



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-077

### **Application of the BOARD OF EDUCATION OF THE HICKSVILLE UNION FREE 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:**

Guercio & Guercio, LLP, attorneys for petitioner, John P. Sheahan, Esq., of counsel

Pamela Anne Tucker, PC, attorneys for respondents, Pamela Anne Tucker, 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 the costs of their son's attendance at the Lindamood-Bell Learning Processes Center (Lindamood-Bell) for a portion of the 2009-10 school year and at the Summit School (Summit) for the 2010-11 school year. The appeal must be sustained.

#### **Background**

At the time of the impartial hearing, the student had been parentally placed at Summit (Tr. pp. 1167-68), which has been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; see also Tr. pp. 1275, 1278). The student's eligibility for special education services as a student with an other health impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

A subcommittee of the Committee on Special Education (CSE) convened on May 19, 2009 for the student's annual review and to develop his individualized education program (IEP) for the 2009-10 school year (Parent Ex. X at p. 1). The May 2009 CSE subcommittee determined that the student was eligible for special education programs and services as a student with an other health impairment (id. at pp. 1-2). The May 2009 CSE subcommittee recommended that the student

attend the district's middle school in 12:1 collaborative classes<sup>1</sup> for English language arts (ELA), math, science, social studies, and skills, each class for 40 minutes five times per week (*id.* at p. 1). The CSE subcommittee also recommended related services of a 1:1 "assistant teacher" in the student's core academic subject areas for four hours per day five times per week, and small group (5:1) counseling for 30 minutes one time per week (*id.* at pp. 1-2). The May 2009 CSE subcommittee recommended that the student receive program modifications, accommodations, and supplementary aids and services; including additional time to complete tasks, refocusing and redirection, reteaching of material, preferential seating near the teacher, copies of class notes, an additional set of books to be kept at home, and reduced homework assignments (Parent Ex. X at p. 2). Recommended testing accommodations were for extended time (2.5); directions explained with simplified language; minimal directions; use of a scribe for essays and "scantrons;" oral comprehension questions read two times more than the standard time; frequent breaks when needed to release his tics in another environment; and except when prohibited, directions read; tests administered in a small group and read in a separate location; spelling requirements waived; and the use of a calculator (*id.* at p. 3). In addition, according to the hearing record, the student received individualized multisensory reading instruction every other day at the start of the 2009-10 school year (Tr. pp. 138, 369, 381, 846, 1115, 1179, 1555).

A private neuropsychological evaluation obtained by the parents was conducted over three days in August and September 2009, prior to the student entering eighth grade (Tr. pp. 100, 307, 609, 1115; Dist. Ex. 28 at pp. 1-11).<sup>2</sup> The resultant neuropsychological evaluation report indicated that the student had been offered diagnoses of Tourette's "syndrome," co-morbid obsessive compulsive disorder (OCD) and attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD) with episodes of anger and rage at home, and school avoidance (Dist Ex. 28 at pp. 1, 6). The evaluation report noted that the student's medical history included use of several medications in an attempt to address various symptoms related to tics, anger, and

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<sup>1</sup> It is apparent from the hearing record that what the parties and the impartial hearing officer use the term "collaborative class" to mean an integrated co-teaching class, also known as collaborative team teaching (CTT) class (*see* Tr. pp. 68-69, 486-93). State regulation defines "integrated co-teaching" as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). Furthermore, school personnel assigned to an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (now the Office of Special Education) issued a guidance document in April 2008 entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (*see* <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). For purposes of this decision, I will refer to this type of class as a CTT class.

<sup>2</sup> The hearing record contains multiple 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 hearing officer that it is his obligation to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (*see* 8 NYCRR 200.5[j][3][xii][c]), notwithstanding that "it's just easier to live with the duplication" (Tr. p. 6). Nothing in the IDEA or State regulations would preclude an impartial hearing officer from issuing a reasonable directive to the parties to identify and remove the duplicative exhibits, especially since State regulations contemplate that the parties will disclose such evidence at least five days prior to convening the impartial hearing (8 NYCRR 200.5[j][3][xii]).

obsessive/compulsive symptoms (id.). The student's history included ongoing psychiatric and psychological treatment (id. at p. 6).

According to the neuropsychological evaluation report, administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a Full Scale score (SS) (scale score/percentile rank) of 99 (47th percentile) and General Abilities Index SS of 108 (70th percentile), both in the average range; a verbal comprehension index SS of 100 (50th percentile) in the average range; a perceptual reasoning index SS of 115 (84th percentile) in the bright average range; and a working memory index SS of 83 (13th percentile) and a processing speed index SS of 88 (21st percentile), both scores in the low average range (Dist. Ex. 28 at pp. 3, 8).

Assessment of the student's academic skills via administration of a variety of formal and informal testing revealed that the student's word recognition was at a beginning second grade level; his phonetic decoding skills was at an early second grade level; his reading fluency was at an early first grade level; and reading accuracy in context was at an early second grade level (Dist. Ex. 28 at p. 5). Because the student's reading fluency and accuracy in context scores were so low, assessment of his reading comprehension was rendered "virtually impossible" (id.). The neuropsychological evaluation report reflected that the student understood material that he was able to read at an early third grade level during a multiple choice task, but displayed ability at the upper first grade level on a closure task where he had more difficulty gaining understanding because of his inaccurate reading (id.). Spelling skills tested in isolation were noted to be at an early first grade level (id.). The student performed at an early fourth grade level on an open ended writing task (id.). Subtests that examined spelling and mechanics of writing (structure, punctuation, and capitalization), resulted in scores below the second grade basal of the test administered (id.). Assessment of math computation skills revealed the student's difficulty with all mathematical operations and with problem solving (id.).

According to the private neuropsychologist who conducted the evaluation, the student presented as friendly and "chatty," but "markedly immature" (Dist. Ex. 28 at p. 6). The evaluator described the student as having normal intelligence, with attention problems and obsessive/compulsive features that were "readily apparent" during the evaluation (id.). The evaluator indicated that vocal and motor tics were "more notable during academic tasks" (id.). The student demonstrated difficulties with attention and executive function skills involving time management, cognitive flexibility, planning and organizational skills, and working memory (id.). The student also demonstrated difficulty with fine motor and visuomotor skills (id.). The evaluator described the student as having "significant" difficulty with complex syntactic formulation, language pragmatics, semantic understanding, and meta-linguistic understanding (id.). In addition, although the evaluator described the student's difficulties with phonological awareness as "variable," he indicated that "conspicuous" problems were noted with the student's auditory processing skills related to dichotic listening, figure ground perception, and speech and noise perception (id.). The evaluator indicated that the student's difficulties using language pragmatically were accompanied by social pragmatic awkwardness and with difficulty perceiving things from another person's perspective ("Theory of Mind") in the absence of verbal cues (id. at pp. 5-6). The evaluator reported that the student had severe learning problems across all basic skill areas (id. at p. 6). The evaluator characterized the student as "significantly dyslexic," and as having difficulties in reading fluency and decoding, spelling and the mechanics of writing, and in math (id.). Overall, the evaluator reported that given the findings of the neuropsychological

evaluation, it appeared the student had a multidimensional neurodevelopmental problem, which affected his behavior and cognition (id.). Furthermore, the evaluator noted that the student appeared to "fit on the mild end" of the pervasive developmental disorder (PDD) spectrum, with features of Asperger's disorder (id.).

The private neuropsychologist further indicated that, given the severity of the student's learning problems, it appeared he was not progressing educationally despite the programs, services, and accommodations he received in school (Dist. Ex. 28 at p. 7). The neuropsychologist recommended that in light of the student's lack of educational progress in conjunction with his increasing school avoidance, an alternative program geared toward students with learning and behavioral difficulties similar to those that the student exhibited should be sought (id.). He recommended that the alternative program should be designed for students of normal intelligence; provide small group instruction, structure and adaptability, and offer an environment where the student could feel safe and not threatened by social or academic demands; have a strong behavioral component but not be directed toward students who act out; and be staffed by individuals who were familiar with PDD (id.).

The evaluator further recommended that the alternative program for the student offer a strong educational component that included individualized instruction in basic skill areas and "an appropriate intensive, multi-sensory approach to reading decoding and fluency" (Dist. Ex. 28 at p. 7). In addition, the evaluator recommended that the alternative program offer direct language services and modifications to address the student's various language needs, as well as accommodations relative to the student's current academic skills, behavioral and temperamental characteristics, and attention problems (id.). The evaluator indicated that in the interim, and in consideration of the student's school avoidance, the student might require additional accommodations in school, such as an abbreviated day, increased individualized attention and emotional support, adaptation of material to his skill level, and remediation, to be provided in such a manner so as not to cause the student to feel threatened or overwhelmed (id.).

In or about late September or early October 2009, the parents provided the district with a copy of the private neuropsychological evaluation report and requested that the CSE reconvene (Tr. pp. 307-08, 350, 954, 1117). In response to the parents' request for a meeting, the CSE convened on October 27, 2009, to review the results of the private neuropsychological evaluation, and to review current information provided by the student's teachers (Tr. pp. 307-08, 310, 954; Dist. Ex. 8 at p. 1).<sup>3</sup> In addition to the parents, who attended the October 2009 CSE in person, the private neuropsychologist and the student's private psychologist participated in the CSE meeting via telephone (Tr. pp. 308-09; Dist. Ex. 8 at p. 5). The hearing record reflects that the private neuropsychologist reviewed the student's evaluation results, behavioral concerns, academic concerns, and speech-language concerns, and recommended an intensive multisensory reading program (Tr. pp. 308-09, 342-43, 349-50, 1391). In addition, the student's private psychologist

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<sup>3</sup> In addition to the private neuropsychological evaluation report, the October 2009 CSE reviewed an October 16, 2009 medical summary report (Dist. Ex. 24); an October 19, 2009 updated developmental and social history questionnaire (Dist. Ex. 23); and individual reports dated between October 14-16, 2009 from the student's special education, skills, ELA, math, science, academic intervention services (AIS), reading lab, computer skills, physical education, and speech-language therapy teachers and providers (Tr. p. 312; Dist. Ex. 22 at pp. 9-20; see Parent Ex. Q at pp. 1-35).

discussed the parents' concerns related to the student's school avoidance and work completion habits at home (Tr. p. 309). After reviewing the private neuropsychological evaluation, the October 2009 CSE added four speech-language goals to the October 2009 IEP that targeted vocabulary and word retrieval strategies, and use of the aforementioned vocabulary and word retrieval strategies in pragmatic communication situations (Tr. pp. 310, 352-53; Dist. Ex. 8 at p. 8). In addition, the CSE added books on compact discs as an assistive technology support for the student (Dist. Ex. 8 at p. 2). The October 2009 CSE also recommended to "move up" the student's triennial reevaluation, and to include in that reevaluation an educational evaluation, a speech-language evaluation, a functional behavioral assessment (FBA), and an assistive technology evaluation (Tr. pp. 310-11, 353).<sup>4</sup>

The hearing record reflects that following the recommendation of the October 2009 CSE to reevaluate the student, the district conducted a speech-language evaluation, an assistive technology evaluation, an educational evaluation, classroom observations, and an FBA; as well as compiled teacher progress reports, and developed a behavioral intervention plan (BIP) between October 2009 and February 2010 (Tr. pp. 310-12; Dist. Exs. 11 at pp. 1-2; 12 at pp. 1-8; 14 at pp. 1-4; 15 at pp. 1-10; 17 at pp. 1-4; 18 at pp. 1-7; 20 at pp. 1-10; 21 at pp. 1-8; 22 at pp. 1-8).

