



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-024

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

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

Skyer, Castro, Foley and Gersten, attorney for respondents, Gregory Cangiano, Esq., of counsel

### **DECISION**

Petitioner (the district), appeals from the decision of an impartial hearing officer which ordered it to reimburse respondents (the parents) for their daughter's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2007-08 school year. The parents cross-appeal from the impartial hearing officer's determination that the district offered the student a free appropriate public education (FAPE). The appeal must be sustained in part. The cross-appeal must be sustained.

At the outset, I must address a procedural matter. On March 31, 2008, the parents served a separate answer and cross-appeal in excess of the 20-page limit as prescribed by State regulations (8 NYCRR 279.4[b], 279.8[a][5]). In light of the foregoing, by letter dated April 4, 2008, a State Review Officer rejected the parents' submission and provided the parents with an opportunity to cure the defect and resubmit their answer and cross-appeal by April 18, 2008. The parents re-filed their answer and cross-appeal in compliance with State regulations and the deadline set by the State Review Officer. The district maintains that it has been prejudiced by the parents' failure to properly serve their first answer and cross-appeal, and requests that the answer and cross-appeal be nullified. The district has offered no proof showing how it has been prejudiced by the parents' failure to properly submit their first answer and cross-appeal, and I therefore decline to dismiss the pleadings.

As a second procedural matter, the parents attached one exhibit to their answer and cross-appeal, asking that it be accepted as additional documentary evidence (Answer Ex. 1). 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 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 a Student with a Disability, Appeal No. 08-003). In this case, the attached exhibit is an "amended" impartial hearing officer decision in this matter dated March 31, 2008 (Answer Ex. 1). The district has not objected to the parents' submission of this exhibit. However, as explained more fully below, the district argues that the impartial hearing officer did not have the authority to render an amended decision and objects to the parents relying on the amended March 31, 2008 decision to support their arguments raised in their answer and cross-appeal. I will accept this exhibit because it is necessary to render a decision.

At the time of the impartial hearing in January 2008, the student was attending the eleventh grade at Bay Ridge, where she was participating in the Achieve Program three to four times per week (Tr. pp. 5, 7, 15, 47).<sup>1</sup> Bay Ridge has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has a diagnosis of spastic dysplasia, a mild form of cerebral palsy that results in a tightening of the lower extremities (Tr. pp. 42-43). She also has exhibited a delay in the area of math fluency (Parent Ex. H at p. 4).<sup>2</sup> Her eligibility for special education services and classification as a student with an other health impairment (OHI) are not in dispute in this appeal (Tr. p. 9; Parent Ex. C; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The hearing record is sparse regarding the student's educational history. The student received a diagnosis of spastic dysplasia when she was two and a half years old (Tr. pp. 42-43). At the time of her diagnosis, she received physical therapy (PT), occupational therapy (OT) and home-based special education services through the New York State Early Intervention Program (EI) (Tr. pp. 45-46). When the student entered school, she received speech-language therapy and OT in addition to resource room services (Tr. p. 46).

When the student was in the fifth grade, her resource room teacher recommended that she be placed in a smaller classroom setting (Tr. p. 46). The parents considered some public middle schools for their daughter, but ultimately decided to send their daughter to Bay Ridge for the sixth grade, where she has remained through high school (Tr. p. 47).

On February 13, 2007, while she was enrolled in the tenth grade at Bay Ridge, a social history of the student was completed as part of her reevaluation (Parent Ex. G). The social history noted that the student was reported to be well-behaved and pleasant in school and that she was

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<sup>1</sup> The hearing record describes the Achieve Program as a program for students who have "some learning issues" which are not considered significant enough to require a separate special education program (Tr. p. 12). Students who participate in the Achieve Program take part in the mainstream programs offered at Bay Ridge and receive additional support throughout the day from Achieve teachers (Tr. pp. 12-13).

<sup>2</sup> I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

doing very well (id. at p. 1). It further stated that she had several friends at school and in the neighborhood and that the student auditioned for and participated in school plays (id. at p. 2).

