



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-046

**Application of the [REDACTED] DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Law Offices of Lauren A. Baum, P.C., attorney for respondent, Lauren A. Baum, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered it to reimburse respondent (the parent) for her daughter's tuition costs at the York Preparatory Academy (York Prep) for the 2007-08 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending sixth grade at York Prep in a general education setting and was participating in the Jump Start program (Jump Start) (Tr. pp. 37-38; Parent Ex. C). York Prep is a private school which 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 programs and services as a student with a learning disability is not in dispute in this appeal (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that when the student was three years old, she began attending preschool at a private day school (Dist. Ex. 1 at p. 2). During that time, the student exhibited language learning and language processing difficulties for which she received speech-language therapy (Tr. p. 35; Dist. Ex. 1 at p. 2). In the middle of kindergarten, the student received a diagnosis of a central auditory processing disorder (Tr. p. 36; Dist. Ex. 1 at pp. 2, 9). In March

2002, surgery for a tonsillectomy and adenoidectomy was conducted, the result of which the hearing record describes as "substantial improvement in her auditory functioning" (Tr. p. 36; Dist. Ex. 1 at p. 2). However, the student remained in kindergarten at the private day school for an additional year (Tr. p. 35; Dist. Ex. 2). The hearing record reflects that during the student's second year of kindergarten, it became evident that enrollment in first grade at the private day school would not meet her needs and that the student required a special education environment (Tr. p. 36). Although the hearing record offers no details regarding the time when the student initially became eligible for special education services as a school age student, it does indicate that at the recommendation of the district the student began attending the Parkside School (Parkside), a non-public State approved school, during the 2003-04 school year, where she transitioned into second grade, and subsequently the student remained at Parkside for four years until she "aged out" of the school at the end of the 2006-07 school year, when she completed fifth grade (Tr. pp. 7, 36-37, 53, 249; Dist. Ex. 1 at p. 2).

Over a three-day period in June and July 2006, shortly after the student completed the fourth grade at Parkside, the student received a neuropsychological evaluation consisting of 18 tests and rating scales, and a review of various reports (Dist. Ex. 1 at pp. 1, 3). The undated neuropsychological assessment report showed that the student was initially "tense and worried," and was "mildly resistant" to participating in the evaluation; however, once the student was given an explanation as to the goal of the evaluation, she was able to engage in the process effectively, maintaining age appropriate eye contact, conversational proficiency, and rapport with the evaluator (*id.* at pp. 3-4). The student's ability to sustain her attention was strongest when she used verbal mediation as a compensatory strategy; however, her focus varied and she required frequent repetition of instructions, redirection, and short breaks to remain on task (*id.* at p. 3). The report also indicated that the student's frustration level appeared to increase when test requirements did not allow for the evaluator to verify the correctness of the student's responses, at which times the student was noted to ask, "Am I good at this?" (*id.*).

Overall, the neuropsychological assessment report indicated that the student's intellectual functioning was in the average to high average range, with her nonverbal skills being more developed than her verbal comprehension skills (Dist. Ex. 1 at p. 9).<sup>1</sup> The student exhibited strengths in nonverbal tasks that required categorical reasoning, visual awareness, selective attention, recognition memory, and basic calculation skills (high average to superior range); she also exhibited strengths on verbal tasks that required follow through on oral instructions (with visual support) and verbal fluency, as well as in her oral reading comprehension skills (average) (*id.*). In contrast, the student exhibited weaknesses in attention control, executive function, processing speed, working memory, organization, concept formation, rapid idea formation,

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<sup>1</sup> Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension index standard score (SS) of 98 (45th percentile), a perceptual reasoning index SS of 112 (79th percentile), a processing speed index SS of 94 (34th percentile), and a working memory index SS of 86 (18th percentile) (Dist. Ex. 1 at pp. 4-6). The assessment report indicated that the evaluator did not provide a full scale IQ score due to the significant 26 point discrepancy in the results of the four indices that comprise the WISC – IV, something that the evaluator noted has been reported in less than five percent of the population (*id.* at p. 4). Overall, administration of the WISC-IV yielded results that reflected that the student's high average perceptual reasoning skills were a relative strength for her, visual-motor skills and verbal comprehension skills were within the average range, and working memory skills (auditory attention skills) were in the low average range (*id.*).

cognitive flexibility, and mental set shifting (id.). The evaluator indicated in the assessment report that the student's learning and memory of verbal information were reduced because she became easily overwhelmed by the amount of information presented, and that functionally, the student's weaknesses had a compromising effect on the development of her academic skills, her ability to work independently, her social relationships, and her self-esteem (id. at p. 10).<sup>2</sup> The evaluator further noted that when the student was provided with structure, verbal encouragement, and redirection, she was able to complete the tasks (id.). Recommendations were for the student to be placed into a structured, nurturing, and highly specialized setting for students of average to above average intellectual functioning with language-based disabilities (id.). The assessment report indicated it was "critical" that the student's classmates be "well-behaved and without primary emotional disorders;" classroom size should be small with a high teacher to student ratio; teachers should be trained to work with students who exhibited language-based learning disabilities; material should be presented in a step by step fashion, allowing the student time to process the information and practice the skills learned; and the student should be given extended time during tests (id.). Recommendations also included that the student required, among other things, related services of individual counseling, small group occupational therapy (OT), individual and small group speech-language therapy, and cognitive therapy (to help the student efficiently self-generate problem solving and coping strategies) (id.).

A December 4, 2006 social history update written by a district social worker with the parent acting as informant, indicated that the student was "aging out" of Parkside, that Parkside had been able to address the student's learning difficulties, and that the student was starting to "catch up" (Dist. Ex. 2). The social history update indicated that the student still had difficulties with reading comprehension, written expression, and auditory processing delays (id.). The report noted that the parent believed that the student was "easily lost" in an academic setting and therefore, needed a small class with a multisensory approach (id.). The social history update indicated that special education programs and services as well as due process rights were discussed and that the parent was given a copy of "The Parents' Rights Handbook" (id.).

