The University of the State of New York

The State Education Department
State Review Officer

No. 07-008

Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Wantagh Union Free School District

Appearances:
Law Offices of George Zelma, attorney for petitioners, George Zelma, Esq., of counsel

Ingerman Smith, LLP, attorney for respondent, Christopher Venator, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request for reimbursement for educational services and transportation for summer 2005 and the 2005-06 school year. The appeal must be dismissed.

At the start of the April 28, 2006 impartial hearing, the student was 14 years old and attending eighth grade at respondent's school. The student's eligibility for special education programs and classification as a student with a learning disability are not in dispute in this appeal (see 8 NYCRR 200.1[zz][6]).

The student is diagnosed as having a pervasive developmental disorder - not otherwise specified (PDD-NOS), a developmental reading disorder, a developmental arithmetic disorder, and an attention deficit hyperactivity disorder (ADHD) (Tr. pp. 99, 110, 112). She takes medication to improve attention and focus (Tr. p. 99). The student's deficits include a developmental language disorder and auditory processing difficulties, both of which significantly impact her acquisition of basic academic skills (Parent Ex. F at p. 6). She also has significant delays in reading decoding and comprehension, math calculation and concepts, and written expression (Parent Ex. E at p. 3).

As a young child the student exhibited delays in speech and motor development (Tr. p. 207, 329). She received speech therapy through respondent's Committee on Preschool Special Education (CPSE); however, she was declassified as eligible for special education services before entering kindergarten (Tr. pp. 207, 330; Parent Ex. F at p. 1). The student struggled in kindergarten (Tr. p. 207), and as a result petitioners sought an evaluation of the student (Tr. pp. 330-31). The

evaluation revealed learning and language delays (Tr. p. 331). The student was classified as eligible for special education services as a student with speech-language impairment (Parent Ex. F at p. 1). For first grade, the student attended an inclusion program in which she spent half the day in a mainstream classroom and the other half in a self-contained special class (Tr. p. 331). The student remained in respondent's schools throughout elementary school (Parent Ex. F at p. 1).

Petitioners reported that during fourth grade there seemed to be a significant decline in the student's abilities (Tr. pp. 208-09, 332-33). Petitioners approached the student's teachers and later the Committee on Special Education (CSE) chairperson with their concerns (Tr. pp. 333-34). When the student was in fifth grade, petitioners asked respondent for supplemental math and reading services (Tr. pp. 209, 336-37).

The student entered a 15:1+1 self-contained class upon transitioning to middle school in September 2003 (Parent Ex. F at p. 1; see Parent Ex. BB at p. 1). During the 2003-04 school year she received counseling and speech-language therapy (Parent Ex. BB at p. 1). The student also received supplemental reading services, which according to petitioners were unsuccessful (Tr. pp. 337-39; see also Tr. p. 210).

On March 23, 2004 the CSE met for the student's annual review (Parent Ex. D at p. 1). For the 2004-05 school year, when the student would be in respondent's seventh grade, the CSE recommended that the she be placed in a 15:1+1 class for 3 hours and 20 minutes per day with related services of group counseling once per six-day cycle, individual speech-language therapy once per six-day cycle and group speech-language therapy once per six-day cycle (Parent Ex. D at p. 1). The individualized education program (IEP) indicated that the student was eligible for extended school year (ESY) services for summer 2004 (Parent Ex. D at p. 1). The ESY service recommendations included placement in a 12:1+1 special class in respondent's "PARISS" program, group reading instruction three times weekly for 40 minutes, and group speech therapy once weekly for 30 minutes (Tr. pp. 451-52; Parent Ex. D at p. 1).

By letter to the director of pupil personnel services (PPS) dated May 23, 2004, petitioners expressed concern regarding their daughter's lack of progress, especially in reading, and requested that the CSE explore how a program of systematic explicit intensive reading instruction, such as Lindamood-Bell Learning Processes (Lindamood-Bell), could be incorporated into the student's IEP (Tr. pp. 210, 340-41; Parent Ex. BB-1 at pp. 1, 2).

The CSE reconvened on June 7, 2004 (Parent Ex. CC) and again on June 23, 2004 (Parent Ex. DD). Petitioners were provided with additional information regarding respondent's proposed summer reading program (Parent Exs. CC at p. 2; DD at p. 1). Petitioners ultimately declined the summer program proposed by respondent's CSE and for summer 2004 enrolled the student in a ten-week program at Lindamood-Bell (Tr. pp. 210-11, 345-46; Parent Ex. EE at p. 1). The student received Lindamood-Bell instruction for four hours per day (Tr. p. 346), five days per week.

Following a September 8, 2004 CSE meeting (Parent Ex. EE) and a subsequent meeting with respondent's staff, petitioners rejected the reading program proposed for the student for the 2004-05 school year (Parent Ex. X). Petitioners informed respondent of their intention to enroll their daughter in Lindamood-Bell part time for the 2004-05 school year (Parent Exs. X; EE at p. 3).

