



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-095

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 New York City Department of Education

Appearances:

Law Offices of Regina Skyer & Associates, LLP, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for costs of their son's Lindamood Bell program in July and August 2009. The appeal must be sustained.

At the time of the impartial hearing, the student attended a State-approved nonpublic school (NPS 2), and received speech-language therapy, counseling, and occupational therapy (OT) as related services (Tr. pp. 114-17, 270-71; Dist. Ex. 16 at pp. 1-2). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; Dist. Exs. 1-2; Parent Ex. A).

Initially, the student began receiving OT and physical therapy (PT) when he was seven months old (Dist. Ex. 13 at p. 3). At the age of one year, the student began receiving speech-language therapy through Early Intervention (EI) services (id.). Thereafter, the student received special education programs and services through the Committee on Preschool Special Education (CPSE) as a preschool student with a disability (Tr. p. 248; see Dist. Ex. 13 at p. 3). For preschool, the student attended a 9:1+1 special class with related services of PT and OT (Tr. p. 248). At four years of age, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and began receiving the services of a 1:1 paraprofessional within his preschool special class (Tr.

pp. 248-49). Upon aging out of the CPSE, the student received services through the Committee on Special Education (CSE), who placed the student in a State-approved nonpublic school (NPS 1), where the student attended kindergarten, first grade (2007-08), and second grade (2008-09) (Parent Exs. A at p. 2; B at p. 2; see Tr. pp. 184, 249-53). While attending NPS 1 in the 2008-09 school year, the student received speech-language therapy, OT, and counseling, as well as 1:1 services from a "reading specialist who utilize[d] the Orton-Gillingham Method" at home (Dist. Ex. 13 at p. 3).¹

During the 2008-09 school year, NPS 1 staff prepared a speech-language progress report, dated December 2, 2008; a classroom report, dated December 9, 2008; a counseling progress note, dated January 22, 2009; and an OT report, dated February 9, 2009 (Dist. Exs. 5; 7; 9-10). In addition, the NPS 1 "Child Study Team" prepared recommendations for the student's educational environment for the 2009-10 school year, and NPS 1 developed a list of recommended testing accommodations for the student (Dist. Exs. 6; 8).² The parents had also privately obtained two evaluations of the student: a psychoeducational evaluation of the student in January 2009, and a speech-language evaluation in February and March 2009 (Dist. Ex. 13; Parent Ex. D).

According to the December 2008 speech-language progress report, the student received three 30-minute sessions of individual speech-language therapy per week and one 30-minute session of small group speech-language therapy per week while attending NPS 1 (Dist. Ex. 9 at p. 1). The speech-language pathologist reported that the student presented with a language processing disorder regarding "form, content, and use affecting syntactic, semantic, pragmatic, and phonological components of language" (id.). With regard to pragmatic language, the student could maintain a conversation, but required support to organize his ideas (id.).

An administration of the Clinical Evaluation of Language Fundamentals—Fourth Edition (CELF-4) yielded a receptive language standard score of 84 and an expressive language standard score of 55 (Dist. Ex. 9 at p. 2). According to the CELF-4 results, the student presented with "mild delays in overall receptive language abilities" and "significant delays in overall expressive language abilities" (id.). An administration of the Receptive One-Word Picture Vocabulary Test—2000 Edition (ROWPVT) and the Expressive One-Word Vocabulary Test—2000 Edition (EOWPVT) yielded, respectively, standard scores of 96 (average ability to identify a variety of age-appropriate nouns, verbs, and categories) and 92 (average ability to name a variety of age-appropriate nouns, verbs, and categories) (id.).

Additionally, the student's performance on the Phonological Awareness Test—Second Edition (PAT-2) indicated that his overall phonological awareness skills fell "below the average range" with strengths noted in the areas of rhyming, segmentation, isolation, and deletion, and weaknesses noted in the areas of substitution, blending, sound-grapheme correspondence, and decoding nonsense words (Dist. Ex. 9 at p. 3). The speech-language pathologist noted

¹ The parents testified that after the student's first year at NPS 1, he no longer required PT services and the services were terminated (Tr. pp. 250-51).

² According to the hearing record, NPS 1 had also prepared a 2009-10 individualized education program (IEP) for the student; however, neither party submitted that IEP into evidence (see Tr. pp. 1-374; Dist. Exs. 1-16; Parent Exs. A-K).

improvements, however, in the student's "ability to blend syllables and phonemes and segment consonant-vowel, vowel-consonant, and consonant-vowel-consonant words in individual therapy sessions" (id.). The speech-language pathologist deferred the student's eligibility and determination of services to the CSE (id.).

According to the annual review classroom report completed by the student's NPS 1 special education teacher, dated December 9, 2008, the student attended a 12:2+2 classroom and received related services of speech-language therapy, counseling, and OT (Dist. Ex. 5 at p. 1; compare Tr. p. 184, with Dist. Ex. 5 at p. 3). The teacher indicated that the student "learn[ed] best through a multi-modality approach" and "small group instruction" (Dist. Ex. 5 at p. 1). In addition, she noted that the student "require[d] a highly structured environment" with "continuous teacher support and guidance" (id.). Although the teacher described the student as "highly distractible," she indicated that the student—when "focused"—could "follow classroom routines and simple directions" (id.). At that time, the student used "Recipe for Reading"—a "multi-sensory, phonics based reading program"—and "Milestones"—a "program that target[ed] reading comprehension" (id. at p. 2). In addition, the teacher used "theme-based literature" to address both reading and writing skills, and a second grade mathematics curriculum program (id.). According to the teacher, the student demonstrated a "relative strength" in rote counting, skip counting, numerical recognition, set concepts, and non-numerical concepts (id.). The student also showed progress in computational skills for sums and differences up to 20 (id.). Overall, the teacher noted that the student demonstrated progress in academics and social skills, but he continued to exhibit difficulties in the areas of language and attention (id. at p. 3).

