



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-096

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 Board of Education of the North Shore Central School District

Appearances:

Ingerman Smith, L.L.P., attorneys for respondent, Susan M. Gibson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for his son for the 2010-11 school year were appropriate and denied the parent's request for Lindamood-Bell services in reading and mathematics. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the School for Language and Communication Development (SLCD) in a fourth grade 12:2+2 special education class (Tr. p. 77; Dist. Ex. 5 at p. 2). SLCD is a private school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (Tr. p. 78; see 8 NYCRR 200.1[d], 200.7). The student's classification and 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]).

The student is profoundly deaf, has a cochlear implant in one ear and uses an "FM" system throughout the day (Tr. pp. 75, 92, 97; Dist. Ex. 8 at p. 1). He demonstrates difficulty in all areas of auditory function including attention, memory, discrimination, figure ground listening, comprehension, sequencing, following directions, and responding to auditory cues (Dist. Ex. 8 at p. 1). The student is easily distracted; processes information slowly; and requires repetition, clarification, and redirection to complete tasks (Dist. Exs. 5 at p. 1; 8 at p. 2). He also reportedly "has a learning disability," and demonstrates inconsistent motivation levels and poor memory skills (Tr. pp. 76, 200, 217).

The student's educational programs have been the subject of two previous administrative appeals (see Application of a Student with a Disability, Appeal No. 09-035; Application of a Student with a Disability, Appeal No. 10-051). The parties' familiarity with the student's prior educational history is presumed and the educational history described in those appeals will not be repeated herein.

An undated¹ SLCD language and communication profile revealed that in the area of language use, the student exhibited deficits in pragmatic skills, specifically in his ability to participate in a conversation, elaborate on a topic, maintain a topic, negotiate for what he wanted, provide sufficient information to help listeners understand what he meant, and to ask questions when he was uncertain of information (Dist. Ex. 7 at p. 1). The SLCD profile also indicated that the student's language deficits affected his social/emotional skills by limiting him in his ability to use words to express feelings of happiness, pleasure, frustration, and anger (*id.*). With regard to language content and structure, the profile reflected that the student exhibited deficits in 15 of the 21 skills assessed including among other things, limited skills in the areas of following directions, vocabulary, verbal sequencing, word retrieval, problem solving, awareness of multiple meanings, structure of utterances, and comprehension and production of complex utterances (*id.* at pp. 1-2). The student also exhibited significant deficits in the area of information processing, including among other things, limited retention skills, auditory and short term memory, word retrieval skills, and information organizational skills (*id.* at p. 1).

On January 28, 2010, the student's speech-language pathologist at SLCD, who was also his audiologist (speech-language pathologist/audiologist), prepared progress reports for the student's annual review (Dist. Exs. 6; 8). Her speech-language progress report reflected that the student received 30-minute individual speech-language therapy sessions four times per week (Dist. Ex. 6 at p. 1). According to the report, the student demonstrated a "language disorder of form, content and use," which affected the pragmatic, semantic, and syntactic components of his language (*id.*). The speech-language pathologist/audiologist reported that the student managed his cochlear implant and his FM system almost independently, changing batteries and recharging the unit on his own, however, he still required reminders to take his FM transmitter with him when he moved to other classrooms (*id.*). She indicated that the student was able to hear fairly well however required visual cues, repetition of information, a reduced rate of presentation, clarification and explanation, and extra time to respond (*id.*). The speech-language pathologist/audiologist opined that the student's significant delays in receptive vocabulary and processing of complex language were secondary to his delays in sequential memory, syntax, and grammatical skills and were not directly related to his deafness (*id.*). The speech-language progress report also reflected that the student participated in the Fast ForWord "Language to Reading" computer program for 30 minutes per day and that he had made "steady progress," particularly in word analysis, organization, and focus and "slow but steady progress" in organization, focus, and word analysis (*id.* at p. 4). The student had made less consistent progress in listening comprehension and English language conventions (*id.*).

¹ According to the student's SLCD speech-language pathologist, the language and communication profile is typically completed by a student's teacher and speech-language pathologist in December or January and was used to make recommendations for the following school year (Tr. p. 284).