The district's school psychologist completed a psychoeducational evaluation of the student on February 13, 2007 (Parent Ex. H). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension index score of 98 (average), a working memory index (WMI) score of 71 (borderline), a perceptual reasoning index (PRI) score of 79 (borderline), a processing speed index (PSI) score of 80 (low average), and a full scale IQ score of 79 (borderline) (id. at pp. 2-3, 6). A test identified in the hearing record as the "Woodcock Johnson – III Tests of Achievement, Standard Battery, Form A" was administered to assess the student's academic abilities (id. at pp. 3-4, 6). The student achieved standard scores of 107 in broad reading, 92 in broad math, and 100 in written language, all within the average range (id.). The student's subtest scores were also all within the average range with the exception of math fluency (low average) (id. at pp. 4, 6). The school psychologist administered several projective tests and conducted a clinical interview to evaluate the student's social and emotional functioning (id. at pp. 1, 5). He reported that she was capable of creative, logical thinking and that her responses reflected age appropriate themes (id. at p. 5). He noted that the student displayed appropriate social skills during the evaluation and that she reported having friends both in and out of school (id.). The school psychologist stated that recommendations for the student should be made after considering the results of other evaluations and other relevant educational materials related to the student (id.).

A March 8, 2007 progress report completed by the student's math instructor at Bay Ridge indicated that she was progressing well in class, and that she was a frequent and attentive participant (Dist. Ex. 2). Her math instructor also described her as pleasant and sociable, and noted that the student was well-liked and respected by her peers (id.). According to the instructor, the student asked for clarification when unsure of a particular method or problem, and that she had maintained a B+ average throughout the year (id.). In addition, the teacher reported that the student's performance was consistent on homework and project completion; however, she became anxious when solving a problem or taking a test which could lead to her making careless mistakes (id.).

On March 8, 2007, the district's special education teacher conducted a classroom observation of the student in her inclusion history class at Bay Ridge, which was comprised of 24 students, both mainstream students and students from the Bridge Program (Dist. Ex. 4).<sup>3</sup> The evaluator characterized the student as "serious," and as someone who tries hard and is very responsible (id.). According to the evaluator, the student sat quietly and appeared to be on task throughout the class (id.). The student did not volunteer answers; however, the evaluator observed that she was mouthing correct answers and that she filled in the answers on the worksheet when they reviewed them (id.). Although the student's attention occasionally drifted, while the teacher or another student was reading she followed along in the text and turned the pages appropriately (id.). Based on her observation, the evaluator found that the student was attentive, able to work independently and receptive to assistance from the teacher (id.).

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<sup>3</sup> The hearing record does not define what the Bridge Program involves or what type of student participates in the program.

A March 8, 2007 report from the director of the Achieve Program revealed that the student demonstrated a "satisfactory to good" understanding of her academic subjects, and that she was able to keep current with her homework assignments (Dist. Ex. 6). He further described her as respectful of authority and attentive to requests made of her (id.). While the director indicated that the student had difficulty raising her opinions when she sensed that others would not accept them, he added that she did seek to please and wanted to be a positive asset in the class (id.). He found that she took her academic responsibilities very seriously (id.). According to the director, the student's most significant challenge was coping with her anxiety about her work, and that she could become easily flustered if her assignments were not broken down into manageable parts (id.). He further stated that the student's other major challenge was expressing her ideas, and he described her writing as simplistic in construction (id.). The director noted that it was difficult for the student to organize her thinking when discussing a complex subject, and that her writing could suffer from a lack of coherence when she had to develop a more complicated topic (id.).

On March 12, 2007, the district's Committee on Special Education (CSE) convened for the student's annual review and to develop her individualized education program (IEP) for the 2007-08 school year (Parent Ex. C). The student's mother, her regular and special education teachers from Bay Ridge, and the district's school psychologist and social worker attended the meeting (id. at p. 2). For the 2007-08 school year, the March 2007 CSE recommended that the student attend a general education classroom with special education teacher support services (SETSS) in an 8:1 setting for five periods per week (id. at p. 1). The resultant IEP described the student as hard working and motivated, and further noted that she was very pleasant and social (id. at pp. 3-4). The March 2007 IEP also characterized the student as well-liked and respected by her peers and stated that she did not exhibit any behavioral problems (id. at p. 4). The IEP further indicated that the student's overall cognitive abilities were in the borderline range (id. at p. 3). Annual goals and short-term objectives were developed in mathematics, specifically related to equations containing whole number dividends and mixed number divisors and to word problems (id. at p. 6). Proposed testing modifications included tests to be taken in a separate location, extended time (2x) on tests and "masks/markers" to be used to maintain her place (id. at p. 9). The March 2007 IEP also contained long-term adult outcomes for the student, as well as related transition services with identified responsibility (id. at pp. 10-11).