A January 2, 2007 mid-year report from Parkside included a rubric that rated the student's performance in her academic subjects during the 2006-07 school year (Dist. Ex. 3 at p. 2). In the area of language arts, the progress report described the student as "proficient, meets the standard" for creating single paragraphs with topic sentences and supporting facts and details, and writes a story with a problem and an event leading to a solution (id. at p. 3). The same progress report described the student as "progressing, meets some of the standard work but more work is needed" specific to her reading habits (including reading aloud with fluency and expression), reading comprehension (including compares/contrasts characters from the past and present with shared goals and challenges, demonstrates understanding of fact versus opinion, skims for information), reading skills (decoding letter pairs, and reading prefixes and suffixes), writing expectations (gathering, organizing, and accurately supporting information, and writing a story with a problem and an event leading to a conclusion), and with her listening and speaking skills

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<sup>2</sup> Results of the Conners' Parent and Teacher Rating Scales – Revised, Long, and the Behavior Rating Inventory of Executive Function (BRIEF), Parent and Teacher Forms reflected that the student's ability to attend and concentrate was consistent with that of other children her age, and that she demonstrated difficulties with emotional control and responses, often appearing sensitive to criticism and becoming easily upset or frustrated (Dist. Ex. 1 at p. 4). The student also demonstrated difficulties with organization and impulsivity (id.).

(attention to volume, pace, clarity, body language, and telling and supporting her opinion of what she has heard or seen) (id. at pp. 2-4). Similar progress was noted in mathematics, specific to the areas of numeration (rounding money to nearest dollar, rounding numbers to nearest tenth and hundredth), computation (multiplies two digit numbers, divides with a single digit number into a three digit number, divides with and without a remainder, and checks division by multiplication), patterns (finding mathematical patterns and relationships, and relates possibilities of arrangements to everyday life), and measurements (applying the skill of telling time to daily routines, counts back change for amounts up to five dollars, explains the process and measures using precise units, and measures up to ¼ inch) (id. at p. 6). The student was described as "proficient, meets the standard" for various numeration and computation skills (id. at p. 5).

In the comments section of the progress report, the student's math teacher noted that the student was kept actively engaged by the teacher dividing the class period into different activities that were predictable and that the teacher used games to reinforce instruction and help the student with her attention difficulties (Dist. Ex. 3 at p. 6). Additional comments included in the progress report noted that the student benefited from the use of simple drawings during word problems because the "visual is beneficial" (id.). In the areas of behavioral and social skills, teacher comments included in the report noted that the student continued to benefit from the structured atmosphere in the class; she easily transitioned from activity to activity; she usually did not have an issue with attending, depending on her comfort level with the activity; she was capable of working independently for longer periods of time; she continued to benefit from teacher prompting; she would continue to benefit from the use of graphic organizers in writing situations; she liked academic challenges depending on the topic; she was socially confident and her well developed language skills made it easy for her to explain when she was confused; and she was socially mature, polite, and demonstrated appropriate behavior, respecting the needs and opinions of others (id. at pp. 7-8). The report also noted that the student did not need any specific interventions for her behavior (id. at p. 9).

The student's speech therapist noted in the mid-year progress report that the student received speech-language therapy twice per week in a group of 3:1 and once per week in a group of 5:1 (Dist. Ex. 3 at p. 22). The progress report indicated that the student made gains in her receptive, expressive, and pragmatic language skills (id.). However, she continued to demonstrate challenges in language formulation in her writing (id.). The student also continued to require prompting to expand her sentence complexity and to add details, as well as visual and verbal prompting to formulate definitions for curriculum-based vocabulary (id.). Although the student's pragmatic skills within discourse contexts were noted to continue to improve, she often misinterpreted her friends' comments or body language as negative, leaving the student feeling insulted (id.).

The student's occupational therapist noted that at the time of the mid-year progress report, the student received OT twice per week in a group of 2:1 and once per week in a group of 5:1 (Dist. Ex. 3 at pp. 25-26). The student "independently mastered" three out of four attending skills that targeted her alertness and focus in the classroom and therapy room, recall of three steps of an activity "without visual," and all goals addressing sensory processing skills, motor skills, and printing lower case (id. at pp. 2, 23-25). The progress report noted that the student "demonstrate[d] skill successfully in a structured setting" for goals that targeted writing lower

case letters in cursive from memory, typing with both hands, and completing an aerobic activity for 15 minutes without fatigue; accepted ideas from teacher/partner; took turns and was aware of listener; and demonstrated appropriate winning/losing responses during or at the end of a game (id. at pp. 2, 24-25). The student needed "continued practice with supports" in order to be an active participant in group activities and to complete work in cursive writing (id. at pp. 2, 23-24). The occupational therapist noted in the progress report that the student made "significant progress" during the school year in meeting her sensory processing goals, allowing her to improve her attention span throughout the school day, and recommended that the student's OT sessions be reduced to once per week in a group of 2:1 (id. at p. 26).

The student's social worker noted in the mid-year progress report that the student displayed improvement in handling her frustrations and disappointments, quickly regaining control of her "emotional equilibrium" following a "momentary challenge" (Dist. Ex. 3 at p. 27). The progress report indicated that the student grew in her self-esteem (id.). The student was described as continuing to benefit from support in remaining open to communicating with others when frustrated due to her misinterpretation of what she considered peer insensitivity directed toward her (id.).