The speech-language progress report also reflected that based on the results of the administration of a battery of tests, the student had made significant progress in phonological awareness and demonstrated improved speech production as well as "slow and steady" progress in various areas of speech and language development (Dist. Ex. 5 at pp. 5-18). However, the speech-language pathologist/audiologist noted that the student's deficits in receptive and expressive language, particularly his limited vocabulary and difficulties with understanding concepts and following directions, understanding and explaining word classes, auditory and reading comprehension, use of syntax, expressing himself in an organized manner, metalinguistics (inferencing), narrative skills, short-term memory, and word retrieval continued to affect the student's ability to communicate and perform academically (id. at p. 5). She recommended the continuation of classroom and testing accommodations for the student for the 2010-11 school year (id.).

The speech-language pathologist/audiologist also prepared a progress report on the student's hearing education services and individual auditory training (Dist. Ex. 8). Her report indicated that the student had been receiving individual hearing education services and auditory training since September 2008 and that he consistently used an FM system throughout the day in the classroom and for "specialty services" (id. at p. 1). According to the speech-language pathologist/audiologist, the student exhibited difficulty in all areas of auditory function including attention, memory, discrimination, figure ground listening, comprehension, sequencing, following directives and responding to auditory cues, even with the assistance of his cochlear implant and FM system (id.). The student's auditory training focused on strategies to enhance the student's auditory skills; on improving his attending, auditory processing, and phonological skills; and on improving his ability to follow oral directions (id. at p. 2). Therapy activities included ensuring that the student's cochlear implant and FM system were functioning properly and used consistently and appropriately in the classroom; auditory memory games; reinforcement of phonological awareness skills such as sound/symbol associations, sound blending, discrimination and final and initial sounds; and reinforcement of curriculum themes and vocabulary (id.). The speech-language pathologist/audiologist reported that the student was making steady progress but experienced "auditory overload" at times, especially when directions became more involved and too much language was presented to him at once (id.). She further reported that the student made adequate eye contact and good use of lip reading cues and that formal testing revealed that he had made progress in several areas of auditory skills including decoding, phonological awareness, auditory comprehension, auditory attention, and the ability to answer questions (id. at p. 3). However, the speech-language pathologist/audiologist indicated that the student continued to require assistance to make use of the hearing provided by his cochlear implant, to attend and listen, to comprehend functional spoken language, and to follow through on orally presented directions (id. at p. 3). The student also required information to be presented to him at a slow rate, repeated, broken down into more manageable pieces, and clarified (id. at pp. 3-4).

A classroom report dated February 2, 2010 from one of the student's SLCD special education teachers indicated that the student had made progress in all academic areas, but that he continued to exhibit language and attending deficits (Dist. Ex. 5 at p. 3). The student was placed in a "small, highly structured setting" and according to the special education teacher, learned best using a multimodal approach with an emphasis on visual cues and prompting (id. at p. 1). A classroom management plan, to which the student responded "positively," was utilized throughout the day to increase the student's attending, task participation, and task completion due to his

variable level of motivation and distractibility (id.) With regard to academics, the report reflected that the student's reading skills were consistently improving (id.). The student used the Recipe for Reading program to address his decoding and encoding needs and the Reading Milestones program for comprehension (id.). The student reportedly demonstrated inconsistent ability to recall details, answer "wh" questions, and make inferences for simple concrete stories and demonstrated an emerging ability to respond to material that required greater abstract thinking or reasoning (id.). Administration of the Woodcock-Johnson III-Tests of Achievement (WJ-III ACH) yielded standard (percentile) scores of 84 (14) in broad reading, and 96 (39) in "basic reading skills" (id. at pp. 1-2). The student's special education teacher indicated that the student exhibited difficulty in the areas of story recall, understanding directions, and reading fluency and performed better on tasks that involved letter-word identification, spelling, word attack, and spelling of sounds (id. at p. 2).

With regard to mathematics, on the administration of the WJ-III ACH, the student achieved a standard (percentile) score of 69 (2) in broad math, at the top end of the very low range (Dist. Ex. 5 at p. 2). The student reportedly demonstrated difficulty in math fluency and applied problems but performed better on tasks involving calculations (id.). The special education teacher reported that the student was working in the fourth grade mathematics curriculum, which she modified with visual aids, manipulatives, teacher-made materials, and hands on activities (id.). Instruction included two and three digit addition and subtraction with and without regrouping, addition properties, place value, comparing/ordering numbers, and graphing (id.). Problem solving skills remained a focus of instruction for the student due to his language deficits (id.). According to the special education teacher, the student continued to make progress in mathematics although he required frequent review of concepts in order to maintain them (id.).

