



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-126

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Neha Dewan, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2010-11 school year was not appropriate. The appeal must be sustained.

At the time of the impartial hearing, the student was attending seventh grade in a 12:1+3 special education setting at the School for Language and Communication Development (SLCD) and receiving occupational therapy (OT), speech-language therapy, counseling, and physical therapy (PT) (Tr. pp. 4-5; Dist. Exs. 3; 4 at p. 1). SLCD has been approved by the Commissioner of Education as a nonpublic school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]; Dist. Ex. 1; see Tr. pp. 4-5; see also Dist. Ex. 4 at p. 1).

The student exhibits global developmental delays in the areas of language, cognition, gross motor, and fine motor skills (Dist. Exs. 9-11; 13; 15-16). The hearing record reflects that the student has received diagnoses of a "severe verbal apraxia," a "mixed expressive language disorder," and an attention deficit disorder (Dist. Exs. 7; 16 at p. 2). The student's reading skills are estimated to be at an upper first grade level and his math skills at a second grade level (Dist. Ex. 4 at p. 3).

In June 2009, the district conducted a psychological evaluation of the student as part of a triennial reevaluation (Dist. Ex. 15). Cognitive assessment results indicated that the student's nonverbal and verbal skills were in the deficient range of intellectual functioning (id. at pp. 2, 4). The evaluator reported that current test results were consistent with both informal observations noted during the evaluation, and previous adaptive behavior assessments that revealed scores in the low range of adaptive skills (id.).

During the 2009-10 school year the student attended SLCD in a 12:2+2 special class and received daily speech-language therapy, twice weekly OT, and twice weekly PT services (Dist. Exs. 9 at p. 1; 10 at p. 1; 11 at p. 1; 13 at p. 1).¹ In December 2009, the district conducted an assistive technology evaluation of the student to assess his ability to use assistive technology to complete written assignments (Dist. Ex. 14). The evaluators recommended that the student use a word processor with word prediction and text-to-speech capabilities to improve his written assignment legibility and independence (id. at p. 5).

A February 2010 classroom report prepared by the student's special education teacher indicated that the student demonstrated limited attending skills and was distractible in both small and large group settings (Dist. Ex. 13 at p. 1). Academically, the student functioned well below grade level in all subjects, and he required a multisensory approach to learning and regular teacher support (id. at pp. 1-2). Socially, the student exhibited a "likable personality;" however, he struggled to communicate with peers and adults due to his limited speech intelligibility (id. at p. 1). The special education teacher reported that the student continued to make "slow and steady progress in most areas," although his difficulty with expressing himself continued to "pose difficulties for him in most situations" (id. at p. 3). She indicated that a "highly structured, small group environment with steady teacher support" was necessary to support the student's academic and social needs (id.).

Also in February 2010, SLCD therapists prepared the student's annual progress reports in the areas of speech-language, OT, and PT (Dist. Exs. 9-11). The speech-language pathologist indicated that the student exhibited delays in all areas of language, with significant weaknesses in the areas of recalling sentences, formulating grammatically correct sentences, defining words, identifying semantic relationships, and answering "wh" questions (Dist. Ex. 9 at p. 2). A language sample revealed that the student produced utterances that were between 1-7 morphemes in length (id. at p. 1). The student's speech intelligibility was judged to be poor in both known and unknown contexts, and he exhibited numerous sound substitutions and frequent groping for articulatory placements (id. at p. 2). The speech-language pathologist reported that she used the Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) approach with the student during therapy to improve his speech production (id.). The occupational therapist reported that the student's therapy sessions focused on improving upper body strength, fine motor skills, visual perceptual/motor skills, and self-help skills (Dist. Ex. 10 at p. 1). Tests of the student's fine manual control and coordination yielded scores in the below average to the well-below average range (id. at p. 2). The physical therapist reported that the student exhibited decreased balance, strength, coordination, and motor planning skills, as well as decreased range of motion and difficulty

¹ The hearing record indicates that the student had attended SLCD for "a number of years" (Dist. Ex. 15 at p. 1; see Tr. pp. 4-5).

maintaining an upright posture (Dist. Ex. 11 at p. 3). Tests of the student's manual and body coordination, and strength and agility yielded scores in the below average range (id.).

In March 2010, an SLCD school psychologist prepared a "Rationale for Counseling" document that indicated the student had become increasingly aware of his weaknesses, and needed the opportunity to increase his self-esteem (Dist. Ex. 12). The SLCD school psychologist opined that the student could benefit from an "appropriate forum to explore issues related to adolescent interactions and to develop age-appropriate coping strategies" (id.).

