



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-020

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, Karyn R. Thompson, Esq., of counsel

Law Office of Anton Papakhin, P.C., attorneys for respondent, Jennifer Tazzi, 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 the district to fund her daughter's tuition costs at the Communities Acting to Heighten Awareness and Learning (CAHAL) program for the 2007-08 school year. The appeal must be sustained.

During the 2007-08 school year, the student attended a tenth grade 8:1+1 class in the CAHAL program at the Torah Academy for Girls (Tr. pp. 137-42, 174-75, 189-90, 200, 212; see Parent Exs. C-D; F).¹ CAHAL is a special education program located within several community Yeshiva elementary schools and high schools, which offers self-contained special education classes, related services, an individualized curriculum, and counseling support for students with learning disabilities, speech or language impairments, and attention deficit disorders (Tr. p. 135; see Parent Ex. B at pp. 1-2). In this case, the student received her language arts instruction, mathematics instruction, and science instruction at CAHAL in an 8:1+1 class, and she received her global studies instruction in a mainstream class setting (see Tr. pp. 138-41, 192-95; Parent Ex.

¹ According to the hearing record, the student attended the CAHAL program for sixth grade (2003-04), seventh grade (2004-05), eighth grade (2005-06), ninth grade (2006-07), and tenth grade (2007-08) (Tr. pp. 138, 174-75, 218).

F).² The Commissioner of Education has not approved either CAHAL or the Torah Academy for Girls as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; see also Parent Ex. D). The student's eligibility to receive special education programs and services as a student with a speech or language impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

During April 2007 in preparation for the student's annual review for the 2007-08 school year, the district observed the student in her language arts class at CAHAL, completed a social history update, and conducted an educational evaluation (Dist. Exs. 3-5; see Tr. p. 62). According to the classroom observation report, the student received her ninth grade language arts instruction in a 7:1+1 special class (Dist. Ex. 3). The student's teacher reported that the student had "a very weak academic skill background," "poor decoding skills," and "weak vocabulary skills," but "good listening comprehension skills" (*id.*). The teacher also reported that the student always completed her homework and further described her as "very responsible" (*id.*). According to the report, the student required "a lot of help" with her reading, writing, and spelling (*id.*). Although the student attended a "mainstreamed" social studies class, she experienced difficulty and required modifications because the "work [was] too difficult" for her (*id.*). The observer reported that the student followed the language arts lesson and participated in class, that she appeared to enjoy the book read and discussed in class, and that she "got along well" with her peers (*id.*).

The updated social history report, dated April 27, 2007, indicated that the student attended a 7:1+3 class in the CAHAL program for ninth grade and received speech-language therapy and counseling services (Dist. Ex. 4 at p. 1).³ According to the report, the parent requested a continuation of the student's speech-language therapy and counseling services (*id.*). The parent explained that the student had difficulty with reading comprehension, but overall, the student "improved academically" (*id.* at p. 2). The parent noted that the student required "academic support" and that her current program provided a "structured setting" (*id.*). The parent also reported that she wanted the student to remain in her "current school program" because the structured setting benefitted the student (*id.*).

On April 27, 2007, the district also conducted an educational evaluation of the student (Dist. Ex. 5 at p. 1). The evaluation report indicated that an administration of the Stanford-Binet Intelligence Scale-Fifth Edition in May 2005 revealed that the student earned a full-scale IQ score in the borderline range (*id.*). The evaluation report further indicated that an administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) in May 2006 revealed that the student's scores for broad reading, broad math, and broad written language all fell within the low range (*id.*). In the updated testing performed in April 2007, the evaluator administered the WJ-III ACH to measure the student's academic achievement in reading, mathematics, and written language (*id.* at pp. 2-3, 5). On the broad reading portion, the student's overall score fell within the low range and her performance on specific subtests for letter-word identification, reading fluency, and passage comprehension indicated that the student demonstrated difficulty "decoding end blend syllables in multisyllabic words," reading "simple sentences" within time constraints to

² In addition to her four core academic courses, the student also received instruction in a variety of religion courses for approximately three hours per day, Monday through Thursday (see Parent Ex. F). On Friday, the student attended only religion courses for approximately three hours (*id.*).

