



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-139

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

Appearances:

Kuntz, Spagnuolo and Murphy, P.C., attorneys for petitioner, Vanessa M. Gronbach, Esq., of counsel.

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the educational program and services recommended for respondents' (the parents') son for the 2008-09 school year were not appropriate. The appeal must be sustained.

The student's overall cognitive abilities are within the low average to average range, with a weakness in working memory (Dist. Exs. 24 at pp. 2-4; 33 at pp. 10-11). Academically, the student exhibits difficulty with written expression, spelling, math, and reading decoding and fluency (Dist. Exs. 24 at pp. 3-6; 33 at p. 10). The district reports that the student's social skills are age appropriate, and that he participates in class and during sports/extra-curricular activities (Dist. Ex. 24 at p. 6). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][11]; 8 NYCRR 200.1[zz][11]).

The student received speech-language services through early intervention and through the district as a preschool student (Tr. pp. 193-94; Dist. Exs. 14 at pp. 1-2; 33 at p. 3). He attended a private parochial school for kindergarten and was classified by the district as a student with a speech or language impairment (Dist. Exs. 14 at p. 2; 33 at p. 3). The student attended a private parochial school through fifth grade (2004-05) and the district provided him with speech-language therapy and consultant teacher services at one of its elementary schools (Tr. pp. 195-96). In February 2005, the student began attending the district's elementary school full time, where he received "the same level of service that was

recommended out of the parochial process" (Tr. p. 197; Dist. Ex. 57 at p. 1). The student's extended school year (ESY) program consisted of three hours per week of special education itinerant teacher (SEIT) services and one weekly group session of speech-language therapy (Dist. Ex. 56 at p. 1).¹

The student attended the district's middle school full time for sixth grade (2005-06), receiving special class instruction in reading comprehension and study skills, and consultant teacher services in other subjects (Dist. Exs. 14 at p. 6; 56 at p. 1).² The student also received twice weekly group speech-language therapy sessions (*id.*). Cognitive testing conducted by a district school psychologist indicated that the student's Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) full scale IQ score of 88 was comprised of a verbal comprehension index score of 96, a perceptual reasoning index score of 98, a working memory index score of 83, and a processing speed index of 83 (Dist. Ex. 54 at 11). Administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) yielded subtest scores in the following percentiles: word reading (10), pseudoword decoding (7), reading comprehension (82), numerical operations (10), numerical reasoning (34), spelling (7), written expression (42), and listening comprehension (45) (*id.* at p. 6).

The student's performance on an assessment conducted by the district speech-language pathologist indicated both expressive and receptive language delays, areas that were focused on in the student's speech-language therapy sessions during that school year (Dist. Ex. 55 at p. 2). By report, the speech-language pathologist noted that the student continued to have "difficulty recalling information that [w]as longer and complex," and that he benefitted "from the use of aids such as a dictionary when defining unknown vocabulary words" (*id.*). The speech-language pathologist recommended that the student receive one session of speech-language therapy per week for the upcoming school year "in order to allow [the student] more instructional time during his core academic subjects" (*id.*).

Reportedly, during sixth grade, the student exhibited "significant weaknesses in decoding and spelling," "improving" comprehension skills, and difficulty with basic mathematical operations (Dist. Ex. 54 at p. 9). The student received the following "end of the year" grades for sixth grade: English (80), reading (86), social studies (87), math (81), science (88), and computers (87) (Dist. Ex. 52). The student received summer 2006 ESY

¹ Although the student's IEP also refers to the student's special education itinerant teacher services as "SEIT" services, New York Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]).

² The director of special education, who also acted as CSE chairperson at the June 2008 CSE and August 2008 CSE subcommittee meetings that are the focus of this appeal, described the district's consultant teaching program as consisting of a special education teacher who is on the same "team" with an English, math, science, and social studies teacher; who "pushes into" those classes to provide team teaching, peripheral support, small group support or "whatever a student or group may need" (Tr. pp. 191, 198; Dist. Exs. 13 at p. 6; 24 at p. 6). For consistency in this decision, the director of special education will be referred to as the CSE chairperson.

services consisting of one group session of speech-language therapy (Dist. Exs. 51; 53 at p. 2).

The hearing record indicates that during seventh grade (2006-07) the student continued to receive similar special education services to those received during the prior school year (Tr. p. 198; compare Dist. Ex. 53 at p. 1, with Dist. Ex. 56 at p. 1). The student received one session of group speech-language therapy per week (Dist. Ex. 53 at p. 1). An April 2007 administration of the WIAT-II to the student yielded scores in the following percentiles: word reading (6), pseudoword decoding (3), numerical operations (18), math reasoning (14), spelling (5), and listening comprehension (32) (Dist. Ex. 50).

In April 2007, a subcommittee of the Committee on Special Education (CSE subcommittee) convened to develop the student's special education program for the 2007-08 school year and recommended nearly the same special education and related services that the student received during seventh grade (2006-07), removing only the student's special class reading services (compare Dist. Ex. 49 at pp. 1-2, with Dist. Ex. 53 at p. 1). The CSE chairperson stated that the student had made progress in the special class reading program and was therefore "moved into" a general education reading class for the upcoming school year (Tr. pp. 213-14). According to information contained in the April 2007 individualized education program (IEP), the CSE subcommittee recommended that the student receive resource room services; however, this service was rejected by the student's mother (Dist. Ex. 49 at p. 5). The CSE subcommittee further recommended a "review" of the student's program after the first marking period of the upcoming school year (id.).

The student achieved the following final grades during the 2006-07 school year: English (84), reading (86), social studies (83), math (73), and science (77) (Dist. Ex. 47). The student's summer 2007 ESY services consisted of ten sessions of group speech-language therapy (Dist. Exs. 45; 49 at p. 2).

At the commencement of the 2007-08 school year (eighth grade), as per the student's April 2007 IEP, the student's special education program consisted of consultant teacher services in English, science, social studies, and math; special class study skills instruction; and one session per week of group speech-language therapy (Dist. Ex. 49 at pp. 1-2). The student also received general education reading instruction in a class composed of general education and special education students, instructed by a certified reading teacher (Tr. pp. 213-14). The CSE subcommittee reconvened on September 27, 2007 to review the student's program and to add one session per week of speech-language consult services to the student's IEP (Tr. pp. 210-11, 457-58; Dist. Ex. 43 at p. 1). At the CSE subcommittee meeting, the parents' requested that an independent neuropsychological evaluation of the student be conducted due to questions regarding their son's learning style, homework and test preparation skills, and his "ability to grasp concepts" (Dist. Exs. 14 at p. 10; 43). The CSE approved the parents' request for an independent evaluation, noting that it would reconvene to review the report (Dist. Exs. 33; 43).

On November 29, 2007, a CSE subcommittee convened at the request of the parents to review the student's program (Tr. p. 206; Dist. Ex. 38). The resultant IEP reflected that the student's mother requested that her son be removed from the study skills class (Dist.

Ex. 38 at p. 5). The CSE subcommittee agreed to this request, removed the student from the study skills class, and added resource room services to the student's IEP (Tr. pp. 207-10; Dist. Ex. 38 at pp. 1, 5). The student's resource room teacher stated that resource room was "a little bit more independent class than study skills," and initially she worked with the student to help him understand that he needed to know his assignments and due dates, and use an assignment planner (Tr. pp. 1007-08). According to the resource room teacher, although the student's transition to resource room "took a little longer," she indicated that in the second marking period she considered him to be a "[r]esource [r]oom student" (Tr. p. 1008).

According to the CSE chairperson, the student's guidance counselor and the student's mother had a discussion regarding the student's dissatisfaction with his general education reading class (Tr. pp. 212-13). In a letter dated January 23, 2008 addressed "To Whom It May Concern," the student's mother requested that her son be removed from the reading class in order for him to register for health class during the second semester (Dist. Ex. 36). Subsequently, the district complied with the student's mother's request (Tr. pp. 211-12).