On January 18, 2007, the same district social worker who conducted the December 2006 social history update observed the student in her classroom at Parkside (Dist. Ex. 4). The classroom observation report revealed that during a reading group activity the student was observed reading aloud (id.). The observation report indicated that although the student was easy to understand, she displayed difficulties with decoding (id.). The student was able to correctly answer questions and make predictions about the behavior of the characters in the story (id.). While discussing temperatures of cities around the word, the observation report indicated that the student played with pencils or discussed her trip to another country (id.). As the discussion topic changed, the student was noted to participate (id.). The classroom observation report noted that the student was frequently distracted and preoccupied by another student's laptop computer, requiring redirection to the lesson by the classroom teacher (id.).

On February 13, 2007, the student's mother and father signed a contract with York Prep for the student's enrollment for the 2007-08 school year (Parent Ex. C at p. 2). The contract also noted that the Jump Start portion of York Prep required that an additional contract be signed (id. at pp. 4-5).

On March 13, 2007, the district notified the parent of an upcoming Committee on Special Education (CSE) meeting, scheduled for April 24, 2007, to review the student's classification and continued eligibility for special education services (Dist. Ex. 5).

On April 24, 2007, during the course of the student's final year at Parkside, the district's CSE met to review the student's classification and eligibility for special education services and to formulate her individualized education program (IEP) for the upcoming 2007-08 school year (Dist. Ex. 6). Participants included the district special education teacher or related service provider who also acted as the district representative, the district school psychologist, the district regular education teacher, an additional parent member, the Parkside director, a teacher from Parkside, and the parent (id. at p. 2). The IEP indicated that the student's present levels of

academic performance and learning characteristics had been prepared by Parkside staff (id. at p. 4). The hearing record also indicates that the goals on the IEP were prepared by Parkside staff (Tr. p. 251). The CSE reviewed the July 2006 neuropsychological report and the student's mid-year reports from Parkside (Dist. Ex. 6 at pp. 3, 4). The CSE recommended that the student's eligibility for special education services be changed from a classification of a student with a speech or language impairment to a student with a learning disability (id. at pp. 1-2). The CSE recommended that the student attend a 12:1 special class in a community school with related services of speech-language therapy once per week for 40 minutes in a group of 5:1; speech-language therapy twice per week for 40 minutes in a group of 2:1; OT twice per week for 40 minutes in a group of 2:1; and individual counseling once per week for 40 minutes (id. at pp. 1-2, 13, 15). The CSE recommended testing accommodations of extended time, separate location, and directions read and reread aloud (id. at p. 15). The CSE noted that it considered and ruled out a "CTT" program<sup>3</sup> and a general education program due to the student's needs (id. at p. 14). The IEP indicated that the recommended program and services were to commence in September 2007 and that a copy of the IEP was given to the parent at the April 24, 2007 CSE meeting (id. at p. 2). Annual goals and short-term objectives in the IEP addressed the student's executive function skills, receptive language skills, written communication for increased independence in the school environment, writing skills, pragmatic language concentrating on social-emotional skills in the classroom setting, computation and numeration skills, mathematical skills and concepts to complete tasks in daily life, self-esteem, and developing positive peer relationships (id. at pp. 8-12).

On May 11, 2007, the district mailed the parent a "Notice of Recommended Deferred Placement," which indicated that the student was recommended for a placement in a district 12:1 special education class with related services as identified on the April 24, 2007 IEP (Dist. Ex. 8). The notice advised the parent that the district did not yet have a specific seat for the student within one of its schools, but that the parent would be receiving a final notice of recommendation (FNR) on or about May 30, 2007 (id.). The notice also included language that indicated that a "Notice of Rights as a Parent of a Child with a Disability" was attached (id.). The hearing record reflects that the district did not provide the parent with an FNR and the parent did not notify the district until March 18, 2008 that she had not received an FNR (see Parent Ex. A; see also Tr. p. 85). The student began the 2007-08 school year at York Prep as a result of the parent's unilateral placement of the student at that school (Tr. pp. 7, 42).

On March 18, 2008, the parent, through her attorney, filed a due process complaint notice requesting an impartial hearing (Parent Ex. A). The parent alleged that the April 24, 2007 IEP was "invalid;" there was no appropriate recommendation of placement; and the student required a small class setting within a structured educational environment with opportunities for inclusion and appropriate support in order to address her variable attention, difficulties with working memory and executive function, and social deficits (id.). The parent's recommended resolution included tuition reimbursement for York Prep, and provision of appropriate related services and transportation (id.).

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<sup>3</sup> CTT is further identified in the hearing record as "collaborative team teaching" or "cooperative co-teaching" (Tr. p. 250).

On March 20, 2008, the district provided the parent with its answer to her due process complaint notice, noting the steps the CSE took in formulating the student's April 24, 2007 IEP, that the district mailed the parent an FNR on "July 1, 2006" with its recommended placement, and that the placement was reasonably calculated to enable the student to obtain meaningful educational benefits (Parent Ex. B).

On October 30, 2008, an impartial hearing began, and was concluded on February 9, 2009, after three days of testimony. Both parties admitted post-hearing briefs into the record, and the record was closed on February 20, 2009 (IHO Decision).

By decision dated March 5, 2009, the impartial hearing officer determined that the district had conceded that it failed to offer the student a free appropriate public education (FAPE), the parent had demonstrated that both York Prep and the Jump Start program within York Prep met the student's special education needs during the 2007-08 school year, and that equitable considerations supported an award of tuition reimbursement (IHO Decision at pp. 5-11).

