The University of the State of New York

The State Education Department
State Review Officer
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No. 09-088

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

Appearances:
Law Office of Andrew K. Cuddy, attorneys for petitioner, Andrew K. Cuddy, Esq., of counsel

Ingerman Smith, L.L.P., attorneys for respondent, Susan E. Fine, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her daughter's tuition costs at the Landmark School (Landmark) for the 2007-08 and 2008-09 school years. Respondent (the district) cross-appeals from those portions of the impartial hearing officer's decision which found that the student made progress at Landmark during the 2008-09 school year and that equitable considerations did not warrant a denial of tuition reimbursement. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student attended ninth grade at Landmark, where the parent had unilaterally placed her for seventh grade (2006-07), eighth grade (2007-08), and ninth grade (2008-09) (see Tr. pp. 835, 860, 865, 878-80; Dist. Ex. 40 at p. 2). The Commissioner of Education has not approved Landmark as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). The student's prior educational history has been discussed at length in previous appeals and will not be repeated here in detail (see Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child with a Disability, Appeal No. 07-119; Application of a Child with a Disability, Appeal No. 04-082; see also Application of a Child with a Disability, Appeal No. 07-095).[1] The student's eligibility for special

[1] The parent appealed the decisions rendered in Application of the Bd. of Educ., Appeal No. 07-135 and Application of a Child with a Disability, Appeal No. 07-119 to federal court in the Eastern District of New York and those appeals are currently pending. At the impartial hearing, the district submitted a copy of Application of the Bd. of Educ., Appeal No. 07-135 into the hearing record (Dist. Ex. 40).

education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

On June 15, 2007, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop the student's individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 14 at pp. 1, 7).[2] Attendees at the CSE meeting included the following: a district CSE chairperson, school psychologist, special education teacher, and regular education teacher; an additional parent member; four of the parent's family friends; the student's case manager at Landmark; Landmark teachers who provided instruction to the student during the 2006-07 school year, including the student's science and mathematics teacher, oral expression and literature teacher, social studies teacher, 1:1 reading tutor, and language arts teacher; Landmark's public school liaison; the student; and the parent (Dist. Ex. 14 at p. 7; Parent Exs. B4; H at p. 1; see Tr. pp. 782-83, 786-88; compare Parent Ex. B4, with Parent Ex. B5 at p. 2).[3] Prior to the June 15, 2007 CSE meeting, Landmark provided the district with a student report, dated January 12, 2007, which included progress reports prepared by the student's Landmark teachers during the 2006-07 school year (Tr. pp. 279-80; Dist. Ex. 7). At the time of the June 15, 2007 meeting, the CSE members had several documents available for review, including a draft IEP developed by Landmark staff, the results of testing administered by Landmark during the 2006-07 school year, and the student's work samples from Landmark (Tr. pp. 281-84; Dist. Exs. 11-13; 14 at pp. 8, 11).

The CSE performed a "page by page" review of Landmark's draft IEP at the June 15, 2007 meeting (Tr. p. 282; Parent Ex. H at pp. 2-41; see Tr. pp. 789-96; Dist. Exs. 11; 14 at pp. 7-9).[4] Initially, both the parent and the student spoke about their individual educational concerns for the upcoming school year, then the CSE reviewed, discussed, and revised the student's strengths, interests, personal attributes, and accomplishments identified in the draft IEP (Parent Ex. H at pp. 3-6; see Tr. p. 282; Dist. Exs. 11 at pp. 2-3; 14 at p. 8). Throughout the CSE meeting, both the parent and the student contributed to the CSE's discussions by asking questions, providing information about assignments, and by noting how certain accommodations aided the student's

[2] In addition to the educational history provided in the previous appeals, the decision rendered in Application of the Bd. of Educ., Appeal No. 07-135, incorporated a detailed account of the June 15, 2007 CSE meeting, which is particularly noteworthy because the instant appeal, in part, challenges the district's alleged failure to fully implement the student's 2007-08 IEP developed at that same June 15, 2007 CSE meeting when the student attended the district for three days in March 2008 (Application of the Bd. of Educ., Appeal No. 07-135; see Dist. Ex. 40 at pp. 2-5; Parent Exs. A at pp. 1-4; A1 at pp. 1, 3; A2 at pp. 1, 3). The decision rendered in Application of the Bd. of Educ., Appeal No. 07-135 also included relevant testimonial evidence from several witnesses who had attended the June 15, 2007 CSE meeting (Application of the Bd. of Educ., Appeal No. 07-135; see Dist. Ex. 40 at pp. 2, 6-9).

[3] All of the CSE and/or CSE subcommittee meetings reported in this decision occurred via telephone conference between members who convened at either the district or at Landmark (Parent Exs. H at pp. 1-2; M; M1-M3; N at pp. 1-2; N1 at pp. 1-2).

[4] At the impartial hearing, Landmark's public school liaison testified that he "chaired" the June 15, 2007 CSE meeting, that he "asked at the start of the meeting if it would be permissible for [him] to run the meeting," and that the district's CSE chairperson agreed to let him "run the meeting" (Tr. pp. 788-89, 805). However, contrary to his testimony, the transcript of the June 15, 2007 CSE meeting submitted into evidence at the impartial hearing reveals that Landmark's public school liaison did not ask to chair the CSE meeting, but instead indicates that the district's CSE chairperson suggested "why don't we just go through your proposed IEP," similar to how another CSE meeting involving Landmark had proceeded in the past (Parent Ex. H at p. 2; see Tr. pp. 281-82; Dist. Ex. 40 at pp. 2, 6-7; Parent Ex. B4).

progress in her coursework (Parent Ex. H at pp. 3-6, 9-12, 14-26, 28-29, 31-47). The CSE discussed the student's performance on academic testing conducted at Landmark in spring 2006 and during the 2006-07 school year (id. at pp. 6-9; see Tr. pp. 282-83; Dist. Exs. 11 at p. 3; 12; 14 at pp. 4, 8). Based upon a comparison of the test scores, the student improved her performance in the following areas: word identification, word attack, reading rate, reading accuracy, passage fluency, spelling, reading vocabulary, reading comprehension, mathematics problem solving, and mathematics procedures (Parent Ex. H at pp. 6-9; see Dist. Ex. 11 at p. 3). The CSE chairperson noted that the student made "tremendous progress" and that the academic test results demonstrated "solid scores" (Parent Ex. H at p. 8).

Next, the CSE reviewed and discussed the student's present levels of educational performance and learning issues within the general education curriculum, how the student's disability affected progress in the curriculum areas, accommodations recommended to assist the student, and the type of specially designed instruction required by the student to make progress, including the necessary instructional modifications related to content, methodology/delivery of instruction, and performance criteria (Parent Ex. H at pp. 10-19; see Dist. Exs. 11 at pp. 4-5; 14 at pp. 1-4, 6-7). In addition, the CSE reviewed and discussed the student's present levels of educational performance in the area of "other educational needs," including extra-curricular activities, social/emotional needs, and assistive technology devices/services (Parent Ex. H at pp. 17-19; see Parent Ex. B5 at p. 8; Dist. Ex. 14 at pp. 1-4, 6-7). Here, the CSE again discussed how the student's disability affected progress in these areas of "other educational needs," accommodations recommended to assist the student, and the type of specially designed instruction required by the student to make progress, including the necessary instructional modifications related to the methodology/delivery of instruction (id.).

The CSE then turned the discussion to the student's current performance levels and specific annual goals included in Landmark's draft IEP related to the student's identified areas of need in study skills, reading, written language/language arts, and mathematics (Parent Ex. H at pp. 19-32; see Dist. Exs. 11 at pp. 6-9; 14 at pp. 8-9, 12-14). With respect to the delivery of services, Landmark's public school liaison described how the programs and services outlined in the Landmark draft IEP would be implemented if the student attended Landmark (Parent Ex. H at pp. 32-33). Landmark's public school liaison concluded by noting that the district's staff "might want to take a moment in thinking about the goals and benchmarks we've discussed today" (Parent Ex. H at p. 33). He then specifically asked how the goals and benchmarks might "be addressed . . . in a different type of setting" and suggested that "we hear a description of it today . . . together as members of the team" (id.).

At that time, the CSE chairperson indicated that she would certainly discuss how the district would address each goal, and further, that the "CSE recommendation would be for a return to district" because the student's most recent test scores did not support a recommendation for an out-of-State residential placement (Parent Ex. H at p. 33). She also indicated that the student's most recent test scores supported placement in the district as the student's least restrictive environment (LRE) (id.). Specifically, the CSE chairperson proposed placement in district inclusion classes, which she described as a "mainstream class environment" with 20 to 23 students, 1/3 of whom would be special education students (id.). She further explained that the student's inclusion classes for English, social studies, mathematics, and science would contain both a regular education teacher and a special education teacher (id.). With regard to accommodations, the CSE chairperson explained that the student would have the use of Kurzweil software on a laptop computer—in

addition to the course textbooks—to assist the student in managing the reading level of the material (id.). The CSE chairperson also proposed that the student attend a daily, 1:1 tutorial with a certified reading teacher to develop her reading fluency skills and further, that the "Read Naturally" program would be offered to the student (id. at p. 34). In addition, she indicated that the district would provide the student with a daily skills class—which would include a small group of students taught by the teacher from the student's inclusion classes—to assist the student with her writing skills (id.). The CSE chairperson stated that it was important for the student to "be exposed to the traditional school setting" and that the district could provide the support required by the student (id.). Finally, the CSE chairperson indicated that although she could go through each annual goal to be included in the student's district IEP, the goals would be exactly the same as the goals contained in the Landmark draft IEP (id.). The CSE chairperson continued by stating that the district's recommended placement in inclusion classes would provide the student with support more "analogous" to the student's program at Landmark (id.).