Thereafter, the subcommittee of the CSE convened on March 1, 2010 to review the student's program (Dist. Ex. 6). Attendees at the March 2010 subcommittee meeting included the private neuropsychologist (*id.* at p. 6). The resultant IEP included standardized test results reflected in the November 2009 speech-language evaluation report and the November 2009 educational evaluation report, in addition to evaluative information included in the student's October 2009 IEP (Dist. Exs. 6 at pp. 4-5; 8 at pp. 4-6). The CSE subcommittee meeting minutes indicated that the March 2010 CSE subcommittee "extensively reviewed" an assistive technology evaluation, an educational evaluation, and an FBA (Dist. Ex. 7). The March 2010 CSE subcommittee meeting minutes also indicated that the student displayed strengths in his average cognitive ability, listening comprehension ability, performance tasks, science, and math, and that he was an auditory learner (*id.*). Consistent with the March 2010 IEP, the CSE subcommittee meeting minutes noted that the student's difficulties in reading decoding, reading comprehension, written expression, and attention affected his progress in age appropriate activities in the general education curriculum (Dist. Exs. 6 at p. 3; 7). In addition, CSE subcommittee meeting minutes noted that the committee reviewed the student's progress in his reading class, in the general education curriculum, and in electives, whereby it was determined that the student was making progress (Dist. Ex. 7).<sup>5</sup>

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<sup>4</sup> The hearing record reflects that the student's previous "baseline" in regard to reading evaluation data was dated March 2007 (Tr. pp. 369-70; Dist. Ex. 8 at p. 4). Accordingly it appears that the student's updated triennial reevaluation was not due until March 2010 (see 8 NYCRR 200.4[b][4]).

<sup>5</sup> The hearing record reflects that at the March 2010 CSE meeting, the student's reading specialist discussed the student's progress as a result of instruction in the multisensory reading program (Tr. p. 320). According to testimony by the district's director of curriculum, instruction, and assessment (the director of curriculum), when the student began his multisensory reading program with the reading specialist in sixth grade, he was at step 1.3 (Tr. pp. 142-43). The director of curriculum testified that the particular multisensory reading program used with the student was cumulative and progressed in difficulty (Tr. pp. 144-45). Sometime after January 2010, the student was working at step six (Tr. p. 145). In addition, the director of curriculum and the assistant director each reported that the March 2010 CSE reviewed the results of a local assessment that the district used to assess

The CSE subcommittee meeting minutes revealed that the parents expressed their concern about the student's self-esteem and his reading and writing abilities, as well as his difficulty attending his first period class on time (Dist. Ex. 7). The CSE subcommittee meeting minutes noted that socially, the student participated in intramurals and enjoyed socialization (id.). In addition to the recommendations noted on the October 2009 IEP, the March 2010 CSE subcommittee recommended the addition of resource room to further remediate the student's reading and writing abilities, a BIP to address the student's behavioral needs, use of assistive technology whereby the student would access a word processor and software, and parent training (Dist. Exs. 6 at pp. 1-2; 7; 8 at pp. 1-2). Review of the March 2010 IEP also reveals that the CSE subcommittee added new goals and changed some of the student's existing goals (compare Dist. Ex. 6 at pp. 7-11, with Dist. Ex. 8 at pp. 6-9).

According to the March 2010 meeting minutes, the parents agreed with the CSE subcommittee's recommendations except for the addition of resource room (Dist. Ex. 7; see Tr. pp. 396-97).<sup>6</sup> In regard to the student's difficulty arriving to his first period class on time, the CSE subcommittee recommended a schedule change that would move the student's physical education class to first period (Dist. Ex. 7).<sup>7</sup> The CSE subcommittee meeting minutes indicated the parents requested that the district consider an out-of-district placement and/or daily reading (Tr. p. 321; Dist. Ex. 7). In response, the CSE subcommittee agreed to meet for a CSE program review with the parents, their attorney, and the district's attorney (Dist. Ex. 7).

By letter dated March 26, 2010, the parents advised the district of their intent to remove the student from the district's schools and place him for part of the day at Lindamood-Bell "for intensive reading and math instruction," and that the student would be home schooled for the remainder of the day (Dist. Ex. 41).<sup>8</sup> The letter also indicated the parents would seek reimbursement for Lindamood-Bell (id.).

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progress in reading and math, and that the assessment showed that the student was progressing in reading (Tr. pp. 158, 319; Dist. Ex. 30 at pp. 1-2).

<sup>6</sup> According to the assistant director, the district also offered at the March 2010 CSE meeting to increase the student's reading instruction to five days per week (Tr. p. 395); however, this change is not reflected on the March 2010 IEP or in the meeting minutes (see Dist. Exs. 6-7).

<sup>7</sup> Although the meeting minutes indicate that this change was made to the student's IEP, the assistant director testified that the district members of the CSE subcommittee recommended the change, but the parents did not wish to make such a change without the student's input, and that the student "was not open to the schedule change" at that time (Tr. pp. 396-98).

<sup>8</sup> State regulation refers to students who are receiving "home instruction" (8 NYCRR 100.10); however, upon reviewing the hearing record as a whole, I note that the parties, their witnesses, and the impartial hearing officer often used the terms "home instruction" and "home schooling" interchangeably (see, e.g., IHO Decision at p. 15; Tr. pp. 10-11, 19, 21-22, 502-03, 541, 965, 1003-05, 1007-09, 1041, 1044, 1063, 1075-80, 1082, 1094, 1156-57, 1159-60, 1186-87, 1189-90, 1194-95, 1197, 1211, 1217, 1244, 1405-07, 1412, 1426, 1435, 1563, 1567). Although the parties use the terms interchangeably, it is apparent from the hearing record that their dispute focuses on the provision of services to a student who was partially home schooled by the parent (8 NYCRR 100.10), rather than a student who received "home and hospital instruction" while enrolled in a district school (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]) and, therefore, I will use the term home schooling in this decision.

On April 6, 2010, the student participated in pretesting at Lindamood-Bell (Tr. p. 1203; Dist. Ex. 46 at pp. 1-3). On April 8, 2010 the student began attending Lindamood-Bell (Tr. p. 1204). The student was absent from the district's middle school from April 8, 2010 to April 28, 2009, during which time the parents informed the district that the reason for the absences was because the student was sick (Tr. pp. 1013-14, 1154-55, 1198-1200, 1205-06; Dist. Ex. 57).

The CSE reconvened on April 21, 2010 for a program review, to follow up with the recommendations made at the March 2010 CSE subcommittee meeting, to consider the parents' request for an out-of-district placement and a daily reading program, and to consider information that had been developed since the March 2010 meeting (Tr. p. 323; Dist Ex. 5 at p. 1). The hearing record reflects that the April 2010 CSE reviewed the student's progress from his participation in a multisensory reading program with his reading specialist and test data discussed by the director of curriculum, both of which demonstrated that the student had made progress in reading during the time period of fall 2009 to spring 2010 (Tr. pp. 158, 319, 324-25; Dist. Exs. 9; 11 at pp. 1-2). The April 2010 CSE also reviewed and reached a consensus regarding the student's present levels of performance and identification of his strengths and needs, all with input from the parents (Tr. pp. 325-31, 821-22, 1029-30). According to the hearing record, based on the student's needs, the April 2010 CSE revised the student's goals in order to foster the student's independence by weaning him from reliance on his 1:1 assistant teacher, and increase his self-esteem (Tr. pp. 160-62, 325, 328-29, 407-08, 821-23; compare Dist. Ex. 5 at pp. 7-10, with Dist. Ex. 6 at pp. 7-11).

The hearing record reflects that the April 2010 CSE considered and rejected the parents' request for an out-of-district placement for the student because the CSE believed that the least restrictive environment (LRE) for the student was in the district's CTT program, with related services, accommodations, and supports per his IEP, in addition to being provided with multisensory reading instruction on a daily basis (Tr. pp. 331-32, 403-05; Dist Ex. 5 at pp. 1-3, 7). The April 2010 CSE also believed that the student was making meaningful progress in his recommended program based on reports provided to it by the student's reading teacher—who had worked with him for three years—and by the director of curriculum (Tr. pp. 159-60, 202, 366-67, 405-07, 1555; Dist. Exs. 9; 11).<sup>9</sup> In addition, the hearing record reflects the student displayed progress in response to the BIP that had been developed and implemented by the district in February or March 2010 (Tr. pp. 61, 65-66, 459).<sup>10</sup>

By letter to the district's attorney dated April 22, 2010, the parents, through their attorney, requested that in addition to attending Lindamood-Bell, the student be allowed to return to the

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<sup>9</sup> An April 21, 2010 report to the CSE indicated that the multi-sensory reading program provided to the student used "controlled text and multi-sensory techniques to teach students decoding and encoding skills while focusing on accuracy, automaticity, fluency, vocabulary and comprehension" (Dist. Ex. 9). The same report indicated that results of the district's local assessment demonstrated the student's ability to apply concepts learned in his reading program (id.). The director of curriculum, instruction and assessments recommended that the student continued to receive explicit reading instruction through the multi-sensory program on a daily basis (id.).

<sup>10</sup> According to the student's special education teacher, by the time of the April 2010 CSE meeting, the student appeared less anxious, was more compliant and motivated, was less reliant on his teaching assistant, was more available for instruction, had fewer outbursts, was less task avoidant, and was more rational in his thinking (Tr. pp. 827-28, 891-94, 907-910).

district's school for the remainder of the school day or, in the alternative, that the district continue to send work home to the student (Dist. Ex. 40).

On or about April 29, 2010, the parents filed an Individual Home Instruction Plan (IHIP) for the student, with "Lindamood-Bell Learning Processes" listed as the syllabus for English instruction (Dist. Ex. 47 at pp. 1, 5). Also in April or early May 2010, the student was accepted to Summit for the 2010-11 school year (Tr. p. 1285). On May 5, 2010, the parents signed a tuition agreement with Summit and made a deposit toward the student's tuition for the 2010-11 school year (Tr. p. 1255; Parent Ex. CC).

### **Due Process Complaint Notice—2009-10 School Year**

In a due process complaint notice, dated April 29, 2010, the parents requested an impartial hearing and asserted in pertinent part that: (1) at the October 2009 CSE meeting requested by the parents, the district improperly disregarded the private neuropsychological evaluation report and the neuropsychologist's recommendations made both in the evaluation report and at the meeting; (2) at the March 2010 CSE meeting, the district offered a multisensory reading program on alternate days, which had been tried in the past and failed to work; (3) the March 2010 CSE refused to consider out-of-district placements; (4) the student made only minimal progress while attending the district's middle school for three years; (5) the parents provided sufficient notice of their intent to send the student to Lindamood-Bell; and (6) although the April 2010 CSE added goals and daily reading instruction to the student's IEP, it improperly refused to consider an out-of-district placement (Dist. Ex. 4 at pp. 1, 3-4, 5). For relief, the parents sought reimbursement for the costs of the student's attendance at Lindamood-Bell, and that the district be directed to "send packets" regarding the student to "neighboring districts" as well as to private schools (*id.* at p. 5).

On May 13, 2010, the district responded to the parents' due process complaint notice contending, among other things, that it had offered the student a free appropriate public education (FAPE); that the due process complaint notice failed to set forth a claim upon which relief may be granted; that the complaint did not "adequately apprise the [d]istrict of the IEP in question" and did not "sufficiently put the [d]istrict on notice as to which aspects of the recommended programs the [p]arents disagree with and why;" that the due process complaint notice should be dismissed based on the doctrine of laches; that the parents did not cooperate with the district; and that the program chosen by the parents did not provide the student with placement in the LRE and was not appropriate (Dist. Ex. 2).

### **CSE Meeting—2010-2011 School Year**

A CSE subcommittee convened on May 25, 2010 for a reevaluation/annual review and to develop the student's IEP for the 2010-11 school year (Parent Ex. W at p. 1). The CSE subcommittee recommended that the student attend ninth grade in the district high school in regular education CTT classes (12:1) for ELA, math, science, and social studies daily for 40 minutes; a special education CTT class (12:1) for ELA skills, daily for 40 minutes; and a regular education CTT class (12:1) for science lab on alternate days (*id.*). Recommended related services were for a 1:1 assistant teacher for seven hours five times per week, small group counseling (5:1) one time per week for 30 minutes, and 1:1 parent training for one hour per week at home (*id.* at p. 2). The CSE subcommittee continued the student's accommodations, modifications and supports,



with the addition of the recommendation for the "School Support Team" to meet in September 2010 to review the student's BIP, IEP, and goals (id. at pp. 2-3). The May 2010 IEP also reflected the CSE subcommittee's recommendation that per the student's BIP; teachers, assistant teacher, and appropriate staff would be "advised of the nature of the student's disability and management needs" (id. at p. 3). In addition, the May 2010 IEP included a coordinated set of transition activities in an effort to begin planning for the student's transition from school to post school (id. at p. 6). Recommended goals addressed the student's needs in the areas of study skills, reading, writing, social/emotional/behavioral, and motor (id. at pp. 7-9).

According to the student's mother, she informed the May 2010 CSE subcommittee that the parents were sending the student to Summit rather than the district's high school for the 2010-11 school year, and that the parents would be seeking reimbursement for the student's tuition at Summit (Tr. pp. 1167-68). The hearing record reflects that the student continued attending Lindamood-Bell until July 8, 2010 (Tr. p. 235; see Parent Ex. T) and began attending Summit in September 2010 (Parent Ex. DD at p. 1).

### **Impartial Hearing and Due Process Complaint—2010-11 School Year**

An impartial hearing convened on the April 2010 due process complaint notice on July 12, 2010. On the first day of the impartial hearing, the parents withdrew their request that the district seek an out-of-district placement for the student (Tr. pp. 14-16). On July 28, 2010, the parents submitted a second due process complaint notice, reasserting the claims made in the April 2010 due process complaint notice and further asserting that: (1) the May 2010 CSE did not discuss the goals or objectives during the time the student's mother was in attendance; (2) the goals on the May 2010 CSE were the same as the goals for the 2009-10 school year; and (3) the parents gave the district notice that the student would be attending Summit and that the parents would be seeking tuition reimbursement (Parent Ex. V at pp. 1-4). With respect to the 2010-11 school year, the parents sought reimbursement for Summit, related services, and transportation (id. at p. 5).

During the impartial hearing, the claims in the April 2010 and July 2010 due process complaint notices were consolidated (Tr. pp. 420, 472-74). The consolidated impartial hearing concluded on December 8, 2010, after 12 days of proceedings. In a decision dated May 27, 2011, the impartial hearing officer initially determined that the October 2009 IEP was "not in issue;" however, he nevertheless went on to find that the goals in the October 2009 IEP were not measurable because the evaluation criteria were imprecise and did not state specific objectives the student was supposed to achieve (IHO Decision at pp. 6, 7, 13). Because of this, the impartial hearing officer concluded that the October 2009 IEP "violated" the Individuals with Disabilities Education Act (IDEA) (id. at p. 13).

With respect to the March 2010 IEP, the impartial hearing officer noted that it included new reading and writing goals designed to be implemented with assistance from the student's assistant teacher (IHO Decision at p. 13). However, the impartial hearing officer found that it "was never clear how these goals would improve [the student's] decoding and reading comprehension skills" and furthermore, that "the goals lacked clear standards to measure achievement" (id.). As the goals were immeasurable, the impartial hearing officer found the March 2010 IEP to be both procedurally and substantively defective (id. at pp. 13-14). Furthermore, the impartial hearing officer found that the March 2010 IEP failed to offer the student a FAPE because the student had

not made meaningful educational progress in reading, as evidenced by the fact that he made only one grade level of progress in reading between September 2009 and March 2010, in essentially the same placement (*id.* at p. 14). The impartial hearing officer specifically addressed the April 2010 IEP very briefly, noting that by the time it was developed, "the parents were convinced that [the student] was not making any meaningful educational progress in reading" (*id.*). He further found that the parents gave the district notice of their unilateral decision to obtain services for the student at Lindamood-Bell on March 26, 2010 (*id.*).

The impartial hearing officer then found that Lindamood-Bell was appropriate because of the progress the student made in reading (IHO Decision at p. 15). He further concluded that the "quality of [the home schooling] program is not an issue in this hearing as the program was set up and the record reflects that the parents made real efforts to comply with the report[ing] requirements of the home school provisions of the [E]ducation [L]aw" (*id.*). With respect to equitable considerations, the impartial hearing officer found that at least one of the parents attended each of the CSE meetings, the parents made the student available for testing by the district, and they had generally cooperated with the district (*id.* at pp. 15-16). Accordingly, the impartial hearing officer granted the parents reimbursement for tuition and fees associated with the student's attendance at Lindamood-Bell (*id.* at p. 16).

Turning to the parents' request for reimbursement at Summit for the 2010-11 school year, the impartial hearing officer found that the May 2010 IEP was "very similar to the earlier" IEPs, with the same accommodations and recommendation for CTT classes (IHO Decision at pp. 17-18). The impartial hearing officer considered the goals on the May 2010 IEP to be "more specific," but still found them to be "substantively defective" because they did not require the student to make sufficient progress and the evaluation criteria were "a percentage of some unstated norm" (*id.* at p. 18). The impartial hearing officer also found that the parents' unilateral placement of the student at Summit was appropriate because of the student's progress in reading and lack of interfering behaviors (*id.* at p. 20). Finally, the impartial hearing officer found that equitable considerations favored the parents, as they attended CSE meetings and cooperated with the district (*id.* at pp. 20-21).

For the reasons set forth above, the impartial hearing officer ordered the district to reimburse the parents for the costs and tuition associated with the student's attendance at Lindamood-Bell and Summit, and for transportation costs to Summit (IHO Decision at pp. 21-22).

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

The district appeals, contending that the impartial hearing officer erred in granting the parents reimbursement for the student's tuition at Lindamood-Bell and Summit. Specifically, the district asserts that: (1) the impartial hearing officer erred in addressing the measurability of the goals in the relevant IEPs, as the parents did not raise this issue in their due process complaint notices and was therefore beyond the scope of the impartial hearing; (2) the impartial hearing officer correctly found that the October 2009 IEP was not at issue, but then he erroneously proceeded to analyze that IEP; (3) even if it had been proper for the impartial hearing officer to address the adequacy of the goals, the impartial hearing officer erred insofar as the goals on the March, April, and May 2010 IEPs were measurable and appropriate to meet the student's needs; (4) the student made academic progress throughout the 2009-10 school year in the district's school;

(5) the district offered a FAPE to the student for the 2009-10 and 2010-11 school years; (6) the impartial hearing officer erred in not analyzing the appropriateness of the home schooling provided by the parents as part of the student's unilateral placement for the 2009-10 school year; (7) the parents' placement consisting of Lindamood-Bell services and home schooling for the 2009-10 school year was not appropriate; (8) Summit was not an appropriate placement for the 2010-11 school year because it failed to provide the student with a multisensory, sequentially presented reading program, a BIP; and assistive technology, and the student did not make progress while attending Summit; and (9) equitable considerations weighed against the parents as they sent the student to Lindamood-Bell while informing the district that the student was sick and continued to make use of district resources, refused parent training offered by the district, applied to Summit without informing the district, and enrolled the student in Summit without giving proper notice.

The parents answer, admitting and denying the district's allegations in the petition and contending that: (1) they raised the inappropriateness of the goals in their July 2010 due process complaint notice and at the impartial hearing without objection from the district; (2) the student made no meaningful progress in the district's program and the district offered the student "the same program that ha[d] failed for the past three years;" and (3) equitable considerations support their claims for reimbursement as they were under no obligation to inform the district that they were considering private placements, they had sufficient reasons for rejecting the offered parent training, they informed the district that the student would be attending Summit at the May 2010 CSE meeting, and Summit would have refunded their deposit if the district had placed the student there.

### **Applicable Standards**

Two purposes of the 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 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. New York City Bd. 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

### Scope of the Impartial Hearing

Before turning to the merits of the district's appeal, neither party has appealed the impartial hearing officer's determination that the FBA and BIP developed by the district in February 2010 were appropriate for the student (IHO Decision at p. 7). 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]), accordingly, these issues have become final and binding and will not be further addressed in this decision.

With regard to the district's argument that the impartial hearing officer erred in reaching the issue of the adequacy of the goals in the October 2009, March 2010 and May 2010 IEPs, the IDEA and State regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process request unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. § 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3]; 8 NYCRR 200.5[i][7][b]; see M.P.G., 2010 WL 3398256, at \*8; Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at \*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at \*6-7 [D. Hawaii Apr. 30, 2008]; Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 10-070; Application of a Student with a Disability, Appeal No. 09-140). In this case, as noted by the impartial hearing officer, the parents did not seek to amend their due process complaint notice for the 2009-10 school year and the district did not agree to expand the scope of the impartial hearing regarding the 2009-10 school year (IHO Decision at p. 4). Additionally, the district correctly points out that the impartial hearing officer ruled that the October 2009 IEP was not at issue in the hearing, but nevertheless inconsistently ruled that the district violated the IDEA due because the goals in the October 2009 IEP were inadequate (IHO Decision at p. 6, 7, 13). Neither the parents' April or July 2010 due process complaint notice is reasonably read to include in the nature of the problem assertions by the parents that the goals contained in the October 2009, March and May 2010 IEPs were not measurable (see Dist. Ex. 4; Parent Ex. V).<sup>11</sup> The crux of issues raised by the

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<sup>11</sup> Although the parents' July 2010 due process complaint notice alleged that the May 2010 CSE did not review goals or objectives at the meeting during the time that the parent participated by phone and that the goals were continued from prior school years, they did not allege that the goals were not measurable or did not align with the student's needs (Parent Ex. V at p. 4).

parents in their complaints was whether the district disregarded the input of the private neuropsychological evaluator, refused to consider requests to place the student outside the district and insisted that the student was making progress when, in the parents' view, the student had made minimal progress in the district's program (Dist. Ex. 4 at pp. 3-5). Therefore, the impartial hearing officer should not have gone further to resolve the adequacy of the goals in the IEPs as his basis for determining whether the district offered the student a FAPE.<sup>12</sup> Accordingly, the impartial hearing officer's decision regarding the adequacy of the goals contained in the student's October 2009, March 2010 and May 2010 IEPs must be annulled. However, even if these issues had been properly raised, as further described below, the parents' claims would nevertheless fail.

## **2009-10 School Year**

### **March 2010 IEP**

In this case, the parties met four times to consider the student's special education services for the 2009-10 school year and to develop revised IEPs (Parent Ex. X; Dist Exs. 5; 6; 8). Generally, the "relevant IEP for purposes of an award of tuition reimbursement is the IEP which the parents had at the time when they enrolled their child in the private school" (Application of the Bd. of Educ., Appeal No. 06-052; Application of the Bd. of Educ., Appeal No. 05-105; Application of a Child with a Disability, Appeal No. 04-046; Application of the Bd. of Educ., Appeal No. 00-072; Application of the Bd. of Educ., Appeal No. 00-053). This principle is applicable under the circumstances of this case in which the parents are seeking reimbursement for the student's Lindamood Bell Services from April through June 2010. At the time of the parents' March 26, 2010 letter notifying the district of their intent to remove the student from the district and place him part of the day at Lindamood-Bell and provide home school instruction for the rest of the day, the March 1, 2010 IEP was in effect (Dist. Ex. 41). However, the parents' March 26, 2010 letter did not state the date on which the parents intended to effectuate the withdrawal of the student (see id.). Furthermore, the parents called the student in sick every day from April 8 to April 28, 2010 (Dist. Ex. 57; see Tr. pp. 1013-14; 1154-55, 1198-99). In a letter dated April 22, 2010, the parents requested that the student be permitted to attend the district's program for that portion of the school day he was not attending Lindamood-Bell or, in the alternative, that the district continue to send home his school work (Dist. Ex. 40). The hearing record reflects that the district was aware of the

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<sup>12</sup> I also note that the impartial hearing officer denied the reimbursement for the private neuropsychological evaluation they obtained of the student (IHO Decision at pp. 16-17); however it is unclear why the impartial hearing officer raised this issue. The issue was not raised in either of the parents' due process complaint notices (see Dist. Ex. 4; Parent Ex. V), nor did the parents interpose a request for such reimbursement at any time during the impartial hearing or in their posthearing brief (see Tr. pp. 1-1574; Parent Post Hr'g Br. at pp. 1-30). It is essential that an impartial hearing officer disclose his or her intention to reach an issue which the parties have not identified as a matter of basic fairness and due process of law (Application of the Bd. of Educ., Appeal No. 10-073; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104, 07-cv-00641 [W.D. Tex. Oct. 24, 2007]; see also John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). In this instance neither party has appealed the issue; therefore, no relief is necessary. However, I encourage the impartial hearing officer to make use of the pre-hearing conference provisions in State regulations to give the parties the opportunity to be heard with regard to the scope of the hearing prior to the presentation of evidence, narrow the issues to be decided whenever possible, and clarify which particular issues will be resolved through the impartial hearing (see 8 NYCRR 200.5[j][3][iii], [xi]).

parents' intent to home school the student as early as April 6, 2010 (Dist. Ex. 50 at pp. 2-3) and the parents first filed an IHIP with the district on or around April 29, 2010 (Dist. Ex. 47; see Tr. p. 1192). Additionally, the parents admit on appeal the district's assertion that they withdrew the student from the district on April 29, 2010. Based on the above, I find that the March 2010 IEP was the IEP in effect at the time that the parents withdrew the student from the district's school during the 2009-10 school year.

### **Annual Goals**

Assuming, for the sake of argument, that adequacy of the annual goals had been properly raised, an IEP is required to include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability and to enable the student to be involved in and make progress in the general education curriculum (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal must include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]; 8 NYCRR 200.4[d][2][iii][b]).

In this case, review of the March 2010 IEP reveals that the district offered the student a FAPE and that the recommendations in that IEP were reasonably calculated to enable the student to receive educational benefits. As noted above, the March 2010 CSE subcommittee evaluated the student, identified the student's strengths and needs, and developed goals aligned with those needs (Dist. Ex. 6 at pp. 2-11). The March 2010 IEP identified the student's need to improve his ability to begin and complete tasks and assignments independently in a timely manner; to improve his ability to follow directions independently; to improve written expression; to demonstrate the proper use of writing mechanics; to improve spelling skills; to improve decoding skills; to improve reading comprehension; to further develop mathematical operation and application skills; and to demonstrate grade appropriate organizational and study skills (id. at p. 4). The March 2010 IEP indicated that socially, the student needed to increase his ability to cope with frustration; to cope more effectively with transitions; to demonstrate flexibility; and to reduce obsessive behaviors (id. at p. 3). The March 2010 IEP indicated that physically, the student needed to improve computer skills; to improve attending skills; and to improve his use of assistive devices and materials to increase reading, writing, and math skills (id. at p. 5). In regard to the student's management needs, the March 2010 IEP reflected that he needed the additional support of special education services to be successful in a regular education classroom, a behavior modification plan, an increase in his attendance in his first period class, additional time to complete classroom assignments, moderate supervision to function in the educational setting, teacher redirection to stay on task, to learn to stay on task without assistance and improve attention to task, to increase his frustration tolerance, and to seek help when needed (id.).

The impartial hearing officer's determination that the goals in the March 2010 IEP lacked clear standards to measure achievement is not sufficiently supported by the evidence (IHO Decision at p. 13). Review of the March 2010 IEP reveals that it contained 27 annual goals that addressed the student's identified needs specific to study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, and motor needs as identified in the assistive technology evaluation, the BIP, the educational evaluation, and the speech-language evaluation

(Dist. Ex. 6 at pp. 7-11; see Dist. Exs. 12; 15; 18; 20-21). Each goal was specific and measurable, defined a procedure to evaluate each goal, included an evaluation schedule, and indicated the educational or related service professional who would be primarily responsible for implementing the goal (Dist. Ex. 6 at pp. 7-11; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]; 8 NYCRR 200.4[d][2][iii][b]). The student's special education teacher who had taught him during the portion of the 2009-10 school year when he attended the district's school testified that she measured the student's progress toward his goals by seeing how much progress he had made from his previous levels of performance, which she would ascertain by observing his performance in class (Tr. pp. 791, 858-60).

The goals in the March 2010 IEP were aligned with the student's present levels of performance, which were based on educational evaluations that were conducted after the October 2009 CSE subcommittee meeting (Dist. Ex. 6 at p. 4; see Dist. Exs. 15; 18; 20-21). Furthermore, the annual goals incorporated the student's use of various accommodations, modifications, and supplementary aids and services that the CSE subcommittee recommended for the student and that were included in the March 2010 IEP (Dist. Ex. 6 at pp. 2-11). Accordingly, the goals on the March 2010 IEP adequately addressed the student's needs so as to enable him to receive educational benefit (see S.H. v. New York City Dep't of Educ., 2011 WL 666098, at \*4-\*5 [S.D.N.Y. Feb. 15, 2011]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; Tarlowe, 2008 WL 2736027, at \*9 [S.D.N.Y. July 3, 2008]; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Bd. of Educ., Appeal No. 10-036; Application of the Dep't of Educ., Appeal No. 08-034; see also Application of a Student with a Disability, Appeal No. 11-043).<sup>13</sup>

Based on the above, I find that the hearing record does not support the impartial hearing officer's conclusion that the district denied the student a FAPE for the 2009-10 school year because the goals on the March 2010 IEP lacked clear standards to measure achievement. As there are no other remaining issues with respect to the 2009-10 school year before me, I will next address the allegations relating to the 2010-11 school year.

### **2010-11 School Year**

With regard to the 2010-11 school year, the impartial hearing officer found that the student was denied FAPE on the basis that although the goals included in the May 2010 IEP were more specific than those included in the student's IEPs for the 2009-10 school year, the evaluative criteria were still vague (IHO Decision at p. 18). The impartial hearing officer also found that the student's lack of progress during the 2009-10 school year made the district's recommendation for

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<sup>13</sup> Although the April 2010 IEP is not directly relevant to this appeal insofar as the parent had already withdrawn the student by the time it was formulated, I note that the April 2010 CSE offered to continue to further refine the student's program and provide additional services to the student, including a daily multisensory reading program (Dist. Ex. 5 at p. 2), updated levels of social development (compare Dist. Ex. 5 at p. 5, with Dist. Ex. 6 at p. 5), and modification of the student's reading and writing goals to be less demanding so as to encourage greater independence from his teacher assistant and bring the goals more in the line with the student's ability to perform the work himself (compare Dist. Ex. 5 at pp. 8-9, with Dist. Ex. 6 at pp. 8-9; see also Tr. pp. 85-88, 159-162, 328-29, 408).



a similar program in the 2010-11 school year insufficient to enable the student to receive educational benefits (*id.*). For the reasons set forth below, I disagree.