The NPS 1 "Child Study Team" recommended the following for the student's educational environment for fall 2009: placement in a 12:2+2 classroom that provided a "high degree of individualized attention and intervention," "a continuity of services," and "a transdisciplinary program" that provided group services in "art therapy, music therapy, and adaptive physical education;" individual OT, counseling, and speech-language therapy, as well as group speech-language therapy; and social skills training, parent training, 12-month programming, and continued instruction using Recipe for Reading and Milestones (Dist. Ex. 6 at pp. 1-2). In addition, NPS 1 recommended the following testing accommodations: extended time; directions read aloud; simplified language in directions; test questions, passages, items, and multiple choice items read to student; repetition of listening sections; on-task focusing prompts; and allowing the student to mark answers in a booklet (Dist. Ex 8).

In January 2009, the parents privately obtained a psychoeducational evaluation of the student for his triennial review (Parent Ex. D at p. 1).³ At that time, the parents expressed concerns regarding the student's "reading development" and sought information to assure that the student

³ At a CSE meeting held in October 2008, the parents requested a new psychoeducational evaluation of the student (see Dist. Ex. 15 at p. 4). At that time, the CSE advised the parents to submit a written request in order to "process [the] request" (id.). I note that that neither federal nor State regulations require parents to submit a written request for a reevaluation of a student (34 C.F.R. § 300.303; 8 NYCRR 200.4[b]). Furthermore, pursuant to State and federal regulations, an "appropriate reevaluation" shall be arranged "if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teachers requests an evaluation" (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[1]-[2]).

was "getting as much support in this area as possible" (*id.*).⁴ An administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) yielded the following standard scores: full scale IQ, 91 (average range); verbal comprehension index, 93 (average range); perceptual reasoning index, 98 (average range); processing speed index, 103 (average range); and working memory index, 80 (low average range) (*id.* at pp. 2, 7). The student's working memory index represented a "clinically significant area of weakness" (*id.* at p. 2).⁵

Based upon results from the Wechsler Individual Achievement Test—Second Edition (WIAT-II), the student demonstrated "severe phonological weaknesses," which made "decoding extremely challenging" for him (Parent Ex. D at p. 4). The private psychologist indicated that while the student exhibited a "conceptual understanding of letter-sound correspondence and [could] sound out beginning consonant sounds," the student could not "reliably decipher vowel sounds" (*id.*). The private psychologist indicated that reading was an "extraordinarily laborious task" for the student (*id.*). With regard to phonological awareness, the student could "distinguish whole words and syllables, [but] could not distinguish phonemes" (*id.*). In addition, the student could "isolate first and last sounds of words," but demonstrated "no capacity to hear the medial parts of words" (*id.*). The student could "articulate the corresponding sounds" of most single letters and "name long and short vowels;" however, he struggled with "consonant blends, consonant digraphs, r-controlled vowels and vowel digraphs, and diphthongs" (*id.*). When presented with "actual reading material," the student "demonstrated minimal sight word knowledge (beginning first grade)," but at times, he could use visual cues for assistance (*id.*).⁶ Writing was also "extremely challenging" for the student (*id.*).

With respect to his academic achievement in mathematics, the student struggled with "basic arithmetic, both mental arithmetic and paper and pencil problems" (Parent Ex. D at p. 4). While he demonstrated "one-to-one correspondence" in counting, the student "could not accurately complete single digit equations" in addition and subtraction (*id.*). The private psychologist opined that the student's performance on "these tasks fell at a kindergarten level" (*id.*). The student performed at a "beginning first grade level" on tasks assessing his ability to "complete simple word problems that required accurate counting, reading simple graphs, creating simple addition problems and solving problems using money" (*id.* at p. 5).

In summary, the private psychologist primarily attributed the student's "reading disability" to his "severe phonological weakness and inability to distinguish vowel sounds" (Parent Ex. D at p. 5). She noted that the student's "limitations in working memory further contribute[d] to weaknesses in his ability to keep phonemic information in mind while processing it" (*id.*). Similarly, the student's limitations in working memory affected his ability to "keep concepts in mind while manipulating them" when attempting to solve simple mathematics problems (*id.*). The

⁴ The evaluation report indicated that the student currently received medication to "address his attentional difficulties with good benefit" and further, that the student could "remain focused in the classroom setting" but required "support to get through academic work" (Parent Ex. D at p. 1).

⁵ The working memory index subtests assessed the student's "ability to mentally manipulate information without the use of external aids like paper and pencil" (Parent Ex. D at p. 3).

⁶ At the time of the psychoeducational evaluation, the student attended second grade at NPS 1 (Parent Ex. D at p. 1).

private psychologist opined that the student met the criteria for both a reading disorder and a disorder of mathematics (id.). In addition, the student met the criteria for the following: a disorder of written expression; a mixed expressive/receptive disorder; and ADHD, combined type (id. at p. 6).