The classroom progress report also reflected that the student participated in a socialization program, which taught and reinforced appropriate communication skills (Dist. Ex. 5 at p. 2). An administration of the Pragmatic Language Skills Inventory (PLSI), a teacher rating instrument that rates classroom, social, and personal interaction yielded a pragmatic language index (PLI) standard score of 69 which indicated that the student's overall performance on the test was in the very low range of functioning (id.). However, the special education teacher reported that the student's socialization skills were emerging and that he demonstrated the ability to initiate conversation, appeared to enjoy conversing with peers, played cooperatively, and made efforts to compromise and collaborate in play (id.). The special education teacher also noted that student was working in the fourth grade social studies and science curricula (id. at p. 2).

As part of the student's triennial evaluation, a district school psychologist conducted an evaluation of the student over four days beginning on February 26, 2010 and ending March 5, 2010 (Dist. Ex. 12 at p. 1). A teacher of the deaf was present during the evaluation to ensure that the student fully understood all directions and to ensure that his hearing devices were functioning properly (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (Integrated Version) (WISC IV) yielded composite scores (percentiles, qualitative descriptions) of 73 (4th, borderline) in verbal comprehension, 104 (61st, average) in perceptual reasoning, 83 (13th, low average) in working memory, 80 (9th, low average) in processing speed, and a full scale IQ of 81 (10th, low average) (id. at p. 2). The district school psychologist indicated that the student's full scale IQ should be viewed only with his index scores, particularly his score on the perceptual reasoning index (id. at pp. 5, 7). According to the school psychologist, the student's

perceptual reasoning score suggested a higher level of functioning in non-verbal intelligence skills which was particularly significant given the student's cochlear implant (id. at p. 7).

Administration of selected subtests of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) by the district school psychologist yielded the following standard scores (percentiles, qualitative descriptions): 78 (7th, below average) in reading comprehension, 94 (34th, average) in word reading, 110 (75th, average) in pseudoword decoding, 72 (3rd, below average) in numerical operations, 81 (10th, average) in spelling, and a basic reading composite score of 101 (53rd, average) (id. at pp. 3, 6, 7). The district school psychologist reported that the results of the WIAT-III administration indicated that the student was performing at or above expectation, based on his cognitive ability, in every academic area assessed with the exception of numerical operations (id.).

On March 8, 2010 the student underwent an occupational therapy (OT) evaluation after his parents expressed concern to the district about his handwriting (Tr. p. 96; Dist. Ex. 13 at p. 1). The student's upper extremity/fine motor functioning was assessed using the Bruinicks-Oseretsky Test of Motor Proficiency, 2nd Edition (BOT 2) and his visual motor/visual perceptual skills were assessed using the Beery-Buktenica Developmental Test of Visual Motor Integrations, 5th Edition (VMI-5) (Dist. Ex. 13 at pp. 1-2). Results from these assessments indicated that the student's fine motor and visual motor integration skills were within the average range, however, the evaluator noted that the student tended to lean close to his paper and that he retraced several letters during the evaluation which affected his speed (id. at pp. 3-4). The evaluator suggested that the student might benefit from a slant board to promote better posture, extra time to complete writing activities, and access to a keyboard (id.).

On April 27, 2010, the Committee on Special Education (CSE) convened to develop an individualized education program (IEP) for the student's upcoming 2010-11 school year (Tr. pp. 84-85). Although the meeting lasted for several hours, the student's IEP was not completed and the CSE adjourned the meeting to another date (Tr. pp. 86; Dist. Ex. 16 at pp. 1-3).

The CSE reconvened on May 20, 2010 to continue the CSE meeting from April 27, 2010 (Dist. Ex. 4). Attendees included the CSE chairperson, a district assistant director of special education, a district school psychologist, a regular education teacher, a teacher of the deaf, a parent member, and both parents (Dist. Exs. 4 at p. 6; 17 at p. 1). One of the student's classroom special education teachers from SLCD, a psychologist from SLCD, and the student's speech-language pathologist/audiologist from SLCD participated by teleconference (Dist. Ex. 17 at p. 1). The CSE recommended school year and extended school year (ESY) programs and services comprised of a 12:2+2 special class at SLCD with two individual 30-minute sessions of auditory training per week in a therapy room, one individual 30-minute session of in-class speech-language therapy per week,² three individual 30-minute sessions of speech-language therapy per week in a therapy