The district appeals the impartial hearing officer's decision, asserting that the parent failed to demonstrate that York Prep and its Jump Start program was an appropriate placement because the student did not receive speech-language therapy, OT, or counseling and her grades declined during the 2007-08 school year. The district also asserts that equitable considerations do not support an award of tuition reimbursement because the parent did not provide notice to the district of her unilateral placement of the student at public expense. The district requests that a State Review Officer either: (a) annul those portions of the impartial hearing officer's decision that found York Prep and its Jump Start program to be an appropriate placement and found that the equities favored the parent; or in the alternative, (b) only award tuition reimbursement for that portion of the tuition that the parent paid for; or in the alternative, (c) only award reimbursement for the Jump Start portion of the program costs; or in the alternative, (d) only award reimbursement for the invoiced amount of York Prep minus those expenditures that the district deems are not reimbursable under the Individuals with Disabilities Education Act (IDEA) and the amount of monies paid by the student's father, who, the district alleges, is not a party to this instant action.

In her answer, the parent alleges general denials to the district's claims, and makes the following assertions: (a) that both York Prep and the Jump Start program are appropriate for the student; (b) that the district did not make any argument below as to the allocation of the reimbursement to the third party persons who contributed to the student's tuition; (c) that the parent did not receive an FNR and therefore, could not notify the district of her rejection of the proposed placement and unilateral enrollment; (d) that the parent believed that the district was aware of the student's enrollment at York Prep, as the district had issued the student a transportation card; (e) that the parent had borrowed money for her daughter's tuition and therefore, does have proof of a debt for the tuition at York Prep; and (f) that the student's grandparents have third party standing for tuition reimbursement because the parent's and grandparents' interests and rights are inextricably linked. The parent requests that a State Review Officer uphold the impartial hearing officer's decision. The answer also contains an additional affidavit from the student's father, asserting that he is a party to the instant action.

In its reply, the district objects to, among other things, the introduction of the affidavit from the student's father as additional exhibit. The district asserts that the affidavit could have been submitted during the impartial hearing, or in the alternative, the father could have testified to the facts contained within the affidavit at the impartial hearing.

Initially, I will address a procedural matter. The district asserts that the student's father's affidavit attached as an additional exhibit to the parent's answer should be rejected. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I find that the additional evidence submitted by the parent with her answer is not necessary to render a decision. Accordingly, this document will not be considered.

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 Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The district conceded at the impartial hearing that it did not offer the student a FAPE for the 2007-08 school year (Tr. p. 11), and does not appeal this part of the impartial hearing officer's decision. 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]). Therefore, the only issues before me are whether the unilateral placement of the student at York Prep and its Jump Start program was appropriate to meet the student's special education needs and whether equitable considerations support the parent's claim for reimbursement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When

determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The district asserts that the parent has not met her burden of demonstrating that York Prep is an appropriate placement for her daughter. Specifically, the district asserts that York Prep is a general education school that did not meet the student's special education needs. Moreover, the district asserts that the student was not provided necessary related services at the private placement. In the alternative, the district asserts that only the Jump Start portion of the York Prep program was appropriate for the student. The impartial hearing officer found that the "combined" York Prep/Jump Start program met the student's special education needs during the 2007-08 school year (IHO Decision at p. 7).

I will begin by addressing the appropriateness of the general education program at York Prep. The hearing record reflects testimony by the district psychologist indicating that the student had "a lot of issues with self-regulation" and "trouble with challenges and making transitions to new and unfamiliar material" (Tr. pp. 254, 267; see Dist. Ex. 6 at p. 1). She also indicated that when the student was "at her comfort level" she was "quite good" (Tr. pp. 254-55). The district psychologist testified that when the student was confronted with challenges with which she felt she would not do well, she tended to become frustrated and upset (Tr. p. 255).

The district psychologist indicated that in consideration of the student's tendency toward frustration and becoming upset, she was not ready for a general education program and that she continued to need "a lot of reassurance" on a 1:1 basis and supports (Tr. pp. 255-56).

The hearing record is sparse regarding information about the general education courses the student participated in at York Prep and how or if those classes specifically addressed the student's special education needs. Testimony by the York Prep psychologist indicated that he was generally responsible for the academic progress of students attending York Prep (Tr. p. 98). He indicated that he was specifically involved with the Jump Start program for students who enter York Prep "with IEPs or special education evaluations that require some form of accommodation or special teaching" (Tr. pp. 97-98). The York Prep psychologist described York Prep as a small, private, coeducational school with approximately 340 students in grades six through twelve (Tr. p. 98). He indicated that York Prep had a "tracking system where students were placed in different levels in each grade based primarily on ability so that there is some homogeneity within the group itself" (*id.*). The psychologist estimated that a little over 30 percent of York Prep students have either an IEP or have undergone psychoeducational evaluations (*id.*). He noted that every class had "some percentage of students with a diagnosed learning disability requiring some accommodation within the class itself" (*id.*). Supplemental programs at York Prep to facilitate students' academic progress were the Jump Start program and the "Edline" program (Tr. pp. 98-99).<sup>4</sup>

The psychologist indicated that York Prep addressed the student's difficulties by first informing the student's teachers of the student's deficits, so that they would know what to address in the classroom with her (Tr. p. 102). The student was provided with reading and writing instruction as part of her general education curriculum (*id.*). Specifically during the 2007-08 school year when the student was in sixth grade, she was enrolled in the academic subjects of English, history, math, and science (Tr. p. 103; Dist. Ex. K). The student also participated in "Fundamentals of Reading," a selective reading class which the hearing record describes as "more devoted to working on specific reading skills--decoding, comprehension, inferential thinking--so it's more focused in the reading area" (Tr. p. 103).<sup>5</sup> The psychologist indicated that the Jump Start teacher and the reading teacher were special education certified (Tr. p. 104). The hearing record reflects that the student's world geography teacher was also certified in special education (compare Tr. p. 104, with Parent Ex. K). When asked if any non-special education certified teachers received any training or mentoring, the psychologist indicated that "these kinds of things in general" were discussed and teachers would speak with the Jump Start teachers about the specific needs for each student (Tr. p. 105).

