



The University of the State of New York

The State Education Department State Review Officer

No. 08-078

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

Appearances:

Lamb & Barnosky, LLP, attorneys for respondent, Robert H. Cohen, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Sappo School (Sappo) for the 2007-08 school year, including summer 2007. Respondent (the district) cross-appeals from those portions of the impartial hearing officer's decision which directed the district to provide extended school year services (ESY), consisting of reading services and three sessions of occupational therapy (OT), during summer 2008. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was attending seventh grade at Sappo where his parents had unilaterally placed him in August 2006 (Tr. pp. 1, 51, 431). The Commissioner of Education has not approved Sappo as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). In this case, the student's educational history through June 2006 has been extensively reported in two previous appeals, thus, familiarity with those facts will be presumed and will not be repeated here in detail (Application of a Child with a Disability, Appeal No. 07-073; Application of the Bd. of Educ., Appeal No. 07-006). The student's eligibility for special education programs and services as a student with a learning disability (LD) is not in dispute in this appeal (Tr. p. 433; IHO Decision at p. 11; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

On May 24, 2007, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop his individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 9 at p. 1; IHO Ex. 3 at p. 1; see Parent Ex. TT). The 4 hour CSE meeting, which was audiotaped and stenographically transcribed, proceeded with 19 members in attendance: the CSE chairperson; a CSE special education chairperson from the district's middle

school; a special education resource room teacher from the district's middle school; a school psychologist from the district's middle school; a reading teacher from the district's middle school; a special education teacher from the district's middle school inclusion program; a regular education teacher from the district's middle school; a co-owner of Access 7 Consulting, Inc. (Access 7); a teacher of the deaf from the Board of Cooperative Educational Services (BOCES); an assistive technology provider from the district; the student's parents; the student's grandparents; the student's great uncle; the student's teacher from Sappo (via teleconference); the student services' administrator from Sappo (via teleconference); the district's attorney; and the parents' attorney (Dist. Ex. 9 at pp. 5-7; see Tr. pp. 450, 527-28, 1832-33, 2060, 2807-08; IHO Ex. 3 at pp. 1-6, 298).¹ In anticipation of the Sappo staff's teleconferenced participation at the CSE meeting, the district forwarded a packet of information to Sappo containing the following: May 2007 academic test scores; January 2006 academic test scores; a May 2007 classroom observation report; a May 2007 letter and audiological evaluation report; a 2007-08 Sappo School draft IEP; a 2007-08 district draft IEP; a November 2006 OT progress report; a February 2007 OT progress report; a May 2007 OT progress report; an April 2007 OT annual review progress report; a January 2007 resource room annual review progress report; and a June 2006 assistive technology evaluation report (Dist. Ex. 41; see IHO Ex. 3 at pp. 6-8).

After introductions, both the student's teacher and the services' administrator from Sappo provided a description of the student's progress during the 2006-07 school year (IHO Ex. 3 at pp. 7-11). The student's teacher noted that when he first entered the school in September 2006, the student "had a lot of social regression as well as academics" and that he was reading at a "kindergarten to first grade level" (id. at p. 8). She stated that the student had difficulty with decoding, recalling stories read aloud, and exhibited socially inappropriate behavior (id.). The student required "total attention" for his behavior, and he interrupted his classmates and gave "super bear hugs" to every adult he encountered (id. at p. 9). Since the beginning of the school year, the teacher stated that the student made progress both socially and academically, noting that he made friends, learned to respect other children, gained self-respect, improved his reading comprehension to approximately a fourth grade level, and improved his decoding skills to approximately a middle third grade level (id. at p. 10). The Sappo services' administrator added that "it's known and evidenced in this peer literature that social growth and development is directly related to academic ability" and that Sappo staff "noticed changes in [the student's] behavior as moderated and less impulsivity," that he regularly interacted in an appropriate manner with peers, and had improved his reading (id. at pp. 10-11).²

The CSE chairperson then directed the discussion to the student's related services (IHO Ex. 3 at pp. 11-12). While the student attended Sappo during the 2006-07 school year, the district contracted with an agency, Access 7, to provide the student's related services (Parent Ex. XXX; see Dist. Exs. 27-29; 31-32; Parent Exs. AAA; DDD). At the CSE meeting, the co-owner of

¹ The parents waived the participation of the additional parent member at the May 24, 2007 CSE meeting (IHO Ex. 3 at p. 3). Both the audiotapes and the bound transcript of the May 24, 2007 CSE meeting were submitted into evidence at the impartial hearing and were reviewed on appeal (Parent Ex. W; IHO Ex. 3).

² Prior to working at Sappo, the student services' administrator testified that he had worked in the restaurant business, had a bachelor's degree in psychology, and had taken courses in different graduate programs, but had never worked in a school (Tr. pp. 3212-13, 3383-86).

Access 7 described the student's OT services (one 30-minute session per week) and his progress (IHO Ex. 3 at p. 12). The student's OT sessions focused on improving his "graphomotor, fine motor, and visual/perceptual skills," as well as his handwriting, including improving his letter formation (id.). The Access 7 co-owner stated that the therapist used the "Handwriting without Tears" program with the student and that he had shown "slow and steady progress" (id. at pp. 12-13). A lengthy discussion then ensued regarding missed OT sessions, Sappo's lack of cooperation in rescheduling the missed sessions, and accommodations implemented in an effort to resolve the situation (id. at pp. 13-21). At the conclusion of that discussion, the CSE chairperson focused the CSE's next discussion on the provision of the student's hearing services (id. at p. 22). After assurances that Sappo had received a copy of the hearing services evaluation report, the CSE directly contacted the evaluator, who participated via teleconference, to review his evaluation report (id. at pp. 22-31, 38-57; see Parent Ex. W).

The CSE next addressed the issue of resource room services (IHO Ex. 3 at pp. 63-82). Initially, the discussion focused on the qualifications of the Access 7 providers, the interruption of services, and Sappo's lack of cooperation in allowing access to the student to provide resource room services (id. at pp. 63-73). The Access 7 co-owner described the student's progress reported in the annual review progress report and commented on Access 7's communication with Sappo regarding the anticipated change in service providers in February 2007 (id. at pp. 73-77). According to the annual review progress report, the student's daily, 40-minute resource room services focused on reading, spelling, increasing the student's ability to self-correct, improving his comprehension skills, and writing three paragraphs (id. at p. 74). The student continued to exhibit difficulty with decoding and encoding, and he required repeated verbal and visual directions (id.). The student had received reading instruction using a combination of the Orton-Gillingham approach and the Wilson program since October 2006 and had demonstrated progress (id.). During this discussion, the Sappo services' administrator stated that Sappo began providing the student's resource room services in February 2007 and a report had been prepared regarding those services, which Sappo offered to transmit by facsimile to the CSE members convened at the district's location (id. at pp. 77-78, 81). While awaiting a copy of the report, the CSE decided to move on to review and discuss a classroom observation report prepared by the district's middle school psychologist who performed the observation (id. at pp. 82-94).

Next, the CSE reviewed and discussed the updated audiological report, dated May 16, 2007, and contacted the student's audiologist via teleconference for additional input (IHO Ex. 3 at pp. 95-99; see Dist. Ex. 53). The audiologist stated that the student's unilateral hearing loss impacted his ability to "separate speech from noise" and that it would be difficult for the student, in a "room where there's lots of things going on," to distinguish "speech from noise without two separate inputs" (Dist. Ex. 53 at p. 2). Thus, the audiologist recommended continued use of the student's personal hearing aide and an "FM system" (id.). The audiologist commented that people with a unilateral hearing loss have difficulty localizing sound, and thus, he had "a concern about safety on the street corner or like that" with respect to the student and recommended that special transportation should be continued (id. at pp. 2-3). When asked about his familiarity with the traffic situation at or around the student's bus stop, the audiologist stated that he was not familiar with it, but indicated that "if it's a quiet street and you have a clear visual cue when you look down the street" that would be "a safer situation" (id. at p. 3). The audiologist further stated that when he wrote his report, he "assumed" that the traffic situation was "probably a mixed bag," but that he had "no way of knowing what the traffic situation is for him at this point" (id.).