Administration of the WIAT-II to the student on February 20, 2008 by his resource room teacher, yielded scores in the following percentiles: word reading (10), reading comprehension (63), pseudoword decoding (2), numerical operations (8), math reasoning (27), spelling (6), and written expression (6) (Tr. p. 1004; Dist. Ex. 34).

On January 3, 2008, an independent psychologist prepared a report of his district funded psychoeducational evaluation of the student (Dist. Ex. 33).³ The report reflected the completion of a clinical interview and administration of multiple cognitive, academic achievement and projective assessments, including the WISC-IV, Ravens Progressive Matrices, Bender Motor Gestalt Test, Wide Range Achievement Test-Revised, Woodcock-Johnson III Tests of Achievement, Gray Oral Reading Test-IV, Gates-MacGinitie Reading Test, Detroit Test of Learning Aptitude, Rorschach Ink Blot Test, Thematic Apperception Test, and House/Tree/Person Figure Drawing (*id.* at p. 5). In analyzing the test results, the psychologist reported that the student was a "bright young man whose intellectual capacity, understanding, and sensitivity are much better developed than he is willing or able to demonstrate" and that at the "crux of [the student's cognitive struggles is, what appears to be, verbal dyspraxia" (*id.* at p. 9).⁴ The psychologist's report pointed to the quality of the student's verbalizations, the disparity between his fluency and comprehension when reading silently versus reading aloud, his aversion to reading aloud, poor working memory, tendency to "surrender" when deeming a task too difficult, and "palpable self-consciousness when explaining his thoughts," as evidence of early experiences with speech

³ The psychologist noted that parental illness delayed provision of feedback regarding the assessment and completion of the written report (Dist. Ex. 33 at p. 4).

⁴ The hearing record defines "verbal dyspraxia" as an "outdated term" for "[c]hildhood apraxia of speech (CAS), a neurological childhood (pediatric) speech sound disorder in which the precision and consistency of movements underlying speech are impaired in the absence of neuromuscular deficits (e.g. abnormal reflexes, abnormal tone) . . . [t]he core impairment in planning and/or programming spatiotemporal parameters of movement sequences results in errors in speech sound production and prosody" (Tr. pp. 466-67; Dist. Ex. 23 at p. 3).

dyspraxia (id.). The psychologist further indicated that the student's academic skills were "quite variable and in no way as well developed as one would expect given his intellect" (id.). The evaluation report described the student's decoding, written expression and math difficulties; academic struggles, which according to the psychologist were "seriously inflamed by underlying emotional factors" (id.). The psychologist indicated that "the greatest concern here is that a continued lack of success will perpetuate feelings of ineffectiveness, stunting any growth of confidence and fortitude. . . ." (id.).

In conclusion, the psychologist reported that the student was "indeed learning disabled" and that his expressive language deficit was "in fact verbal dyspraxia" (Dist. Ex. 33 at p. 14). Formal diagnostic impressions included "Mixed Receptive-Expressive Language Disorder (DYSPRAXIA), Disorder of Written Expression, Arithmetic Disorder and Adjustment Disorder NOS" (id. at p. 15). In his recommendations, the psychologist opined that "the best efforts by the [district] are falling short of teaching [the student] the basic academic skills he will need to succeed in high school and achieve his potential," urging that the student "be placed in an academic setting offering an intensive proven language based remedial curriculum... designed for bright learning disabled teens" (id.). Additionally, the psychologist recommended that the placement offer a five or seven day boarding component and suggested placement at a specific private school (id. at pp. 15-16). Other recommendations included enrolling the student at the suggested private school's six week "intensive summer remedial program," a neurological consultation, a comprehensive speech-language assessment, private psychotherapy, classroom modifications, testing accommodations, and instruction in written language using a specific writing program (id. at pp. 16-17).

On March 27, 2008, a CSE subcommittee convened to review the psychoeducational evaluation report (Tr. pp. 214-15; Dist. Ex. 31). Attendees included the CSE chairperson, a district school psychologist, the student's resource room teacher who signed in as a special education teacher, a regular education teacher, a district speech-language pathologist, a guidance counselor, a school psychology intern, and the student's mother (Dist. Ex. 31 at p. 6; see Dist. Ex. 30). The hearing record reflects that the psychoeducational evaluation report was reviewed by the school psychologist and speech-language pathologist at the CSE subcommittee meeting (Tr. pp. 215-18, 465-69, 1399-1401; Dist. Ex. 31 at pp. 6-7). Information contained in the resultant IEP indicated that the student's speech-language pathologist was "concerned about the basis of [the psychologist's] diagnosis of dyspraxia" because the psychologist was not a licensed speech-language pathologist and did not "follow the typical protocol to diagnose dyspraxia which includes an oral motor examination along with comprehensive speech and language assessments" (Dist. Ex. 31 at pp. 6-7). The CSE subcommittee requested that the district speech-language pathologist conduct articulation and oral motor assessments of the student in light of the psychologist's findings (Tr. p. 354). In response to the psychologist's findings about the student's "emotional state," the CSE subcommittee recommended twice monthly individual counseling sessions and developed annual social/emotional goals (Dist. Ex. 31 at pp. 2, 7, 9). Additionally, the student's mother and the district agreed that the student would return to the general education remedial reading program he had left earlier in the school year (Tr. pp. 221-22; Dist. Ex. 31 at p. 7). According to the March 2008 IEP, the student's mother asked that the CSE subcommittee consider schools outside of the district (Dist. Ex. 31 at p. 7). The CSE subcommittee indicated that it was "premature to consider

high school options until the annual review," and noted the district would continue to monitor the student's progress (id.).

On May 15, 2008, the district's speech-language pathologist prepared the student's speech-language evaluation report that included the results of the February 5, 2008 Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) administration (Dist. Ex. 28).⁵ According to the speech-language pathologist, the student was "very clear" that he did not want to receive speech-language therapy during the upcoming 2008-09 school year (Tr. p. 474; Dist. Ex. 28 at p. 1). Administration of the CELF-4 to the student yielded the following index standard scores (percentile): receptive language 98 (45), expressive language 85 (16), language content 106 (66), language memory 82 (12), and working memory 57 (0.2) (id. at p. 2). Following administration of additional subtests to the student measuring his ability to repeat numbers forward and backward and a familiar sequence, the speech-language pathologist concluded that the student exhibited a significant weakness in his working memory skills (Tr. pp. 470-74; Dist. Ex. 28 at p. 1). For the 2008-09 school year, the speech-language pathologist recommended that the student receive two small group sessions per week of speech-language therapy (Dist. Ex. 28 at p. 1).

On June 18, 2008, the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 24).⁶ Attendees included the CSE chairperson, a district school psychologist, the student's consultant teacher who signed in as a special education teacher, the student's resource room teacher who signed in as a special education teacher, one of his regular education teachers, the student's district speech-language pathologist, a guidance counselor, the student's mother, and an additional parent member (Dist. Ex. 24 at p. 6; see Dist. Ex. 30). According to information contained in the resultant IEP, each of the student's special education teachers reviewed the student's progress and his consultant teacher indicated that although he struggled more significantly in the areas of language arts and math due to weakness in those areas, he had "maintained steady progress" in his "four primary" classes (Dist. Ex. 24 at p. 6). The CSE noted that the student's homework completion was "sometimes inconsistent" and that he struggled on tests and quizzes (id.). It was reported that the student was an "active member of any classroom discussion and [the student's] classroom participation [wa]s strong" (id.). According to the resultant IEP, the student's consultant teacher and regular education teacher both commented that the student was well liked by his peers and that at times, he had taken a leadership role in his classes (id.). The resource room teacher reported that the

⁵ The hearing record reflects that on February 5, 2008, the district obtained parental consent to administer the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) to the student, which occurred on February 5, 2008 (Tr. pp. 464-65; Dist. Exs. 28 at 2; 35). Thereafter on June 18, 2008, after repeated attempts, the district obtained parental consent to conduct articulation and oral motor assessments of the student, which occurred on June 20 and June 23, 2008 (Tr. p. 468-69, 476-77; Dist. Exs. 23 at p. 1; 26; Parent Ex. C).

