



The University of the State of New York

The State Education Department State Review Officer

No. 08-123

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

The Law Offices of Skyer, Castro, Foley and Gersten, attorneys for respondent, Regina Skyer, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Mary McDowell Center for Learning (MMCL) for the 2007-08 school year. The appeal must be dismissed.

The facts and procedural history in this case were set forth in specificity in the impartial hearing officer's decision (IHO Decision at pp. 1-13), and the parties' familiarity with them is presumed. Therefore, the student's educational history and the procedural aspects of the underlying impartial hearing will not be repeated here in detail. At the time of the impartial hearing in May 2008, the student was attending a special class in the upper elementary division at MMCL with approximately eleven other students (Tr. pp. 189-90). MMCL 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). The student's eligibility for special education services as a student with a learning disability is not in dispute in this appeal (Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

While the student was attending the third grade during the 2005-06 school year, the parent obtained a private psychoeducational evaluation of the student due to the student's uneven performance in academic tasks, especially in math and writing (Dist. Ex. 1 at p. 1). At the time of the evaluation, the student was at risk for being retained in the third grade (id.). The psychoeducational evaluation was conducted over four days between February 21, 2006 and February 28, 2006 (id.). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension index composite score (percentile rank) of 146 (99.9th percentile), a perceptual reasoning index composite score of 112 (79th percentile), a working memory index composite score of 107 (68th percentile), and a processing speed index composite score of 97 (42nd percentile) (id. at pp. 3, 7). The evaluation report stated that the student's significantly above average verbal comprehension score was an indication that she was able to take in information readily and use it within a context (id. at p. 3). The student demonstrated practical knowledge about the world around her and how things work (id.). A significant discrepancy between the student's high verbal comprehension score and her reduced working memory and processing speed scores yielded a full scale IQ score of 123 (94th percentile) (id.). The evaluation report noted that although the full scale IQ score was in the high average range, it was also an indication of how the student's learning disabilities impaired her overall cognitive functioning (id.).

Administration of the Wechsler Individual Achievements Test – Second Edition (WIAT-II) yielded composite scores of 105 in reading, 68 in mathematics, 52 in written language, 146 in oral language, and a total composite score of 91 (Dist. Ex. 1 at p. 8). The evaluator noted significant weaknesses in mathematics and written language (id.). The evaluator's observation of the student revealed that she struggled to simultaneously organize her thoughts in a coherent manner and translate them into a written form (id. at p. 4). The evaluator opined that this deficit was compounded by "limited transcription skills," which were described in the evaluation report as the process of getting sentences onto paper incorporating spelling, handwriting, and punctuation (id.). The evaluator also indicated that graphomotor problems resulted in illegible written responses during testing (id.).

According to the evaluation report, writing was "an arduous task" for the student (Dist. Ex. 1 at p. 4). During the evaluation, the student limited her writing to a minimum (id.). When asked to verbally answer a question or tell the evaluator about something, the student elaborated with details about characters and events fairly well with good sequencing and structure (id.). In comparison, when asked to write the answer to a similar question, the student provided limited information on the paper, "as if she was unable to organize, write, spell, and create simultaneously" (id.).

According to the evaluation report, a comparison of the responses from the parent and teacher on the Conners' Parent/Teacher Rating Scales-Revised Long Form (L) indicated a considerable difference between how the student was perceived at home in a small, socially supportive setting as opposed to in the classroom (Dist. Ex. 1 at p. 3). The parent reported that the student was "connected" and "trying hard," while the student's teacher described the student as someone that sometimes lost focus, had multiple academic difficulties, and gave up when frustrated (id.). The evaluator opined that the profile described by the student's teacher was typical of an "[attention deficit hyperactivity disorder (ADHD)] girl with learning disabilities" (id.). The

evaluator characterized the student as an easily distracted child unable to stay focused on her work unless it was personally interesting; as someone unable to respond adequately to social cues, specific academic problems and lowered self-esteem; and as someone who had a lack of confidence in her work (id.). The evaluation report also indicated that the teacher's profile described the student as a quiet and shy girl that had no significant behavioral problems, but who could easily fade into the group if ignored (id.).

The psychoeducational evaluation report noted that the student was motivated to succeed and wanted to please (Dist. Ex. 1 at p. 5). Projective testing indicated that, at the time, the student felt isolated from her peers by her inability to keep up with the work and by identifying with students who had been marginalized by her class (id.).