In response, the parent questioned why the district would recommend an inclusion class for the 2007-08 school year when a CSE had previously determined that an inclusion class was not appropriate for the 2006-07 school year and instead recommended that the student be "totally mainstreamed" for the 2006-07 school year (Parent Ex. H at pp. 34-35). Although the CSE chairperson interjected that the inclusion classes had changed since the previous year, the parent denied knowledge of any change in the inclusion policy within the district and stated further, that the district did not offer language-based classes (id.). The parent continued to express her disagreement with the district's recommended program and services by, among other things, raising issues with the programs and services previously recommended by the district, challenging the CSE chairperson's assertion that the district used Kurzweil software, alleging that the district had failed in the past to provide the student with a personal "FM" system, and indicating that the student would require an individual skills class for each and every content area class in order to "glean something" from a regular education classroom (id. at pp. 34-41). At one point, Landmark's public school liaison interrupted, noting that the Landmark teachers had approximately five minutes left available to participate in the CSE meeting, and that the CSE needed to determine whether the student qualified for extended school year (ESY) services for summer 2007 (id. at p. 41). The CSE meeting concluded after a discussion about the student's eligibility for ESY services (id. at pp. 41-48).

After the June 15, 2007 CSE meeting, the CSE chairperson transposed all of the information contained in the Landmark draft IEP into the district's IEP for the 2007-08 school year (Tr. pp. 284-85; Dist. Ex. 14; Parent Ex. RR at pp. 1, 7-8, 10; see Parent Ex. H at pp. 5, 45). According to the district's IEP, the student's special education programs and services included the following: daily resource room in a small group; a daily, 1:1 reading tutorial; program modifications, accommodations, and supplementary aids and services, including the use of a graphic organizer, "Inspiration" software, modified homework assignments, and the use of a word bank (Dist. Ex. 14 at pp. 1-2). The IEP included recommendations for assistive technology devices and services, specifically, the use of an auditory enhancer ("FM" unit or system), use of a laptop, use of Kurzweil software (with the additional support of training on the use of Kurzweil), and the use of "Read Naturally" (id. at p. 2). Finally, the IEP included the following testing accommodations: extended time, administration in a small group, special location, directions explained and read, use of a word processor or laptop with Kurzweil software, use of a word bank on tests, and use of a calculator (id.).

By due process complaint notice dated June 21, 2007, the parent alleged that the district's CSE chairperson unilaterally removed the student's summer 2007 services at the June 15, 2007 CSE meeting (Dist. Ex. 40 at p. 5). The district prepared a prior written notice, dated June 22, 2007, which explained to the parent that the student did not qualify for ESY summer 2007 services because she did not demonstrate substantial regression (id.; see Dist. Ex. 15 at pp. 1-2).[5, 6] By letters dated July 2, 2007, the district forwarded a copy of the student's 2007-08 IEP developed at the June 15, 2007 CSE meeting to the parent; the district also enclosed a consent form for the parent's signature and for the parent to indicate whether she either agreed or disagreed with the CSE's recommended special education programs and services (Dist. Ex. 16 at pp. 1-4). The parties proceeded to a resolution session on July 16, 2007, in connection with the June 21, 2007 due process complaint notice (Dist. Ex. 40 at p. 6; Parent Exs. RR at pp. 1-15; RR[A]). In addition to discussing the disputed ESY summer 2007 services, the parent expressed confusion with respect to the 12-month designation associated with the annual goals in the 2007-08 IEP she had recently received from the district (Parent Ex. RR at pp. 1-4). The CSE chairperson responded that the 12-month designation was a "mistake" since the student did not qualify for ESY services (id.). Shortly thereafter, the parent asked the CSE chairperson why she did not attach the Landmark draft IEP to the district's IEP, noting that although "we were all in agreement as to what was going on during that time until the very last ten minutes of the meeting," the parent did not believe the district's IEP "exactly reflect[ed] the meeting" and suggested that a CSE reconvene to address the differences (id. at pp. 7-10). The CSE chairperson agreed that a CSE could reconvene, and the parent agreed to explain in writing what she believed had been "left out" of the district's IEP (id.). Although the parties did not resolve the dispute related to ESY summer 2007 services, the parent requested—and the district agreed to secure and fund—an updated neuropsychological evaluation and an updated auditory and language processing evaluation (Dist. Ex. 40 at p. 6; Parent Ex. RR at pp. 4-7, 11-13; see Dist. Exs. 17-18; Parent Ex. B).

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[5] 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[k][1], [k][1][v]; see Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; 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 regulation defines 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]).

[6] The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding 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.

The updated neuropsychological evaluation of the student occurred on August 7, 8, and 9, 2007 (Dist. Ex. 17 at p. 1). As part of the evaluation, the neuropsychologist reviewed numerous prior assessments of the student conducted throughout her educational history (id. at pp. 1-3). In his report, the neuropsychologist described the student as "pleasant and agreeable," "mature in behavior and attitude," and "task-oriented and focused" (id. at p. 3). Despite noting response times "on the slow side," the student's summary scores on the Test of Variables of Attention (TOVA) used to measure the student's attention skills "fell within normal limits" (id. at pp. 3, 8).

An administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) yielded the following scores: verbal comprehension, 116 (bright-normal range); perceptual reasoning, 115 (bright-normal range); working memory, 77 (borderline range); processing speed, 109 (average range); and a full scale intelligence quotient (IQ) score of 108 (average range) (Dist. Ex. 17 at pp. 3-5, 8). Due to variability in the student's scores and a "particularly low" working memory score, the neuropsychologist calculated a General Abilities Index (GAI) of 119 (bright-normal range), which he described as a "more accurate reflection" of the student's "cognitive skills" (id. at pp. 3, 8). According to the evaluation report, the "only area of concern raised on the WISC-IV related to working memory, with well-developed skills on both the conceptual language and non-verbal aspects of this test" (id. at pp. 3-4). On additional measures of non-verbal problem solving skills, the student exhibited difficulty with cognitive flexibility, organization, and planning skills (id. at pp. 4, 6). The student performed within the normal range on tasks measuring visuospatial/construction skills, fine motor skills, visual scanning skills, visuomotor copying skills, and visuomotor production skills (id. at p. 4).

On an assessment of language skills, although the student did not display difficulty with speech articulation, speech morphology and syntax, a definitional vocabulary task, or confrontational naming activities, the student did exhibit word retrieval difficulty on the latter task (Dist. Ex. 17 at p. 4). The student exhibited normal language understanding on tasks measuring both semantic and inferential understanding of language (id.). An assessment of the student's auditory processing skills, specifically phonemic awareness, yielded average scores, which reflected significant improvement from a prior assessment of the student when she was eight years old (id. at p. 5). On the SCAN-A Test for Auditory Processing Disorders in Adolescents and Adults, the student improved her performance in the auditory figure ground subtest, but exhibited difficulty on the competing words subtest that measured her "ability to recognize words presented to either ear when words [were] presented to both ears almost simultaneously" (id. at pp. 2, 5, 10). Tasks used to assess the student's memory revealed poor working memory skills, verbal learning, and visual memory skills (id. at pp. 5-6).

The neuropsychologist reported that although the student did not demonstrate difficulties with reading comprehension, she struggled "slightly" with reading decoding and exhibited a significant degree of difficulty with reading rate, especially when she encountered longer words requiring the student to apply her decoding skills (Dist. Ex. 17 at pp. 5-6). The student performed adequately on spelling tasks, and she displayed "quite sophisticated" sentence structure, complexity, content, and punctuation (id. at p. 6). The neuropsychologist described the student's performance on basic mathematics computation tasks across operations as "good" and noted that her "weak" problem solving skills could reflect the student's difficulty with organizational skills (id.). The Behavior Assessment System for Children, Second Edition (BASC-2), completed by the student's mother, did not reveal any significant concerns (id.).

Based upon a review of the student's previous assessments and the current testing results, the neuropsychologist noted that the student had benefited in the past from "intensive interventions" and further added that regardless of the student's academic placement, she needed to improve her reading fluency by increasing the automaticity of her phonetic decoding skills (Dist. Ex. 17 at p. 7).[7]..To assist the student, the neuropsychologist recommended allowing extended time for the student to complete independent reading with the use of assistive technology for large amounts of text, and in addition, opined that the student would benefit from direct instruction for mathematics problem solving due to her organizational difficulties (id.). The neuropsychologist noted the importance of using a "linear model" to provide the student with an "explicit structure" when teaching new skills to the student (id.). To address the student's memory difficulties, the neuropsychologist recommended using multisensory strategies to "enhance learning and recall" and to reinforce material presented, as well as additional time (id.). In larger settings, the neuropsychologist recommended that teachers work closely with the student to assist with organization and to provide close teacher proximity during lessons when the student did not use a personal FM system (id.).

On August 8, 2007, a speech-language pathologist conducted the updated auditory and language processing evaluation of the student agreed to at the July resolution session (Dist. Ex. 18 at p. 1).[8] The evaluator's assessment included a review of the student's academic records from prior school years, an audiological evaluation, and the administration of tests of auditory processing and language, which included the following: the SCAN-A test, the Staggered Spondaic Word Test (SSW), the Lindamood Auditory Conceptualization Test (LAC), the Random Gap Detection test, the Duration Pattern Test, the Clinical Evaluation of Language Fundamentals—Fourth Edition (CELF-4), and two subtests of the Comprehensive Assessment of Spoken Language (CASL) (id. at pp. 1-7, 10-13).