In a letter dated April 28, 2010, the student's pediatric neurologist reported that the student exhibited severe verbal apraxia, and a "mixed expressive language disorder" (Dist. Ex. 7). In his letter the neurologist stated "[i]t is for this reason that [the student] requires Fast ForWord," and expressed his belief that Fast ForWord would improve the student's auditory processing skills, which in turn, would be expected to improve the student's "ability to produce sounds and words in a predictable fashion" (id.). The neurologist requested that Fast ForWord be provided to the student "in the school setting" (id.).

On May 25, 2010 the CSE convened for the student's annual review and to prepare his 2010-11 IEP (Dist. Ex. 4). Attendees included the parents and a district representative; and by telephone, both an SLCD school psychologist and an SLCD special education teacher (id. at p. 2; see Dist. Exs. 12; 13 at p. 3). For the 2010-11 school year, the May 2010 CSE recommended placement of the student in an approved nonpublic day school in a 12:1+3 special class, and that he receive twice weekly individual OT, twice weekly individual PT, three sessions per week of individual speech-language therapy, and two sessions per week of group speech-language therapy (Dist. Ex. 4 at pp. 1, 15). The May 2010 CSE also recommended two sessions of group counseling for the student (id. at pp. 2, 15).

In a Final Notice of Recommendation (FNR) dated May 25, 2010, the district summarized the recommendations made by the May 2010 CSE regarding the student's special education program (Dist. Ex. 2). On May 28, 2010, the parents signed the FNR, indicating their agreement with the recommended program and services (id.).

In a due process complaint notice dated August 2, 2010, the parents requested an impartial hearing "to resolve the issue of placing the Fast ForWord program on [the student's] IEP" (Dist. Ex. 1).^{2, 3} According to the parents, staff at SLCD had requested to use Fast ForWord with the student, but would not do so unless Fast ForWord was indicated on the student's IEP (id.). The parents requested that the district add the use of Fast ForWord to the student's IEP, and that the district review a letter from the student's pediatric neurologist which stated that "[the neurologist] would like the Fast ForWord program to be implemented" (id.).

By letter dated August 12, 2010 to the CSE, an SLCD speech-language pathology supervisor described the Fast ForWord program as "[a] computer based technology which acoustically changes the physical characteristics of an auditory signal in order to develop temporal

² According to the parents, the CSE chairperson refused their request to place Fast ForWord on the student's IEP; however, it is not clear from the record when the CSE chairperson had denied the parent's request (Dist. Ex. 1).

³ The district's answer, if any, to the parents' request for an impartial hearing was not made part of the hearing record.

integration skills and phonological skills which lead to the acquisition of reading" (Tr. p. 152; Dist. Ex. 6).

In August 2010 the director of SLCD provided the CSE and the student's parents with a progress report indicating the student's progress toward his 2009-10 IEP annual goals and short-term objectives (Dist. Ex. 3).

An impartial hearing convened on September 30, 2010 and concluded on November 1, 2010 after two days of testimony (Tr. pp. 1, 92; IHO Decision at p. 2). During the impartial hearing, the impartial hearing officer denied the district's request to admit four documents into evidence that the district asserted were central to its argument that Fast ForWord was not required on the student's IEP (Tr. pp. 96-102).

In a decision dated November 17, 2010, the impartial hearing officer determined that the district did not offer the student a free appropriate public education (FAPE) (IHO Decision at p. 8).⁴ In reaching this conclusion, the impartial hearing officer determined that Fast ForWord is an assistive technology device as defined under the Individuals with Disabilities Education Act (IDEA) because it improves the functional capabilities of a student with a disability (*id.*). The impartial hearing officer also determined that Fast ForWord was a "critical" component of the student's IEP, since the student was reading approximately six years below grade level (*id.*). The impartial hearing officer then determined that since the CSE did not place Fast ForWord on the student's May 2010 IEP, the student was denied a FAPE (*id.*). The impartial hearing officer ordered the district to amend the May 2010 IEP to include Fast ForWord (*id.*).

The district appeals, asserting that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE. The district contends that: (a) the impartial hearing officer overstepped her authority in making a determination on the issue of FAPE because that point was not raised in the parents' due process complaint notice; (b) the impartial hearing officer failed to articulate a legal basis for her finding of a denial of FAPE; (c) the student was provided a FAPE for the 2010-11 school year; (d) Fast ForWord is an instructional methodology, and as such, the district is not required to mandate its use on the student's IEP; and (e) even if the Fast ForWord program is an assistive technology device, since the student was never exposed to the program it was erroneous to conclude that the program was an essential component of the student's educational program and, therefore the error of not including it in the student's IEP was de minimus.

The parents did not file an answer to the district's petition. Although the parents have not responded to the petition, I am nevertheless required to examine the entire record and make an independent decision based on the entire hearing record (20 U.S.C. § 1415[g]; 34 C.F.R. § 300.510[b][2][i]; *see* 8 NYCRR 279.3).

⁴ The term "free appropriate public education" means special education and related services that-
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

Two purposes of the 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]).

