



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-122

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

#### **Appearances:**

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

Frishman & Faber, P.C., attorneys for respondents, Jill F. Faber, Esq., of counsel

#### **DECISION**

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

At the time of the impartial hearing, the student had just completed third grade at Villa Maria, where he was unilaterally placed by his parents in September 2009 (Tr. p. 819; see Parent Exs. B; C; Dist. Ex. 17). The Commissioner of Education has not approved Villa Maria as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record indicates that the student has received diagnoses of static encephalopathy, childhood apraxia of speech, oral-motor apraxia, dysarthria, and an attention deficit hyperactivity disorder (ADHD) (Dist. Exs. 45 at p. 5; 53 at p. 7; Parent Ex. G at p. 3). The student is reported to be highly distractible, exhibits language delays in receptive and expressive domains, and has deficits in fine motor skills and sensory integration (Dist. Exs. 26 at p. 9; 45 at pp. 2, 5). The student's eligibility for special education programs and services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The hearing record reflects that the student was initially evaluated at the age of 18 months due to speech and language concerns and subsequently received home-based Early Intervention services including occupational therapy (OT), physical therapy (PT), and speech-language therapy (Dist. Exs. 42 at p. 1; 45 at pp. 2-3). In September 2005, he attended a district half day special

class preschool program in an integrated setting and received OT, PT, and speech-language services (Tr. p. 54; Dist. Exs. 42 at p. 1; 45 at p. 3). For his kindergarten year, the 2006-07 school year, the student attended a district kindergarten "cluster class" and received OT and speech-language therapy (Tr. pp. 44-46).<sup>1</sup> For first grade, the 2007-08 school year, the Committee on Special Education (CSE) recommended that the student's program include resource room services, counseling, OT, and speech-language therapy (Dist. Ex. 51 at p. 1).

During first grade, the parents brought the student to a pediatric neurologist for an evaluation (Dist. Ex. 45). The resultant report dated December 28, 2007 reflected a diagnosis of static encephalopathy, which the pediatric neurologist opined "is manifested by significant delays and deficiencies in speech and language with central auditory processing problems" (*id.* at p. 5). The neurologist also noted the student's difficulties with fine motor skills as evidenced by his dysgraphia and an inability to button or tie shoelaces (*id.*). He further opined that the student exhibited a "significant learning disability" which is affected by the student's ADHD (*id.*). The neurologist recommended speech-language therapy, OT, a special education placement with a small student to teacher ratio, continued psychological support, and medication for the student's ADHD (*id.* at p. 6).

The district conducted reevaluations of the student during winter and spring 2008 (Dist. Exs. 41; 42; 43; 44). On April 14, 2008, the student's special education teacher completed an educational evaluation report of the student's recent achievement testing (Dist. Ex. 43 at p. 1). The special education teacher indicated that the student exhibited difficulty attending during the testing, required prompting to stay on task, and responded to praise and incentives (*id.* at pp. 1, 2). Administration of the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III ACH) yielded standard scores on the reading battery that ranged from the low to the low average range (75 to 88); standard scores on the mathematical battery that ranged from the low to the average range (77 to 92); and standard scores on the written expression battery that ranged from the low to the low average range (75 to 89) (*id.* at pp. 2-4). The special education teacher reported that the student's overall academic skills based on the WJ-III ACH results fell at the 9th percentile just within the low average range; however, his application of those skills was slightly lower at the 7th percentile, in the low range (*id.* at p. 5). Additionally, administration of the Roswell-Chall Diagnostic Reading Test of Word Analysis Skills indicated that the student had mastered naming of capital and lower case letters; needed review for naming and writing consonant sounds; and needed systematic instruction for sight words, digraphs, and blends (*id.* at p. 3). The student's performance on the administration of the Test of Early Written Language-Second Edition, Form A (TEWL-2) reflected percentile ranks of 37 (average range) on the basic writing subtest (measures the functional, tool or mechanical components of writing); 4 (low average range) on the contextual writing subtest (measures the student's ability to generate a writing sample); and 10 (low average range) on the global writing subtest (measures overall written expression) (*id.* at p. 4). The special education teacher indicated that in the classroom the student struggled to complete tasks, remain focused, and express himself (*id.* at p. 5). According to the teacher, although the

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<sup>1</sup> A "cluster class" is described in the hearing record as a kindergarten class in which three to four special education students are supported in the class by an instructional assistant (Tr. p. 44; *see* Tr. pp. 1020-22). A consultant teacher also provides direct services in the classroom to the identified special education students once a week and indirect services one hour per week to assist staff who work in the classroom (Tr. p. 45).

student had mastered some first grade reading skills he continued to need systematic review and required the use of manipulatives for calculations in math (id.).