The evaluator concluded that significant factors prevented the student from performing at an optimum level including working memory deficits, reduced processing time, fine motor and graphomotor deficits, attentional problems and her presentation as a visual learner (Dist. Ex. 1 at p. 5). The evaluator noted that the student performed better on measures of visual-spatial memory than on measures that were primarily auditory (id.). The evaluation report indicated a diagnostic impression of an ADHD, a developmental mathematics disorder, a developmental writing disorder, and dysgraphia/fine motor delays (id. at p. 6). Educational recommendations included: (1) the use of word processing devices to address the student's fine motor deficits which slowed her handwriting and made it illegible, and occupational therapy (OT) to address keyboarding skills; (2) physical therapy to help her with fine motor problems; (3) the assistance of a learning specialist in math to strengthen the student's knowledge of math facts and to help her processing speed improve, use of calculators and supportive learning materials to help free working memory so the student could pay attention to mathematical operations; (4) a smaller class size to help the student feel less overwhelmed so that she would not withdraw or not respond; (5) the assistance of a writing specialist to help the student learn to recognize areas of weakness and to strengthen her performance; (6) enhanced sound projection in her small class to keep her attention on her work, preferential seating, and monitoring of medication; and (7) provision of extra time on tasks that required organizational skills, including writing assignments, exams, and projects (id.).

After the psychoeducational evaluation was completed, the Committee on Special Education (CSE) convened and determined that the student was eligible for special education services as a student with a learning disability (Tr. pp. 475-76). The parent enrolled the student at MMCL for the remainder of the 2006-07 school year (Tr. p. 477; see Tr. p. 30).

The CSE convened on June 8, 2007 for the student's annual review and to develop the student's individualized education program (IEP) for the 2007-08 school year (fifth grade) (Parent Ex. C at pp. 1-2). CSE meeting attendees included the parent, a district representative/school psychologist, a school social worker, a regular education teacher assigned to the CSE, and the student's special education teacher from MMCL (Tr. pp. 149, 331; Parent Ex. C at p. 2). The hearing record reflects that the parent was informed at the CSE meeting that an additional parent member was not available that day and that she had the option to reschedule the meeting or continue the meeting in the absence of the additional parent member (Tr. pp. 153-54; Dist. Ex. 2). The parent signed a "declination letter" agreeing to go forward without an additional parent member (Dist. Ex. 2). The CSE decided to continue the student's eligibility for special education

services as a student with a learning disability (Parent Ex. C at p. 1). The CSE recommended that the student be placed in a 12:1+1 collaborative team teaching (CTT) class for all subjects, and receive the related service of individual OT two times per week for 30 minutes (*id.* at pp. 1-2, 12).¹ Recommended testing accommodations for the student included extended time (double) and a separate location (*id.* at p. 12). The resultant IEP noted that the student took medication to address her ADHD (*id.* at pp. 1, 5). The June 2007 IEP also noted that the student's behavior did not seriously interfere with instruction and could be addressed by the special education classroom teacher, and that she did not require any assistive technology devices or services (*id.* at p. 4). With regard to promotional criteria, the CSE recommended that the student should "meet 80% of the elements of the fifth grade ELA standard and 50% of the elements of the fifth grade standard as evidence by student work, teacher observation, and assessments/grades" (*id.* at p. 12; *see* Tr. pp. 341, 368-70).² The district sent the parent a Final Notice of Recommendation (FNR) dated June 27, 2007 reflecting the recommendations of the June 2007 CSE for a CTT class and OT to take place at a specific district school (Parent Ex. D).

In a letter to the CSE chairperson dated August 20, 2007, the parent, through her attorney, indicated that she was rejecting the recommendations of the June 2007 CSE, that the student would be placed at MMCL for the 2007-08 academic year, and that the parent intended to seek funding for the unilateral placement from the district (Parent Ex. B).

In a due process complaint notice dated February 19, 2008, the parent alleged that procedural violations were committed by the district insofar as the June 2007 CSE lacked a qualified regular education teacher and an additional parent member, and no "objective testing" was conducted to measure the student's level of functioning (Parent Ex. A at pp. 2-3). Substantively, the parent alleged that placement in a CTT class would not meet the student's needs, and that the promotional criteria contained in the IEP was inappropriate (*id.*). Among other things, the parent indicated that there were no suitable, functional peer groups for the student for academic and social/emotional purposes in the CTT class that she observed in fall 2007, and none of the children were using assistive technology, whereas the student required the use of an "AlphaSmart" (*id.*) As relief, the parent sought reimbursement for the cost of the student's tuition at MMCL (*id.* at p. 3).