To address the student's areas of weakness, the private psychologist recommended the following: a small class placement that would provide intensive intervention for the student's language and academic weaknesses; multisensory instruction to address his difficulties with reading and language processing; the use of manipulative objects to address the student's weaknesses in mathematics; and a classroom environment with an "amplification system" to assist the student in discriminating smaller parts of speech (Parent Ex. D at p. 6). In addition, the private psychologist included the following recommendations to specifically address the student's reading difficulties: an intensive, multisensory approach to reading, such as Orton-Gillingham, provided by a reading specialist; the use of an intervention, such as Fast ForWord, to target the student's "need to develop the ability to hear and discriminate between phonemes and develop his vowel sounds"; and "distributed practice and sight word drills" to increase the student's sight word recognition (id.). The private psychologist also recommended the following related services: individual speech-language therapy to address expressive and receptive language weaknesses; small group speech-language therapy to address pragmatic language skills; and group therapy to improve cooperative behavior, sharing, and frustration tolerance (id.).

In February and March 2009, the parents privately obtained a speech-language evaluation of the student for his triennial review (Dist. Ex. 13 at p. 1). At that time, the parents expressed concerns about the student's reading development (id.). The speech-language pathologist administered a battery of standardized tests to assess the student's receptive and expressive linguistic skills and literacy skills, including the Comprehensive Assessment of Spoken Language (CASL), the Peabody Individual Achievement Test—Revised (PIAT-R), the Comprehensive Test of Phonological Processing (CTOPP), and the Motor-Free Visual Perception Test—Revised (MVPT-R) (id. at pp. 4-8).

The CASL assessed the student's "processes of comprehension, expression, and retrieval in four language categories: lexical/semantic, syntactic, supralinguistic, and pragmatic" (Dist. Ex. 13 at p. 5). The speech-language pathologist administered five specific subtests: antonyms (assessed word retrieval and semantic relationship skills); sentence completion (measured knowledge of semantics and grammar); paragraph comprehension (measured auditory verbal working memory at the level of connected speech); grammatical morphemes (measured knowledge and expression of grammatical analogies); and inference (measured the student's use of semantic knowledge to derive meaning from inferences in the oral verbal modality) (id. at pp. 5-6). Overall, the results of the CASL indicated that the student's receptive and expressive language skills fell within the low average to average range when compared to his "typically developing peers" (id. at p. 5). Specifically, however, the student's performance on the individual subtests indicated "low average word knowledge and reading comprehension potential," "a significant deficiency in the comprehension of morphological structure in oral language," "low average" paragraph comprehension skills, "difficulty processing and producing grammatical morphemes," "weakness in inferential reasoning," and "poor listening comprehension" skills (id. at pp. 5-6). The speech-language pathologist opined that the student's subtest scores "may reflect a lack of cognitive flexibility for comprehension of unfamiliar syntactical forms," and further, that

the student's deficits in "oral language comprehension" and "decoding skills" may intensify his difficulty with reading comprehension (id.). In summary, the speech-language pathologist noted that the student's "varied functioning" on the CASL indicated deficiencies "across many components of language" and that the student exhibited "[s]ignificant limitations in auditory verbal working memory and cognitive flexibility" (id. at p. 6).

An administration of the PIAT-R to assess the student's reading recognition and reading comprehension yielded scores within the low average range, which suggested a "greater than one-year delay in reading" (Dist. Ex. 13 at p. 6). The speech-language pathologist also administered an informal writing sample to assess the student's "writing and graphomotor skills" (id.). When asked to write a "complete sentence," the student "attempted to and approximated writing words, however he had difficulty writing simple sentences" (id. at pp. 6-7). On the informal writing sample, the student demonstrated inappropriate letter size, poor letter formation, and "poor encoding skills," which indicated "significantly delayed" writing and encoding skills, as well as a deficiency in graphomotor skills (id. at p. 7).

To assess his phonological awareness skills, the speech-language pathologist administered the CTOPP to the student (Dist. Ex. 13 at p. 7). On the sound blending subtest, the student "demonstrated the ability to synthesize two phonemic elements to produce the whole word, however performance deteriorated when the task involved three phonemic elements, indicating [the student] ha[d] most trouble synthesizing sounds as the phonological demands increase[d]" (id.). The speech-language pathologist noted that "[p]honological awareness [was] important in developing appropriate decoding skills," and further, that the student's performance on this subtest provided "a possible explanation for [his] struggle with decoding" (id.). The speech-language pathologist also administered the Roswell-Chall Phonetic Inventory to assess the student's "word analysis skills by taking a direct inventory of his knowledge for sound-symbol correspondence" (id.). In this test, the student was asked to identify the following: "single consonant sounds (16/18 items correct), consonant combinations (2/10 items correct), short vowels (3/10 items correct), vowel combinations (2/12 items correct), the syllabification of words and sentences (0/10 items correct), and . . . knowledge of the silent 'e' rule (0/10 correct)" (id.).

Results of the MVPT-R revealed that the student had strong visual-perceptual skills, suggesting that he preferred a "visual approach" to learning (Dist. Ex. 13 at pp. 7-8). Attention and memory tests revealed "significant deficits" in both auditory attention and in "processing auditory verbal information in connected speech" (id. at p. 8).

In her summary of clinical impressions, the speech-language pathologist indicated that the student's "[d]ifficulties with regard to literacy [were] significant, with both reading decoding and comprehension skills lagging" (Dist. Ex. 13 at p. 8). She noted that the student appeared "more comfortable learning in the visual modality," and further, that his "auditory attention and phonological working memory [were] significant factors that contribute[d] to reading decoding deficits" (id.). Although the student demonstrated stronger reading comprehension levels due to "better semantic skills," his "inferencing deficits, pragmatic concerns, and a lack of cognitive flexibility" contributed to the student's "comprehension deficits in both oral and written language" (id.). In addition, the student's phonological deficits and graphomotor difficulties affected his written expression (id.).