The record indicates that for the 2004-05 school year the student attended a half-day 15:1+1 special class at respondent's Wantagh Middle School (Parent Ex. F at p. 1). In addition she received instruction two hours per day at Lindamood-Bell (Tr. pp. 40, 69; Parent Ex. F at p. 1). As a result of a due process hearing, the expense for Lindamood-Bell was shared by petitioners and respondent (Parent Exs. A at p. 2; F at p. 1).

In March 2005 petitioners submitted a completed application for transportation to respondent's transportation office, requesting transportation between respondent's middle school and the Lindamood-Bell Learning Center for the 2005-06 school year (Parent Exs. K at p. 1; R). In a response dated March 30, 2005, respondent's assistant superintendent for business indicated that he was in receipt of petitioners' request but could not respond until after the CSE conducted its annual review (Parent Exs. S; Z at p. 1).

In May 2005 petitioners obtained a private neuropsychological evaluation of the student (Tr. pp. 158-59; Parent Ex. F). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following composite (and percentile) scores: verbal comprehension 87 (19th), perceptual reasoning 65 (1st), working memory 83 (13th) and processing speed 91 (27th) (Parent Ex. F at pp. 3, 8). In addition the student received a full scale IQ score of 75 (5th) and general abilities index score of 74 (4th) (id.). The evaluator noted that there was significant variability on the test, and that the student's scores on the verbal comprehension, working memory and processing speed scales fell either in the low average or average range, while her scores in the perceptual reasoning portion of the test were deficient (Tr. pp. 160-61; Parent Ex. F at p. 3). He stated that a summary score did not adequately describe the student's deficiencies or her assets, and that the student could not be seen as a student who fell in the borderline range (Tr. pp. 161, 180-81; Parent Ex. F at pp. 3, 6).

The evaluator indicated that although the student was taking her usual dosage of medication when tested, she still had some difficulty attending, especially under low levels of stimulation (Parent Ex. F at pp. 3, 5). He noted that the student demonstrated difficulty with regard to fine motor skills (Parent Ex. F at p. 3). According to the evaluator the student exhibited a significant developmental language disorder which affected both her receptive and expressive language skills (Parent Ex. F at p. 5). Receptively the student demonstrated difficulty with auditory processing, including phonemic awareness and auditory discrimination, as well as semantic and inferential understanding (Parent Ex. F at pp. 4, 5). The student's expressive language problems included mild speech phonology problems coupled with more significant difficulties with regard to lexical skills, speech morphology and syntax, and complex language formulation (Parent Ex. F at pp. 4, 6).

Based on his assessment of the student's academic skills the evaluator reported that the student's word recognition, when tested in isolation, was at an upper second grade level and her phonetic decoding skills, when measured in isolation, were at an early third grade level (Tr. p. 161; Parent Ex. F at pp. 4, 5). The student's oral reading skills fell at a mid-third grade level and her contextual accuracy at a mid-to-upper fourth grade level (Tr. pp. 161-62; Parent Ex. F at p. 5). According to the evaluator the student demonstrated significant difficulty with reading comprehension secondary to her language comprehension difficulty (Parent Ex. F at p. 6). Her scores on measures of reading comprehension ranged from the early second to the mid-to-upper third grade level, depending on the format (Parent Ex. F at p. 5). The evaluator reported that the

student's spelling skills, when tested in isolation, fell at an early second grade level; however, on an open ended writing task her scores for spelling and punctuation fell below the second grade basal level (Tr. p. 162; Parent Ex. F at p. 5). The evaluator noted that with the exception of multiplication, the student's basic computational skills across operations were "markedly problematic" (Parent Ex. F at p. 5). He described the student's problem solving skills as very poor (Tr. p. 162; Parent Ex. F at p. 5).

The evaluator concluded that the student's overall pattern on testing indicated neurodevelopmental difficulties with visuospatial, motor and visuomotor abilities, as well as with executive functions such as attention, time management, planning and organization (Parent Ex. F at p. 5). He further indicated that the student's developmental language disorder and auditory processing difficulty had a significant impact on the student's ability to acquire basic academic skills, and that the most appropriate classification for the student would be learning disabled (Parent Ex. F at p. 6).

The evaluator opined that the student needed to continue the intensive, individual, multi-sensory instruction that she was receiving (Tr. p. 169) and further indicated that the student required a similar approach to her acquisition of other basic skills including math and writing (Parent Ex. F at p. 6). He recommended that the student receive intensive speech-language remediation to address her difficulties with regard to lexical and structural aspects of language and to teach her strategies to compensate for her language processing difficulty (id.). The neuropsychologist opined that individual instruction in reading and other basic skills using a multisensory program should continue during the summer, as should speech-language services (id.).