⁶ The district maintains that at the June 2008 CSE meeting, the recommended program and services were reviewed and discussed with the parent, but the parent rejected the 2008 ESY services (Tr. pp. 230-43). The June 2008 IEP also reflected that the student's mother stated that the student would attend a private school and not the district's high school (Dist. Ex. 24 at p. 7). The parent denied at the impartial hearing that the June 2008 CSE proposed program and services were discussed at the CSE meeting and denied that she rejected 2008 ESY services (Tr. pp. 1461-63, 1512).

student had made progress in developing strategies for reading and writing, including using graphic organizers (id.). The resource room teacher also explained to the CSE the student's weaknesses in written expression, and how she addressed his needs by using writing strategies and strategies from a specific writing program (Tr. pp. 1003-04; Dist. Ex. 24 at p. 6). She further indicated that the student used context cues appropriately and was able to read for meaning using that strategy (Dist. Ex. 24 at p. 7). Socially, it was reported that the student was "very well immersed" in the middle school community and was an active participant at school (id.).

The June 2008 CSE reported the student's present levels of academic achievement, social and physical development and management needs, and developed annual goals in the areas of study skills, reading, writing, mathematics, speech-language, and career/vocation/transition (Dist. Ex. 24 at pp. 3-6, 8-10). The CSE recommended that the student receive ESY services of one weekly group session of speech-language therapy and three hours per week of group (5:1) "SEIT" services (id. at p. 2). Commencing in September 2008, the CSE recommended that the student receive a consultant teaching program for English, described as daily English instruction provided by both a regular education English teacher and a special education teacher (Tr. pp. 126, 233-34; Dist. Ex. 24 at p. 7). The CSE further recommended placement in a general education global studies class and a consultant teaching global studies lab, described as a class that convened every other day, instructed by both a regular education global studies teacher and a special education teacher "to reinforce key vocabulary and key concepts that [were] covered" in the global studies class (Tr. pp. 127, 233-34; Dist. Ex. 24 at p. 7). The CSE further recommended placement in a "slower paced" general education math class and instruction in a 5:1 math resource room that convened every other day and was taught by "a special education teacher who is well versed in the math curriculum" (Tr. pp. 127, 234-37; Dist. Ex. 24 at p. 7). The CSE also recommended that the student receive instruction in a resource room, which convened every other day opposite the math resource room to address study skills, and "to provide [the student with] assistance to manage his general education classes, especially with reading and writing" (Tr. pp. 127-28, 235; Dist. Ex. 24 at p. 7).

At the impartial hearing for this matter, the CSE chairperson indicated that the student would have been placed in "slower paced" general education science class (Tr. pp. 128-29, 236-37). The IEP included a recommendation for instruction in a general education "foundations of reading and writing lab" provided by a certified reading teacher/special education teacher to address reading and writing weaknesses (Tr. pp. 236, 704-07, 733; Dist. Ex. 24 at p. 2). The CSE recommended two 45-minute sessions of group speech-language therapy per week; program modifications including use of a calculator, "check for understanding," and access to a word processor; and testing accommodations including extended time, use of a calculator, special location, and "tests read" (Dist. Ex. 24 at pp. 2-3).

On June 20 and 23, 2008, the district speech-language pathologist conducted an oral motor and articulation assessment of the student (Dist. Ex. 23). The speech-language pathologist reported that the student indicated that he had difficulty producing words and that although this difficulty "sometimes embarrassed" him, it did not affect his socialization (id. at p. 1). The student did not exhibit any articulation errors during administration of a

standardized articulation test and his performance was reported to be within the average range (id.). Assessment of the student's oral motor skills included oral position at rest, oral strength and stability, oral mobility and differentiation, and speech tasks such as repeating multisyllabic words and reading aloud words of increasing difficulty (id. at pp. 1-2). The speech-language pathologist noted that the student demonstrated difficulty reading more difficult words, which affected his speech fluency (id. at p. 2). The speech-language pathologist also reported that student "read the words quickly and was hesitant to slow down and read each word slowly" (id.). According to the speech-language pathologist, the student displayed many "vocalizations of frustration" while attempting to produce the words he read (id.). The report included a definition of childhood apraxia of speech (CAS), a list of characteristics of the disorder, and a conclusion that although "[the student] d[id] not demonstrate all the characteristics of [CAS,]. [h]e d[id] demonstrate difficulty with his phonemic skills and prosody when reading aloud" (id.). For the 2008-09 school year, the speech-language pathologist recommended that the student receive small group speech-language therapy services twice weekly (id.).

At the conclusion of the 2007-08 school year, the student achieved the following final grades: English (71), "LAS 8-1" (87),⁷ social studies (84), math (66), science (80), resource room ("satisfactory"), and "MATH APP" ("passed") (Dist. Ex. 22). During this time period, the district attempted to contact the parents to determine whether the student would attend the recommended summer 2008 ESY program (Tr. pp. 1068-75; Dist. Exs. 67, 69). Ultimately the student did not receive any summer services from the district (Dist. Ex. 4 at pp. 7, 10).

By letter dated August 13, 2008, the CSE chairperson informed the student's mother that the student's IEP was "close to completion," and would be mailed to her by the close of business that day (Dist. Ex. 16). The letter acknowledged that the student's mother had attempted to contact the CSE chairperson to inquire about ESY services, but that "on June 18[th] [the student's mother] informed the CSE that [she] would not be accessing our summer program this year" (id.). The letter also stated that the district's special education teacher contacted the student's mother over the summer and was informed that the student would not be attending the ESY program, and that two telephone messages left with the family by a district speech therapist about speech-language ESY services went unreturned (Tr. pp. 1067, 1619-20; Dist. Ex. 16). Additionally, the CSE chairperson indicated that "throughout the [s]pring" 2008, the district's speech-language pathologist had attempted to obtain consent from the parents for additional oral motor and articulation assessments of the student, but that consent was not obtained until the June 18, 2008 CSE meeting (Dist. Ex. 16). He informed the student's mother that the CSE would convene on August 22, 2008 to review the results of the district's oral motor and articulation assessment, and to bring the student's 2008-09 recommendations "to a conclusion" (id.).

By letter dated August 15, 2008, the admissions director from the private school previously recommended by the independent psychologist informed the parents that their son had been accepted at the school for the 2008-09 school year (Dist. Ex. 71). Enclosed

⁷ The hearing record suggests that "LAS" stands for "Language Arts Support" and refers to the student's general education remedial reading program (see Tr. pp. 329, 354-55).

with the letter was a contract and a request from the private school that the parents have a "school district representative sign one copy and send it back to [the admissions director] as soon as possible to ensure a place for [the student]" (id.). The admissions director advised that the parents could contact her with any questions (id.).

By due process complaint notice dated August 20, 2008, the student's mother requested an impartial hearing (Dist. Ex. 15). In the due process complaint notice, she stated that she had not received the "fall IEP" despite numerous requests (id. at p. 1). She further asserted that the student's "success in his educational experience" had been delayed due to insufficient resources, inadequate diagnosis, and an inability to implement a program to meet the student's needs (id.). The parent requested that the recommendations of the independent psychologist be followed (id. at pp. 1-3). The parent also stated that "we must honor the recommendation" of the independent psychologist to place the student at the private school he recommended (id.). She reported that she and the student had visited the private school to seek fall placement at the district's expense (id.). She attached to the due process complaint notice an acceptance letter verifying that the student had a space reserved for him at the private school for the upcoming 2008-09 school year (id.).