Based upon the student's testing results, the speech-language pathologist recommended the implementation of weekly, individual speech-language therapy to focus on the student's identified needs in the following areas: receptive language, expressive language, and literacy skills (Dist. Ex. 13 at pp. 8-9). To improve the student's receptive language skills, the speech-language pathologist recommended increasing his auditory verbal recall through the "use of visualization and verbal rehearsal strategies," and increasing his ability to follow auditory commands involving linguistic concepts through the use of "one-step" and "two-step directives" (*id.* at p. 9). To improve the student's expressive language skills, the speech-language pathologist recommended increasing the student's ability to "sequence events in narration" and increasing the student's "[v]ocabulary and knowledge of semantic relationships through a multi-sensory approach to include visualization, phonemic, and semantic cueing" (*id.*). Finally, to improve the student's literacy skills, the speech-language pathologist recommended developing the student's "sight word skills to age-appropriate levels;" increasing the student's "phonological awareness skills," "knowledge of sound-symbol correspondence," "reading decoding skills," and "written communication skills;" and developing "text comprehension" for factual information, inferential reasoning, self-awareness of comprehension, and use of contextual cues to infer meaning (*id.*). Additionally, the speech-language pathologist recommended the use of the Orton-Gillingham approach in conjunction with visual-perceptual methods to develop the student's literacy skills (*id.*).

On May 20, 2009, the CSE convened to conduct the student's triennial review and to develop his IEP for the 2009-10 school year for third grade (Dist. Ex. 11 at pp. 1-2). The following individuals attended the May 2009 CSE meeting: a district school psychologist (who also acted as the district representative), a district special education teacher, the student's then-current special education teacher from NPS 1 (via telephone), the student's psychologist from NPS 1 (via telephone), and the student's mother (Dist. Ex. 11 at p. 2; *see* Tr. pp. 255-57). According to the hearing record, the May 2009 CSE had all of the aforementioned NPS 1 reports and both private evaluation reports available for review and consideration when it developed the student's 2009-10 IEP (Tr. pp. 50-59, 87-90, 254-55, 257-59).

In the present levels of academic performance, the CSE recorded that the student "learn[ed] best though a multi-modality approach" and "small group instruction" (Dist. Ex. 11 at p. 3). In addition, the CSE noted that the student required "a highly structured environment where continuous teacher support and guidance [were] provided" (*id.*). The CSE described the student as "highly distractible" and noted his need for "frequent refocusing to the task at hand" (*id.*). The CSE reported the student's December 2008 Woodcock-Johnson—Third Edition (WJ-III) grade equivalent scores in the following areas: decoding, 1.3; reading comprehension, K.6; computation, 1.0; and problem solving, K.5 (*id.*).⁷ With respect to academic management needs, the CSE indicated that the student required "speech-language therapy" and a "small structured class setting" (*id.*).

With regard to the present levels of social/emotional performance, the CSE indicated the student's need for a "highly structured setting" with "teacher support and guidance . . . provided consistently," as well as the student's need for "constant redirecting and prompting to complete a

⁷ Neither party submitted documentary evidence regarding the administration of the WJ-III in December 2008 (*see* Tr. pp. 1-374; Dist. Exs. 1-16; Parent Exs. A-K).

task in the allotted time" (Dist. Ex. 11 at p. 4). The CSE indicated in the May 2009 IEP that the student's behavior did not seriously interfere with the instructional process and could be addressed by the special education classroom teacher (*id.*). In addition, the CSE noted that the student's social/emotional management needs included a "small structured class" and "counseling" (*id.*). With regard to the student's present levels of health and physical development, the CSE included a notation in the May 2009 IEP regarding the student's diagnosis of ADHD (*id.* at p. 5). The CSE also recommended adaptive physical education in a 6:1+1 environment and OT (*id.*).

The CSE attached annual goals that were drafted by NPS 1 to the May 2009 IEP (Dist. Ex. 11 at pp. 6-12; *see* Tr. pp. 51-54). The annual goals addressed the student's needs in the following areas: study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, motor, and basic cognition/daily living skills (Dist. Ex. 11 at pp. 6-12). The CSE also incorporated the testing accommodations recommended by NPS 1 (*compare* Dist. Ex. 11 at p. 15, *with* Dist. Ex. 8).

According to the May 2009 IEP, the CSE recommended a 12-month program for the student and placement at NPS 1 in a 6:1+1 classroom "combined type for educational purposes only" with related services of speech-language therapy, counseling, and OT (Dist. Ex. 11 at pp. 1, 15). The parents testified, however, that at the May 2009 CSE meeting, the CSE advised them that NPS 1 had not been "approved" and therefore, NPS 1 could not be written into the student's 2009-10 IEP as the recommended placement and that the student's "case" had to be sent to the "CBST" (Tr. pp. 255-61; *see* Parent Ex. I at pp. 1, 3-4).⁸