The CSE met on June 7, 2005 for the student's annual review (Dist. Ex. 2). At the beginning of the CSE meeting, petitioners' advocate presented the chairperson with pre/post testing data from the Lindamood-Bell program, as well as the results of petitioners' private neuropsychological evaluation (Tr. pp. 348-49, 454-55; Dist. Ex. 2 at p. 2). Meeting minutes indicated that the CSE reviewed a draft IEP which included student progress and proposed goals, and that respondent's staff provided an update on the student's performance (Tr. pp. 456-58; Dist. Ex. 2 at pp. 1-2). A reading inventory conducted by respondent's special education teacher identified the student's independent reading level as grade two, instructional reading level as grade three and frustration level as grade four (Dist. Ex. 2 at p. 1). The CSE reviewed the proposed program for the student for the 2005-06 school year, which included special class, counseling one time per six day cycle, and daily speech-language therapy (Dist. Ex. 2 at p. 2). The CSE chairperson indicated that the student's IEP would reflect a recommendation for daily reading instruction through respondent's supportive reading program (id.), although such instruction is not a special education service. Petitioners expressed concern regarding the student's math abilities and opined that the student needed an individualized math program to address her needs (Tr. pp. 223-24; Dist. Ex. 2 at p. 2). The CSE chairperson agreed to investigate whether or not supportive math, in addition to a special education math class, would be available to the student (Dist. Ex. 2 at p. 2). Petitioners expressed concern regarding some of the proposed goals that had been provided to them (Tr. pp. 247, 466; Dist. Ex. 2 at p. 2). Although the CSE chairperson recommended that petitioners meet with the student's service providers to edit the goals, petitioners indicated that they were not sure if they could meet on this issue outside of a CSE (Tr. pp. 217-18, 467; Dist. Ex. 2 at p. 2). The CSE recommended that the student again attend respondent's PARISS summer program, where she

would receive daily reading instruction and speech-language therapy three times per week (Tr. pp. 243-45, 459-60; Dist. Ex. 2 at p. 2). According to meeting minutes, petitioners were not ready to commit to the summer program (Tr. pp. 460, 465; Dist. Ex. 2 at p. 2). It was requested that petitioners contact respondent as soon as possible regarding whether the student would be participating in the recommended summer program (Dist. Ex. 2 at p. 2). The CSE meeting was adjourned with the understanding that the CSE would reconvene to finalize the 2005-06 IEP, including editing the narrative and goals (id.). The adjournment also allowed additional time for CSE members to review the material presented to the CSE by petitioners (Tr. pp. 353, 458-59, 465-66).

Following the June 7, 2005 CSE meeting, petitioners drafted IEP goals for the student for the 2005-06 school year with the help of the student's tutor and doctor (Tr. pp. 218, 354-55) and Lindamood-Bell staff (Tr. pp. 350-51; Parent Ex. E at p. 6). By letter dated June 17, 2005 petitioners submitted their goals to respondent's PPS director and requested another CSE meeting (Parent Ex. T at pp. 1, 8).

After several failed attempts to reschedule the meeting the CSE reconvened on July 12, 2005 (Tr. pp. 221, 468-70, 520; Dist. Exs. 3, 4; Parent Exs. G, H, I, Y). The meeting lasted five or more hours (Tr. pp. 257, 360, 472). The parties reviewed the draft IEP line by line and made adjustments (Tr. pp. 228, 257, 473). Based on a recommendation contained in the private neuropsychologist's report, the CSE determined that the student's classification should be changed to learning disabled (Tr. pp. 478-79; Parent Ex. E at p. 5). For the 2005-06 school year, the CSE recommended that the student be placed in a 15:1+1 special class for 3 hours and 20 minutes per day and be assigned a 1:1 aide (Tr. p. 481; Parent Ex. E at p. 1). Recommended related services included speech-language therapy daily, with alternating group and individual sessions, and counseling one time per six day cycle (Tr. p. 490; Parent Ex. E at p. 1). The IEP generated by the CSE recommended daily supportive reading (Tr. pp. 485-87) and that supportive math be explored as a possibility; however, the IEP indicated that an appropriate group might not be available on the student's math level (Tr. pp. 487-89; Parent Ex. E at p. 1). The IEP included numerous supports and accommodations (Parent Ex. E at p. 2).