In spring 2008, a district school psychologist conducted a psychological reevaluation and updated social history of the student (Dist. Ex. 42 at p. 1). During the social history interview, the student's mother reported that the student had received a diagnosis of ADHD and was on his fifth regiment of medication since the beginning of the school year (id. at p. 2). According to the school psychologist, the student presented as a happy, friendly boy who cooperated with testing, but required encouragement, redirection, and positive reinforcement to complete tasks (id.). The student achieved a full scale IQ of 75 in the borderline range of functioning on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) (id. at p. 4). Administration of selected subtests of the Developmental Neuropsychological Assessment Test (NEPSY) also yielded standard scores that fell in the borderline range in the language domain (75) and the memory domain (74) (id.). The May 8, 2008 report further reflected that teacher ratings on the Conners' Rating Scales were significant for hyperactivity, social problems, Conners' ADHD Index and DSM-IV criteria, while the parents' ratings were significant for cognitive problems, hyperactivity, Conners' ADHD Index and DSM-IV criteria (id.).

The student's speech-language pathologist completed a speech and language update dated April 2, 2008 (Dist. Ex. 44 at p. 1). The speech-language pathologist indicated that the student's attention has been variable throughout the school year and that he demonstrates difficulty expressing his thoughts verbally (id.). She noted that the student often repeats words, uses filler words, and has difficulty retrieving words and using proper word order to ask questions (id.). The speech-language pathologist administered standardized testing over the course of six testing dates to evaluate the student's expressive and receptive language (id. at pp. 2-7). In January 2008, the student received composite scores on the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4) in the very low range, a word finding quotient on the Test of Word Finding – Second Edition (TWF-2) in the very low range; and a receptive vocabulary score in the very low range on the Peabody Picture Vocabulary Test – Third Edition Form IIIA (PPVT-III) (id. at pp. 6-7). Administration of the Expressive Vocabulary Test (EVT) in March 2008 yielded a score in the average range and re-administration of the PPVT-III using a different form (form IIIB) in April 2008 also yielded a score in the average range (id.). According to the speech-language pathologist, the student had significantly higher ability to understand vocabulary than to verbally express it and, although both the student's expressive and receptive vocabulary scores improved as a result of his medication change, he continued to present with significant word retrieval difficulty (id. at p. 7).

The student's occupational therapist completed a reevaluation of the student in May 2008 to determine his need for OT services (Dist. Ex. 41 at p. 1). According to the report, the student demonstrated deficits in functional vision abilities, motor planning, postural control, and exhibited an under-aroused proprioceptive system (id. at pp. 1-2). In the classroom, the student demonstrated independent self-help skills, but often required cueing due to impulsivity and decreased organizational skills (id.). The student's fine motor skills were assessed using selected subtests of the Bruininks-Oseretsky Test of Motor Proficiency – Second Edition (BOTS-2) and yielded scores in the below average to well below average ranges (id. at p. 2). The student's visual-motor integration skills were assessed via administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), which yielded scores in the very low range for motor and visual-motor tasks and scores in the average range on visual tasks (id. at p. 3).

On May 29, 2008, the CSE convened to develop an individualized education program (IEP) for the student's second grade, 2008-09 school year (Dist. Ex. 38 at p. 1). The CSE continued the student's classification as a student with an other health impairment and recommended a second/third grade co-teach consultant classroom with related services of OT two times per week, once in a group and once individually, and speech-language therapy twice per week in a group (id. at pp. 1-2). In addition, the CSE recommended an occupational therapy consultation on both a weekly and monthly basis, and a once per week speech-language consultation in the classroom (id.). The CSE also recommended a social skills group one time per week to provide the opportunity for social skills development and to address the student's anxiety level in social and academic situations (id. at p. 2). Program modifications and accommodations included checking for understanding, providing frequent opportunities for movement (every five minutes during writing tasks), a modified curriculum, preferential seating, and refocusing and redirection by all teachers (id.). The IEP set forth testing accommodations that included breaks during extended testing, directions explained, oral directions repeated two times, cues and prompts to stay on task, and modified assessments (id.). The IEP included annual goals in the areas of study skills, reading, writing, mathematics, speech and language, social/emotional, and motor skills (id. at pp. 8-10).<sup>2</sup> The May 2008 IEP reflected that the CSE, including the parents, agreed that the co-teach consultant program with related services would offer the student a program that would meet his needs in the least restrictive environment (LRE) (id. at p. 6).