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). 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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 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).

Although an IEP must provide for specialized instruction in the child's areas of need, the IDEA does not explicitly require a CSE to specify methodology on an IEP and, in many cases, the precise teaching methodology to be used by a student's teacher is generally a matter to be left to the teacher (Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46; Matter of a Handicapped Child, 23 Ed. Dept. Rep. 269).

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]).

At the outset, I note that the parents have not challenged as inappropriate any of the recommended annual goals, the amount of special education and related services set forth in the student's IEP, or the district's assignment of the student to SLCD (Tr. pp. 8-9; Dist. Ex. 1). Further, the parents did not challenge compliance with any of the procedural aspects of developing the student's IEP for the 2010-11 school year (*id.*). According to the hearing record, the parents and SLCD staff want to try the Fast ForWord program with the student, due to their belief that the student could benefit from its use (Tr. pp. 5, 6, 8, 12, 119, 131). I note that at the impartial hearing, the district did not object to SLCD's use of Fast ForWord with the student (Tr. pp. 6-8, 79, 211). However, SLCD representatives took the position that the use of any assistive technology device, of which the representatives believed Fast ForWord is an example, can only be implemented if the assistive technology device is specified on a student's IEP (Tr. pp. 8, 130, 150). Contrary to the position taken by SLCD staff, the district argued that Fast ForWord is an instructional methodology, and that unnecessarily placing a specific methodology on an IEP would restrict schools from using appropriate alternative methods, make changing the IEP cumbersome, and possibly cause schools to prolong the use of a potentially ineffective method (Tr. pp. 7-8). The district further argues that an instructional methodology need not be specified on an IEP unless the particular methodology is required for the student to receive a FAPE (Tr. pp. 7, 96-97, 100). The crux of this appeal is whether this student required Fast ForWord on his IEP in order to receive a FAPE.

In this case, the parents did not assert that the May 2010 IEP failed to accurately reflect the results of evaluations that identified the student's needs, establish annual goals related to those needs, or provide for the use of appropriate special education services other than lacking the use of Fast ForWord (see Tr. pp. 8-9; Dist. Ex. 1). Although the parents did not assert any specific procedural infirmities, they noted that the student's pediatric neurologist stated that, due to the student's severe verbal apraxia, the student required the use of Fast ForWord (see Dist. Exs. 1, 7). When developing a student's IEP, the IDEA requires a CSE to "consider" among other things, the concerns of parents regarding enhancing a student's education and the results of the initial evaluation or most recent evaluation of the student (20 U.S.C. § 1414[d][3][A][ii]-[iii]; 34 C.F.R. § 300.324[a][1][ii]-[iii] see 8 NYCRR 200.4[d][2], [f][1]). Additionally the CSE must consider independent educational evaluations obtained at public expense, and private evaluations obtained at private expense provided that such evaluations meet the district's criteria (34 C.F.R. 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 808 F.Supp. 926, 931 [D.Conn.1992]; aff'd, 10 F.3d 87, 90 [2d Cir.

1993] citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see also Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Independent School Dist. No 15, 2010 WL 2132072, at *19 [D. Minn.]; James D. v. Board of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F.Supp.2d 804, 818 [N.D. Ill. 2009]). In this case, the private pediatric neurologist indicated that the student required the use of Fast ForWord due to his severe verbal apraxia, and the hearing record indicates that the May 2010 CSE discussed and rejected specifying Fast ForWord on the student's May 2010 IEP (Dist. Exs. 4 at p. 14; 7). The hearing record supports the conclusion that the CSE considered, but subsequently rejected, the private pediatric neurologist's conclusion that the student required Fast ForWord (Tr. pp. 27-28, 39, 65-66; Dist. Ex. 4 at p. 14).

Turning to the parents' challenge to the district's decision not to add Fast ForWord to the student's May 2010 IEP (Dist. Ex. 1; see Tr. pp. 8-9), I find, as further described below, that a review of the hearing record does not support the impartial hearing officer's determination that Fast ForWord was "a critical component" of the student's IEP, and that the absence of a CSE recommendation for Fast ForWord denied the student a FAPE (IHO Decision at p. 8).