As discussed above, relative to the student's placement for the 2009-10 school year, the CSE (or CSE subcommittee) met four times and generated four IEPs over the course of the school year (Dist. Exs. 5-8; Parent Ex. X). Also as previously discussed with regard to the 2009-10 school year, the CSE considered the information provided in the private neuropsychological evaluation report and decided to move up the student's triennial reevaluation; revising and developing specific and measurable goals for the student that addressed his areas of need; providing a comprehensive array of modifications, accommodations, and supports (including a BIP) that comprehensively addressed the student's needs; providing related services of a 1:1 assistant teacher, counseling, and parent training; and by offering special education services in 12:1 CTT classes in all of the student's core academic courses (*see id.*). Furthermore, as previously discussed, the student made meaningful progress during the 2009-10 school year. While the impartial hearing officer found that a "student of average intelligence who is in the 8th grade when starting the year reading on a first grade level and moves up only one grade in the year has not made meaningful educational progress," I note that progress is to be determined relative to a student's abilities (*see Mrs. B.*, 103 F.3d at 1120-21). As noted previously, the private neuropsychologist described the student as having received diagnoses of significant dyslexia, ODD, OCD, ADHD, and Tourette's syndrome, with a possible diagnosis of PDD (*see Dist. Ex. 28* at pp. 1-2, 6-7), none of which the impartial hearing officer considered in his analysis of the student's progress, and in these circumstances it was not reasonable for the impartial hearing officer to reject the evidence showing the student's progress, including that of the reading specialist described above, and instead rely solely on the factor that the student was of average intelligence to conclude that he should have made faster progress in reading during the 2009-10 school year. Instead, it appears that the impartial hearing officer held the district to a standard of providing a program that would maximize the student's potential to read, which is a laudable objective for any student, but not one that was required of the district under the IDEA (*A.H.*, 2010 WL 3242234; *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 254 [2d Cir. 2009]; *C.T. v. Croton-Harmon Union Free Sch. Dist.*, 2011 WL 2946706, at \*10 [S.D.N.Y. Jul. 18, 2011]; *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 2011 WL 1346845, at \*22 [S.D.N.Y., Mar. 31, 2011]). Accordingly, I find that the impartial hearing officer erred in determining that the May 2010 IEP was not designed to offer the student a FAPE because the student only made one grade level of progress during the portion of the 2009-10 school year that he attended the school district.

Turning now to the goals included in the May 2010 IEP for the 2010-11 school year, the IEP included 12 annual goals that addressed the student's needs in the areas of study skills, reading, writing, social/emotional/behavioral, and motor (Parent Ex. W at pp. 7-9). Several of the goals were carried over from the April 2010 IEP (*compare* Dist. Ex. 5 at pp. 7-10, *with* Parent Ex. W at pp. 7-9).<sup>14</sup> One goal was added to address the student's need to display appropriate coping skills

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<sup>14</sup> Review of the April 2010 and May 2010 IEPs revealed that that the May 2010 CSE subcommittee did not carry over the student's math goals (*compare* Dist. Ex. 5 at p. 9, *with* Parent Ex. W at pp. 7-9). Neither party raised any objection regarding the math goals and the impartial hearing officer did not make any findings specific to those goals. However, I note that the May 2010 IEP described math as the student's "strength" and continued a recommendation for a testing accommodation whereby the student would be able to use a calculator (Parent Ex. W at p. 3).

to deal with change and disappointments (Parent Ex. W at p. 9). All of the goals were specific and measurable, defined a procedure to evaluate each goal, included an evaluation schedule, and indicated the educational or related service professional who would be primarily responsible for implementing each particular goal (*id.* at pp. 7-9). Similar to the March 2010 and April 2010 IEPs, the annual goals in the May 2010 IEP incorporated the student's use of various accommodations, modifications, and supplementary aids and services (Dist. Exs. 5 at pp. 2-3; 6 at pp. 2-3; Parent Ex. W at p. 2).

The student's special education teacher who attended the May 2010 CSE subcommittee meeting testified that the student's mother attended the meeting via telephone (Tr. p. 829). The special education teacher recalled that the CSE subcommittee reviewed the entire draft IEP during the meeting (*id.*). In regard to the goals included in the May 2010 IEP, the special education teacher testified that during the period of April 21, 2010 to April 25, 2010, the student had not been in school, and that as a result of his absence during that time, she was not able to work on the goals developed by the April 2010 CSE (Tr. p. 830). Accordingly, the teacher testified that there was no reason for the May 2010 CSE subcommittee to change the student's goals for the 2010-11 school year at that time (*id.*).

With respect to the May 2010 IEP, the special education teacher testified that the student's last day attending his CTT class was sometime after the middle or end of March 2010 (Tr. pp. 830-31). She noted that the high school program recommended for the student by the May 2010 CSE subcommittee for the 2010-11 school year was similar to the placement that he had in the middle school and would have been appropriate to be continued for him in the high school because the student would have attended CTT classes with a special education teacher and a 1:1 assistant teacher for his four main subject areas of math, social studies, science, and English; would have attended a skills class period; would have received daily multisensory reading instruction; and would have received the same accommodations and supports that he received during the 2009-10 school year (Tr. pp. 831-32). In addition, the special education teacher testified that the parent raised no objection at the CSE meeting with regard to the program or any of the services that were recommended by the May 2010 CSE (Tr. p. 832). For these reasons, and the reasons discussed above in relation to the 2009-10 school year, I find that the May 2010 IEP was reasonably calculated to enable the student to enable the student to receive educational benefits. Consequently, the district's request that the impartial hearing officer's decision regarding the May 2010 IEP be overturned must be granted.

## **Conclusion**

Having found that the district offered the student a FAPE for the 2009-10 and 2010-11 school years, it is unnecessary to address the appropriateness of the Lindamood-Bell program or the home schooling program for those school years or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (see *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. 11-016).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations as set forth above.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that those parts of the impartial hearing officer's decision, dated May 27, 2011, which found that the district did not offer the student a FAPE for the 2009-10 and 2010-11 school years are annulled; and

**IT IS FURTHER ORDERD** that the portions of the impartial hearing officer's decision directing the district to reimburse the parents for the costs of the student's Lindamood-Bell services, the student's tuition costs at Summit for the 2010-11 school year and transportation costs to Summit are annulled.

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

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