On June 5, 2009, shortly after the May 2009 CSE meeting, the parents sent an e-mail to NPS 1 to inquire about the information they received at the May 2009 CSE meeting that NPS 1 "was not approved for the summer and that [the student's] case ha[d] to be sent to CBST" (Parent Ex. I at pp. 1, 3-4). Confused by the information presented at the CSE meeting, the parents sought clarification regarding whether the NPS 1 program had not been approved for summer 2009 or whether the student had not been approved for a program for summer 2009 (*see id.*). Over the next six days, the parents exchanged e-mails with parents of other NPS 1 students and with the director of NPS 1 about this issue (*see id.* at pp. 1-4; Tr. pp. 262-63). In a series of e-mails dated June 9 and 10, 2009, the NPS 1 director advised the parents that NPS 1 had been "approved" for 12-month programs for "k[indergarten] to grade 3," which included summer programs; the CSE should not have sent the student's 2009-10 IEP to the CBST; and further, that the parents should request an impartial hearing (Parent Ex. I at pp. 2-4). The parents responded, and indicated that the district had until June 15th to send the student's IEP and that they would request an impartial hearing the following week (*id.* at p. 4).

By due process complaint notice dated June 17, 2009, the parents requested an impartial hearing and agreed to waive the resolution session (Dist. Ex. 2). The parents alleged that the district failed to provide a completed copy of the student's IEP developed at the May 2009 CSE meeting; that during the two years the student previously attended NPS 1, the student failed to make meaningful progress, and NPS 1 failed to meet the student's needs; and that the district failed to offer the student a free appropriate public education (FAPE) on procedural and substantive

⁸ "CBST" refers to the district's Central Based Support Team (*see* Tr. pp. 21-24; Parent Ex. A at p. 2).

grounds (id.). As relief, the parents proposed placing the student in a Lindamood Bell program during July and August 2009 for an "intensive reading remediation language based program," and requested that the district make direct tuition payments for the summer program (id.). The parents also requested tuition reimbursement or the issuance of a Nickerson letter for the 2009-10 school year (id.).

After learning that the parents had not yet received a copy of the student's 2009-10 IEP developed at the May 2009 CSE meeting, the district mailed a second copy of the IEP to the parents on June 25, 2009 (Tr. pp. 46-49, 306-08; Dist. Ex. 15 at p. 4).

On or about June 27, 2009, the parents received a copy of the student's 2009-10 IEP developed at the May 2009 CSE meeting (Parent Ex. B at p. 2). Upon receipt of the IEP, the parents were "surprise[d]" to learn that the IEP recommended placing the student at NPS 1 (id.; see Dist. Ex. 11 at p. 1). On July 1, 2009, the parties conducted a resolution session via telephone, but a resolution was not achieved (Tr. pp. 265-69; Parent Ex. B at p. 2).

On July 6, 2009, the CSE reconvened at the parents' request (Parent Ex. J at pp. 1-2). The following members attended the July 2009 CSE meeting: a district representative, a district school psychologist, a district special education teacher, a district school social worker, an additional parent member, and the student's mother (id. at p. 2). The CSE did not make any changes to the student's 2009-10 IEP developed at the May 2009 CSE meeting, except to note in the IEP that the student's recommended services had been deferred to the "CBST," and to include an additional page titled "Promotion Criteria" in the IEP (id. at pp. 1-2, 16; Tr. p. 270; compare Dist. Ex. 11 at pp. 1-15, with Parent Ex. J at pp. 1-16).

By amended due process complaint notice dated July 7, 2009, the parents maintained that the district failed to offer the student a FAPE for summer 2009 based upon procedural and substantive grounds (Parent Ex. B at p. 1). The parents alleged that the student presented with "severe reading weaknesses" resulting from "severe phonological weakness and an inability to distinguish vowel sounds" (id. at p. 2). According to the parents, the student's reading difficulties were further compounded by his "limitations in working memory," which affected the student's ability to "keep phonemic information in mind while processing it" (id.). The parents alleged that at the May 2009 CSE meeting, the CSE deferred the student's placement for the 2009-10 school year to the CBST, but that upon receipt of the 2009-10 IEP on June 27, 2009, the IEP contained a recommendation to place the student at NPS 1 (id.). The parents advised that the student had been placed in an eight-week Lindamood Bell program and sought tuition reimbursement for the program (id. at pp. 1-3). In addition, the parents requested reimbursement for the privately obtained psychoeducational evaluation and either the provision of direct transportation or reimbursement for the costs of the student's transportation to the eight-week Lindamood Bell program (id.).

By letter dated August 14, 2009, the parents received notification that NPS 2 had accepted the student for the 2009-10 school year (Dist. Ex. 16). On August 31, 2009, the CSE reconvened (Parent Ex. K at p. 1). The CSE did not make any changes to the student's 2009-10 IEP developed at either the May or July 2009 CSE meetings, except to recommend placement at NPS 2 in a 10:1+1 classroom (compare Parent Ex. K at pp. 1-11, with Dist. Ex. 11 at pp. 1-15, and Parent Ex. J at pp. 1-16).

On September 16, 2009, the parents prepared a second amended due process complaint notice, which repeated, verbatim, the allegations contained in the July 7, 2009 amended due process complaint notice, and added new information (compare Parent Ex. A, with Parent Ex. B). In particular, the parents added that the student had been placed in a Lindamood Bell program for "the 2009-2010 academic year" and that the parents were also seeking reimbursement for that placement (Parent Ex. A at pp. 1, 3). In addition, the parents asserted that the student made progress in the eight-week Lindamood Bell program, and thus, the program was appropriate to meet the student's educational needs (id. at p. 2).

