



# The University of the State of New York

The State Education Department  
State Review Officer

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No. 11-017

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

## **Appearances:**

New York Legal Assistance Group, attorneys for petitioner, Phyllis Brochstein Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy SiligmueLLer, Esq., of counsel

## **DECISION**

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for reimbursement of her son's tuition costs at The Child School for the 2010-11 school year. The appeal must be sustained.

## **Background**

At the time of the impartial hearing, the student was attending kindergarten at The Child School (Tr. pp. 322, 324; Dist. Ex. 13; Parent Ex. L at p. 3).<sup>1</sup> The Child School is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8

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<sup>1</sup> The hearing record contains duplicative exhibits. For the purposes of this decision, only District exhibits were cited in instances where both a District exhibit and a Parent exhibit were identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 09-124; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

A review of the student's educational history reflects that the student received an early diagnosis of a pervasive developmental disorder (PDD), and thereafter received Early Intervention (EI) services that included speech-language therapy, occupational therapy (OT), and applied behavioral analysis (ABA) services (Dist. Ex. 5 at p. 1). The hearing record further reflects that the student began attending a therapeutic preschool in September 2007 due to delays in all areas of development, including language development, fine and gross motor skills, sensory processing, social/emotional functioning, and play skills (Dist. Ex. 15 at pp. 1, 8). Specific concerns included distractibility, low frustration tolerance, inconsistent eye contact, repetitive play, and difficulty with transitions (Parent Ex. E at p. 1). The hearing record reflects that in September 2009, the student was enrolled in an 8:1+2 class at the therapeutic preschool and that he attended the program five days per week for five hours each day (Dist. Exs. 9 at p. 1; 15 at p. 1). The hearing record reflects that the student received speech-language, OT, counseling, and physical therapy (PT) services two times per week for 30 minutes at his therapeutic nursery school, speech-language therapy and OT services two times per week for 45 minutes at home, and five hours per week of special education itinerant teacher (SEIT) services (Parent Ex. E at p. 1). The hearing record further reflects that as of early November 2009, the student began attending a YMCA mainstream after school program two times per week with the support of a SEIT, and that the student received five hours per week of SEIT services (Dist. Exs. 5 at p. 1; 9 at p. 1; Parent Ex. E at p. 1).<sup>2</sup>

A December 16, 2009 social history update report was prepared based upon a telephone interview by respondent's (the district's) school psychologist with the student's mother (Dist. Ex. 5 at p. 1). According to the report, the parent described the student as having difficulty with focusing and self-direction (id.). The parent further described the student as an "under registered child" with "sensory issues," indicating that he could fall and not feel pain and that he sometimes pushed against his parents to feel pressure (id.). According to the parent, the student tended to get "hyper" (id.). The parent described the student as verbal and able to speak in full sentences, but indicated that he had difficulty with pragmatics (id.). The social history update report further indicated that the family did not plan on placing the student at a private school at their own expense, but was considering a particular public school program designed to integrate children on the autism spectrum into the general population (Tr. p. 162; Dist. Ex. 5 at p. 2).<sup>3</sup>

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<sup>2</sup> Prior to attending the YMCA after-school program, the student received SEIT support on an individual basis in a "playroom" (Dist. Ex. 9 at p. 1).

<sup>3</sup> According to the testimony by the parent at the time of the impartial hearing, the student was not accepted into the public school program for students on the autism spectrum (Tr. p. 342). Results of the program's assessment of the student for the purpose of possible admission indicated that the student was "too social" for the program (id.).

A December 20, 2009 educational progress report<sup>4</sup> written by the student's preschool special education teacher indicated that the student received the following related services: speech-language therapy, OT, PT, and play therapy; each for two times per week for 30 minutes (Dist. Ex. 15 at p. 1). The student also received music therapy one time per week for 30 minutes (id.). Overall, the student's special education teacher indicated that with support from adults, the high ratio of teachers to students, and the structure of the therapeutic setting, the student displayed steady progress in all areas (id. at p. 7). The educational progress report indicated that the student presented with many strengths including strong cognitive potential and many early academic skills and a strong social connection to others (id.). In addition, the educational progress report indicated that the student was eager to please, enjoyed learning, and enjoyed sharing his ideas (id.). The student was described as popular and well-liked by peers and adults (id.). However, the report indicated that despite the student's strengths, he continued to require adult support to function appropriately in the classroom (id.). Although the student showed steady progress, he continued to present with delays in social/emotional development, expressive language skills, fine and gross motor development, and the attainment of age appropriate symbolic play skills (id.). According to the student's teacher, his performance in the aforementioned areas of development improved when an adult was available to redirect his attention to tasks, provide emotional support, and facilitate and model appropriate skills and interactions (id.). According to the progress report, additional supports helpful to the student included a clear statement of expectations, visual and verbal cuing, and positive reinforcement (id.). The special education teacher recommended a small structured classroom with bright non-aggressive peers, a high teacher-to-student ratio, and continuation of the student's related services (id. at p. 8).

A January 4, 2010 speech-language progress report was written by the student's speech-language pathologist (Parent Ex. B at pp. 1-2). Administration of the Test of Language Development-Primary, Third Edition (TOLD: P-3) revealed findings that "almost all subtest scores on this moderately difficult test for children of [the student's] chronological age fell at or above the mean" (id.). The speech-language progress report indicated the student's strength on the picture vocabulary subtest (picture identification task) and weakness on the relational vocabulary subtest (explain how two objects are alike) (id. at p. 2). Additional challenge for the student was noted on the sentence imitation subtest, which the report described as "completely auditory" and without visual support to assist the student in processing the language (id.). Although the student scored within the mean on the grammatic completion subtest, weakness was noted as to various grammatical structures (id.). The speech-language pathologist described the student behaviorally as "fidgety" and distracted by things in his external environment (id.)<sup>5</sup> The speech-language pathologist further noted that when the student was engaged in a task that had a visual component, he was better able to focus (id.). The report revealed he enjoyed symbolic play with toy people and a dollhouse; he created simple sequences such as family members watching television, going to bed and then going to the park (id. at p. 4). The student

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<sup>4</sup> The December 20, 2009 educational progress report was signed by the student's preschool special education teacher on January 5, 2010 (see Dist. Ex. 15 at pp. 1, 8).