By letter dated August 21, 2008, the student's mother informed the CSE chairperson that she had had a conversation with a district special education teacher prior to the start of the 2008 ESY program (Dist. Ex. 68). The letter explained that during the conversation, the special education teacher indicated that she would contact the CSE chairperson about the messages that the student's mother left for the CSE chairperson, and then follow up with the student's mother, and that that follow up never occurred (id.). The letter also stated that a district speech-language therapist had called the student's mother on July 22, 2008, and had left a message that the student's summer speech-language therapy would start two days later (id.). The letter contended that the district-provided transportation services had not been arranged for this speech-language therapy (Tr. pp. 1465-66, 1619-20; Dist. Ex. 68). The letter also explained that the student's mother had received the district's request for consent to conduct additional speech assessments of her son during the district's April 2008 vacation, which she signed and returned to the district via the student (Dist. Ex. 68; Parent Ex. C).

On August 22, 2008, a CSE subcommittee convened to review the district speech-language pathologist's June 2008 oral motor and articulation evaluations of the student (Tr. p. 245; Dist. Ex. 13 at p. 6; see Dist. Ex. 23). Attendees included the CSE chairperson, a district school psychologist, a special education teacher, a regular education teacher, and the parents (Dist. Ex. 13 at p. 6). The district speech-language pathologist participated by telephone (id.). The district speech-language pathologist reported the results of her evaluation of the student at the CSE subcommittee meeting, indicating that although the student exhibited some, he did not demonstrate all of the characteristics of CAS (Tr. pp. 479-82; Dist. Ex. 13 at pp. 6-7). The resultant August 22, 2008 IEP indicated that the student continued to exhibit reading fluency weaknesses that affected his language skills, especially when reading out loud (Dist. Ex. 13 at p. 7). The CSE continued the same program recommendations for the student as had been detailed in the June 18, 2008 IEP (compare Dist. Ex. 13 at pp. 1-3, with Dist. Ex. 24 at pp. 1-3). According to the August 22, 2008 IEP, the student's mother indicated her intention to enroll the student in the private

school "as she d[id] not agree with the recommended program discussed in detail in the June 2008 CSE meeting that is reflected in [the student's] IEP" (Dist. Ex. 13 at p. 7).

On September 2, 2008, a private speech-language pathologist conducted a speech-language evaluation of the student (Dist. Ex. 7). The private speech-language pathologist reported that the student was referred by the independent psychologist to further assess the student's language skills and presence of a motor planning speech disorder (*id.* at p. 1). The evaluation consisted of informal and standardized language testing and assessment of the student's articulation, oral motor, speech production, and expressive vocabulary skills (*id.* at pp. 1-9). The private speech-language pathologist reported that the student's speech production was marked by differences in both the segmental and suprasegmental features of speech, "consistent with a motor planning [p]ediatric [s]peech [s]ound [d]isorder" (*id.* at p. 10). She further reported that the student demonstrated inconsistent errors in repeated productions of syllables/words, lengthened and inappropriate pauses between sounds and syllables, and inappropriate prosody at the word and phrase level, indicating that "these three features are the core diagnostic characteristic of [CAS]" (*id.*). The private speech-language pathologist's report also indicated that the student's receptive language skills were "significantly better" than his expressive language skills, which were characterized by weaknesses in grammar, vocabulary and narrative development (*id.*). She reported further that the student exhibited a "severe delay" in phonemic awareness skills, and that his memory for words, digits and sentences appeared to be below age level expectations (*id.*). The private speech-language pathologist concluded that the student "would benefit from a supportive educational setting that would provide mu[lti]-sensory input to improve his abilities in the areas of phonemic awareness, language processing of literal and inferential information, expressive vocabulary and grammar, and narrative development" (*id.*). She further indicated that "[i]ndividual speech therapy is imperative if [the student] is not placed in a supportive educational setting," recommending three weekly individual sessions of speech-language therapy and "additional" group therapy sessions (*id.* at p. 11). Her report also provided specific speech-language goals developed for the student (*id.*).

By amended due process complaint notice dated September 15, 2008, the parents, through their special education advocate, requested an impartial hearing (Dist. Ex. 4). In the due process complaint notice, the parents challenged the appropriateness of the placement, program, related services, modifications, and the goals and objectives recommended at both the June 18, 2008 and the August 22, 2008 CSE meetings (*id.* at p. 6). The parents also asserted that the district failed to provide appropriate "SEIT" services and related services during summer 2008 (*id.*). The parents asserted further that the parents' procedural rights had been violated because: (1) they were not afforded the opportunity to review the recommended district class while it was in session prior to the placement recommendation; (2) they were never provided with a classroom profile; and (3) the minutes from the August 22, 2008 CSE meeting failed to note that the parents had requested an independent speech-language evaluation (*id.*). As relief, the parents requested: (1) a finding that the district denied the student a free appropriate public education (FAPE) for the 2008-09 school year; (2) annulment of both the June 18, 2008 and the August 22, 2008 IEPs; (3) that the CSE reconvene; (4) a finding that the district had failed to provide the parents with the opportunity to review the program and placement while they were in session; (5) an order that the district provide a redacted classroom profile of the classrooms in which the student would be placed; (6), an order that the district provide an accurate

stenographic or recorded record of the CSE meetings; (7) an order that the district had violated the parents' procedural rights by ignoring the parents' request for an independent speech-language evaluation; (8) reimbursement for the private speech-language evaluation obtained by the parents at their own expense; and (9) compensatory education and related services for what the parents alleged was a lack of services provided during the summer 2008 (id. at pp. 7-8).

The student did not attend the district's high school during the 2008-09 school year (see Tr. pp. 1581-82). According to the student's mother, at the commencement of the school year the student was ill and she contacted the student's guidance counselor, who sent the student's school work home (Tr. pp. 27, 32-35). On September 29, 2008, the student's mother informed the district that she had contacted a private tutoring agency to arrange for the student to attend ten hours per week of tutoring (Tr. p. 35). Subsequently, the student received tutoring services from the private agency 2.5 hours per day, four days per week, in addition to "two or more hours" per week of math and science instruction from a retired public high school teacher (Tr. p. 41).

On September 29, 2008, the CSE convened to review the student's private speech-language evaluation report (Tr. p. 271; Parent Ex. S at p. 8). Attendees included the CSE chairperson, a district school psychologist, a district special education teacher, a district regular education teacher, a district teacher of the speech and hearing handicapped (speech therapist), a district speech-language pathologist, the student's mother, the parents' advocate, and counsel for the district (Tr. pp. 454, 741; Parent Ex. S at p. 8). At the CSE meeting, the district's speech-language pathologist reviewed the private speech-language evaluation report; providing information about CAS and commenting on both her June 2008 articulation and oral motor evaluation of the student and the private speech-language pathologist's evaluation results (Tr. pp. 273-74, 482-84; Parent Ex. S at p. 9). The district speech-language pathologist indicated that she disagreed with the private speech-language pathologist's finding that the student exhibited CAS (Parent Ex. S at p. 9; see Tr. pp. 484-87). She indicated to the CSE that the student's poor phonemic skills were the result of poor language and working memory (Parent Ex. S at p. 9). To address the student's "current refusal to come to school" and to "assist his transition to [the district's] high school," the CSE recommended counseling services (id.). The CSE adjourned the meeting due to time constraints and agreed to reconvene to consider additional recommendations resulting from the private speech-language evaluation and the student's mother's concerns regarding counseling services (id.).