The evaluator described the student as "cooperative" and "well related," and she noted that the student "maintained good attention" during testing (Dist. Ex. 18 at pp. 2, 7). Based upon the testing results, the evaluator noted that the student continued to present with an auditory processing disorder that contributed to her "language based learning disability" (id. at p. 7). The student's audiological evaluation revealed normal hearing with "good" speech discrimination skills in "quiet," but with difficulty discriminating speech in "noise" (id.). According to the evaluator, the student's performance on the SCAN-A test identified a "significant auditory processing deficit" with difficulty in the areas of "auditory closure, figure-ground listening, and integration" (id. at pp. 7-8). The evaluator indicated that the student's performance on the SSW confirmed the presence of an auditory processing deficit "in the areas of decoding and tolerance fading memory, consistent with [the student's] reading disorder" (id. at p. 8). In addition, the evaluator noted that although the student's temporal integration skills had improved, she exhibited inconsistency, which

[7] The neuropsychologist noted that the student had made "gains between testing performed in 2003 and 2005, when she was exposed to the Lindamood-Bell Program," and further, that based upon testing conducted at Landmark, the student had made "significant gains with regard to reading rate and accuracy in context, between March of 2006 and May of 2007" (Dist. Ex. 17 at p. 6).

[8] According to the auditory and language processing evaluation report, the student's mother accompanied the student to the evaluation and "acted as [an] informant" (Dist. Ex. 18 at p. 1). The speech-language pathologist who conducted the updated evaluation had previously conducted evaluations of the student (id.). In addition, the speech-language pathologist is also certified in audiology (Tr. p. 943).

could "underlie [the student's] discrimination difficulties" (id.). On assessments used to measure phonemic awareness, the student exhibited some difficulty with sound blending skills, but she demonstrated "grade level" decoding skills (id.). The student also showed a significant improvement in her auditory comprehension skills (id.).

The administration of the CELF-4 yielded a composite expressive language score within the average range and a composite receptive language score in the above average range (Dist. Ex. 18 at pp. 6, 8, 11). The evaluator reported that overall, the student demonstrated measurable gains in language skills, primarily in her expressive and comprehension skills (id. at p. 6). Notably, the student demonstrated strengths in "formulating syntactically correct sentences, defining words (vocabulary), understanding semantic relationships, and assembling sentences" (id. at p. 8). The student performed within the average range on measures of non-literal language skills and inference ability (id. at pp. 6-7). However, the student's short-term memory and word retrieval skills remained "compromised," according to the evaluator (id. at pp. 5-6, 8). The evaluator noted that although the student exhibited "weaker" skills in understanding word classes (low average range) and metacognitive skills ("lower end of average"), these "skills should improve as her language skills continue to improve" (id. at p. 8).

Turning to her recommendations, the evaluator concluded that although the student's "intensive program and individual instruction" had resulted in "measurable gains" she continued to exhibit difficulty with auditory processing, short-term memory, word retrieval, and reading fluency skills (Dist. Ex. 18 at p. 8). In order to "improve [the student's] auditory and language processing," the evaluator recommended continued placement of the student at Landmark, because the student received "excellent support and services and has shown progress" (id. at pp. 8-9). Among other recommendations, the evaluator suggested the use of classroom and testing accommodations, a personal FM ear-level unit, twice weekly speech-language therapy, extended school year reading specialist and speech-language therapy services, use of a multisensory reading program, provision of support services for writing, and the ability to take a foreign language on a "pass-fail" basis (id.).

By letter to the district dated August 17, 2007, the parent asserted that the district failed to offer the student an appropriate program to meet her educational needs, and thus, failed to offer the student a free appropriate public education (FAPE) (Parent Ex. G64). Noting her "responsibility" to provide a 10-day notice to fulfill the equitable considerations prong in such "disputes," the parent advised the district of her intent to enroll the student at Landmark for the 2007-08 school year (id.).

By letter to the district dated October 16, 2007, the parent requested a CSE meeting to review the neuropsychological evaluation report and the auditory and language processing reevaluation report (Parent Ex. C33; see Dist. Exs. 17-18). In the letter, the parent explicitly expressed her desire to address summer 2008 ESY services at the CSE meeting, and she asked the district respond to her request within five business days (Parent Ex. C33).

By letter dated October 24, 2007, the parent reminded the district of her request to schedule a CSE meeting to discuss the student's updated evaluation reports and summer 2008 ESY services (Parent Ex. C32). In addition, the parent indicated that the district's failure to respond to her previous request within five business days constituted "repetitive, uncooperative and adversarial behavior" and that she could "no longer let so much time pass by" awaiting a response from the

district (id.). The parent advised in the letter that if the district failed to communicate regarding the scheduling of a CSE meeting, she would have "no other option" than exercising her due process rights (id.).

On December 12, 2007, the CSE convened to review the student's updated evaluations and to discuss summer 2008 ESY services (Parent Ex. N at pp. 1, 4, 7; see Dist. Ex. 19 at pp. 1, 4, 7-8; Parent Ex. M; see generally Parent Ex. G4). Attendees at the CSE meeting included the following: a district CSE chairperson, school psychologist, special education teacher, regular education teacher, and speech-language pathologist; an additional parent member; three of the parent's family friends; the Landmark public school liaison; the student's case manager from Landmark; the student's language arts teacher at Landmark; the student's reading literature teacher at Landmark; the student; and the parent (Parent Ex. N at pp. 1-2; see Dist. Ex. 19 at p. 7).[9] During the 90-minute meeting, both the neuropsychologist and the speech-language pathologist who conducted the student's updated evaluations in August 2007 participated via telephone (Parent Ex. N at pp. 1-2, 25, 38). After an initial review of both of the updated evaluation reports, questions about the reports, and input from the student's teachers at Landmark, the CSE chairperson suggested that additional accommodations of "preferential seating" in the classroom, "breaking down of instructions," and "checking for understanding" be added to the student's 2007-08 IEP, dated June 15, 2007, based upon the recommendations contained in the speech-language pathologist's updated evaluation report (id. at pp. 4-33). The parent asserted that the student did not "have an IEP that's been approved," arguing that "there was no IEP written at that meeting, unless you're talking about the Landmark IEP, but [the CSE chairperson] wrote one in July" (id. at p. 33). After a brief discussion on this issue, the CSE chairperson suggested tabling the meeting due to time constraints, and further, that another meeting should be scheduled to address the remainder of the recommendations contained in the speech-language pathologist's updated evaluation report, as well as to discuss ESY services, final recommendations, and other items raised by the parent as being "discrepant" (id. at pp. 33-34). The CSE then discussed potential future dates to reconvene and concluded the meeting (id. at pp. 35-39).

On January 15, 2008, the CSE reconvened to continue the meeting from December 12, 2007 (Parent Ex. N1 at p. 1; see Dist. Exs. 19 at p. 8; 21 at pp. 1, 7-8). Attendees at the CSE meeting included the following: a district CSE chairperson, school psychologist, special education teacher, regular education teacher, and speech-language pathologist; an additional parent member; two of the parent's family friends; the Landmark public school liaison; the student's case manager from Landmark; the student's language arts teacher at Landmark; the student's reading literature teacher at Landmark; the student; and the parent (Parent Ex. N1 at pp. 1-2; see Dist. Exs. 19 at p. 7; 21 at pp. 1, 7-8; Parent Ex. M3; compare Parent Ex. N at pp. 1-2, with Parent Ex. N1 at pp. 1-2). As in the December 12, 2007 CSE meeting, both the neuropsychologist and the speech-language pathologist who conducted the student's updated evaluations in August 2007 participated via telephone at the January 2008 CSE meeting (Parent Ex. N1 at pp. 1, 18). At the January 2008 meeting, the CSE reviewed and discussed the testing results and recommendations contained in the neuropsychologist's updated evaluation report, as well as the program modifications and accommodations contained in the student's 2007-08 IEP, dated June 15, 2007 (id. at pp. 1-11).

[9] The CSE chairperson who attended and chaired the December 12, 2007, January 15, 2008, and May 6, 2008, CSE meetings had been hired by the district in November 2007 to act as a CSE chairperson (Parent Ex. N at p. 4; see Dist. Exs. 19 at p. 7; 21 at p. 7; 31 at p. 7).

Ultimately, the neuropsychologist stated that regardless of the student's academic setting, she required "certain modifications" and "support," which included a reading program (id.).

The CSE then heard from the student and the student's teachers at Landmark (Parent Ex. N1 at pp. 1, 15-18). The student's reading literature teacher indicated that after recently returning from a two-week winter break, the student took a "few days to get back in the swing of things; . . . back into the routine and into the structure" (id. at pp. 15-16). The teacher commented that although the student "did back peddle on her . . . reading skills," she was able to "come back with it" once the "structure was in place" (id.). The teacher also described the focus of the coursework (id.). Next, the student's language arts teacher spoke about his class with the student, noting that since her return from Christmas break, she had demonstrated a "progression in terms of . . . actually wanting to do more work" (id. at p. 16). The language arts teacher further noted that the student not only finished a poem, but "she went above and beyond and did a PowerPoint for me as well" (id.). He indicated that the student would be presenting her work at an upcoming "Landmark Language Arts Coffee House" (id.). Finally, the language arts teacher commented on areas where the student had difficulty, including varying sentence structure and elaborating on details (id. at pp. 16-18).

The CSE also reviewed and discussed the testing results, accommodations, and recommendations contained in the speech-language pathologist's updated evaluation report (Parent Ex. N1 at pp. 19-26). Next, the CSE discussed ESY services (id. at pp. 26-40). The CSE chairperson expressed that at that time he did not believe that any different or additional evidence had been presented to establish that the student experienced a problem with regression since the last time the CSE considered the student's eligibility for ESY services at the June 15, 2007 CSE meeting (id. at pp. 26-27). Further discussion ensued, which included the topics of why students regress; the necessity of having evidence of regression following both long and short school breaks; the student's testing results; the State regulations regarding ESY services; and State guidance on ESY eligibility determinations, specifically, the period of time to recoup skills and the absence of such evidence in this case (id. at pp. 26-33). Although the CSE chairperson suggested that all the CSE members should be allowed to speak on the issue, not all of the CSE members had the opportunity to do so, due to, among other things, time constraints, and the meeting adjourned without any final determinations (id. at pp. 33-40; see Dist. Ex. 21 at pp. 7-8). By letters dated March 5, 2008, the district attempted, unsuccessfully, to reschedule a continuation of the December 2007 and January 2008 CSE meetings for March 25, 2008 (Dist. Exs. 23-25).

