



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-049

**Application of the BOARD OF EDUCATION OF THE LAKE  
GEORGE 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:**

Tabner, Ryan and Keniry, LLP, attorneys for petitioner, Tracy L. Bullett, Esq., of counsel

Law Office of Andrew K. Cuddy, attorneys for respondents, Jason H. Sterne, Esq. and Michael J. Cuddy, Jr., Esq., of counsel

### DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Waldorf School (Waldorf) for the 2007-08 and 2008-09 school years and ordered the district to provide the student with 1:1 reading instruction. The appeal must be sustained in part.

At the time of the impartial hearing, the student was not enrolled in an educational program and was living and working outside of the United States (Tr. pp. 581-84). The parties do not dispute that due to his age, the student remains eligible for special education programs and services (Dist. Ex. 22 at p. 1; see 20 U.S.C. § 1412[a]; Educ. Law § 3201[1]). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record shows that the student began receiving "special services" in preschool due to language related difficulties (Dist. Ex. 1 at p. 2). In elementary school, the student continued to receive support in the form of resource room and speech-language services (id.). In seventh grade the student transferred to a private parochial school because, as reported by his mother, the school district in which the family resided did not believe that it had an appropriate program for the student and believed that the student would be better placed in a small private setting (Tr. pp. 812-14). The private school tuition was paid for by the parents; however, the student continued to

receive consultant teacher services and speech-language therapy from the school district that the parents resided in at the time (id.; Parent Ex. B1 at p. 1).

In February 2005 while the student was in eighth grade, he transferred to the district which is the subject of this appeal (Tr. pp. 815-16, 874; Dist. Ex. 42). The Committee on Special Education (CSE) met on February 7, 2005, classified the student as having a learning disability, and recommended that he be placed in a 12:1+1<sup>1</sup> class for one period daily of both English and math and two periods daily of study skills for the remainder of the 2004-05 school year (Dist. Ex. 42 at p. 1). In addition, the CSE recommended that the student receive related services of speech-language therapy two times per four-day cycle (id.). At that same CSE meeting, the CSE recommended that for ninth grade (commencing September 2005), the student be placed in an 8:1+1<sup>2</sup> special class for one period daily of both English and math, and two periods daily of study skills (id.). In addition, the CSE continued its recommendation for speech-language therapy two times per four-day cycle (id.). The resultant February 2005 IEP indicated that the student was anticipated to graduate in June 2010 with a Regents diploma (id. at p. 3).

In October 2005 during the student's ninth grade year, the district's school psychologist conducted a psychoeducational evaluation of the student as part of the student's triennial reevaluation (Dist. Ex. 1). As noted by the psychologist in the evaluation report, the student's special education case manager reported that the student appeared overwhelmed with the demands of his ninth grade classes (id. at p. 1).<sup>3</sup> According to the psychologist, the student's difficulties related to short-term memory and processing speed adversely affected his ability to understand and to keep up with class and home assignments (id. at p. 2). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 64; however, the psychologist reported that the sub-scale variability of the WISC-IV indicated that the student's intellectual functioning was not best represented by a full scale score (id. at p. 3). The psychologist noted that the student exhibited a relative strength in perceptual reasoning skills and significant delays in working memory and processing speed (id. at pp. 6, 7). Based on the results of additional standardized testing, the psychologist concluded that the student was "generally functioning" at a beginning third to fourth grade level in most areas and that he demonstrated particular difficulties on oral language tasks, including understanding directions (id.). The school psychologist concluded that although the student's classroom accommodations and testing modifications appeared appropriate in meeting the student's needs, the test results and the student's classroom functioning indicated that the student's general education program might be inappropriate to meet his needs (id.). According to the psychologist, due to the student's delays in working memory, processing speed and academic skills, consideration of moving the student into

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<sup>1</sup> According to the hearing record, the district's 12:1+1 special class is comprised of a maximum of twelve students with one teacher and one aide or assistant (Tr. p. 36).

<sup>2</sup> It is presumed within the context of the hearing record that an 8:1+1 classroom consists of eight students, one teacher, and one supplementary school personnel (see 8 NYCRR 200.6[h][4][ii][b]).

<sup>3</sup> According to the school psychologist, the student was in a mainstream program at the time but was receiving instruction in math and English in an 8:1+1 setting from a special education teacher (Tr. pp. 860-61).

a GED<sup>4</sup> preparatory program with vocational or life skills opportunities was warranted (*id.* at p. 7).

The school psychologist reported that following testing he met with the student's mother and the student's special education teacher, who was also the student's special education case manager (Tr. p. 860; Dist. Ex. 1 at p. 2). The parties discussed the difficulties the student was experiencing in his then-current educational program and the expectations of the program moving forward (Tr. pp. 860-63). According to the school psychologist, a variety of program options for the student were discussed, including different diploma options (Tr. pp. 863-65). In addition, the psychologist reported that the student's mother discussed providing the student with a program that would surround him with the things he loved, specifically music (Tr. p. 864).

On November 7, 2005, the CSE reconvened and recommended that the student's placement be changed from an 8:1+1 special class for four periods per day to a 12:1+1 special class for 3 hours and 15 minutes per day, combined with a work study program for 3 hours and 15 minutes per day (Tr. p. 867; Dist. Exs. 43 at p. 1; 44).<sup>5</sup> The CSE's recommendation for speech-language therapy remained the same (Dist. Ex. 43 at p. 1). The student's IEP was amended to reflect his pursuit of an IEP diploma (*id.* at p. 3). The parents consented to the November 17, 2005 CSE recommendations (Dist. Ex. 45). The hearing record reflects that the student's grade point average for ninth grade fluctuated from 74.57 in the first quarter to 89 in the second quarter, 62.85 in the third quarter, and back to 88.8 in the fourth quarter (Parent Ex. O at p. 2).

According to notes maintained by the parents, an IEP planning meeting with the CSE chairperson, the student's special education teacher, the school principal, a speech "teacher," the student, and the parents took place on June 20, 2006 (Parent Ex. T at p. 1). Among other things, meeting participants discussed developing a music program for the vocational component of the student's program (*id.*). As reflected in the parents' notes, between June 2006 and October 2006 numerous conversations took place between the parents and the district regarding the feasibility of implementing such a program (*id.* at pp. 1-2). In a September 15, 2006 meeting with the parents, the district superintendent reportedly indicated that the music program requested by the parents could not be funded (*id.* at p. 2).

The CSE reconvened on October 16, 2006 during the student's tenth grade year for an annual review, and recommended that the student be placed in a 12:1+1 special class for 18 periods per four-day cycle and that he receive speech-language therapy two times per four-day cycle (Parent Ex. D at p. 1). The IEP developed by the CSE indicated that the student would be mainstreamed for music, art, and band (*id.*). The IEP included post-secondary goals, which described the student's music training and his participation in workshops and a youth orchestra (*id.* at p. 5). Further, the IEP detailed the student's work experience and outlined transition activities related to instruction, development of employment/other post-school adult living options, and community experience (*id.*). According to notes maintained by the parents, the October 16, 2006

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<sup>4</sup> Although not defined in the hearing record, GED is presumed to refer to the Tests of General Educational Development.

<sup>5</sup> The work study program included work in the district's elementary and high school music departments (Tr. p. 868).

CSE meeting ended without an IEP being agreed upon (Parent Ex. T at p. 2; see Parent Ex. I at p. 18). In November 2006, the parents filed a due process complaint notice in which they challenged the adequacy of the transition services recommended by the CSE (see Parent Exs. I at p. 1; T at p. 3).

The hearing record suggests that for the 2006-07 school year (tenth grade), the student received services in accordance with his November 7, 2005 IEP (see Parent Ex. I at p. 18). For tenth grade, the student achieved a fourth quarter GPA of 89.87 and made the school's high honor roll (Parent Ex. O at p. 1).

On August 24, 2007, the CSE convened to conduct a program review and develop an IEP for the student's eleventh grade year (2007-08) (Tr. pp. 30, 34; Dist. Ex. 3 at p. 1). Because the parties were awaiting the decision of the impartial hearing officer regarding transition services for the 2006-07 school year, only certain portions of the IEP were addressed (Tr. pp. 31-32). According to the CSE chairperson, by agreement the parties did not review the student's transition services or post-secondary goals at the August 2007 CSE meeting (Tr. pp. 48, 897-98). In addition, the CSE chairperson stated that attorneys for both parties agreed not to revise the student's present levels of performance (Tr. pp. 38-39). The August 2007 CSE recommended that the student be placed in a 12:1+1 special class for five periods daily and that he receive speech-language therapy services twice per four-day cycle (Dist. Ex. 3 at p. 1).<sup>6</sup> According to the IEP, the student would be provided with math and English instruction on a daily basis and instruction in science and social studies every other day (id.). The IEP noted that the student required support for reading and writing (id.). The IEP further noted that the student would be mainstreamed daily for specials, band, business, and health (id. at pp. 1, 5). The CSE recommended that the student receive the following program modifications and accommodations: organizational strategies, preferential seating, use of a word processor, use of a spelling checker, use of a calculator, use of math tables, directions restated in own words, reteaching of materials, and modified homework assignments (id. at p. 2). In addition, the IEP afforded the student the following testing accommodations: extended time (1.5); a special location; directions read/explained; student restates; spelling requirements waived; use of a calculator; and tests read, except reading comprehension tests (id.). A notation in the IEP indicated that recommendations and accommodations were agreed upon by all in attendance (id. at p. 6). The August 2007 IEP was not sent to the district's Board of Education for approval and the student's mother stated that she believed that the CSE chairperson had agreed to include the services of direct instruction by a reading specialist on the IEP, that she did not receive a copy of this IEP at the close of the CSE meeting, and that she eventually obtained a copy from the district by going to the district's offices in December 2007 (Tr. pp. 745-47, 893-894).

The student began the 2007-08 school year at the district's high school (Tr. pp. 57, 747). On September 28, 2007, the decision in the prior impartial hearing was rendered which included an order that directed the district to reconvene the CSE and rewrite an IEP with an appropriate transition services plan in accordance with State and federal regulations (Parent Ex. I at p. 24).

As a result of parental concerns, a meeting between the parents and district staff was held on October 15, 2007 (Tr. pp. 58-60; see Tr. pp. 758-60; Parent Ex. T at pp. 4-8). According to the

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<sup>6</sup> According to the school principal, the district's 12:1+1 special class was not a Regents-bound, credit bearing program; rather, students in the class were designated to receive an IEP diploma (Tr. p. 517).

CSE chairperson, the parents expressed concerns regarding the social studies and science components of the student's program and questioned whether the student could be successful in a modified general education setting (Tr. p. 61). The CSE chairperson reviewed the expectations of students in Regents level classes (Tr. pp. 61, 64-65). She noted that this student did not have the foundation skills required to fully participate in the general education classes and that he would be missing the primary instruction that he needed (Tr. pp. 64-65). The district agreed to conduct a reevaluation of the student to determine his then-current levels of achievement and to determine if the student's skill levels had changed enough to consider different types of classes for him (Tr. p. 65; Dist. Ex. 5).

In response to the prior impartial hearing decision dated September 28, 2007, the CSE chairperson sent a letter to the parents dated October 22, 2007, inviting them to a CSE meeting to discuss the student's transition plan (Tr. p. 66; Dist. Ex. 6 at p. 1).<sup>7</sup> In addition, on October 22, 2007, the CSE chairperson sent the parents a transition questionnaire to complete (Tr. pp. 67-68; Dist. Ex. 7). The questionnaire was also given to the district's transition coordinator to complete with the student and to the student's special education teacher (Tr. p. 67). The student's special education teacher completed the transition questionnaire on October 22, 2007 and returned it to the CSE chairperson (Tr. p. 360; Dist. Ex. 8). The parents did not return the questionnaire and the CSE chairperson reported that she did not believe that the transition coordinator had reviewed the questionnaire with the student (Tr. pp. 68-69). On or about October 29, 2007, the student was removed from the district's school by the parents and began attending the Waldorf School (Tr. pp. 695, 760-61). The parents did not give the district notice of this removal (Tr. pp. 547-50).

On October 29, 2007, the student's special education teacher from the district completed an inclusion/mainstreaming consideration worksheet at the request of the CSE chairperson (Tr. pp. 71-73, 363; Dist. Ex. 9). The special education teacher concluded that the student was not able to participate in the general education curriculum at that time (Dist. Ex. 9).