Moving on to the topic of updated testing, the CSE discussed the results of the May 18, 2007 administration of the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (IHO Ex. 3 at pp. 99-114). The district's middle school resource room teacher reported the student's standard scores and percentiles for subtests on reading fluency, letter-word identification, passage comprehension, word attack skills, math calculation, math fluency, applied problems, spelling, writing fluency, and writing samples (id. at pp. 100-03). As the teacher reported the scores, she explained the task required in each subtest and what each subtest measured (id. at pp. 100-03, 107-10). The CSE chairperson then referred to the student's test scores generated by a February 2006 administration of the WJ-III ACH, identified differences between the 2006 and 2007 scores, and explained whether those differences were statistically significant in terms of either a "lack of skill development or a growth in skill development" (id. at pp. 103-14; compare Dist. Ex. 16, with Dist. Ex. 18). The CSE chairperson interpreted a comparison of the student's scores to indicate that the student remained within the same standard error of measurement—meaning "no change significantly in either a lack of skill development or a growth in skill development"—for the following subtests: letter-word identification, word attack skills, written expression, and academic applications (IHO Ex. 3 at pp. 105-06, 110-11, 112-13; compare Dist. Ex. 16, with Dist. Ex. 18). The CSE chairperson indicated that the student's scores demonstrated growth in skill development in passage comprehension and writing samples (IHO Ex. 3 at pp. 106-07; compare Dist. Ex. 16, with Dist. Ex. 18). Finally, he noted that the student's scores demonstrated a lack of maintenance of skills in the following areas: writing fluency, spelling, math calculation, math fluency, and applied problems (IHO Ex. 3 at pp. 107, 111-12; compare Dist. Ex. 16, with Dist. Ex. 18).

Turning to the next issue, the CSE discussed assistive technology and reviewed the report generated in June 2006 by the assistive technology provider at the CSE meeting (IHO Ex. 3 at pp. 114-25). Although the assistive technology provider had not seen the student for one year, she had spoken with the Sappo services' administrator about the nature of the student's program and his needs (id.). Based upon the information gathered, the assistive technology provider recommended software to support the student's needs with respect to spelling and writing, use of a keyboard, graphic organizers and/or graphic organizers' software, and Kurzweil 3000 software to access grade-appropriate textbooks (id.). The provider noted that her recommendations could be altered to specifically address the student's needs if he remained at Sappo, but that the basis of her recommendations assumed a district placement (id. at pp. 122-25). Upon request by the parents' attorney, the CSE agreed to consider conducting an assistive technology evaluation of the student at Sappo (id. at p. 125).

Following the presentation of all of the information, the CSE chairperson suggested that the CSE review the district's draft IEP (IHO Ex. 3 at pp. 100, 125-226). The CSE chairperson began the discussion with an overall presentation of the special education programs and services to be provided at the district's middle school to offer the student a free appropriate public education

(FAPE)³ for the 2007-08 school year (id. at p. 125). The CSE chairperson stated that the student's needs could be met in the district's middle school inclusion program with the "addition of reading resource support and related services," which the CSE would discuss as they reviewed the draft IEP (id.). Upon questioning from the parents' attorney as to how the CSE arrived at that recommendation without a discussion of the inclusion program up to that point in the meeting, the CSE chairperson responded that the recommendation was based upon the most recent impartial hearing officer's decision that Sappo was not appropriate to meet the student's needs and upon the information and discussions presented at the CSE meeting (id. at pp. 125-26). The CSE chairperson further stated that the CSE would continue to discuss the recommendations as they all proceeded through the draft IEP and that the teachers present could answer questions about the recommended inclusion program and related services as they arose (id. at p. 126).

The district's middle school CSE chairperson for special education first discussed the district's inclusion program; the maximum number of students in the class; the ratio of disabled to non-disabled students in the class; how the consultant/special education teacher, the certified support staff teacher, and the regular education teacher managed and shared the instruction process; the daily, self-contained inclusion support period; and why the inclusion program was appropriate for the student (IHO Ex. 3 at pp. 128-33). The CSE chairperson then began a systematic, page-by-page and line-by-line review of the district's draft IEP beginning with the student's classification, placement information, and special alerts (id. at pp. 133-226). The CSE discussed and rejected the parents' request to place dyslexia, dysgraphia and attention deficit hyperactivity disorder (ADHD) within the special alerts section of the IEP because the special alerts section was for medical issues and the issues raised by the parents were more related to the student's academic issues, which were captured within other sections of the IEP (id. at pp. 134-36). After a brief discussion, the CSE agreed to change the student's classification from hearing impairment to learning disabled (id. at pp. 136-41).

The CSE next addressed the issue of ESY services for summer 2007 (IHO Ex. 3 at pp. 141-84). The CSE chairperson noted that a student's eligibility for ESY services was based upon substantial regression and explained the definition of regression according to regulations (id. at pp. 142-43). Moving the discussion forward, the district's attorney asked whether any documentation existed as evidence of substantial regression and the Sappo services' administrator responded that when the student "misses time, he struggles" (id. at p. 144). The Sappo services' administrator also stated that the student "lost quite a bit of ground" when his resource room services lapsed in February 2007, and that after vacations, the Sappo teachers reported that the student "had trouble getting back in synch (sic) with his work," and that he would "benefit by maintaining his work, especially his reading" (id. at pp. 144-45). The Sappo administrator noted that the student was

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 school, 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]).

making steady progress in reading and "it's accelerating," but that if he did not "have that throughout summer, that he would lose a lot of valuable time" and it would impact his self-esteem (id. at p. 145). When asked again by the district's attorney if Sappo had any "evaluative data" to evidence substantial regression other than Sappo's "concerns," the Sappo services' administrator said "no," but added that the staff "notice[s] these things" when the student returns to school (id. at pp. 145-46). The CSE then reviewed a Sappo document titled "regression history" generated by the Sappo services' administrator the day before the CSE meeting, which reported the following:

[The student] becomes disoriented at times, causing a distortion in how he perceives and processes symbols. Repetition and a comfortable setting is needed. Regression was noted after vacation periods away from school. During these times, [the student] re-entered school unfocused and restless. Attention span decreased and reading skills needed to be reviewed. [The student] began each re-entry seeming more stressed than before vacation. It takes [the student] one to two weeks to refocus and continue progressing momentum

(Dist. Ex. 38; see IHO Ex. 3 at pp. 147-49). The student's mother then spoke about the student's regression, the lack of consistency of services, the decrease in the student's English Language Arts (ELA) statewide assessment test scores between fourth and fifth grade, that the student's lower score on the fifth grade ELA test—which was given after a Christmas break—indicated substantial regression, and that if no other documentation existed, then no meaningful discussion occurred to prove that substantial regression either did or did not occur (IHO Ex. 3 at pp. 152-54). The district's attorney noted that in his "legal opinion," the evidence presented at the CSE meeting did not "demonstrate substantial regression" as defined in the regulations (id. at pp. 154-57). He based his opinion upon the information contained in Sappo's "regression history" indicating that it took the student one to two weeks to continue to progress, which was not "enough" to "demonstrate substantial regression" (id. at p. 157). The student's mother argued her interpretation of the regulations, stating that

[y]ou don't actually have to show regression in order to be eligible for [ESY] services. It's a possibility of regression and that's what the law states. And the fact that the child went down on a No Child Left Behind Test, an [ELA] test, a whole rubric level, from a three to a two shows that the child has regressed

(id. at p. 158).