By letter dated March 14, 2008, the parent notified the district that due to financial reasons, the student would return to the district on Monday, March 17, 2008 (Dist. Ex. 26 at pp. 1-2; Parent Ex. G47).[10] In addition, the parent noted her expectation that the student would attend "all her classes with her IEP fully implemented" (id.). Upon receipt of the letter on Friday afternoon, March 14, 2008, the district's administrator of pupil personnel services (administrator) used the student's 2007-08 IEP, dated June 15, 2007, to create a class schedule for the student (Tr. pp. 269,

[10] The parent sent the March 14, 2008 letter to the district via e-mail and facsimile on March 14, 2008 (Dist. Ex. 26 at p. 1; see Tr. p. 293).

293-95; see Dist. Ex. 14; Parent Exs. X-Y).[11] The administrator e-mailed a copy of the student's IEP to the district teachers who would be providing services to the student upon her return, noting that the student would be placed in inclusion classes, but not as an inclusion student (Dist. Ex. 26 at pp. 2-3). The administrator's e-mail identified the teacher and the class period for the student's resource room support, reading, and tutorial (id.; compare Dist. Ex. 26 at pp. 2-3, with Parent Exs. X-Y). The administrator also e-mailed the district's network and systems specialist advising of the student's return on Monday, March 17, 2008, and the need to install Kurzweil software on the student's laptop (Dist. Ex. 26 at pp. 4-5; see Tr. p. 297).

At the impartial hearing, the administrator testified that although the student's June 15, 2007 IEP recommended a 1:1 reading tutorial, she could only arrange for the student to participate in a 2:1 reading tutorial by Monday, March 17, 2008 (Tr. pp. 293-95; see Dist. Ex. 14 at p. 2; Parent Exs. X-Y). She explained in testimony that a 1:1 tutorial service required "board approval" (Tr. p. 294). In addition, the administrator testified at the impartial hearing that she could not schedule the student to attend an inclusion class for science by Monday, March 17, 2008 (Tr. pp. 295-96; see generally Dist. Ex. 26 at pp. 2-3). The administrator testified that she immediately ordered the student's auditory enhancer listed on her IEP and expected to receive it within a week (Tr. p. 297). With respect to the Kurzweil software, the administrator testified that at that time the student's science and social studies textbooks were "already" on the software and that the student's English books and other literature would have been downloaded onto the software as needed (Tr. pp. 297-98).

According to the administrator's testimony, when the student arrived at the district on Monday, March 17, 2008, a guidance counselor met her and gave her a tour of the school; after the tour, the student attended classes (Tr. pp. 295-96). On Monday, March 17, 2008, the administrator "worked out" the student's schedule, having received approval for the increased salary for the student's recommended 1:1 reading tutorial (Tr. p. 296). The administrator further testified that the student remained at the district for three days, March 17 through March 19, 2008, and that the district closed school for March 18, 19, and 22, 2008 (Tr. p. 296). According to the evidence submitted into the hearing record, the parent e-mailed the district and specifically, the student's teachers, guidance counselor, and the administrator, throughout the three days the student attended the district regarding, among other things, the curriculum implemented within the classes, the student's schedule, the student's accommodations, textbooks used, and the availability and scheduling of electives and extra-curricular activities (Dist. Ex. 26 at pp. 8-14; Parent Exs. G27-G37; G39-G46).

By e-mail dated Friday, March 21, 2008, the parent notified the district that the student would return to Landmark because "this week [the district was] not ready or able to implement the IEP that [the district] had written and endorsed" (Dist. Ex. 26 at pp. 15-16; Parent Ex. G24-G25).[12]

[11] The administrator was the same person who acted as the CSE chairperson at the student's June 15, 2007 CSE meeting and May 22, 2008 CSE subcommittee meeting (compare Tr. p. 269, with Dist. Ex. 14 at p. 7, and Parent Ex. H at p. 1, and Dist. Ex. 35 at p. 14).

[12] Testimonial evidence at the impartial hearing indicated that during the three days the student attended the district in March 2008, Landmark was "on vacation" (Tr. pp. 386, 426-27, 716-17, 744-45, 1182-83).

By letter dated March 24, 2008, the administrator wrote to the parent advising of the final adjustments to the student's class schedule (Dist. Ex. 27 at pp. 1-2). The letter identified the special education teacher who would provide the student's resource room services and who would also be present in the student's English, science, social studies, and mathematics inclusion classes (id. at p. 1). The letter also identified the teacher responsible for providing the student's 1:1 reading tutorial (id.). The administrator updated the parent regarding the anticipated installation of the auditory enhancer system and the Kurzweil software available for the student's social studies and science classes (id. at p. 2). By e-mail dated March 31, 2008, the parent acknowledged receiving the administrator's March 24, 2008 letter on March 27, 2008, and that the letter confirmed that the student's "IEP was not implemented during the time" she attended the district (Dist. Ex. 26 at p. 17).

By letters dated April 11, 2008, the district invited the parent to attend a CSE meeting on May 6, 2008, to continue the previous December 2007 and January 2008 CSE meetings (Dist. Ex. 28 at p. 6; see Dist. Exs. 29-30; 31 at pp. 1, 7-8; Parent Ex. M2). On May 6, 2008, the CSE reconvened with the following members in attendance: a district CSE chairperson, school psychologist, special education teacher, regular education teacher, speech-language pathologist; an additional parent member; four of the parent's family friends; the Landmark public school liaison; the student's Landmark case manager; the student's reading literature teacher at Landmark; the student; the parent; and the speech-language pathologist who conducted the student's updated evaluation in August 2007 (Dist. Ex. 31 at pp. 1, 7-8; Parent Ex. M2).[13] The CSE chairperson started the meeting by reviewing the summary and recommendations contained in the student's updated neuropsychological evaluation report from August 2007 (Parent Ex. M2; see Dist. Ex. 31 at p. 8). The speech-language pathologist who conducted the student's updated evaluation in August 2007 reported her findings from that assessment, noting the student's areas of strength and weaknesses, the testing scores, and the recommendations and accommodations the student required (Parent Ex. M2). The speech-language pathologist concurred with the neuropsychologist's findings reported by the CSE chairperson and added information regarding the student's auditory processing deficit and how that deficit affected the student academically (id.).

According to Landmark staff attending the May 6, 2008 CSE meeting, the student demonstrated improvement in her self-confidence and self-advocacy skills (Parent Ex. M2). Staff noted that the student also exhibited improvement "across the board" and could apply skills learned (id.). The student's reading literature teacher at Landmark reported that the student had expanded her independent reading, and the student discussed books she read, including the "Secret Garden," "Little Women," and "The Kite Runner" (id.). The student stated that when she returned to Landmark in September 2007, she experienced increased "frustration" and in her opinion, that summer services were necessary for her (id.). The parent reported, with agreement by Landmark staff, that prior to the student's two-week break at Landmark in March 2008, teachers expressed a concern that the student might return to "old habits" (id.). Landmark staff indicated that after the

[13] The December 12, 2007, January 15, 2008, and May 6, 2008, CSE meetings were attended by many of the same individuals, including the following: the district CSE chairperson, school psychologist, special education teacher, and regular education teacher; the Landmark public school liaison, case manager, and reading literature teacher; and some of the parent's family friends (compare Parent Ex. N at pp. 1-2, with Parent Ex. N1 at pp. 1-2, and Dist. Ex. 31 at pp. 7-8).

two-week break, the student's automaticity had declined and it "took a while" for the student to return to that same level (id.).

Addressing the issue of ESY summer services, the CSE chairperson stated his opinion that the student did not qualify for ESY services based upon the information presented at the CSE meeting (Parent Ex. M2). The parent expressed her disagreement and suggested tabling the meeting so that all of the CSE members could review the student's records (id.). The CSE chairperson disagreed with the need to table the meeting and suggested to the parent that if she wanted additional summer services for the student, the parent could pursue the remedial reading academic intervention services (AIS) offered to the student for summer 2007 (id.). The CSE discussion then turned to the district's AIS services and policy, and the definition of substantial regression (id.). The parent asserted that based upon a comparison between the student's test scores on a May 2007 and September 2007 administration of the Gray Oral Reading Test (GORT), the student exhibited regression after a summer when the student did not receive services (id.; see Parent Ex. D1 at p. 12).[14] The CSE chairperson indicated that in the student's case, the information provided to the CSE did not demonstrate what skills the student lost, what was provided to the student to help her recoup the lost skills, or how long it took for the student to recoup the lost skills (Parent Ex. M2).[15] Although the CSE chairperson attempted to have each member of the CSE speak on the issue, that task was not accomplished due to, among other things, time constraints (id.). Prior to the conclusion of the meeting, Landmark staff indicated that on the issue of ESY services, the CSE would continue to "agree to disagree" and noted that the student would soon undergo standardized testing at Landmark that would be available for the student's upcoming annual review on May 22, 2008 (id.; see Dist. Ex. 31 at p. 8).[16] The parent noted that the meeting needed to be continued because it was "not finished" (Parent Ex. M2).