² An SLCD document provides that the student's speech-language therapy consisted of three individual 30-minute sessions per week and one 30-minute group (5:1) session per week (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 9 at p. 1).

room, and one 60-minute session of parent training per month at SLCD (id. at pp. 1-2).³ The resultant May 20, 2010 IEP included program modifications and supports of refocusing and redirection, preferential seating to the side of the student's cochlear implant, an FM unit, Fast ForWord with cochlear implant modification, and access to a word processor (Dist. Ex. 4 at p. 2). Testing accommodations included extended (double) time, directions read aloud, language in directions simplified, on task focusing prompts, masks or markers to maintain place, and a separate location with minimal distractions for State tests, among others (id.). The May 2010 IEP contained 31 annual goals to address the student's needs in study skills, reading, writing, mathematics, speech-language, hearing, health/physical fitness, and socialization skills (id. at pp. 7-12). The IEP also reflected that the CSE considered a general education setting with support services for the student but rejected this option because the student's then-current academic functioning indicated that he required a higher level of special education support (Dist. Ex. 4 at p. 6; see Dist. Ex. 11 at pp. 1-2).

By due process complaint notice dated May 21, 2010, the parent advised the district that he was requesting an impartial hearing (Dist. Ex. 1 at p. 1). The parent alleged that the district's failure to provide the student with Lindamood-Bell remedial services in reading and mathematics during the 2010-11 school year was a denial of a free appropriate public education (FAPE) (id. at pp. 2-3). He alleged further that the district failed to come to the April 27, 2010 CSE meeting prepared with goals for the student's 2010-11 school year (id. at p. 2). The parent also alleged that, at the May 20, 2010 CSE meeting, the CSE members who "voted" not to provide Lindamood-Bell services to the student did not have daily interaction with him (id.). As relief, the parent requested remedial 1:1 reading and mathematics services from Lindamood-Bell (id. at p. 3).

In the district's May 28, 2010 response to the parent's due process complaint notice, the district asserted that the CSE's recommended program offered the student a FAPE (Dist. Ex. 2 at p. 2). The district also asserted that the parent made several incorrect factual assertions regarding what had transpired at the two CSE meetings (id.). The district asserted further that the CSE declined the parent's request for Lindamood-Bell services because the Lindamood-Bell program was not a New York State approved special education program nor did it utilize New York State certified teachers (id. at pp. 2-3).

The impartial hearing began on July 12, 2010 and concluded on July 20, 2010 after three days (Tr. pp. 1, 190, 439, 525).⁴ On September 24, 2010, the impartial hearing officer rendered her decision (IHO Decision at p. 19). The impartial hearing officer determined that the program recommended by the district's CSE in its May 20, 2010 IEP provided a FAPE in the least restrictive environment (id. at pp. 17, 19). She also found that the district's IEP recommended a program that was tailored to meet the student's unique needs and would enable the student to receive educational benefit (id. at pp. 17-18). The impartial hearing officer found further that the parent had participated in the CSE process and that his assertion that he was not afforded meaningful participation was without merit (id. at p. 18). She also found that the record did not support the parent's assertion that the district gave "no real consideration" to teaching approaches (id.). She

³ The student's ESY recommendations for summer 2010 were identical to those recommended for the 2010-11 school year with the exception of speech-language therapy, which was to be provided as four individual 30-minute sessions of speech-language therapy per week (Dist. Ex. 4 at pp. 1-2).

⁴ A summary of the July 14, 2010 prehearing conference was entered into the hearing record (IHO Exhibit 1).

also found that the student's progress reports and formalized assessments demonstrated that the student had progressed in all academic areas (id. at p. 17). As such, she found that the parent's request for additional private tutorial services was not warranted (id. at p. 18).

The parent appeals and asserts that the impartial hearing officer erred in determining that the district's 2010-11 program offered the student a FAPE. The parent asserts that the district predetermined the student's educational program, focused on cost considerations not needs, and refused to consider the Lindamood-Bell Visualizing and Verbalizing program.⁵ The parent also alleges that his participation at the CSE meetings was impeded by the district's limited and predetermined "mindset" not to provide the Lindamood-Bell services requested by the parent. The parent asserts further that the impartial hearing officer lacked the necessary legal background to understand the detrimental effect of predetermination, erred in determining that the district gave fair consideration to the Lindamood-Bell services, and erred in not receiving documentary evidence proffered by the parent.