On January 19, 2010, the parties proceeded to an impartial hearing that occurred over the course of three, nonconsecutive days and concluded on May 11, 2010 (Tr. pp. 1, 96, 227). By decision dated August 18, 2010, the impartial hearing officer determined that the district offered the student a FAPE for the 2009-10 school year (IHO Decision at pp. 14-18). The impartial hearing officer found that although the May 2009 CSE failed to include an additional parent member, the procedural violation did not result in a "loss of educational opportunity or seriously infringe on a parent's participation in the creation or formation of the IEP," and therefore, did not rise to the level of a denial of a FAPE (id. at pp. 15-16).

The impartial hearing officer then analyzed the substantive appropriateness of the student's 2009-10 IEP (IHO Decision at pp. 16-18). Initially, the impartial hearing officer found that the IEP "accurately portrayed" the student's "unique profile" (id. at p. 17). The impartial hearing officer also found that contrary to the parents' assertion that the May 2009 CSE deferred the student's placement for the 2009-10 school year to the CBST, the May 2009 IEP submitted into evidence contained a recommended placement at NPS 1 for the 2009-10 school year, and further, that district witnesses testified that NPS 1 "held a seat open for the student for the summer of 2009" (id.). In addition, the impartial hearing officer found that the parents' rejection of the district's offer to provide a tutor to the student for individualized instruction during summer 2009 while he attended NPS 1 was "ambiguous" because the parents "perceived scheduling problems due to the student coming home late from [NPS 1], although [the student] did not attend [NPS 1] during that summer" (id.). The impartial hearing officer also found that the parents placed the student at Lindamood Bell only after receiving information that it was a "better program," and thus, the decision to unilaterally place the student during summer 2009 was not "based upon the inappropriateness of [NPS 1]" (id.). The hearing officer concluded that the recommended placement at NPS 1, along with the additional services of a tutor during summer 2009, was "reasonably calculated for the student to receive educational benefit" (id. at p. 18). Moreover, the hearing record indicated that the parents were satisfied with the student's then-current placement at NPS 2, and the hearing record was devoid of evidence to conclude that the student's placement at NPS 2 was not appropriate (id.). Therefore, the impartial hearing officer determined that the district sustained its burden to establish that the student's 2009-10 IEP offered the student a FAPE, and specifically, that the summer placement recommended for the student offered the student a FAPE (id.).

Next, the impartial hearing officer concluded that the parents failed to inform the district of their "disagreement with the proposed placement and [their] intent to place the student in a private school at public expense prior to such removal, ten business days before" (IHO Decision at p. 18). The impartial hearing officer denied the parents' request for reimbursement for the costs

of the student's Lindamood Bell program during July and August 2009, as well as the related transportation costs (id. at p. 19).

On appeal, the parents contend that the impartial hearing officer erred in finding that the district offered the student a FAPE for the months of July and August 2009.⁹ The parents argue that NPS 1 was not an appropriate placement for the student because the student failed to make meaningful progress while attending NPS 1 during the previous school years, and further note that the district's failure to recommend NPS 1 as a placement for the remainder of the 2009-10 school year is evidence that NPS 1 was not an appropriate placement for the student. In addition, the parents assert that the Lindamood Bell program conferred educational benefits to the student, as indicated by the student's progress in vocabulary, word attack, word recognition, oral language comprehension, reading fluency, and mathematics during July and August 2009. Finally, the parents contend that the impartial hearing officer erred in finding that the parents failed to provide the required ten-day notice. As relief, the parents seek to set aside the impartial hearing officer's decision, and request an order finding that the Lindamood Bell program during July and August 2009 was appropriate, as well as an order directing the district to reimburse the parents for the full costs of their son's Lindamood Bell program.

In its answer, the district asserts that the impartial hearing officer correctly found that the district offered the student a FAPE for the 2009-10 school year and timely recommended a placement at NPS 1, including during the months of July and August 2009. In addition, the district contends that the student made progress at NPS 1 during second grade. The district also argues that the parents failed to sustain their burden to establish that the Lindamood Bell program was appropriate to meet to the student's needs, and in fact, the hearing record establishes that the 1:1 instruction at Lindamood Bell did not constitute the student's least restrictive environment (LRE). Finally, the district contends that equitable considerations do not support an award of reimbursement in this matter. Thus, the district seeks to uphold the impartial hearing officer's decision in its entirety and to dismiss the parents' petition.

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

⁹ In their petition, the parents assert that the impartial hearing officer erred in denying their request to be reimbursed for the costs of the student's Lindamood Bell program "for the months of July and August of the 2009-2010 school year," and affirmatively assert in a footnote that they "are not appealing the remaining portion of the decision" (Pet. at p. 2 n.1).

render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Turning to the parents' appeal, I disagree with the impartial hearing officer's determination that the district sustained its burden to establish that it offered the student a FAPE during July and August 2009. As noted above, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][1], [a][2], [a][4]; 8 NYCRR 200.4[d][2][i], [2][iii], [2][v]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]). Upon an independent review of the hearing record, I find that the district failed to sustain its burden to establish that the CSE developed an appropriate program for the student because contrary to the impartial hearing officer's decision, the student's 2009-10 IEP does not "accurately portray[]" the student's "unique profile," especially in light of the information contained in the private psychoeducational evaluation and the private speech-language evaluation, which were both available to the CSE at the time of the May 2009 CSE meeting for its review and consideration when developing the student's 2009-10 IEP (Tr. pp. 50-59, 87-90, 254-55, 257-59; compare Parent Ex. D, and Dist. Exs. 13, with Dist. Ex. 11 at pp. 1-15).