<sup>5</sup> The January 4, 2010 speech-language progress report revealed that the student displayed greater ability to attend to task and was less fidgety when performing tasks that reflected his strengths and that had a visual component (Parent Ex. B at pp. 2-3).

was further described as enjoying art activities and he was able to relate the sequence of steps used in making art projects; he also enjoyed a particular book and could retell the story while looking at pictures in the book (id.).

The speech-language pathologist characterized the student's articulation as "fully intelligible," although the student used a "choppy" style of speaking (Parent Ex. B at p. 4). In addition, since the student presented with sensory difficulties, based upon suggestions by the student's occupational therapist, the speech-language pathologist had the student wear a vest designed to give him tactile input during speech sessions and used a "brushing" technique to help calm the student's body (id. at p. 3). Recommendations were for a small structured language based academic setting with a high teacher-to-student ratio and continuation of speech-language therapy at the same level of service that he was receiving at that time (id. at p. 4). The speech-language pathologist further recommended that the student's goals include helping him keep a calm body and increase attention to language-based tasks, first with visual support and then without the use of visual support, development of receptive and expressive language, and improvement of articulation skills (id.). Recommended treatment objectives were to reduce fidgety behavior during speech-language tasks; increase in-seat behavior and attention to task; facilitate conceptual development for "same" and "different;" facilitate ability to describe similarities and differences between objects and pictures; reduce word retrieval difficulties and increase semantic development; reduce choppy speaking pattern; improve verbal formulation skill including correct use of past tense and present tense; facilitate ability to relate sequences regarding art activities, sequence stories, and stories in books; increase sequenced symbolic play; and narrate play sequences during and after play (id. at p. 3).

A January 4, 2010 educational progress report written by the student's SEIT indicated that the student demonstrated developmental challenges in speech-language, physical coordination, attention, and social and emotional development (Dist. Ex. 9 at pp. 1, 5). The educational progress report noted that the student continued to benefit from SEIT services and other related services to help him be a successful classroom participant (id. at p. 1). According to the SEIT, administration of the Brigance Diagnostic Inventory of Early Development II (IED-II) revealed the student's functioning to be at the 92nd percentile in the academic/cognitive domain; the 91st percentile for quantitative and general skills; the 92nd percentile in pre-reading/reading; the 46th percentile in expressive language; the 48th percentile in receptive language; the 16th percentile for fine motor skills; the 21st percentile for gross motor skills; and the 9th percentile for self-help skills (id. at pp. 1-3).

The educational progress report indicated that the student tended to become easily distracted in many areas of the classroom such as by the pattern on the rug, and that at times he became preoccupied while talking, would not finish his sentence, and required verbal redirection (Dist. Ex. 9 at p. 2). The progress report further reflected that at times the SEIT helped the student expand his thoughts by prompting him with questions, as he frequently ended a thought before it was complete, especially if he was transitioning between two activities and was preoccupied by his involvement in the transition (id.). The student was described as being able to spend long periods of time on tasks that involved connecting materials such as Legos, bristle blocks, and wooden and plastic connectors (id.). With support and verbal modeling, the student was able to use dollhouse figures to play out personally familiar activities such as traveling,

eating, or bathing (id.). The educational progress report indicated that the student required significant help to expand his play repertoire, and that while the student often commented on specific actions of his figures, sequential play was a challenge for him (id.). Regarding language, the educational progress report noted that in the classroom environment, the student understood basic routine directions such as lining up to wash hands before snack, but at times needed reminders as to what came next in sequential steps as he became distracted (id.). When provided with support, the student was able to refocus on the task (id.). Overall, the educational progress report described the student as a "warm and curious" boy who displayed a desire for peer connections; he struggled with verbally expressing himself in complete sentences; and presented with challenges in the areas of speech-language, fine and gross motor skills, and age appropriate social/emotional behavior (id. at p. 4). The report indicated that the student benefited from support, clear guidelines, and much verbal modeling to successfully navigate through the classroom experience and interact productively with peers (id.). Recommended goals were to decrease impulsivity; to utilize support in order to interact for extended periods with peers; to improve eye contact; to more fluidly express himself with support and verbal modeling; and to improve appropriate attention skills during group times (id.). In addition, the educational progress report recommended the strategies of assisting the student to express his feelings verbally; providing verbal modeling when the student was playing with peers; helping the student become more aware in open spaces; and providing the student with clear structure and expectations, as well as limit setting (id.). Recommendations included a small classroom with clear expectations and structure; teachers available to provide successful strategies in various situations; a setting with support and guidance; as well as continued SEIT and related services (id. at p. 5).

A January 5, 2010 OT progress report written by the student's occupational therapist reflected that the student received OT two times per week for 45 minutes at a private agency (Parent Ex. D at p. 1). OT sessions addressed sensory processing, body awareness, motor planning, and attention to task, as well as postural control, visual motor skills, and fine motor skills (id.). The OT progress report indicated that the student's ability to attend to a task was tied to his ability to effectively process sensory information, regulate impulsive tendencies, his motivation to engage in that task, and environmental distractions (id.). The occupational therapist described the student as continuing to seek out intense proprioceptive and vestibular input such as jumping, crashing, and swinging to organize himself (id.). In addition, the student continued to struggle with distractibility, but could focus better on tasks, control impulses better, and wait his turn following intense movement activities (id.). The OT report noted that the student demonstrated difficulty attending to tabletop activities, and he benefited from the use of a weighted vest to help with body awareness and staying seated in his chair (id.). Furthermore, when engaging in fine motor or visual motor activities, the student required encouragement to stay on task for more than a few minutes as he quickly lost focus (id.).

The OT report also revealed that in addition to poor body awareness, the student displayed decreased core strength and had difficulty maintaining an upright seated position for tabletop activities, a situation that affected the quality of his fine motor skills and upper extremity control (Parent Ex. D at p. 1). The student's balance skills were affected by difficulty with vestibular and proprioceptive processing and his decreased core stability (id.). Recommendations were for the student to continue to receive individual OT services at the

current frequency in a sensory gym in order to engage in intense movement and proprioceptive activities for improved self-organization, in order to achieve his individualized education program (IEP) goals and to address his delays in sensory processing, fine motor skills, postural control, and upper extremities strengthening (id. at p. 2).