The parents' attorney asked about the CSE's position on the issue of ESY services, and when the CSE chairperson and the district's attorney asked for opinions from the other CSE members as to whether the documentation or information presented demonstrated substantial regression, the middle school CSE chairperson for special education noted that the student's Sappo report card showed "pretty good grades" for his first quarter after returning from summer vacation and that it did not appear from his grades that the student struggled as a result of substantial regression during the summer vacation (IHO Ex. 3 at pp. 160-62). The student's mother reiterated her interpretation of the law and her belief that the CSE was being misinformed about a student's

eligibility for ESY services (*id.* at pp. 162-65). The parents' attorney clarified that the standard was "substantial regression" and the CSE chairperson again solicited opinions from other CSE members regarding the student's eligibility for ESY services and/or substantial regression (*id.* at pp. 165-66). The student's mother contended that "there are a lot of people at this table that should be able to speak what they would like to say," and her attorney responded, "I think they are being given the opportunity. So if anybody else has anything to chime in, now is the time," and referred his statement directly to the Sappo services' administrator (*id.* at p. 166). The Sappo services' administrator opined that the student's entrance into Sappo in September 2006—which coincided with the timeframe for the student's first quarter grades—"had a major impact on his ability as a student" (*id.* at p. 167). The parents' attorney noted that the student did not receive ESY services during summer 2006 and at the end of the first quarter at Sappo, the student's report card grades ranged from 75 percent in Orton-Gillingham to 99 percent in math, with a total cumulative first quarter average of 92 percent (*id.* at p. 168). When the parents' attorney directly asked the Sappo services' administrator about the opinion offered by the district's middle school CSE chairperson that if the student had substantially regressed due to a lack of services during summer 2006 the student would not have been able to "get such good grades" during the first quarter, the Sappo services' administrator was not able to offer any other explanation or opinion (*id.* at pp. 168-69).

The CSE continued to discuss the issue of ESY, the improvement in the student's Orton-Gillingham grade from 75 percent at the end of the first quarter to 94 percent at the end of the second quarter, the student's final grade for fifth grade English before summer 2006,⁴ and whether, based upon the differences in the student's academic grades, he exhibited substantial regression (IHO Ex. 3 at pp. 169-77). The question of the student's ESY eligibility was, again, presented to the CSE members and a vigorous discussion ensued about the participation of the CSE members and whether a consensus had been reached on the issue of ESY services (*id.* at pp. 178-84). During that discussion, the assistive technology provider stated that since she had not seen the student for one year, she had no opinion "one way or the other" (*id.* at p. 179). At the conclusion of the discussion and without additional comments from the other CSE members, the parents' attorney suggested that the meeting "move on" (*id.* at p. 184).

Special transportation was the next topic addressed and discussed by the CSE (IHO Ex. 3 at pp. 184-201). The CSE chairperson reviewed the information presented by the student's audiologist, including the audiologist's opinion to err on the side of caution and thus, continue the student's special transportation (*id.* at pp. 184-85). The CSE chairperson noted that he had driven by the student's anticipated bus stop, which was approximately 100 feet from the student's home, and found that it was located in a quiet, residential area that was not heavily trafficked (*id.* at pp. 184-86). He further noted that the bus stop was clearly visible from the student's home and determined that based upon his own observations, there was no evidence of safety concerns (*id.* at p. 185). The CSE chairperson explained that according to the district's policy, the CSE should consider whether the student required special seating, specific vehicle and/or equipment needs, adult supervision, or if a special type of transportation or other accommodation was needed in determining whether to recommend special transportation (*id.* at pp. 185-86). Based upon those

⁴ Although not available for the CSE's review, the parents submitted the student's fifth grade report card into evidence at the impartial hearing, which indicated that the student received a grade of A- in "Reading" at the conclusion of the fourth quarter (IHO Ex. 3 at pp. 170-77; Parent Ex. III).

considerations, the CSE chairperson stated that the student did not require special transportation and a lengthy discussion ensued regarding the provision of special transportation in the past, the CSE chairperson's description of the bus stop and traffic patterns, and the differing opinions about the information and recommendation presented by the student's audiologist (id. at pp. 186-90, 191-201). The discussion was briefly interrupted when the district's middle school psychologist requested to leave the CSE meeting to attend a dental appointment, and after some discussion, both parties consented to his departure and to continue the meeting in his absence (id. at pp. 190-91). The discussion about special transportation ended with the CSE chairperson noting that "we'll agree to disagree" and moved on to review the student's recommended services (id. at pp. 201-226). The CSE also reviewed, discussed, and revised the annual goals and short-term objectives (id. at pp. 226-86).

After the CSE concluded its review and revisions of the student's annual goals and short-term objectives, the parents' attorney stated the following: "Classification is okay. We're rejecting the committee's recommendation with respect to ESY. We are rejecting the committee's recommendation with respect to special transportation. We are rejecting the committee's recommendation with respect to the in-District program" (IHO Ex. 3 at pp. 286-87). The parents' attorney then requested an independent educational evaluation (IEE), an updated assistive technology evaluation, and that the CSE reconsider its placement recommendation and place the student at Sappo (id. at pp. 287-88). The parents' attorney then concluded: "With respect to the goals, with respect to the modifications, the other support services, we are in agreement. So it's just those specific things that I identified" (id. at p. 288). The district's attorney noted the obligation to convene a separate meeting to develop an individualized education services program (IESP) under dual enrollment for the student (id. at pp. 288-89; see Parent Ex. SSS). The CSE considered the parents' requests and agreed to both the IEE and updated assistive technology evaluations (IHO Ex. 3 at pp. 289-97; see Dist. Exs. 13-15).⁵

Based upon the information presented, the discussions, and the revisions made at the CSE meeting, the district developed a finalized IEP for the student's 2007-08 school year and sent a copy to the student's parents (compare Dist Ex. 9, with Dist. Ex. 10; see also Parent Ex. CC). The district's final recommendations included the following: placement in the district's middle school inclusion program with a daily, self-contained inclusion support period; a 40-minute, daily

⁵ It should be noted that the IEE took place on July 12, 2007, and that the IEE report contains a typographical error regarding the date of the evaluation (compare Dist. Ex. 13 at p. 1, with Parent Ex. Z at p. 1; see Tr. p. 827). The CSE chairperson testified that the CSE did not reconvene to review the IEE report because as of July 1, 2007, the provision of the student's related services for the 2007-08 school year became the responsibility of the district of location (i.e., the district within which Sappo was located), pursuant to a recent amendment in the law (Tr. pp. 823-27; see Parent Exs. V; SSS at pp. 1, 5). In addition, the CSE chairperson testified that the IEE report did not add any new or additional information in terms of understanding the student's disability and did not add any new or additional information regarding the student's eligibility for ESY services (Tr. pp. 827-29, 842-43). Although the CSE did not reconvene to review the report, the student's mother, the evaluator, and a special education teacher from the district attended a meeting to review and discuss the report (Tr. pp. 828-29, 1592-1696, 2651-60). At the impartial hearing, the parents attempted to submit an audiotape of this meeting, which the impartial hearing officer did not allow since the IEE report and the evaluator who conducted the evaluation and prepared the report had testified at the impartial hearing (Tr. pp. 294-300, 3967-70; see Tr. pp. 1592-1696; Dist. Ex. 13; Parent Ex. Z). The IEE report was reviewed and considered by the district of location on November 5, 2007, when its CSE convened to develop the student's IESP for the 2007-08 school year, which recommended a 40-minute, daily resource room for reading in a 5:1 setting for the student (Parent Ex. SSS at pp. 1, 5-6).