An impartial hearing convened on May 2, 2008 and concluded on July 17, 2008 after five days of testimony. In a decision dated September 19, 2008, the impartial hearing officer found that the district failed to offer the student a free appropriate public education (FAPE) because the regular education teacher who participated at the June 2007 CSE meeting was not qualified and

¹ "Collaborative team teaching," also referred to in the State regulations as "integrated co-teaching services," 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 integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (*see* <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

² It appears from the context of the document that "ELA" refers to English Language Arts.

his participation "should not have been compromised" since the student was being placed in a "general education classroom in a general education school" (IHO Decision at pp. 15-16).³ The impartial hearing officer further determined that the district failed to evaluate the student in all areas of suspected disability and reflect the evaluations on her June 2007 IEP insofar as "no current objective testing" was conducted (*id.* at p. 17). According to the impartial hearing officer, the student's IEP was also deficient because the promotional criteria for math and English were inappropriate and would "set the stage for trivial to no advancement and no accountability," in light of factors such as the student's superior IQ (*id.* at p. 19). The impartial hearing officer also determined that the CTT classroom to which the student would have been assigned by the district was inappropriate for the student because it would not have provided a suitable, functional peer group for student; and the special education teacher from that classroom, who was in her first year of teaching, did not demonstrate that she would have been able to address the student's needs (*id.* at pp. 20-22). The impartial hearing officer also determined that the special education teacher of the recommended CTT class was "ineffective" because six out of nine of the special education students in her class "had their promotion in doubt" (*id.* at p. 22). In regard to the parent's placement of the student at MMCL, relying on testimony from staff and a mid-year report from MMCL, the impartial hearing officer determined that MMCL was appropriate to meet the student's needs (*id.* at pp. 22-23). The impartial hearing officer also rejected the district's contention that equitable considerations weighed against the parent's tuition reimbursement claim (*id.* at pp. 23-24). Consequently, the impartial hearing officer awarded the parent tuition reimbursement for the 2007-08 school year.

The district appeals, arguing that the June 2007 IEP was appropriate for the student and was reasonably calculated to confer educational benefits to the student in the least restrictive environment (LRE). The district contends that the special education teacher in the proposed CTT classroom had the appropriate certification, notwithstanding her relative inexperience. The district also asserts that the impartial hearing officer erred by considering the progress of the other students in the proposed class in deciding whether the district had offered a FAPE. The district further asserts that the impartial hearing officer incorrectly determined that there was no objective testing of the student. The district also contends that impartial hearing officer erred in concluding that lowering the promotional standards in the student's IEP "automatically sets the stage for trivial advancement." Among other things, the district argues that the functional levels in the proposed classroom were consistent with State law. Furthermore, the district contends that there was a duly certified regular education teacher at the CSE meeting or, in the alternative, that there was no evidence of a loss of educational opportunity for the student due to the district regular education teacher's participation at the June 2007 CSE meeting.

The district also asserts that: (1) the hearing record fails to specifically identify how MMCL would meet the student's needs; (2) MMCL failed to provide OT to the student in the ratio specified on her IEP; (3) MMCL staff failed to implement any portion of the student's IEP; and (4) the student "made minimal progress and/or regressed" at MMCL (emphasis in original). The district contends that equitable considerations do not support the parent's claim because the parent chose not to discuss potential concerns with the June 2007 CSE, failed to inform the district at the

³ The impartial hearing officer rejected the parent's arguments regarding the lack of an additional parent member at the June 2007 CSE meeting (IHO Decision at p. 20).

June 2007 CSE meeting that she had reenrolled the student at MMCL, rejected the public school prior to visiting it, and did not seriously intend to enroll the student in the district's school. As relief, the district seeks the annulment of the impartial hearing officer's decision.

In the answer, the parent denies many of the district's allegations and asserts that: (1) the regular education teacher attending the June 2007 CSE was not qualified to serve in that capacity; (2) the special education teacher from the proposed CTT classroom was inexperienced and had failing students; (3) MMCL was appropriate for the student; and (4) equitable considerations do not preclude an award of tuition reimbursement.