During the 2008-09 school year, the student attended the district's second/third grade co-teach consultant classroom (Tr. pp. 302-03). In February 2009, the student was administered the Otis-Lennon School Ability Test (OLSAT) (Dist. Ex. 30 at p. 1). The student's total OLSAT score was below average in comparison with typically developing students of the same grade (id.). In late February 2009, the parents discussed their concerns regarding the student's lack of reading progress with his classroom teachers and the student's special education teacher from first grade (Tr. pp. 790-91). As a result, beginning approximately in April 2009, the student received resource room assistance on a building level basis for the remainder of the school year (Tr. pp. 796-97).<sup>3</sup>

In March 2009, the student was reevaluated by the same private pediatric neurologist who conducted the December 2007 evaluation (Dist. Ex. 27; see Dist. Ex. 45). The pediatric neurologist reiterated his diagnosis of static encephalopathy, which manifested itself with impairments of coordinative skills, particularly "fine finger motor coordination," and speech-language deficits (Dist. Ex. 27 at p. 3). The pediatric neurologist also noted that the student had a significant learning disability diagnostic of dyslexia (id.). He recommended that the student be placed in a "highly individualized program" and continue with his current medication to address ADHD (id.).

A private psychoeducational evaluation of the student was conducted over the course of four testing dates in spring 2009 (Dist. Ex. 26 at p. 1). The evaluating psychologist noted that the student presented as highly distractible with limited ability to remain focused on task demands,

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<sup>2</sup> A corrected version of the student's May 29, 2008 IEP was completed on October 27, 2008 which changed the evaluation schedule of the goals to reflect that they were to be evaluated at the end of each marking period (compare Dist. Ex. 38 at pp. 8-10, with Dist. Ex. 33 at pp. 8-10).

<sup>3</sup> Testimony by the student's mother indicated that, although the student received resource room services for the remainder of the school year, these services were not formally added to the student's IEP for the 2008-09 school year (Tr. pp. 796-97, see Tr. pp. 155-56, 972-73, 1009-11).

but responded to incentives to complete the test (id. at p. 3). She further noted that the student advocated for himself at times when he needed clarification of task instructions (id.). In the emotional realm, she noted that the student was a lovely and sensitive boy who was acutely aware of his learning challenges and limited ability to independently overcome them (id. at p. 10). The psychologist concluded that the student demonstrated a language impairment and learning disability and was functioning within the borderline range of intelligence as indicated by his full scale IQ of 77 on the administration of the WISC-IV (id. at p. 9). With regard to academics, the student's performance on the administration of the Weschler Individual Achievement Test – Second Edition (WIAT-II) yielded standard scores that ranged from 60 to 86 (very low range to the low average range of functioning) (id. at pp. 12-13). The psychologist reported that the student's reading, spelling, writing, and math skills were below grade level functioning (id. at pp. 7-8). She noted that the student exhibited limited phonemic skills, had difficulty reading sight words and pseudo-words, and was unable to read a pre-primer narrative passage (id. at p. 10). According to the psychologist, the student's difficulty with word retrieval caused him to gesture and use fillers, false starts, and hesitations in his expressive language (id. at p. 9). The psychologist indicated that the student's inability to remain focused affected his ability to comprehend lengthier pieces of information, to reason, and to recall larger amounts of material (id.). The psychologist further indicated that the student's working memory deficits interfered with his ability to see tasks through to completion (id.). The psychologist opined that the student was able to demonstrate increased capabilities when working in a highly structured environment (id. at p. 10). On or about April 29, 2009, the parents met with the psychologist to discuss her findings (Tr. p. 815).

On May 11, 2009, the parents visited Villa Maria and were provided with information regarding the school's curriculum, support services, and methodologies (Dist. Ex. 1 at p. 6). Shortly thereafter, the student visited Villa Maria for two days during which time he was observed by Villa Maria staff (id.). On June 4, 2009, the student was accepted to Villa Maria for the 2009-10 school year (id.).