In their answer, the district asserts that the impartial hearing officer correctly determined that the district sustained its burden to establish that it offered the student a FAPE in the least restrictive environment for the 2010-11 school year and seeks to uphold the impartial hearing officer's decision in its entirety. The district also asserts that the impartial hearing officer correctly limited the issues to the 2010-11 school year and contends that prior school years should not be at issue because these matters were either settled by stipulation, or were fully litigated. The district asserts further that the impartial hearing officer correctly denied the parent's request for "additional private tutorial services." The district further argues that the impartial hearing officer correctly determined that the parent did not establish the student's entitlement to "additional services," and argues that the parent is not entitled to an award of compensatory educational services. The district also asserts that the parent's petition must be dismissed because the notice of intention to seek review was not timely served.

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

⁵ The parent did not appeal the impartial hearing officer's decision with respect to the district's alleged failure to prepare goals in advance of the April 27, 2010 CSE meeting (see Dist. Ex. 1 at p. 2) An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Student with a Disability, Appeal No. 09-095; Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073). The impartial hearing officer did not address this issue and, since this aspect of the impartial hearing officer's decision has become final and binding upon the parties, I will not consider it.

(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 (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).

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]).

Preliminarily, I will address two procedural issues that have arisen on appeal. First, the district alleges that the parent failed to timely serve the notice of intention to seek review because he served it together with the petition for review. State regulations require, in relevant part, that a notice of intention to seek review "shall be personally served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed" (8 NYCRR 279.2[b]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review. Both the hearing record and the answer to the petition for review in this matter were received by the Office of State Review in a timely manner and I decline to dismiss this appeal of the pro se petitioner (see Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 07-123; Application of a Child with a Disability, Appeal No. 05-106; Application of a Child with a Disability, Appeal No. 04-018).

Second, the parent submitted eight documentary exhibits as additional evidence together with his petition. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 09-098; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Several of the documents were letters that were available at the time of the impartial hearing and could have been offered into evidence, and they were either marked for identification but not offered or were offered and not admitted by the impartial hearing officer (Tr. pp. 5-9, 25-28, 56-57). Another document was not prepared until after the impartial hearing concluded (Tr. pp. 519-20). However, none of these documents are necessary in order to render a decision in this appeal and, therefore, I decline to consider them.⁶

⁶ The remaining documents—a copy of a published decision of a State Review Officer, a federal guidance document published in the Federal Register and the parent's post-hearing brief submitted to the impartial hearing officer—need not be admitted as additional evidence because I may either take notice of them or they are already considered part of the administrative hearing record.

Next, I turn to the parent's contention that he was denied the opportunity to participate in the formulation of the student's IEP because the district refused to consider the Lindamood-Bell program.

Federal and State regulations require districts to take steps to ensure that parents are present at their child's IEP meetings and are afforded the opportunity to participate (34 C.F.R. § 300.322; 8 NYCRR 200.5[d]; see Cerra, 427 F.3d at 193; Perricelli, 2007 WL 465211, at *14-15 Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 378-79 [S.D.N.Y. 2006]; see also Paoella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]; A.E. v. Westport Bd. of Educ., 2006 WL 3455096 [D. Conn. Nov. 29, 2006]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford, 569 F. Supp. 2d at 383 ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paoella, 2006 WL 3697318, at *1). The IDEA guarantees an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker, 873 F.2d at 567 [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

In this case the hearing record reflects that the parent attended both the April 27, 2010 and the May 20, 2010 CSE meetings and had the opportunity to express his concerns and opinions both prior to and during the two CSE meetings (Tr. pp. 79-84, 86, 96-97, 102-05, 107-08, 110, 240, 242-43, Dist. Exs. 3 at p. 6; 13 at p. 1; 16 at pp. 2, 3; 17 at pp. 2-3). The CSE discussed the parent's requests for Lindamood-Bell services at both the April 27, 2010 and May 20, 2010 CSE meetings (Tr. pp. 102-04, 107-08, 110, 240, 242-43). The hearing record does not suggest that the parent was precluded from presenting concerns to the district, and there is no basis to find that the district "impeded" or failed to afford the parent the opportunity to meaningfully participate in the development of the student's 2010-11 IEP. The hearing record reflects that any procedural errors asserted by the parent are not supported by the hearing record (see Cerra, 427 F.3d at 193; Grim, 346 F.3d at 381).