A January 12, 2010 counseling update report indicated that in individual counseling sessions, the student demonstrated the ability to engage in constructive, symbolic play; the student's scenarios became increasingly complex; the student developed imaginative scenarios; and the student was able to ask for help appropriately (Parent Ex. E at p. 1). However, the student exhibited a preference for playing on his own while the therapist observed, rather than participating (id.). In addition, the student demonstrated perseverance in constructing complex figures out of Legos, while at other times the student became "stuck" in repetitive play sequences that tended to focus on destruction and punishment (id.). Furthermore, the student could become overwhelmed with anxiety and was working on accepting the therapist's offers of assistance (id.). According to the counseling update report the student displayed difficulty maintaining a sense of mastery and control over his natural aggressive impulses (id. at pp. 1-2). An ongoing goal for treatment included further development of the student's repertoire of emotional language and his ability to reflect on his emotional state and the reasons for his actions (id. at p. 2). Socially, the student had made significant progress in that he recently began referring to the therapist by name; showed interest in when the next play therapy session would occur; demonstrated an increased awareness of social interactions occurring around him; and said goodbye to the therapist when transitioning back into the classroom (id.). In addition, the student's "burgeoning interest" in social relationships with peers was noted in the transitions between the classroom and play therapy sessions, as the student frequently interacted with other children in the stairwell or in the elevator during that time (id.).

The counseling update report revealed that the student's therapist helped facilitate appropriate social interaction by verbalizing for the student what he intended to communicate as well as helping him to think about the other child's experience (Parent Ex. E at p. 2). At the time of the report, the student had already begun asking other students their name and showing them a toy (id.). The student's therapist highly recommended that he continue counseling/play therapy sessions at the mandate that was current at the time of the report (id.). Recommended goals were to help the student modulate his anxiety, achieve successful mastery over aggressive impulses, manage emotional experiences with coping strategies, increase reciprocal interaction, continue to expand symbolic play, and help initiate and sustain positive interactions with peers (id.).

On January 13, 2010 the parent completed an application to The Child School (Dist. Ex. 10 at pp. 1-8). On the application, among other things, the parent described the student's areas of greatest needs as "self-regulation and sensory processing" (id. at p. 2). The parent indicated that the student needed more physical or verbal input to process outcome; that as a result of not processing information quickly he was impulsive; that he responded positively to redirection; and that he benefited from extra time to process a novel direction or idea (id. at pp. 2, 5). The parent also indicated on the application that the student appeared "anxious with his inability to control his body movements [and] body awareness" (id. at p. 6).

A questionnaire from The Child School was completed by the student's preschool teacher on January 15, 2010 (Dist. Ex. 11 at pp. 1-2). The preschool teacher indicated that academically, the student had good pre-academic reading readiness skills, that the student's writing skills were emerging, and that he had good pre-math skills (id.). Regarding the student's social/emotional development, the teacher indicated that the student was bright and enjoyed learning and sharing information, but was challenged by self-regulation, sensory processing, and impulse control (id. at p. 2). The teacher described the student as generally respectful of peers and indicated that he formed close bonds with familiar adults and accepted redirection and support (id.). Behaviorally, the student's self-directed behavior interfered with group activities and he needed support with self-regulation and sensory processing (id.). The teacher indicated that she provided clear expectations, structured choice, sensory input strategies, and although used rarely, brief time away from group as needed (id.). The teacher recommended a small structured language-based program for the student (id.).

A psychological evaluation report was prepared by a psychologist from a center affiliated with the student's therapeutic nursery school to facilitate planning for kindergarten, based on testing of the student between October 9, 2009 and January 15, 2010 (Dist. Ex. 8 at p. 1). Administration of the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III) resulted in a verbal IQ in the average range, a performance IQ in the superior range, and a full scale IQ in the high average range (id. at p. 5). The evaluator indicated that the student demonstrated particular strength in his abilities to process non-verbal, visual-spatial information and that he demonstrated age appropriate verbal comprehension abilities (id. at p. 12). In addition, the student exhibited particular strength for verbal abstraction when using expressive language to describe how two objects were similar (id.). Weaker skills were noted for tasks involving verbal reasoning skills and social knowledge to explain situations, actions, or activities for coming events (id.). Regarding processing speed, the student demonstrated weak graphomotor skills on measures of cognitive and neuropsychological testing (id.).

The psychological evaluation report indicated that the student's neuropsychological functioning was well developed with two exceptions (Dist. Ex. 8 at p. 12). Although the student displayed strength in language, memory and learning, social perception, and visuospatial processing; he displayed weaker skills in the area of attention and executive functions (id. at pp. 12-13). The evaluator noted that the student was inattentive throughout testing and that he had to be redirected during cognitive and social/emotional tasks due to distractibility and a "restless body" (id.). Pre-academic skills, counting, as well as naming letters and the days of the week were described as "solid" (id.). In the social/emotional domain, the student displayed preoccupation with thoughts regarding aggressive themes, which caused significant anxiety (id.). The evaluator indicated that the student was not aggressive toward classmates, but that his anxiety impeded his optimal cognitive functioning (id.). The psychological evaluation report noted that when anxious, the student often perseverated on the same anxiety-provoking themes and struggled to utilize his strong cognitive skills to think coherently and logically (id.).

Overall, the psychological evaluator indicated that given the student's strengths and weaknesses as well as his need for breaks, adult support, refocusing, and repetition of instructions, he would benefit from a structured, organized classroom with a small class size and high staff-to-student ratio (Dist. Ex. 8 at p. 13). The evaluator indicated that this would allow the

student to use his strong cognitive skills to the best of his ability by providing support for his attention, regulatory, and social difficulties (id.). The evaluator further recommended that the student continue speech-language therapy, OT, and PT to help him develop more adaptive coping mechanisms, lessen his preoccupations and anxiety, and help him better access his cognitive understanding and abilities (id.). The evaluator also indicated that continued services should provide the student with supplementary skills that would help him effectively access his strong cognitive abilities (id.).