With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). The CSE is required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. § 300.306[c][2]; 8 NYCRR 200.4[d][2]). Incumbent with that duty is the mandate that the IEP "shall report the present levels of academic achievement and the functional performance and indicate the individual needs of the student." (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320 [a][1]). Moreover, a CSE is required to "consider" information about the student provided to, or

by, the parents (8 NYCRR 200.4[f][2][ii]; Application of a Child with a Disability, Appeal No. 07-139).

Therefore, as part of the CSE's review, a CSE must consider an evaluation report submitted to the CSE by a parent, provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider private evaluation reports, it is not required to follow their recommendations (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). In determining whether a CSE adequately "considered" a private evaluation report, in the absence of a statutory or regulatory definition, the Second Circuit Court of Appeals has looked to the plain meaning of the term (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993] [finding that an evaluation report was adequately "considered" when it was read by the director of special education, portions of the report were read and summarized for the CSE, and the CSE minutes showed discussion about the issues raised in the report]). In developing the recommendations for the IEP, the CSE must consider "the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessment programs; and any special considerations" (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.324[a]).

A review of the hearing record does not reveal any evidence to suggest that the May 2009, July 2009, or August 2009 CSEs discussed or considered either the privately obtained psychoeducational evaluation report or the privately obtained speech-language evaluation report (see Tr. pp. 1-374; Dist. Exs. 1-16; Parent Exs. A-K). For example, the hearing record does not contain any CSE meeting minutes to describe what transpired during the CSE meetings, and the hearing record does not contain any other documentary or testimonial evidence sufficient to establish that the CSE participants familiarized themselves with the content of the private evaluation reports either prior to or during the CSE meeting (see Tr. pp. 1-374; Dist. Exs. 1-16; Parent Exs. A-K). The special education teacher who attended the CSE meeting testified that she had the private psychoeducational evaluation submitted by the parents, but that she was unsure whether the CSE reviewed it (Tr. pp. 56-57). Despite the district's knowledge about these private evaluative reports, it also appears that the reports were not considered by the CSE because the May 2009, July 2009, and August 2009 IEPs do not contain adequate information regarding the student's identified needs in the areas of reading, phonological processing, mathematics, receptive language, and expressive language, which significantly affect the student's academic performance (see Tr. pp. 50-59, 87-90, 254-55, 257-59; compare Dist. Ex. 11 at pp. 1-15, with Parent Exs. D at pp. 1-9; J-K).¹⁰ Moreover, a CSE is required to "consider" information about the child provided to, or by, the parents (8 NYCRR 200.4[f][2][ii]). Given the CSE's failure to adequately identify the student's needs on his IEP as contained within the private evaluative reports, the CSE also

¹⁰ Pursuant to State and federal regulations, the results of a reevaluation "must be addressed" in a CSE meeting "to review and, as appropriate, revise the student's IEP" (8 NYCRR 200.4[b][4]; see 8 NYCRR 200.4[f][1][iii], [2][ii] [noting that at "[a]ny meeting to develop, review or revise the IEP" a CSE "shall consider" the results of the student's most recent evaluation, and "[i]f appropriate," must revise the IEP to address the "results of any reevaluation conducted pursuant to this part and any information about the student provided to, or by, the parents"]; 34 C.F.R. § 300.324[a][iii]; Application of a Student with a Disability, Appeal No. 08-077; Application of a Child with a Disability, Appeal No. 07-139).

failed to develop sufficient annual goals related to those needs and, under the circumstances of this case, I cannot conclude that the CSE recommended appropriate special education services to address those needs (compare Dist. Ex. 11 at pp. 1-15, with Parent Exs. D at pp. 1-9; J-K). Thus, without an IEP that accurately identified the student's special education needs, the CSE failed to recommend an appropriate placement for July and August 2009, and in this matter, the district failed to sustain its burden to establish how its recommended placement at NPS 1—either with or without a 1:1 tutor—would have met the student's needs in a way that offered the student a FAPE (see Tr. pp. 1-374; Dist. Exs. 1-16; Parent Exs. A-K).

Having found that the district failed to offer the student a FAPE for July and August 2009, I must now determine if the parents sustained their burden to establish the appropriateness of the services obtained by the parents through the Lindamood Bell program in July and August 2009.¹¹ According to the hearing record, the student attended Lindamood Bell between July 1, 2009 and September 9, 2009, and received 128 hours of instruction in the "Seeing Stars" program and 18 hours of instruction in the "Visualizing and Verbalizing" program (Parent Ex. C at p. 1; see Tr. pp. 264-65, 271).

According to the hearing record, Lindamood Bell is a research-based program that develops "the underlying sensory processing necessary for good reading, spelling, comprehension, and math" (Tr. pp. 140-42). The Lindamood Bell program mainly provides 1:1 instructional services for persons five years old through adulthood (Tr. p. 141). Each incoming student receives a diagnostic evaluation in order to develop an individualized program for the student (Tr. pp. 141-42). In this case, the student's diagnostic testing results revealed deficits in phonological processing, phonemic awareness, symbol imagery, and receptive and expressive language (Tr. pp. 144-45; see Parent Ex. C at pp. 1-2). Based upon the student's diagnostic evaluation, the director of Lindamood Bell recommended that the student attend Lindamood Bell for intensive instruction—4 hours per day for 5 days per week, for at least 8 to 12 weeks—and receive instruction through the "Visualizing and Verbalizing" and the "Seeing Stars" programs (Tr. pp. 143-46; Parent Ex. C at p. 3). The "Visualizing and Verbalizing" program was designed to specifically provide "sensory cognitive development of concept imagery" to support the "development of oral vocabulary, oral language comprehension, reading comprehension, written language expression, ability to follow directions, and critical/analytical thinking" (Parent Ex. C at p. 3). The "Seeing Stars" program developed "the ability to visually image sounds and letters within words" to support the "development of phonemic awareness through the multisyllable level, visual memory, word attack, word recognition, spelling, contextual reading (both accuracy and fluency), and reading comprehension" (id.). In addition, the student's diagnostic evaluation at Lindamood Bell revealed that he "may benefit" from additional instruction to "develop his mathematical computation and reasoning skills," and therefore, the director suggested that the student attend the "On Cloud Nine" program following a "retest or during his instruction in language processing" (id.).