resource room for reading in a 5:1 setting; a full-time shared aide (2:1); one 30-minute session of OT per week in a 1:1 setting; one 60-minute bi-monthly consultation with a teacher of the deaf in a 1:1 setting; and that consultant teacher services would provide support in all Language Arts and reading (Dist. Ex. 9 at pp. 1-2). The district also recommended the following program modifications, accommodations, and supplementary aides and services: a modified curriculum; a modified curriculum in all reading and writing assignments; additional time to complete tasks and additional time of one to two days to complete "extensive written assignments;" a positive reinforcement plan, noting that the positive reinforcement plan would allow the student to remain on task during instructional sessions; and preferential seating in the classroom (*id.* at p. 2). The student's IEP also contained the following recommendations for assistive technology devices and services: access to an auditory trainer (personal FM system); books on tape (for homework); access to a word processor throughout the school day, including keyboarding practice, use of Kurzweil 3000 software for homework to build skill, and a gradual use of Kurzweil 3000 software during the student's school day; and one 60-minute "team meeting" per month to review the student's needs with respect to assistive technology (*id.*). The IEP contained the following testing accommodations: tests read aloud by the student; a special location (for minimal distractions and to self-read test aloud); a waiver of spelling requirements; a scribe for tests with extensive writing; extended time (2.0); flexible time; directions read to the student; the use of masks or markers to maintain place; tests read; listening sections repeated; and the use of an auditory amplification device (in addition to his own personal hearing aide) (*id.* at pp. 2-3). The finalized IEP did not contain recommendations for ESY services or special transportation (*id.* at p. 1). The 2007-08 IEP contained the student's present levels of performance regarding academic achievement, functional performance, and individual needs, as well as his present levels of performance regarding social development, physical development, and management needs (*id.* at pp. 3-5). The scores from the student's most recent educational testing were also included, as well as annual goals and short-term objectives in the areas of the student's identified needs: study skills, reading, writing, social/emotional/behavioral, motor, and assistive technology (*id.* at pp. 4, 7-11).

By due process complaint notice dated November 8, 2007, the parents alleged that the district failed to offer their son a FAPE for the 2007-08 school year based upon the district's removal of special transportation from the 2007-08 IEP, the district's failure to ensure adequate and equal participation of the CSE members at the May 24, 2007 CSE meeting, the CSE's failure to adequately discuss and offer ESY services to their son for summer 2007, the district's failure to offer ESY services in a timely manner, and the district's failure to fully provide related services (OT and resource room) between February 2007 and June 2007 (Dist. Ex. 1 at pp. 1-4; *see* Dist. Ex. 4; IHO Exs. 1-2).⁶ As relief, the parents requested implementation of ESY services and documentation of ESY services on the student's IEP; the reinstatement of special transportation on the student's IEP; that future discussions about ESY services occur annually and with sufficient time for the parents to exercise their due process rights; that future CSE meetings include an equal

⁶ By letter dated January 4, 2008, the district moved to preclude or limit portions of the parents' due process complaint notice (Dist. Ex. 5 at pp. 1-3). The parents responded to the district's motion, and by decision dated January 18, 2008, the impartial hearing officer determined that the allegation contained in paragraph 6 of the parents' due process complaint notice was barred by the doctrine of *res judicata*, but that the allegations set forth in paragraphs 7-9 were not barred by *res judicata* and thus, she would allow the presentation of proof on these allegations limited to the failure to adequately provide resource room and OT services between February 2007 and June 2007 (IHO Ex. 4 at pp. 8-10).

opportunity for all CSE members to participate; reimbursement for the costs of their son's tuition at Sappo for the 2007-08 school year; special transportation to and from Sappo; "removal" of the CSE chairperson; and proper training of all CSE members regarding "how to participate" in a CSE meeting (Dist. Ex. 1 at pp. 3-4). After receiving the parents' due process complaint notice on November 16, 2007, the district prepared a response, dated November 30, 2007 (Dist. Ex. 4).

On January 23, 2008, the parties proceeded to an impartial hearing, which included 13 days of testimony and the submission of documentary evidence (Tr. pp. 1-4112; Dist. Exs. 1-58; Parent Exs. A-Z; AA-ZZ; AAA-ZZZ; AAAA-EEEE; IHO Exs. 1-7). In a 100-page decision, dated June 30, 2008, the impartial hearing officer initially identified the issues to be determined, described the procedural history, and briefly summarized the student's educational deficits and the parties' litigation history up through the May 24, 2007 CSE meeting that formed the basis for the current impartial hearing (IHO Decision at pp. 1-14, 92). The impartial hearing officer then recounted in detail the issues discussed at the May 24, 2007 CSE meeting, the CSE's review of the district's draft IEP for the 2007-08 school year, and the revisions made to the draft IEP (*id.* at pp. 14-31). The impartial hearing officer then summarized the testimonial and documentary evidence presented with regard to the specific issues identified for her determination, including the provision of related services (resource room and OT) between February 2007 and June 2007, special transportation, the district's recommended program, ESY services during summer 2007, and the appropriateness of the parents' unilateral placement at Sappo for the 2007-08 school year (*id.* at pp. 31-38, 38-43, 53-61, 61-65, 65-77). The impartial hearing officer's decision also included a lengthy summary of the testimonial and documentary evidence presented relating to the student's educational testing and evaluations performed since September 2004, the recommendations made pursuant to the educational testing and evaluations, as well as the progress reports and classroom observation reports submitted into evidence (*id.* at pp. 43-52). In addition, the impartial hearing officer considered the results of an IEE, which occurred subsequent to the May 24, 2007 CSE meeting in question, and the testimony offered by the evaluator who conducted the IEE (*id.* at pp. 44-46). The impartial hearing officer noted that according to the CSE chairperson's testimony, the CSE did not reconvene to review the IEE report because the results were "consistent with prior testing" performed by the district and "identified the same weaknesses" as "previously identified" (*id.* at p. 47). The impartial hearing officer also noted that the CSE chairperson testified that the CSE did not reconvene to review the IEE report because the provision of the student's related services in 2007-08—i.e., resource room for reading—became the obligation of the school district where Sappo was located under the dual enrollment provisions (*id.*).

Next, the impartial hearing officer presented her findings of fact and conclusions of law regarding the district's recommended program, ESY services, special transportation, the provision of related services (resource room and OT) between February 2007 and June 2007, and the appropriateness of the parents' unilateral placement at Sappo for the 2007-08 school year, including summer 2007 (IHO Decision at pp. 77-91). With respect to the district's recommended program, the impartial hearing officer first considered the parents' procedural challenges to the 2007-08 IEP, including CSE composition and predetermination (*id.* at pp. 77-80). She determined that based upon the evidence presented, the parents' argument that the May 24, 2007 CSE meeting was improperly composed because the district's middle school psychologist was excused from the meeting after 2 ½ hours to attend an emergency dental appointment did not impact the student's right to a FAPE or significantly impede the parents' opportunity to meaningfully participate in the CSE meeting (*id.* at p. 78). After listening to the audiotapes and reviewing the transcript of the

CSE meeting, the impartial hearing officer noted that the audiotapes did not support the parents' allegations that the CSE chairperson and the district's attorney intimidated others at the meeting or presented themselves in an intimidating tone, but that the student's mother "frequently interrupted participants at the meeting during their presentations" (*id.* at 28, n. 12). On the issue of predetermination, the impartial hearing officer found that although the CSE chairperson included his opinions about proposed special education programs and services to be offered to the student for the 2007-08 school year in the draft IEP, the evidence showed that the parents had an opportunity to discuss their concerns about the recommendations in the draft IEP, the parents had an opportunity to ask questions and present information on issues of concern, the parents' attorney represented their interests at the CSE meeting, and the student's draft IEP was revised regarding classification, annual goals and objectives, and hearing education services following discussions on these topics (*id.* at pp. 79-80). Ultimately, the impartial hearing officer concluded that there were no procedural violations that impacted the student's right to a FAPE or the parents' ability to meaningfully participate in the CSE meeting or in the development of the student's 2007-08 IEP (*id.* at p. 80).