The district's school psychologist conducted a classroom observation of the student at his therapeutic preschool on January 21, 2010 (Tr. p. 32; Dist. Ex. 6 at p. 1). According to the report, the psychologist observed the student for 65 minutes in a class with seven other children, one student teacher, and two assistants during free play time, snack, and small group reading time (Tr. p. 49; Dist. Ex. 6 at p. 1).<sup>6</sup> The psychologist indicated that the student presented as expressive, displayed a high energy level at some points, and demonstrated good listening skills during story reading (Dist. Ex. 6 at p. 2). She indicated that the student had some difficulties transitioning between activities, noting that he did not want to stop playing to get ready for snack and could not stay seated until snack time was completed (id.). According to the psychologist and the narrative report, the Preschool Evaluation Scale (PES),<sup>7</sup> a scale described as "a relevant measure of developmental delays for the educational environment," was completed by the classroom teacher after the observation was conducted (Tr. p. 50; Dist. Ex. 6 at p. 2). The narrative report reflects that results of the PES revealed the student's "average" range of skills in the areas of large muscle skills, cognitive thinking, and expressive language skills; and an "area of concern" for skills related to small muscle skills, social/emotional, and self-help skills (Dist. Ex. 6 at p. 2). The narrative report indicated that the student was making "great improvements in many areas but continu[ed] to require support" (id.).

A February 5, 2010 classroom observation and teacher report written by another district psychologist indicated that at his parents' request, the student was observed in his therapeutic prekindergarten classroom for consideration in a district inclusion program for students on the autism spectrum (Dist. Ex. 7 at p. 1). Administration of the Behavior Assessment Scale for Children, Second Edition (BASC-2), the Student Observation and Teacher Rating Scale; the Social Responsiveness Scale (SRS), Teacher Version; and a teacher interview revealed results indicating that overall the student's behavior was rated within the normal range, with an explanation that "[c]hildren who obtain[ed] scores within this range typically [we]re not affected by autism spectrum conditions" (id. at p. 3). The observation report indicated that the only area on the SRS in which the student was rated as having behaviors at a higher level than most other students his age was in "[a]utistic [m]annerisms," which included stereotypical behaviors or highly restricted interests (id.). The evaluator indicated that it was likely the student scored higher in this area due to sensory concerns and his repetitive play sequences (id.). The BASC-2 Teacher Report revealed at-risk ratings in the areas of hyperactivity, attention, and atypicality; as

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<sup>6</sup> The hearing record reflects that the head teacher was absent that day (Tr. p. 50; Dist. Ex. 6 at p. 1).

<sup>7</sup> The January 21, 2010 narrative report indicated that the PES "cannot be used as the sole determinant as to whether the child is determined to have a developmental delay" (Dist. Ex. 6 at p. 2).

well as elevated range ratings in the area of aggression (id.). Difficulty was also noted with adaptability (id.).

The February 5, 2010 classroom observation and teacher report indicated that overall the student was observed to be engaged and interactive with his peers in the classroom, his classroom teacher, and partially with the evaluator (Dist. Ex. 7 at p. 3). The student spoke in both sentences and short phrases; he was attentive to teacher directions during snack time and engaged nicely with a peer at a chalk easel by drawing, talking and laughing with each other (id.). The report further noted that after about 10 minutes of a drawing activity the student seemed to become restless and moved around the room (id.). According to the student's teacher, the student was often distracted in class and required a great deal of sensory stimulation (id.). The teacher described the student academically and cognitively as bright with a good ability to make connections and benefitting a great deal from the small classroom situation and the high student-to-teacher ratio (id.). Results of the teacher version of the SRS revealed ratings that placed the student overall in the "[n]ormal" range, indicating appropriate social motivation and engagement with others (id.). The evaluator indicated that on a more global behavioral scale, the student presented with more difficulties controlling his emotions, activity levels and attention and less able to adapt to change in his environment compared to other children his age (id.).

A March 2, 2010 report of the student written by an evaluator from The Child School indicated that the student separated from his mother easily, he was cooperative and showed in-seat behavior, and his eye contact was poor but he followed instructions and responded verbally (Dist. Ex. 14). The report indicated that the student enjoyed a story that was read to him, answered simple questions, labeled most letters except lowercase, knew most sounds, spelled and printed his first name, counted to 20 and labeled through 11, had good 1:1 correspondence counting pictures up to 10, recited the days of the week and months of the year, and stated his age (id.). The evaluator concluded that the student would do well in a beginning kindergarten class at The Child School (id.).

A form dated March 4, 2010 entitled "Request for Medical Accommodations to be completed by Treating Physician" indicated that the student was under his physician's care for a diagnosis of a PDD (Parent Ex. H). The form indicated that a PDD was a condition which limited the student because he was overwhelmed by too many children and tended to become impulsive and out of control; and he had difficulty "regulating" and tolerating a long bus ride (id.). The form indicated that the student's PDD diagnosis resulted in his need for a small classroom so that he would not be overwhelmed and so he could function (id.). In addition, the form indicated that being on a bus with a lot of children would cause him to become overwhelmed as he had "sensory issues" and tended to become overwhelmed by crowded and noisy spaces (id.). The physician recommended a small classroom and small bus with the shortest route possible due to the student's difficulty "regulating [and] tolerating a long bus ride" for the remainder of the school year (id.).

The Committee on Special Education (CSE) convened on March 10, 2010 for a requested educational planning conference (EPC) (Tr. p. 32; Dist. Ex. 3 at pp. 1-2). Attendees included the

district representative who also participated as the school psychologist,<sup>8</sup> a district regular education teacher, a district social worker, the student's preschool special education teacher, the parents, an additional parent member, and a social worker from The Child School (Dist. Ex. 3 at p. 2). According to the district representative/school psychologist, the discussion at the CSE meeting primarily focused on the January 21, 2010 narrative report, and referred to the January 15, 2010 psychological report and the December 20, 2009 educational progress report (Tr. pp. 34-35; see Dist. Exs. 6 at pp. 1-2; 8 at pp. 1-13; 15 at pp. 1-8). The CSE determined that the student was eligible for special education services as a student with a speech or language impairment (Dist. Ex. 3 at p. 1). The resultant IEP reflects that the CSE considered and rejected placement options in a general education setting with related services because it would not address the student's needs; a general education setting with special education teacher support services (SETSS) because it would not address the student's needs; special class in a community school because it would be too restrictive for the student at the time; and a more restrictive State-approved nonpublic school because the student's needs could be addressed within the community public school setting (id. at p. 13). Instead, the March 2010 CSE recommended placement for the student in an integrated co-teaching (ICT) class with a 12:1 student-to-teacher ratio<sup>9</sup> and related services of individual counseling one time per week for 30 minutes and group counseling (3:1) one time per week for 30 minutes, both in a separate location; individual OT two times per week in an unspecified location and group OT (2:1) one time per week in a separate location; individual speech-language therapy in an unspecified location two times per week for 30 minutes and group speech-language therapy in a separate location one time per week for 30 minutes; and group PT (3:1) one time per week for 30 minutes in a separate location (id. at pp. 2, 12, 14-15).<sup>10</sup> In addition, the CSE recommended that the student participate in State and local assessments without accommodations, and that standard criteria be used for promotion to the next grade (id. at p. 15).

In an April 21, 2010 letter from The Child School to the student's mother, she was informed that the staff at The Child School could "effectively work with [the student]," based upon the interview with him (Parent Ex. J). The letter included, among other things, information regarding funding options (id.).

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<sup>8</sup> The school psychologist at the March 2010 CSE meeting was the same person who conducted the January 21, 2010 classroom observation of the student at his therapeutic preschool as part of the "Turning Five" evaluation process (Tr. p. 34; compare Dist. Ex. 3 at p. 2, with Dist. Ex. 6 at p. 1).

<sup>9</sup> An ICT class, also referred to as a "collaborative team teaching" (CTT) class, means "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]). School personnel assigned to an ICT class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The Office of Special Education issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes ICT services (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>.) I note that the parties and impartial hearing officer have also used the terms ICT and CTT interchangeably to describe the student's recommended program for the 2010-11 school year. For consistency within this decision, I will use the term "ICT" class when referring to the district's recommended placement.

<sup>10</sup> The March 2010 CSE also terminated individual PT two times per week in a separate location (Dist. Ex. 3 at p. 15).

The district issued a letter dated June 2, 2010, describing the district's final recommendation to the parent which summarized the recommendations made by the March 2010 CSE for the 2010-11 school year and identified the name of the student's assigned school (Dist. Ex. 4). The letter also provided district contact information and instructions to the parent if the parent agreed with the recommendation or wanted to discuss the decision or arrange for another CSE meeting (id.).

### **Due Process Complaint Notice**

In a due process complaint notice dated July 23, 2010, the parent asserted that the district's recommended placement in an ICT class with related services on the student's IEP for the 2010-11 school year was inappropriate for the student (Dist. Ex. 1 at p. 2). The parent asserted that in order for the student to progress educationally, the student required a "small, structured classroom with non-aggressive peers and a high staff to student ratio to provide support for his attentional, regulatory and social difficulties" (id.). The parent further asserted that although the student displayed "solid, age appropriate abilities to complete tasks," he required "continuous support and positive reinforcement from teachers and therapists" (id.). In addition, the parent asserted that the recommended ICT class would not offer the student the small, highly structured, high student-to-teacher ratio classroom that the student required to "solidify his gains, avoid regression and help further develop his academic skills and social and emotional development" (id.). The parent further asserted that a visit to the assigned school and a classroom observation revealed that the large class size, lack of individual support and absence of necessary structure would "exacerbate" the student's attentional, regulatory and social difficulties, which would impede his ability to learn and likely cause regression (id. at p. 3). As relief, the parent requested that the district pay tuition for the student's attendance at The Child School for the 2010-2011 school year and pay for transportation (id.).

### **Impartial Hearing Officer Decision**

An impartial hearing was convened and conducted over the course of two days in October and November 2010 (Tr. pp. 1-413). In a decision dated January 10, 2011, the impartial hearing officer found that the district failed to establish that the student was offered a free appropriate public education (FAPE) (IHO Decision at p. 13). Specifically, the impartial hearing officer found that the March 2010 IEP was not reasonably calculated to enable the student to receive educational benefits (id.). The impartial hearing determined that the student had always been in "smaller class sizes" and required "constant individualized attention" to stay focused and address social/emotional and language difficulties (id.). The impartial hearing officer concluded that the parent's witnesses had testified persuasively as to the student's need for constant adult support (id. at p. 14). He further found that their testimony along with some of the parents' documentary evidence, established the student's continued need for individualized attention and that the recommended district program was not appropriate to address the student's needs (id. at pp. 14-15).

Next, with regard to The Child School, the impartial hearing officer found that the parent did not meet her burden of proof regarding the appropriateness of the unilateral placement (IHO

Decision at p. 15).<sup>11</sup> Initially, the impartial hearing officer found that the parent was legally required to establish with objective evidence that the private program was appropriate and he concluded that the parent submitted "virtually no objective evidence" regarding this issue except the testimony of the parent and one witness (*id.*). The impartial hearing officer further found that the parent failed to submit any documentary evidence, except for the December 2009 progress report,<sup>12</sup> to establish the appropriateness of the school; noting that no "report cards, enrollment contract, teacher reports, [or] academic progress reports" were submitted (*id.*). In addition, the impartial hearing officer found that the parent failed to establish the student's progress, the related services he was receiving, the contents of his academic instruction along with the credentials of the student's instructors, and who his related service providers were (*id.*). The impartial hearing officer also found that although the December 2009 progress report was objective, the exhibit carried less weight because it was prepared in December 2009 and did not fully address the student's needs for the school year in question (*id.*).

Next, the impartial hearing officer found that the equitable considerations favored the district (IHO Decision at p. 16). Finding that the parent had cooperated in the development of the IEP and the process, the impartial hearing officer found; however, that the "intention" of the parent was "questionable" (*id.*). Specifically, he found that the hearing record showed that the parent intended to place the student in a private placement and that her "view" of the recommended placement was "discolored by her prior experience" (*id.*). The impartial hearing officer further found that the parent submitted her application to the private school before the CSE meeting and that "regardless of the recommendation, this parent was determined to place the student in a private placement" (*id.*). The impartial hearing officer concluded that the "parent's intent and conduct rises to the ... requisite level of unreasonableness, in consideration of a totality of the circumstances" (*id.*). Therefore, the impartial hearing officer denied the parent's request for tuition and ordered the CSE to reconvene to develop an appropriate IEP for the student for the school year (*id.* at p. 17).