Turning to the parent's argument that the impartial hearing officer erred by failing to award Lindamood-Bell services, as more fully described below, the hearing record demonstrates that the district's recommended program was reasonably calculated to provide the student with educational benefit without the addition of remedial services in reading and mathematics from Lindamood-Bell.

The hearing record reflects that at the April 27, 2010 CSE meeting, the CSE spent several hours considering current evaluative data regarding the student that included a January 2010 hearing and auditory training report, a January 2010 speech-language progress report, a March 2010 psychological evaluation report, and a March 2010 OT evaluation report (Tr. pp. 84-87, 219; Dist. Ex. 4 at p. 6). Additionally, testimony by one of the student's special education teachers indicated that although her February 2010 classroom progress report was not specifically reviewed at the April 2010 CSE meeting, she participated in the CSE meeting by telephone and provided information to the CSE based on that report as well as additional information regarding the student since the time of the report (Tr. pp. 218-21). As described above, the special education teacher's classroom report indicated that the student had made progress in all academic areas, the progress

reports developed by the student's speech-language pathologist/audiologist reflected that the student had made significant progress in phonological awareness and demonstrated improved speech production as well as "slow and steady" progress in various areas of speech and language development; and the district school psychologist reported in the student's triennial psychological evaluation report that the student was performing at or above expectation, based on his cognitive ability, in every academic area assessed with the exception of numerical operations (Dist. Exs. 5 at p. 3; 6 at pp. 5-18; 8 at p. 3; 12 at p. 7). According to the testimony of the district assistant director of special education, the CSE also reviewed the recommendations made by SLCD for summer 2010 ESY services, the 2010-11 academic school year program, and related services (Tr. pp. 86-87; see Dist. Exs. 9; 10).⁷ The district's assistant director of special education further testified that the April 2010 CSE thoroughly discussed the parent's request that the student attend Lindamood-Bell all day in summer 2010 (Tr. p. 102; see Tr. pp. 203, 238). The hearing record reflects that the CSE members did not believe that the student's attendance in full day Lindamood-Bell services was an appropriate option because without the SLCD program and related services he would regress in speech, language, and academics (Tr. pp. 103, 203, 240).

When the CSE reconvened on May 20, 2010 to continue developing the student's 2010-11 IEP, it briefly reviewed the information considered at the April 2010 meeting, reviewed the student's then-current levels of performance, and developed annual goals for the student (Tr. p. 106). The CSE also considered the parent's request for Lindamood-Bell after-school services for the student and the hearing record reflects that district assistant director of special education asked all of the CSE members for their opinions regarding the student's need for the Lindamood-Bell services (Tr. pp. 107, 254-55, 308).

The student's special education teacher who participated in the April 2010 and May 2010 CSE meetings testified that the Lindamood-Bell after-school reading and math services were discussed at both the April and May CSE meetings and that the student's goals were reviewed at the May CSE meeting (Tr. pp. 219, 237-39, 242, 243). The special education teacher further testified that at the May CSE meeting, she was asked by the district assistant director of special education whether it would be "appropriate" for the student to attend Lindamood-Bell three times per week for two hour sessions for the summer and for the school year and that she had responded "yes" for both summer and during the school year (Tr. pp. 243-44, 255, 256, 261). She further stated that she believed the services were appropriate because they "were deemed appropriate in the past" and because "any reinforcement, reading reinforcement could be beneficial" (Tr. p. 244). When asked, the special education teacher testified that she believed that the SLCD program provided the student with a "Free Appropriate Public Education" and that he did not need after-school remedial reading services in addition to the program that he received at SLCD to make SLCD an appropriate program for either summer 2010 or the 2010-11 school year (Tr. pp. 247, 248, 250).

Notably, the student's speech-language pathologist/audiologist testified that "[i]t is a well-known approach in speech and language to use a visualizing and verbalizing approach especially for a child who is hearing-impaired and is very visual" and that "using visualization is a right-on program for [the student]" (Tr. p. 332). However, she also testified that, at the CSE meeting, she

⁷ The district assistant director of special education was the CSE chairperson at the April 2010 and May 2010 CSE meetings (compare Dist. Ex. 4 at p. 6, with Tr. pp. 72-75).

stated that she believed that "SLCD was meeting [the student's] needs" although "that didn't mean he couldn't use some extra help" (Tr. p. 308). She testified that she was specifically asked at the CSE meeting if SLCD met the student's needs and that her answer was "yes" (Tr. pp. 308-09). She further testified that at the CSE meeting she was also asked if SLCD could meet the student's needs for 2010-11 and that her answer again, was "yes" (Tr. p. 309). The speech-language pathologist/audiologist further testified that she believed that the IEP that was generated for the student for the 2010-11 school year offered him a free appropriate public education (Tr. pp. 309-10) and that the student did not require 1:1 after-school services in order to make the SLCD program appropriate for either summer 2010 or for the academic school year September 2010 through June 2011 (Tr. p. 310).

Moreover, I note that the recommendations prepared by SLCD staff for the student's 2010-11 ESY and academic school year did not include a recommendation for after-school Lindamood-Bell services or for any additional 1:1 after-school services (Dist. Exs. 9; 10).

The May 20, 2010 IEP reflects that the CSE accurately identified the student's needs in the areas of letter-sound correspondence; receptive, expressive and pragmatic language skills; mathematics; reading; writing; social interactions; and with regard to his bilateral sensorineural hearing loss, and developed annual goals to address the student's needs in each of these areas (Dist. Ex. 4 at pp. 3, 6-12). The May 2010 IEP reflected that the student required an "intensive, small teacher-to-student ratio program provided in a special school environment in order to academically progress" (*id.* at p. 6). Consequently, the CSE recommended a 12-month 12:2+2 special class in a special school with related services of auditory training, speech-language therapy, and parent training (Dist. Ex. 4 at pp. 1- 2).

The hearing record describes SLCD as a comprehensive "language-based" or "language immersion" program, which incorporates an integrated transdisciplinary curriculum that infuses language into every part of the day (Tr. pp. 77-78; Dist. Ex. 18 at pp. 4, 6). Programming at SLCD coordinates academic content areas with 90 minutes of intensive daily reading instruction (*id.* at p. 6). Each classroom is equipped with an FM sound field system to optimize teacher and student voice quality (*id.* at p. 7). According to the hearing record, SLCD special education teachers and related service providers are "certified" (Tr. p. 77). Parent training is described as an "integral part" of SLCD's programs and services and parents are expected to attend parent training classes and observe their children on SLCD's closed circuit video system (Dist. Ex. 18 at p. 3).

In summary, I conclude that the May 20, 2010 IEP was reasonably calculated to confer educational benefits to the student (see T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 418 [2d. Cir 2009]; A.C., 553 F.3d at 171; D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 599 [2d. Cir 2005]). The hearing record shows that the CSE considered all of the available evaluative reports (Dist. Ex. 4 at pp. 4-6; see also Tr. pp. 218-221; Dist. Ex. 5). The CSE identified the student's needs and developed an educational program, related services, and annual goals to address each of these specific needs (Dist. Ex. 4 at pp. 3, 6, 7-12). The hearing record also illustrates that the student has exhibited significant progress in the district's SLCD program (Tr. pp. 114, 224, 227-28, 235, 262-63, 293, 371-75; Dist. Exs. 5 at pp. 1-2; 6 at pp. 2-5; 8 at p. 3; 15 at pp. 1-7). Although the student benefited from the additional Lindamood-Bell services, the hearing record does not support that the student requires these additional services in order to receive a FAPE for the 2010-11 school year (Tr. pp. 114-15, 224-25, 243, 244, 247-48, 250, 256, 261, 308-10, 376-77).

I concur with the impartial hearing officer's finding that the district's program recommendations in the student's 2010-11 IEP offered the student a FAPE. In addition, I find that the hearing record demonstrates that the district's proposed program is consistent with LRE requirements (Dist. Exs. 4 at p. 6; 11 at pp. 1-2; see 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]).

Lastly, I note that the parent requests that a State Review Officer determine that the impartial hearing officer engaged in "incompetence" (see 8 NYCRR 200.21[4][iii]). After reviewing the hearing record in this matter, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and there is no need to modify the determinations of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). I find that the record on appeal, including the impartial hearing officer's 21-page decision does not support a finding of incompetence. Furthermore, while the parent may disagree with the conclusions reached by the impartial hearing officer, his disagreement does not provide a basis for finding the impartial hearing officer incompetent. Accordingly, the parent's request is denied.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 19, 2010**

**JUSTYN P. BATES
STATE REVIEW OFFICER**