On October 8, 2008, a CSE subcommittee reconvened to continue their review of the private speech-language evaluation and to review the student's recommended program (Parent Ex. S at pp. 1, 7-8). With the exception of the district's speech-language pathologist, the same attendees from the September 29, 2008 CSE meeting were present (id.). The October 8, 2008 IEP noted that the parents' advocate opined that the student needed a language-based program (id.). The district's regular and special education teachers described how they could meet the student's needs in their classrooms (id.). The district speech therapist described how her therapy reinforced "key vocabulary, literary concepts, writing and comprehension" and indicated that she built her lessons from the curriculum presented in the student's general education classes (id.). Additionally, the speech therapist indicated that her job was "to develop a language based approach to [the

student's] learning and how it relate[d] to the high school curriculum" (id.). The October 8, 2008 IEP described discussions between the parent, the parents' advocate, and district staff regarding the student's exposure to general education curriculum, the private speech-language pathologist's recommendation for individual speech-language therapy sessions, the student's home schooling program, and the parents' rejection of recommended counseling services (id. at p. 9). The October 8, 2008 CSE subcommittee recommended the same special education program and related services it had previously recommended in August 2008, and added speech-language therapy annual goals (compare Dist. Ex. 13 at pp. 1, 10, with Parent Ex. S at pp. 1-2, 12-13).

The impartial hearing began on December 4, 2008 and concluded on September 2, 2009, after seventeen days of hearing (Tr. pp. 1, 108, 179, 302, 514, 622, 737, 841, 942, 1048, 1081, 1174, 1265, 1390, 1486, 1586, 1677). On November 2, 2009, the impartial hearing officer rendered his decision (IHO Decision at p. 27). The impartial hearing officer found that the student had been denied a FAPE for the 2008-09 school year (id. at p. 24). Procedurally, the impartial hearing officer disagreed with the parents' assertion that they were denied meaningful participation at the CSE meetings because of the inability to view the recommended placement and the unavailability of class profiles for the recommended classes (id. at p. 21). The impartial hearing officer also determined that these issues were never raised by the parents at the CSE meetings (id.). Substantively, the impartial hearing officer determined that the CSE failed to adequately assess the student's decline in academic functioning, the student's general education reading and writing lab was inadequate given the student's severe reading deficits, and the speech-language therapy recommended by the district was inadequate given the student's substantial deficits (id. at pp. 22-23). He found that the speech-language recommendations of the CSE were not consistent with the private speech-language pathologist's evaluation, which the impartial hearing officer found correctly described the student's speech-language needs (id. at p. 24). The impartial hearing officer further found that the parents' objections to the goals and objectives were not based on evidence at the impartial hearing, but were based on "'facts' articulated in the parents' [w]ritten [s]ummation" and that the parent's decision to withdraw the student from the district school and educate him in a non-special education setting rendered those arguments moot (id.).

In fashioning a remedy for the denial of a FAPE, the impartial hearing officer determined that the student was entitled to "compensatory education" for the inadequacy of the reading recommendations and speech-language therapy recommendations, but that he was not entitled to compensatory education for summer 2008 (IHO Decision at pp. 25-26). The impartial hearing officer ordered that the district provide the student with compensatory education/additional services consisting of five individual 45-minute sessions of reading remediation with a special education teacher trained in the multisensory Orton-Gillingham methodology "for each week" of the 2008-09 school year (id. at p. 27). However, he also ordered that this reading services award be reduced by 50 percent because he found that the parents acted unreasonably in removing the student from the district's school and that this removal only exacerbated the student's deficits (id. at pp. 25, 27). The impartial hearing officer further ordered the district to provide the student with compensatory education/additional services of three individual 45-minute sessions of speech-language therapy and one 45-minute group session "for each week" of the 2008-09 school year (id. at p. 27). He also ordered that these speech services be reduced by 50

percent because he found that the parents acted unreasonably in removing the student from the district's school and the general and special education services he was offered "and where he benefitted from contact with non-disabled peers" (*id.* at pp. 25, 27). Regarding the services for summer 2008, the impartial hearing officer determined that the district was not under any obligation to consider the private non-approved special school recommended by the independent psychologist (*id.* at p. 26). Moreover he stated that the purpose of summer services is to prevent regression and that the evidence at the impartial hearing did not support the conclusion that a full-time special education program was necessary to prevent the student from experiencing substantial regression over the summer; rather the recommendation from the independent psychologist for the summer program was to remediate the student's deficits, not to prevent regression (*id.*). He also found that the district offered summer services, but that the parents declined them (*id.*). Finally, the impartial hearing officer found that the private speech-language evaluation obtained by the parents correctly described the student's speech-language needs and that the district's speech-language evaluations were not appropriate (*id.*). Therefore, he ordered the district to reimburse the parents for the private speech-language evaluation upon proof of payment by the parents (*id.*).

The district appeals, and asserts that the impartial hearing officer erred in granting the student compensatory education/additional services for the district's alleged denial of a FAPE for the 2008-09 school year. The district argues that in the due process complaint notice, the parents only requested compensatory education for the alleged failure to provide services during summer 2008; therefore, the issue of compensatory education/additional services for the remainder of the 2008-09 school year was not properly raised. The district also asserts that the impartial hearing officer erred in finding that the CSE failed to follow the recommendations in the evaluations, particularly the recommendations from the private speech-language pathologist. The district contends that it did review the student's evaluations and based its recommendations on those evaluations. With respect to the private speech-language evaluation, the district argues that the recommendations in that evaluation report were not available until September 2008, after both the June and August 2008 CSE meetings. The district states that once it did review this evaluation, it recommended additional speech-language goals. The district also asserts that the impartial hearing officer erred in finding that the district's recommended general education reading and writing lab was inadequate. The district contends that the reading and writing lab class contained no more than six students; was taught by a special education teacher who was also a certified reading specialist; and furthermore, it was offered in conjunction with a consultant teacher English class, which was co-taught by a special education teacher; a global studies lab; and resource room services. The district also asserts that the impartial hearing officer erred in determining that the student's academics declined, contending that the student's grades demonstrate that his academic performance actually improved. The district also asserts that the impartial hearing officer erred in awarding reimbursement for the private speech-language evaluation obtained by the parents because there is no evidence that the parents ever requested an independent speech-language evaluation.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE, and that the impartial hearing officer's decision should be upheld in its entirety. The parents also assert that the recommendations for additional services by both the independent psychologist and the

private speech-language pathologist indicate that the district's program was inadequate. The parents assert further that the student's mother did not know how to specifically word her attempt to obtain an independent speech-language evaluation when she made her request at the August 22, 2008 CSE meeting. The parents also assert that the absence of any proof of this request for the independent evaluation was due to the district's failure to note the request, and further that the need for this independent evaluation was acknowledged by the district because they used the resultant report to generate new speech-language goals. The parents assert further that the impartial hearing officer did not err in providing compensatory education for the 2008-09 school year because the parents' due process complaint notice specifically requested "any other equitable remedies of relief" that the impartial hearing officer deemed appropriate.⁸

In its reply, the district argues that the parents' claim that they did not understand how to request an independent evaluation is not supported by the hearing record because the parents previously requested an independent evaluation during the prior year. The district also asserts that the parents' attempt in the answer to introduce additional evidence regarding the goals and the reading teacher's program is improper.

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

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

⁸ The parents do not cross-appeal the impartial hearing officer's decision denying their request for compensatory education for summer 2008 or the 50 percent reduction in the additional services awarded for the 2008-09 school year (IHO Decision at p. 26).

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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).