Turning to the issue of ESY services, the impartial hearing officer found that although the CSE "discussed extensively" the issue of ESY services with input from the Sappo staff, the CSE "did not have before it, or did not review, specific, objective data" regarding the student's need to prevent substantial regression in reading (IHO Decision at pp. 80-81). She noted, however, that at the CSE meeting when the district's attorney inquired directly of Sappo staff whether such objective data existed, he was informed by Sappo that such data did not exist (*id.* at p. 81). Relying upon documentary and testimonial evidence presented at the impartial hearing, the impartial hearing officer concluded that "due to the nature of his disability, [the student] require[d] ESY in order to prevent substantial regression in his reading ability" (*id.* at pp. 81-82). In formulating her conclusion, the impartial hearing officer noted that documentary evidence submitted at the impartial hearing regarding the student's performance before and after summer 2006 "would certainly have aided the [CSE] in determining whether ESY was needed to prevent substantial regression" (*id.* at p. 81). The impartial hearing officer determined that the documentary evidence provided a basis upon which to compare the student's "ability to read specific sounds before and after a summer without special education services," which, in her opinion, showed the student's inability to retain specific sounds as well as his inability to recover those specific sounds until approximately December 2006 (*id.*). When considered in conjunction with the testimonial evidence regarding the "importance of reading during the summer to avoid regression in a student with a severe reading disability," the impartial hearing officer reached the conclusion that the student required ESY services to prevent substantial regression (*id.* at pp. 81-82). Finding the IEP "inadequate," the impartial hearing officer noted her authority to order additional services "where the record provide[d] a sufficient basis" for such an award instead of remanding the matter to the CSE (*id.* at 82). Consequently, she directed the district to provide ESY services for "resource room—reading" during summer 2008 in the same frequency and amount as recommended in the student's 2007-08 IEP, namely, 40 minutes daily in a 5:1 setting, in order to prevent substantial regression (*id.*).

Attending next to the issue of the district's recommended program, the impartial hearing officer found that, with the exception of ESY services, the district's recommended inclusion program with supports and related services was reasonably calculated to enable the student to receive educational benefits (IHO Decision at p. 82). She noted that the testimony from

professionals "independent of the school district" indicated that the student would benefit from a mainstream setting, given his "many strengths," and further, that the recommended program provided "a great deal of support" for the student in a mainstream setting including the assistance of a special education teacher in his core courses and a shared aide to assist with reading, writing and organization (*id.*). In addition, the recommended program provided for a daily, self-contained support period with special education teachers assigned to the student's content areas and assistive technology, such as books on tape and software, to access reading materials above his reading level (*id.* at pp. 82-83). The IEP included annual goals and short-term objectives to address the student's needs in the areas of study skills, reading (decoding and comprehension), writing, social/emotional/behavioral, motor goals, and assistive technology goals, which were developed with input from the Sappo staff and which were agreed upon by the parents at the CSE meeting (*id.* at p. 83). With respect to the "most disputed portion" of the student's IEP—the resource room/reading instruction services—the impartial hearing officer found that although the Sappo staff and the parents testified that the student should continue with 1:1 reading instruction using the Orton-Gillingham approach, the testimony of several other witnesses as to the efficacy of the Wilson program, the likelihood of continued progress if the student received the Wilson program, the student's "proven progress in his reading skills" when instructed in a group, and the effectiveness of reading instruction in a "group setting of up to five students," convinced her that the student would continue to make meaningful progress in reading and that the district's recommended program, including the resource room/reading instruction services, was reasonably calculated to enable the student to receive educational benefits (*id.* at pp. 83-84).

Addressing the issue of special transportation, the impartial hearing officer found that the CSE properly removed door-to-door special transportation from the student's 2007-08 IEP (IHO Decision at pp. 84-86). The impartial hearing officer was not persuaded by the parents' argument that the district's failure to provide prior written notice pursuant to State regulations invalidated the CSE's proposed change to the student's IEP (*id.* at p. 84). She noted that the issue was discussed at the CSE meeting and that the CSE's decision to remove special transportation occurred after consideration of the student's needs, safety concerns, the traffic situation at and/or near the intended bus stop, and input from the student's audiologist and other CSE members (*id.* at p. 85). The impartial hearing officer further noted that expert testimony presented at the hearing clarified the nature of the student's hearing loss in one ear and that his hearing loss did not create a safety issue, "even in a noisy location" (*id.*). The impartial hearing officer also relied upon maps submitted into evidence, testimony about the location of the bus stop in relation to the student's home, traffic patterns in the area of the bus stop, and the student's own testimony that he was allowed to cross the street on his own "provided he looks both ways" (*id.* at pp. 85-86).

Moving on to the issue of the provision of related services (resource room and OT) from February 2007 through June 2007, the impartial hearing officer determined that any "lack" of resource room services directly resulted from Sappo's "refusal to allow the provider access" to the student and thus, denied the parents' request to direct the district to reimburse Sappo for resource room services provided to the student from February 2007 through June 2007 (IHO Decision at pp. 87-88). The impartial hearing officer found that the district fulfilled its obligation to provide resource room services through a qualified instructor and that Sappo's insistence that the instructor be certified in Orton-Gillingham was an improper basis upon which to deny access to the student (*id.*). With respect to OT services, the impartial hearing officer credited the testimony of the CSE chairperson acknowledging three missed sessions (*id.* at p. 88). She noted that although Sappo

"insisted" that the make-up sessions occur during the summer, the make-up sessions could not "be implemented" because the student was not "eligible for ESY" (*id.*). Based upon her earlier determination that the student was "entitled to ESY," the impartial hearing officer directed the district to provide the three missed OT sessions during the summer months (*id.*).

After completing her analysis of the first prong of the tuition reimbursement standard, the impartial hearing officer went on to analyze the appropriateness of Sappo and whether the parents sustained their burden under the second prong of the tuition reimbursement standard (IHO Decision at pp. 88-91). She noted that "[e]ven if [she had found] that the school district failed to offer [the student a] FAPE," the parents did not sustain their burden to establish the appropriateness of Sappo because "the school failed to provide appropriate special education services to [the student] on a consistent basis and because it is unduly restrictive" (*id.* at p. 89).⁷ Based upon the evidence presented, the impartial hearing officer found "nothing in the record to indicate that [the student] require[d] such an intensive staffing ratio [of 6:1] in order to make academic progress" (*id.* at p. 90). To the contrary, the hearing record indicated that when the student previously attended an inclusion program in the district's school, he progressed in all academic areas (except reading), interacted with other students, and participated in activities (*id.*). She noted that "[n]othing in the record supports the need for [the student's] placement in an intensive, therapeutic setting with frequent pull-out interventions" (*id.*). Moreover, the impartial hearing officer questioned the special education services provided to the student—and in particular the reading instruction—and whether those services were included in the student's tuition at Sappo (*id.* at pp. 89-90). In addition, she noted that the student's related services had been provided by "outside providers" and at one point during the 2007-08 school year, Sappo terminated resource room/reading services for approximately three to four weeks until the parents agreed to pay for the services out-of-pocket (*id.* at p. 89). The impartial hearing officer concluded that based upon her consideration of documentary and testimonial evidence regarding the benefits of educating the student in a mainstream setting, and in light of the parents' reduced burden under the law's requirement to educate students in the least restrictive environment (LRE), Sappo was unduly restrictive, the parents failed to sustain their burden, and therefore, she denied the parents' request for reimbursement for the costs of their son's tuition at Sappo for the 2007-08 school year (*id.* at pp. 90-91).

As a final matter, the impartial hearing officer addressed the parents' request to be reimbursed for the costs of their son's tuition at Sappo for the "resource/reading instruction" services obtained during summer 2007 (IHO Decision at p. 91). She found that the hearing record did not contain sufficient evidence to determine the specific nature of the services provided or whether the student actually received the services to warrant an award of reimbursement and denied the parents' request (*id.*). Having determined that the parents failed to sustain their burden with respect to tuition reimbursement for the 2007-08 school year, including summer 2007, the

⁷ It should be noted that in the parents' previous impartial hearing in which they sought reimbursement for the costs of their son's tuition at Sappo for the 2006-07 school year, the impartial hearing officer denied tuition reimbursement on similar grounds and the impartial hearing officer's findings and conclusions of law were upheld in Application of a Child with a Disability, Appeal No. 07-073 (see Application of a Child with a Disability, Appeal No. 07-073; Dist. Ex. 5 at pp. 5, 13, 19-20).

impartial hearing officer noted that it was not necessary for her to address equitable considerations (id.).