On June 9, 2009, the CSE convened for an annual review of the student and to develop his third grade IEP for the 2009-10 school year (Dist. Ex. 21 at p. 1). The resultant IEP continued the student's classification as a student with an other health impairment and recommended a second/third grade co-teach consultant classroom with resource room services three times per week (id.). The CSE also recommended related services of OT twice per week, once individually and once in a group, speech-language therapy three times per week, and a weekly social skills group (id. at pp. 1-2). The June 2009 IEP reflected program modifications and accommodations including checking for understanding, a modified curriculum, preferential seating, refocusing and redirection, and the use of a color overlay as needed for reading (id. at p. 2). Testing accommodations included modified district and class assessments, directions explained, oral directions repeated up to two times, cues and prompts provided to keep on task, tests read (except reading comprehension tests), answers in test booklet, flexible scheduling (2-minute breaks for every 10 minutes of testing), and flexible setting (id. at pp. 2-3). The IEP contained annual goals in the areas of reading, writing, mathematics, speech and language skills, motor skills, and basic cognitive/daily living skills (id. at pp. 9-11). Comments on the June 2009 IEP reflected that CSE members reported tremendous growth during the current year and as such agreed that the co-teach consultant program with resource room and related services would offer the student a program that would meet the student's needs in the LRE (id. at p. 7). The IEP noted that the parents did not report disagreement with the recommendation but indicated that they would "go home and

consider the recommendations and decide if they should make other decisions which were not shared with the committee" (id.).

By letter dated July 27, 2009, the parents notified the district that they were rejecting the student's 2009-10 IEP and would be unilaterally placing the student at Villa Maria for the 2009-10 school year (Dist. Ex. 17). The parents further advised that they would seek transportation and reimbursement for the student's tuition and related services at Villa Maria (id.). The hearing record reflects that the student attended Villa Maria for the 2009-10 school year (Tr. pp. 89, 819; Dist. Exs. 1 at p. 6; 3; 4; Parent Ex. A).<sup>4</sup>

By due process complaint notice dated April 6, 2010, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 and 2009-10 school years and requested an impartial hearing to adjudicate their claim for tuition reimbursement at Villa Maria for the 2009-10 school year (Dist. Ex. 1).

On June 16, 2010, the parties proceeded to an impartial hearing that occurred over the course of six, nonconsecutive days and concluded on August 6, 2010 (Tr. pp. 1, 223, 454, 570, 719, 934). Both parties presented testimonial and documentary evidence at the impartial hearing (Tr. pp. 1-1034; Dist. Exs. 1-72; Parent Exs. A-J). By decision dated November 8, 2010, the impartial hearing officer determined that the district offered the student a FAPE in the LRE for the 2008-09 school year (IHO Decision at p. 22). Reviewing the student's second grade IEP for the 2008-09 school year at the time it was formulated, the impartial hearing officer determined that it was appropriate for the district in May 2008 to recommend changing the student's program to a co-teach consultant program in a mainstream classroom with additional support from a special instructor for math and English language arts (ELA) and a teaching assistant to address his attention needs in social studies and science (id.).

With regard to the 2009-10 school year, the impartial hearing officer concluded that objective evidence supported the parents' position that the student did not make sufficient progress in reading and other academic areas to warrant a continuation of the student's program in third grade during the 2009-10 school year (IHO Decision at p. 24). He cited favorably to the reports of the private pediatric neurologist as well as the private psychologist who evaluated the student in spring 2009, and determined that the student's placement in a general education setting, even in a collaborative model, did not provide him with the level of individualized and structured support that was recommended by these private evaluators (id. at p. 26). The impartial hearing officer also declined to find that the student received a FAPE on the basis that the student progressed toward, or met some, modified curriculum objectives (id.). He found that the student required increasing amounts of special education services, program modifications, and test accommodations to function in the general education setting; and notwithstanding those supports, the student suffered anxiety and a decline in self-esteem (id. at p. 27). For these reasons, the impartial hearing officer concluded that the district did not offer the student a FAPE for the 2009-10 school year (id.).

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<sup>4</sup> On or about August 11, 2009, the district provided the parents with a "corrected copy" of the student's June 9, 2009 IEP indicating that the student was parentally placed outside the district (Dist. Exs. 12; 13). On or about August 26, 2009, the district again sent the parents the same corrected IEP that was sent to them on August 11, 2009 (Tr. p. 160; Dist. Exs. 8; 9).

In evaluating the parents' unilateral placement, the impartial hearing officer concluded that the parents met their burden to show that Villa Maria was appropriate for the student (IHO Decision at pp. 28-29). He noted that Villa Maria provided a small class, special education program with small group and individualized instruction, which was recommended by the private evaluators in spring 2009 (*id.*). The impartial hearing officer further determined that the student made significant progress at Villa Maria and that Villa Maria addressed the student's emotional needs (*id.* at p. 30). He declined to find that Villa Maria was too restrictive of a program for the student, noting that the student's need for a small class, special education program far outweighed the benefit the student would receive from interaction with non-disabled peers, particularly given that the student did not succeed in the district's co-teach consultant class (*id.* at p. 31). He also determined that "it appear[ed] [the student] was adversely impacted educationally by integration with higher functioning non-disabled peers and felt 'dumb' in the mainstream setting" (*id.*). Lastly, the impartial hearing officer found that the parents cooperated with the district and that there were no equitable reasons for denying or limiting tuition reimbursement (*id.* at p. 32). Accordingly, he ordered the district to reimburse the parents for the student's tuition at Villa Maria for the 2009-10 school year (*id.* at p. 33).