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<sup>4</sup> The hearing record describes "Edline" as an "off-site server which is able to provide good communication of information to both the parents, students, and the Jump Start teachers" (Tr. p. 99). The psychologist at York Prep indicated that the teacher of each course that the student takes records progress for that academic week on Edline, including homework, quizzes, essays, and test scores (*id.*). Parents access the information on Edline with a password (Tr. pp. 99-100). The Jump Start teacher communicates with each of the student's classroom subject teachers regarding a student's possible difficulties or need for intervention in any class, or to help facilitate that student's instruction (Tr. p. 100).

<sup>5</sup> Testimony by the York Prep psychologist indicated that a general education student would take a foreign language course, but that some students who have special needs regarding reading would instead be placed in the fundamentals of reading class (Tr. p. 103).

The York Prep psychologist further testified that the sixth grade classes, including the fundamentals of reading class, typically averaged about 15 or 16 students (Tr. p. 105).<sup>6</sup> Every class would have one teacher (id.). Regarding the age range of students in each class, the psychologist indicated that the students were close to grade level, deviating no more than one year, and that most of the students would be "exactly at the age levels of that particular grade" (Tr. p. 106). Regarding functional range and tracking of students, the psychologist indicated that before the start of a school year, the school's administration met with the Jump Start staff and placed students based primarily on their ability, grades and recommendations from teachers, on IEPs, and on psychoeducational evaluation reports, so that students who were weaker or who had needs were placed in the lower track where they would be able to work more to their level (id.). He noted that the range of ability in a tracked class would "never" exceed three years (Tr. pp. 106-07). When asked during direct examination if York Prep provided testing accommodations or followed an IEP in any way, the psychologist indicated that York Prep reads IEPs and provides accommodations such as extended time in classes, preferential seating, and directions read or reread or broken down (Tr. p. 107). However, he did not indicate what, if any, accommodations were given to this student. In addition, he noted that goals regarding executive function, verbal mediation for problem solving, organization and planning for written language, reading, math, and writing were examples of goals that would be dealt with by the Jump Start program (id.).

The psychologist testified that beyond Jump Start and the fundamentals of reading class, the student received no other special education classes or related services during the 2007-08 school year (Tr. pp. 111, 115). However, he also testified that he did not know for sure what methodologies were used with the student, but it was possible that the student's world geography teacher, who was a certified special education teacher, could have used "special ed methods" with the student in that class (Tr. pp. 124, 127).<sup>7</sup> When asked during cross-examination how the student's teachers in the general education classes dealt with the student's language-based and organizational difficulties, the psychologist indicated that the general education class teachers were made aware of the student's difficulties through communication with the Jump Start teacher (Tr. pp. 115-16).

Comments from the student's general education teachers on the student's skill report reflected consistency regarding skills addressed by the Jump Start teacher, the student's demeanor in class, her confidence level, and encouragements to participate more in class discussions (Parent Ex. H at pp. 4-7, 11-14). However, the teachers' comments did not specifically indicate if or how the student's unique needs were addressed in her general education academic classes.

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<sup>6</sup> In contrast, the Jump Start special education teacher indicated that the small groupings that the student was part of in her general education classes at York Prep during the 2007-08 school year were no greater than 11 students (Tr. pp. 196, 198-99). The hearing record also reflects that students were "tracked" and functionally grouped according to "higher" or "lower" performance (Tr. p. 204).

<sup>7</sup> The hearing record offers no information indicating that the world geography teacher or any other general education teacher used "special ed methods" to instruct the student.

Based on the above, I find that the parent did not meet her burden to demonstrate that the general education portion of the York Prep program was an appropriate placement for the student because the hearing record does not sufficiently demonstrate that that portion of the program adequately addressed the student's special education needs by providing instruction specially designed to meet the student's unique needs (see Application of the Dep't of Educ., Appeal No. 06-061; Application of a Child with a Disability, Appeal No. 05-008; Application of a Child with a Disability; Appeal No. 99-28; see also Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). I will therefore annul that portion of the impartial hearing officer's decision that awarded tuition for the general education portion of the York Prep program.<sup>8</sup>

Next, I will address the appropriateness of the Jump Start program because the hearing record indicates that the student also participated in Jump Start during her enrollment at York Prep (Tr. pp. 37-38; Parent Ex. C at p. 5).

Testimony by the Jump Start special education teacher at York Prep indicated that she was permanently certified in special education and had 40 years experience in special education (Tr. pp. 191-92). As a Jump Start teacher at York Prep, she had a caseload of 12 students in grades six through eleven (Tr. pp. 192, 208). The Jump Start teacher testified that she did not go into the student's general education classrooms during the week (Tr. pp. 200, 213). Instead, she testified that her knowledge of what happens in other classrooms was based on what the student told her, the Edline reports, e-mail correspondence with the teachers, and any dialogue she had with the teachers in the hall (Tr. pp. 213-14). Consistent with the testimony by the York Prep psychologist, the Jump Start teacher indicated that she saw each student individually two times per week for 45 minutes, as well as in a group for 30 or 45 minutes, two times per day, every morning and four afternoons per week (Tr. pp. 192, 208; see Parent Ex. G). The special education teacher indicated that she initially met the student during the 2007-08 school year when the student first entered York Prep as a sixth grader (Tr. pp. 192-93). She indicated that at that time, the student presented as "a very sweet young girl, very socially immature, initially, very emotionally immature" (id.). The special education teacher noted that the student did not display negative behaviors, but that initially she had a hard time transitioning to York Prep and required support in getting from one place to another within the school (Tr. p. 193). The special education teacher indicated that if the student did not understand something in class she tended to become sad, she would cry during her Jump Start session, and she would need to speak to the parent prior to returning to working with the teacher (Tr. pp. 193-94).

Regarding the morning Jump Start group, the student's special education teacher indicated that she checked every student's planner to make sure that each student's homework matched up with what was recorded in the planner (Tr. p. 209). She also checked to make certain that the students understood directions and questions, that they were organized and had the materials they needed for the day, and that they were accountable for all of their assignments (Tr. pp. 209-10). The student's special education teacher testified that the purpose of the afternoon Jump Start group was for students to understand what their assignments were, to check Edline on the computer, to start working on their assignments, to type on the computer if necessary, and to make sure everyone knew what was required of them (Tr. p. 210). Sometimes,

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<sup>8</sup> I also note that there is nothing in the hearing record that supports a conclusion that this student cannot be appropriately educated in a public school setting with related services.

if a student needed to meet with a teacher for review, the student could do so during the group Jump Start class (Tr. p. 212).

The Jump Start teacher indicated that the focus of the student's individual sessions with the Jump Start teacher was to support the student in the classroom (Tr. p. 210). The individual sessions were based on the Edline reports from the student's teachers (id.). She evaluated the student's work that was completed for the week, and checked the student's planner to make sure that the student wrote everything down "exactly" as she needed to do, making sure that the student followed what was requested in the classroom, and "tying up loose ends" between the student and the classroom teacher (id.). Sometimes, the student would meet with both the Jump Start teacher and the classroom teacher during the individual sessions (Tr. p. 212). When asked on cross-examination if she used a particular methodology or curriculum during her Jump Start sessions with the student, the special education teacher testified that she supported the curriculum within each class (Tr. p. 211). When asked if she used any particular "special education academic intervention curriculum," the special education teacher indicated that she used "different reading comprehension activities" and that she and the student also worked on fluency, sequencing, breaking down sentences, and writing appropriate sentences (id.). The special education teacher indicated that she and the student spent a good amount of time "breaking down" through a "step by step process" what every teacher said about the student's performance, where she had challenges, and where she had successes (Tr. p. 194).

Regarding the student's initial difficulties with transitioning to York Prep, the special education teacher indicated that the focus was "making the Jump Start session a comfortable place for [the student] to come to" (Tr. p. 194). Sometimes the student was paired up with another student when walking from one class to another (id.). The special education teacher indicated that she contacted the student's teachers by e-mail, and sometimes she and the student would meet with one of her teachers if she was "a little reticent about asking a question" (Tr. pp. 194-95). The special education teacher described the situation as "pretty much taking [the student] by the hand" (Tr. p. 195).

Academically, the student's difficulty regarding math was addressed by the student spending time with a math teacher and the special education teacher during the afternoon study hall or at other times (Tr. p. 195). Regarding reading, the special education teacher indicated that the student initially displayed difficulty with reading comprehension (id.). The student also had difficulty with class participation (id.). The special education teacher stated that she worked with the student on reading fluency by finding various articles on websites that the student was interested in reading and discussing (id.). The special education teacher described the work conducted for reading as "very basic" (id.). She spoke with the student's teachers about one time per week, especially during the first half of the 2007-08 school year because of the student's difficulty transitioning and her need for "constant affirmation that she was on the right track" (Tr. pp. 198-99). The special education teacher indicated that she did not attend the student's other classes, but did e-mail her teachers and follow up with the Edline program that was updated weekly by the student's teachers (Tr. p. 200). She stated that she discussed "every single statement" that was in the Edline report with the student, making sure the student understood what the teachers said in the report, and discussed strategies that the student could use both in school and at home (id.). The special education teacher also communicated with the student's

tutors through e-mail (id.).<sup>9</sup> If teachers had questions about working with the student, they contacted the special education teacher, who spoke with them about what she found helpful for the student on an individual basis in the Jump Start room (Tr. pp. 200-01). Specifically, the special education teacher indicated that she and the student's teachers dialogued and discussed strategies such as how the classroom teacher could set up a confidential signal with the student to refocus her when she was losing focus in class (Tr. p. 201). In addition, if there was an activity done in class that moved too quickly for the student, the special education teacher would break the activity down into appropriate steps for the student (id.). She also spoke with the student's private psychologist during the psychologist's visit to York Prep, "to make sure we were on the same page with her development" (id.). In addition, the special education teacher testified that she and the student would set up step-by-step goals on a weekly basis to help the student become more comfortable and to move around with "greater ease in her classes" (Tr. p. 202). The special education teacher and the student role-played how the student could participate in class (id.). For example, they would formulate a specific question and practice how to ask it of a specific teacher (id.).

Moreover, when questioned about the student's progress during the 2007-08 school year, the York Prep psychologist testified that based upon the student's grades, what "worked for her" was her work with the Jump Start teacher, and her participation in the fundamentals of reading class, as well as her participation in her English class (Tr. pp. 109-10). The Jump Start special education teacher testified that the student made progress (Tr. pp. 202-03). She indicated that the student was happier; she did not need to call her mother all the time from mid-year forward; she was more accepting of strategies and activities; and with role-playing she was able to ask a specific teacher a specific question (Tr. p. 202).