The CSE reconvened on November 16, 2007 to complete the student's IEP for the 2007-08 school year, and to develop a transition plan in accordance with the order of an impartial hearing officer in the prior impartial hearing (Tr. pp. 66, 75; Dist. Ex. 12). The student's special education teacher and the CSE chairperson drafted an IEP in which they revised the student's present levels of performance and transition plan (Tr. pp. 74, 367). The student's IEP goals were also revised by the special education teacher (Tr. p. 367). Other components of the IEP, such as the recommended program modifications and recommended program, remained the same as in the August 2007 IEP (Tr. pp. 77-78; compare Dist. Ex. 12, with Dist. Ex. 3).

With respect to the student's present levels of performance, the November 2007 IEP indicated that the student's "mental math" skills were inconsistent due to difficulty remembering and applying information he had heard and read (Dist. Ex. 12 at p. 4). The IEP stated that the student benefited from the use of a calculator and manipulatives when solving basic problems and that he demonstrated success with word problems when they were read aloud and the key points were identified (id.). The IEP noted that when presented with a math activity that the student

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<sup>7</sup> The CSE chairperson indicated that she did not receive a response to the October 22, 2007 letter inviting the parents to a CSE meeting scheduled for November 20, 2007 (Tr. pp. 66; Dist. Ex. 6 at p. 1). As a result, a second letter was sent to the parents on October 30, 2007 (Tr. p. 66; Dist. Ex. 6 at p. 2).

might encounter in daily life, the student did not have the ability to determine which mathematical processes to use (*id.*). With respect to English, the IEP indicated that at the beginning of the year the student wrote incomplete sentences that lacked capitalization and proper punctuation, but that his written expression had significantly improved and he was beginning to answer questions with a higher degree of interpretation and introspection (*id.*). The IEP described the student as being "proactive" in asking questions that helped him understand vocabulary words, directions, or the meaning of a sentence (*id.*). The IEP stated that although the student's reading skills were improving, he continued to demonstrate needs related to decoding, comprehension, and fluency (*id.*). The student reportedly experienced greater success with fictional versus non-fictional materials as they were more interesting and the student was able to follow the story line (*id.*). According to the IEP, the student had difficulty completing forms and applications independently, interpreted written text "quite literally," and had difficulty independently understanding the intent of words in things such as advertisements (*id.*). With respect to post-secondary preparation, the IEP indicated that the student exhibited age appropriate self-management and personal care skills, and had successful employment experiences (*id.*). The student was described as being "easily overloaded" when information was presented auditorily, but the IEP noted that the student was successful listening to 1-2 short sentences from a paragraph and identifying key words to aid in his recall (*id.*). The IEP indicated that the student's social skills were largely within age expectations and his physical abilities were within age expectations (*id.* at p. 6). The IEP further noted that the student required the additional support of special education services to be successful in all classes, including general education electives (*id.*). The CSE chairperson reported that at the meeting, the parents and their attorney did not want to discuss the transition plan, noting that the student would be transferring to Waldorf and receiving consultants and support in that program (Tr. p. 77). She further indicated the parents did not provide any input into the post-secondary goals (Tr. p. 80; *see* Dist. Ex. 13 at p. 1).

According to minutes from the November 2007 CSE meeting, the parents believed that the student could be successful at Waldorf with consultant teacher and resource room supports since it was not a Regents program (Dist. Ex. 13 at p. 1). The minutes indicated that the student would receive a modified high school diploma from Waldorf (*id.*). The meeting minutes indicated that the district's school psychologist and speech-language pathologist would conduct a reevaluation of the student, even though he was going to Waldorf (*id.*). The minutes further indicated that the CSE chairperson would discuss the student's placement at Waldorf with the CSE of the school district in which Waldorf is located (hereinafter "the district of location") (*id.*). The student's father signed a consent form to share the student's records with the district of location and "unilateral placement paperwork" (*id.*; Dist. Ex. 14).

In a letter to the parents dated November 26, 2007, the CSE chairperson indicated that at the parents' request, the student's IEP had been transferred to the district of location (Dist. Ex. 15; *see* Tr. p. 85). She noted that all components of the draft IEP would be finished by the district of location (Dist. Ex. 15). The CSE chairperson further indicated that district staff would contact the parents regarding the reevaluation of the student and suggested that the parents also discuss the reevaluation with the district of location (*id.*). Lastly, the CSE chairperson stated that the parents should contact her if they had any questions or if she could "be of any assistance in making this a positive transition for [the student]" (*id.*). The CSE chairperson confirmed that in late fall 2007, the parents, through their attorney, sought tuition reimbursement for Waldorf (Tr. pp. 216-17). She further indicated that she believed that the parents' request was denied by the district (Tr. p.

216). The student's mother indicated that the parents did not file a due process request at that time because the parties were involved in settlement discussions (Tr. pp. 618-20).

In a Waldorf mid-year report dated fall 2007, the student's science teacher for "Electricity and Magnetism" reported that the student's efforts were "sincere and consistent" (Dist. Ex. 20 at p. 1). He noted that while the student struggled with some of the more intricate details of the course, he was impressed by the student's ability to articulate a few of the basic principles (id.). The teacher stated that his sense was that the student "did get something from the class" (id. at p. 2). The student's English teacher for "Shakespeare" noted that he was impressed with the student's "tenacity and strong efforts" (id.). He noted that although the student's written work on quizzes and in his main lesson book indicated some confusion over characters and details within the studied plays, it was clear that the student grasped many of the major important themes within them (id.). The student's algebra teacher described the student as "serious and resourceful" (id. at p. 3). He noted that although the student did not have the requisite background for the class, he improvised with help from the teacher, friends, and neighbors (id.). The algebra teacher opined that the student's ongoing work program with help from the Board of Cooperative Education Services (BOCES) should be a better match for his background (id.).<sup>8</sup> The student's chorus teacher indicated that the student had done excellent work in her class and that he worked attentively and had a positive attitude (id.). The student's English 11 teacher characterized the student as "diligent and attentive" (id.). He noted that the student strove to perfect his written work and that he had offered some promising beginning essays (id. at p. 4). The student's German teacher reported that the student began the semester with no prior German experience, but noted that the student had traveled to Germany and shared his experience with enthusiasm (id. at p. 5). She indicated that the student showed good capacities in German and that he had a good ear for the sounds of the language (id.). The student's orchestra teacher reported that the student's efforts in his class had been excellent and that the student had worked hard to learn his percussion parts (id.). According to the mid-year report, the student received a grade of "full participation" for Shakespeare and English Skills 11, a grade of "participation" for Electricity and Magnetism and Algebra Skills 11, a grade of "pass with individual modification" for German 11 and Visual Design, and a grade of "pass" for Social Studies Forum (Dist. Ex. 20).<sup>9</sup> In addition, the student received a letter grade of "C" for an English class centered on "Dante" (id. at p. 1).

In December 2007, the district's school psychologist conducted a psychoeducational assessment of the student, with the consent of his parents (Dist. Exs. 11; 16). The psychologist reported that the purpose of the assessment was to obtain updated cognitive and achievement test scores for the student and indicated that the scores would be used to supplement a comprehensive independent psychoeducational assessment that was scheduled to be conducted (Dist. Ex. 17 at p. 1). Administration of the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) yielded a verbal IQ score of 84 (14th percentile), a performance IQ score of 70 (2nd percentile), and a full scale IQ score of 76 (5th percentile) (id. at p. 2). The psychologist noted that the student's verbal

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<sup>8</sup> The student's consultant teacher services were provided by BOCES in the district of location while he attended Waldorf during the 2007-08 school year (Tr. pp. 654-55, 832, 856-57, 892).

<sup>9</sup> According to one of the student's teachers at Waldorf, the student was on a "participation-attendance track" rather than a "graded track" for some of his classes, wherein the grades in increasing levels of success were "not participated," "participation," and "full participation" (Tr. pp. 686-89).

skills were somewhat better developed than his non-verbal skills and that the student demonstrated strength in his abstract verbal reasoning and social knowledge (*id.* at p. 4). The psychologist also noted weaknesses in the student's short-term auditory memory and perceptual organizational skills (*id.*). As measured by the Woodcock-Johnson III-Tests of Achievement (WJ-III ACH), the student received a total reading standard score of 72 (3rd percentile), a total mathematics standard score of 62 (1st percentile), a written language standard score of 73 (4th percentile), and an oral language standard score of 70 (2nd percentile) (*id.* at p. 2). The psychologist noted that the student's decoding skills were measured as an area of significant weakness (*id.* at p. 3). He reported that the student struggled with mathematics, as assessed by the WJ-III ACH, and that his ability to perform mathematical computations and his mathematical fluency were both below the 1st percentile (*id.* at p. 4). The student also struggled with written expression but demonstrated greater success on a measure of writing fluency (*id.*). According to the psychologist, the student demonstrated a significant weakness in oral language skills, including in his ability to recall and repeat information and to follow directions (*id.*). As measured by the Gray Oral Reading Test-Fourth Edition (GORT-4), the student demonstrated significant weaknesses in oral reading skills (reading quotient 67) (*id.* at p. 3). The psychologist concluded that based on academic testing, the student's skills generally fell within a late third to mid fourth grade level (*id.* at p. 4). On or about December 12, 2007, a copy of the psychoeducational assessment was sent to the parents (Dist. Ex. 18). The accompanying letter indicated that the CSE would welcome the opportunity to meet with the parents to discuss the results of the evaluation (*id.*). The letter further indicated that the parents had previously received a copy of the "Procedural Safeguards Notice" explaining their rights regarding the special education process; however, if the parents need an additional copy, they should contact the district (*id.*).

In January 2008, an independent evaluator assessed the student for the stated purpose of obtaining additional information about the student's academic performance and learning characteristics for both placement and program considerations, as well as IEP development (Parent Ex. K at p. 1).<sup>10</sup> Administration of the Comprehensive Test of Phonological Processing (CTOPP) yielded the following composite standard scores: phonological awareness 75 (5th percentile, phonological memory 85 (16th percentile), and rapid naming 70 (2nd percentile) (*id.* at p. 3). The evaluator noted that the student's performance on the CTOPP revealed substantial deficits across all sub-tests and all three ability areas (*id.*). Based on his administration of the Qualitative Reading Inventory - 4 (QRI-4), the evaluator reported that the student was able to read a fifth grade word lists at the instructional level (*id.* at p. 4). He opined that the student would have difficulty independently reading text at the upper middle school or high school levels (*id.*). The evaluator indicated that the student's fluency rate was on average 1/2 the level of a typical student entering high school, which suggested that it would take the student twice as long to read texts at his grade level (*id.*). The student's comprehension of fifth grade reading passages was at the instructional level indicating that the student understood what he read at that level (*id.*). According to the evaluator, an analysis of the student's miscues and a running record indicated that the student's errors would not change the meaning of the text (*id.*). On the Test of Written Language-Third Edition (TOWL-3) the student received the following composite quotients: contrived writing 74 (4th percentile), spontaneous writing 87 (19th percentile), and overall writing 78 (7th percentile) (*id.* at p. 5). The evaluator commented that the student's performance across all composite areas

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<sup>10</sup> The district paid for the independent evaluation (Tr. p. 88).



was weak for his age, noting specifically the student's scores on the vocabulary (scaled score 4) and spelling (scaled score 4) subtests (id.). However, the evaluator also noted that the student's "story construction" and ability to express his ideas was average for his age (id.). The evaluator reported that the student was able to express his ideas clearly and neatly in written form, although he was able to provide more detail and expression when conveying his thoughts verbally (id.). As detailed by the evaluator, the student was administered the Word Identification and Spelling Test (WIST) informally at the elementary level in order to perform an analysis of the student's decoding and spelling skills and to determine appropriate intervention strategies (id.). According to the evaluator, an analysis of error patterns in regular words indicated that the student had difficulty with open syllables, final stable syllables, and suffixes (id.). He noted that the student's performance was stronger when reading regular words with closed syllables, vowel-consonant-e syllables, vowel teams, and r-controlled syllables (id.). When asked to read and spell pseudo words, the student demonstrated greater difficulty, with substantial errors in reading and spelling all six syllable types (id.). The evaluator commented that the student had difficulty with vowels in all "situations," consonant digraphs, and blends (id.). He noted that the student lacked word attack and decoding skills that would enable him to read new and unknown words (id.).

In addition to reading and writing assessments, the evaluator reported that he administered the arithmetic subtest of the Wide Range Achievement Test-Revised to the student informally (WRAT-R) (Parent Ex. K at p. 5). The evaluator noted that the student was able to add up to three columns correctly with regrouping, but that he could not correctly subtract two column problems which required regrouping (id.). According to the evaluator, the student demonstrated some knowledge of multiplication but could not divide (id.). The student could add simple fractions but had difficulty with mixed numbers (id.).