³ The social history report did not identify a provider of services for either the speech-language therapy or counseling services or where the student received those services (see Dist. Ex. 4).

assess the truth of statements, and answering questions after reading a passage (*id.* at pp. 2, 5). Overall, the student scored in the low range on the letter-word identification, reading fluency, and passage comprehension subtests (*id.*).

The student's scores on the broad math portion of the WJ-III ACH fell within the low to low average range (Dist. Ex. 5 at pp. 2-3, 5). In particular, the student performed within the low range on the calculation subtest, which indicated that the student exhibited difficulty solving a variety of problems (*id.* at p. 3). The evaluation report indicated that the student could perform basic addition, subtraction, multiplication, and division, but that she "struggled" with multi-digit division and problems involving "fractions with common denominators" (*id.*). On the math fluency subtest, the student failed to earn credit for "items involving signed numbers, decimals, percentages, and algebraic equations" and her score fell within the low range (*id.*). The student also exhibited difficulty completing arithmetic problems within time constraints and demonstrated a lack of "automaticity" (*id.*). On the applied problems subtest, which required the student to solve a problem after listening to an orally presented item, the student's score fell within the low average range (*id.*). The evaluation report noted that the student could solve "a variety of problems" involving money, but struggled with "items pertaining to measurement, geometry and fractions" (*id.*).

With respect to broad written language, the student's overall score fell within the low range (Dist. Ex. 5 at pp. 2-3, 5). She performed in the low average range on the spelling and writing samples subtests, but within the low range on the writing fluency subtest (*id.* at pp. 3, 5). On the spelling subtest, the student could spell "sixteen, floor and early," but demonstrated difficulty with words such as "adventure, garage and beautiful" (*id.* at p. 3). On the writing fluency subtest, which required the student to "formulate and write simple sentences" within time constraints, the student lost credit for changing tenses of "stimulus words" (*id.*). On the writing sample subtest used to measure the student's ability to produce written responses on demand, the student's responses provided a "wealth of information," but the "excess information did not necessarily improve the quality of her writing" (*id.*). At the end of the evaluation report, the evaluator summarized the test results but did not include any recommendations (*id.* at pp. 3-4).

In addition to the foregoing, the district received a "teacher report," dated June 2007, completed by the student's then-current special education teacher for ninth grade (Dist. Ex. 2 at pp. 1-3; *see* Tr. pp. 71-72, 189). The teacher reported that the student exhibited "extremely weak" phonics, decoding, and vocabulary skills, with particular difficulty "sounding out" unfamiliar, multi-syllabic words (Dist. Ex. 2 at p. 1). Although the student's poor decoding skills impacted her ability to comprehend independently read materials, her comprehension skills improved upon oral presentation of the materials (*id.*). With respect to mathematics, the student understood and performed "basic number facts" in addition, subtraction, multiplication, and division; she could also "complete problem solving" with "support" (*id.*). The teacher also reported that the student participated in a "mainstream" global studies class with a "modified curriculum," noting that for global studies exams the student would only be "required to answer six out of twenty five questions" (*id.* at pp. 1-2). For biology, the teacher reworded the vocabulary so the student could understand material "presented in reading assignments" (*id.* at p. 2). In the area of speech, the student exhibited appropriate articulation, but demonstrated "many grammatical errors" when speaking (*id.*). In addition, although the teacher reported expressive and receptive language "delays," the report indicated that the student did not receive speech-language services (*id.*).

Turning to the student's written language skills, the teacher reported that due to the student's difficulty "organizing her thoughts into well written paragraphs," she required the use of graphic organizers and outlines to write essays (id.). The student also needed support to develop "topic sentences and supporting details in a structured format" (id.). The teacher report also noted the student's difficulty "composing proper sentences" (id.).