An undated Jump Start skill information report reflected that for the first semester of the 2007-08 school year and "with support," "when prompted," or "under direct supervision," the student was able to determine in reading comprehension the main idea, gather relevant details, understand literal meaning, understand inferred meaning, use effective strategies to deal with reading challenges, and self-monitor attention, concentration, and efficiency of strategies (Parent Ex. H at p. 1). Regarding the writing process and "when prompted," the student was able to use pre-writing tools to collect information and/or explore ideas (id.). When "under direct supervision" the student was able to sequence thoughts effectively, with clear topic sentences supported by examples, explanations, definitions, and details; use correct grammar, punctuation, capitalization, and spelling; and proofread to improve coherence, style, and accuracy of written work before submitting a final draft (id.). Regarding organization/work habits and "when prompted," the student completed homework on a nightly basis, handed in homework on time, maintained her binders, backpack, and locker, was prepared for class, and brought necessary work to and from school (id.). "With support," the student met the expectations of homework assignments, completed long-term projects/papers to the best of her ability, and used Edline and/or handouts to make note of nightly assignments, long-term assignments, and upcoming tests/quizzes (id. at p. 2). Regarding test preparation and "when prompted," the student

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<sup>9</sup> The hearing record provides no further information about the student's "tutors." The parent testified that the student received extra help or tutoring when the student asked for such help from her teachers at York Prep (Tr. p. 48). The Jump Start teacher mentioned the student's "tutor" within the context of her testimony (Tr. pp. 200, 202), but did not elaborate further.

identified the information that would be covered on tests, allotted an appropriate amount of time to prepare for tests, and used all available resources such as study sessions with classroom and/or Jump Start teacher (*id.*). "With support," the student used study strategies such as review sheets, flashcards, practice problems, and outlining/summarizing information specific to the type of test and her individual learning preferences (*id.*). Regarding self-awareness and "with support," the student could identify strengths and challenges that affected her school success and could self-advocate in order to get her needs met by classroom teachers (*id.*). "When prompted," the student implemented strategies that were helpful to her (*id.*). Regarding the Jump Start program, the student "always" attended the morning check-in session and the afternoon study hall (*id.*). The student's behavior in Jump Start was "appropriate" (*id.*). Detailed comments from the Jump Start teacher included that although the student initially had some difficulties transitioning to York Prep, she had become comfortable in her new academic environment; and from the outset, the student "made a serious effort to follow instructions and work diligently to complete assignments" (*id.*). The student remembered to e-mail the Jump Start teacher to alert the teacher of any unfinished work (*id.* at pp. 2-3). She would often reread an assignment for retention and additional information and in study hall she would ask questions when she needed clarification (*id.* at p. 3). Individual Jump Start sessions were devoted mainly to language skills, including reading comprehension, writing skills, and reading assigned sections of books or stories to strengthen the student's comprehension, organization, and study skills (*id.*). Additional focus was placed on how the student could better participate in class (*id.*). The Jump Start teacher indicated that the student was willing to take direction and was better able to accept suggestions regarding work and class involvement, and seemed to have settled into the structure and expectations of York Prep (*id.*).

The Jump Start skill information report for the second semester of the 2007-08 school year reflected that although the student performed the aforementioned skills "with support," or "when prompted," she no longer needed to be "under direct supervision" (Parent Ex. H at pp. 8-9). The skill report reflected that the student "independently" identified the information that would be covered on tests (*id.* at p. 9). Comments from the Jump Start teacher included that the student had a positive second semester; she continued to arrive on time at morning check-in and used the time to finish work and become organized for the day; she appeared comfortable moving around school and going to and from classes; and she was more confident about her workload, pending assignments, and teachers' expectations (*id.*). The Jump Start teacher noted: "It has been a pleasure to watch [the student] develop from a somewhat frightened, reserved and cautious student, to a student who presents herself as an integral part of the York Prep community" (*id.* at pp. 9-10). The student used her time to do research projects, practice spelling and grammar, develop reading comprehension skills, improve pronunciation of words, increase vocabulary, and learn to break down directions in order to understand what was being asked (*id.* at p. 10). The skill report indicated that the Jump Start teacher encouraged the student to be more willing to participate in her classes, to raise her voice a bit in order to be heard clearly, and to read for her own pleasure (*id.*).

Based on the above, I find that the Jump Start program addressed the student's special education needs, particularly in dealing with her difficulties regarding self-esteem, self-advocacy, self-regulation and frustration, organization, challenges with making transitions with new and unfamiliar material, attention to task, completion of assignments, and pragmatic

interactions with her peers and adults. However, the district further argues that the impartial hearing officer erred in determining that the student's needs were met at the unilateral, private placement because it did not provide the student with related services (IHO Decision at p. 7). Under the circumstances of this case, for the reasons set forth below, I need not modify the impartial hearing officer's decision on this issue.

The student's April 2007 IEP recommended that the student receive related services of OT, speech-language therapy, and counseling (Dist. Ex. 6 at p. 15). Testimony by the Parkside director indicated that the student had "definitely made gains" in OT when at that school, and that by June 2007, the frequency of OT had been reduced (Tr. p. 135). The January 2007 mid-year progress report from Parkside indicated that the student had made progress in OT (Dist. Ex. 3 at pp. 1-2, 23-26). The Parkside director testified that he believed that the student could benefit from OT to improve her cursive handwriting (Tr. p. 143). Additional testimony by the director indicated that while at Parkside, the student was working on cursive writing, but by the mid-year progress report the student was able to independently print, she aligned her letters on the writing line, she made appropriate connections between the letters, in a structured situation she was able to write lower case letters from memory, and she needed support to write capital letters in cursive (Tr. pp. 137-38). In addition, the director affirmed that cursive handwriting could be supported by a special education teacher in the classroom (Tr. p. 138). In light of the Parkside director's testimony and the Parkside School mid-year progress report, I find no reason to disturb the impartial hearing officer's finding that even though OT was listed on the April 24, 2007 IEP, the hearing record reflects that she no longer needed OT (see IHO Decision at p. 7).