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 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 (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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the

student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111 [2d Cir. 2008]; 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 (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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). In formulating an appropriate IEP, a CSE must also take into consideration special factors, including the student's communication needs and whether the student requires assistive technology devices and services (34 C.F.R. § 300.324[a][2][v]; 8 NYCRR 200.4[d][3][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended 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, I concur with the impartial hearing officer's conclusion that the district failed to offer the student a FAPE; however, as more fully described below, I reach this conclusion on different grounds. The parent identified the student's need for and use of assistive technology when she initiated this case with her February 2008 due process complaint notice (Parent Ex. A at

p. 3). The school psychologist who participated in the June 2007 CSE testified that the evaluative information before the CSE consisted of a "full report" from MMCL, an OT evaluation, and the February 2006 psychoeducational evaluation (Tr. pp. 334, 336). The February 2006 psychoeducational evaluation indicated that the student displayed among other things, fine motor and graphomotor deficits (Dist. Ex. 1 at p. 5). Based upon her assessment of the student, the private evaluator recommended that the student use a word processing device to address her fine motor deficits, as those deficits slowed her handwriting and made it illegible (*id.* at p. 6). The student's June 2007 IEP contained a writing goal that stated that the student would be able to use a range of appropriate strategies to improve her ability to communicate effectively through various written activities to a fifth grade level (Parent Ex. C at p. 8). One of the corresponding short-term objectives stated that the student would "produce a report that describe[d] or analyze[d] the subject on an appropriate grade level" (*id.*). However, the IEP did not indicate the expected mode of production of that report (*id.*). The mid-year progress report from MMCL for the period from September 2006 through January 2007 that was before the CSE also indicated that "writing was an area in which [the student] struggled, due to graphomotor and organizational issues" (Dist. Ex. 3 at p. 2). Although some of the students at MMCL hand wrote their reports during the 2006-07 school year, the hearing record reflects that the student typed a writing project about her memoirs and a research project about a famous person (*id.* at pp. 9-10).

Also, the student's June 2007 IEP lacked any information regarding the student's auditory processing needs. The psychoeducational evaluation report relied upon by the June 2007 CSE recommended that the student use enhanced sound projection in her small class to keep her attention on her work (Dist. Ex. 1 at p. 6). Furthermore, the student's MMCL mid-year progress report indicated that auditory processing weaknesses were noted in the areas of auditory attention, figure-ground listening, sentence memory, and auditory interpretation of directions (Dist. Ex. 3 at p. 19). Consistent with the recommendation in the psychoeducational evaluation report for enhanced sound projection, the language therapy section of the student's 2006-07 mid-year progress report stated that "the use of an FM amplification system in both the classroom and therapy room appear[ed] to improve [the student's] ability to focus on auditory information" (*id.*). This is particularly significant in consideration of the part of the psychoeducational evaluation which indicated that the student appeared to be a visual learner, and that she performed better on measures of visual-spatial memory than on measures that were primarily auditory (Dist. Ex. 1 at p. 5).

Inconsistent with the assessment and recommendations in the psychoeducational evaluation and the information contained in the mid-year progress report from MMCL, the June 2007 IEP indicated, without any other support in the hearing record, that the student did not require assistive technology devices or assistive technology services (Parent Ex. C at p. 5). Moreover, the hearing record does not show that the CSE adequately considered the student's need for an enhanced listening system or device to improve her ability to focus on auditory information. In addition to the lack of adequate consideration by the CSE of assistive technology needs, the June 2007 IEP did not identify or substantively address significant areas of the student's needs, i.e. assistive technology devices or services (*see id.* at p. 3). In view of the student's written expression and auditory processing deficits, which the parties do not dispute the need to address, I find that the June 2007 CSE, based upon the information before it, should have incorporated assistive technology services into the student's educational program and reflected such services in the

student's IEP. Accordingly, I find that the district did not sustain its burden to establish that it offered the student a FAPE. In view of this decision, it is unnecessary to address the parties remaining arguments with respect to whether the district offered the student a FAPE.

Turning next to the district's argument that MMCL was inappropriate for the student, 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, aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added])).

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).

In this case, I find that the hearing record reflects that MMCL appropriately addressed the student's special education needs. One of student's special education teachers at MMCL testified that she was one of two full-time teachers in the student's classroom (Tr. p. 190). The student's class included seven boys and five girls between the ages of ten and twelve (Tr. pp. 191, 405). The cognitive ability of the students in the class ranged from "average" to "gifted" (Tr. p. 191). Depending on the disability and area of academic need of a particular student, the academic functioning of the other student's in the class fell between the sixth/seventh grade level and the second/third grade level (Tr. pp. 191-92). The special education teacher explained that the range of academic functioning was addressed through "multi-modality" teaching, which she defined as multisensory instruction (Tr. p. 192). The teacher described numerous teaching/learning opportunities that included collaborative teaching experiences in small groups, large group discussions, and hands on tactile experiences (id.). The special education teacher indicated that the students in the class wrote in their journals every morning regarding a question that the teachers used as a topical prompt and all students "conferenced" with their teachers (Tr. pp. 193-94). There was a daily classroom meeting that was conducted by each student in turn to help each student develop independence and leadership skills (Tr. pp. 193-94, 197). Visual aids were used to help the students brainstorm ideas and graphic organizers were used to help them organize their ideas, write down key words, and write structured paragraphs (Tr. p. 194). An explicit schedule was reviewed daily and included color coding by subject so that each student knew what to expect during the day (Tr. p. 198). The students in the elementary and upper elementary divisions of MMCL worked in small homogeneous math and reading groups, depending on their individual needs (Tr. pp. 192, 199). The classroom teacher indicated that the classroom co-teachers and the student's math teacher conferred "all the time" about each student's academic achievement, development, and needs (Tr. pp. 199, 208).

Fifth grade language arts and social studies curricula were co-taught by the student's classroom teachers (Tr. pp. 384, 411). According to one of the teachers, the language arts curriculum primarily addressed writing (Tr. p. 213). The focus of the 2007-08 school year was on sentence structure, parts of speech, and writing structured paragraphs including descriptive, narrative, expository and persuasive paragraphs (id.). The curriculum also included a poetry unit and a research project that was linked to the social studies curriculum co-taught by the student's teachers (id.). The social studies curriculum included timelines; geography and mapping; concepts such as social strata, tactile activities, reenactments; and field trips to various museums (Tr. pp. 202-04).

The student's other classroom teacher (reading teacher), who testified that she taught the student's reading group at MMCL, was trained in basic reading skills for general education and special education students, the Orton-Gillingham methodology for teaching reading to students

with disabilities, basic writing skills methodology, and the Lindamood-Bell verbalization and visualization methodology (Tr. p. 384). The reading teacher was supervised by the educational director at MMCL, who was also trained and experienced in Orton-Gillingham reading instruction (id.). The student received reading instruction four times per week for one hour (Tr. p. 385; Parent Ex. G). There was a total of seven students in her reading group that received instruction at the fourth grade level (Tr. p. 385). The reading teacher testified that the student's reading group had "fairly strong cognitive abilities" (Tr. p. 386). Similar to the student, several of the students in the reading group had strong verbal comprehension skills and could discuss material at a fourth and fifth grade level "at the very least" (Tr. p. 387). During reading instruction time, the group worked on a compilation of reading skills and activities that included spelling, writing, basic language arts (as applied to reading), and decoding and comprehension skills (Tr. pp. 385, 390). To address the student's need to avoid overemphasizing the details of what she read, the reading teacher provided direct coaching and modeled different strategies to focus the student and help her prioritize details in a paragraph (Tr. p. 388). From the beginning of the 2007-08 school year to the time of the impartial hearing, the reading teacher testified that the student progressed from a low fourth grade reading level to a high fourth grade level (Tr. p. 386). Although the student's slow processing speed and difficulties with working memory continued to challenge the student in reading, the teacher reported that the student started trusting her own opinions and began taking risks in her discussions and writings (Tr. p. 388). Scaffolding techniques were used with the student (id.). The teacher indicated that the entire group read the same trade book at the same time to advance their reading skills (Tr. pp. 390, 392). Some of the instruction involved silent reading, whereby the students either wrote their responses right into the text or they inserted "post-it notes" next to the text so that they could check their comprehension (Tr. p. 390). The students answered comprehension questions individually or as a group and they read aloud to each other in order to understand story elements such as character, plot and being able to extract themes and discuss them (Tr. pp. 391-92). The reading teacher indicated that she spent additional individual time (up to one half hour) with each child over the course of four days (Tr. p. 392).

The reading teacher stated that the student's recall and synthesis difficulties with working memory were addressed through a "great deal of visual information" (Tr. pp. 393-95). When reading a passage, the student was asked to write response notes that involved either a visualization where she drew a picture of what she was getting from the passage, a question, a comment or a prediction of what she thought might happen (Tr. p. 393). The response notes were used to remind the student of what she read (id.). The teacher indicated that she worked with the student on summarizing themes and developing a hypothesis rather than focusing on every detail (id.). The students in the group made storylines with pictures and captions telling what happened in the plot, so that they had something to refer to during discussions (Tr. p. 394). The reading teacher also reviewed information with the student prior to discussion, previewing material with the student prior to introducing a new book to the class (id.). To further address the student's slow processing speed, the hearing record indicates that the reading teacher met with the student to help her prioritize the activities she needed to complete first and helped the student define goals for particular tasks before completing them (Tr. p. 395).

With regard to addressing the student's math needs at MMCL, one of the teachers indicated that the student was in a third/fourth grade level math group that met four times per week for 40 minutes (Tr. pp. 206-07; Dist. Ex. 3 at pp. 3, 11, 13; Parent Ex. G). The student was learning

addition, subtraction, multi-step addition and subtraction with and without regrouping, multiplication, two-digit by two-digit multiplication, and she was introduced to long division (Tr. p. 207). The student was provided a hand held computer device that she could bring home to practice multiplication tables (Tr. p. 208). She also worked with fractions, time, money, and measurements (Tr. p. 207).

With regard to the student's attentional needs, the hearing record reflects that her teachers at MMCL used strategies and devices provided by the occupational therapist for the student including a heavy vest, a "fidget" that she could manipulate with her hands, a ball chair in the classroom, as well as a seat cushion (Tr. p. 396). The student's teachers described her as a good self-advocate who might request chewing gum or the opportunity to go into the hallway for movement breaks to calm her body (Tr. pp. 217-18, 396, 492). The teachers also redirected the student while in the classroom (Tr. p. 218).

Regarding the student's assistive technology and supplemental aids needs as discussed above, I note that MMCL provided the student with opportunity to use a word processor for typing and an FM unit in her classroom and the language therapy room for sound enhancement (Dist. Ex. 3 at pp. 10, 19; Parent Exs. A at p. 3; E at p. 11).⁴ I also note that a Smart Board was used in the student's classroom as a visual component of the multimodal instruction provided to her at MMCL (Tr. p. 219). Additionally, the student attended an OT "rotation" to address her keyboarding skills (Tr. p. 209).

In view of the foregoing evidence in the hearing record, I am unpersuaded by the district's argument that the parent failed to provide specific information regarding the student's program at MMCL. Consequently, I agree with the impartial hearing officer that the parent satisfied her burden with respect to the second Burlington/Carter criterion because the student's program at MMCL addressed her unique needs and provided her with an appropriate educational program that was reasonably calculated to provide educational benefits.

The final criterion for a tuition 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 tuition 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 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,

⁴ The hearing record does not clearly indicate whether the word processor was the same as or in addition to the AlphaSmart described in the parent's due process complaint notice (Parent Exs. A at p. 3; E at p. 11).

2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [SDNY 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]).

Here, the district contends that the parent failed to visit the proposed classroom prior to the start of the school year, entered into the enrollment contract with MMCL prior to meeting with the June 2007 CSE (see Dist Ex. 4), and never seriously intended to send the student to the district's CTT class. In balancing the equitable considerations in this case, I note that the parent provided timely written notice in August 2007 of her concerns and her rejection of the district's recommended placement for the student in the CTT class and that she was placing the student at MMCL and would be seeking tuition reimbursement (Parent Ex. B). With regard to the enrollment contract, the evidence shows that it was unlikely that she would be held responsible for any remaining tuition if she decided to withdraw the student from MMCL and place the student in a district school (Tr. pp. 447-48).⁵ Although the district specifically asserts that the parent failed to cooperate by visiting the proposed placement prior to the beginning of the school year in September 2007, I find that district did not actually offer any evidence to rebut the parent's assertion that the classroom was closed and unavailable during that time period due to summer recess (Tr. pp. 459, 484, 514-15). In view of the forgoing, I find that the district failed to satisfy its burden to establish that equitable considerations should preclude an award of tuition reimbursement. Accordingly, I find no reason to disturb the impartial hearing officer's determination that equitable considerations supported the parent's claim or her resulting decision to award the parent costs for the student's tuition at MMCL.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 22, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁵ The parent testified that if she withdrew the student from MMCL, she was aware she would forfeit a deposit paid to MMCL that was due prior to the scheduling of the student's annual CSE review (Tr. pp. 509-10).