I now turn to the district's argument on appeal that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE for the 2008-09 school year (see IHO Decision at p. 24).⁹

The hearing record indicates that the student's proposed program for the 2008-09 school year would have consisted of a daily consultant teacher English class composed of two teachers; one certified as a regular education English teacher and one dually certified in both English and special education (Tr. p. 628; Dist. Ex. 13 at p. 1). The class contained approximately twenty-three to twenty-four students, seven or eight of whom received special education services (Tr. p. 631). The consultant English teacher, who is also a resource room teacher, testified that the English class is "truly collaborative" in that each teacher provides instruction approximately 50 percent of the time (Tr. pp. 628-30). He testified that he is responsible for modifying the curriculum for special education students according to their respective reading and language needs (id.). He further testified that curriculum is broken down into chunks and students receive help organizing their writing (Tr. p. 629). The consultant teacher testified that the English class is language based in that it focuses on reading comprehension, literature, spelling and writing; and that it is multisensory in that there are many methods of instruction utilized such as note taking, group work, individual work, and oral presentation (Tr. pp. 631-32, 659-60, 674-75). He explained that had the student attended the class, he would have addressed the student's working memory deficits by providing reminders and clarification of instruction for assignments (Tr. pp. 638-40). He stated that he would have addressed the student's reading deficits by sitting with the student and having the student read out loud and practice phrasing, and by ensuring that the student heard language modeled and saw "how the language is supposed to look" (Tr. pp. 639-40, 675-77). He testified that written expression is a "big component" of the English class, and that the curriculum is geared toward preparing the students for Regents examinations (Tr. pp. 643-44). He further testified that in the English class, the teachers sit with students and use various strategies to assist students with spelling and vocabulary difficulties (Tr. pp. 645-46, 689-92). He also testified that written assignments are broken down and graphic organizers and prewriting skills techniques are employed (Tr. pp. 643-44). Students also receive direct instruction in formulating research papers and use "peer editing" and editing by the teachers to review their written work (Tr. pp. 646-47, 692-95). The consultant teacher also testified that he would have consulted with the speech-language pathologist regarding any speech-language difficulties the student exhibited in the classroom (Tr. pp. 687-89).

The district also recommended that for the 2008-09 school year, the student attend a consultant teacher global studies lab (Dist. Ex. 13 at p. 1). The special education teacher

⁹ The analysis herein is based upon the 2008-09 programs recommended in the June 18, 2008 and August 22, 2008 IEPs (Dist. Exs. 13; 24). Although the hearing record contains an IEP dated October 8, 2008, (Parent Ex. S), that IEP was created subsequent to the parents' due process complaint notice and the start of the 2008-09 school year, and with the exception of new speech-language therapy goals, the October IEP recommended the same program and services as the two prior IEPs (compare Dist. Ex. 13 and Dist. Ex. 24 with Parent Ex. S). The parents failed to amend their due process complaint notices to include any new claims pertaining to the October 2008 IEP (see Dist Exs. 4; 15). However, in the course of reviewing the entire hearing record, I have reviewed the October 2008 IEP and that review does not alter my conclusion that the district offered a FAPE in the LRE for the 2008-09 school year.

who taught the consultant global studies lab testified that up to eight special education students attend both a consultant teacher global studies lab and a general education global studies class (Tr. pp. 792, 794, 820). She further testified that the general education global studies class is a two year course resulting in a cumulative Regents examination at the end of tenth grade (Tr. pp. 793-94). Students in the consultant teacher global studies lab were primarily in ninth grade and were classified as having either a speech or language impairment or a learning disability (Tr. p. 830). The special education teacher testified that the global studies lab is designed to provide instruction to the students who are identified by their middle school teachers as needing the most support (Tr. pp. 792, 794). The consultant teacher global studies lab is taught by both a regular education global studies teacher and a certified special education teacher (Tr. pp. 791-92, 796-97, 829-30).¹⁰ The special education teacher testified that the consultant teacher global studies lab offered students opportunities to work as a whole group, in a small group or individually, and to review skills learned in the general education global studies class (Tr. pp. 792, 794-95). She further testified that the program is designed to strengthen skills in reading, writing, and test taking, and to prepare students for the Regents examination (Tr. pp. 792-93, 795-96). The special education teacher testified that the regular education global studies teacher presents the course content during the lab while the special education teacher provides small group or individual instruction to students exhibiting need (Tr. pp. 796-97). She also testified that had the student attended the consultant teacher global studies lab program, she would have been able to address the student's weaknesses in working memory, essay writing, and decoding skills (Tr. pp. 801-10, 821-22, 824-27, 834-36). She described how the class reduces reading demands, utilizes graphic organizers to assist with essay writing, provides strategies for breaking down tasks associated with document based questions and long-term assignments, and provides strategies for learning vocabulary and spelling words (Tr. pp. 801-10, 815-16, 821-22, 824-27, 834-36). Moreover she stated that she addresses test taking and study skills by improving her students' reasoning skills, by utilizing practice tests, and through classroom competitions (Tr. pp. 806-07, 812-15). She also testified that the regular education teacher in the global studies class utilizes a multisensory approach with hands-on kinesthetic activities, auditory activities, and music (Tr. pp. 811-12).

The student's program for the 2008-09 school year also contained both resource room and math resource room services (Dist. Ex. 13 at p. 1). The resource room teacher, who also was the consultant teacher in the student's recommended English class, described the resource room as a class for students receiving special education that supports and supplements their general education classes (Tr. p. 632).¹¹ He testified that he maintains contact with regular education teachers on a daily basis in order to determine what is occurring in his students' general education classes (Tr. pp. 632-33). To address reading

¹⁰ The special education teacher who taught the consultant teacher global studies lab testified that she had prior experience co-teaching global studies classes with a regular education teacher and teaching self-contained ninth/tenth grade global history, study skills, and resource room classes (Tr. pp. 791-92).

¹¹ Although he testified that as of the commencement of the 2008-09 school year the student was not assigned to his particular resource room, the resource room teacher testified about how the district provides resource room services (Tr. p. 668). After reviewing the student's August 22, 2008 IEP, he testified that the student's weaknesses in language, working memory, and math computation were "typical" as compared to other students receiving resource room support (Tr. pp. 627, 635-37).

needs, the resource room teacher testified that he reads and reviews classroom literature with the students in order to help them interpret what they have read (Tr. p. 641). He also listens to students' reading (Tr. p. 655). He also stated that he works with the classroom teachers and, if necessary and when time permits, he pulls out students from their classes in order to address specific issues (Tr. pp. 678-79). To support written language skills, the resource room teacher noted that he employs strategies that are similar to those used in the consultant teacher English class (Tr. p. 645). Specifically, he utilizes thesis preparation and works on the different components of writing including pre-writing, drafting, revision, proofreading and editing, and works to improve spelling through the use of a word processing spell checker and through memorization of words (Tr. pp. 645-46, 653-57). To address organizational and study skill needs, the resource room teacher testified that he utilizes checklists and flashcards, reviews students' planners, assists students with their homework, and communicates to parents about homework completion (Tr. pp. 647-51). The resource room teacher also testified that the resource room addresses students' math goals by focusing on specific issues or individual math concepts (Tr. pp. 657-58).

For the 2008-09 school year, the student was also recommended to attend a daily, general education foundations of reading and writing lab (foundations lab) with a teacher who is dually certified in both reading and special education (Tr. pp. 704-06, 733; Dist. Exs. 13 at p. 2; 24 at p. 2). The district's reading specialist who taught the foundations lab testified that there is a maximum of six students in the class (Tr. pp. 704, 706-07). Students can be either general education or special education students (Tr. p. 707). The teacher described her class as a "lab" that addresses students' reading and writing weaknesses in the areas of reading comprehension, decoding, spelling, vocabulary, outlining, note taking, completing work study pages, organizing ideas for writing tasks, proofreading, and editing (Tr. pp. 706-07). The teacher stated that the lab is also used to assist students with the English curriculum or with research projects (Tr. pp. 706, 712). Students with similar needs are grouped together during activities and 1:1 support is available for students exhibiting "severe deficits" (Tr. pp. 724-25). The foundations lab teacher testified that she communicates with students' English teachers to support their activities in the classroom (Tr. pp. 707-08). She further testified that she also communicates with parents and her students' resource room teachers (Tr. pp. 717-18). She testified that had the student attended the foundations lab, she would have assessed the student to identify his specific reading, writing, and study skills needs and to determine what strategies she would have used to address his weaknesses (Tr. pp. 710-13, 721-23). She also testified that she works toward her students' IEP annual goals and provides information to the students' special education teachers on the progress made toward those goals (Tr. pp. 713-14). To address the students' goals in the areas of reading and writing, she testified that she uses running reading records, instructs students in decoding multisyllabic words and vowel digraphs, breaks down multiparagraph essays, helps students to brainstorm writing ideas, helps students organize the writing process, utilizes writing templates, assists students in writing rough drafts, and edits their work (Tr. pp. 711, 714-16). Progress is measured by informal assessment of skills at the beginning of the year, once per marking period, and with administration of standardized testing at the end of the school year (Tr. pp. 716-17, 732).