In addition to assessing the student's academic skills, the evaluator observed the student in his science class at Waldorf and detailed his observations in his report (Parent Ex. K at p. 6). Among other things, the evaluator noted that the teacher in the observed class encouraged students to problem solve and engage in higher order thinking and that the student was a full participant in the process (id.). The evaluator stated that although the student may not have always comprehended all of the details presented, he was able to benefit by understanding the concepts and being able to apply them to everyday experiences and problem solving (id.). The evaluator noted that the student was "fully involved, included, and respected as a citizen of this classroom community" and that "instead of being "'mainstreamed' [the student] was 'fully included'" (id.). The evaluator concluded that the student's lack of certain basic skills had not served as a barrier to meaningful and productive participation in classes at Waldorf (id. at p. 7).

The evaluator concluded that the results from numerous standardized assessments conducted over the years consistently showed that the student had substantial deficits in reading, writing, spelling, mathematics, problem-solving, and processing speed (Parent Ex. K at p. 7). The evaluator further noted the student's performance on the WIST revealed the student's difficulty with phonics and his need for support in developing both word analysis and decoding skills (id.). Additionally, the evaluator reported that the student required reinforcement of basic mathematical skills, especially natural applications within content areas (id.). The evaluator recommended that the student could benefit from a highly structured, systematic, sequenced, rule-based, and phonics-based multisensory reading program, such as Wilson (id.). He recommended that the student should be provided further support in the writing process by a consultant teacher and that a

structured writing program should be explored (id. at p. 8). The evaluator also recommended that reading comprehension strategies should be employed with the student and consideration should be given to adaptive text in the content areas and books on tape (id.). Lastly, the evaluator recommended that the student continue to participate in a full inclusion class across the curriculum with consultant teacher support (id.).<sup>11</sup>

On February 7, 2008, a subcommittee of the CSE of the district of location met and developed an individualized education services program (IESP) for the student for the remainder of the 2007-08 school year (Dist. Ex. 21).<sup>12</sup> The subcommittee of the CSE recommended that the student receive consultant teacher services four times weekly for one hour and speech-language therapy twice per four-day cycle (id. at p. 1).

On May 28, 2008, a subcommittee of the CSE of the district of location reconvened to develop an IESP for the student for the 2008-09 school year (Dist. Ex. 23 at p. 1). The IESP indicated that the student was a willing participant in all aspects of his school program (Dist. Ex. 23 at p. 3). However, it also noted that the student experienced delays in all academic areas including reading (decoding and comprehensions), writing (encoding and syntax/written expression), and math (operations and applications) (id.). According to the IESP, the student had trouble remembering information that had been learned (id.). The student struggled to transfer his ideas to paper, and the IESP indicated that it was best to give the student the opportunity to dictate his thoughts and ideas so that he could engage in the "writing" process without being slowed down by writing mechanics (id. at p. 4). The IESP further indicated that the student was learning how to take notes and use an outline (id.). According to the IESP, the student participated in an independent math program and was able to perform basic computations using a calculator (id.). However, the IESP noted that student was not able to identify the appropriate operation to use when presented with "real life" situations (id.). The IESP explained that the student learned best with frequent opportunities for repetition, real life situations, and the use of manipulatives (id.). The student required that his texts be read to him in academic classes and that information be simplified and reexplained (id.). The IESP indicated that the student was interested in a variety of science topics, but that he comprehended them at a basic/elementary level (id.). The IESP stated that the student enjoyed listening to literature, though it was best when summaries were used, because when something was too long the student lost focus and had trouble remembering what he had heard (id.). The IESP indicated that student enjoyed playing drums and was interested in

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<sup>11</sup> The evaluation report includes a notation that it was "respectfully submitted" on March 31, 2008 (Parent Ex. K at p. 7). The hearing record does not indicate to whom the evaluation was submitted on that date. The student's mother reported that the evaluator provided the evaluation to the district (Tr. pp. 828-29). The hearing record indicates that the evaluator was present at the May 28, 2008 CSE meeting held by the district of location and that the evaluation was discussed by the CSE of the district of location at that time (Tr. p. 776; Dist. Ex. 23 at p. 7).

<sup>12</sup> Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts, upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs (Educ. Law §§ 3602-c[2][a], [2][b][1]).

pursuing a career using his musical skills and that the student was also interested in working with children (id.).

The May 2008 IESP also reported upon an April 2008 administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-IV) wherein the student attained a total language score of 66, placing the student's overall language skills in the very low range of functioning (Dist. Ex. 23 at p. 3). According to the IESP, the student had demonstrated progress in his ability to read newspaper articles and answer related questions (id. at p. 4). In addition, the IESP indicated that the student had shown improvement in answering comprehension questions, identifying opposites, and discerning fact or opinion at a fifth to sixth grade level (id.). The IESP noted that the student struggled to decode and as a result, was challenged to understand what he read unless it was at a very elementary level (id. at p. 3). As detailed in the IESP, role playing, picture cues, summarized versions, and highlighting were all helpful tools for the student (id. at p. 4). The IESP indicated that the student was not able to understand daily classroom work without assistance (id.). It further noted that the student would benefit from a phonetically based, systematic reading program to help develop his encoding and decoding skills (id. at p. 3). The subcommittee of the CSE of the district of location recommended that for the 2008-09 school year, the student be provided with consultant teacher services four times per week for 45 minutes in math class and three times per week for 45 minutes in English language arts (ELA) class (id. at p. 1). In addition, the subcommittee of the CSE recommended that the student receive speech-language therapy twice weekly for 30 minutes (id.). The student's transition plan was revised to reflect his interest in working with children and his need for a systematic, phonetically-based reading program (id. at p. 6). The student's IESP goals were also revised (id. at pp. 7-9). According to the student's mother, although not explicitly stated on the student's IESP, the CSE of the district of location recommended an increase in consultant teacher services for the 2008-09 school year to allow the student to receive reading instruction using Wilson (Tr. pp. 777-79).

Also on May 28, 2008, the parents signed a district of location form indicating that they were electing to unilaterally place the student in a private school (Waldorf) at their own expense and that they wished to discuss and arrange for special education services (Dist. Ex. 24).<sup>13</sup>

In a Waldorf spring 2008 year-end report, the student's science teacher reported that it appeared that with the support of his tutor and the written notes of a classmate, the student was able to develop a clear, concise understanding of some of the points covered during Atomic Chemistry (Dist. Ex. 25 at p. 1).<sup>14</sup> The teacher indicated that he was concerned about the student's concentration and focus in class, noting that the student appeared to be less engaged, perhaps due to the fact that he was no longer responsible for his own notes (id.). The teacher suggested that

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<sup>13</sup> In a letter to the parents dated August 8, 2008, the district of location stated that according to their records, the student was dually enrolled and was receiving special education services from the district of location (Parent Ex. V at p. 2). The district of location requested that the parents indicate their intention for the upcoming school year for the student (id.). The letter asked the parents to choose from one of two options; that they wished for the same program to continue for the upcoming school year or that the student would not be returning to the previous year's program (id.). The parents checked the option indicating that they were requesting the same program for the upcoming (2008-09) school year (id.).

<sup>14</sup> The student's "tutor" as noted in the hearing record appears to refer to the consultant teacher (Tr. pp. 631, 764-65).

when the student did offer insight or ask a question, both he and the class benefited from his participation (*id.*). The student's Botany teacher indicated that the student seemed interested in the class but some of the details were difficult for him to grasp and hold (*id.*). The Botany teacher commented that the student's main lesson book included some good class notes that demonstrated the student's effort to engage with the material (*id.*). The student's English skills teacher reported that the student generally put forth "strong effort" (*id.* at p. 3). She noted that while the depth at which the student was able to encounter various writing assignments was not always at the same level as some of his classmates, the student was good at completing the assignments as they were assigned and he generally caught the essence of what was being asked for (*id.* at pp. 3-4). The English skills teacher noted that the student sometimes became lost during classroom discussion and had a tendency to disengage (*id.* at p. 4). According to the English skills teacher, the student had "great potential within the work of the school" (*id.*). The student's English teacher for "Parzival" reported that the student worked well and with sincere attention throughout the main lesson (*id.* at p. 2). She noted that it was evident from the student's essay that he really tried to follow the themes and ideas presented by the epic poem (*id.*). According to the student's math skills teacher, the student worked on an independent math program with his tutor (*id.* at p. 6). The math skills teacher reported that often the student carried out his work independently in class (*id.*). The teacher indicated that the student worked on world-based problems involving expenses for travel or rent (*id.*). The student's projective geometry teacher reported that the student worked with the content of the course together with content from his BOCES tutor and that he melded his work into his main lesson book (Parent Ex. Q at p. 3). According to the projective geometry teacher, the student "wrestled" with the geometric construction of the course and achieved greater accuracy in the work from his tutor concerning the fundamentals of perspective drawing (*id.* at p. 3). The teacher noted that the student's summary conclusions demonstrated a clear understanding of the student's experience of drawing in perspective (*id.*). The end of the year report further indicated that the student had successfully completed a "junior internship" in the guidance department of a local elementary school (Dist. Ex. 25 at p. 6). It further indicated that the student had completed 19 of 20 required community service hours (*id.* at p. 3).<sup>15</sup> According to the student's year-end report, he received a grade of "full participation" for Projective Geometry and English Skills 11; a grade of "participation" for Atomic Chemistry and Parzival; a grade of "pass with individual modification" for Botany, Math Skills 11, and German 11; and a grade of "pass" for Social Studies Forum (Dist. Ex. 25). The student also received a letter grade of "B" for his "History Through Music" class (*id.* at p. 2).

In addition to the Waldorf progress reports, the district of location, through BOCES, issued "IEP" progress reports for the 2007-08 school year (Parent Exs. OO; TT).<sup>16</sup> The final progress report for the 2007-08 school year indicated that the student had achieved goals related to keeping track of homework assignments, making correct change, and solving addition and subtraction problems using money notation (Parent Ex. TT). In addition, the student was "progressing satisfactorily" toward goals related to developing prioritizing and pacing skills to determine which assignments to do first, using a map or online mapping websites to locate specific places, sharing his personal opinion, and supporting that opinion, and participating in meaningful math

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<sup>15</sup> The parents reported that he met the requirements for his community service project (Tr. pp. 637-38, 768-69).

<sup>16</sup> Although identified in the hearing record as "IEP" progress reports, the goals reported on in these documents are from the student's February 2008 IESP (compare Parent Ex. OO, and Parent Ex. TT, with Dist. Ex. 21 at pp. 7-9).

experiences (*id.*). The student was making "some progress" on goals related to stating the main idea of a reading passage, answering questions from factual materials, demonstrating relevant from non-relevant material, writing creatively, writing a short paragraph including the necessary components, identifying the main idea after listening to a paragraph, and recalling three details from a paragraph (*id.*).

According to notes maintained by the parents, on April 28, 2008 the parents received a telephone call from Waldorf indicating that the student would receive a "certificate of attendance" and not a diploma from the school (Parent Ex. T at p. 9).<sup>17</sup>

The district's CSE chairperson stated that she did not contact the parents regarding developing an IEP for the student for the 2008-09 school year because the parents had unilaterally enrolled the student in Waldorf in November 2007 and the district of location was therefore responsible for providing the student's services (Tr. pp. 93, 211-12). The CSE chairperson also stated that after the November 2007 CSE meeting, she believed that the parents intended to continue the placement for the student at Waldorf until he completed his education and graduated (Tr. pp. 76-77). The parents indicated that they did not directly contact the district regarding developing an IEP for the student for the 2008-09 school year because they had notified the district of location of their intentions to continue to place the student at Waldorf and seek dual enrollment at the district of location, and had no intention at that time of returning to a district placement (Tr. pp. 644-46, 829).