On May 22, 2008, a subcommittee of the CSE convened to conduct the student's annual review and to develop the student's IEP for the 2008-09 school year (Dist. Ex. 35; Parent Ex. M1). During the approximately 1.5 hour meeting, the Landmark staff reported on the student's progress, areas of need, strengths, weaknesses, and present levels of performance (see Dist. Ex. 35 at pp. 1-6, 14-15; Parent Ex. M1; see also Tr. pp. 398-99). Both the student's reading literature teacher and

[14] At the impartial hearing, the student's case manager at Landmark who attended the December 12, 2007, January 15, 2008, and May 6, 2008 CSE meetings, as well as the May 22, 2008 CSE subcommittee meeting, testified that he administered both the GORT and two subtests (word attack and word identification) of the Woodcock Reading Mastery Test to the student in September 2007 (Tr. pp. 681-85; Parent Exs. N at p. 1; N1 at p. 1; M1-M2). According to his testimony, although the student's reading rate, fluency, and accuracy scores on the GORT had declined from the previous scores in May 2007, the student's performance on the Woodcock Reading Mastery Test did not reflect the same decline, and in fact, showed "growth" (Tr. pp. 681-85). The student did not receive any summer services in summer 2007 or summer 2008 (Tr. pp. 821-26).

[15] In Application of the Bd. of Educ., Appeal No. 07-135, the parent asserted the same argument, namely, that the decrease in the student's GORT scores between May 2007 and September 2007 established that the student experienced substantial regression (Dist. Ex. 40 at pp. 7-8, 13). However, that argument was rejected at that time because unrebutted testimonial evidence indicated that although the student's test scores declined, the student's performance on the GORT in May 2007 and September 2007 both fell within the "normal range" and within the "same standard deviation," and thus, failed to establish that the student experienced substantial regression (id. at pp. 8, 13).

[16] The Landmark testing referred to at the May 6, 2008 CSE meeting was not submitted as part of the hearing record in this case.

language arts teacher from Landmark commented that after "breaks" the student tended to "backslide" and it would take a "few days" to get her "back on track" (Parent Ex. M1).[17] Specifically, the language arts teacher noted that when writing, the student would return after a break and forget to include a topic sentence or that her "details" would be "muddled" (id.). With respect to ESY summer services, the CSE subcommittee chairperson indicated that since no new information had been presented regarding substantial regression, the student did not qualify for ESY services and further discussion ensued (id.). Due to time constraints, among other things, the CSE subcommittee did not develop an IEP for the 2008-09 school year at this meeting, and the meeting was adjourned with the expectation that a CSE would reconvene to formulate the student's 2008-09 IEP (see Dist. Ex. 35 at p. 15; Parent Ex. M1). At the impartial hearing, the district's administrator acknowledged in her testimony that the CSE did not reconvene after the May 22, 2008 CSE subcommittee meeting (Tr. p. 318; see Tr. p. 396).

By letter dated August 21, 2008, the parent notified the district that the programs and services offered by the district failed to offer the student a FAPE, and thus, the student would attend Landmark for the 2008-09 school year (Parent Ex. C).

By due process complaint notice, dated January 13, 2009, the parent asserted that the district failed to offer the student a FAPE for the 2007-08 and 2008-09 school years (Parent Ex. A at pp. 1-4). With respect to the 2007-08 school year, the parent alleged that the district failed to fully implement the student's 2007-08 IEP when she returned to the district in March 2008 (id. at pp. 1-2). In particular, the parent indicated that the district failed to provide the student with the following: a 1:1 reading tutorial; special education support in the student's inclusion classes; textbooks in an alternative format; "Read Naturally;" modified homework assignments; use of a word bank; program supports; testing accommodations; and assistive technology identified on the student's IEP (id. at pp. 1-3). With regard to the 2008-09 school year, the parent alleged the following procedural and substantive violations: the district failed to develop an IEP for the 2008-09 school year; the CSE failed to make final recommendations or develop annual goals and objectives; the CSE failed to determine an appropriate placement for the student; the district failed to provide notice of the CSE's recommendations prior to the start of the 2008-09 school year; the district failed to provide copies of the student's 2008-09 IEP in a timely manner; the district did not conduct a triennial evaluation by the projected reevaluation date identified in a May 6, 2008 IEP; the district failed to provide ESY services for summer 2008; the district failed to consider the auditory and language processing evaluation report and the recommendations contained within the report; the CSE failed to discuss methodologies and failed to identify methodologies within the student's IEP; and the district failed to implement a transition plan (id. at pp. 2-3). As relief, the parent requested an annulment of the student's "current IEP," placement at Landmark, reimbursement for the costs of the student's tuition at Landmark for the 2007-08 and 2008-09 school years, the provision of an appropriate IEP, compensatory and/or additional services for the services denied to the student upon her return to the district in March 2008, compensatory and/or additional educational services for the district's failure to provide summer 2008 ESY services,

[17] The same reading literature teacher and language arts teacher from Landmark who attended the May 22, CSE subcommittee meeting also both attended the CSE meetings held on December 12, 2007, and January 15, 2008 (compare Dist. Ex. 35 at pp. 3-4, with Parent Exs. N at p. 1; N1 at p. 1). In addition, the same reading literature teacher at the May 22, 2008 CSE subcommittee meeting also attended the May 6, 2008 CSE meeting, where she reported the student's need to "get back on track" after breaks, which she also expressed at the May 22, 2008 CSE subcommittee meeting (compare Parent Ex. M2, with Parent Ex. M1).

payment of the parent's attorneys' fees, and any other further relief deemed necessary and proper (id. at pp. 3-4).

The parties proceeded to impartial hearing on March 24, 2009, and concluded on April 17, 2009, after eight days of testimony and the submission of documentary evidence (Tr. pp. 1, 1153; Dist. Exs. 1-43; Parent Exs. A-A2; B-B6; C-C16; C18-33; D-D7; E-E6; F-F1; G-G63; H; I-I9; J-J3; K; L-L1; M-M3; N-N1; O-U; V-V1; W-Z; AA-FF; II-LL; NN-OO; QQ-QQ[A]; RR-RR[A]; Joint Exs. I-IV).[18]

Testimonial evidence at the impartial hearing described Landmark as a school for students in grades 3 through 12, with average to above average cognitive skills and a language-based learning disability (Tr. pp. 579, 581). The high school program consisted of approximately 302 students in grades 9 through 12 (Tr. p. 580). The assistant director of Landmark's Preparatory Program (assistant director) testified that Landmark offered three programs: the Expressive Language Program, the Standard Program, and the Preparatory Program (Tr. pp. 576, 578-79). During the 2008-09 school year, the student participated in the Preparatory Program as a ninth grade residential student (Tr. pp. 585-86, 663).[19] In her testimony, the assistant director distinguished the Standard Program and the Preparatory Program by explaining that Preparatory Program students did not receive a 1:1 tutorial to address decoding and reading fluency needs (Tr. pp. 613). She further testified that a student's transfer from the Standard Program into the Preparatory Program reflected progress, and that students in the Preparatory Program "generally" functioned more independently than students in the Standard Program (Tr. pp. 657-58). The Preparatory Program focused on developing students' study skills and organization of time, information, and materials (Tr. p. 590).

According to the testimony, during the 2008-09 school year the student received instruction in physical science, study skills, US history II, geometry, literature and grammar composition, and an elective of chorus and drama (Tr. p. 588).[20] All of the student's academic classes contained no more than eight students (Tr. pp. 589, 645-46). All of the student's instruction occurred in non-integrated settings (Tr. pp. 719-20).[21] The student's history teacher at Landmark testified that in US history II, the student worked on note taking skills, test preparation, and completing projects using Power Point in a very "structured" approach, noting that structure was "absolutely common across the curriculum in every subject in every area" (Tr. pp. 527-28, 532). The history teacher testified that the student did not exhibit difficulties in the classroom related to short-term memory

[18] On the first day of testimony, the district conceded that it failed to offer the student a FAPE for the 2008-09 school year (Tr. pp. 37, 44-45; Dist. Post-Hr'g Br. at pp. 26-27).

[19] For eighth grade during the 2007-08 school year, the student participated in Landmark's Standard Program and received instruction in the following: algebra I, US history I, marine science, language arts, language arts tutorial, reading literature, and chorus (Tr. p. 612; Parent Exs. E3 at pp. 1-13; E4). The parent testified that the student "was a resident at the high school as an eighth grader" (Tr. p. 860).

[20] The hearing record suggests that the student's 2008-09 geometry and US history II classes were courses generally taken by students in tenth grade (see Tr. pp. 546-47, 652-53).

[21] The student's academic case manager at Landmark testified the student participated on a sports team that competed against teams from other schools with "non-disabled populations" (Tr. p. 711). He did not know what, if any, affect the student's participation on the sports team had on her self-esteem (id.).

due to the use of graphic organizers (Tr. pp. 538-39). The student's sixth grade teachers from the district testified similarly at the impartial hearing, indicating that although during the 2005-06 school year the student occasionally needed clarification of a question, she benefitted from the supports offered to her, including using graphic organizers, rereading text and test questions, planning long-term assignments, and developing paragraphs for writing assignments (Tr. pp. 222-23, 226-29, 248-49, 253-56).

According to the evidence presented, Landmark staff used the following instructional strategies with the student: use of a laptop, graphic organizers, Power Point, and assignment books; breaking tasks into smaller sections; oral reading; previewing unfamiliar text; two-column note taking; developing test questions; and formulating paragraphs and dividing syllables, which were not unique to Landmark and were available in other educational settings, such as the district (Tr. pp. 228-29, 249, 255, 528-30, 538-39, 597-98, 735-43, 774, 1246-53; see Dist. Ex. 14 at p. 2).