At the impartial hearing, the director of Lindamood Bell testified about the student's progress between July 1 and September 9, 2009 (Tr. pp. 149-53). On the Woodcock Reading

¹¹ I note that although the hearing record contains evidence regarding the student's continued attendance at Lindamood Bell between September 9, 2009 and October 28, 2009, the parents did not appeal this portion of the impartial hearing officer's decision (see Pet. at pp. 2 n.1, 6-7, 11).

Mastery Test, the student improved his ability to read nonsense words by "almost a two grade level gain" (Tr. pp. 149-50; Parent Ex. C at p. 1). Similarly, the results of the Slosson Oral Reading Test revealed that the student increased his ability to read real words in a list from a beginning first grade level to approximately the mid-second grade level (Tr. pp. 150-51; Parent Ex. C at p. 2). The director also testified that with respect to spelling, the student improved his ability to spell more words correctly and even when misspelled, the student's spelling "had become far more phonetically accurate" (Tr. p. 151; Parent Ex. C at p. 2). On the Gray Oral Reading Test, the student improved his accuracy, his rate, and his fluency (Tr. pp. 151-52; Parent Ex. C at p. 2). The director also testified that the student's reading comprehension improved as a result of the progress in other areas (Tr. p. 152).

In addition, the private psychologist who conducted the student's private psychoeducational evaluation in January 2009 opined that the student made significant improvements as a result of receiving the Lindamood Bell services (Parent Ex. G). Specifically, she noted that the student's "reading ability in terms of decoding skills and comprehension" had improved one grade level to the mid-second grade level (*id.*). The private psychologist reported that the student "now ha[d] a sight word vocabulary containing 500 words" and that he exhibited "more confidence in his reading" (*id.*). The private psychologist indicated that the student demonstrated significant improvement in the areas of sight word recognition and spelling skills (*see* Parent Ex. H at p. 1). In addition, the private psychologist opined that the student "made great gains in developing his decoding and word attack skills in a short period of time with intensive intervention," noting that the student's decoding skills improved from a kindergarten level to a second grade level (*id.* at p. 3).

Based upon the evidence in the hearing record, I find that the Lindamood Bell program attended by the student during July and August 2009 met the student's significant deficits in reading, including phonological processing, decoding skills, and sight word vocabulary, and receptive and expressive language. Therefore, the parents sustained their burden to establish the appropriateness of the Lindamood Bell program during July and August 2009.

The final criterion for a reimbursement award is the consideration of equitable factors, which are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; *see Carter*, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; *see S.W. v. New York City Dep't of Educ.*, 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], *aff'd*, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; *see also* Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch.

Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA provides that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]; Stevens v. New York City Dept. of Educ., 2010 WL 1005165 [S.D.N.Y. Mar. 18, 2010]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

After reviewing the hearing record, I disagree with the impartial hearing officer's conclusion that the parents failed to inform the district of their "disagreement with the proposed placement and [their] intent to place the student in a private school at public expense prior to such removal, ten business days before" (IHO Decision at p. 18). Notably, the hearing record contains the parents' initial due process complaint notice, dated June 17, 2009, which provided more than ten days notice regarding the parents' concerns with NPS 1 as well as the relief they sought from the district in the form of the costs of the student's program at Lindamood Bell for July and August 2009 (see Dist. Ex. 2). According to the hearing record, the district convened a resolution session on or about July 1, 2009, upon receipt of the parents' June 17, 2009 due process complaint notice, in an effort to resolve the dispute (Tr. pp. 265-69; Parent Ex. B at p. 2). Based upon the foregoing, I find that the parents' June 17, 2009 due process complaint notice substantially complied with the statutory requirements, and allowed the district an opportunity to remedy the parents' objections at least ten days prior to the date that the student was enrolled at Lindamood Bell. Although the district asserts that a due process complaint notice, without the addition of a separate written ten-day notice, fails to fulfill the statutory notice requirement even when filed more than ten days in advance of the parent's unilateral placement of the student, the argument that a parent is required to go through the exercise of providing a duplicative written notice is unpersuasive and not supported by the IDEA. In light of the foregoing evidence and my review of the remainder of the hearing record, I find that equitable considerations support the parents' request for reimbursement for the costs of the student's Lindamood Bell program in July and August 2009.

I have considered the parties' remaining contentions and find that they are without merit and need not be addressed.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision, dated August 18, 2010, is annulled in its entirety; and,

IT IS FURTHER ORDERED that the district reimburse the parents for the full costs of the student's Lindamood Bell program provided to the student during July and August 2009 upon proper proof of payment.

Dated: **Albany, New York**
 November 24, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER