



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-023

### **Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

#### **Appearances:**

Law Office of Neal Howard Rosenberg, attorney for petitioner, Nathaniel Kuzma, Esq., of counsel

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

#### **DECISION**

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Steven Gaynor School (Stephen Gaynor) for the 2007-08 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that equitable considerations supported the parent's claim. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was attending an ungraded class at Stephen Gaynor with approximately ten other students (Tr. pp. 20, 128). Stephen Gaynor has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Stephen Gaynor admits only students who have disability diagnoses (Tr. p. 31). The student's eligibility for special education services as a student with a speech or language impairment is in dispute in this appeal (see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The hearing record reflects that the student's early speech and language development was delayed (Dist. Ex. 13 at p. 2). Results of a speech and language assessment at the age of two years 11 months reportedly indicated that the student experienced delays in articulation skills, and had receptive and expressive language skills in the low average to borderline range on formal testing (id.). At age three, the student began receiving speech-language therapy from a private speech language pathologist two times per week and responded well to intervention (Tr. pp. 85-86; Dist.

Exs. 13 at p. 2; 14 at p. 2).<sup>1</sup> The hearing record indicates that evaluation of the student at age five revealed some strong receptive and expressive language skills upon formal testing as well as "some persisting difficulties with language formulation, retrieval, and temporal sequencing" (Dist. Ex. 13 at p. 2).

The student attended the Browning School (Browning), a regular education private school, from kindergarten through fourth grade (Tr. p. 85; Dist. Ex. 13 at p. 2). According to the parent, the student began to experience difficulty in school when he was in second or third grade at Browning, and the situation worsened in fourth grade because the student "started throwing tantrums at home" (Tr. pp. 85, 87; Dist. Ex. 14 at p. 3). The parent indicated that the student did not understand all of the verbal information his teachers provided and that he did not fully participate in class, resulting in boredom (Tr. p. 87). The parent noted that the student had a "major meltdown every single night over his homework," and she attributed the tantrums to his language problem and his inability to organize his homework assignments (Tr. pp. 87-88). A private speech-language pathologist helped the student with homework for half of his fourth grade school year, and thereafter the parent engaged the services of homework and reading tutors (Tr. p. 88).

In November 2004, the parent sought a private psychoeducational assessment of the student (Dist. Ex. 13 at pp. 1-2, 10). The psychoeducational evaluation report, dated January 30, 2005, indicates that on January 8 and 9, 2005, a battery of tests was administered to the student as part of a neuropsychological evaluation (*id.* at pp. 1-2). With regard to the student's presenting issues, the evaluator noted that while the student had some difficulties in acquiring reading and writing skills, he had nonetheless been making good progress in school (Dist. Ex. 13 at p. 2). Administration of the Wechsler Intelligence Scale for Children - IV (WISC-IV) yielded a verbal comprehension index composite score (percentile, range description) of 110 (75th percentile, high average), a perceptual reasoning index composite score of 115 (84th percentile, high average), a working memory index composite score of 88 (21st percentile, low average), a processing speed index of 106 (66th percentile, average), and a full scale IQ (FSIQ) score of 108 (70th percentile, average) (*id.*). The evaluation report indicates that the student's verbal reasoning abilities were strong on the verbal comprehension index of the WISC-IV, but relative weaknesses were seen in the student's executive-expressive skills, undermining his ability to offer complete responses to test items (*id.* at p. 4). Administration of various subtests of the Developmental Neuropsychological Assessment (NEPSY) yielded a preponderance of scores in the low average to average range (*id.* at pp. 1, 4-6, 11-14). According to the evaluation report, the student's difficulties on the sentence repetition subtest (9th percentile, low average) of the NEPSY in conjunction with the working memory index of the WISC-IV "appeared to reflect auditory sequencing weaknesses rather than inattention per se" (*id.* at p. 5). A discrepancy was evident between the student's strong abilities on the symbol search subtest (95th percentile) and his weak graphomotor speed on the coding subtest (25th percentile) of the WISC-IV (*id.* at p. 5).<sup>2</sup>

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<sup>1</sup> The student received private speech-language therapy from age three until midway through his fourth-grade year (Tr. pp. 47-48, 86, 88).

<sup>2</sup> The psychoeducational evaluation report indicates that on the symbol search subtest of the WISC-IV, the student scored at the 95th percentile; however, the score is subsequently listed in the same report as the 91st percentile (Dist. Ex. 13 at pp. 5, 11). It appears that both scores fall within the average range.

As part of the January 2005 psychoeducational testing, administration of the Woodcock Johnson Tests of Achievement - Third Edition (WJ-3) revealed persisting weaknesses in the student's word encoding and decoding skills (Dist. Ex. 13 at p. 6). The student's letter/word decoding and sight-reading skills were in the low average range on the letter-word identification subtest (22nd percentile), and pseudoword decoding skills were in the low end of the average range on the word attack subtest (32nd percentile) (id.). The student's fund of learned words was weaker than would be expected given his verbal aptitude, and his ability to decode novel words was unreliable; weaknesses were particularly pronounced on multisyllabic words, and he had some difficulty sounding out vowels and vowel combinations (id.). The student's reading speed for basic sentences was in the low average range on the reading fluency subtest (24th percentile), and his comprehension abilities were in the low end of the average range on the passage comprehension subtest (26th percentile) (id.). The student's word encoding abilities were weak on the spelling subtest (17th percentile) and the spelling of sounds subtest (16th percentile), and both subtest results were in the low average range (id.). The psychoeducational evaluation report indicated that the student's fund of previously learned words was far weaker than would be expected given his intellectual abilities, and incorrect efforts on unfamiliar words revealed weak segmenting skills and a tenuous mastery of sound-symbol relationships (id.). The student's ability to quickly formulate simple sentences with target words was in the superior range on the writing fluency subtest (95th percentile), although his sentence construction and written expression abilities were in the average range on the writing samples subtest (34th percentile) (id.). Basic math calculation skills were in the average range on the calculation subtest (62nd percentile), but rapid calculation skills were in the low average range on the math fluency subtest (16th percentile) (id.).

Administration of the Comprehensive Assessment of Spoken Language (CASL) in January 2005 yielded a receptive language composite score at the 87th percentile (high average) and an expressive language composite score at the 45th percentile (average) (Dist. Ex. 13 at p. 12). Regarding the student's motor and sensory skills, results per administration of selected subtests of the NEPSY revealed the student's basic graphomotor constructional abilities were in the low average range on the design copy subtest (16th percentile), and rudimentary graphomotor tracking speed and precision were in the borderline range on the visuomotor precision subtest (5th percentile) (id. at p. 6). Fine motor coordination was in the average range (63rd percentile) on the fingertip tapping subtest (id.).

The results of a personality assessment from January 2005 testing indicated that the student was using coping strategies to maintain an optimistic outlook on life, but academic difficulties left him feeling "stressed out" (Dist. Ex. 13 at p. 8). The evaluation report indicated that academic interventions should focus on helping the student to overcome and compensate for "weaknesses evident in his encoding and decoding capacities to as great an extent as possible, and to assist him in developing ways to utilize his study time in an effective manner" (id.). Recommendations from the January 2005 evaluation included direct instruction in reading through the use of an Orton-Gillingham or Wilson Language approach to instruction that focused on complex sound-symbol relationships, word segmenting skills, reading vocabulary, and reading for meaning (id. at p. 9). The evaluator also recommended books on tape, text scanners, development of the student's touch-typing skills, use of a spell checker device and marking without downgrading the student's spelling errors, provision of a written outline with the main points presented by his instructors, alternative means of copying homework assignments, "hands-on" learning or other active student involvement, and extended time limits on school and standardized examinations (id.).

In September 2006, the student was enrolled at Stephen Gaynor (Dist. Ex. 14 at p. 2). The classes at Stephen Gaynor are ungraded, but the student was placed with his chronologically aged peers (Tr. pp. 88-89; Dist. Ex. 14 at p. 3). In November 2006, the parent referred the student to the district's Committee on Special Education (CSE) because of the student's language processing and reading comprehension difficulties (Tr. pp. 89-90; Dist. Exs. 11 at p. 1; 14 at p. 1).

On January 26, 2007, the district conducted a social history, relying in part on information provided by the parent (Dist. Ex. 14 at p. 1). According to the social history, the student gets along with friends, and he likes science, computer games and "hanging out with friends" (id. at p. 3). The social history report indicated that the student received speech services at Stephen Gaynor (id. at p. 4). At the time of the interview, the parent indicated that she would share with the district a copy of a "neurological" of the student as well as teacher and service provider reports (id. at p. 4; see Parent Ex. B).<sup>3</sup>

On January 26, 2007, the district conducted a psychological/educational evaluation (Dist. Ex. 11 at p. 1). Administration of the WISC-IV yielded a verbal comprehension index composite score of 128 (top part of the superior range), a perceptual reasoning index composite score of 108 (average), a working memory index composite score of 94 (average), a processing speed index of 88 (low average), and a FSIQ score of 109 (average) (id. at pp. 2-4). Based upon the timed subtests comprising the processing speed index, the psychological/educational evaluation report noted that although the student's work was quite accurate, he worked relatively slowly under the time limits and "sacrificed speed for accuracy" (id. at p. 4). The evaluation report indicated that processing speed is an area of relative weakness for the student (id.).

During the January 2007 psychological/educational evaluation, administration of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) yielded scores between the high average to the lower part of the average range (Dist. Ex. 11 at pp. 7-8). The psychological/educational evaluation report stated that according to an ability-achievement discrepancy analysis, the student functioned significantly below what would be expected, given his ability level, in the areas of phonics, math computation, and math reasoning (id. at p. 8). The evaluation report indicated that emotional factors possibly contributed to the student's academic difficulties and slowed processing speed (id.). The evaluation report did not contain recommendations, indicating that recommendations would be considered at the CSE meeting (id.).

On February 6, 2007, the district conducted a classroom observation of the student at Stephen Gaynor (Dist. Ex. 12). The observation report indicated that the class consisted of ten students, one teacher, and one teacher assistant (id.). The student was described as an active participant in the class lessons and attended "to everything his peers and the teacher were saying" (id.).

On March 7, 2007, the district's CSE convened for an initial review and determined that the student should not be classified as eligible for special education services (Parent Ex. C at pp. 1-2).

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<sup>3</sup> The hearing record does not include a neurological evaluation of the student; however, the psychoeducational evaluation report conducted at the request of the parent contained neuropsychological aspects (see Dist. Ex. 13).

At the request of the parent, the student's former private speech-language pathologist conducted a private language evaluation of the student's comprehension and expression of spoken language in March 2007 while the student was attending Stephen Gaynor (Tr. p. 95; Dist. Ex. 9 at p. 1). Administration of the 14 subtests of the CASL yielded a core composite standard score (SS) (percentile rank) of 71 (3rd percentile), a lexical/semantic composite SS of 86 (18th percentile), a syntactic composite SS of 81 (10th percentile), and a supralinguistic composite SS of 72 (3rd percentile) (Dist. Ex. 9 at p. 2). The language evaluation report noted that the core composite score was below the mean for the student's age peers (id. at p. 3). According to the language evaluation report, the student's ability to process language at a more abstract level, by considering non-literal meanings, inferential comprehension and obtaining meaning from context without visual support, was most difficult for him, and was different than the expected ability of his same-age peers (id.). During the evaluation, the speech-language pathologist observed moderate to severe word retrieval difficulty and difficulty comprehending and formulating complex ideas to suit more sophisticated pragmatic functions (id.). The speech-language pathologist opined that the student's language impairment affects his self-esteem as well as his academic performance (id.). The speech-language pathologist recommended that the student "attend a special education setting that is uniquely suited to meet his language needs" and that "language therapy be provided that is concomitant with the educational program" (id.).

In April 2007, the parent requested that a new CSE team convene to consider providing special education services for the student (Tr. p. 95; Dist. Ex. 3). The parent submitted a copy of the March 2007 private language evaluation and asked that it be considered at the upcoming CSE meeting (Dist. Ex. 3). Although the parent provided consent for the CSE to evaluate the student, no additional evaluations were conducted and the CSE requested no additional information from the parent (Tr. p. 96; Dist. Exs. 4; 6).

On July 11, 2007, the district's CSE convened for another eligibility review (Dist. Ex. 8 at p. 1). The parent participated in the CSE meeting by telephone because she was out of town (Tr. p. 97; Dist. Ex. 8 at p. 1). The CSE once again determined that the student was ineligible for special education services (Dist. Ex. 8 at p. 1). According to the parent, she did not agree with or understand why the July 2007 CSE determined not to classify the student (Tr. p. 97). According to another participant at the July 2007 CSE meeting, the parent told the CSE team that she was "fine" and "okay" with the CSE's recommendations (Tr. pp. 258-89). In addition, testimony was provided by district personnel that general education intervention programs, as opposed to special education services, are available to students who have weakness similar to those of the student (Tr. pp. 218-19).

In a due process complaint notice dated July 30, 2007, the parent alleged, among other things, that the district failed to classify the student and failed to offer the student a free appropriate public education (FAPE) on both procedural and substantive grounds for the 2007-08 school year (Dist. Ex. 1). As relief, the parent sought tuition reimbursement for Stephen Gaynor, transportation and related services (id.).

In September 2007, the student resumed attendance at Stephen Gaynor for the 2007-08 school year (Tr. p. 98). At Stephen Gaynor, the student was in a class of 11 students with a head teacher and an assistant, and he worked in smaller groups for reading, math and social studies (Tr. pp. 187-88). The student received what was described as speech and language therapy with a speech-language pathologist once per week individually and once per week in a group (Tr. p. 127).

The speech-language pathologist also sat in on the student's social studies class at least twice per week (Tr. p. 127). The student received group reading instruction five times per week and individual remedial reading instruction two times per week (Tr. p. 160).

An impartial hearing was conducted and concluded on January 16, 2008 after three days of testimony. In a decision dated February 14, 2008, the impartial hearing officer determined that the burden of persuasion to establish that the district failed to offer the student a FAPE was on the parent because the due process complaint notice was filed prior to the effective date of legislation shifting the burden of persuasion to the district (IHO Decision at p. 16). The impartial hearing officer determined that there was no dispute that the student has deficits with respect to expressive language, but that the evidence did not show that the student's educational performance is adversely impacted by his deficits to the extent that he requires special education and/or related services, and that the student could be educated in a general education setting (*id.* at pp. 17-21). The impartial hearing officer found that Stephen Gaynor was not appropriate for the student, finding that the student experienced a marked decrease in evaluation scores after spending seven months there (*id.* at pp. 22-23). The impartial hearing officer also determined that the speech-language therapy provided to the student at Stephen Gaynor appeared to be a form of academic tutoring because it consisted mostly of previewing and reviewing class materials (*id.* at p. 23). With regard to equitable considerations, the impartial hearing officer found in favor of the parent because there was "no evidence" that she failed to cooperate with the CSE or with the district's personnel at any time (*id.*).

The parent appeals, arguing that the impartial hearing officer improperly placed the burden of persuasion on the parent. The parent further alleges that the impartial hearing officer failed to determine that the student was eligible for services as a student with a speech or language impairment that adversely affects his educational performance in the areas of reading, writing, math, spelling and verbal communication, and that the student's scores on evaluative testing supported the conclusion that the student should be classified. The parent also contends that the impartial hearing officer erred in her determination that Stephen Gaynor is not appropriate for the student. The parent argues that Stephen Gaynor is appropriate because it provides small group instruction, a laptop computer, speech-language therapy, and reading instruction, which have enabled the student to make academic progress. Among other things, the parent asserts that the impartial hearing officer ignored the evidence in favor of classification, gave undue weight to a three year old psychological assessment and the testimony of the district's speech-language pathologist, and inappropriately found that the student had regressed at Stephen Gaynor. As relief, the parent seeks reimbursement for the cost of tuition at Stephen Gaynor for the 2007-08 school year.