When asked about the benefits of being a residential student, the student's academic case manager testified that Landmark managed the students' lives "from the minute they wake up to the minute they go to sleep" (Tr. pp. 689). Specifically, dormitory staff awakened students, ensured that students were prepared for classes, and that students arrived at breakfast by 7:30 a.m.; students then attended classes from approximately 8:00 a.m. until 3:00 p.m. (Tr. pp. 583, 689). From approximately 3:00 p.m. until 4:30 p.m., students participated in mandatory activities that included sports, drama, or community service (Tr. pp. 583-84, 689-90). Students ate dinner between 4:30 p.m. and 6:00 p.m., and the "evening routine" consisted of a combination of room clean-up, a 1.5 hour structured study hall, 1 hour of free time, and then bedtime, which was based on the student's individual level of privileges (Tr. pp. 584, 690). The case manager testified that the structure of the residential program provided the student with "boundaries" and "predictability" so she would not "have to worry" about her schedule or when to complete homework because "[t]hat structure help[ed] her micromanage her life and understand when she's going to be doing certain aspects of her life" (Tr. pp. 690-91).[22] He further testified that the student had exhibited a certain amount of independence in the dormitory, and the amount of micromanaging had decreased (Tr. p. 733). Although the assistant director of the Preparatory Program testified that she did not believe the student would make progress in a large classroom environment, she also testified that the student did not require a residential placement in order to make progress in her program at Landmark (Tr. pp. 640-41).

By decision dated July 15, 2009, the impartial hearing officer concluded that for the 2007-08 school year, the district offered the student a FAPE, and for the 2008-09 school year, the parent was not entitled to reimbursement for the costs of the student's tuition at Landmark because Landmark was not the student's least restrictive educational environment (IHO Decision at pp. 10-24). In addition, the impartial hearing officer determined that the student did not qualify for ESY summer 2008 services and denied the parent's request for compensatory and/or additional services (id. at pp. 19-20).

With respect to the 2007-08 school year, the impartial hearing officer found that the June 15, 2007 CSE reviewed a draft IEP prepared by the student's case manager and classroom teachers

[22] Landmark staff denied that the student exhibited behavioral problems or had management needs (Tr. pp. 773, 811-12).

at Landmark (IHO Decision at p. 13). Based upon the testimonial evidence, the impartial hearing officer noted that the entire CSE reviewed "each goal and bench mark" included in the draft IEP and that each CSE member had the opportunity to ask questions or assert an opinion about the appropriateness of the goals and bench marks (id.). According to the impartial hearing officer, the hearing record further indicated that the CSE agreed upon the goals and bench marks in the draft IEP and that the district incorporated the student's academic needs, social needs, and goals and bench marks from the draft IEP into the district's IEP (id. at pp. 13-14).

The impartial hearing officer further found that the June 15, 2007 CSE reviewed the student's academic testing from May 2007, which demonstrated "significant gains" in word identification, word attack, reading rate, reading accuracy, and reading fluency since March 2006 (IHO Decision at p. 14). The impartial hearing officer also found that the student's academic testing in April 2007 showed increased scores in the areas of reading, vocabulary, reading comprehension, math problem solving, and math procedures, compared to testing conducted in October 2006 (id.). According to the impartial hearing officer's decision, the district "recommended placement as a general education student in an 'inclusion' class of 23 students with a general education teacher and a special education teacher for math, English, social studies and science," daily resource room, and a daily 1:1 reading tutorial (id.). The impartial hearing officer noted that the special education teacher in the student's inclusion classes would modify the student's homework assignments, and that the student would have the use of a graphic organizer and assistive technology devices, such as a laptop with Kurzweil and "Read Naturally" software, as well as a personal FM unit (id.). The impartial hearing officer further noted that the June 15, 2007 IEP included testing accommodations (id.). Based upon testimonial evidence, the impartial hearing officer noted that disagreement at the CSE meeting arose, however, when the Landmark participants recommended continued placement at Landmark and the CSE chairperson voiced her disagreement with the Landmark recommendation based upon the student's strong test scores, noting that the student could benefit from the district's recommended program (id.). In addition, the impartial hearing officer indicated that the CSE chairperson did not believe that the student required an "out-of-district residential placement" and that when polled, the "[district] members of the CSE, . . . appeared to agree" (id.).

Turning to the parent's allegations challenging the June 15, 2007 IEP, the impartial hearing officer rejected the parent's assertion that the district denied the student a FAPE because Landmark "ran the meeting" and district members "failed to participate" as contrary to the evidence and without merit (IHO Decision at p. 15). Based upon the testimonial evidence, the impartial hearing officer found that all of the CSE members reviewed the entire Landmark draft IEP, including "every goal area and each subject," and reached agreement (id.). The impartial hearing officer found that the failure to agree with Landmark's recommendation to continue the student's placement at Landmark did not deny the parent meaningful participation, noting that a review of the CSE meeting minutes demonstrated that the parent was an "active participant" (id.).

The impartial hearing officer also rejected the parent's contention that the June 15, 2007 IEP did not "reflect the program . . . announced at the CSE meeting," causing the parent and "parent member" to be "'confused,'" as contrary to the evidence and without merit (IHO Decision at p. 15). The impartial hearing officer noted that the June 15, 2007 CSE meeting minutes "clearly reveal" that the CSE chairperson "discussed, at length, the inclusion class and the supports [the district] would put in place" for the student for the 2007-08 school year (id.). The impartial hearing officer concluded that the parent's claim of confusion was belied by the evidence in the hearing record,

noting the parent's "lengthy response" to the district's recommended placement recorded in the CSE meeting minutes (id.). Similarly, the impartial hearing officer found that the additional parent member's "response, although somewhat vague and contradictory, did not indicate that she failed to understand" the district's recommended placement (id.).

The impartial hearing officer further rejected the parent's assertion that the June 15, 2007 IEP failed to meet the student's needs, thus denying the student a FAPE, as unsupported by the evidence and without merit (IHO Decision at pp. 15-16). The impartial hearing officer noted that the parent's reliance upon Landmark's recommendation for a small class size as evidence to support her claim was misplaced, as "most children in an academic setting would benefit from a small class size" (id. at p. 16). The impartial hearing officer determined that based upon the evidence, the student could make meaningful academic progress in the program and with the services recommended by the district (id.).

As for the parent's claim that the district denied the student a FAPE by failing to provide the student with an FM unit, the impartial hearing officer determined that although the hearing record did not contain evidence that the district ordered the FM unit prior to the beginning of the 2007-08 school year, such argument was irrelevant since the parent "had every intention" of placing the student at Landmark for the 2007-08 school year (IHO Decision at p. 16).

Based upon the foregoing, the impartial hearing officer concluded that the district offered the student a FAPE in the LRE, adding that the "classroom experience would have provided [the student] with the benefit of being educated with her typically developing peers . . . , a benefit that cannot be underestimated" (IHO Decision at pp. 16-17). Given the student's significant academic gains and the results of recent academic testing, the impartial hearing officer determined that the student was "performing at or above grade level in almost every area tested" and that the district's recommended program could address any remaining areas of weakness (id. at p. 16). The impartial hearing officer found that the student's placement in inclusion classes as a general education student during the 2007-08 school year would have provided "access to two teachers, one of whom would provide modified homework," and that the daily resource room would allow the student to work in a small group (id. at p. 17). He therefore concluded that the district's recommended special education programs and services addressed the student's academic and social/emotional needs for the 2007-08 school year and offered the student a FAPE in the LRE (id.).

With respect to the parent's claim that the district denied the student a FAPE by failing to fully implement the student's IEP during the three days she attended the district in March 2008, the impartial hearing officer concluded that the program and services provided to the student by the district "substantially reflected the program recommendation in the IEP" and that the parent's claim was without merit (IHO Decision at pp. 17-18). Although the parent asserted that "she decided to give [the district] 'another try,'" the impartial hearing officer rejected this argument as "completely disingenuous" and further noted that the parent "created this scenario in order to bolster her claim for tuition reimbursement" (id. at p. 18).

The impartial hearing officer also rejected the parent's assertion that the June 15, 2007 IEP denied the student a FAPE because the district failed to review the student's updated evaluations conducted in August 2007 and/or incorporate the recommendations contained in the updated evaluations into the student's IEP (IHO Decision at pp. 18-19). The impartial hearing officer concluded that the June 15, 2007 IEP, as written, already identified and addressed the student's

needs identified in the updated evaluation reports (id.). Specifically, the neuropsychologist's evaluation report identified the student's difficulty with working memory, word retrieval, reading fluency, and math problem solving, and recommended services to improve reading fluency; accommodations, such as extended time for testing; assistive technology to deal with large amounts of text; and "multi-modal strategies with reinforcement to enhance learning an[d] recall" (id. at p. 18). Similarly, the impartial hearing officer found that the speech-language pathologist's evaluation report identified the student's difficulty with, among other things, short-term memory, word retrieval, and reading fluency (id.). According to the impartial hearing officer, the speech-language pathologist recommended classroom accommodations, testing modifications, use of an FM unit, and continued placement at Landmark (id.). The impartial hearing officer found that the special education programs and services offered in the June 15, 2007 IEP addressed the issues raised in the evaluation reports, noting the academic support available from the two teachers in the inclusion classes; the assistive technology and software to assist the student with reading and writing; the daily 1:1 reading tutorial to address the student's reading fluency needs, as well as the use of "Read Naturally" software; the daily resource room to work on academic skills in a small group; the program modifications providing modified homework; the additional testing accommodations; and the opportunity for the student to receive the program in a setting with her typically developing peers (id. at p. 19). The impartial hearing officer further determined that based upon the evidence, the speech-language pathologist's recommendation for continued placement at Landmark was not supported by the weight of the evidence, especially in light of the student's grade level, or above grade level, academic skills reflected in the student's testing (id.). The impartial hearing officer found that the recommended residential placement at Landmark was neither necessary nor appropriate for the student to make meaningful educational progress (id.). Having determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, the impartial hearing officer declined to address the appropriateness of the parent's unilateral placement or equitable considerations for the 2007-08 school year (id.).