Based upon her findings of fact and conclusions of law, the impartial hearing officer ordered the district to reconvene a CSE meeting within ten business days to add ESY services to the student's IEP as set forth in her decision and for the district to provide three OT sessions during summer 2008 to remedy the missed sessions during the school year (IHO Decision at p. 92).

On appeal, the parents assert that the impartial hearing officer erred in her determination that the district offered a FAPE to the student for the 2007-08 school year because the student's IEP did not contain updated evaluative information obtained from an IEE that occurred after the CSE meeting, the impartial hearing officer precluded the parents from submitting an audiotape of their meeting with the IEE evaluator, and the CSE did not have persons knowledgeable about the student's reading and writing disabilities and the types of programs needed to remediate these deficits at the CSE meeting. The parents also assert that the impartial hearing officer erred in finding that Sappo was not appropriate to meet the student's special education needs despite her finding that the parents' Sappo tuition paid for an all-inclusive package of services and supports and that the student failed to make sufficient progress in reading while attending the district's school. The parents also contend that the impartial hearing officer erred when she failed to address equitable considerations regarding tuition reimbursement because the evidence clearly established that the parents paid for tuition at Sappo for the 2007-08 school year and for summer 2007. The parents also challenge the impartial hearing officer's finding that the district properly removed special transportation from the student's 2007-08 IEP because the district failed to provide prior written notice of their intent to remove the service prior to the May 24, 2007 CSE meeting, and that the impartial hearing officer failed to adequately consider the evidence regarding the student's ADHD diagnosis and recommendation by the student's audiologist regarding special transportation.

With respect to the May 24, 2007 CSE meeting, the parents contend that the impartial hearing officer erred when she failed to address the manner in which the meeting was conducted, including whether all of the CSE members adequately and equally participated in the CSE meeting and whether the CSE was properly composed when one member left prior to the conclusion of the meeting, one member never spoke during the meeting, and the CSE chairperson's conduct and the district's attorney's conduct intimidated both the parents and the Sappo staff, thereby preventing their meaningful participation at the CSE meeting. The parents also contend that the impartial hearing officer erred when she found that the parents meaningfully participated in the May 24, 2007 CSE meeting. With respect to ESY services obtained by the parents during summer 2007, the parents allege that the impartial hearing officer erred when she failed to award reimbursement for the costs of those services. As relief, the parents seek to annul the impartial hearing officer's determinations that the district met its burden of proof and "put on a prima facie case," that the district offered the student a FAPE for the 2007-08 school year, and that the parents failed to sustain their burden to establish the appropriateness of Sappo. The parents request a finding that they are entitled to reimbursement for the costs of their son's tuition at Sappo for the 2007-08 school year, including summer 2007, and that special transportation services be reinstated on the student's IEP.

In its answer, the district seeks to dismiss the petition in its entirety and uphold the impartial hearing officer's decision, except as to those issues raised in the district's cross appeal. The district asserts the following affirmative defenses as grounds to dismiss the petition: the parents' failure to properly serve the notice of intent to seek review; the parents' failure to include separately numbered paragraphs in the petition for review as required by the regulations; and the parents' failure to include a full and complete notice in the petition for review as required by the regulations. In its cross-appeal, the district seeks to annul those portions of the impartial hearing officer's decision directing the district to provide ESY reading services and three OT sessions as additional services and/or as compensatory educational services during summer 2008. The district contends that the impartial hearing officer erroneously concluded that the student substantially regressed during summer 2006 and that an award of ESY reading services was contrary to the law and to the weight of the evidence. With respect to the impartial hearing officer's directive to provide three missed OT sessions during summer 2008, the district argues that the impartial hearing officer's award was based solely upon her decision to award ESY services, and absent a finding that the missed OT sessions adversely impacted the student's progress, an award of compensatory educational services was unwarranted. The parents prepared a reply responding to the affirmative defenses raised in the district's answer.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is 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 (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]).

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]; O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 701 [10th Cir. 1998]). 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]; 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 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). A student's educational 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 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 child 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program that met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No.

01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Moreover, parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105).

The New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007; see Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-018).

Turning to the issues raised on appeal, as noted above the parents challenge the impartial hearing officer's determinations that the district offered the student a FAPE for the 2007-08 school year, that Sappo was not appropriate to meet the student's special education needs, that the CSE properly removed special transportation from the student's 2007-08 IEP without the required prior written notice, that the parents meaningfully participated in the May 24, 2007 CSE meeting, and that the impartial hearing officer denied their request for tuition reimbursement for the 2007-08 school year, including summer 2007. The parents assert that the impartial hearing officer failed to address their concerns about the manner in which the CSE meeting was conducted and that she failed to address equitable considerations regarding tuition reimbursement.

After carefully reviewing the entire hearing record, I find that the impartial hearing officer, in a thorough, well-reasoned, and well-supported 100-page decision, correctly determined that the district's recommended program in the student's 2007-08 IEP was reasonably calculated to enable the student to receive educational benefits and thus, offered the student a FAPE during the 2007-08 school year (IHO Decision at pp. 82-84, 89). The impartial hearing officer applied the proper legal standard in determining whether the student was offered a FAPE, including whether the district complied with the procedural requirements in the IDEA by analyzing the issues raised by the parents regarding whether the parents meaningfully participated at the CSE meeting, whether the CSE was properly composed, and whether the special education programs and services recommended in the student's 2007-08 IEP were predetermined (*id.* at pp. 77-80, 82-84, 89). Specifically, the impartial hearing officer found that the parents, with the assistance of their attorney, asked questions and presented information at the CSE meeting; that the early departure of one CSE member occurred only after consent was obtained by both parties and that his absence did not negatively impact the composition of the CSE or the ability of the CSE meeting to proceed; and that the CSE's use of a draft IEP did not constitute predetermination since the hearing record amply demonstrates that full discussions occurred on all of the special education programs and services considered by the CSE, and moreover, that revisions were made to the draft IEP prior to its finalization (*id.* at pp. 77-80; compare Dist. Ex. 9, with Dist. Ex. 10). The impartial hearing officer also correctly determined that the CSE's decision to remove special transportation was supported by the evidence and that the district's failure to provide prior written notice was not fatal since the CSE's final decision to remove the service did not occur until after the consideration of a lengthy discussion at the CSE meeting (*id.* at pp. 84-86). With respect to the issues raised on appeal regarding the IEE, I find that the impartial hearing officer properly considered the results of the IEE and properly credited the CSE chairperson's testimony regarding why the CSE did not reconvene to review the IEE report or incorporate the results into the student's 2007-08 IEP (Tr. pp. 294-300, 827-29, 842-43, 2651-60, 3967-70; see Tr. pp. 1592-1696; Dist. Ex. 13; Parent Exs. Z; SSS at pp. 1, 5-6). I also find that the impartial hearing officer properly precluded the submission of the parents' audiotape of the meeting with the IEE evaluator, as it would have been cumulative since all of the participants at the IEE meeting testified at the impartial hearing (Tr. pp. 823-27; see Parent Exs. V; SSS at pp. 1, 5).