The student continued to attend Waldorf for the 2008-09 school year, during which Waldorf generated both a mid-year report and a year-end report detailing the student's progress in his courses (Dist. Exs. 26; 29). In the year-end progress report dated spring 2009, the student's English teacher reported that the student "quite brilliantly and intuitively" demonstrated a strong understanding of some of Faust's spiritual journey and transformation (Dist. Ex. 29 at p. 1). According to the student's "History Through Architecture" teacher, the student was attentive and enthusiastic throughout the class (*id.*). The teacher reported that as time went on, the student displayed an increasing familiarity with vocabulary and concepts necessary to communicate effectively about developments in architecture (*id.*). He noted that the student's presentation displayed a lot of thought and preparation (*id.*). The student's "Physics Through Vision" teacher reported that the student participated well in all of the demonstrations, experiments, and discussions of the block class (*id.* at p. 2). According to the teacher, although the student's summary of what he received in the course could have had more details, the breadth of the discussion covered the major topics investigated in the class (*id.*). The student's Biochemistry teacher indicated that the student participated fully in class (*id.*). She noted that the student worked with his group to complete laboratory experiences during which he followed directions and recorded data accurately (*id.* at p. 3). The teacher reported that the required readings and resulting class discussions were very difficult, but the student listened and participated to the best of his ability (*id.*). The student's English skills teacher reported that although the student did not write a paper of the required length, he was able to identify the central ideas and concerns in a clearly

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<sup>17</sup> According to testimony from one of the student's teachers at Waldorf, a certificate of attendance is a designation given by Waldorf to students who positively impact the classroom, work to the best of their ability and benefit from being at the school, but are not at grade level and cannot be given a diploma that indicates they have completed all the work necessary to graduate with a full diploma (Tr. pp. 682-83).

formed four paragraph essay (*id.* at p. 4). The student's Human Development teacher reported that the student actively participated in the experiential exercises, observations, and during class discussions (*id.* at p. 6). The teacher noted that the student conducted school observations, which would have been more thorough if he had used the observation worksheets to collect more data (*id.*). He further noted that the student's notebook was missing several comparison exercises (*id.*). The teacher reported that the student's presentation on Maslow was concise and reflected suggestions the teacher had made on the draft (*id.*). The student's math skills teacher described a book the student wrote to introduce the concept of fractions within the context of music (*id.* at pp. 6-7). The teacher reported that the student did an excellent job writing the text for the book (*id.* at p. 7). A notation on the year-end report indicated that the student was late 23 times during the 2008-09 school year (*id.* at p. 8). According to the student's year-end report, he received a grade of "full participation" for Biochemistry and English Skills 12; a grade of "pass with individual modification" for Faust and Physics Through Vision; a B+ for History Through Architecture, Play Production 12, and Math Skills 12; a B for Human Development; and a grade of "pass" for Social Studies Forum (Dist. Ex. 29).

In spring 2009, the parents became concerned about the number of high school credits the student had earned, the student's lack of a local or Regents high school diploma, and the limited options available to the student upon graduating from Waldorf (Dist. Ex. 40 at p. 4; Parent Exs. W; AA; BB). The hearing record contains a series of e-mails written beginning in March 2009 wherein the student's mother contacted the CSE chairperson for the district of location regarding securing Wilson reading instruction for her son (Dist. Ex. 41 at pp. 2-3).<sup>18</sup> She provided the chairperson with the name of a Wilson instructor (*id.*). The district of location's CSE chairperson responded that the student's consultant teacher and his speech-language therapist were well versed in reading instruction and knew the student's needs in this area (*id.* at p. 1). He noted that each provider was working on the student's IESP goals related to reading and that they were seeing progress at that time (*id.*). The district of location's CSE chairperson indicated that he would schedule a CSE meeting for mid-May but, if requested, would meet with the student's mother sooner to discuss her concerns about the student's reading problems (*id.*). In response, the student's mother stated that although the student's service providers were well versed in reading, it was not the same as following a "formal, intensive reading program" (*id.*). She indicated that she did not think the time allotted for the student's Wilson instruction had been used for the program during the 2008-09 school year and that she wanted to see if it could help the student make reading and "comp." gains (*id.*). She commented that she was still hopeful that something could be worked out for the rest of the year, during the summer, and next school year (*id.*). In a follow-up e-mail to the CSE chairperson of the district of location dated April 1, 2009, the student's mother indicated that if Wilson needed to be provided five times per week, the parents would be willing to prioritize and drop speech-language services in order for the student to receive the Wilson instruction (*id.* at p. 4). In a subsequent e-mail to the CSE chairperson of the district of location dated April 7, 2008, the student's mother indicated that she wanted to have the student evaluated by the Wilson

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<sup>18</sup> The student's mother indicated that the student's consultant teacher for twelfth grade, who was Wilson trained, was not the student's teacher in January of that year and therefore, Wilson was no longer being implemented by the district of location (Tr. pp. 776-78).

instructor whose name she had provided to the CSE chairperson and urged the CSE chairperson to "make this happen" (id. at p. 5).

On April 13, 2008, the student was administered selected subtests of the WJ-III ACH by the Wilson instructor that the student's mother had recommended to the district of location's CSE chairperson (Dist. Exs. 27 at p. 1; 41 at p. 2). The following standard scores (and percentile ranks) were reported as: letter word identification 70 (2nd percentile), passage comprehension 65 (1st percentile), work attack 75 (5th percentile), picture vocabulary 86 (18th percentile), and oral comprehension 92 (29th percentile) (Dist. Ex. 27 at p. 2). A test summary indicated that the student's performance was low in basic reading skills; however, there was no further analysis of the student's scores and no recommendations for instruction (id. at p. 1).

In an e-mail to the district of residence's CSE chairperson dated May 19, 2009, the student's father indicated that the student was starting to transition to college (Dist. Ex. 40 at p. 4). He requested a copy of the student's transcript from the district of residence that reflected the credits the student had earned from that school, as the parents were compiling the student's credits from Waldorf and trying to determine how many more credits he needed to graduate (id.). The student's father also requested a CSE meeting with the district of residence as soon as possible (id.). In response, the district of residence's CSE chairperson indicated that she would be scheduling a CSE meeting to discuss the special education process in order for the student to transition back to the district's high school the following September (id.). She requested that the student's father contact the guidance counselor so that he could provide them with information regarding credits and re-enrollment (id.). In a subsequent e-mail that same day, the student's father indicated that he had asked the CSE chairperson to give the student credit for the classes he had completed and passed and that he needed to know if she was going to do so (id. at p. 3). The student's father stated that he was interested in opening discussion regarding the student's transition to college, not for going back to the district's high school (id.). He further stated that he was looking for the CSE chairperson of the district of residence to work with the parents to create a program that would "move [the student] forward," such as an intensive Wilson reading program, college classes in which he could receive dual credit, and internships (id.). The parties exchanged additional e-mails regarding the student's earned credits and the district's CSE chairperson scheduled a meeting of the subcommittee of the CSE for June 3, 2009 (id. at pp. 1-3).

On May 21, 2009, a subcommittee of the CSE for the district of location met and developed an IESP for the student for the 2009-10 school year (Dist. Ex. 28). The student's present levels of performance were modified to indicate that the student participated in an independent math class in addition to his tutoring in consumer math concepts; that he was "quite" comfortable asking for assistance from his teachers and had developed positive relationships with both staff and fellow students at Waldorf; that he was interested in serving the community through the "Ameri-Corp" program; and that he was unsure at that time whether he would pursue a post-secondary education (id. at p. 3). With respect to the student's speech-language development, the IESP indicated that the student communicated in sentences of appropriate length that were grammatically and syntactically correct, but that he continued to demonstrate a limited vocabulary both expressively and receptively (id.). The IESP further indicated that the student had shown some improvement in identifying the main idea, remembering facts, making inferences, and understanding the vocabulary of reading materials at fifth, sixth, and seventh grade levels (id.). However, the IESP noted that the student had difficulty reading newspaper articles and needed to have them broken

down almost sentence by sentence to discuss the vocabulary meaning (*id.* at p. 4). The student had difficulty remembering anything from the article when asked to summarize it (*id.*). According to the May 21, 2009 IESP, the student struggled with limited vocabulary and comprehension skills, and as a result was challenged to understand reading unless it was at a very elementary level (*id.*). The IESP noted that the student would benefit from continued instruction in the use of reading comprehension skills and exercises designed to increase his vocabulary (*id.*). The IESP indicated that the student did not have any speech or language needs at that time (*id.*). The subcommittee of the CSE for the district of location recommended that for the 2009-10 school year, the student continue receiving direct consultant teacher services five times per week in math class, direct consultant teacher services four times per week in ELA class, and direct reading instruction five times per week in a group (*id.* at p. 1). Preferential seating and organizational strategies were removed as program modifications from the student's IESP and the subcommittee of the district of location's CSE no longer recommended that spelling requirements be waived during testing (*id.* at p. 2). Use of a word processor was added to the recommended assistive technology devices for the student (*id.*). The student's IESP goals remained the same as in the previous years, except that the criteria were revised on most of the recommended goals (*id.* at pp. 6-8).

In a May 28, 2009 e-mail to the CSE chairpersons for both the district of residence and the district of location, the student's mother indicated that she was requesting dual enrollment in both districts (Dist. Ex. 39). She further indicated that she was requesting access to special education services in the event that the student was home schooled (*id.*). In a May 29, 2009 response, the district of residence's CSE chairperson indicated that she was forwarding the parents request to the superintendent's office, which coordinated home schooling services (*id.*).

When the June 3, 2009 meeting of the district of residence's subcommittee of the CSE occurred, the parents had not yet re-enrolled him in the district (Tr. p. 104). As a result, the parties met to discuss possible options for the student for the 2009-10 school year, but the meeting was not considered a CSE meeting (*id.*). The CSE chairperson reported that the student's father brought information to the meeting regarding an on-line program he was interested in for the student that he identified as "PLATO," which, as presented by the parent, was a credit recovery program for students who had taken courses but had not passed them (Tr. p. 105). The program also included special education services to supplement general education instruction and services for students who were college bound (Tr. p. 106). The parties also discussed the parents' interest in the Wilson program, which the CSE chairperson indicated was available in the district (*id.*). According to the CSE chairperson, the district's transition coordinator was present at the meeting and services offered by the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) were discussed, among other options for the student (Tr. pp. 107-08, 219). The parents indicated that they were not interested in VESID services or pursuing a GED (Tr. pp. 107, 109). According to the CSE chairperson, at the time of the meeting there was some confusion over what the parents wanted as there were many options that the student's father talked about and he did not seem sure of which option the parents were pursuing (Tr. p. 110). The CSE chairperson agreed to look into the PLATO program (Tr. p. 111).

By letter to the student's father dated June 9, 2009, the district of residence's superintendent's secretary provided the parents with information regarding the policies and procedures for home schooling and she informed the parents that home schooled students did not receive a Regents or local diploma (Dist. Ex. 30).



In an e-mail to the district of residence's CSE chairperson, dated June 15, 2009, the student's father indicated that the student had been re-enrolled in the district and requested a CSE meeting (Parent Ex. FF). The CSE chairperson responded that a CSE meeting was scheduled for June 24, 2009 (id. at p. 1).

The student's senior transcript from Waldorf dated June 19, 2009, indicated that the student had earned a total of 11.75 credits from the school (Parent Ex. S; see Tr. pp. 437-47).

The parties reconvened on June 24, 2009 at the district of residence (Tr. p. 112). According to the district's CSE chairperson, the purpose of the meeting was twofold: first, to hold a meeting for the parties to talk about the research the guidance counselor and principal had done on the programs that the parents had presented to the district for consideration; and second, to hold a CSE meeting following discussion of the parents' suggested programs (id.). Minutes from the initial administrative discussion indicated that the student's father was interested in the PLATO program and he believed that PLATO, along with consultant teacher services, would allow the student to be successful in reaching the goal of obtaining a local diploma (Dist. Ex. 31 at p. 3). The school principal indicated that there were two schools that the district was aware of that used PLATO for credit recovery, but it was not used for primary instruction at either of those schools (id.). The principal indicated that PLATO was not an option for the student's core academics nor would it be approved as one (id.). According to the meeting minutes, the principal stated that the district believed it was an unreasonable request for the student to graduate with a local or Regents diploma in 2010 as the student had not been in the district for two years and still needed to obtain numerous credits and take numerous exams (id.).

Following the initial discussion with the school principal and guidance counselor, a CSE meeting was held (Dist. Ex. 31). A draft IEP was distributed at the meeting (Tr. pp. 113-14; Dist. Ex. 32).<sup>19</sup> The CSE meeting minutes indicated that the student's father provided new assessments to the CSE, which the CSE chairperson accepted for consideration once the CSE was able to review them (Tr. p. 648; Dist. Ex. 31 at p. 1). The school psychologist reviewed the results of previous assessments, and indicated that based on the student's performance it would be very difficult for him to participate in general education classes without significant amounts of support and modifications to the Regents' curriculum (Dist. Ex. 31 at p. 1). The psychologist further indicated that State assessments such as the Regents could not be modified and would present a significant challenge for the student if his goal was to obtain a local or Regents diploma (id.). The school guidance counselor reported that based on his analysis of transcripts from Waldorf and the district, the student would need an estimated 10-11 additional courses in the areas of English, math, social studies, and science in order to obtain a local or Regents diploma (Tr. p. 448; Dist. Ex. 31 at p. 1). The guidance counselor noted that some of the student's content area courses taken at Waldorf had been modified, and further explained the impact of the modification as it related to obtaining Regents credit and preparing for Regents assessments (Dist. Ex. 31 at p.1). In response to parent questioning, the CSE chairperson indicated that the student could attend the public school for three more years (id. at pp. 1-2). The student's father suggested that the CSE should focus on developing a program for the student that would assist him in obtaining the needed credits to graduate with a

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<sup>19</sup> The CSE chairperson reported that for the draft IEP, the district adopted the 2009-10 IESP from the district of location (Tr. pp. 113-14).

local or Regents diploma, and indicated that he would like to see a program containing both high school and college credit bearing courses (id. at p. 2). The student's father commented that the student would not be returning to the district's high school and that the CSE should consider how to provide services to the student without the student having to take courses at the district (id.). The student's father indicated that he would like the student to be provided with consultant teacher and Wilson reading services (id.). The CSE chairperson indicated that while the CSE was unable to review the recent assessments for that meeting, based on the information from the school psychologist the student would qualify for the district's 12:1+1 program but would need to come into the building (id.). The student's father stated that the student had graduated from Waldorf and indicated that it would be a move backwards for the student to return to the district's school (id.).

The June 24, 2009 CSE meeting minutes also indicated that the CSE discussed the student's eligibility for extended school year (ESY) services, in that the student's father requested reading services and the CSE chairperson stated that ESY services were for students who demonstrated regression and noted that there had been no mention of regression from the district of location (Dist. Ex. 31 at p. 2). The CSE chairperson indicated that the student would be eligible for reading services in September 2009 and that the district could offer him the Wilson program (id.). The minutes reflected that the 12:1+1 program was further described to the student, as well as why students in the program may not qualify for Regents credits (id.). According to CSE meeting minutes, the student's father stated that he did not see the need for the meeting to continue and indicated that he would contact the school if he needed anything further (id.). The CSE chairperson stated that the district had the academic, transition, and vocational services that would meet the student's needs and stated that she was available if the parents had any further questions (id.).

In an e-mail to the district of location's CSE chairperson dated July 9, 2009, the student's father indicated that he was trying to design a program for the student through the district of residence and explained that at the last CSE meeting at the district of residence, the parents' request for a summer reading program was denied because the district of location had not recommended it and district of location staff had indicated that the student had made gains in reading and therefore was not eligible (Parent Ex. KK). The student's father stated that he "hoped" the district of location CSE chairperson agreed that the student could use help in reading and asked the chairperson to clarify if he had made the statements above to anyone at the district of residence (id.). The district of location's CSE chairperson responded that he had spoken to the district of residence and shared the proper information with the staff to prepare for the student's return to school in that district (id.). The district of location's CSE chairperson also stated that he had advised the district of residence that it was responsible for developing an IEP for the student for the 2009-10 school year (id.). He further stated that the parents' "enrollment and intent to return to the district" of residence had been "acted upon" (id.).

In a letter dated August 20, 2009, the district of residence's superintendent informed the parents that since the student's father had rejected the recommendations made at the June 24, 2009 CSE meeting and had refused to participate in the development of a program for the student, the parents had refused to consent to have the district provide special education services to the student and therefore the district was not required to offer the student a free appropriate public education

(FAPE)<sup>20</sup> during the 2009-10 school year (Parent Ex. LL). The superintendent further stated that until the parents consented to the district providing special education services, the student would not receive any such services (*id.*). He also indicated that the district was willing to work with the parents to develop and implement an appropriate program for the student and recommended that the parents contact the CSE chairperson to schedule a CSE meeting as soon as possible so that the student could begin school in September (*id.*). According to the district's CSE chairperson, the CSE never reached a consensus and failed to recommend a program or placement or finalize an IEP for the student's 2009-10 school year (Tr. pp. 208-09).

On October 23, 2009, through their attorney, the parents filed a due process complaint notice with the district of residence (Parent Ex. A). As relief they requested, among other things, reimbursement of the parents' tuition payments to Waldorf for the 2007-08 and 2008-09 school years; provision of compensatory services to address the district's alleged failure to provide appropriate transition support and academic services, including "summer[]session" reading instruction, since July 1, 2009; compensatory services at an "institution or facility" selected by the parents to meet the students needs; authorization for independent evaluations; and provision of a new IEP that would be developed with the "full participation of the parents and the student" and would lead toward the student obtaining a local or Regents diploma (*id.* at pp. 4-5).

The parents argued in part, that the district failed to offer the student a FAPE during the 2007-08 and 2008-09 school years by failing to provide a program and placement that addressed the students needs, including direct instruction in science and social studies; failing to provide a program and placement with appropriate transition services; failing to properly evaluate the student; failing to give due consideration to alternative placements such as distance learning programs, community college programs, and special schools; failing to give due consideration to programs other than the proposed 12:1+1 classroom program; failing to establish "objective, meaningful and measurable" IEP goals in reading, vocational development, and transition; failing to provide an appropriate internship or work study program that would provide an effective transition from school to work; and failing to provide needed academic support, such as reading instruction, on a 12-month basis (Parent Ex. A at pp. 3-4).

In its answer to the parents' due process complaint notice, the district argued that it offered the student a FAPE for the 2007-08 school year and that it was not required to offer the student a FAPE and develop an IEP for the remainder of the 2007-08 school year after the student was unilaterally placed at Waldorf, as well as for the student's 2008-09 school year at Waldorf because, pursuant to Education Law § 3602-c, the district of location was responsible for providing special education services to the student (Dist. Ex. 37 at pp. 1-2). The district also argued that it had not failed to offer the student a FAPE during the 2009-10 school year because after multiple CSE

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<sup>20</sup> The term "free appropriate public education" means special education and related services that-  
(A) have been provided at public expense, under public supervision and direction, and without charge;  
(B) meet the standards of the State educational agency;  
(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and  
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.  
(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

meetings were conducted in an attempt to produce an IEP for the student, the student's father refused to consent to any services (id. at pp. 3-4).

An impartial hearing convened on January 12, 2010, and concluded on March 2, 2010, after five hearing dates (Tr. pp. 1, 196, 428, 624, 797). Prior to the beginning of the impartial hearing, the district requested an order dismissing the parents' due process complaint notice, arguing that the parents' attorney had failed to respond to the district's request for a resolution session (IHO Interim Decision at p. 2). In an interim decision dated November 30, 2009, the impartial hearing officer denied the district's motion, holding that the State regulations envision the district reaching out directly to the parents in order to arrange a resolution session, rather than having an attorney for the district contact an attorney or advocate for the parents (id. at pp. 2-3). At the impartial hearing, the district called five witnesses and entered 47 exhibits into the hearing record (Tr. pp. 26, 223, 297, 430, 505, 859, 876; Dist Exs. 11-47) and the parents called four witnesses and entered 56 exhibits into the hearing record (Tr. pp. 481, 660, 707, 728; Parent Exs. A, B1-B7, C-Z, AA-XX).<sup>21</sup>

In a decision dated May 3, 2010, the impartial hearing officer determined that the district had failed to offer the student a FAPE for the 2007-08 school year, finding numerous flaws with the district's proposed program and implementation of the program in that it was not designed to meet the "present and individual needs" of the student for that school year (IHO Decision at pp. 6-20). More specifically, the impartial hearing officer found that the annual goals in study skills, reading, writing, mathematics, and speech-language as well as the comments listed in the "present levels of performance and individual needs" and "social development" sections of the August 2007 IEP, were all identical to the corresponding section of a previous IEP created for the student dated October 16, 2006 (id. at p. 12). The impartial hearing officer also found that the August 2007 IEP was flawed in that it failed to offer the student any direct reading instruction and failed to provide goals for decoding despite the student's known deficits in these areas (id. at pp. 13-14). The impartial hearing officer also found that a subsequent IEP dated November 2007, contained only minor changes to the IEP's academic goals and objectives and did not improve the proposed program (id. at p. 14). Regarding transition goals and activities, the impartial hearing officer determined that the transition goals and activities provided in the November 2007 IEP were "inadequate" and did not comply with State regulations in that they were vague and immeasurable and otherwise did not comply with the applicable procedural requirements (id. at pp. 17-20).

The impartial hearing officer also found that the student's program for the 2007-08 school year was not properly implemented (IHO Decision at pp. 14-17). More specifically, the impartial hearing officer found that there was a four week delay in delivering speech-language services; that the IEP's program wherein science and social studies were to be taught "parallel" to the general education curriculum was not followed; and that although there was a curriculum document produced by the student's 12:1+1 teacher, the hearing record showed that the curriculum had no relation to what was actually taught in the class (id.). The impartial hearing officer lastly noted that the August 2007 IEP was never approved by the district's Board of Education (id. at p. 17).

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<sup>21</sup> The exhibit list appended to the impartial hearing officer's decision fails to list District Exhibit 43; however, the transcript indicates that the exhibit was entered into evidence and it was included as part of the record on appeal (Tr. p. 800; see IHO Decision at p. 36).

Regarding the 2008-09 school year, the impartial hearing officer found that the district had an obligation to convene a CSE and develop an IEP for the student because the district was not aware of the parents' intention to re-enroll the student at Waldorf and seek an IESP from the district of location prior to the start of the 2008-09 school year; yet, it made no attempt to contact the parents regarding placement of the student for that school year, nor did it attempt to evaluate the student or offer a program to the student (IHO Decision pp. 20-21). As such, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2008-09 school year (id. at p. 21).

The impartial hearing officer next turned to the appropriateness of the parents' unilateral placement at Waldorf during the 2007-08 and 2008-09 school years (IHO Decision at pp. 21-25). The impartial hearing officer found that there was sufficient evidence in the hearing record to show that the student was able to access the curriculum at Waldorf and make academic progress during both school years (id. at pp. 23-24). The impartial hearing officer noted that the student was able to "access the content" of his general education classes, that he received reading instruction in the Wilson program during the 2008-09 school year, that an independent evaluator recommended in January 2008 that the student should remain in a general education program with consultant teacher support, and that the student demonstrated that he could learn in a group setting (id. at pp. 24-25). The impartial hearing officer concluded that in light of the student's "highly developed social skills and unique learning style," the program at Waldorf with the services of a consultant teacher provided by the IESP was appropriate for the student for both the 2007-08 and 2008-09 school years (id. at p. 25).

Addressing the equitable considerations in the case, the impartial hearing officer did not agree with the district's claim that the parents' tuition reimbursement requests should be denied because they provided insufficient notice of their unilateral placement for the 2007-08 and 2008-09 school years (IHO Decision at pp. 25-26). Noting that the parents had begun the process of unilaterally placing the student during the 2007-08 school year prior to giving the district notice of the placement on November 16, 2007, the impartial hearing officer determined that the parents' reimbursement for the 2007-08 school year would be pro-rated from November 16, 2007 (id. at p. 26). With respect to the 2008-09 school year, the impartial hearing officer found that the hearing record suggested that contrary to its argument that they were not given notice of the parents' unilateral placement for that school year, the district was aware of the parents' decision to continue to unilaterally place the student at Waldorf (id. at pp. 26-27).<sup>22</sup> Upon these findings, the impartial hearing officer determined that the equities did not bar reimbursement of the student's tuition at Waldorf for the 2007-08 and 2008-09 school years (id.).

The impartial hearing officer next turned to the parents' request for ESY services in the form of reading instruction for the student during summer 2009 (2009-10 school year) (IHO Decision at p. 27). The impartial hearing officer found that although there was insufficient evidence in the hearing record to determine if the student was in danger of regressing during the

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<sup>22</sup> The impartial hearing officer's finding that the district had notice of the student's placement at Waldorf for the 2008-09 school year (IHO Decision at pp. 26-27) appears to conflict with the impartial hearing officer's finding earlier in the decision that the district was not aware of the unilateral placement for the 2008-09 school year upon which he determined that the district was required to offer the student a FAPE for that school year (id. at pp. 20-21).

summer such that ESY services would be appropriate, he nonetheless held that because the student's reading level was significantly delayed and the district did not recommend direct reading services to meet this need, ESY services were justified on that basis and he found that the student was entitled to 1:1 reading services during summer 2009 (id. at p. 28).

The impartial hearing officer then turned to the remainder of the 2009-10 school year (IHO Decision at pp. 28-31). The impartial hearing officer found that although the student's father left the June 2009 CSE meeting before the committee could reach a consensus on the student's program for the coming school year, this fact did not excuse the district from its duty to develop an IEP and offer the student a FAPE (id. at pp. 28-29). As such, the impartial hearing officer found that the district's failure to finalize an IEP and offer the student a program and placement denied the student a FAPE for the 2009-10 school year (id. at p. 29). The impartial hearing officer next addressed the parents' claim for compensatory education wherein the parents requested an award in the form of "financial assistance" for the student to attend an out-of-State college specializing in teaching students with learning disabilities (id. at pp. 29-31). The impartial hearing officer found that based on the district's prior failures to offer the student a FAPE and the district's failure to provide the student with direct reading instruction while the student was enrolled in the district, the student was entitled to compensatory services (id. at p. 30). However, the impartial hearing officer found that there was insufficient evidence in the hearing record to show that the out-of-State college would address the student's reading delays and he denied the parents' request for tuition assistance (id. at p. 31). Nonetheless, the impartial hearing officer ordered that the district address the student's reading delays and provide compensatory education in the form of 1:1 reading instruction in the Wilson program for two hours per day, five days per week from June 1, 2010 to September 1 2010 (id. at pp. 30-31). Lastly, the impartial hearing officer granted the parents' request for evaluations and ordered the district to conduct a triennial evaluation of the student in all areas of his suspected disability prior to the start of the 2010-11 school year (id. at p. 31).

The district appeals from that portion of the impartial hearing officer's decision which awarded the parents tuition reimbursement for the 2007-08 and 2008-09 school years, the award of 1:1 reading instruction for two hours per day, five days per week from June 1, 2010 to September 1, 2010 as ESY services, and the finding that the district denied the student a FAPE for the 2009-10 school year.<sup>23</sup>

Specifically, the district contends that the impartial hearing officer's finding that the district failed to offer the student a FAPE during the 2007-08 school year was in error because his decision was against the weight of the evidence. The district maintains that the impartial hearing officer failed to consider that the August 2007 IEP was drafted at a time when the parties were constrained by a pendency order from a prior impartial hearing and had agreed to change the services on the IEP without discussing transition services and other matters pending a decision in the prior impartial hearing. The district also contends that the parents had agreed to the content of the August 2007 IEP, including the provision of reading support services as opposed to direct reading instruction. The district further argues that the August 2007 IEP was properly implemented and that the student was making progress in the program up until the time he was removed from the

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<sup>23</sup> The district does not appeal the impartial hearing officer's interim decision dated November 30, 2009, pertaining to the district's request for a resolution session.

district by the parents. The district argues that contrary to the impartial hearing officer's findings, the student's academic program provided by the district during the 2007-08 school year was appropriate for the student and he was benefiting from the program because the hearing record shows that the student was taught using a multisensory approach to learning with a curriculum formulated by combining State standards with the individual goals on the IEPs of the students in the class. The district alleges that the student was making progress in science, written expression, reading comprehension, vocabulary, and interpretation and had engaged in transition activities. The district also contends that the student's auditory processing deficits were addressed by the multisensory approach to learning and through speech-language therapy. The district also argues that the impartial hearing officer erred in finding that the transition goals and activities on the November 2007 IEP were vague and not measurable because the transition goals and activities were specific and appropriate to the student's interests and needs. Additionally, the district contends that after the decision was received in the prior impartial hearing and the CSE met again in November 2007 to develop transition activities and goals for the student's IEP, the parents interfered with preparing the transition goals and activities because they were unwilling to discuss the student's transition needs, which forced the district to develop the student's transition program without the input of the parents.

The district further argues that the impartial hearing officer erred in finding that the district failed to offer the student a FAPE for the 2008-09 school year because the district contends it had no obligation to offer the student a FAPE during that school year. Specifically, the district argues that the parents notified the district of location of their intention to continue their placement of the student at Waldorf and sought special education services through an IESP, and never requested an IEP or a CSE meeting from the district. The district also contends that the parents never had any intention of returning the student to the district and that under the provision of Education Law § 3602-c, in these circumstances, the district of location was responsible for evaluating the student and identifying any student with a disability and providing special education services, leaving the district with no obligation to prepare an IEP or offer the student a FAPE.

The district next argues that Waldorf was not an appropriate placement for the student because the school offers no special education services to students and the student was not provided with specially designed instruction or programs to address his areas of need. Additionally, the district argues that the student's English and social studies teacher at Waldorf stated that he did not work with the consultant teacher provided by the IESPs to discuss strategies to use with the student given his needs, that he did not modify the content of the classes for the student, and that he did not provide the student with any testing accommodations. The district further argues that the student was attending general education academic classes but was not receiving school credit for many of these classes, having instead been put onto a "non-graded track." Lastly, the district argues that the hearing record contains no evidence that the student made progress while at Waldorf and that instead, the hearing record contains evidence in the form of evaluations conducted before and after the student attended Waldorf that show a lack of progress.

The district next argues that the impartial hearing officer erred in finding that it failed to offer the student a FAPE for the 2009-10 school year because the decision was against the weight of the evidence. Specifically, the district argues that the CSE met and discussed various programs that the parents were interested in, but that these options would not have been appropriate for the

student and that the district offered an appropriate placement in a 12:1+1 class in a district school. However, the district contends that the student's father refused to consider any program in a district school and that by leaving the meeting before it was concluded, the student's father refused to cooperate with the CSE and refused to consent for services. The district claims that this refusal to cooperate with the CSE left the CSE without enough information to prepare an IEP for the student for the 2009-10 school year. The district further states that the student did not attend any school during the 2009-10 school year because he was living outside of the country.

Regarding the parents' request for ESY services and the impartial hearing officer's award of 1:1 reading instruction, the district contends that there was no evidence in the hearing record that the student required reading instruction by a teacher certified in the Wilson program and no evidence that the student was in danger of regressing without ESY services. As such, the district argues that the impartial hearing officer's award of 1:1 ESY reading instruction should be reversed.<sup>24</sup>

In their answer, the parents request dismissal of the district's appeal. The parents contend that the impartial hearing officer properly found that the district failed to offer the student a FAPE during the 2007-08 school year because the district's program and placement did not address the student's reading and writing needs, did not provide the student with a meaningful transition plan, did not offer a program and placement in the least restrictive environment (LRE), and did not provide meaningful and measurable goals and objectives.

The parents also argue that the district failed to offer the student a FAPE during the 2008-09 school year because under applicable law, the district was required to offer the student an appropriate special education program via an IEP and failed to do so. Specifically, the parents argue that the district of location was not charged with providing a FAPE under the Individual with Disabilities Education Act (IDEA), but rather with providing equitable services pursuant to Education Law § 3602-c, an entitlement under State law. The parents' argue that by availing themselves of services under the State law, they cannot be deemed to have waived their federal IDEA rights, including their right to reimbursement. In the alternative, the parents argue that guidelines from the VESID memorandum require that the parents must make clear to the district their intention to keep their child enrolled in the nonpublic school outside the district in order for the district to be relieved of the duty to annually review an IEP for the student, which the parents argue they did not do in this case.<sup>25</sup>

The parents next argue that Waldorf offered an appropriate program in conjunction with the services that the parents obtained from the district of location via the IESPs for the 2007-08 and 2008-09 school years. The parents contend that at Waldorf, the student was included in classes with mainstream students and experienced a general education curriculum. The parents contend

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<sup>24</sup> The district does not appeal the impartial hearing officer's award of 1:1 reading instruction as compensatory services.

<sup>25</sup> The guidelines the parents refer to are found in a VESID guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c" (Available at <http://www.vesid.nysed.gov/specialed/publications/policy/nonpublic907.htm>).



that although the student lacked certain basic skills, he nonetheless was able to have meaningful and productive participation in those classes. The parents argue that although the student did not receive full academic credits from many of the classes he took at Waldorf, he did receive a number of credits toward graduation during the years he was enrolled at Waldorf, including credits in core academic classes. The parents argue that the experiences gained in completing his senior project and an internship while at Waldorf were effective in aiding the student to transition from school to the community.

The parents further argue that the impartial hearing officer properly granted the parents' requests for tuition reimbursement for the 2007-08 and 2008-09 school years because the equities are in their favor. Specifically, the parents argue that the IDEA only requires that parents provide the school with notice of a unilateral placement prior to the removal of the student from the public school and that notice is not required by the IDEA when parents continue with a unilateral placement for subsequent school years. The parents contend that they gave notice to the district of their intent to remove the student at the November 2007 CSE meeting and that although they did not give further notice of their intent to continue to place the student at Waldorf for the 2008-09 school year, the equities are in their favor because the district never contacted the parents and failed to hold a CSE meeting or offer the student a placement for the 2008-09 school year.

Lastly, the parents argue that the impartial hearing officer properly found that the district failed to offer the student a FAPE for the 2009-10 school year when it failed to finalize an IEP and offer the student a program and placement. Accordingly, the parents argue that regardless of whether the impartial hearing officer's award of 1:1 reading instruction is characterized as ESY services or compensatory education, the award was proper.

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]).

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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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

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).

As set forth in detail above, the district argues that the impartial hearing officer erred in finding that it failed to offer the student a FAPE during the 2007-08 school year. However, as discussed below, the hearing record supports the impartial hearing officer's determination because the IEPs drafted for the student's 2007-08 school year lacked proper reading services to address the student's known special education needs.

According to the student's August 2007 IEP, the student demonstrated significant delays in speech-language skills, reading, math, written expression, spelling, processing speed, and memory (Dist. Ex. 3 at p. 3). To address the student's needs, the CSE recommended that the student be placed in a 12:1+1 class for his core academic classes and that he be provided with speech-language therapy two times per four day cycle (*id.* at p. 1). The CSE recommended that the student be mainstreamed for art, band, business, and health and also proposed numerous program modifications and testing accommodations for the student, as detailed above (Dist. Ex. 3). The student's August 2007 IEP goals targeted his weaknesses in study skills, reading, writing, mathematics, and speech-language development (*id.* at pp. 7-10).

The impartial hearing officer determined that despite the student's well known reading delays, the August 2007 CSE failed to offer the student direct reading services and furthermore, that the CSE copied the student's reading goals from his prior IEP and failed to include any goals to address student's deficits in decoding, which was an acknowledged weakness of the student (IHO Decision at p. 13).

With respect to reading, the hearing record shows that the last formal evaluation of the student's reading skills, prior to the August 2007 CSE meeting, took place in October 2005 (Dist. Exs. 1; 3 at p. 4; see Tr. p. 36). At that time, the district's school psychologist reported that the student's performance on standardized achievement tests placed the student's reading comprehension skills in the low average range (SS 80, 9th percentile) and identified the student's decoding skills as an area of weakness (SS 69, 2nd percentile) (Tr. pp. 236, 238; Dist. Ex. 1 at pp. 3, 5). The CSE chairperson testified that the student needed primary instruction in reading, writing, and math and that he also needed skills development in those same areas (Tr. p. 46). She testified that the student would receive primary instruction in reading, writing, and math through his English and math classes (Tr. p. 46).

The student's August 2007 IEP included a notation indicating that the student required "reading and writing support" (Dist. Ex. 3 at p. 1). The CSE chairperson acknowledged that the CSE discussed the student's deficits in reading and writing and determined that he required additional support in these areas, beyond his English class (Tr. pp. 46-47, 199). She further testified that the CSE talked about using the student's interests to increase the student's reading and writing skills (Tr. p. 199). The CSE chairperson stated that she recommended the student receive reading and writing support every other day, but noted that this support did not consist of direct reading and writing instruction (Tr. pp. 200, 883). She noted that when the CSE recommended reading support under the "notations" section of the August 2007 IEP, it was because she wanted to make sure that the teachers understood that it was important that such support be provided (Tr.

p. 896). In contrast, she testified that when a CSE recommended direct reading instruction for a student, it was listed on the IEP under "special education programs," and she noted that the August 2007 CSE did not offer the student in this case direct reading instruction (Tr. pp. 200, 888). The CSE chairperson testified that the parents were pleased with the reading and writing support that was recommended on the student's August 2007 IEP (Tr. p. 200). However, the parents testified that the student was offered direct reading instruction with a reading specialist at the August 2007 CSE meeting, but that this recommendation was not reflected on the student's draft IEP nor was the service provided to the student during the 2007-08 school year while he attended the district's school (Tr. pp. 529-30, 745-46). In addition, notes maintained by the parents for the 2007-08 school year indicate that the student was offered the services of a reading specialist every other day and several entries for the beginning of the school year state that "no reading specialist" was provided (Parent Ex. T at pp. 4, 6, 8). An October 12, 2007 note to the parents, written on the CSE chairperson's letterhead, stated that "[r]eading support is put under notations because at the [high school], reading is a recommended service not a special education service that can be mandated. I am going to explore that legally" (Tr. pp. 896-97; Parent Ex. SS).

The CSE chairperson testified that the focus of reading instruction at the high school level was on comprehension, as opposed to decoding and fluency (Tr. pp. 141, 879, 880, 884, 908). According to the CSE chairperson, the student's reading support for the 2007-08 school year consisted of primarily working with the student "to have an appreciation and understanding of reading, as well as to be a better comprehender of different things" (Tr. p. 882). She noted that the 12:1+1 class was a small class with intense instruction and further noted that within the 12:1+1 class, students received reading instruction throughout the content areas, as well as direct instruction on how to become a better reader (Tr. pp. 883-84).

The student's 12:1+1 special education teacher testified that based on the student's 2007-08 IEP, he was responsible for providing the student with primary instruction in the core curriculum along with reading and writing support, which he distinguished from direct instruction (Tr. p. 301). The special education teacher testified that during the 2007-08 school year, he provided the student with direct instruction in English on a daily basis, which targeted the student's reading skills including phonics, phonemic awareness, comprehension, fluency, and vocabulary (Tr. pp. 326-27). Further, the special education teacher reported that he provided the student with reading support "whenever necessary" within the curriculum and noted that at times it was necessary to clarify, check for comprehension, restate things, model things instead of having the student read them, or to have the student explain things in his own words (Tr. p. 338).

According to the special education teacher, when the student entered his class he was working on vocabulary development, word identification, decoding, fluency, and the ability to think beyond the literal meaning of words (Tr. p. 338). With respect to decoding, the special education teacher reported that he worked with the student to break down the parts of words and worked on Greek and Latin prefixes and suffixes (Tr. p. 339). The teacher testified that he did not know the student's grade level with respect to decoding, but that he did know that it was an area in which the student was in need of improvement (Tr. p. 340). He reported that he worked with the student on decoding skills "[d]epending on the situation, when it was necessary" (*id.*). The special education teacher testified that there was no set time at which he addressed the student's deficits in reading because he was not providing the student with reading instruction, he was only providing reading support (Tr. p. 341).

In response to questioning as to how he knew when student needed reading support, the special education teacher testified that sometimes the student would verbally ask if he didn't understand something and that would be the teacher's cue to assist the student with the pronunciation of a word or breaking down sounds within a word (Tr. p. 348). The special education teacher reported that at other times, he would read aloud and the student would read along (id.). The special education teacher stated that in that situation he would ask the student questions to check for comprehension (id.). According to the special education teacher, the student made progress in his class with respect to reading because he was better able to comprehend and interpret what he read and he had expanded his vocabulary (Tr. pp. 341-42).

The special education teacher further testified that there was a certified reading teacher who provided services to high school level students (Tr. p. 380). He indicated that students were referred to the reading teacher based on their performance on evaluations, as well as teacher observations and past performance (Tr. pp. 380-82). The teacher indicated that if a student's scores were several grade levels below expectation on the "Woodcock Johnson," it would lead him to refer a student to the reading specialist (Tr. pp. 383-84, 422). The special education teacher testified that he was familiar with the student's scores but believed that at that time, the program the district was providing was appropriate (Tr. pp. 384, 422).

The special education teacher also testified that he used a multisensory approach for imparting content area knowledge to students with reading deficits, specifically citing his use of print materials, a computer, and/or audio recordings (Tr. p. 409). He noted that with the student it was important throughout the presentation of material to frequently check for understanding, slow down his speech, simplify vocabulary, and restate things (Tr. p. 410). The special education teacher stated that he did not know if the student required intensive reading instruction, but that the program the student was in was designed to target improvement of the student's reading skills (Tr. p. 412). The special education teacher further reported that reading skills were imparted throughout content area lessons and provided as separate lessons at discreet times (Tr. p. 413). He recalled that every other day there was a specific time that he further worked on reading support with the student (id.). The special education teacher stated that there was no one during the 2007-08 school year who was providing the student with reading instruction specifically, but that as the student's teacher, he was the primary instructor of the core curricular areas and also providing both reading and writing support (Tr. p. 414). The special education teacher stated that in his estimation, the student had the capacity to improve his reading skills (id.).

The student's August 2007 IEP included reading goals related to paraphrasing reading passages, stating the main idea and answering "wh" questions about the passage, answering comprehension questions from factual materials, and predicting the outcome of a story (Dist. Ex. 3 at pp. 7-8). The student's IEP also included speech-language goals targeting the student's comprehension skills (id. at pp. 9-10).

Although the CSE met again and revised the student's present levels of performance, IEP goals and transition plan in November 2007, the CSE's program recommendations regarding reading remained the same.

In light of the above, I find that the district did not meet its burden of proof with respect to showing that the program it offered to the student for the 2007-08 school year was appropriate,

specifically as it related to the student's reading needs. The CSE chairperson testified that the CSE did not recommend direct reading instruction for the student for the 2007-08 school year because the student was recommended for the 12:1+1 program, which was a small class that provided "intense" instruction (Tr. p. 883). The CSE chairperson further testified that the CSE determined that the student needed reading support beyond the 12:1+1 class, to the extent that the CSE made a notation on the IEP that the student required extra reading support (Tr. pp. 46-47, 199). However, the additional support implemented, as described by the student's special education teacher, consisted of strategies that would be routinely employed by most classroom teachers (see Tr. 338). The special education teacher testified that he did not know if the student required intensive reading instruction (Tr. p. 412). He further acknowledged that although the student fit the profile of a student that he would typically refer to the reading specialist, he did not do so (Tr. pp. 383-84, 422). While the focus of reading at the district's high school may have been on comprehension, as the CSE chairperson testified, the CSE was still required to take into account the individual needs of this particular student. The information that the CSE had at the time that the August and November 2007 IEPs were developed, indicated that the student's reading skills as measured by standardized testing were significantly delayed and that his decoding skills were more impacted than his comprehension skills (Dist. Ex. 1 at p. 5). In addition, the student's special education teacher acknowledged that decoding was an area in which the student was in need of improvement (Tr. p. 340). Despite this known need, the student's IEPs did not include any goals to address the student's decoding deficits. The hearing record shows that when the student's reading skills were more thoroughly evaluated later in the 2007-08 school year, the student was found to have significant delays in phonological processing and was also found to lack word analysis and decoding strategies to read unknown words (Parent Ex. K at pp. 2-4, 7). At that time, it was recommended that the student receive multisensory reading instruction on a daily basis (Parent Ex. K). Accordingly, there is an insufficient basis to overturn the impartial hearing officer's determination on this issue and I find that the district failed to offer a program that adequately addressed the student's identified needs and therefore failed to offer the student a FAPE during the 2007-08 school year.

Turning to the appropriateness of Waldorf for the 2007-08 school year, assuming, without deciding, that the parents' subsequent reenrollment of their son in public school via the Education Law § 3602-c dual enrollment statute did not preclude a request for reimbursement of tuition, I will review the appropriateness of the private placement. 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).

The parents contend that their unilateral placement of the student at Waldorf, coupled with the services provided by the district of location via the February 7, 2008 and May 28, 2008, IESPs were appropriate to meet the student's needs. While 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), the school must offer appropriate individualized services to meet the student's unique, special education needs. Moreover, supplementation of education services offered at a unilateral placement with services obtained elsewhere, either privately or from outside agencies, does not support a finding that the services at the unilateral placement were appropriate to meet the student's needs (see Thies v. New York City Bd. of Educ., 2008 WL 344728, at \*3 [S.D.N.Y. February 4, 2008]; Green v. New York City Dept. of Educ., 2008 WL 919609, at \*7 [S.D.N.Y. March 31, 2008]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 [S.D.N.Y. 2005]; Application of a Student with a Disability, Appeal No. 08-119; Application of the Bd. of Educ., Appeal No. 07-097; Application of the Dep't of Educ., Appeal No. 06-114; Application of a Child

with a Disability, Appeal No. 06-094). Accordingly, the appropriateness of the parents' unilateral placement at Waldorf must be determined on its own merits, without regard to the supplementary services obtained via the IESPs from the district of location.

Based on the circumstances in this case, as discussed more fully below, I find that the parents have not met their burden of demonstrating that Waldorf provided educational instruction specially designed to meet the student's unique educational needs during the 2007-08 school year.

The hearing record shows that the student attended Waldorf from November through June of the 2007-08 school year (Tr. pp. 695, 760-61; Dist. Exs. 21 at p. 1; 23 at p. 1). In February 2008, or possibly sooner, the student began receiving consultant teacher services and speech-language therapy pursuant to an IESP developed by the district of location (Tr. pp. 553, 632, 856; Dist. Ex. 21). According to the parents, the consultant teacher services were primarily provided after school; however, they could also be provided during school as long as the student was not pulled from class (Tr. pp. 626, 651, 823).

As noted in detail above, reports from the student's Waldorf teachers generated during the 2007-08 school year indicated that the student struggled with the details in his academic classes, but that he was able to "articulate a few basic principles;" "grasp many of the major themes" presented; develop an understanding, with the assistance of his "tutor" of some of the points covered; and "generally caught the essence of what was being asked for" (Dist. Exs. 20 at pp. 1, 2; 25 at pp. 1, 3-4). Comments by the student's math teacher further indicated that the student did not have the requisite background for his algebra class and that the student worked on an independent math program with his "tutor" (Dist. Exs. 20 at p. 3; 25 at p. 6).

At the impartial hearing, the parents presented one witness from Waldorf, a teacher, to describe the private school and to provide details regarding the student's academic program (Tr. 660). According to the teacher, the philosophy of Waldorf centered on age appropriate teaching and content (Tr. p. 678). By way of explanation, the teacher reported that ninth grade content focused on topics that were apparent and current, such as modern history, whereas twelfth grade focused on "moving into the world" (*id.*). According to the teacher, there was recognition that content that held more "ephemeral qualities" was just as important as content with concrete material qualities (*id.*). The teacher stated that in addition to conveying facts and dates, Waldorf teachers also wanted to instill students with a sense of "beauty, and awe and reverence for the world" (*id.*). The teacher explained that the school used main lesson blocks in which academic work was broken into three or four week blocks, with the subject alternating between disciplines (Tr. p. 663). According to the teacher, "the meat" of the academic work was done in the first hour and a half each day (*id.*).

During the 2007-08 school year, the teacher taught the student a three-week main lesson block in Shakespeare, as well an English skills class, which included a study of the romantic poets and some European literature (Tr. pp. 663-64). According to the teacher, reading, writing, and comprehension skills were all addressed within the English skills class (Tr. p. 664). The teacher testified that there were 12-14 students in his classes, all of whom were juniors, and that it was the same set of students for each class (Tr. pp. 681-82). He indicated that there was no other staff in the classroom (*id.*). The teacher reported that the classes were not tracked according to ability and that "everybody is in the same room" (Tr. p. 665). The teacher confirmed that Waldorf did not



have a special education program (*id.*). He noted that while the school did not employ special education teachers, students at the school had access to "that kind of support" (Tr. pp. 665-66). The teacher reported that such support generally took the form of a student meeting 1-4 periods per week with a "tutor" during the school day or after school (Tr. p. 666). He could not recall the specific services that the student had received (*id.*). According to the teacher, the student was included in classes with non-disabled peers (Tr. p. 665).

According to the student's Waldorf teacher, the student's consultant teacher observed his class so that she could better help the student (Tr. pp. 666-67). The Waldorf teacher testified that he communicated with the consultant teacher throughout the school year with respect to the student and that they discussed the course content and skills the Waldorf teacher was trying to teach (Tr. pp. 668, 688-89). The Waldorf teacher stated that he did not explicitly discuss strategies with the consultant teacher with respect to the instruction of the student (Tr. p. 668). He further noted that he did not modify any of the content of his classes based on his conversations with the consultant teacher (*id.*). The Waldorf teacher noted that the student was on a "non-graded track" and that he was not necessarily getting a letter grade for the work he was doing in the teacher's class (*id.*). The teacher explained that when he graded students, it was in relation to expectations of where all students should be and also in relation to the other students in the class (Tr. p. 689). The teacher indicated that the non-graded track essentially removed both of those considerations (*id.*).

The teacher testified that the student had challenges related to reading, writing, and understanding abstract concepts (Tr. p. 699). To address the student's difficulties, the teacher reported that he would sometimes cycle through certain ideas a couple of different times or would call upon the student and speak directly to him as he was elucidating a point to try to engage him (Tr. p. 700). He reiterated that he modified his expectations for the student, with the understanding that the student was learning even if it wasn't to the same degree as his classmates (*id.*). The teacher testified that he did not help the student with his organizational skills (Tr. p. 698). He indicated that he did check for understanding, but he did not specifically reteach materials to the student anymore than he would help out the other students in the class (Tr. pp. 698-99). The teacher testified that he tried to treat the student like "any other student" and that in terms of writing essays, he provided the student with the same advice as he did to his other students (Tr. p. 675).

With respect to the "main lesson block" in Shakespeare, the teacher reported that the work was very challenging for the student and that obtaining information by reading was difficult for the student (Tr. p. 669). The teacher reported that nothing he assigned to the student was modified rather, in the student's case he modified his expectations because it was clear immediately that he could not expect the same thing from the student as he could from a peer that was at grade level (Tr. pp. 676, 698). As a result, the teacher reported that his expectations focused on whether the student was able to get the main point, listen, and contribute to discussions that centered on main themes (*id.*). The teacher also stated that he believed the student understood the major themes of the class, noting that through discussion the student was able to gain some of the content of the class (Tr. pp. 669, 670). According to the teacher, the student contributed to a group performance in the Shakespeare class and although he did not grade the student, he believed that the student was more than passing at a graded level (Tr. p. 674).

The teacher confirmed that for the 2007-08 school year, the student received a grade of "full participation" for English Skills 11 (Tr. pp. 683-85). He elaborated that the student's final grade of full participation meant that the student was present in class, had full attendance, put forth his best effort, and contributed positively to the classroom (Tr. pp. 685, 687). The teacher testified that the student was able to keep up with the work in the English skills class (Tr. p. 686). However, he acknowledged that there were times when the class discussion was too broad or too abstract and the student would disengage (Tr. p. 687). He also acknowledged that the student was not able to prepare the class writing assignments at the same level as his classmates (Tr. pp. 687-88).

The Waldorf teacher testified that the student was benefiting from the school and should remain there (Tr. p. 670). The teacher noted that the student's writing improved tremendously over the course of his attendance at Waldorf (Tr. p. 671). He reported that in the beginning, the student's writing was rudimentary but that by the student's senior year, his compositions had an introduction, a body, and a conclusion (*id.*). He further testified that the student was able to take up a central theme and develop it (Tr. p. 673). The teacher testified that drafting paragraphs with topic sentences was part of the curriculum he taught during the 2007-08 and 2008-09 school years and that the student was able to make progress toward that goal (Tr. p. 672). The teacher further noted that the student had demonstrated academic improvement in that his ability to read and his ability to appropriately comment and engage in discussion also improved (Tr. p. 677).

The student's father testified that the student's classes were modified in "extreme cases" (Tr. p. 565). For example, he indicated that the student attended an Atomic Chemistry class and the teacher, being aware of the student's inability to grasp the entire concept, made sure the student grasped the basic concepts of the course (*id.*). The student's father further testified that he wondered how the student would survive in a calculus class, but that the teacher found a way for the student to learn what calculus was and how it applied to everyday life (Tr. p. 568). The student's father indicated that the student "could not do a calculus" but that he knew what calculus was (*id.*). According to the student's father, the same was true for chemistry where the student grasped some of the material enough to say that he participated in the class (*id.*). The student's father further reported that the student studied German at Waldorf and that he learned "hardly anything at all" (Tr. p. 569). However, he noted that the student participated in the German class with the understanding that he was going to try to learn as much as he could (*id.*). The student's father noted that at Waldorf the student was engaged, academically challenged, and "welcomed" (Tr. pp. 564, 566, 569).

Although the student was clearly struggling in his core academic classes at Waldorf, there is no indication in the hearing record that Waldorf attempted to modify its academic program to meet the unique needs of this student. As noted above, the student's English teacher modified his expectations of the student, rather than modifying his classroom material and assignments (Tr. pp. 76, 689, 700). Furthermore, the hearing record indicates that the student's English teacher did not discuss instructional strategies for the student with the consultant teacher, did not modify the content of his classes based on conversations with the consultant teacher, and provided the student with the same support that he provided to other students in the general education program (Tr. pp. 668, 675, 698-99). The hearing record indicates that to the extent that the student's special education needs were addressed during the 2007-08 school year, they were addressed by the student's consultant teacher that was provided pursuant to the district of location's IESP and not by Waldorf (Tr. pp. 631, 609, 691, 695, 696, 765-66, 772, 821-23). As a result, the hearing record

does not support a conclusion that the services offered the student by Waldorf for the 2007-08 school year were appropriate to meet the student's needs.

Turning to the 2008-09 school year, the district argues that the impartial hearing officer erred in finding that it failed to offer the student a FAPE for that school year. Specifically, it contends that pursuant to Education Law § 3602-c, the district, as the district of residence rather than the district of location, had no obligation to offer the student a FAPE during that school year.<sup>26</sup> The parents argue that under the appropriate interpretive guidance issued by VESID, the parents need to make clear their intention to keep the student enrolled in the private school in order for the district of residence to be relieved of the duty to annually review an IEP for the student.<sup>27</sup> For the reasons set forth below, I find that the district was not obligated to offer the student an IEP for the 2008-09 school year because according to the facts of the case and consistent with the VESID guidance memorandum dated September 2007, the district "need not make FAPE available" to a student who has been parentally placed in a private school in the district of location and who has been evaluated and provided with an IESP by the district of location.<sup>28</sup> The following question and answer in the VESID guidance memorandum addresses the question as pleaded by the parties:

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<sup>26</sup> Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities, such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs. (Educ. Law §§ 3602-c[2][a], [2][b][1] as amended by L.2007, c. 378, § 27, subd. d; L.2005, c. 352, § 22). The district of location's CSE is also required to assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).

<sup>27</sup> I note that the parents also argue that because the district of location was not charged with providing a FAPE under the IDEA, but rather with providing equitable services pursuant to Education Law § 3602-c, an entitlement under State law, the parents cannot be deemed to have waived their federal IDEA rights, including their right to reimbursement, by availing themselves of services under the State law. However, the parents have not cited to any case law, statutes or regulations to support their argument.

<sup>28</sup> According to an interpretive guidance memorandum published by the New York State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and titled "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," (VESID guidance memorandum) dated September 2007, with respect to child find requirements and the provision of special education programs and services to students parentally placed in private schools within the district of location, the VESID guidance memorandum notes, in pertinent part, the following:

The district of location is responsible for child find for students who are parentally placed in nonpublic schools located in their geographic boundaries.

The CSE of the district of location must develop the IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic . . . schools located in the geographic boundaries of the public school.

The IESP must be developed in the same manner and with the same contests as an IEP is developed. (VESID guidance memorandum at pp. 4-5).

12. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP?

U[nited] S[tates] E[ducation] D[epartment] has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private . . . school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep their child enrolled in the nonpublic . . . school, the district of residence need not develop or annually review an IEP for the student.

(VESID guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State Education Law Section 3602-c" available at <http://www.vesid.nysed.gov/specialed/publications/policy/nonpublic907.pdf>).<sup>29</sup>

In this case, the parents made their intent clear to the district that the student would remain enrolled at Waldorf, i.e., parentally placed in a private school located within the district of location for the 2008-09 school year. The parents referred the student to the district of location and requested IESP services on May 28, 2008, well before an IEP would have been required to be produced for the 2008-09 school year by the CSE of the district of residence (Dist. Ex. 24; see Parent Ex. V). According to the district of residence's CSE chairperson, the student's father informed her at the November 2007 CSE meeting that the student would be attending Waldorf for the duration of his education until he graduated (Tr. pp. 76-77). The student's father testified that he believed that by the act of requesting IESP services from the district of location, he was giving notice to the district of residence of the continued unilateral placement at Waldorf in the district of location (Tr. p. 645). The student's father also testified that prior to the close of the 2007-08 school year, he had decided that Waldorf was appropriate for the student and had no intention of returning the student to the district during the 2008-09 school year (Tr. pp. 645-46). Lastly, the student had been evaluated and had been found eligible for special education programs and services by the district of location, which produced an IESP for the 2008-09 school year that was implemented at Waldorf (Parent Ex. F; Dist Exs. 23 at p. 3; 26; 29). Under the facts of this case and consistent with the VESID guidance memorandum and federal guidance, the district—as the district of

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<sup>29</sup> United States Education Department guidance can be found in the Federal Register at: Child Find for Parentally-Placed Private School Children with Disabilities (§300.131) 71 Fed. Reg. 46593 (August 14, 2006): "If a determination is made by the LEA [local educational agency] where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private [school] located in another LEA, the LEA where the child resides need not make FAPE available to the child" (See Maine School Administrative District #40, 108 LRP 40513 [ME SEA, Oct. 23, 2007] [interpreting and applying the federal guidance and concluding that a district of location was not required to create an IEP for a student given the parent's intention to keep a student in a private boarding school]).

residence—was not required to make a FAPE available to the student and therefore, is not responsible for tuition reimbursement for the 2008-09 school year.<sup>30</sup>

Even if I were to determine that the district had a duty to offer the student a FAPE during the 2008-09 school year, an order providing for tuition reimbursement would be improper because the parents' unilateral placement at Waldorf was not an appropriate placement for the student during the 2008-09 school year for reasons similar to those discussed above regarding the 2007-08 school year. Specific to the 2008-09 school year, the Waldorf teacher testified that he taught the student a main lesson block entitled "World Culture," which was a study of different cultures; an English class, which was primarily a study of Russian culture and literature; and some blocks related to college writing, applications, and essays (Tr. p. 664). With respect to the World Culture class, the teacher acknowledged that at times the student had difficulty keeping up with the class and that the student missed a lot of the factual information that was conveyed (Tr. pp. 700-01). However, he noted that the student was able to gain understanding of class themes (Tr. p. 702). The teacher confirmed that the student had difficulty with the more complex discussions of Russian literature (*id.*). The hearing record provides no additional information regarding the appropriateness of Waldorf for the 2008-09 school year and much of the testimony at the impartial hearing did not distinguish between the two school years. Therefore, similar to the 2007-08 school year, the parents did not meet their burden to show that Waldorf was appropriate for the student for the 2008-09 school year.

Turning next to the 2009-10 school year and the impartial hearing officer's award of ESY services in the form of 1:1 reading services, the district argues that the impartial hearing officer had no basis in the hearing record to determine that the student was in danger of regressing during the summer such that the student was eligible for ESY services.

According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[k]; 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. 07-039; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 07-004; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The State regulations define substantial regression as "the 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

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<sup>30</sup> I note that had the evidence in the hearing record led to the conclusion that the parents had not clearly communicated to the district their intention to continue the 3602-c placement during the 2008-09 school year, the evidence shows that the parents did not provide adequate notice of a unilateral private placement of the student at public expense for the 2008-09 school year, as required by 20 U.S.C. § 1412(a)(10)(C)(iii)(I).

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]).<sup>31</sup>

In his decision, the impartial hearing officer identified guidelines setting forth an appropriate standard for determining if the student was eligible for ESY services, but failed to properly apply that standard to the evidence in the hearing record (IHO Decision at pp. 27-28). The impartial hearing officer did not find that the student met the standard for regression; rather, he based his decision to award ESY services on his determination that the student's reading level was significantly delayed and that the district was aware of this need and did not appropriately address it during the prior school year (*id.*). However, as set forth above, that is not the proper legal basis on which an impartial hearing officer may award ESY services. Moreover, an independent review of the hearing record supports that there was not a showing of substantial regression during the prior school year that would warrant ESY services. Accordingly, I find that the student was not entitled to the ESY services of 1:1 reading instruction awarded by the impartial hearing officer.

The impartial hearing officer also found that the parents' request for compensatory education to remedy the district's failure to offer a FAPE to the student provided an independent basis for his order that the district provide 1:1 reading instruction (IHO Decision at pp. 28-32). The district has not set forth an argument on appeal challenging the impartial hearing officer's order granting compensatory education. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). Therefore, the impartial hearing officer's order granting compensatory education in the form of 1:1 reading instruction is affirmed and I will modify the dates specified in the order for the district to provide the services as set forth below.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated May 3, 2010, which ordered the district to reimburse the parents for all tuition and related expenses for

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<sup>31</sup> VESID has 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 (<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

the student's placement at Waldorf for the 2007-08 school year from November 16, 2007 are annulled; and

**IT IS FURTHER ORDERED** that the portions of the impartial hearing officer's decision dated May 3, 2010, that ordered the district to reimburse the parents for all tuition and related expenses for the student's placement at Waldorf for the 2008-09 school year are annulled; and

**IT IS FURTHER ORDERED**, unless the parties otherwise agree, that the portions of the impartial hearing officer's decision dated May 3, 2010, which ordered the district to provide the student with 1:1 reading instruction using a certified reading instructor in the Wilson program for two hours per day, five days per week from June 1, 2010 to September 1, 2010, is modified to the extent that the district shall provide the services described, in the manner and duration as described, between July 1, 2010 and October 1, 2010.

**Dated:**            **Albany, New York**  
                         **June 28, 2010**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**