Turning to the 2008-09 school year, the impartial hearing officer first addressed the issue of the student's eligibility for ESY summer 2008 services (IHO Decision at pp. 19-20). Here, the impartial hearing officer noted that the parent relied upon the findings, recommendations, and testimonial evidence offered by the speech-language pathologist who conducted the student's updated evaluation in August 2007, which indicated that the student's "memory deficits" affected her ability to retain information and that as such, the student required "'constant stimulation and . . . to rehearse'" (id. at p. 19). The impartial hearing officer noted the district's contention that the evidence did not support a finding that the student experienced substantial regression consistent with State regulations and guidance on the issue, and thus, the student was not eligible for ESY summer 2008 services (id. at p. 20). The impartial hearing officer agreed with the district's argument, noting that the hearing record did not establish that the student's "academic skills regressed to a point that they could not be recouped in 20-40 days after an extended school break," and he denied the parent's request for compensatory and/or additional services (id.).

With respect to the remainder of the 2008-09 school year, the impartial hearing officer noted that since the district conceded that it did not offer the student a FAPE, he would only address whether the parent sustained her burden to establish the appropriateness of the student's unilateral placement at Landmark for the 2008-09 school year and whether equitable considerations supported the parent's request for tuition reimbursement (IHO Decision at pp. 20-25). Based upon the evidence, the impartial hearing officer found that during the 2008-09 school year, the student

attended ninth grade at Landmark as a residential student, with approximately 300 high school students, "all of whom have a language-based learning disability" (id. at p. 21). The student's classes ranged in size from six to eight students, and her courses included the following: "U.S. History II, geometry, literature and grammar, physical science, study skills, chorus an[d] drama" (id.). Prior to the student entering ninth grade, Landmark made a "decision to 'shift the set of skills'" addressed by the student, and thus, she was no longer assigned a 1:1 reading tutorial (id.).

Although disputed by the district, the impartial hearing officer determined that the testimonial and documentary evidence supported a finding that the student made progress at Landmark during the 2008-09 school year (IHO Decision at pp. 21-23). Notwithstanding this finding, the impartial hearing officer concluded that the student's unilateral placement at Landmark during the 2008-09 school year was not appropriate because, as the district argued, Landmark failed to provide the student "with an education in the least restrictive environment" (id. at pp. 23-24). The impartial hearing officer found that the student's residential program was a "self-contained" school, where all of the students had a language-based learning disability, the student's day was "managed from the moment she [woke] up, to the moment she [went] to bed," and the contact with non-disabled peers was limited to her participation in sports activities (id. at p. 23). The impartial hearing officer found this "particularly troubling" since the hearing record indicated that the student was capable of performing "at grade level in most academic areas with appropriate education supports" (id.). He noted that although parents were not "held as strictly to the standard of placement in the least restrictive environment as school districts . . . , the restrictiveness of the placement [was] still a relevant factor" (id. at pp. 23-24). Here, the student was "completely segregated from her typically develop[ing] peers," despite having average intelligence and well developed academic skills, in a residential, "out-of-state special school placement far removed from her community" (id. at p. 24). The impartial hearing officer found no evidence in the hearing record to support the need for a residential placement in order to meet the student's educational needs, noting further that two of the student's Landmark teachers testified that the student did not require a residential placement to make academic progress (id.). The impartial hearing officer also rejected the parent's argument that Landmark was an appropriate placement because no other appropriate program was available closer to the student's home community (id.). Therefore, based upon the foregoing, the impartial hearing officer denied the parent's request to be reimbursed for the costs of the student's tuition at Landmark for the 2008-09 school year (id.). Turning briefly to the issue of equitable considerations, the impartial hearing officer declined to find that the parent's behavior at CSE meetings would have warranted a denial of tuition reimbursement in this case (id. at pp. 24-25). The impartial hearing officer also declined to consider a post-hearing submission of evidence related to a rebuttal witness's testimony, noting that although the parent's evidence was available at the time of the impartial hearing, the parent did not request the evidence until after the final day of testimony on April 9, 2009 (id. at p. 25). Thus, the impartial hearing officer dismissed the parent's due process complaint notice in its entirety (id.).

On appeal, the parent asserts that the impartial hearing officer erroneously concluded that the district offered the student a FAPE for the 2007-08 school year. Specifically, the parent contends that the impartial hearing officer failed to appreciate the distinction between the student's placement in an inclusion classroom as a regular education student, as compared to the student's placement in an inclusion classroom as a special education student. The parent argues that the impartial hearing officer erred in finding that the student would make meaningful progress in a classroom with 20 to 23 students and that the hearing record contains insufficient evidence to

support this conclusion. The parent also alleges that the impartial hearing officer erred in concluding that the district's failure to provide the student with an FM unit did not rise to the level of a denial of a FAPE and contradicts the evidence contained in the hearing record. In addition, the parent argues that the impartial hearing officer erred in finding that the district's failure to fully implement the student's 2007-08 IEP during the three days the student attended the district's school in March 2008, did not rise to the level of a denial of a FAPE. The parent contends that the impartial hearing officer further erred in finding that the CSE properly reconvened to review the student's updated evaluations and that the IEP developed at the June 15, 2007 CSE meeting properly addressed the issues raised in the updated evaluations. Finally, the parent alleges that the impartial hearing officer failed to analyze whether the parent sustained her burden to establish the appropriateness of the student's unilateral placement at Landmark for the 2007-08 school year.

Regarding the 2008-09 school year, the parent alleges that the impartial hearing officer erred in concluding that the student did not qualify for ESY summer 2008 services because he erroneously determined that the evidence did not establish that the student experienced substantial regression. Although the parent agrees that the impartial hearing officer properly found that the district denied the student a FAPE for the 2008-09 school year, the parent argues that the impartial hearing officer erred in concluding that the parent was not entitled to reimbursement for the student's tuition costs at Landmark because Landmark was not the student's LRE. In addition, the parent contends that the hearing record contains sufficient evidence that no other alternative placement existed for the student, the impartial hearing officer erred in finding that such situation did not justify the student's placement residentially at Landmark.

Finally, the parent argues that the impartial hearing officer denied the parent her due process rights by improperly allowing the district to present a rebuttal witness on the installation of a SMARTboard without allowing the parent to submit additional documentary evidence on this issue. As relief, the parent requests that a State Review Officer sustain her appeal and grant such further relief as deemed just and proper.

In its answer, the district asserts as affirmative defenses that the impartial hearing officer properly determined—and the hearing record fully supports—that the district offered the student a FAPE for the 2007-08 school year, that the student did not qualify for ESY summer 2008 services, and that Landmark was not appropriate to meet the student's special education needs during the 2008-09 school year because Landmark was overly restrictive. The district also asserts that the impartial hearing officer correctly determined that any delay in reviewing the student's updated evaluations did not deny the student a FAPE for the 2007-08 school year, and further, that the June 15, 2007 IEP accurately reflected the special education programs and services discussed and recommended by the CSE at the June 15, 2007 CSE meeting. The district asserts that the impartial hearing officer correctly found the June 15, 2007 CSE meeting to be procedurally sound, and that the failure to provide the student with an FM unit did not deny the student a FAPE. In addition, the district contends that the impartial hearing officer properly concluded that the student's courses at Landmark were above her grade level, that the student did not require a residential placement to make meaningful progress in eighth or ninth grade, that the parent's inability to find an alternative placement closer to the student's home community did not transform Landmark into an appropriate placement. The district seeks to uphold the abovementioned findings and conclusions in the impartial hearing officer's decision regarding the 2007-08 and 2008-09 school years.

The district cross-appeals those portions of the impartial hearing officer's decision which found that the student made progress at Landmark during the 2008-09 school year and that equitable considerations did not warrant a denial of tuition reimbursement. The district argues that since the student had not taken any State assessments or other objective measurements of progress, the impartial hearing officer erred in finding that the student made progress while at Landmark and improperly relied upon improvements noted in standardized testing and the student's updated evaluations to infer progress. With respect to equitable considerations, the district contends that the impartial hearing officer erred in his determination that such would not warrant a denial of tuition reimbursement, given the parent's behavior obstructing the finalization of the student's 2008-09 IEP. Accordingly, the district seeks to reverse those portions of the impartial hearing officer's decision and to dismiss the parent's appeal in its entirety. The parent, in her answer to the district's cross-appeal, responds to the affirmative defenses and additional factual allegations within the district's answer and cross-appeal.

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

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

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley,

458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits

available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

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

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 which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; 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 Bd. of Educ., Appeal No. 08-085; 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. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [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 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 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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 in determining whether the parents are entitled to an award of reimbursement (M.S., 231 F.3d at 105; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482 [S.D.N.Y. 2007]).

Upon independent review and due consideration of the hearing record in this matter, I find that the impartial hearing officer, in a thorough and well-reasoned 31-page decision, correctly determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, that the student was not eligible for ESY summer 2008 services, and that the parent's unilateral

placement of the student at Landmark for the 2008-09 school year was not appropriate because it was overly restrictive (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B., 103 F.3d at 1121-22; Application of the Bd. of Educ., Appeal No. 05-081). The impartial hearing officer accurately recounted the facts of the case, and he set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2007-08 school year and whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at Landmark for the 2008-09 school year (IHO Decision at pp. 1-13, 20-21, 23). With respect to the 2007-08 school year, the impartial hearing officer properly concluded that based upon the evidence presented, the June 15, 2007 CSE thoroughly reviewed and discussed the entire draft IEP created by Landmark, including the annuals goals; the CSE members had an opportunity to ask questions or assert opinions during the meeting; the parent had the opportunity to meaningfully participate in the development of the IEP; the CSE appropriately reviewed and relied upon the student's most recent academic testing; the CSE appropriately considered information from the student's Landmark teachers regarding her present levels of performance; the CSE chairperson discussed, at length and in detail, the recommended inclusion classes and the supports that would be put into place at the district for the 2007-08 school year; and that the 2007-08 IEP developed at the June 15, 2007 CSE meeting appropriately identified and addressed the student's special education needs in the LRE (id. at pp. 13-17). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that he carefully marshaled and weighed the evidence in support of his conclusions (id.).