For the 2008-09 school year, the district also recommended that the student receive two 45-minute sessions of 5:1 speech-language therapy per week (Dist. Exs. 13 at p. 1; 24 at p. 2). The district's speech therapist who would have provided the student's speech-

language services testified that she typically provides pull-out speech-language therapy sessions during non-academic subject periods and push-in services during "skills" classes or in a supportive class (Tr. pp. 746-47). She testified that it is important to recognize that excessively pulling students out of classes can affect academic performance and as such, she thought that the twice per week group speech-language therapy sessions were appropriate for the student's needs (Tr. p. 768). She further testified that she collaborates with regular education teachers to reinforce concepts and vocabulary introduced during general education classes (Tr. pp. 749-50). She testified that had the student attended the district school, she would have worked on the student's vocabulary skills, "different kinds of processing skills," expressive language skills, and research skills (Tr. pp. 747-48). The speech therapist also testified that she would have addressed the student's memory needs by utilizing associations, creating stories from vocabulary words, drawing pictures, identifying context clues, and requiring the student to create his own directions and then critiquing those directions (Tr. pp. 748-49, 752-53). She testified that she would have addressed the student's annual speech-language goals through modeling and by using stories about social situations (Tr. pp. 756-57; compare Dist. Exs. 13 at p. 10 and Dist. Ex. 24 at p. 10, with Parent Ex. S at p. 13).

The hearing record reflects that the majority of the information reflected in the speech-language portion of the district's recommended 2008-09 program was provided by the district's speech-language pathologist who had been working with the student for two years (Tr. pp. 456, 487; Dist. Exs. 13; 24).¹² She conducted a February 2008 speech-language evaluation of the student and a June 2008 evaluation of the student's oral motor and articulation skills (Tr. pp. 454, 456, 462; Dist. Exs. 23; 28). After her speech-language evaluation, she opined that the student demonstrated significant weakness in working memory, was disorganized, and needed work strategies to be "retold" or "retaught" (Tr. pp. 469, 474; Dist. Ex. 28). She testified that the majority of the student's CELF-4 index scores were in the average range and this indicated that the student did not exhibit a significant speech-language deficit (Tr. pp. 554-55; see Dist. Ex. 28 at p. 2). After her articulation and oral motor assessment of the student, she noted that the student demonstrated difficulty with phonemic skills and prosody when reading aloud (Dist. Ex. 23 at p. 3). She concluded that the student exhibited "some" but not all of the characteristics of CAS (Tr. p. 480; Dist. Ex. 23 at p. 3). Although the student exhibited difficulty producing longer words, the speech-language pathologist testified that it appeared to be difficulty with reading, not difficulty in saying the word (Tr. p. 480).¹³ The district's speech-language pathologist opined that although the September 2008 private speech-language pathologist's report presented the student as "severely disabled in his speech," she did not feel this impression was accurate (Tr. pp. 484-87, 545). She testified that during the course of the prior school year (2007-08), the student had improved in his ability to understand and use compensatory

¹² The hearing record reflects that the student's district speech-language pathologist has worked in the district for approximately ten years, is licensed by New York State, and is certified by the American Speech-Language-Hearing Association (ASHA) (Tr. pp. 454-55). The speech-language pathologist also testified that she has a "teaching license" (Tr. p. 456).

¹³ The district's speech-language pathologist also testified that she discussed CAS diagnoses with ASHA, which confirmed her belief that the student did not exhibit all the characteristics of CAS (Tr. pp. 480-81).

strategies when determining appropriate answers (Tr. pp. 474-75). She also reported that the student matured during the course of that year, was polite, personable, and responded well to redirection (*id.*).¹⁴

Testimony from the student's consultant teacher and resource room teachers during the 2007-08 school year support the district's speech-language pathologist's opinion that the student demonstrated progress in the district's 2007-08 special education program (Tr. pp. 126, 474-75, 553-54, 584, 590-91, 616-17, 1004, 1013, 1022-25; Dist. Ex. 64). Moreover, during that school year, he achieved passing grades in all subjects (Dist. Ex. 22).¹⁵ The hearing record reveals that the student's 2008-09 proposed special education program was similar to the program provided to him during the prior school year in the middle school (Tr. p. 126). According to the student's consultant teacher during the 2007-08 school year, despite the student's ongoing weaknesses in math and English, with the assistance provided for in the 2008-09 IEP and with the school-based supports offered to all students, she believed that the student would have been capable of undertaking the district's proposed Regents course work in those subjects during the 2008-09 school year (Tr. pp. 990-91; Dist. Ex. 22).

Turning to the district funded independent psychoeducational evaluation conducted in January 2008, which the impartial hearing officer discussed in his decision (IHO Decision at pp. 22-23), the hearing record reveals that the psychologist's conclusions were made without the benefit of a classroom observation of the student and without discussions with the district about how the student performed at school (Tr. p. 919, Dist. Ex. 33). The psychologist testified that the student required "a more intensive language based program" than what was being offered by the district, yet admitted under questioning by the impartial hearing officer that he had no understanding of the district's program (Tr. pp. 920-21). Likewise, regarding the private speech-language evaluation conducted in September 2008, I note that the private speech-language pathologist did not observe the student in the school setting, and although she recommended that the student's speech and language deficits should be addressed in part by the Orton-Gillingham methodology, she also testified that she was not familiar with what is required to be considered a Orton Gillingham specialist, and that she "didn't spend a lot of time with Orton-Gillingham" (Tr. pp. 1157, 1162-67). Moreover, the September 2008 private speech-language evaluation report was not presented at the June 2008 CSE meeting or the August 2008 CSE subcommittee meeting because the evaluation report had yet to be created.

The hearing record reflects that the June 2008 CSE and the August 2008 CSE subcommittees relied on both recent and prior evaluations for an accurate assessment of the student's present levels of academic, social, physical development, and management needs (Dist. Exs. 7; 13 at pp. 2-6; 22; 23; 24 at pp. 2-6; 28; 33 at pp. 6-8; *see* Tr. pp. 454,

¹⁴ Although the student's private speech-language evaluation report from September 2008 was not available to the CSE at the time the June 2008 and August 2008 IEPs were developed, the hearing record reveals that the CSE subsequently considered the private evaluation (Tr. pp. 480-87, 545; Dist. Ex. 7).

¹⁵ The student's consultant teacher from the 2007-08 year testified that grades were comprised of scores on tests, quizzes, homework, projects, and writing assignments (Tr. p. 616). She indicated that special education students do not receive modified grades and are "graded as any other eighth grader" (Tr. pp. 614-16, 956-57, 962-63).