Minutes of the July 12, 2005 CSE meeting indicate that the CSE reviewed each goal and objective, comparing the original proposed goals to those provided by petitioners (Parent Ex. E at p. 5; Tr. pp. 354-55, 472-74). The minutes further indicate that the chairperson made revisions to the IEP pursuant to the requests of petitioners, their advocate and other members (Parent Ex. E at p. 5). Petitioners voiced concern about the methodologies to be used and the manner in which the student's math instruction would be delivered (Tr. pp. 357-59; Parent Ex. E at p. 6). The special education teacher explained that she would utilize the 1:1 aide to assist with instruction. The CSE chairperson stated that only a person with appropriate levels of education/training would be assigned to the student and the aide would always be under the supervision of the special education teacher (Parent Ex. E at p. 6). There was disagreement regarding the student's reading goals (Tr. pp. 228, 357, 475-76, 477; Parent Ex. E at p. 6). The goals proposed by petitioners projected multiple year gains, while school-based team members suggested goals that focused on the mastery of specific reading skills (Tr. pp. 523-24; Parent Ex. E at p. 6). Petitioners expressed their desire for their daughter to continue to receive reading instruction using Lindamood-Bell methodology (Parent Ex. E at p. 6). The CSE chairperson indicated that respondent had entered into an agreement with the Lindamood-Bell professional development department to have at least one

reading teacher and one special education teacher in each of respondent's buildings trained and ready to use the Lindamood-Bell methodology (Tr. p. 496; Parent Ex. E at p. 6). Petitioners questioned whether the training would be sufficient to meet the student's needs (Tr. pp. 228-31, 258-59, 494-95; Parent Ex. E at p. 6). Petitioners declined the summer program recommended by respondent (Tr. p. 480) and indicated that they were not prepared to agree to the 2005-06 program recommendations because they had been surprised by respondent's offer of the Lindamood-Bell program at the middle school (Tr. pp. 496-97; Parent Ex. E at p. 6). The chairperson explained that if petitioners could not make a decision another CSE meeting would be needed so that the IEP could be finalized (Parent Ex. E at p. 6). The CSE chairperson further suggested a meeting with a Lindamood-Bell representative along with respondent's teachers, so that the particulars of the student's current reading program could be explored and petitioners would be able to come to a decision as to whether they felt the district was able to provide appropriate reading instruction for the student (id.). The parent advocate suggested adjourning the meeting and promised to communicate with respondent's PPS director regarding setting up such a meeting by July 19, 2005 (id.).

By letter to the CSE chairperson dated July 14, 2005, petitioners questioned the reasonableness of holding another meeting, given the approximately seven hours spent sharing information and reviewing evaluation reports (Dist. Ex. 5). Petitioners requested a copy of the IEP developed at the last two CSE meetings to review and consider (id.). In a response dated July 21, 2005, the CSE chairperson suggested that petitioners' unwillingness to develop parts of the IEP with the student's teachers prior to the CSE meeting had contributed to the lengthy meeting (Dist. Ex. 6 at p. 1; Parent Ex. V at p. 1). She reiterated respondent's offer to schedule a meeting which included a representative from Lindamood-Bell, including the student's current clinician (Dist. Ex. 6 at p. 2; Parent Ex. V at p. 2). The CSE chairperson concluded her letter by stating that she would interpret petitioners' decision not to meet with Lindamood-Bell and respondent's staff as signaling that petitioners were no longer questioning the district's ability to provide appropriate reading instruction using the Lindamood-Bell program for the student (id.). She noted that she would schedule a CSE meeting, at which time the student's fall program could be approved (id.).

By letter dated August 1, 2005 petitioners rejected respondent's proposed summer 2005 and 2005-06 school year programs, taking issue with respondent's recommended summer program, math instruction, reading instruction, and the approach outlined by respondent for teaching core academics (Tr. pp. 361-63; Parent Ex. J). Specifically petitioners expressed concern that the proposed summer program did not incorporate one-on-one multisensory teaching methods as recommended by the neuropsychologist; the proposed math instruction for the 2005-06 school year was the same as in the past and not individualized to the student's needs; petitioners were not certain that respondent could provide the student with reading instruction that would successfully address the student's reading deficits; and facilitation of the student's academic instruction by a 1:1 aide was inappropriate (Parent Ex. J at pp. 2, 3). Petitioners also expressed concern that the IEP goals developed at the July 12, 2005 CSE meeting had since been revised by respondent and were now inappropriate (Tr. pp. 274-75; Parent Ex. J at p. 4). Petitioners concluded that the program developed by the CSE was inappropriate to address the student's learning needs and advised respondent that they would be enrolling the student in Lindamood-Bell for the 2005-06 school year to address her reading and math needs (Parent Ex. J at p. 4). Petitioners further advised that they would be seeking tuition reimbursement for summer 2005 and the 2005-06 school year (id.).