With regard to the parent's claim that the district failed to fully implement the student's IEP during the three days the student attended the district's school in March 2008, I concur with the impartial hearing officer's determination that the programs and services provided to the student during that time substantially reflected the recommendations contained in the June 15, 2007 IEP (IHO Decision at pp. 17-18). In addition to the rationale expressed by the impartial hearing officer in his decision, I note that in order to prevail on a claim that a district failed to implement a student's IEP, resulting in a denial of a FAPE, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Accordingly, in reviewing failure to implement claims under the IDEA, it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (Van Duyn v. Baker Sch. Dist. 5J, 481 F.3d 770 [9th Cir. 2007] [holding that a material failure occurs when the services a school provides to the disabled student fall significantly short of the services required by the IEP]); see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007] [holding that where a student missed a "handful" of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]). Here, although the district acknowledged in testimony that it could only arrange for the student to participate in a 2:1 reading tutorial instead of the 1:1 reading tutorial recommended in the student's IEP, the FM unit/system was not immediately operational, and that the student's schedule did not contain an inclusion science class upon the student's first day back at the district, such departures do not constitute either a failure to implement substantial or significant provisions of the student's IEP or a material aspect of the IEP

that would rise to the level of a denial of a FAPE (Tr. pp. 293-96; see Dist. Exs. 14 at p. 2; 27 at pp. 1-2; Parent Exs. X-Y; see generally Dist. Ex. 26 at pp. 2-3).

Next, I also concur with the impartial hearing officer's rationale supporting his determination that the district properly reviewed the student's updated evaluations conducted in August 2007 (IHO Decision at pp. 18-19). In this case, the district agreed to secure and fund—upon the parent's request—an updated neuropsychological evaluation and an updated auditory and language processing evaluation (Parent Ex. RR at pp. 4-7, 11-13; see Dist. Exs. 17-18; Parent Ex. B).[23] The CSE convened on December 12, 2007, January 15, 2008, and May 6, 2008, to review the evaluations (Parent Exs. N at pp. 1, 4, 7; N1 at p. 1; M; M2; see Dist. Exs. 19 at pp. 1, 4, 7-8; 21 at pp. 1, 7-8; 28 at p. 6; 29-30; 31 at pp. 1, 7-8; see generally Parent Ex. G4).[24, 25] Both the neuropsychologist and speech-language pathologist who conducted the updated evaluations participated in lengthy discussions at the CSE meetings regarding the results and recommendations contained within their respective evaluation reports (Parent Ex. N at pp. 1-2, 25, 38; Parent Ex. N1 at pp. 1, 18; Parent Ex. M2; see Parent Ex. M2; see also Dist. Ex. 31 at p. 8). Thus, based upon the evidence and in accord with State and federal regulations, the CSE properly reviewed and considered the student's updated evaluations (8 NYCRR 200.4[b], [f][1][iii], [2][ii]; 34 C.F.R. § 300.324[a][iii]; IHO Decision at pp. 18-19). In addition, State and federal regulations require that a CSE review and revise a student's IEP "as appropriate," and as argued by the district in this case, do not require a CSE to incorporate all of the recommendations contained therein (8 NYCRR 200.4[b], [f][1][iii], [2][ii]; 34 C.F.R. § 300.324[a][iii]). Here, as determined by the impartial hearing officer, the evidence presented supports a determination that the CSE did not need to revise the student's 2007-08 IEP to incorporate the recommendations contained in the updated evaluation reports because many of the recommendations had already been included in the IEP by the June 15, 2007 CSE (see IHO Decision at pp. 18-19).

Turning to the student's eligibility for ESY summer 2008 services, the impartial hearing officer properly concluded that based upon the evidence presented, the student did not exhibit substantial regression consistent with State regulation and guidance (IHO Decision at pp. 19-20). At the January 15, 2008 CSE meeting, the student's reading literature teacher at Landmark stated that the student took a "few days to get back in the swing of things; . . . back into the routine and into the structure" following a two-week winter break (Parent Ex. N1 at pp. 15-16). According to the same teacher, although the student's reading skills "back peddle[d]" during winter break, the

[23] Pursuant to State and federal regulations, an "appropriate reevaluation" shall be arranged "if the school district determines that the educational or related services needs, including improved academic achievement and functional performance of the student, warrant a reevaluation or if the student's parent or teachers requests an evaluation" (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[1]-[2]).

[24] Pursuant to State and federal regulations, the results of a reevaluation "must be addressed" in a CSE meeting "to review and, as appropriate, revise the student's IEP" (8 NYCRR 200.4[b][4]; see 8 NYCRR 200.4[f][1][iii], [2][ii] [noting that at "[a]ny meeting to develop, review or revise the IEP" a CSE "shall consider" the results of the student's most recent evaluation, and "[i]f appropriate," must revise the IEP to address the "results of any reevaluation conducted pursuant to this part and any information about the student provided to, or by, the parents"]; 34 C.F.R. § 300.324[a][iii]; Application of a Student with a Disability, Appeal No. 08-077; Application of a Child with a Disability, Appeal No. 07-139).

[25] Pursuant to State and federal regulations, if an independent educational evaluation (IEE) of the student is obtained, the results of such IEE "must be considered by the school district, . . . , in any decision made with respect to the provision" of a FAPE for the student (8 NYCRR 200.5[g][1][vi]; see 34 C.F.R. § 300.502[c][1]).

student "c[a]me back with it" once the "structure was in place" (id.). At the May 6, 2008 CSE meeting, the student spoke about experiencing increased "frustration" upon her return to Landmark in September 2007 and stated her opinion that she required summer services (Parent Ex. M2). Landmark staff at the CSE meeting commented that after a two-week break in March 2008, the student's automaticity had declined, and it "took a while" for the student to return to that same level (id.). In addition, the parent asserted that the student's GORT test results demonstrated that the student experienced substantial regression after summer 2007 when the student did not receive services (id.; see Parent Ex. D1 at p. 12). At the May 22, 2008 CSE subcommittee meeting, the student's reading literature teacher and language arts teachers at Landmark reiterated that after "breaks," the student tended to "backslide" and it would take a "few days" to get her "back on track" (Parent Ex. M1). Consistent with the opinions expressed at the CSE and/or CSE subcommittee meetings, the impartial hearing officer specifically noted that the evidence presented did not establish that the student's "academic skills regressed to a point that they could not be recouped in 20-40 days after an extended break" (IHO Decision at p. 20).

In addition to the impartial hearing officer's rationale, I note that documentary evidence in the hearing record lends further support to his determination regarding ESY summer 2008 services (IHO Decision at pp. 19-20; see Parent Exs. E1; E3-E4). In November 2007, Landmark staff prepared progress reports for each of the student's courses, as well as for residential life (Parent Ex. E3 at pp. 1-13). While the progress reports note that the student successfully reviewed and applied many skills during that first quarter, notably absent from all of the progress reports is any discussion of skills the student lost as a result of the extended summer break or skills the student had yet to regain (see id.). The student's first quarter grades ranged from "B+" to "A" across all subjects, with "exemplary" or "consistent" effort (id. at p. 6). Similarly, a review of progress reports prepared by Landmark staff in January 2008 reveals that the Landmark staff did not identify any skills the student lost or had yet to regain following the winter break (Parent Ex. E1 at pp. 2-9). The student's second quarter grades ranged from "B+" to "A" across all subjects, with "exemplary" effort (Parent Ex. E4). The district, pursuant to State regulations, considered ESY services for the student in accord with the need to prevent substantial regression based upon the information provided by Landmark staff—who, in this case, were in the best position to observe the student's skills before and after short or extended school breaks—and the parent at the CSE and/or CSE subcommittee meetings (8 NYCRR 200.6[k][1], [k][1][v]; Parent Exs. N1 at pp. 15-16; M1-M2; see Parent Ex. D1 at p. 12). Even assuming that Landmark staff's reports about the student's skills after short breaks constituted "lost skills," the evidence reveals that the student only required a "few days" to regain the skills or "get back on track," which is insufficient to establish substantial regression (8 NYCRR 200.1[aaa]; see 34 C.F.R. § 300.106 [defining ESY]).

With respect to the impartial hearing officer's determination that the parent is not entitled to reimbursement for the student's tuition costs at Landmark for the 2008-09 school year, I concur with his determination that Landmark failed to provide the student "with an education in the least restrictive environment" (IHO Decision at pp. 23-24). Here, the impartial hearing officer correctly found that the student attended a residential school far from her home community with no opportunity to participate in an academic setting with non-disabled peers, which he found particularly troubling given the student's grade level performance in most of her academic areas with appropriate education supports (id.). The impartial hearing officer also correctly determined that based upon the evidence presented, the student did not require an out-of-State, residential placement to meet her special education needs, further noting Landmark staff's testimonial

evidence that the student did not require a residential placement to make academic progress (id.). In addition to the impartial hearing officer's expressed rationale, the hearing record also indicates that the educational supports provided at Landmark were not unique to Landmark, and in fact, could have been provided by the district (Tr. pp. 228-29, 249, 255, 528-30, 538-39, 597-98, 735-43, 774, 1246-53; see Dist. Ex. 14 at p. 2). Thus, based upon the foregoing, the impartial hearing officer properly denied the parent's request to be reimbursed for the student's tuition costs at Landmark for the 2008-09 school year.

Finally, I remind both parties that federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special education services (see Schaffer v. Weast, 546 U.S. 49, 53 [2005][noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]; Cerra, 427 F.3d at 192-93). I encourage the parties to work collaboratively and cooperatively in this effort.

In summary, based upon my independent 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 determinations of the impartial hearing officer (34 C.F.R. § 300.514[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my decisions herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 8, 2009

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ROBERT G. BENTLEY
STATE REVIEW OFFICER