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

The parent appeals, challenging the impartial hearing officer's determinations that The Child School was not an appropriate placement and that equitable considerations favored the district. The parent asserts that the impartial hearing officer applied an erroneous legal standard in finding that The Child School was not an appropriate placement. More specifically, the parent contends that The Child School program was "properly designed to enable [the student] to receive educational benefit" and that the student was "likely to progress, not regress." The parent further asserts that although The Child School was the placement at issue, the impartial hearing

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<sup>11</sup> I note that the impartial hearing officer erroneously referred throughout the decision to the student's preschool as the student's current placement (*see* IHO Decision at pp. 2, 10, 11, 15, 16, 17). The student's preschool was not the placement at issue at the impartial hearing, nor is it the placement at issue in the instant appeal (*see* Dist. Ex. 1; *see also* Pet).

<sup>12</sup> I note that, despite the impartial hearing officer's statement to the contrary, the December 2009 progress report was not submitted into evidence by the parent and is marked in the hearing record as a district exhibit (*see* Dist. Ex. 15). Furthermore, the exhibit describes the student's preschool program, not the student's program at The Child School (*id.*).

officer erroneously referred to the student's preschool program throughout the decision; disregarded the parent's exhibits; improperly excluded from evidence an important pediatric report; and that the decision failed to reference at least five other documents entered into evidence by the parent at the impartial hearing. In addition, the parent asserts that the impartial hearing officer failed to explain the basis for his finding that the testimony of the parent and another witness (the psychologist at The Child School) were insufficient to establish the appropriateness of the private placement.

As to the equitable considerations, the parent asserts that she attended all CSE meetings during 2010, submitted all available documentation that she wanted the CSE to consider, and expressed her objections to the CSE's recommended placement at the March 2010 CSE meeting. In addition, the parent asserts that she considered a specific district placement in January 2010, but that the student was not accepted into that program; that she advised the March 2010 CSE that she was considering nonpublic schools; and that although she received an acceptance letter dated April 21, 2010 from The Child School, she did not enroll the student until after the beginning of the 2010-11 school year. Moreover, the parent asserts that she visited the district's assigned school, spoke with the teacher of the assigned class, advised the district as to why the assigned class was not appropriate by letter dated June 22, 2010, did not receive any further placement recommendations and thereafter on September 13, 2010 sent a 10-day notice to the district advising them of her intent to enroll the student at The Child School effective September 28, 2010. The parent submits additional evidence and asks that it be considered on appeal.

In its answer, the district requests that the additional evidence submitted by the parent not be considered on appeal. Substantively, the district asserts that the parent failed to submit sufficient evidence to prove that they are entitled to the relief sought. Next, the district asserts that the parent failed to prove that the unilateral placement was appropriate. The district asserts that the only witness from the Child School was a school psychologist who does not teach and only observed the student informally in class, and that the hearing record did not include any documentary or testimonial evidence regarding how the program at Child School was designed to meet the student's unique needs. The district specifically asserts that the student needs redirection and prompting, as indicated on the student's IEP, and that there was no evidence that The Child School provided the student with such accommodations. The district further asserts that the parent failed to prove that The Child School met the needs that their own witnesses alleged the student required. The district contends that the parent offered no information regarding the experience or credentials of the student's teacher, paraprofessional or related service providers, other than that The Child School's teachers had masters degrees, were certified in special education, and that their paraprofessionals had bachelors degrees. Moreover, the district asserts that the private placement did not provide the necessary related services to address the student's individual needs, specifically PT. The district further alleges that there was no evidence as to the frequency and duration of the related services provided to the student at The Child School, nor was there any evidence regarding the details of how the related service sessions addressed the student's unique needs.

Lastly, the district asserts that equitable considerations do not support the parents, asserting that the evidence shows that the only public school option that the parent would have

considered was a program that the student was not accepted into, and that the parent would have rejected any other public school placement in favor of a private school.

In the event it is determined that the parent should be awarded reimbursement, the district argues in the alternative, that any award should be reduced to reflect only the amount allegedly paid by the parent. Moreover, the district asserts that there is no evidence in the hearing record to show when the student actually attended The Child School, that the parent asserts that the student did not attend until September 28, 2010, that any award should be conditioned on provision of proof of the student's attendance at Child School, and that the district should only be ordered to pay tuition to the extent that the student actually attended The Child School.

In a reply, the parent, among other things, responds to the district's assertions that the additional evidence should not be considered.

## **Procedural Matters**

### **Excluded Evidence**

Initially, I will consider whether the impartial hearing officer erred in excluding from evidence at the impartial hearing the August 19, 2010 developmental pediatric report, which the parent attached to the petition (Pet. Ex. M). Impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. § 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]). Although it is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious, I have reviewed the August 2010 developmental pediatric report and find that, although it was prepared after the March 2010 CSE meeting and not available or relevant to the March 2010 CSE determination, the impartial hearing officer nevertheless erred in excluding it from evidence insofar as it has some relevance regarding the determination of appropriateness of the parent's unilateral placement of the student at The Child School (see 8 NYCRR 200.5[j][3][xii][c]). I note that the report was prepared as a developmental assessment to help with educational planning; contains a history of present illness, developmental history, and developmental evaluation that are consistent with the hearing record; and also includes a recommendation for a small therapeutic kindergarten program (Pet. Exhibit M).

Second, I will consider whether the impartial hearing officer erred in excluding from evidence at the impartial hearing the first page of the parent's 2009 tax return (Pet. Ex. P). While the parties "shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing," "[e]ach party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing" (8 NYCRR 200.5(j)(3)(xii); see 34 CFR 300.512[a][2],[3]). In addition, as stated above, the impartial hearing officer "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Upon review of the hearing record, I find that the impartial hearing officer appropriately excluded the first page of the parent's tax return based upon the

parent's failure to comply with the five-day disclosure rule (see L.J. v. Audubon Bd. of Educ., 2008 WL 4276908 [D.N.J. Sept. 10, 2008]).