On or about May 10, 2007, the district mailed a Final Notice of Recommendation (FNR) to the parents recommending a specific school within the district for their daughter (Parent Ex. D; see Tr. p. 54).

A May 19, 2007 physical examination report revealed that despite her diagnosis of mild cerebral palsy, the student could participate in all school activities including gym and after-school sports (Dist. Ex. 8).

A June 2007 report by the program director of Achieve revealed that the student was very concerned about her success, which could cause her to become anxious and could impede her progress (Parent Ex. I). Nevertheless, he reported that the student's teachers stated that she had become increasingly confident in class as well as more successful in dealing with challenging topics (id.). The director also stated that class participation was a critical piece of her learning process and that the student needed to feel secure in order to raise questions and issues (id.). The after-school sessions, which focused on organization, study skills and a review of class material, were particularly helpful in giving the student an opportunity to review the material and clarify her

learning (id.). According to the director, the student's learning was compromised by poor memory resources, therefore, the after-school sessions were an opportunity for her to have additional practice and reinforcement in order to compensate for her memory deficiencies (id.). Describing her as the "model of a responsible learner," the director noted that the student often raised questions for clarification (id.). The director also reported that the student had some difficulty in differentiating between main ideas and supporting material and that she often had trouble effectively communicating her ideas (id.). He noted that the student often had a better verbal understanding of a topic than she actually explained on paper; however, the director described the student as a more reflective thinker than her writing demonstrated (id.). He recommended that with continued practice, her writing syntax, which he characterized as overly simplistic, would improve (id.). The director further recommended that the student's future "support work" should continue to focus on sharpening her receptive and expressive language skills (id.). Overall, the director stated that the student had made progress during the 2006-07 school year (id.).

By due process complaint notice dated August 20, 2007, the parents commenced an impartial hearing seeking tuition reimbursement for Bay Ridge for the 2007-08 school year (Parent Ex. A). The parents alleged that as a result of procedural and substantive deficiencies surrounding the development of the March 2007 IEP, the district failed to offer their daughter a FAPE for the 2007-08 school year (id.). Specifically, the parents contended, among other things, that the proposed placement was not appropriate to meet their daughter's special education needs (id.).

The student's November 2007 report card from Bay Ridge revealed the following grades for the first quarter of the 2007-08 school year: Art: A-; Honors Chemistry: B-; Honors Chemistry Lab: P; English Literature 11(a): A-; History 11(American): B+; Math B(b): B-; Physical Education 11: A+; Psychology: A+; Spanish III: A+ (Parent Ex. J). Teacher comments revealed that the student's attentiveness to her lectures was "excellent" in all of her courses and that her conduct was also deemed to be "excellent" by each of her instructors, except her art teacher who rated her conduct as "good" (id. at p. 1). The student's November 2007 report card also showed that the majority of her teachers described the student's performance as "excellent," with respect to her homework and influence on other students, with the exception of art, where her teacher noted that she had a "good" influence on other students (id.).

An impartial hearing was held in January 2008 (IHO Decision at p. 2). By decision dated February 15, 2008, the impartial hearing officer determined that the district bore the burden to prove that it made "a valid and timely placement offer" (id. at p. 5). The impartial hearing officer held that the district had "offered a placement to [the student] in a timely fashion" and therefore, the district had offered the student a FAPE (id.). Despite her finding that the district offered the student a FAPE for the 2007-08 school year, the impartial hearing officer continued her analysis finding that the parents established that Bay Ridge was appropriate because the small class size and structure of the school combined with a supportive faculty addressed the student's academic, social and emotional needs (id. at pp. 5-6). Lastly, she found that equitable considerations supported the parents' claim, and accordingly awarded tuition reimbursement to them for the 2007-08 school year (id. at p. 6).

On March 31, 2008, the impartial hearing officer issued an "amended decision" in this matter, wherein she reversed her finding that the district offered the student a FAPE as set forth in her February 15, 2008 decision (Answer Ex. 1). In her amended March 31, 2008 decision, the impartial hearing officer found that the district failed to offer the student a FAPE because it

presented the parents with a substantively flawed IEP that failed to address the student's academic and social needs (id.).

The district commenced this appeal by filing a petition. The district seeks reversal of the impartial hearing officer's February 15, 2008 decision to the extent that she awarded tuition reimbursement to the parents and determined that Bay Ridge was an appropriate placement for the student and that the equities favored their claim. The district contends that the impartial hearing officer's tuition reimbursement analysis should have ended when she found that the district offered the student a valid and timely placement offer, and that she consequently erred by awarding the parents tuition reimbursement. The district asks that the impartial hearing officer's decision be upheld with respect to her finding that the district offered the student a FAPE. However, the district alleges that the impartial hearing officer erred in finding that the parents' unilateral placement of the student at Bay Ridge was appropriate and that the equities were in favor of the parents' claim for tuition reimbursement.

The parents cross-appeal the impartial hearing officer's decision to the extent that she determined that the district offered the student a FAPE. Specifically, they allege that the impartial hearing officer made a clerical error with respect to her determination that the student was offered a FAPE as evidenced by her findings with respect to the remainder of her decision. Additionally, the parents contend that (1) the March 2007 IEP was inadequate because it failed to include goals in each subject area that the student has taken; (2) the proposed program was not appropriate because it failed to provide the student with the small class sizes that she requires to learn; (3) the composition of the proposed SETSS class does not comply with State regulations; and (4) a valid placement was never offered to the student.

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 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 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

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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]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 Walczak, 142 F.3d at 132).

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).

As a preliminary matter, I note that the impartial hearing officer in the instant case placed the burden of persuasion on the district to demonstrate that it had offered the student a FAPE (IHO Decision at p. 5). At the time that the parents commenced this hearing, the burden of persuasion was 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]).<sup>5</sup> Neither party has asserted on appeal that the impartial hearing officer has misapplied the burden of proof. Accordingly, I have conducted my review of the hearing record with the burden placed on the district to show that it had offered the student a FAPE.

Next, I turn to the district's argument that the impartial hearing officer lacked the authority to issue an amended decision in this matter. Impartial hearing officers must be appointed by the board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). An impartial hearing officer's jurisdiction is limited by statutory and regulatory law and there is no authority for an impartial hearing officer to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16). Further, allowing an impartial hearing officer to render a subsequent decision would generally run afoul of the finality provisions set forth in the IDEA and its implementing regulations. An impartial hearing officer's decision is final unless appealed to a State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). If there is an appeal to a State Review Officer, the independent decision on review is final; however, either party may seek judicial review of a State Review Officer's decision (20 U.S.C. §§ 1415[g], 1415[i]; 34 C.F.R. § 300.514[d]; 8 NYCRR 200.5[k][3]). Under the circumstances of this case, I find that the impartial hearing officer erred in rendering an amended decision dated March 31, 2008.

Further, I am not persuaded by the parents' contention that the impartial hearing officer made a clerical error in her original February 2008 decision with respect to her finding that the district offered the student a FAPE. A review of the impartial hearing officer's amended March 31, 2008 decision offers no indication that she intended to correct a clerical error. Rather in her amended decision, the impartial hearing officer improperly reconsidered a key element of her prior decision, struck her original analysis and reversed her finding with regard to whether or not a FAPE was offered to the student. As stated above, the impartial hearing officer lacked the jurisdiction to amend her decision in this case and I am not persuaded that she merely corrected a clerical error when rendering the amended decision. Accordingly, I base my decision in the present case on the original February 15, 2008 decision and will not further address the March 31, 2008 amended decision.

A review of the hearing record shows that the district has not met its burden to prove that it had offered the student an appropriate program for the 2007-08 school year. At the impartial hearing, the district presented the testimony of the principal at the proposed placement and the school psychologist. The principal testified that the student's March 2007 IEP did not address the

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<sup>5</sup> New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. Here, the due process complaint notice was filed on August 20, 2007 (Parent Ex. A). Therefore, the burden of persuasion rested with the parent to show that the district failed to offer the student a FAPE (see Application of the Dep't. of Educ., Appeal No. 08-018).



student's needs (Tr. p. 117). She further testified that after reviewing the March 2007 IEP and a subsequent progress report from Bay Ridge, she was concerned that the March 2007 IEP lacked goals in some of the areas which had been identified as weaknesses for the student (Tr. p. 107). An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Although the school psychologist testified that the student exhibited average academic skills, except for the one specific area of mathematics (math fluency), that was considered to be in the low average range (Tr. pp. 80-81), the March 2007 IEP reflects that the student's overall cognitive abilities were in the borderline range (Parent Ex. C at p. 3).