Having determined that the district offered the student a FAPE, the impartial hearing officer went on to analyze, under the proper legal standard, whether Sappo was appropriate to meet

the student's special education needs, and she correctly determined that Sappo was unduly restrictive, noting that there was no evidence in the hearing record to suggest that the student required such an intensive staffing ratio to make academic progress (IHO Decision at pp. 88-91). Given her conclusions that the district offered the student a FAPE and that Sappo was not appropriate, the impartial hearing officer also properly noted that it was not necessary to reach the issue of equitable considerations (id. at p. 91). Based upon her findings and conclusions of law, the impartial hearing officer properly determined that the parents were not entitled to reimbursement for the costs of their son's tuition at Sappo for the 2007-08 school year, including summer 2007. I also note that the decision demonstrates that the impartial hearing officer carefully marshaled and weighed all of the testimonial and documentary evidence presented by both parties with regard to the parents' procedural and substantive challenges to the student's 2007-08 IEP and properly based her ultimate determinations on the weight of the evidence. The hearing record amply supports the impartial hearing officer's conclusion that the district offered the student a program that was appropriate to his special education needs. In short, based upon my review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the findings of fact or conclusions of law as determined by the impartial hearing officer regarding the issues raised in the parents' appeal, and thus, the parents' appeal is dismissed in its entirety (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]; see Application of a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 05-095; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

Turning next to the district's cross-appeal challenging those portions of the impartial hearing officer's decision directing the district to provide ESY reading services and three OT sessions during summer 2008, I concur with the district's claim that the impartial hearing officer erroneously concluded that the student substantially regressed during summer 2006 and that the award of ESY reading services was contrary to the law and to the weight of the evidence (see IHO Decision at pp. 80-82).

As an initial matter, the impartial hearing officer's award of additional services is inconsistent with her determination that the district's recommended program offered the student a FAPE for the 2007-08 school year since it is well settled that an award of either compensatory educational services or additional services must be predicated upon a finding that the student was denied a FAPE (see IHO Decision at pp. 82-84, 89; Application of a Student with a Disability, Appeal No. 08-074; Application of a Child with a Disability, Appeal No. 07-135; Application of a Child with a Disability, Appeal No. 07-109). Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 2008 WL 3474735, at *1 [2d Cir. Aug. 14, 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]).

While compensatory education is a remedy available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of

instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (see Application of the Bd. of Educ., Appeal No. 08-060; Application of a Child with a Disability, Appeal No. 07-109; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 02-047; see also Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). In general, the award of additional educational services for a student who is still eligible for instruction requires a finding that the student has been denied a FAPE (Application of a Child with a Disability, Appeal No. 07-109; Application of the Bd. of Educ., Appeal No. 04-085; Application of the Bd. of Educ., Appeal No. 02-047). As correctly noted by the impartial hearing officer in her decision, where a hearing record provides a sufficient basis, an impartial hearing officer may order the provision of additional services instead of remanding the matter to the CSE for consideration (Application of a Student with a Disability, Appeal No. 08-019 [noting that the hearing record contained extensive testimonial and documentary evidence, which provided a sufficient basis upon which the impartial hearing officer could rely to properly determine and order services that were not recommended by the CSE]; see Application of a Child with a Disability, Appeal No. 02-076).

However, in this case, the impartial hearing officer did not find that the district denied the student a FAPE for the 2007-08 school year (IHO Decision at pp. 82-84, 89). Significantly, the impartial hearing officer found the student's 2007-08 IEP was "inadequate" without ESY services, which did not rise to the level of a denial of FAPE since she ultimately concluded that the special education programs and services recommended by the CSE were reasonably calculated to enable the student to receive educational benefit (*id.*). Thus, absent a determination by the impartial hearing officer that there was a denial of a FAPE, no basis exists upon which to predicate an award of additional services (see Application of a Student with a Disability, Appeal No. 08-019; Application of a Child with a Disability, Appeal No. 07-135; Application of a Child with a Disability, Appeal No. 02-076). On this basis alone, therefore, the impartial hearing officer's award of ESY services, consisting of reading services, must be annulled.

In addition to the foregoing, however, and as more fully explained below, I note that the impartial hearing officer erroneously interpreted the documentary evidence she relied upon to conclude that the student required ESY services in order to prevent substantial regression in his reading ability.

Pursuant to State regulations, students "shall be considered for [ESY/] 12-month special services and/or programs in accordance with their need to prevent substantial regression . . . who because of their disabilities, exhibit the need for a 12-month special 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 committee on special education" (8 NYCRR 200.6[j][1][v]; see Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulations define substantial regression 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]; see 34 C.F.R. § 300.106 [defining ESY]). A guidance memorandum published by the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and dated February 2006, sets forth the factors used to determine a student's eligibility for ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>; see also Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-089).

In her analysis of the parents' claim that the student required ESY services to prevent substantial regression, the impartial hearing officer relied primarily upon three documents in evidence that were not reviewed by the CSE at the May 24, 2007 CSE meeting, but were submitted into evidence at the impartial hearing, as well as the expert witnesses' testimony presented at the impartial hearing (IHO Decision at pp. 80-82; Dist. Ex. 34; Parent Exs. C; OOO). One document relied upon by the impartial hearing officer was identified in the hearing record as the district's May 2006 administration of the Wilson Assessment of Decoding and Encoding (WADE) to the student (Parent Ex. OOO). According to the assessment results, the student demonstrated knowledge of 20 out of 24 consonant sounds (83 percent), 5 out of 9 consonant digraph/trigraph sounds (55 percent), 17 out of 56 vowel sounds (30 percent), 2 out of 15 "additional" sounds (13 percent), and 6 out of 16 welded sounds (37 percent) (*id.* at pp. 3, 8). The WADE assessment results also reflected that the student correctly decoded 22 out of 120 real words (18 percent), 3 out of 60 nonsense words (5 percent), and 55 out of 72 sight words (76 percent) (*id.* at pp. 4, 8). The results further indicated that the student correctly encoded 12 out of 100 words (12 percent), and correctly spelled 5 out of 72 sight words (7 percent), and 1 dictated sentence (*id.* at pp. 8-12). In a handwritten notation, the evaluator indicated that the student read independently at a second grade level (*id.* at p. 1).

A second document relied upon by the impartial hearing officer was a test identified in the hearing record as a "Reading Assessment" administered by the Sappo director to the student upon his entrance into Sappo, dated September 22, 2006 (Dist. Ex. 34). Results of this assessment reflect that the student was unable to demonstrate knowledge of the sounds of 5 vowels, 3 consonant digraphs, 5 vowel digraphs, both the hard and soft G, both the hard and soft C, 4 four-letter sounds, and 17 "combinations" (*id.* at p. 1). The results also revealed that the student was unable to apply the short vowel sound of "CVC" pattern words or to apply the "silent e" concept consistently (*id.*). The assessment report indicated that the words missed by the student on "word list reading" were "often read with incorrect vowel pronunciation and weaknesses noted above" (*id.* at p. 2). The

Sappo assessment report did not indicate, however, what words the student missed (see id. at pp. 1-2). The assessment report also did not reflect what sounds the student was able to demonstrate knowledge of or words he successfully decoded, encoded, or recognized (id.). The evaluator reported that the student was reading on a second grade level (id. at p. 2).

The third document relied upon by the impartial hearing officer documented the results of three Orton-Gillingham reading assessments administered to the student by Sappo on September 22, 2006, December 5, 2006, and March 1, 2007 (Parent Ex. C). In September, the student missed 5 vowel sounds, 8 diphthong/digraphs sounds, 4 four-letter sounds, and 17 combination sounds (id.). According to the document, the student missed no vowel sounds, no 4-letter sounds, 3 diphthongs/digraph sounds, and 4 combination sounds when assessed in December 2006 (id.). In March 2007, the student missed no vowel sounds, no four-letter sounds, 4 diphthongs/digraph sounds, and 2 combination sounds (id.). The report also indicated that by December 2006, the student demonstrated "CVC Mastery" and "Silent E Mastery," and by March 2007, he demonstrated "Hard and Soft G Mastery" and "Hard and Soft C Mastery" (id.).

In her decision, the impartial hearing officer noted that although the CSE extensively discussed the issue of ESY services, the CSE "did not have before it, or did not review specific, objective data" that spoke directly to the student's need for ESY in reading to prevent substantial regression, despite the fact that when asked directly, the Sappo services' administrator stated that no such data existed (IHO Decision at pp. 80-81). And while the three documents relied upon by the impartial hearing officer may have existed at the time of the May 24, 2007 CSE meeting, I do not agree with the impartial hearing officer's opinion that an "examination of this information would certainly have aided the Committee in determining whether ESY was needed to prevent substantial regression" because the documents do not establish that the student substantially regressed during summer 2006 or that the student required ESY services to prevent substantial regression of his reading ability (id. at p. 81).