### **Additional Evidence**

As to the additional evidence attached to the petition for consideration, 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). In light of the district's objections, I decline to accept the remaining additional documentary evidence as some of the additional evidence was available at the time of the impartial hearing and not offered into evidence for the impartial hearing officer's consideration, and, moreover, consideration of the additional documentary evidence is not necessary in order to render a decision in this case.<sup>13</sup>

### **Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-

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<sup>13</sup> Regarding the submission by the parent of additional evidence by letter dated February 22, 2011, State regulations do not contemplate the submission by letter of additional documentary evidence after the party's pleading has been filed (see 8 NYCRR 279.4[a], 279.6; 279.10[b]). Accordingly, the additional evidence will not be considered.

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, but "school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

Returning to the instant case, since the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2010-11 school year has not been appealed, that determination has become final and binding on the parties and will not be reviewed on appeal (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also Application of a Student with a Disability, Appeal No. 11-027; Application of a Student with a Disability, Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-115; Application of a Student with a Disability, Appeal No. 10-102). Therefore, the only issues before me are the appropriateness of the parent's unilateral placement and equitable considerations.

Turning to the question of the appropriateness of the parent's unilateral placement of the student at The Child School, 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).

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

v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

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).

Regarding the student's needs, the hearing record reflects that his overall cognitive functioning was assessed as high average (full scale IQ 112), although unevenly developed, with a significant difference between his performance (121) and verbal (108) IQ (Dist. Ex. 8 at p. 5). The hearing record further reflects that the student presented as highly distractible and impulsive, and that he had difficulties with emotional and behavioral regulation, linguistic and sensory processing, and anxiety, which impeded his ability to access his cognitive strengths (id.).

In determining whether the parent's unilateral placement was appropriate, I have considered the unappealed finding by the impartial hearing officer that the student requires constant individualized attention to maintain focus and address his social/emotional and language difficulties (see IHO Decision at pp. 13-14). I further note the impartial hearing officer's finding that the parent's witnesses testified persuasively regarding the student's need for constant adult support, and specific testimony and documentary evidence presented at the impartial hearing that the student needed to be in a "fairly small" and "very structured class" with a "very high" student-to-teacher ratio in order to access his education (Tr. pp. 271; IHO Decision at p. 14; see Tr. pp. 301-302; Dist. Exs. 8 at p. 13; 9 at p. 5; 15 at p. 8; Parent Ex. M at p. 5).

Upon review of the hearing record, I find that The Child School is an appropriate placement for the student. Specifically, the instruction provided to the student at The Child School was aligned with his present levels of performance and identified management needs (see Dist. Ex. 3 at pp. 3-6). The hearing record reflects that The Child School serves students with average or above average cognitive abilities, who have special learning or emotional needs and are usually not able to function appropriately in larger classes (Tr. p. 314). The hearing record further reflects that the Child School provides special class settings that are generally in an 8:1+1 student-to-teacher ratio, except for the kindergarten class which is 6:1+1 ratio (Tr. p. 315). Such information is consistent with the unappealed finding of the impartial hearing officer that the student needed a special class with constant adult support.

Moreover, review of the kindergarten class profile for the student's 2010-11 special class prepared on October 12, 2010 by The Child School, provides additional support for finding that the school was appropriate (see Dist. Ex. 13). Specifically, the hearing record reflects that there were six students in the student's class between the ages of four years six months and seven years five months, all with average intellectual functioning, similar to the student (id. at pp. 1, 3). All six students' instructional reading and instructional math levels were between .5 and 1.5 (id. at p. 1). One of the six students was characterized as being at an average functional level of physical development, while the remaining five students were characterized as being in the below average functional level of physical development and received adapted physical education (id. at p. 2). In regard to functional level of social development, the class profile characterized all six students as below average (id.). All six students in the class received both OT and speech-language therapy; three of the six students received counseling (id. at p. 3). In regard to management needs, the class profile reflected that the students needed separation from the group at times during the school day, similar to the student in this case (id.).

Contrary to assertions by the district, the hearing record reflects that the teachers at The Child School were qualified. Specifically, the record reflects that all of the teachers have master's degrees in special education and hold credentials in special education (Tr. pp. 317, 332). The assistant teachers in the school, described as paraprofessionals in the hearing record, all have a bachelor's degree (Tr. pp. 321, 330). In addition, the hearing record reflects that The Child School has a structured environment, the staff employs specific methodologies to address the behavioral management needs of the students and designs individualized learning programs for the students (Tr. p. 315). Testimony at the impartial hearing reflected that the schools' overall environment is structured (id.).

In addition, the hearing record reflects that The Child School addresses the student's academic management needs identified in his March 2010 IEP (see Dist. Ex. 3 at p. 3). Regarding the district's assertion that there was no evidence that The Child School provided the student with redirection and prompting, the hearing record reflects that The Child School uses the district IEPs in the course of instruction of the students (Tr. p. 328), and, moreover, although there was not specific testimony that the student's teacher used "redirection and prompting," a review of the hearing record in totality leads to the conclusion that redirection and prompting techniques were employed by the teaching staff. The hearing record reflects that the approach to each student at The Child School was individual and that the school addressed the student's

individualized needs by targeting his emotional and behavioral needs through his high cognitive ability, in conjunction with working on his sensory motor integration needs (Tr. pp. 318-19).

Additionally, the school psychologist from The Child School testified that she had informally observed the student in his classroom on many different occasions since he began attending The Child School (Tr. pp. 319, 326). The school psychologist testified that at the time of the impartial hearing, the student needed a lot of direction and repetition, tended to become quite distracted by other children, and became distracted internally by his "fantasy world" (Tr. p. 319). In addition, the school psychologist described the student as tending to get "quite restless;" requiring a lot of breaks (Tr. p. 320). Her testimony further noted that it was not easy for the student to follow directions and that he tended to get angry, whereupon it was best to talk with him and provide him with choices (*id.*). The school psychologist indicated that the student sometimes needed quiet time alone in the classroom and was thereafter ready to "come back," and that he needed "a lot of attention" (*id.*).<sup>14</sup> The school psychologist's testimony revealed that The Child School gave the student space but provided support by an adult to help him focus (Tr. p. 319). Moreover, the school psychologist testified that as the student was settling in a little more, he received more redirection and a lot of "one-to-one" time (Tr. p. 323). Accordingly, upon review of the hearing record, I find that the student's academic management needs were addressed by The Child School.