Further, the parents argue that the recommended placement was not appropriate because the composition of the SETSS class does not comply with State regulations. State regulations provide that the composition of instructional groups in a resource room program shall be based on the similarity of the individual needs of the students according to academic achievement characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (8 NYCRR 200.6[f][4]).

A review of the hearing record indicates that the March 2007 IEP recommended that the student be placed in a general education classroom with SETSS in an 8:1 setting for five periods per week (Parent Ex. C). The hearing record shows that SETSS classes are taught by a certified special education teacher, who aligns what she is teaching with "the goals of the IEP" (Tr. pp. 103-04). The SETSS teacher in the proposed placement utilizes both a push-in and a pull-out program and there is no more than eight students in a SETSS class (Tr. pp. 102, 103, 112).<sup>6</sup> The principal at the proposed placement testified that students in the SETSS class are in the same grade and grouped according to levels of academic achievement (Tr. pp. 113, 116). However, she testified that students are not grouped according to levels of social development (Tr. p. 116). Moreover, the district failed to produce any evidence such as a class profile or testimony about the other students who would have been in the proposed SETSS class (see Application of a Child with a Disability, Appeal No. 03-037). Based on the hearing record, the district has not shown that the student would have been suitably grouped for instructional purposes in the recommended SETSS class.

Given the discrepant information in the hearing record concerning the student's special education needs, the admission by the district's witness that the March 2007 IEP was inappropriate, and the failure to demonstrate placement based on similarity of individual needs, I am constrained to find that the district has not met its burden to show that it offered the student an appropriate IEP.

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

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<sup>6</sup> The hearing record describes a "push in" SETSS model as a program where the teacher pushes into the classroom and works with the regular education teacher to support the needs of the SETSS students and any "at risk students" in the class (Tr. p. 102). The hearing record further describes a "pull-out" SETSS model as a program where a specific student who is in need of SETSS is "pulled out" to work with the teacher in a small group in the SETSS teacher's classroom (id.).

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 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; 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 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). 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). 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).

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 also Frank G., 459 F.3d at 364-65).

The hearing record reflects that Bay Ridge serves both students with significant learning problems in self-contained classrooms and students with varying academic abilities who participate in "mainstream" classes (Tr. p. 13). The high school Achieve program at Bay Ridge provides students who attend mainstream classes, but have some learning problems with extra teacher support during the day (Tr. pp. 12-13). Achieve is individualized to meet each student's needs and students are seen by teachers either individually or in small groups of approximately four students (Tr. p. 17). The director of the Achieve program testified that the majority of the 140 Bay Ridge high school students graduate with a Regent's diploma (Tr. p. 33).

Generally, the student meets with an Achieve teacher three to four times per week for 45-minute sessions initiated by either the student or a teacher (Tr. pp. 34-35). The work addressed in the sessions is guided by what is occurring in the student's classes and her IEP (Tr. p. 37). The director of the Achieve program, who has been the student's Achieve teacher for two years and is her history teacher, testified that he reviews work with the student that she finds difficult, goes over her writing, reviews for tests, and ensures that she clearly understands class material (Tr. pp. 15-16). The director indicated that as part of the Achieve program, the student could also work with her math or other teachers to address any difficulties she is confronting (Tr. p. 16). The director further testified that because the student has weak memory resources that affect her ability to retain information and her long-term conceptual understanding of material, he addresses the student's writing by providing her with repetition to help her "secure" concepts (Tr. p. 18). The director receives feedback from teachers on his students' progress, test performance, or particular concerns approximately every two weeks (Tr. p. 24). The hearing record reflects that the student has made academic and social progress at Bay Ridge (Tr. pp. 24-25, 48-49; Parent Exs. I; J).

Based on the foregoing, I concur with the impartial hearing officer's determination that Bay Ridge addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363).

The final criterion for an award of tuition reimbursement is that the parents' claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at 363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). Here, I find no reason to disturb the impartial hearing officer's determination that equitable considerations favor the parent (IHO Decision at p. 6).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations.

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

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated February 15, 2008 is annulled to the extent that she determined that the district offered the student a FAPE.

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

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