The student's May 2010 IEP identifies his difficulty with attention and distractibility, cognitive and speech-language deficits, and diagnoses (Dist. Ex. 4 at pp. 3-5). Regarding the student's management needs, in the area of assistive technology, the May 2010 IEP reflected a "Fusion with text to speech package, padded case, and Fusion USB jump drive;" and that the student would use a keyboard to complete school work as monitored by the classroom teacher, and use a keyboard to complete homework/research assignments (*id.* at p. 3). The May 2010 IEP also indicated that the student required the use of the PROMPT approach due to his apraxia, and the use of a multisensory/multimodality approach to instruction (*id.*).⁵ The IEP further indicated the use of "strategies that utilize[] acoustical enhancement to improve learning" (*id.*). The CSE incorporated SLCD's draft annual goals in the areas of study skills, reading, social/emotional/behavioral, motor, basic cognitive/daily living skills, writing, mathematics, and speech-language into the May 2010 IEP (*id.* at pp. 6-11). The IEP also contained an assistive technology annual goal (*id.* at p. 12). As noted above, for the 2010-11 school year, the May 2010 CSE recommended placement of the student at SLCD in a 12:1+3 special class, and that he receive twice weekly individual OT, twice weekly individual PT, twice weekly sessions of group counseling and three sessions per week of individual and two sessions per week of group speech-language therapy (Dist. Exs. 3; 4 at pp. 1, 15).

A speech-language pathologist/audiologist from SLCD testified that she had supervised the use of Fast ForWord with approximately 30 students, but that at the time of her testimony, Fast ForWord had not yet been tried with the student (Tr. pp. 125-26, 128-29, 142). Although she stated that Fast ForWord was "not for every child," she opined that based on the student's profile, he was an appropriate candidate for Fast ForWord as it could "possibly" help him improve his processing speed (Tr. pp. 127-29). The SLCD speech-language pathologist/audiologist also testified that Fast ForWord was not the only way to effectively address the student's language needs, and that she had "no direct evidence" that Fast ForWord would be effective to use with the student (Tr. pp. 130-31).

⁵ Testing accommodations included extended time, a separate location, questions/directions read and reread aloud, use of a calculator, and answers recorded in any manner (e.g. assistive technology) (Dist. Ex. 4 at p. 15).

Both the district's speech-language pathologist and audiologist testified that Fast ForWord is not the only program that addresses auditory processing, speech discrimination, and phonological difficulties, and that there were other programs that would be appropriate and effective (Tr. pp. 21-22, 28-31, 40-41, 45, 49-50, 58-60). After reviewing the student's May 2010 IEP, SLCD's definition of Fast ForWord, the private neurologist's April 28, 2010 letter, both SLCD's February 2010 speech-language and classroom progress reports, and the district's December 2009 assistive technology evaluation report, the district's speech-language pathologist opined that Fast ForWord was not appropriate to use with the student, and that she would not recommend Fast ForWord for him (Tr. pp. 39-40). The May 2010 IEP reflects that the CSE considered including Fast ForWord in the student's IEP; however, determined that the IEP need not indicate a specific reading program (Dist. Ex. 4 at p. 14; see Tr. pp. 198-99).

Additionally, the hearing record reflects that the student exhibited "some" progress described as "slow" and "steady" with the services provided to him; without the use of Fast ForWord (Tr. pp. 129-30; see Dist. Exs. 3; 13). Although the student's 2009-10 special education teacher described the student's reading progress as "inconsistent" and "gradual," she reported the student was "working through" the Wilson Reading System and the Milestones Reading program, which addressed decoding, encoding, and reading comprehension skills (Dist. Exs. 3 at pp. 2-3; 13 at p. 2). The student achieved both of his 2009-10 speech-language annual goals, one relating to comprehension of yes/no questions and the second relating to his ability to attend to "speaker-listener responsibilities," both of which address receptive language and auditory processing skills (Dist. Ex. 3 at p. 5).

I also note that the hearing record reflects that while SLCD staff recommended the use of the Fast ForWord program because the student may receive benefit from its use, and the district did not object to its use with the student, there is no testimonial or documentary evidence in the hearing record which persuades me that the student required the program in order to receive a FAPE (see Tr. pp. 1-214; Dist. Exs. 1-17, 22). Furthermore, as the hearing record shows that the student has not yet used Fast ForWord, any benefit that the student may receive from the use of Fast ForWord would be speculative (Tr. pp. 128-29).

In summary, the hearing record shows that it would not be inappropriate for SLCD to try the Fast ForWord program as one possible option for implementing the student's IEP, but the program is not a necessity for the student.⁶ The "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; 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). In this case, based on the evidence described above, the hearing record reflects that consistent with his cognitive abilities, the student exhibited some degree of progress in reading and language skills without the use of the Fast ForWord program. The hearing record

⁶ Although it does not affect my decision in this case, noticeably absent from the hearing record is a candid explanation of why SLCD personnel believe that the Fast ForWord program cannot be provided to the student unless it is specified on his IEP, when the district has adopted the position that it would be permissible for SLCD to provide the student with Fast ForWord under the existing IEP.

does not show that the student's language and reading needs could be addressed only via Fast ForWord or that the program was required on his IEP to offer him a FAPE. Therefore, the impartial hearing officer's determination that the district was required to set forth Fast ForWord in the student's IEP must be annulled.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated November 17, 2010 is hereby annulled in its entirety.

Dated: **Albany, New York**
 January 21, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER