



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-055

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Depew Union Free School District**

### **Appearances:**

McCallion & Associates LLP, attorneys for petitioner, Kenneth F. McCallion, Esq., of counsel

Harris Beach PLLC, attorneys for respondent, Jeffrey J. Weiss, Esq., of counsel

### **DECISION**

Petitioner (the parent) appeals from a portion of an impartial hearing officer's decision which denied her request to be reimbursed for her son's tuition costs at the Gow School (Gow) for the 2010-11 school year.<sup>1</sup> Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to offer an appropriate educational program to the student for the 2009-10 school year and ordered it to reimburse the parent for the student's tuition costs at Gow for that school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student was 14 years old, had received diagnoses of a reading disorder (dyslexia) and a disorder of written expression, and was attending Gow (Tr. p. 495; see Dist. Exs. 4 at p. 3; 36 at p. 7). Gow is a boarding school for male students with language-based learning disabilities (Tr. p. 381). Gow has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

### **Background**

The hearing record reflects that the student attended school in the district from kindergarten (2001-02) through sixth grade (2007-08) (Tr. p. 462). According to the parent, the student experienced difficulty in school as early as kindergarten, had difficulty following multistep directions, and complained to the parent that he did not complete worksheets because he could not

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<sup>1</sup> The parent does not appeal the portion of the impartial hearing officer's decision which denied her request to be reimbursed for tuition at Gow for the 2008-09 school year (Pet. at p. 1).

read and did not know what the class was doing (Tr. p. 453). During first grade, the student's teacher reportedly informed the parent that the student was not "catching on" and that "he couldn't keep up with the class" (Tr. p. 454). The parent noted that after she pursued private testing and shared the results with the district, the district put an individualized education program (IEP) in place for the student for second grade (2003-04) (Tr. p. 455; see Parent Ex. D at p. 1).<sup>2</sup> The hearing record reflects that the student remained eligible for special education services as a student with a learning disability in subsequent years, and that he was provided with related services and multiple accommodations, modifications, supplementary aids and services, assistive technology, testing accommodations, and support for school personnel on behalf of the student (Dist. Exs. 4 at pp. 1-3; 7 at pp. 1-3; 12 at pp. 1-3; 15 at pp. 1-3; 18 at pp. 1-3; 21 at pp. 1-2; 24 at pp. 1-2; 26 at pp. 1-2).

The student attended "academic day" summer programs at Gow after fourth, fifth and sixth grades (Tr. pp. 458, 460, 487-88). After his third summer at the Gow summer program, the student reportedly asked his parent if he could attend the school during the school year because he believed that the school could help him learn to read (Tr. p. 487).

In March 2008, the Committee on Special Education (CSE) convened to develop the student's IEP for the 2008-09 school year (see Dist. Exs. 12-13). The parent did not accept the IEP offered by the district and in September 2008, she unilaterally enrolled the student in seventh grade at Gow for the 2008-09 school year (Tr. p. 495). The CSE reconvened in August 2009 to develop an IEP for the 2009-10 school year, and again the parent enrolled the student at Gow (Tr. p. 495; Dist. Exs. 7-8).

The student underwent formal cognitive testing by the district's school psychologist as part of a three-year reevaluation on January 27, 2010, which revealed that the student had average cognitive ability overall, as well as average verbal reasoning and average nonverbal reasoning abilities (Dist. Ex. 28 at pp. 1-2). Academically, formal achievement testing also conducted as part of the district's psychological evaluation in January 2010 revealed that the student displayed average math reasoning skills and low average skills in word reading and reading comprehension, with the student's greatest challenge in decoding and numerical operation skills (id. at p. 2). The hearing record reflects that given the student's average cognitive abilities and his difficulties per achievement test results in January 2010, he continued to display a learning disability (id. at pp. 2-3). The hearing record also reflects that the student presented as kind and polite, and as someone who put forth his best effort and completed his work both inside and outside of class (Dist. Exs. 4 at p. 4; 28 at p. 2). Despite his struggles with decoding, spelling, comprehension, memorization of multiplication facts, and reading math problems, the hearing record reflects that the student had a "good attitude" about school and learning (Dist. Ex. 4 at p. 4).

The CSE convened in February 2010 to develop an IEP for the student for the 2010-11 school year, but the parent again enrolled the student at Gow for that school year (Tr. p. 495; Dist. Exs. 4-5).

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<sup>2</sup> The parent referred to a private neuropsychological evaluation that occurred between August and November 2004 (Tr. p. 455; Dist. Ex. 41 at p. 1). Review of the documentary evidence in the hearing record reveals that the student's initial CSE review occurred on June 11, 2003, prior to the private neuropsychological evaluation (compare Parent Ex. D at p. 1, with Dist. Ex. 41 at p. 1).

## Due Process Complaint Notice

The parent filed a due process complaint notice dated August 23, 2010, in which she alleged complaints relating to the student's IEPs for the 2008-09, 2009-10 and 2010-11 school years (Dist. Ex. 1 at pp. 1-2).<sup>3</sup> She specified problems with all three of the IEPs that included, among other things, inappropriate or inadequate "goal planning" that did not appropriately reflect the full scope of the student's abilities and disabilities; and the lack of a specialized reading program for the student who had a language-based learning disability (*id.* at p. 2). The parent objected to the general education class sizes that she believed, even with a consultant teacher, were too large for the student (*id.* at p. 3). According to the parent, the student should have been placed by the district in a general education class due to his "above average intelligence," but such a general education class should be made up of "no more than" ten students (*id.* at p. 3). The parent further asserted that: the consultant teacher was not specifically trained in working with severely dyslexic students; the offered resource room support was insufficient because the teacher was not trained specifically in severe dyslexia and it was difficult for one teacher to work with all of the various disabilities even though the class size was small; the student required an extended school day in order to receive a free appropriate public education (FAPE) given the severity of his dyslexia and, specifically, the student required additional teacher support for 1:1 tutoring and additional study halls with proctors able to assist the student on a daily basis; and the extended time provided for the student on tests was only available during resource room, which took place during one "normal school period" and did not meet "the criteria of extended time necessary for a student with severe [d]yslexia" (*id.*). The parent also contended that: there was no technical assistance or trained staff to assist the student and the parent with the available Kurzweil technology, which, along with a lack of teacher participation, rendered the Kurzweil "virtually useless;" contrary to statements on the IEPs, the student had made no progress and the IEP goals were not being met or were inappropriate; the student had not received, nor was it anticipated that he would receive, appropriate counseling for lack of self-esteem and "other emotional concerns" caused by his disability; and the district had consistently failed to provide clear instructions as to homework and other assignments, which had severely restricted the student's ability to perform at a grade appropriate level or receive an appropriate education (*id.* at pp. 3-4).

As a proposed resolution, the parent requested that the district reimburse the parent for the student's tuition and room and board at Gow for the 2008-09 and 2009-10 school years and "pay or reimburse" the parent for the student's tuition at Gow for the 2010-11 school year (Dist. Ex. 1 at p. 4). The parent further alleged that Gow provided all the necessary supports to allow the student to receive an appropriate education (*id.* at pp. 4-5).

## Impartial Hearing Officer Decision

An impartial hearing convened on November 8, 2010 and concluded on November 9, 2010.<sup>4</sup> In a decision dated April 24, 2011, the impartial hearing officer determined that the parent's

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<sup>3</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (*see* 8 NYCRR 200.5[j][3][xii][c]).

<sup>4</sup> A prehearing conference was held on October 4, 2010, and was appropriately memorialized by the impartial hearing officer and made part of the hearing record (IHO Decision at p. 17; IHO Ex. VI; *see* 8 NYCRR 200.5[j][3][xi]).

claim for tuition reimbursement for the 2008-09 school year was time barred and that, even if not time barred, equitable factors would preclude reimbursement (IHO Decision at pp. 8-10).

Regarding the 2009-10 school year, the impartial hearing officer determined that although it was "clear from the testimony" that "a lot of planning went into formulating the CSE's recommendations" for that school year, she found that "despite the CSE's best intentions," the district did not meet its burden of establishing that it had offered the student a FAPE. She further found that the parent met her burden of establishing that Gow was appropriate for the student, and that there were no equitable factors barring tuition reimbursement for that school year (IHO Decision at pp. 10-14). Specifically, the impartial hearing officer found that the student needed "some level of small group special education instruction in a separate location in order to address his reading and writing deficits" and that his August 2009 IEP did not include small group instruction outside the general education setting (*id.* at p. 11). She further found that the recommended consultant teacher instruction in the general education setting would not have provided the student with the "individualized and targeted instruction" that he needed in reading and writing (*id.*). The impartial hearing officer also found that the reduction of the student's speech-language support from direct services provided outside the general education setting to indirect consultation provided by his teachers, was not warranted and would decrease the likelihood of the student making meaningful educational progress (*id.* at pp. 11-12). She further determined that the student's goals in the August 2009 IEP included speech-language goals that could not be met or addressed by the student's consultant teachers, and that the student needed the goals to be addressed in a small group setting outside the general education classroom (*id.* at p. 12).

Turning next to whether Gow was an appropriate placement for the student for the 2009-10 school year, the impartial hearing officer found that the program at Gow provided specialized instruction to address the student's reading and writing deficits; utilized an approach shown to be effective with students with dyslexia; enabled the student to make gains; was expected to continue allowing the student to make educational progress; utilized technology that was helpful to the student; consisted exclusively of small group and individual instruction; included supervised study halls; and made individualized tutoring available on an as needed basis to address each student's particular needs (IHO Decision at p. 13). The impartial hearing officer also determined that the student exhibited a steady pattern of progress during his 2009-10 attendance at Gow (*id.*). She determined that although Gow was a more restrictive placement than necessary because the student did not need a residential placement, it was an appropriate placement and the setting was not so restrictive as to preclude tuition reimbursement (*id.*). Therefore, the impartial hearing officer awarded the parent tuition reimbursement for the 2009-10 school year (*id.* at pp. 14-15).

Regarding the 2010-11 school year, the impartial hearing officer determined that the district offered the student a FAPE and that it was unnecessary address the appropriateness of Gow for the student or equitable factors for that school year (IHO Decision at pp. 14-15). Specifically, she determined that the February 2010 CSE's recommendation for daily resource room services would have provided the student with reading instruction in a small group setting that she found lacking in his August 2009 IEP, and the parent's argument that the district did not provide for the same level of support that the student received at Gow did not render the district's recommendations insufficient (*id.* at p. 14). The impartial hearing officer noted that the district's recommendation for continued use of the Kurzweil technology provided the student with consultant teacher support in his major content area classes, and provided him with daily small group instruction in resource room (*id.*). She also determined that although the student's annual goals in the February 2010 IEP were not as comprehensive as they could have been, they targeted

his "key deficit areas" and they were nevertheless specific and objectively measurable (id.). Upon determining that the district met its burden of showing that the February 2010 CSE's recommendations for the student were appropriate and would have provided him with a FAPE, the impartial hearing officer denied the parent's claim for tuition reimbursement for the 2010-11 school year (id. at pp. 14-15).

### **Appeal for State-Level Review**

This appeal by the parent ensued. The parent appeals only from the impartial hearing officer's decision to deny the parent's tuition reimbursement claim for the 2010-11 school year. Specifically, she alleges that the impartial hearing officer erred in denying relief for the 2010-11 school year because the same rationale that led her to award reimbursement for the 2009-10 school year was equally applicable to the 2010-11 school year, and there were no significant differences in the district's offered program and capabilities from one year to the next, except that the recommended services were reduced. The parent further alleges that the impartial hearing officer misinterpreted the nature of the support and testimony provided by and for the student at Gow, and incorrectly assumed that because of the student's progress made while at Gow, his reading and writing had improved to the point that he no longer required the supports Gow provided. The parent alleges that the impartial hearing officer incorrectly assumed that the technological supports offered in the February 2010 IEP would provide the student with a level of support that was equivalent to the supports the student was receiving at Gow, and that the inclusion of Kurzweil technology as recommended in the student's February 2010 IEP did not mean that the district was in a position to use that technology as a support in the same way that it was assisting the student at Gow. The parent also alleges that the impartial hearing officer misinterpreted the student's February 2010 IEP in finding that resource room once per day would provide the necessary reading and writing support that was critical for the student to receive a FAPE because, among other things, the resource room was not a replacement for an intensive reading and writing support program. For relief, the parent requests a determination that the impartial hearing officer erred in finding that the district offered the student a FAPE for the 2010-11 school year, and an order directing the district to reimburse the parent for the student's tuition at Gow for the 2010-11 school year.

In its answer, the district denies many of the parent's allegations regarding the 2010-11 school year and cross-appeals from the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2009-10 school year.

The district alleges that, contrary to the impartial hearing officer's determination, the district developed an appropriate IEP for the student for the 2009-10 school year that was designed to continue the student's educational progress at the district. Specifically, the district alleges that the impartial hearing officer incorrectly found that the August 2009 IEP should have included small group instruction outside the general education setting, and that she incorrectly found that the recommended speech-language services were inappropriate.

Alternatively, the district also argues that even if the student's August 2009 IEP was inappropriate for the student, the impartial hearing officer erred by finding that Gow was appropriate for the student for the 2009-10 school year and consequently granting the parent's request for tuition reimbursement for that year. More specifically, the district alleges that Gow was inappropriate because the student did not demonstrate sufficient progress there during the 2009-10 school year and, at best, the student progressed at the same level that he had exhibited when he previously attended the public school. The district further alleges that Gow was overly restrictive because it was limited to students with disabilities in small group settings and was a

residential program. The district claims that the impartial hearing officer failed to fully consider or give any weight to whether Gow was overly restrictive for the student, especially considering the student's well-established record of educational progress in the public school setting. The district alleges that the impartial hearing officer's determination that the educational placement offered by the district for the 2010-11 school year was appropriate further establishes that Gow, a residential placement, was not appropriate for the prior 2009-10 school year. The district requests an order dismissing the parent's appeal and granting the district's cross-appeal.

The parent submitted an answer to the district's cross-appeal in which she responds to the allegations raised by the district, and again requests an order reversing the portion of the impartial hearing officer's decision that denied her request for tuition reimbursement for the 2010-11 school year, in addition to requesting that the district's cross-appeal be dismissed.

### **Applicable Standards**

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## Discussion

### 2009-10 School Year

#### August 2009 IEP

As more fully described below, the hearing record supports the impartial hearing officer's determination that significant planning was conducted when formulating the CSE's recommendations for the student for the 2009-10 school year (IHO Decision at p. 11). However, contrary to the impartial hearing officer's conclusion that the district failed to offer the student a FAPE, I am not persuaded that the student's August 2009 IEP was not reasonably calculated to enable the student to receive educational benefits (id.).

The hearing record shows that the CSE met on August 20, 2009 for the student's annual program review and to develop the student's IEP for the 2009-10 school year (Dist. Exs. 7 at p. 1; 9 at p. 1). Meeting attendees included the district's director of special education, school psychologist, two special education teachers, a regular education teacher, a reading teacher, and the speech-language pathologist (Dist. Ex. 7 at p. 5; see Dist. Ex. 8 at pp. 1-2; 9 at pp. 1-29). An additional parent member and the parent were also in attendance (id.). The director of the middle school at Gow participated in the CSE meeting telephonically (Dist. Exs. 7 at p. 5; 9 at p. 1). Evaluative information available to the CSE, as noted on the August 2009 IEP, included a March 2006 psychological evaluation report,<sup>5</sup> a March 2006 classroom observation report,<sup>6</sup> a May 2005 physical examination report, and a February 2005 speech-language evaluation report (Dist. Exs. 7 at p. 5; 38; 39 at pp. 1-2).<sup>7</sup> In addition to the information contained in the evaluations reviewed by the CSE, the resultant August 2009 IEP reflected results of evaluations administered throughout 2006 assessing the student's speech-language and auditory processing skills (Dist. Ex. 7 at p. 4). During the August 2009 CSE meeting, the student's former district teachers and the Gow middle school director also provided the CSE with verbal reports and participated in the discussion about the student (Dist. Ex. 9 at pp. 1-29).

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<sup>5</sup> The March 2006 three-year reevaluation conducted by a district school psychologist indicated that cognitive testing was not conducted at that time because formal testing in November 2004 using the Wechsler Intelligence for Children, Third Edition (WISC-III) yielded a full scale and a verbal IQ in the average range and a performance IQ in the low average range (Dist. Ex. 39 at p. 1). The evaluator reported that formal academic testing of the student yielded a reading composite score in the low average range with "borderline" achievement in decoding, and a math reasoning score in the superior range (id. at p. 2).

<sup>6</sup> The March 2006 classroom observation report indicated that during fourth grade science instruction, the student paid attention throughout the lesson, raised his hand to volunteer and share answers when he was sure of himself, and stayed on task and followed directions during the lesson (Dist. Ex. 38).

<sup>7</sup> The February 2005 speech-language evaluation report indicated that the speech-language evaluation was conducted after the evaluator received a copy of a private neuropsychological evaluation that described the student's memory for spoken words to be "poor," his expressive language as "weak," and his receptive language as "normal" (Dist. Ex. 40 at p. 1; see Dist. Ex. 41 at pp. 1-4). Testing on February 28, 2005, further assessed language and memory for auditorily presented information (Dist. Ex. 40 at p. 1). According to the evaluation report the student achieved mildly delayed scores on testing that focused on sentence combining and word ordering (id. at p. 2). The evaluator indicated that such delays appeared to be related to the student's difficulties with memory and his ability to manipulate words within sentences (id.). Formal testing involving phonemic synthesis yielded results above the "normal range" for his grade level (id.). The evaluator noted that the student was able to listen to auditory information and a paragraph, and answer questions about the information at an age appropriate level (id.).



Consistent with the evaluative information available to the CSE, the August 2009 IEP reflected that the student's dyslexia affected his ability to independently progress toward State learning standards and that the student had significant delays in decoding, reading comprehension, and math concepts; all of which affected his academic performance (Dist. Ex. 7 at p. 3). Regarding the student's academic achievements, functional performance and learning characteristics, the August 2009 IEP indicated that the student was a hard-working student with dyslexia who consistently completed work in and out of class (id. at p. 4). The IEP also reflected the student had a "good attitude" about school and learning, even when things were challenging for him (id.). In reading and language arts, the IEP noted that although the student struggled with decoding, spelling, and comprehension, he used comprehension strategies well and when a story or passage was read to him, the student could answer questions that asked him to recall details (id.). Additionally, the IEP noted the student did well in math and, although he exhibited difficulty with memorization of multiplication facts and reading math problems, he excelled in the concepts and demonstrated the ability to learn, apply, and retain math knowledge (id.). The IEP noted that the student required teacher support in science and social studies to make sure he copied notes accurately, as copying notes could be a tedious process for him (id.). The IEP described the student as honest, hard working, and willing to participate in class on a regular basis, and stated that he received "excellent support from home" (id.).

Regarding the student's speech-language achievement and performance, the August 2009 IEP reflected the student continued to use the Lindamood Phoneme Sequencing Program to address decoding (Dist. Ex. 7 at p. 4). The IEP further reflected that the student required reminders to apply learned decoding rules when he was reading, and that he had significantly improved his ability to follow orally presented directions during speech-language therapy class (id.). According to the IEP, the student continued to have difficulty differentiating subtle changes in language structure, and hesitated at times to request assistance when hearing or reading an unfamiliar vocabulary word during speech-language therapy class (id.).

Socially, the student was described in the August 2009 IEP as being polite to adults and peers (Dist. Ex. 7 at p. 5). The August 2009 IEP noted that the student participated regularly in class discussions and described him as being honest and trustworthy (id.). Physically, the student was able to participate in regular physical education with his peers and was characterized as a healthy student who led an active lifestyle and participated in sports (id.).

In consideration of the student's present levels of performance as discussed above, the August 2009 CSE accurately identified the student's needs (Dist. Ex. 7 at pp. 4-5). Additionally, I note that the parent did not dispute the accuracy of the district's assessment of the student's deficits (see Parent Ex. A). The CSE determined that the student needed to have continuous support throughout his academic day with reading, word attack skills, editing, and decoding; that he needed time to figure words out when reading as he tended to rush; and that he needed to continue to develop his word recognition skills and to continue to read and increase his reading level (id. at p. 4). Regarding the student's speech-language needs, the IEP reflected that the student needed to continue to develop phonemic awareness and language comprehension abilities, as well as to independently request/obtain assistance when encountering unfamiliar vocabulary (id.). The IEP indicated the student had no social or physical needs at that time (id. at p. 5).

Regarding the student's management needs, the August 2009 IEP reflected that he needed teacher support in the classroom in order to succeed (Dist. Ex. 7 at p. 5). The IEP noted that due to the student's dyslexia, he sometimes made spelling mistakes when copying notes from the board or from overheads and that he needed his notes to be checked for accuracy (id.). The IEP also

noted that the student tended to ask that directions or schedule changes be repeated because he had difficulty remembering a list of directions, and he needed assistance ensuring assignments were spelled correctly and written legibly in his academic planner (id.). The IEP reflected that the student was exempt from the language other than English requirement because his disability adversely affected his ability to learn another language (Dist. Exs. 7 at p. 3; 53). He was identified as working toward earning a Regents diploma in June 2014 (Dist. Ex. 7 at p. 3).

The August 2009 CSE developed objective and measurable annual goals that addressed the student's academic and speech-language needs, and that targeted the areas of study skills, reading, speech-language, and math (Dist. Ex. 7 at pp. 6-7). Annual goals focused on improving the student's ability to accurately and legibly track long and short-term assignments in a school planner or assignment book; to orally identify the rules for word attack skills regarding consonant blends or digraphs when given a reading passage, and to pronounce the consonant blends or digraphs and read the words in the passage; to identify contextual clues and predict definitions of the vocabulary words when given five unfamiliar vocabulary words from a story; to answer five "wh" questions related to the read story upon listening to a teacher read a story; to identify which operation to use and correctly solve the problem when presented with word problems or equations; to complete the components of the published phonological program used by the district at that time or another phonological processing program; and to improve comprehension by identifying subtle changes in language structures (drove versus was driven by) and requesting and/or independently obtaining assistance when encountering an unfamiliar vocabulary word (id.).

With regard to special education services, the August 2009 CSE recommended that the student be placed in a general education program with consultant teacher services provided daily for English language arts (ELA), math, science, and social studies, and receive an individual speech-language consultation for two hours weekly in the general education environment (Dist. Ex. 7 at p. 1). The August 2009 IEP reflected that the student would receive daily academic support in all content areas, and reading in a small group setting (id. at p. 2). As reflected in an "LRE Determination" form attached to the August 2009 IEP, the CSE reviewed the continuum of available placements and determined that student's academic functioning, auditory processing deficits, and speech-language needs required the support of consultant teacher services in a general education setting, which was the student's LRE (id. at p. 8; see 8 NYCRR 200.6).

The student's August 2009 IEP included multiple program modifications, accommodations, and supplementary aids and services that were to be delivered daily throughout the school day both in and outside of the general education environment including that written work may be printed; provision of printed handwritten or typed copies of class notes; copies of all PowerPoint presentations; copies of all overheads; copies of review sheet answers prior to tests to assist with at-home study; access to a calculator; preferential seating; and that the student's "agenda book" would be checked daily for accuracy (Dist. Ex. 7 at p. 2). The CSE also recommended assistive technology for the student including access to a computer and use of Kurzweil 3000, a computer-based program to assist with reading, writing and word prediction, in school and at home (id.). The August 2009 IEP further reflected that the CSE recommended training specific to Kurzweil 3000 and provision of information regarding dyslexia to school personnel working with the student (id.).

The August 2009 CSE also recommended multiple testing accommodations for the student including test directions and questions read, a separate location, extended time (2x), directions repeated, clarification of directions, and grammar and spelling requirements waived (Dist. Ex. 7 at p. 3).

## **Small Group Instruction**

The impartial hearing officer determined that even though the student would have been able to function with consultant teacher support and the various modifications and accommodations described in the August 2009, he continued to need "some level of small group special education instruction in a separate location in order to address his reading and writing deficits" (IHO Decision at p. 11). She also found that the August 2009 IEP provided that the student would receive academic support for all four content areas and reading everyday in a small group setting, but did not include small group instruction outside the general education setting as part of his special education program (*id.*). During the August 2009 CSE meeting, the director of special education explained to all CSE participants that the student's reading needs in phonemic awareness would be identified on the IEP, as would his recommended special education services; that the student would receive reading instruction in small group academic support time; and that academic instructional support (AIS) would be noted on the IEP, but the specifics of such instruction would not appear on the student's IEP under "program and services" because it was a general education service available to both disabled and nondisabled students (Tr. p. 110; Dist. Ex. 9 at pp. 13, 17-18).

The transcription of the August 2009 CSE meeting and testimony by the district's director of special education reflected that the recommendation for a consultant teacher in all four content areas of ELA, math, science, and social studies consisted of two teachers who would co-teach the student all day in each area (Tr. pp. 107-08; Dist. Ex. 9 at pp. 27-28). The district's director of special education testified that the recommended program was designed to allow the student to be in the mainstream environment, which was a less restrictive environment than a self-contained class, but provide the student with the support of the special education teacher (Tr. p. 108). She testified that based on the student's success in his previous programs, the CSE believed that the student was ready to try a consultant teacher model (Tr. p. 109). The director of special education specified that the student would have continued to receive academic support in all four content areas and reading instruction to increase his reading and to provide literacy support in the recommended program (Tr. p. 110). According to the transcript, she stated at the August 2009 CSE meeting that if the district determined that the student needed 1:1 reading instruction, it would look to schedule him with the AIS teacher, who was also a special education teacher by training (Dist. Ex. 9 at p. 28). Additionally, I note that the extensive variety of modifications, accommodations, and supports included in the August 2009 IEP, in conjunction with the special education consultant teacher, were appropriately designed to enable the student to access the curriculum by addressing his needs and helping him compensate for his academic deficits.<sup>8</sup>

## **Speech-Language Services**

The hearing record reflects that the August 2009 CSE recommended a change from the student's 2008-09 IEP's recommended speech-language services consisting of two small group 30-minute sessions outside the general education setting per week to two hours of individual indirect

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<sup>8</sup> Although the August 20, 2009 CSE meeting transcript noted that the student "struggled a bit" in a larger group, it also noted that the student wanted to fit in and be done with tasks when the other students were done (Tr. pp. 193-94; Dist. Ex. 9 at p. 8). Testimony by the district's director of special education reflected that there was no recommendation for the student to be in a small group, that the student had the opportunity to be pulled into smaller groups as necessary, and that the student did not need small group instruction all day long (Tr. p. 194). The director of special education indicated that small special classes (6:1 or 8:1) were not recommended for the student, and that such classes were not designed to meet this student's needs (Tr. p. 195).

consultation services per week in the general education setting for the 2009-10 school year (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 12 at p. 1). The impartial hearing officer determined that this change "was not warranted and constituted a reduction in services" that decreased the likelihood of the student making meaningful educational progress (IHO Decision at pp. 11-12). She also determined that the two speech-language goals included in the August 2009 IEP were "not the type of goals that could be met, or addressed, by the consultant teachers in the four content area classes" (id. at p. 12).

After a thorough review of the hearing record, I disagree with the impartial hearing officer and find that the evidence does not support her conclusion. Although the August 2009 CSE recommended a less restrictive manner of delivery of speech-language therapy than it did for the 2008-09 school year, its recommendation for indirect speech-language consultation services for the 2009-10 school year expanded the reach of the related service from the therapy room to the student's teachers in his classroom settings, and was consistent with the student's academic and management needs as described in his August 2009 IEP (Dist. Ex. 7 at pp. 4-5). A review of the August 2009 IEP reveals that the speech-language therapy goals included in the IEP supported the student's phonological processing and comprehension needs by identifying subtle changes in language structures (drove versus was driven by) and requesting and/or independently obtaining assistance when encountering an unfamiliar vocabulary word (Tr. pp. 113-14; Dist. Ex. 7 at p. 7). The hearing record reflects the student needed to develop his ability to independently apply phonological rules within the context of academic subjects (Tr. pp. 304-06). A review of the hearing record further indicates that speech-language therapy services delivered to the student through indirect consultation by the speech-language pathologist were designed to afford the student a greater opportunity for teachers to be on the "same page" in order for the student to receive consistent instruction across subjects (see Tr. pp. 304-06). Based on the foregoing, I find that the recommended speech-language services in the August 2009 IEP were appropriate to meet the student's needs.

### **Goals**

With regard to the annual goals included in the August 2009 IEP and in view of the student's present levels of performance, I am persuaded that the goals were aligned with the student's needs and specifically addressed study skills and reading, his primary areas of difficulty (Dist. Ex. 7 at pp. 4-7). I am also persuaded that the student's goals were objective and measurable (id. at pp. 6-7). The goals targeted the student's needs related to legibly tracking his assignments in a school planner or assignment book; orally identifying and implementing phonological rules when reading a passage; identifying contextual clues and predicting definitions of vocabulary word; answering five "wh" questions related to a story read aloud by the teacher; phonological processing; improving comprehension skills by identifying subtle changes in language structures and requesting or independently obtaining assistance when encountering an unfamiliar vocabulary word; and identifying which mathematical operation to use when presented with word problems and correctly solving the problem (id. at pp. 4-7). The district's director of special education testified that while some of the goals were similar to goals included in the student's previous IEPs, the goals in the August 2009 IEP increased the level of reading difficulty in which the student would demonstrate the goal appropriate to grade level expectations and in relation to the information the CSE had about the student (Tr. pp. 113-118; compare Dist. Ex. 7 at p. 6, with Dist. Ex. 15 at p. 6; see Dist. Ex. 15 at p. 3). For example, regarding the goal that addressed word attack skills, the August 2009 IEP increased in intensity from the 2007-08 IEP goal specific to the student's word attack skills from reading words to reading passages (id.). Furthermore, in addition to the goals, the August 2009 IEP included multiple modifications, accommodations, and

supplementary aids and services that addressed the student's needs (Dist. Ex. 7 at pp. 2-3). Based on the foregoing, I find that the goals contained in the student's August 2009 IEP were appropriate for the student based on his identified needs and present levels of performance.

In light of the evidence above in regard to the August 2009 IEP, I find that the district offered the student a FAPE and designed an IEP that was reasonably calculated to enable the student to receive educational benefits in the LRE for the 2009-10 school year.

## **2010-11 School Year**

### **IEP Development**

The CSE met on February 25, 2010 for the student's reevaluation, annual review and to develop his IEP for the 2010-11 school year, when he would begin high school as a ninth grade student (Dist. Ex. 4 at p. 1). Meeting attendees included the district's director of special education, the school psychologist, a special education teacher, a general education teacher, a school counselor, a reading specialist, an additional parent member, two "Education Advocate[s]", and the parent (Dist. Exs. 4 at p. 5; 6 at p. 1). The director of the middle school at Gow participated telephonically (*id.*). In addition to the evaluative data that was available to the August 2009 CSE, the February 2010 CSE utilized the student's January 2010 psychological evaluation report, input from the middle school director at Gow, a district reading specialist, and a district high school counselor (Dist. Exs. 4 at p. 5; 6 at pp. 1-22; *see* Dist. Ex. 28 at pp. 1-3). The recommendations made by the February 2010 CSE were similar to the recommendations made by the August 2009 CSE, except that the CSE added to the IEP recommendations for resource room (5:1) for 40 minutes five times per week and a laptop computer for the student to use the Kurzweil 3000 program when necessary at school and at home to assist with reading, writing, and word prediction (*compare* Dist. Ex. 4 at pp. 1-5, *with* Dist. Ex. 7 at pp. 1-5). Additionally, the February 2010 CSE removed indirect consultant speech-language therapy as a related service for the student for the 2010-11 school year (Tr. p. 122; *see* Dist. Ex. 4 at p. 1). For the reasons discussed below, I agree with the impartial hearing officer's determination that the district offered the student a FAPE for the 2010-11 school year.

### **Assistive Technology**

As noted above, the parent alleges that the impartial hearing officer incorrectly assumed that the technological supports offered in the February 2010 IEP would provide the student with a level of support that was equivalent to the supports the student was receiving at Gow, and that the inclusion of Kurzweil technology as a support in the student's February 2010 IEP did not mean that the district was in a position to use that technology as a support in the same way that it was assisting the student at Gow. In essence, these allegations raise the question of whether the district would have appropriately implemented the student's February 2010 IEP; however, the district was not required to establish that it implemented the student's IEP because the parent did not enroll the student in the recommended program at the district's school for the 2010-11 school year. A district must have an IEP in effect at the beginning of each school year for each student with a disability in its jurisdiction (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; *Cerra*, 427 F.3d at 194; *Tarlowe*, 2008 WL 2736027, at \*6; *Application of the Bd. of Educ.*, Appeal No. 10-006; *Application of a Student with a Disability*, Appeal No. 09-111; *Application of a Student with a Disability*, Appeal No. 08-157; *Application of a Student with a Disability*, Appeal No. 08-088). An IEP is required to be implemented if the student is enrolled in a district's recommended placement (*see generally Application of a Student with a Disability*, Appeal No. 08-005;

Application of a Child with a Disability, Appeal No. 07-043). Upon review of a claim that a district has failed to implement a student's IEP under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007). It has been held that a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at \*3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). (10-013). In this case, the district proposed an IEP for the student; however, the district did not have the opportunity to implement the student's IEP as a result of the parent's decision not to enroll the student in the district's school. Nor was the district required to specify in the student's IEP how the student's special education services would be delivered since such matters are left to the discretion of the educators in the student's class who would be charged with the responsibility of putting the IEP into effect (see S.M. v. Hawai'i Dep't of Educ., 2011 WL 1527068, \*6-\*7 [D. Hawai'i Apr. 20, 2011]). Therefore, in this case it would be speculative to determine the degree to which the student may or may not have made educational progress relating to the implementation of the recommended assistive technology had he attended the district's school, even if, assuming for the sake of argument, the district staff would have deviated from the student's IEP (see Application of the Bd. of Educ., Appeal No. 11-005; Application of the Bd. of Educ., Appeal No. 10-104; Application of a Student with a Disability, Appeal No. 10-103). Moreover, I do not find persuasive evidence in the hearing record that the district would have deviated from the student's IEP. The parent's do not argue that the recommendation for the Kurzweil in and of itself would not have met the student's needs. Therefore, I find the parent's argument unpersuasive.

### **Resource Room**

The district's special education director testified that the February 2010 IEP recommended the student receive resource room services upon his entry into the high school (Tr. pp. 121-22). She testified that resource room was more appropriate for the student for the 2010-11 school year because when he entered high school in September 2010, the amount and the pace of the school work would increase from what it had been in the middle school setting (*id.*). She further testified that the resource room recommendation would have provided the student with additional support as he entered the more rigorous high school setting (*id.*). I find that the hearing record reflects that the recommendation for resource room services was appropriately designed to address the student's identified needs for the 2010-11 school year.

### **Speech-Language Therapy**

Regarding the February 2010 CSE's recommendation to discontinue the student's speech-language therapy services for the 2010-11 school year, the district's special education director testified that at the time of the CSE meeting, the speech-language pathologist believed that the

student no longer needed direct speech-language therapy (Tr. p. 122).<sup>9</sup> She further testified that the language-based skills he needed to acquire would have been addressed in the recommended ELA class, resource room, and literacy support class (*id.*). I find the recommendation by the February 2010 CSE was appropriate upon consideration of the student's needs and present levels of performance as reflected in the February 2010 IEP.<sup>10</sup>

### **Goals**

Consistent with the determination of the impartial hearing officer, I agree that the student's February 2010 IEP contained objective and measurable annual goals that targeted the student's key deficit areas (IHO Decision at p. 14; *see* Dist. Ex. 4 at pp. 6-7). The district's director of special education testified that three reading goals were carried over from the previous year because the CSE felt that based on information available to them at the February 2010 CSE meeting, the areas of word attack skills, vocabulary, and ability to answer "wh" questions were still areas of need specific to reading; that upon review the CSE recommended modification of the evaluation criteria for the goals and the evaluation/monitoring schedule whereby the CSE would reconvene sooner than usual (every two to four weeks as opposed to every ten weeks) to review the student's progress toward achieving the goals; and that the CSE would amend the goals if necessary (Tr. pp. 124-27; Dist. Ex. 4 at p. 6). The district's director of special education noted that the addition of the resource room, along with literary support time, would support the student in working toward achieving the goals sooner (Tr. pp. 125-27). She testified that the recommended resource room would provide for more individualization for the student in high school than if he remained in the 15:1 academic support setting that he had been in during the prior school year and that the CSE's recommendation for a laptop computer increased the student's opportunity to achieve his goals because he would have the assistive technology at all times (Tr. pp. 125-26). She testified that additionally, accommodations would be available to the student in all of his academic settings, including resource room (Tr. p. 127).

Based on the foregoing, I find that the recommendations in the February 2010 IEP were reasonably calculated to enable the student to receive educational benefits and that the impartial hearing officer properly determined that the district offered the student a FAPE for the 2010-11 school year.

### **Conclusion**

As discussed above, I find that the district offered the student a FAPE for the 2009-10 and 2010-11 school years. I have considered the parties' remaining contentions, including whether Gow was an appropriate placement for the student in the 2009-10 school year, and find them unnecessary to address in light of my determinations herein (*M.C. v. Voluntown*, 226 F.3d 60, 66 [2d Cir. 2000]; *Walczak*, 142 F.3d at 134; *Application of the Bd. of Educ.*, Appeal No. 11-040).

### **THE APPEAL IS DISMISSED.**

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<sup>9</sup> Although not directly relevant to the timeframe during which the February 2010 IEP was developed, the hearing record shows that the student did not receive speech-language therapy at Gow for the 2010-11 school year (Dist. Ex. 6 at p. 12).

<sup>10</sup> Additionally, I note that the district's special education director testified that the high school staff who would have worked with the student had already been trained in the Kurzweil 3000 program and would have supported the student with such assistive technology in ninth grade (Tr. pp. 122-23).

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portion of the impartial hearing officer's decision, dated April 24, 2011, which determined that the district failed to offer the student a FAPE for the 2009-10 school year and ordered it to reimburse the parent for the cost of the student's tuition at Gow for the 2009-10 school year is hereby annulled.

**Dated:**           **Albany, New York**  
                      **June 30, 2011**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**