For summer 2005, the student attended Lindamood-Bell four hours per day, five days per week (Tr. pp. 78, 225). Relative to reading, instructor notes indicate that the student worked on decoding, multi-syllable processing and reading in context (Parent Ex. O at p. 3). The student progressed from using fourth grade material to using fifth grade material when reading contextually (Parent Ex. O at pp. 1, 7). The student's math instruction included the review and practice of basic computational skills across operations and the introduction of decimals and fractions (Parent Ex. O at pp. 3, 7, 9, 10, 12). The student moved from solving one-step word problems (Parent Ex. O at p. 3) to solving word problems of increasing complexity that included multiple steps and extra information to be filtered out (Parent Ex. O at p. 5). The student's computational skills improved (Tr. pp. 47-48) and she progressed from step six to step ten in the Lindamood-Bell "On Cloud Nine" math program (Parent Ex. O at pp. 3, 9, 10).

For the first three days of the 2005-06 school year the student attended respondent's school full time, as she was on break from Lindamood-Bell and petitioners wanted her to become familiar with her schedule and classes (Tr. pp. 231-32). However, as of the second week in September petitioners began signing their daughter out of school at 12:30 each day so that she could attend three hours of instruction at Lindamood-Bell (Tr. p. 85; Dist. Exs. 7, 8).

By letter dated September 12, 2005 respondent's CSE chairperson requested that petitioners reconsider their decision to sign out their daughter from school each day (Tr. pp. 502-03; Dist. Ex. 8 at p. 1). The CSE chairperson noted that among other things the student was missing the opportunity for interaction with peers, as well as her daily reading class with a master's level reading teacher who was trained by Lindamood-Bell in the use of the Lindamood-Bell process (Dist. Ex. 8 at p. 1). The record indicates that the student was also missing English and a study skills class during the time she attended Lindamood-Bell (Tr. p. 503; Dist. Ex. 8 at p. 1).

Standardized testing conducted by Lindamood-Bell indicated that the student demonstrated progress on specific reading and math skills between the end of May 2005 and the beginning of October 2005 (Parent Exs. M, N). On the Woodcock Reading Mastery Tests -Revised/Normative Update (WRMT-R/NU) the student's standard score on the word attack subtest increased from 80 to 85 (compare Parent Ex. M at p. 3, with Parent Ex. N at p. 1). On the arithmetic subtest of the Wide Range Achievement Test-3 (WRAT-3) the student's standard score increased from 72 to 89 and on the computation subtest of the Test of Mathematical Abilities, Second Edition (TOMA-2) the student's score increased from the 1st to the 25th percentile (compare Parent Ex. M at pp. 3-5, with parent Ex. N at pp. 1-3). However, at the same time the student's scores on spelling skills, as measured by the WRAT-3, decreased from a standard score of 80 to 69, and the student's reading comprehension, as measured by the Gray Oral Reading Tests, Fourth Edition (GORT-4), declined from the 25th to the 5th percentile (compare Parent Ex. M at pp. 3, 4, with parent Ex. N at pp. 1, 2).

The student's November 2005 progress report, generated by respondent, indicated that the student achieved one objective during the first quarter of the 2005-06 school year related to correctly identifying coins and bills and identifying their value (Parent Ex. W at p. 7). The report further indicated that the student made "some progress" or was "progressing satisfactorily" on the majority of her IEP objectives (Parent Ex. W).

The CSE reconvened on December 1, 2005 (Dist. Ex. 9). Occupational therapy services of one individual and one group session per six day cycle were added to the student's IEP (Tr. pp. 506-07; Dist. Ex. 9 at pp. 1, 5). In addition the CSE recommended that the student's 1:1 aide no longer accompany her to non-academic classes (Tr. p. 507).

Between September 2005 and March 2006 the student's instruction at Lindamood-Bell focused on reading, math, spelling and writing (Tr. p. 84; Parent Ex. O at pp. 14-24). In math, the student worked on fractions and story problems, including problems involving time and money (Parent Ex. O at pp. 14, 15, 17, 23). In writing, the student worked on spelling words in isolation and in context, and in reading the student worked on oral reading fluency (Parent Ex. O at pp. 15, 17, 19, 21, 24).

As assessed by Lindamood-Bell, between October 2005 and January 2006 the student's scores on standardized testing increased on measures of word attack, spelling, sight word recognition, and oral reading (Parent Exs. M, N). Specifically, on the WRMT-R/NU the student's standard score on the word attack subtest increased from 85 to 93; the student's standard score on the spelling subtest of the WRAT-3 increased from 69 to 78; and the student's score on the Slosson Oral Reading Test-Revised (SORT-R) increased from 76 to 81 (compare Parent Ex. M at p. 1, with Parent Ex. N at p. 1). As measured by the GORT-4 the student's reading accuracy increased from the 9th to the 16th percentile and her fluency increased from the 1st to the 2nd percentile (compare Parent Ex. M at pp. 1-2, with parent Ex. N at p. 2). During this same time period the student's scores declined on measures of arithmetic and reading comprehension. On the WRAT-3 arithmetic subtest the student's standard score dropped from an 89 to 81 and on the GORT-4 the student's reading comprehension dropped to the 2nd percentile from the 5th percentile (id.).