This appeal by the district ensued. The district asserts that it offered the student a FAPE for the 2009-10 school year. The district alleges that the impartial hearing officer misapplied the standard for determining a FAPE and erred by invalidating the 2009-10 program based on his finding of a lack of sufficient progress during the 2008-09 school year. The district asserts that the impartial hearing officer should have made his determination based on whether the district offered a program that was reasonably calculated to provide the student with educational benefits. According to the district, it met this standard as its CSE considered the findings and recommendations of evaluations, and then developed a program that addressed the student's needs in the LRE. Moreover, the district asserts that contrary to the impartial hearing officer's findings, the student made progress in the district's program during the 2008-09 school year. According to the district, the impartial hearing officer erred by giving undue weight to the parents' evidence and dismissing the district's evidence concerning the student's progress. The district further asserts that the impartial hearing officer erred in determining that the student was adversely impacted educationally by a placement in a mainstream class. In addition, the district submits that Villa Maria was an overly restrictive program for the student and that the parents failed to meet their burden to show that Villa Maria was designed to meet the student's unique needs. Lastly, the district alleges that equities do not favor an award of tuition reimbursement because the parents began exploring private placements prior to the June 2009 CSE meeting and did not have the intention of placing the student in public school. The district seeks to reverse the impartial hearing officer's decision to the extent it awarded tuition reimbursement and found a denial of a FAPE for the 2009-10 school year.

In their answer, the parents deny most of the district's assertions and seek to sustain the impartial hearing officer's decision. The parents assert that the impartial hearing officer's decision was legally sufficient and based on the facts before him. They also argue that the impartial hearing officer correctly held that the district did not offer a FAPE to the student for 2009-10 school year because the student did not make progress in the program during the previous year. According to the parents, the district failed to provide any objective evidence to demonstrate the student's progress. Additionally, the parents argue that Villa Maria is the LRE in which the student can

make appropriate progress and equitable considerations support an award of tuition reimbursement.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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



City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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

Initially, I note that the parents did not cross-appeal the impartial hearing officer's determination that the district offered the student a FAPE for the 2008-09 school year.<sup>5</sup> Therefore, that decision is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of

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<sup>5</sup> Although the parents seek reversal of the impartial hearing officer's decision with respect to the 2008-09 school year in the wherefore clause of their answer, I decline to construe the answer so broadly when the parents did not set forth the reasons for challenging the impartial hearing officer's conclusion regarding the 2008-09 school year (see 8 NYCRR 279.4; Application of the Bd. of Educ., Appeal No. 06-074). To the extent that the parents argued in their memorandum of law that the impartial hearing officer erred in finding a FAPE for the 2008-09 school year, I note that a memorandum cannot substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of the Dep't of Educ., Appeal No. 09-051; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031).

a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). With regard to the 2009-10 school year, I find for the reasons set forth below that the district's recommended program and services for the 2009-10 school year were designed to confer the student with educational benefits.

When the CSE convened on June 9, 2009 to develop the student's IEP for the 2009-10 school year, the meeting participants included the assistant director of special education who functioned as the CSE chairperson, a school psychologist, the special education teacher and the regular education teacher from the student's co-teach consultant classroom, the learning specialist who provided the student's "building level" resource room services, the student's speech-language pathologist, his occupational therapist, the building principal, and the student's parents (Dist. Ex. 21 at p. 5). The hearing record reflects that the CSE considered formal evaluations including a spring 2009 private psychoeducational evaluation,<sup>6</sup> a private neurological evaluation dated March 2009, and district evaluations conducted in spring 2008 including an OT evaluation, a psychological evaluation and social history, an educational evaluation, and a speech-language evaluation (Tr. pp. 71, 82, 147, 258; Dist. Ex. 21 at p. 8). According to the hearing record, the CSE also considered feedback from the student's regular education teacher, his special education teachers, related service providers, and the parents (Tr. p. 147). The CSE chairperson testified that the student's related service providers and teachers provided information to the CSE regarding the student's progress, including both continued weaknesses and improved skills, and that the CSE discussed recommendations based on that information as well as information provided by the parents and their two private evaluations (Tr. p. 148; see Tr. pp. 976-77).

The CSE recommended services for the student's 2009-10 IEP that were similar to those received by the student during the 2008-09 school year in that it continued the second/third grade co-teach consultant classroom and formally added the resource room services (three 30-minute group sessions per week) that the student had been receiving on a "building level" basis since April 2009 (Tr. pp. 156, 354-55, 796-97, 812, 972-73; Dist. Ex. 21 at p. 1). According to the CSE chairperson, the CSE agreed that it should make the resource room service a part of the student's IEP upon reviewing the student's progress data that was provided by the resource room teacher (Tr. p. 156). The CSE also determined that the student exhibited continued need in the areas of OT and speech-language and accordingly, recommended OT services similar to the previous year of one 30-minute individual and one 30-minute group (of five) sessions per week and added an additional session of speech-language therapy so that the student would receive three 30-minute group (of five) speech-language sessions per week for the 2009-10 year (compare Dist. Ex. 21 at

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<sup>6</sup> The June 9, 2009 IEP states that the CSE based its decisions upon, among other things, a psychoeducational evaluation dated April 20, 2009 and a psychoeducational evaluation dated March 19, 2009 (Dist. Ex. 21 at p. 8). The hearing record contains a private psychological evaluation which reflects four dates of examination beginning on March 19, 2009 and ending on April 20, 2009 (Dist. Ex. 26 at p. 1).

p. 1, with Dist. Ex. 33 at pp. 1, 2).<sup>7</sup> The June 2009 CSE continued its recommendation that the student participate in a social skills group twice per month in a whole class setting and twice per month in a small group during lunch or recess (Dist. Ex. 21 at p. 2). The CSE chairperson testified that the June 2009 CSE discussed the student's needs in each area and generated goals based on the information presented by the student's teachers, his related service providers, and parents (Tr. pp. 153-54). Testimony by the student's special education teacher indicated that the CSE in this case discussed each goal individually (Tr. p. 979).

In addition to the program modifications and accommodations that the student received during the 2008-09 year, the June 2009 IEP reflected the addition of the use of a color overlay as needed for reading (Dist. Ex. 21 at p. 2). Additions to the student's 2008-09 testing accommodations included tests read (except on reading comprehension tests), answers in test booklet, and flexible setting if anxiety and/or distractibility levels are significant (id.). According to the CSE chairperson, the program modifications and accommodations in the June 2009 IEP were based on what had been utilized and needed during the student's second grade year, what the student's continued needs were, and what accommodations he would need in third grade (Tr. p. 158). The student's regular education teacher testified that she believed the supports that were recommended by the CSE were sufficient to allow the student to make progress in third grade because he had received those supports during his second grade year and she "saw the progress that [the student] had made in [her] classroom" (Tr. p. 331).

The impartial hearing officer noted that the district's recommendation for the student for the 2009-10 school year was premised on its assessment that the student had made satisfactory progress during the 2008-09 school year, and therefore a similar program would be appropriate for the student for the 2009-10 school year (IHO Decision at p. 24). The impartial hearing officer disagreed with the district, as he determined that the student did not make sufficient progress in the district's program during the 2008-09 school year to warrant a continuation of the program for the 2009-10 school year (IHO Decision at pp. 24-26). However, a student's academic progress must be viewed in light of the limitations imposed by the student's disability (Rowley, 458 U.S. at 202, n.25). Contrary to the impartial hearing officer's determinations, I find that the hearing record indicates that the student did make progress commensurate with his ability in the district's program during the 2008-09 school year.

According to the CSE chairperson, the special education teacher brought student work samples to the June 2009 CSE meeting and reported to the CSE the student's increased ability to decode CVC (consonant/vowel/consonant) words and words with blends and digraphs, the student's substantial increase in his sight word vocabulary, that he had progressed from a level 4 to a level 10 DRA,<sup>8</sup> that he was beginning to compute with regrouping although he required

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<sup>7</sup> The hearing record indicates that the "consultation" services that were reflected in the student's 2008-09 IEP relating to OT and speech-language therapy were not listed in the student's 2009-10 IEP because the consultation was built into the co-teach program for the 2009-10 school year via weekly meetings between the special education teacher and the related service providers and bi-monthly meetings with the whole team (Tr. pp. 157, 173, 264, 407; Dist. Ex. 33 at pp. 1-2).