Regarding the provision of related services to the student, the hearing record reflects that the student received speech-language therapy, OT, and counseling at The Child School (Tr. p. 329). Although the hearing record does not contain information regarding whether the student received PT at the School, 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).<sup>15</sup> Moreover, upon review, I find that the failure of the parent to identify with particularity the duration and frequency of the student's speech-language therapy, OT and counseling and the lack of information in the hearing record as to whether the student received PT does not, in this instance, render the unilateral placement inappropriate as the hearing record shows that the core need of the student for a special class setting (that was not offered by the district), was provided to the student at The Child School (see R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at \*27 [E.D.N.Y. Jan. 21, 2011] [finding the parents' unilateral placement appropriate where deficiencies in student's IEP were corrected] adopted at 2011 WL 1131522 [E.D.N.Y. March 28, 2011]; M.N. v. New York City Dept. of Educ., Region 9 (Dist. 2), 700 F.Supp.2d 356, 367 [S.D.N.Y. 2010] [quoting Cerra and upholding an educational placement without related services where it was nevertheless "likely to produce progress, not regression"]; compare Mr. I v.

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<sup>14</sup> The school psychologist from The Child School testified that the student was distracted by a noisy environment and going to a larger group such as a lunchroom situation, which at The Child School consisted of approximately 24 to 30 students (Tr. p. 322). To address the student's difficulty with regulation and his tendency to be "up and about" in this situation, The Child School separated the class tables in the lunchroom and provided the student with redirection (*id.*).

<sup>15</sup> The hearing record does reflect that most students at the school who were mandated to receive PT received it through district provided Related Service Authorizations (RSAs), which enabled them to receive the service outside of school (Tr. p. 329); however, this is not sufficient to establish that student in this case received PT services.

Maine School Admin. Dist. No. 55, 480 F.3d 1, 24 [1st Cir. 2007]; Berger v. Medina City School Dist., 348 F.3d 513, 523 [6th Cir. 2003]).

Accordingly, after a thorough review of the hearing record, I find that the impartial hearing officer erred in finding that The Child School was not appropriate. In assessing the propriety of the student's unilateral placement I have considered the "totality of the circumstances" and have determined that the placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the unique needs of the student, supported by services necessary for the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).<sup>16</sup>

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., 646 F.Supp.2d 346, 363-64, [S.D.N.Y. 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,

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<sup>16</sup> I note that the district does not assert on appeal that The Child School is not the student's least restrictive environment (LRE) and that the LRE mandate is only a factor to be considered when considering a parent's unilateral placement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105; see 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 also Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428).

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. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty, 315 F.3d at 27); 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 parent contends that the impartial hearing officer erred by finding that the equitable considerations precluded reimbursement. Upon review, I find that the hearing record does not support the impartial hearing officer's conclusion. Specifically, the impartial hearing officer's finding that the parent was intent on placing the student in a private placement and that she sought a private placement other than The Child School, which was rejected, is not supported by the hearing record (see IHO Decision at p. 16). Contrary to the impartial hearing officer's finding, the hearing record reflects that the parent considered a specific district program in January 2010, visited the district program at two different locations, but that the student was not accepted into that program (Tr. pp. 342, 373, 374-75, 376; Dist. Ex. 7). The hearing record further reflects that the parent completed an application to The Child School on January 13, 2010 (Dist. Ex. 10); that she received an acceptance letter dated April 21, 2010 from the school (Parent Ex. J); but that she did not enroll the student in The Child School until after the beginning of the 2010-11 school year, on or about September 28, 2010 (Parent Ex. N). Moreover, I find that the parent acted cooperatively insofar as she visited the district's assigned school when offered the opportunity and spoke with the teacher of the assigned ICT class, she advised the district that she disagreed with the type of class setting proposed by the district (Parent Ex. K at p. 2); and on July 23, 2010 filed a due process complaint notice identifying those aspects of the IEP with which she disagreed (Dist. Ex. 1), providing the district with ample opportunity to correct the IEP. Thereafter, on September 13, 2010, the parent sent a notice to the district advising them of her intent to enroll the student at The Child School effective September 28, 2010 and seek reimbursement at public expense (Parent Ex. N). Accordingly, the parent's actions in this case are clearly distinguishable from cases in which tuition reimbursement should be denied due to a delay in notifying the CSE of rejection of a district's IEP or due to misconduct, obfuscation or a lack of cooperation in identifying an appropriate public school placement warranting a limitation or denial of relief (see S.W., 646 F.Supp.2d at 364; Carmel, 373 F. Supp. 2d at 417-18), and I find no basis in the hearing record to reasonably infer that the parent would not have considered placing the student in a district program.

## **Conclusion**

Having concluded that the parent's unilateral placement at The Child School was appropriate and that equitable considerations favored the parent, I will direct that the district reimburse the parent for tuition payment made to The Child School for the 2010-11 school year. Additionally, I will direct the district to place the student at the Child School for the remainder of

the 2010-11 school year.<sup>17</sup> I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated January 10, 2011 that determined that the parent failed to meet her burden of proving that the unilateral placement was appropriate and that equitable considerations favored the district are annulled; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for any portion of the tuition she paid to The Child School for the 2010-11 school year upon submission of proof of attendance and payment; and

**IT IS FURTHER ORDERED** that that the district shall enter into a contract with The Child School, as an approved nonpublic school under State regulations, for the remaining unpaid portion of the 2010-11 school year, upon the submission of proof of attendance.

**Dated:** Albany, New York  
May 18, 2011

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

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<sup>17</sup> Under certain circumstances, the issuance of an order directing placement of a student at a State-approved nonpublic school to ensure that a FAPE is offered is appropriate (see Burlington, 471 U.S. at 369-71 ["In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for a placement in a public school was inappropriate," the United States Supreme Court held, "it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school"]; Application of a Student with a Disability, Appeal No. 09-134; Application of a Student with a Disability, Appeal No. 08-103; see also 34 C.F.R. § 300.104; 8 NYCRR 200.6[j]).