In its answer and cross-appeal, the district denies the parent's allegations and asserts that the impartial hearing officer correctly placed the burden of persuasion on the parent with respect to whether the district offered the student a FAPE. The district contends that the impartial hearing officer's determination that the student is not eligible for special education services should be upheld and that Stephen Gaynor was not appropriate for the student. The district cross-appeals the impartial hearing officer's finding that the equities weigh in favor of the parent and seek reversal of that finding. In the answer to the cross-appeal, the parent denies the allegations in the district's cross-appeal and asserts that she fully cooperated, produced the student for evaluations, attended CSE meetings, and filed her due process complaint notice in a manner that afforded the district an opportunity to cure any procedural or substantive defects.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written individualized education program (IEP) (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>4</sup> A student's educational 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 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

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 (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

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<sup>4</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 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 child 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).

Turning first to the parties' arguments regarding the burden of persuasion, under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). The New York State Legislature amended the Education Law to place the burden of persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). In this case, the parent's due process complaint notice was dated July 30, 2007, well before the burden of proof shifted to the district (Dist. Ex. 1 at p. 1). Under the circumstances presented herein, the impartial hearing commenced prior to the effective date of the amended law. Accordingly, in the instant case, the burden of persuasion that the district failed to offer the student a FAPE rested with the parent. (Application of the Dep't of Educ., Appeal No. 08-018).

Next, with regard to parent's argument that the impartial hearing officer erred in her conclusion that the July 2007 CSE appropriately decided not to classify the student, for the reasons explained below, I concur with the conclusion reached by the impartial hearing officer with respect to the first Burlington/Carter criterion.

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]). In order to be classified, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (34 C.F.R. § 300.8[a], [c]; see 8 NYCRR 200.1[zz]; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of the Board of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36).

A child with a disability having a speech or language impairment, pursuant to federal regulations, means "a child evaluated . . . as having . . . a speech or language impairment . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [explaining that a child must meet a two-prong test to be considered a child with a disability]). A speech or language impairment, in turn, is defined as "a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance" (34 C.F.R. § 300.8[c][11]; see 8 NYCRR 200.1[zz][11]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 755, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67), others do not and instead resolve the issue on a "case-by-case" basis (R.B. v. Napa Valley Unified Sch. Dist., 2007 WL 2028132, at \*9 [9th Cir. July 16, 2007]; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at \*8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement, evidence that a student has a disability, considered in isolation, does not establish that the student "needs special education services as a result of that disability" (Corchado, 86 F. Supp. 2d at 176; see 34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; N.C., 473 F. Supp. 2d at 542; see also Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 383 [5th Cir. 2007]; M.P. v. North East Indep. Sch. Dist., 2007 WL 4199774 [W.D.Tex. 2007]). Moreover, as recently noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clarke, 48 IDELR 77).

In this case, the district's evaluation of the student revealed that his processing speed index was in the low average range and was a relative weakness among his index scores (Dist. Ex. 11 at pp. 2, 4); however, his remaining index scores show that he is functioning in the average to superior range (id. at p. 2). Observation of the student revealed that he participated with the other students in his class and was able to attend to what his teacher and peers were saying (Dist. Ex. 12). The observation report also shows that the student was an active participant in the class lesson (id.) I also note that the hearing record does not contain evidence that the student experienced an adverse effect on his educational performance while he attended school in a regular education setting, and that the parent testified that he was having tantrums at home while doing his homework (Tr. p. 87). Although stating that he was having difficulty with the accelerating language demands of the curriculum, there is no dispute that the student was passing from grade to grade while attending Browning (Tr. p. 149), and the private speech-language pathologist reported that the student's "curiosity, interest, and social skills were appropriate for a mainstream setting" at the time he attended there (Dist. Ex. 9 at p. 1). At the time the student attended a regular education setting, the recommendations in the January 2005 psychoeducational assessment included accommodations such as extended time limits on school and standardized testing and suggestions for reading instruction methodologies (Dist. Ex. 13 at p. 9).<sup>5</sup>

In summary, I find that the parent did not establish that the student's language deficit adversely affected his educational performance such that he required special education services for the 2007-08 school year. Consequently, I agree with the conclusion reached by the impartial hearing officer that the parent did not satisfy the first Burlington/Carter criterion by showing that the district failed to offer the student FAPE.