By letter dated February 1, 2006, petitioners requested an impartial hearing, asserting that the CSE had failed to recommend an appropriate program for summer 2005 and the 2005-06 school year (Parent Ex. A at p. 2). In the letter, petitioners asserted that the recommended summer program for their daughter was designed to "merely prevent regression" and that she required a more proactive program in order to progress and develop (id.). With regard to the 2005-06 school year petitioners asserted that the program recommended by respondent's CSE would not adequately address their daughter's needs in math and reading (Parent Ex. A at p. 3). Petitioners further argued that respondent had not responded to their request for transportation to and from Lindamood-Bell (id.). Finally, petitioners requested reimbursement for the neuropsychological evaluation conducted in May 2005 (Parent Ex. A at p. 4).

Petitioners requested that the impartial hearing officer find that the IEP developed on July 12, 2005 was substantively defective, that the CSE failed to offer an appropriate program/placement for the student for the 2005-06 school year, that the program petitioners selected was appropriate, that they cooperated with the CSE, and that they were entitled to reimbursement for the private tutoring at Lindamood-Bell from July 2005 through June 2006 and associated costs and fees (id.).

In a response dated February 15, 2006 respondent's attorney indicated that the "alleged deficiency in the summer program recommended by respondent's CSE was not consistent with the legal requirements for such programs" and that the recommended summer program was reasonably calculated to prevent regression (Parent Ex. B at p. 1). In addition, respondent's attorney noted

that petitioners were thoroughly provided with information with respect to the summer program (id.). Respondent's attorney further asserted that the program recommended by the CSE for the 2005-06 school year was reasonably calculated to enable the student to make progress toward her IEP goals (id.). The attorney indicated that respondent agreed to reimburse petitioners for the May 2005 neuropsychological evaluation (Parent Ex. B at p. 2). Finally, respondent's attorney rejected petitioners' request for transportation (id.).

The impartial hearing was conducted on April 28, May 18, and June 9, 2006. At the impartial hearing, petitioners asserted that a) respondent's CSE failed to recommend an appropriate placement for their daughter for the 2005-06 school year; b) the 2005 summer program offered to their daughter was inappropriate; c) respondent failed to reimburse petitioners for associated transportation costs; and d) the IEP developed on July 12, 2005 was substantively defective. Petitioners did not raise any procedural argument pertaining to the formulation of the student's educational programs.

By decision dated November 13, 2006 the impartial hearing officer denied petitioners' request for reimbursement after determining that the program and services recommended by respondent's CSE on July 12, 2005 offered the student a free appropriate public education (FAPE) (IHO Decision p. 23).

On appeal petitioners assert, among other things,[1] that the impartial hearing officer was not impartial and that he erred when he denied petitioners reimbursement for private educational services and related transportation expenses for summer 2005 and the 2005-06 school year.

Respondent asserts that the impartial hearing officer correctly determined that the program and services recommended by its CSE were appropriate; that the impartial hearing officer was impartial; and that the program petitioners enrolled their daughter in is not the least restrictive environment (LRE). For the following reasons, I find that the impartial hearing officer correctly found that the programs recommended by respondent's CSE were appropriate and offered the student a FAPE.

I will first consider petitioners' allegation of bias on the part of the impartial hearing officer. Petitioners challenge the impartial hearing officer's impartiality on the ground that he failed to disclose that he represents other school districts in special education matters.

An impartial hearing officer must avoid giving even the appearance of impropriety (Application of the Bd. of Educ., Appeal No. 03-015; Application of a Child with a Disability, Appeal No. 02-027; Application of a Child with a Disability, Appeal No. 00-063; Application of a Child with a Disability, Appeal No. 99-061; Application of a Child with a Disability, Appeal No. 99-025; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-55; Application of a Child with a Disability, Appeal No. 94-32). State

[1] On appeal, petitioners also assert that respondent's recommended reading program was not a scientifically based peer- reviewed program. However, at the impartial hearing petitioners did not raise this issue. I find that this issue is beyond the scope of my review because it was not raised below (Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 04-043; Application of a Child with a Disability, Appeal No. 04-019; Application of the Bd. of Educ., Appeal No. 02-024).

regulations provide that an impartial hearing officer shall not have a personal or professional interest which would conflict with his or her objectivity in the hearing (8 NYCRR 200.1[x][3]; Application of a Child with a Disability, Appeal No. 01-046). Impartial hearing officers are required to disclose all potentially conflicting interests at the outset of the hearing, so that any question about their impartiality can be addressed and an adequate record can be developed for subsequent review (Application of a Child with a Disability, Appeal No. 98-51; Application of a Child with a Handicapping Condition, Appeal No. 91-27).