<sup>8</sup> DRA indicates the Developmental Reading Assessment, which the district special education teacher explained was used by the district to assess the student's reading progress, decoding, and reading comprehension (Tr. p. 968).

prompts, that he was beginning to benefit from prewriting strategies, that he was demonstrating the ability to express himself in three sentences given prompts for appropriate word order, and that the teachers had seen a decreased level of anxiety throughout the school year (Tr. pp. 149-50). The CSE chairperson testified that the student's occupational therapist reported to the CSE that the student had improved his letter formation and his ability to maintain attention to table top activities and that the speech-language pathologist reported to the CSE that the student had made progress in, among other things, responding to questions and formulating more complex sentences (Tr. pp. 150-51). The abilities documented in the present levels of performance on the student's June 2009 IEP are consistent with the CSE chairperson's testimony (Dist. Ex. 21 at pp. 3-4).

The student's special education teacher provided a detailed description of how she worked with the student toward mastering each of his 2008-09 IEP academic goals, how she measured the student's progress toward each of these goals, and also reflected that the student ultimately met all of his 2008-09 academic goals by the end of the 2008-09 school year (Tr. pp. 952-63; see Dist. Ex. 71 at pp. 2-3). For example, to address the student's goal to identify and use 50 sight words, the teacher testified that she initially assessed the student's sight word vocabulary at the beginning of the school year, then gave him words to practice each week, adding in new words as the student was ready for them, while reviewing the old words (Tr. p. 953). She indicated that she used the Dolch Word list to select the words she worked on with the student, beginning with pre-primer words, and that the student progressed from pre-primer to primer, and then to first grade level words (Tr. pp. 953-54). The student increased the number of sight words that he was able to read from approximately two dozen in September 2008 to more than one hundred sight words by the end of the 2008-09 school year (Tr. pp. 946, 954; Dist. Ex. 21 at p. 3). With regard to the student's goal to pronounce the short vowel in and read CVC words given a list of 20 words, the special education teacher indicated that she started out the year working with the student on "short a" CVC words, and that the student's rate of growth was slow at the beginning of the year, but that he made consistent growth mastering the short vowel sounds (Tr. p. 955). She indicated that sometime around January or February the student had mastered the short vowel sounds and they then moved forward to address words with blends and digraphs with short vowel sounds which enabled the student to read much more (Tr. p. 955). There is also indication in the hearing record that the student's progress in decoding had a positive effect on his comprehension goal (see Tr. pp. 955-57). According to the special education teacher, she first had to work on the student's comprehension goal by having him listen to a story, (rather than read) because he could not read well enough independently (Tr. pp. 955-56). As the student was able to read more, he was then able to answer questions and give specific details from the stories that he had read himself and he achieved his comprehension goal, on his reading level, with moderate assistance (Tr. pp. 955-57; Dist. Ex. 71 at p. 2).

Testimony by the student's regular education teacher also supports the conclusion that the student progressed during the 2008-09 school year. She testified that the student showed growth during the 2008-09 year in reading, math, science, and social studies, based on his modified curriculum, and that the student's scores on his second grade report card were an accurate reflection of his progress (Tr. pp. 327, 328). Her testimony indicated that toward the end of the 2008-09 school year, the student was able to incorporate more detail and examples into his writing and he could better organize his ideas (Tr. pp. 330-31). The regular education teacher believed that the student understood all the content that was taught in social studies and science (id.). She testified

that the student had made progress academically and socially, was ready for third grade, and would have adjusted well to the third grade classroom in the modified program (Tr. p. 331).

With regard to the student's progress in the area of speech-language, the student's speech-language pathologist testified that she "saw a lot of progress in [the student's] second grade year," that at the beginning of the 2008-09 school year the student was "far more disorganized in posture, his language, his social ability," and that they worked toward increasing the organization of the student's expressive output (Tr. p. 252). The student's occupational therapist reported to the June 2009 CSE that the student had demonstrated progress toward his OT goals (Tr. p. 403). Specifically, she reported that the student had demonstrated improved attention for tabletop tasks especially following movement activities, that his accuracy in letter formation had improved including proper placement of letters on the line, that he had increased his ability to perform multistep directions to include three to four steps, and that he was demonstrating the ability to work well in a group setting (Tr. pp. 403-04).