Regarding speech-language therapy, testimony by the parent indicated that the student did not need speech-language therapy because her language needs were "covered" in the fundamentals of reading class and in the Jump Start program (Tr. p. 42). The York Prep progress report and the district teacher report reflected that the student consistently worked on specific components of expressive language, receptive language, and pragmatic language related to her academic and social-emotional needs (Parent Exs. H at pp. 1-13; I at pp. 1-2). The Parkside director testified that the student's language needs could be addressed by a special education teacher in the classroom if the special education teacher was trained in language or had the focus of a language program (Tr. p. 138). The hearing record shows that the Jump Start teacher and the fundamentals of reading teacher addressed the language needs of the student (Tr. pp. 202, 211; Parent Ex. H at pp. 3, 10-13). In light of this, I find no reason to disturb the impartial hearing officer's finding that the student's speech-language needs as described in the goals contained in the April 2007 IEP were addressed in the fundamentals of reading class and by the Jump Start teacher (see IHO Decision at p. 7; see also Dist. Ex. 6 at pp. 8, 10).

Regarding the student's need for counseling, the April 24, 2007 IEP indicated that the counseling goals and objectives would have addressed the student's self-esteem, feelings and emotions, and development of positive peer relationships (Dist. Ex. 6 at p. 12). The student's private counselor testified that the student's concerns during counseling sessions involved transitioning to a new school, making friends in a new school, changes going on in her family at the time, and working on self-esteem and distractibility (Tr. p. 218). Testimony by the Jump Start special education teacher as previously discussed reflects that the student's counseling needs were also addressed in Jump Start (Tr. pp. 194-95, 198-99, 201-02). Furthermore,

testimony by the student's private counselor and Jump Start teacher indicated that the private counselor had telephone contact with staff at York Prep and visited the school (Tr. pp. 201, 219-20). The counselor noted that the staff she met or spoke with at York Prep appeared "warm and responsive" to the student's academic and emotional needs (Tr. p. 221). In consideration of the above, I find that the hearing record reflects that the services provided at Jump Start were designed to sufficiently address the student's social/emotional needs as identified on her April 24, 2007 IEP and by the district's psychologist.

Having found that the Jump Start program appropriately addressed the student's special education needs, the inquiry now turns to the final criterion of whether or not equitable considerations favor an award of tuition reimbursement for the cost of the Jump Start portion of York Prep.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at \*13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005] aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v.

\_\_\_\_\_, 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

The district asserts that the impartial hearing officer erred in her determination that equitable considerations favor an award of tuition reimbursement. Specifically, the district asserts that the parent did not provide notice of unilateral placement as required by the IDEA. The impartial hearing officer found that equitable considerations favored the parent because the student was not removed from public school and "there was no allegation or showing" that the parent was made aware of the notice requirement (IHO Decision at pp. 8-10).<sup>10</sup> As set forth below, I disagree with the impartial hearing officer's determination.

The parent testified that she did not provide the district with written notice of the student's unilateral placement at York Prep (Tr. p. 62). However, she further testified that she did not provide written notice to the district because "I didn't know I could do that" (id.; see Tr. p. 85). The hearing record reveals that the parent was provided with two copies of her procedural safeguards and rights during the 2007-08 school year (Dist. Exs. 2; 8).<sup>11</sup> The district mailed the parent a "Notice of Recommended Deferred Placement" as a result of the April 24, 2007 CSE meeting (Dist. Ex. 8). The form reflects that the district provided the parent with her procedural safeguard rights as an attachment (id.). The hearing record also reveals that the district's social worker met with the parent on December 2006, and according to the resultant report, she discussed due process rights as well as special education services with the parent and provided the parent with a copy of the parent's procedural safeguards and rights as contained in the "Parents' Rights Handbook" (Dist. Ex. 2). Documentary evidence in the hearing record supports the conclusion that the parent was informed through the provision of parent guides that she was required to conform with the notice requirements related to reimbursement for unilateral placements (see Application of a Student with a Disability, Appeal No. 08-145; see also Application of a Child with a Disability, Appeal No. 99-97). Moreover, I note that the parent has a history of participating in the CSE process and has filed for impartial hearings in the past (Tr. pp. 80, 83-85).

Under these circumstances, I find that the parent failed to provide the district with notice of her unilateral placement of the student at York Prep at public expense until she filed her due

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<sup>10</sup> I note that while the impartial hearing officer determined that the student was not "removed from a public school" (IHO Decision at p. 9), during the 2006-07 school year, the student had been attending a State approved non-public school in which she had been placed by the district and which the district funded (Tr. pp. 36-37, 53, 249; see 34 C.F.R. § 300.325[c]). Therefore, the parent was required to provide notice consistent with 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (see S.W., 2009 WL 857549).

<sup>11</sup> Federal and State regulations require that all districts provide parents with a procedural safeguard notice which includes specific information, including the requirements for a unilateral placement by parents of children in private schools at public expense (see 34 C.F.R. § 300.504[c][9]; see also 34 C.F.R. § 300.148[d]; 8 NYCRR 200.5[f]). I note further that the New York State Office of Vocational and Educational Services for Individuals with Disabilities mandates that all public schools in New York State use the same procedural safeguards notice which provides in relevant part the requirement that a parent provide notice to receive reimbursement for a unilateral placement (<http://www.vesid.nysed.gov/specialed/publications/policy/psgn807.doc>).

process complaint notice, 11 months after the CSE had developed the IEP in contention and that therefore equitable considerations do not favor an award for tuition reimbursement (see S.W., 2009 WL 857549). Having reached this conclusion, I need not address the parties' remaining contentions.

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

**IT IS ORDERED** that the impartial hearing officer's decision dated March 5, 2009 is annulled to the extent that it found that the parent met her burden in demonstrating that the general education portion of York Prep's program was an appropriate placement; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision dated March 5, 2009 is annulled to the extent that it found that the equitable considerations supported the parent and awarded tuition reimbursement at York Prep.

**Dated:** Albany, New York  
June 9, 2009

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