I note that at the outset of the hearing, the impartial hearing officer did not disclose the fact that he represents school districts in special education matters (Tr. pp. 3-4). Rather, he stated that he was "not an employee of the Wantagh School District or any school district within the State of New York, nor of the State Education Department" (Tr. p. 3). He further stated that he had no personal or professional interest in the matter that would conflict with his impartiality, and that both parties were free to raise objections at that time (Tr. p. 4). I note that neither party objected at that time (id.).

The impartial hearing officer's failure to disclose that he practices law in the area of special education on behalf of school districts is troubling. This was a potential conflict of interest and the impartial hearing officer was required to disclose this information to the parties at the outset of the hearing (Application of a Child with a Disability, Appeal No. 98-51; Application of a Child with a Handicapping Condition, Appeal No. 91-27). I caution the impartial hearing officer to fulfill his obligation to fully disclose potentially conflicting interests in the future (see Application of a Bd. of Educ. Appeal No. 03-015 [cautioning impartial hearing officer who failed to disclose that she represented parents in special education matters]). I have carefully reviewed the transcript and the impartial hearing officer's decision, and I find that there is no evidence of any actual bias against petitioner (Application of a Child with a Disability, Appeal No. 00-063; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child with a Disability, Appeal No. 98-51). In the absence of actual bias, I am constrained to find that the impartial hearing officer's failure to disclose that he represents school districts in special education matters does not afford a basis to annul his determination.

Having decided the assertion of bias lacks merit, I will now turn to petitioners' substantive arguments. A central purpose of the Individuals with Disabilities Education Act (IDEA)[2] is to ensure that students with disabilities have available to them a FAPE[3] (20 U.S.C. § 1400[d][1][A];

[2] On December, 3, 2004, Congress amended the IDEA, and the amendments became effective on July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), Pub. L. No. 108-446, 118 Stat. 2647). As the relevant events in the instant appeal took place after the effective date of the 2004 amendments, the provisions of IDEA 2004 apply and the citations contained in this decision are to the newly amended statute.

[3] 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].

see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 S. Ct. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a comprehensive written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.22).[4] The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 532, 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). 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 (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 child did not receive a FAPE only if the procedural inadequacies (a) impeded the child'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 child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. School Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]).

Both the Supreme Court and the Second Circuit have noted that the IDEA does not, itself, articulate any specific level of educational benefits that must be provided through an IEP (Rowley, 458 U.S. at 189; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 122, 130 [2d Cir. 1998]), although the Supreme Court has specifically rejected the contention that the "appropriate education" mandated by the IDEA requires states to maximize the potential of students with disabilities (Rowley, 458 U.S. at 197 n.21, 189, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [internal quotation omitted]; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, a school district satisfies the FAPE standard "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203).

[4] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]).

The record indicates that the student has been diagnosed with ADHD, PDD-NOS, a developmental reading disorder and a developmental arithmetic disorder (Tr. pp. 99, 110, 112). She takes a stimulant medication to help her with attention and focusing (Tr. p. 99). The student also exhibits a developmental language disorder and auditory processing difficulties, which significantly impact her acquisition of basic academic skills (Parent Ex F at p. 6). The student demonstrates significant delays in reading decoding and comprehension, math calculation and concepts, and written expression (Parent Ex. E at p. 3). She lacks confidence in social situations and needs to learn how to identify her feelings and express them in an appropriate manner (Parent Ex. E at p. 4).

The parties do not dispute the student's need for an extended school year program. Students shall be considered for 12-month special services and/or programs if they exhibit the need for a service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the CSE (8 NYCRR 200.6[j][v]). "Substantial regression" is further defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

For summer 2005 the CSE recommended that the student attend a 12:1+2 special class as part of respondent's PARISS summer program (Tr. p. 460; Parent Ex. E at p. 2). PARISS is a six week summer program housed in respondent's middle school (id.) and is designed to prevent regression (Tr. p. 461). The students in the program are grouped according to age and ability and frequently students are grouped with classmates from the previous school year (id.). As part of the PARISS program, all students receive reading, writing and math instruction as a 40 minute class (id.). The program includes art, recreational and physical education components, as well as a computer class (id.). The teachers in the PARISS program are certified special education teachers (id.). Reading teachers provide additional small group (5:1) or 1:1 reading instruction to students as recommended (Tr. p. 462). Related services are provided by respondent's therapists (id.).

In addition to the daily reading that was inherent in the PARISS program, for summer 2005 the CSE recommended that the student receive individualized reading instruction five times per week for forty minutes from a reading teacher (Tr. p. 459; Parent Ex. E at p. 2). The CSE also recommended that the student receive group speech-language therapy for three 30 minute sessions per week (Tr. pp. 460, 464; Dist. Ex. 2 at p. 2; Parent Ex. E at p. 2).