457-59, 581-83, 590-601). Annual goals were developed to address the student's identified weaknesses in study skills, decoding, written language, mathematics, and expressive language skills (Tr. pp. 230, 239-42; Dist. Exs. 13 at pp. 9-11; 24 at pp. 8-10). The district recommended program modifications and testing accommodations to address the student's identified areas of need (Dist. Exs. 13 at pp. 2-3; 24 at pp. 2-3). The CSE also considered a general education setting with related services, but rejected that option because the student's current language processing needs indicated that the student required a more intensive setting with support (Dist. Exs. 13 at p. 9; 24 at p. 8). The hearing record also reveals that the student would have received daily reading and writing remedial intervention services in a group no larger than six students and provided by a dually certified reading and special education teacher in the foundations lab (Tr. pp. 704-07, 733).

Based on the foregoing, I find that the district's recommended 2008-09 program accurately reflected the student's needs and that the district's recommended program was reasonably calculated to confer educational benefits to the student in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]; see Cerra, 427 F.3d at 195; see also Mrs. B., 103 F.3d at 1120; Application of a Student with a Disability, Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-112; Application of a Child with a Disability, Appeal No. 06-071; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 05-021).

Moreover, the impartial hearing officer determined that the parents were entitled to compensatory education because the district's recommendations for the 2008-09 school year were "inappropriate" and "failed to follow the recommendations" of the January 2008 independent psychologist, the February 2008 results of a WIAT-II administration, the February 2008 CELF-4 results and the private September 2008 speech-language evaluation results (IHO Decision at p. 22). A review of the entire hearing record reveals that the hearing record does not support the impartial hearing officer's conclusion that a FAPE was denied for the above mentioned reasons. The hearing record reflects however, that the district did follow many of the independent psychologist's recommendations, including continuing the student's classroom modifications and testing accommodations according to his IEP, providing educational services such as resource rooms and a foundations lab, which focuses on teaching skills and using specific writing interventions, rather than compensatory strategies (Tr. pp. 645-46, 653-57; Dist. Exs. 13 at pp. 1-3, 7; 33 at pp. 15-17; 38 at p. 2). While the district did not follow the independent psychologist's recommendation that the student be placed residentially, I note that the impartial hearing officer agreed with the district that the student could have been educated at the district's high school, a significantly less restrictive setting (Dist. Ex. 33 at pp. 15-16; IHO Decision at p. 22). In addition, regarding the independent psychologist's recommendations, I note that although a CSE is required to consider reports from outside evaluators, it is not required to follow their recommendations (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087).

Regarding the results of the February 2008 WIAT-II test administration, the hearing record does not indicate that the resource room teacher offered specific recommendations based on those results (Tr. pp. 1030-36; Dist. Ex. 34). I note that the resource room teacher who administered the WIAT-II testified that she agreed with the program and services recommended for the student for the 2008-09 school year (Tr. pp. 1038-40; Dist. Ex. 34). She testified that based on her experience with the student during eighth grade (2007-08), she felt that the student had good communication and organizational skills, was willing to work, and had a positive attitude (Tr. pp. 1004, 1008-15, 1017-18, 1024-25). She testified that the student "would have thrived at high school," that she was excited about the district's high school recommendation, and thought that it "would be a good fit for him" (Tr. pp. 1039-40).

Similarly, the hearing record reflects that the district did follow the district speech-language pathologist's May 2008 evaluation report, which summarized the student's performance on the CELF-4, and recommended twice weekly group speech-language therapy (Dist. Exs. 13 at p.1; 28 at p. 1).

Finally, although the impartial hearing officer determined that the September 2008 private speech-language evaluation "most accurately described [the student's] language deficits" I agree with the district's assertion that the impartial hearing officer erred when he considered information from that report, which was not available to the June 2008 CSE or August 2008 CSE subcommittee. The district's February and June 2008 evaluations of the student encompassed language, articulation and oral motor testing and identified areas of need (Dist. Exs. 23; 28). In testimony, the district's speech-language pathologist stated that the private speech-language pathologist used "different tests" but achieved "similar results" to her assessments of the student (Tr. p. 545). However, she further testified that the private speech-language pathologist's report presented the student as "severely disabled in his speech," which the district's speech-language pathologist "never felt that [the student] was" and that the private speech-language pathologist did not have the advantages of working and with the student for two years or speaking with his teachers (Tr. pp. 484-87, 545).

The impartial hearing officer determined that the "CSE failed to adequately assess [the student's] decline in academic functioning at the June[] 2008 CSE meeting knowing all of the student's core subject grades had declined over the 2007/08 school year," and that the student's achievement test performance warranted "a recommendation for intensive reading and writing remediation provided by a special education teacher" (Dist. Exs. 30; 42; IHO Decision at pp. 22-23). The hearing record shows that during the 2008-09 school year the student would have received daily reading and writing remedial intervention services (foundations lab), in a group no larger than six students, provided by a teacher who is dually certified in reading and special education (Tr. pp. 704-07, 733). Moreover, the hearing record reflects that the district offered resource room services to support and supplement his general education classes, and a specific math resource room program, which had not previously been recommended (Tr. p. 632; Dist. Ex. 13 at p. 1). The math resource room would have "reinforce[d] the key concepts taught in [the student's] [i]ntegrated [m]ath curriculum," with instruction provided by a teacher who had "extensive experience with high school math curriculum" (Dist. Ex. 13 at p. 2). The hearing record as a whole reflects that the district's recommended special and general education programs

and related services would have addressed the student's identified needs and provided the student with a FAPE in the LRE during the 2008-09 school year.

I now turn to the district's assertion that the impartial hearing officer erred when he awarded reimbursement for the student's private speech-language evaluation.

Federal and State regulations provide that, subject to certain limitations, a parent has the right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027). In addition, an unnecessary delay in the district seeking an impartial hearing to contest a parent's request for an IEE may result in district liability for an IEE at public expense (Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289 [N.D. Cal. Dec. 15, 2006] [finding the district liable to pay for an IEE due to nearly three months unnecessary delay in requesting an impartial hearing]; but see L.S. v. Abington Sch. Dist., 2007 WL 2851268, at *9, *10, *13 [E.D. Pa. Sept. 28, 2007] [six week delay in the district requesting an impartial hearing to dispute parent's request for IEE reimbursement is consistent with procedures and intent of IDEA where the district first attempted to resolve the matter]; see also Letter to Sapperstone, 21 IDELR 1127 [OSEP 1994] [there is no specific time period within which a district must request an impartial hearing to dispute a parent's request for IEE reimbursement, but an impartial hearing request may not be delayed such that it interferes with a free appropriate public education]).

In this case, the parents requested reimbursement for a private speech-language evaluation conducted in September 2008 in their due process complaint notice and alleged that the district "ignored" their request for this evaluation (Dist. Ex. 4 at pp. 6, 9). The impartial hearing officer upheld the parent's request for reimbursement based upon his conclusion that the district's evaluations were not appropriate (IHO Decision p. 26). However, as previously discussed, the record shows that the district's speech-language evaluation and oral motor articulation assessment were appropriate, and the hearing record does not support the impartial hearing officer's contrary conclusion. Therefore, because the district's evaluations were appropriate, pursuant to Federal and State statute and

regulations, the parent is not entitled to reimbursement for an IEE because of their disagreement with the district evaluations. Therefore I will annul the impartial hearing officer's order that the district provide reimbursement for the private speech-language evaluation.

I have considered the parties other contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision which determined that the student was not offered a FAPE for the 2008-09 school year is annulled; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's November 2, 2009 decision which ordered the district to provide five 45-minute periods per week of reading remediation is hereby annulled; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's November 2, 2009 decision which ordered the district to provide three 45-minute individual speech-language sessions per week and one 45-minute group speech-language session per week is hereby annulled; and

IT IS FURTHER ORDERED that the portion of the impartial hearing officer's November 2, 2009 decision which ordered the district to reimburse the parents for the privately obtained speech-language evaluations is hereby annulled.

Dated: Albany, New York
January 20, 2010

PAUL F. KELLY
STATE REVIEW OFFICER