Although the parent has not established that the student is eligible for special education services, I have nevertheless reviewed whether the parent has met her burden under the second Burlington/Carter criterion to prove that Steven Gaynor is an appropriate placement for the student. For the reasons more fully described below, I concur with the impartial hearing officer's determination that Stephen Gaynor is not appropriate for the student (IHO Decision at p. 23).

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; Frank G., 459 F.3d at 363-64; 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 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). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, 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).

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<sup>5</sup> It should be noted that district personnel testified that the Wilson Reading Program and programs for reading fluency and writing are available at the district for students who have weaknesses that can be addressed through these programs (Tr. pp. 218-19).

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 also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

In Gagliardo, the Second Circuit 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).

Parents are not held as strictly to the standard of placement in the LRE as school districts; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105).

Upon reviewing the information in the hearing record as a whole, I note that the description of special education services offered to the student at Stephen Gaynor is vague. With regard to the speech-language therapy provided by Stephen Gaynor's speech-language pathologist, the evidence demonstrates that she previewed and reviewed class material with the student and worked with the student, at times, in the classroom (Tr. pp. 132, 138-9). Although the speech-language pathologist reported that her work with the student was different from that of a tutor because her work with the student was more "layered" and "language based" (Tr. p. 140), no further description of her services was provided. While the student's classroom teacher at Stephen Gaynor concluded that the student made "tremendous progress" in spelling and writing (Tr. pp. 26-27), the evidence does not demonstrate how she reached this conclusion. Similarly, testimony by the parent indicated that the student progressed in writing and that he was no longer frustrated, but she attributed this to the student being permitted to bring a computer into the classroom and to complete homework assignments on the computer (Tr. p. 89). While the student's report card from Stephen Gaynor is included in the hearing record, it offers laudatory remarks on the student's achievements, but little detail with regard to how Stephen Gaynor meets his needs (Dist. Ex. 10).

I also find that the testimony of Stephen Gaynor's reading specialist was equivocal. When asked if the student could make academic progress if he did not receive supports from the reading specialist, the reading specialist testified that the student would not make the "same kind of progress" (Tr. p. 170). Additional testimony by the student's homeroom teacher indicated that, although the student was not required to preview all class materials, it was "beneficial for him" (Tr. p. 197). The homeroom teacher reported that the student would progress without previewing materials but his progress would not be as great (Tr. p. 197). While the teacher, speech-language pathologist and reading specialist at Stephen Gaynor provided general remarks that the student would not get enough attention if he was placed in a general education setting in the public school without special education supports (Tr. pp 29, 142, 171-72), as the district argued at the impartial hearing, there is no specific evidence in the hearing record regarding how the student, who was apparently passing from grade to grade at Browning without special education services, actually performed in a regular education setting or that he needed to be placed exclusively with other disabled peers (Tr. pp. 102, 105, 302). Therefore, the evidence in the hearing record does not persuasively show that Stephen Gaynor, which does not admit non-disabled students, is the LRE for the student (Tr. p. 31; see Application of a Child with a Disability, Appeal No. 07-108).

In view of the forgoing, and upon reviewing the evidence in the hearing record regarding the student's attendance at Stephen Gaynor as a whole, I conclude that the hearing record does not provide sufficient objective evidence that specifies or explains how appropriate special education services were provided to the student at Stephen Gaynor (see Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364; Application of a Student with a Disability, Appeal No. 08-021). Consequently, I find that the parent has not established that Stephen Gaynor was an appropriate placement for the student and that the impartial hearing officer correctly determined that her tuition reimbursement claim must be denied.

With regard to the district's cross-appeal on the third Burlington/Carter criterion, I note that I have reviewed the hearing record and find no reason to disturb the conclusion reached by the impartial hearing officer with regard to equitable considerations (IHO Decision at p. 23).

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

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 4, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**