Furthermore, the student's progress on his IEP goals for the 2008-09 school year was summarized in a progress report (Dist. Ex. 71 at pp. 1-4). The progress report reflected that by the end of the 2008-09 school year, the student had met all but one of his eighteen IEP goals and was progressing satisfactorily toward the unmet goal (*id.*). In addition, the student's successes during the 2008-09 school year were documented in his end of the year report card for the 2008-09 school year (*see* Dist. Ex. 19). The report card reflected that he had primarily earned ratings of "consistent" for skills in the areas of "behaviors that promote learning," "listening and speaking," and "personal and social growth" (*id.* at p. 1). With regard to academics, the student earned ratings of "developing" or "developed" in all subjects (*id.* at pp. 2-3). The student also earned ratings of "consistent" with regard to effort and growth for all subjects (*id.*). Teacher comments on the report card noted that the student's grades were based on prioritized skills, concepts, and content and indicated that he had grown in all academic areas and was working with greater independence (*id.* at p. 4).

In assessing the student's progress, the impartial hearing officer referred to evidence that he believed indicated that the student had made insufficient academic progress during the 2008-09 school year. For example, he relied on unclear testimony to conclude that the student had not made progress in reading according to his DRA levels (Tr. pp. 316-17, 790-91, 796-97, 805, 972; IHO Decision at p. 24), but did not rely on other indicators of reading progress as noted in detail above (*see, e.g.*, Tr. pp. 952-63; Dist. Exs. 19 at p. 2; 71 at pp. 2-3).

The impartial hearing officer also referred to the private psychoeducational evaluation conducted in spring 2009 and noted that the student continued to have difficulty computing single digit addition problems while in the second grade (IHO Decision at p. 25; *see* Dist. Ex. 26). He noted that the student's performance on the February 2009 administration of the standardized OLSAT<sup>9</sup> yielded scores that indicated that the student was functioning on a very low level of proficiency as compared to his peers and also noted that because the student's curriculum was modified it did not consist of grade level work and therefore indicated that the student continued

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<sup>9</sup> I note that although the impartial hearing officer indicated that the student's below average scores on the OLSAT demonstrated that the student was experiencing substantial academic delays, the OLSAT measures reasoning skills that are related to school-learning ability and does not provide a measure of a student's academic achievement (IHO Decision at p. 26; Dist. Ex. 30 at p. 1).

to lag behind his peers in mastering academic skills (IHO Decision at pp. 25-26). However, these statements do not support a finding that the student did not make progress commensurate with his ability. The private psychoeducational evaluation conducted in spring 2009 yielded a full scale IQ of 77 and the district's testing in May 2008 yielded a full scale IQ of 75, both assessments indicating that the student's overall intellectual functioning was within the borderline range (Dist. Exs. 21 at p. 4; 26 at p. 3). The academic achievement testing reflected in the June 2009 private psychoeducational evaluation indicated that the student scored in the borderline range in word reading, pseudoword decoding, numerical operations and slightly higher, in the low average range, in math reasoning (Dist. Ex. 26 at p. 12). While it is understandable that the parents wanted the student to have made more progress, these test results indicate that the student's academic achievement was commensurate with his intellectual ability and further indicate that the student had maintained his level of functioning while progressing from one year to the next. Thus, the impartial hearing officer erred in his assessment that the student was not making sufficient progress in the co-teach consultant program.

Based on the foregoing, I find that the June 2009 CSE's recommendation of a second/third grade co-teach consultant classroom with resource room service, OT, speech-language therapy and a social skills period was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2009-10 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Contrary to the impartial hearing officer's determination, I find that the hearing record demonstrates that the student was able to make progress commensurate with his ability in the co-teach consultant classroom setting, with the modifications and supports recommended by the CSE during the 2008-09 school year (see, e.g., Tr. pp. 149-51, 252, 327-31, 403-04, 952-63; Dist. Exs. 19; 71), and therefore it was appropriate for the district to offer a similar program to the student for the 2009-10 school year (Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 367-68 [S.D.N.Y. 2010]; Schroll v. Bd. of Educ., 2007 WL 2681207, at \*5 [C.D.Ill. Aug. 10, 2007]).<sup>10</sup> I also find that the hearing record demonstrates that the district's proposed program is consistent with LRE requirements (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]). Having determined that the district offered the student a FAPE, I need not reach the issue of whether Villa Maria was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

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

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<sup>10</sup> I note that the modifications to the student's curriculum were not so extensive that no substantive correlation existed between the general education classroom activities and the student's activities.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the impartial hearing officer's decision dated November 8, 2010 is hereby annulled to the extent that it found a denial of a FAPE for the 2009-10 school year and ordered the district to pay for the student's tuition costs at Villa Maria for the 2009-10 school year.

**Dated:**           **Albany, New York**  
                      **February 7, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**