Petitioners assert that the summer 2005 program recommended by respondent was the same program the student had attended the prior summer (Tr. pp. 214, 219, 516). Although the record indicates that the student had previously attended respondent's PARISS program (Tr. pp. 220, 255), the program recommended by the CSE for summer 2005 included increased levels of service from the prior summer (compare Parent Ex. D at p. 1, with Parent Ex. E at p. 2). Specifically the recommended level of speech-language therapy was increased from one group session per week (Parent Ex. D at p. 1) to three group sessions per week (Parent Ex. E at p. 2). In addition reading instruction was increased from three times per week in a group (Parent Ex. D at p. 1) to five times per week individually (Parent Ex. E at p. 2).

Based upon a review of the hearing record, I find that respondent's CSE not only considered and recommended a summer program in accordance with the student's need to prevent substantial regression, but it also provided for increased services in reading and speech-language therapy for the student.

Petitioners also claim that the 2005-06 school year program commencing September 2005 was insufficient and inappropriate to meet their daughter's needs. They contend that she requires 1:1 instruction in reading and math. The record shows that the CSE met on June 7, 2005 and July 12, 2005 to develop the student's IEP for the 2005-06 school year. The CSE considered materials from Lindamood-Bell and petitioners' private neuropsychological evaluation (Tr. pp. 228, 472, 478; Parent Ex. E at p. 5). The record further shows that petitioners had the opportunity to participate in the development of the IEP, including goals and objectives (Tr. pp. 227-28, 248, 258, 357, 473, 477; Parent Ex. E at p. 5).

The CSE recommended that for eighth grade the student be placed in a 15:1+1 special class for core academics and for an additional daily skills period (Tr. pp. 484-85). In addition the CSE recommended that the student be assigned a 1:1 aide for academic subjects (Tr. pp. 481-82, 498). To address the student's reading deficits the CSE recommended that the student be provided reading instruction for forty minutes per day in a group of 2:1 (Tr. pp. 487-88, 498, 502, 533, 540) from a master's level reading teacher who had received training in the Lindamood-Bell processes sufficient to allow her to employ program strategies during instruction (Tr. pp. 502, 584-85, 602-04). To address the student's math deficits, the CSE proposed providing math instruction in the 15:1+1 special class, with additional assistance provided by the student's 1:1 aide (Tr. pp. 482-84). In addition the CSE recommended that the student receive assistance as needed during the study skills component of the special class (Tr. pp. 489-90). The CSE also recommended the possibility of participating in a supportive math group (Parent Ex. E at pp. 5-6). To address the student's expressive and receptive language weaknesses the CSE recommended that the student receive daily speech-language therapy (Tr. p. 490; Parent Ex. E at p. 1). To address the student's social/emotional needs the CSE recommended that the student receive counseling one time per week (Tr. pp. 490-91; Parent Ex. E at p. 1). The IEP developed by the CSE contained goals and objectives related to study skills, reading, writing, mathematics, speech-language and social/emotional/behavioral development (Parent Ex. E at pp. 6-10).

The record shows that respondent's recommended program for the 2005-06 school year was significantly different than the student's prior year's IEP in that it included daily reading instruction in a 2:1 setting by a teacher trained in the Lindamood-Bell processes, a 1:1 aide assigned to the student during academic classes and an increase in the frequency of speech-

language therapy from two sessions per six day cycle to six sessions per six day cycle (compare Tr. p. 450, Parent Ex. D at p. 1, with Tr. p. 498, Parent Ex. E at p. 1). The record also shows that respondent's reading teacher stated that the student's instruction could be individualized within a 2:1 setting (Tr. pp. 597-600). In addition the student's private tutor, who held master's degrees in special education and reading and was certified as an Orton-Gillingham practitioner (Tr. pp. 288-89), opined that the student could receive an appropriate education in a 2:1 setting (Tr. pp. 318-19). I concur with the impartial hearing officer that the record is insufficient to support petitioners' claim that only one-to-one instruction would confer educational benefit (see IHO Decision at p. 22). I also agree with the impartial hearing officer's conclusion that respondent offered the student a program for summer 2005 and the 2005-06 school year that was appropriate to meet her special education needs. Having determined that the challenged IEP adequately offered a FAPE to petitioners' daughter for summer 2005 and the 2005-06 school year, I need not reach the issue of whether the services obtained by petitioners at Lindamood-Bell were appropriate; petitioners are not entitled to reimbursement, and the necessary inquiry is at an end (Voluntown, 226 F.3d at 66; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

The impartial hearing officer's decision shows that he carefully considered all of the testimony and exhibits from both parties. Based upon my review of the entire hearing record, I find that the hearing was conducted in a manner consistent with the requirements of due process, that respondent offered petitioners' daughter a FAPE, that petitioners are not entitled to reimbursement for educational services and related transportation costs, and that there is no need to modify the determination of the hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). I have reviewed petitioners' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 28, 2007

PAUL F. KELLY
STATE REVIEW OFFICER