-51). Regarding the multisensory reading instruction recommended for the student in the April 2009 IEP, testimony by the middle school special education teacher reflects that a decoding class would have been scheduled one day and a comprehension class would have been scheduled on the alternate day (Tr. pp. 603-04, 655).

In describing the special education students at the middle school, the special education teacher noted that the special education students enrolled in her integrated co-teaching language arts class have reading and writing difficulties, particularly difficulties that require help decoding and help getting started and organizing their thoughts for writing (Tr. pp. 655-56). The special education teacher opined that the special education students in the co-teaching integrated language arts class have the potential to achieve and succeed in the general education classroom (Tr. p. 656). In comparing the co-teaching integrated language arts class with the special class English program option, the middle school special education teacher testified that the students in special class English have difficulty decoding but that their "IQ and intellectual ability doesn't lend itself to be in the [W]ilson reading program" and unlike the students in the integrated co-teaching class, the students in the English special class do not have the ability to retrieve information well and do not have a lot of prior knowledge to access from their memory, nor do they have a lot of people communicating with them, or a lot of experience to draw upon (Tr. p. 657). Based on her knowledge of the student from the April 2009 CSE subcommittee meeting, the special education teacher opined that the student would have been appropriately placed in the co-teaching integrated model at the middle school (Tr. p. 658).¹⁸ Considering the student's intellectual level and abilities in conjunction with the recommended modifications and accommodations discussed at the annual review, she testified that the student would have been successful and would have received "rich instruction" had he attended the district's middle school for sixth grade (*id.*).

Contrary to the conclusions of the impartial hearing officer, the hearing record further demonstrates that even though he exhibited a significant reading disability, the student progressed and received meaningful educational benefits during prior years while attending school in the district. Testimony by the student's FOL special education teacher provides extensive information about the implementation of the FOL program and the student's academic and social/emotional progress during fourth grade (2007-08) (Tr. pp. 221-67). Regarding fifth grade (2008-09),

¹⁸ The middle school special education teacher indicated that she spoke with the student's elementary school special education teacher on the phone prior to the student's April 2009 annual review and learned that the student needed a lot of help with decoding and writing in all of his classes (Tr. p. 685). She also indicated that because of the student's emotional state, the student's teachers in the middle school would need to make sure the student felt he was in a comfortable, trusting, and safe environment (*id.*).

testimony by the FOL special education teacher indicates that while the student was performing below grade level in reading and writing, he made "solid progress" in the volume and quality of his writing and in reading (Tr. p. 269). The teacher noted that the student functioned well in the inclusion classes and regular class settings, and that he benefited emotionally and academically from participation in the fifth grade class (*id.*). She testified that although the student displayed weaknesses similar to those he had displayed in the past, his February 2009 performance on the WRAT-4 maintained parameters that reflected one year of progress over the course of one year in time (Tr. pp. 269, 349; compare Dist. Ex. 40 at p. 4, with Dist Ex. 55 at p. 4).

Regarding the results of the student's triennial evaluation, the school psychologist testified that the student had made some progress in terms of his "absolute ability to read" despite his struggles with reading when compared to his same age peers (Tr. pp. 521-23; Dist. Ex. 46 at p. 8).¹⁹ The school psychologist's testimony affirms that the student displayed weak writing skills (Tr. p. 525). However, she noted that "we were getting a lot of writing out of him," so that proofreading, editing, spelling, and story construction could be addressed (Tr. p. 526). She testified that by November 2008, she saw improvement in the student's ability to participate in some of the groupings in the general education class (Tr. p. 528). Additionally, she noted that by the end of fifth grade, the student was no longer having meltdowns or crying in class (Tr. p. 540).

A review of the student's fifth grade report card reflects that by the third trimester the student's performance was rated as "Meets Standards" for listening and speaking in reading, and as "Meets Standards" for number sense and operations, algebra, geometry, measurement, statistics and probability, problem solving, reasoning and proof, communication, connections, and representation in math (Dist. Exs. 48; 59; 62). The student's performance was also rated as "Meets Standards" for skills related to art, social studies, music,²⁰ and physical education (Dist. Exs. 48; 59; 62).

The hearing record reflects that the student would have received academic and social/emotional support individually tailored to meet his specific needs in the program recommended by the district for the 2009-10 school year. Consistent with the LRE mandate of federal and State law, he also would have been placed in a program that allowed him supported educational opportunities with non-disabled peers. Additionally, despite ongoing delays in the student's areas of deficit, the hearing record reflects that the student had made progress in the district's prior recommended programs with the receipt of district recommended supports and services, and that the April 2009 IEP recommended a program that was formulated based upon prior programs that provided educational benefit. Based on the foregoing, the hearing record reflects that there were no procedural infirmities rising to the level of a denial of a FAPE and that

¹⁹ In reviewing the results of administration of the Developmental Reading Assessment (DRA 2) to the student, the impartial hearing officer classified the student's improvement from "instructional to independent" on text level from September 23, 2008 to April 13, 2009 as "marginal progress" (IHO Decision at p. 33).

²⁰ The student's second marking period and third marking period report cards reflected the student received a rating of "Meets Standards w/ Distinction" for demonstrates appropriate behavior in music (Dist. Exs. 59; 62).

the April 2009 IEP was reasonably calculated to enable the student to obtain educational benefits in the LRE.

Having found that the district offered the student a FAPE in the LRE, I need not reach the issue of whether the parents' unilateral placement of the student at Eagle Hill was appropriate and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have examined the parents' remaining contentions regarding the district's offered program and find them to be without merit.

THE APPEAL IS SUSTAINED.

**Dated: Albany, New York
July 9, 2010**

**PAUL F. KELLY
STATE REVIEW OFFICER**