Although the hearing record suggests a similarity between the WADE and Sappo/Orton-Gillingham assessment instruments because they both evaluated reading skills, the Sappo reading assessment provided insufficient information from which to determine the student's actual knowledge of decoding, encoding, and word recognition. Although the Sappo report provided sounds "missed" by the student, it did not indicate the total number of sounds presented to the student in each area or document those sounds of which the student demonstrated knowledge. For example, the WADE report indicated that the student demonstrated knowledge of the sh, ck /k/, ch /ch/, th, and ph /f/ consonant digraph sounds, but that he did not demonstrate knowledge of the ch /k/, wh /w/, and wh /hw/ consonant digraph sounds (Parent Ex. OOO at pp. 3, 8). The Sappo reading assessment report only indicated that the student "missed" three consonant digraphs (ch, ph, wh), but did not specify whether the student missed one or both sounds of the ch and wh digraphs (Dist. Ex. 34 at p. 1). Similarly, the Sappo report indicated that the student missed the vowel sounds of "a, e, i, o, u," but did not specify whether he missed one or all of the sounds associated with each vowel (e.g. /ā/, /ā/, /ō/, or /ə/) compared to the WADE report, which specifically indicated which sounds associated with each vowel the student was able to demonstrate knowledge of (compare Dist. Ex. 34 at p. 1, with Parent Ex. OOO at pp. 3, 8). As noted above, the May 2006 WADE assessment indicated that the student demonstrated knowledge of 20 out of 24 consonant sounds; however, the September 2006 Sappo assessment did not indicate that the student missed any consonant sounds (compare Parent Ex. OOO at pp. 3, 8, with Dist. Ex.

34 at p. 1). It is not clear from the Sappo report if Sappo assessed the student's knowledge of consonant sounds in September or whether the student, in fact, made progress during summer 2006. I also note that both the May 2006 WADE assessment and the September 2006 Sappo assessment concluded that the student was reading at the second grade level (Dist. Ex. 34 at p. 2; Parent Ex. OOO at p. 1).

Based upon the limited data provided in the Sappo reports, the information in the hearing record does not provide a thorough picture of the student's abilities in decoding, encoding, or recognition of sight words, and cannot be compared to the results of the WADE to formulate an opinion regarding regression of the student's reading skills. Moreover, although the hearing record reflects testimony from Sappo personnel and documentary evidence attempting to establish that the student regressed following summer 2006, 2006-07 vacation breaks, and the lapse of resource room services in February 2007, such testimony and evidence primarily describes regression in the student's behavior, his social/emotional status, and his ability to attend to tasks, and are, at times, contradictory (Tr. pp. 3052-54, 3096-98, 3147-48, 3179-80, 3215-16; Dist. Ex. 38; Parent Exs. A; L at pp. 2-3; JJ; IHO Ex. 3 at pp. 8-10, 144-46). For example, according to reports from Sappo personnel at the May 2007 CSE meeting, at the time of his enrollment in September 2006, the student was "basically a nonreader" and his reading was approximately at the kindergarten to first grade level (IHO Ex. 3 at pp. 8-10). However, the hearing record reflects that when the student was administered a reading assessment by Sappo on September 22, 2006, he was reportedly reading at a second grade level, which was inconsistent with the report provided by his Sappo teacher at the May 2007 CSE meeting, but was consistent with his reading level as reported in the May 2006 WADE assessment (compare Dist. Ex. 34 at p. 2, with Parent Ex. OOO at p. 1).

The hearing record also reflects that all of expert witnesses' testimony expressed a preference for recreational reading over a formal structured reading program to prevent regression over the summer (Tr. pp. 1629, 1675-77, 3858, 3860-61, 3862-64). The evaluator (a reading diagnostician) who conducted the student's July 2007 IEE testified on behalf of the parents and opined that a combination of individual instruction and independent reading was optimal to maintain the student's progress during the summer; however, he believed that independent reading and activities, such as library book clubs, are oftentimes more advantageous than structured reading programs offered over the summer (Tr. pp. 1629, 1677). The evaluator further testified that a structured summer reading program—without independent reading at home—was insufficient to maintain progress, and he opined that it would be "detrimental" to a student who is as "severely deficient in reading" as the student in question to be "out of print during the summer, meaning he is not reading at all recreationally" (Tr. pp. 1629, 1675-77). The evaluator also testified that for this student, being "in print" during the summer was "perhaps even more critical" when considering whether the student would substantially regress (Tr. pp. 1629, 1675-77). In his IEE report, the evaluator noted that when asked about his recreational reading habits, the student responded, "I would never pick up a book to read for fun" (Dist. Ex. 13 at p. 8). The evaluator's IEE report contained several recommendations regarding an instructional reading program for the student, notably "extensive, SILENT reading of independent level texts" with each successive test becoming incrementally more difficult (id. at pp. 8, 9).

The chairman of the department of special education and literacy at a State university testified on behalf of the district (Tr. pp. 3788-3870). He opined that a student receiving a structured reading program during the school year would likely regress without that instruction if

the student did not read independently at home or at the library during the summer (Tr. pp. 3862-63). He further indicated that a structured program, alone, would help maintain progress, but even more progress would occur if there was cooperation from home, such as providing a language-rich environment and visiting the library (Tr. pp. 3858, 3860-61, 3863-64).

Although, the student's mother testified that the student had regularly participated in summer reading activities prior to summer 2007 and that he had substantially regressed each year, I note that the student's fifth grade teacher testified that he exhibited no evidence of regression following holidays, that the student has continued to exhibit progress in core academic subjects, such as English and social studies, and that academic achievement testing demonstrates consistent standard scores in reading, indicating progress in the student's reading skills (Tr. pp. 1152, 1604, 3465; Dist. Exs. 13; 15-18; 25-26; 31-32; 37-40; 54; Parent Exs. G; JJ; AAA-BBB; GGG-III).

Based upon the foregoing, I do not agree with the impartial hearing officer that the documentary and testimonial evidence she relied upon provided a basis upon which to conclude that the student required ESY services to prevent substantial regression in his reading ability and furthermore, I find that the hearing record does not contain evidence to support a finding that the student required ESY services during the summer to prevent substantial regression in his reading ability. Therefore, that portion of the impartial hearing officer's decision directing the district to provide ESY services as set forth in her decision during summer 2008 is annulled.

Finally, turning briefly to the district's final issue raised in its cross-appeal challenging the impartial hearing officer's decision directing the district to provide three OT sessions during summer 2008, I concur with the district's claim that the impartial hearing officer's award was based solely upon her decision to award ESY services, and that absent a finding that the missed OT sessions adversely impacted the student's progress, an award of compensatory educational services and/or additional services was unwarranted. Notably, when parents are seeking compensatory education as relief, the hearing record must reflect that there was a deprivation of services that caused harm that could be rectified by additional services, and such proof is lacking in the hearing record (see Reid v. District of Columbia, 401 F.3d 516, 524 [DC Cir. 2005] [holding regarding compensatory awards that "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]). In this case, the hearing record established that the student missed three OT sessions and that despite the efforts made by the Access 7 agency and its providers, Sappo's insistence that the make-up OT sessions could only occur during the summer effectively prevented the student from receiving the full complement of OT services during the school year (IHO Decision at p. 88). However, I note that the hearing record is devoid of any evidence that the deprivation of services caused harm to the student. As such, the impartial hearing officer erred when she directed the district to provide three missed OT sessions during summer 2008, and that portion of the impartial hearing officer's decision is also annulled.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it directed the district to provide ESY services, consisting of reading services and three sessions of OT, during summer 2008.

Dated: **Albany, New York**
 September 12, 2008

PAUL F. KELLY
STATE REVIEW OFFICER