On June 18, 2007, the Committee on Special Education (CSE) convened to conduct the student's annual review and to develop her individualized education program (IEP) for the 2007-08 school year (Parent Ex. G at p. 1). Attendees at the meeting included the following: a district representative, a school psychologist, a regular education teacher from CAHAL via telephone, the parent via telephone (with the assistance of a translator via telephone), CAHAL's educational coordinator, and the student's ninth grade special education teacher from CAHAL via telephone (id. at p. 2; see Tr. pp. 65-66, 187-89; Dist. Ex. 2 at p. 1).⁴ The CSE relied upon the April 2007 educational evaluation, classroom observation, and updated social history, as well as the June 2007 teacher report, to develop the student's present levels of performance (see Tr. pp. 70-72, 92-93; Dist. Exs. 2-5; Parent Ex. G at pp. 3-7). In addition, the CSE included teacher estimates of the student's instructional levels provided by CAHAL's special education teacher to further develop the student's present levels of performance in the IEP (Tr. pp. 71-72; see Dist. Ex. 2 at pp. 1-3; Parent Ex. G at p. 4). Based upon either the WJ-III ACH test results in the educational evaluation or the teacher estimates, the student's instructional levels in reading, writing, and mathematics ranged between the third and sixth grades (Parent Ex. G at pp. 3-4; see Dist. Ex. 5 at p. 5). In particular, the CSE noted that the student demonstrated difficulty "decoding end blends in multisyllabic words," "dividing multi-digit numbers," and solving problems involving "fractions, signed numbers, decimals, percentage, geometry, measurement and algebraic equations" (Parent Ex. G at p. 3; see Dist. Ex. 5 at pp. 2-3). The CSE also noted that the student had weak "phonic[s], decoding, and vocabulary skills," that the student's difficulty "sounding out multi syllable words . . . unfamiliar to her" affected her ability to comprehend materials, that she required "support" to complete "problem solving" in mathematics, and that she exhibited difficulty "organizing her thoughts into well written paragraphs" (Parent Ex. G at p. 4; see Dist. Ex. 2 at p. 1). To address the student's identified academic management needs, the CSE recommended reteaching; repetition; visual prompts, such as charts; use of a calculator; clarification; and breaking tasks into smaller units (Parent Ex. G at p. 3).

With respect to the student's present levels of performance in the speech-language area, the CSE documented in the IEP that the student—based upon unidentified "previous reports"—could "receptively answer questions" on brief subjects, but struggled "as [the] length and complexity of [the] stimulus increase[d]" (Parent Ex. G at p. 5). The student could also "follow multi-step directions with cueing" and expressively, she had "expand[ed] her vocabulary" (id.).

As to the student's present levels of performance in the social/emotional area, the CSE described the student as "responsible, [conscientious], hard working," and "extremely motivated" (Parent Ex. G at p. 6). The CSE further noted that the student could "ask for help or clarification when necessary" (id.). According to the IEP, the student continued to "struggle in social settings,"

⁴ According to the IEP's conference information, the attendance of an additional parent member was noted as "declined" (Parent Ex. G at p. 2).

but had improved her social skills, and she interacted "well with both teachers and classmates" (id.). The student also struggled with her "self esteem" (id.). To address the student's identified social/emotional management needs, the CSE recommended the use of "praise and encouragement" and "verbal and visual redirection" (id.).

The student's IEP also contained annual goals and short-term objectives in the areas of speech-language, reading, mathematics, writing, and counseling (Parent Ex. G at pp. 8-12). In speech-language, the first annual goal indicated that the student would "improve and develop her receptive language skills by [June 2008] to approach more age appropriate levels;" the second annual goal indicated that the student would "improve her expressive language skills to approach age appropriate levels" by June 2008 (id. at p. 8). The accompanying short-term objectives targeted the student's needs in the following areas: following "multistep directions;" answering "cause/effect questions" related to more lengthy and complex information; answering "sequential questions" about a story; increasing her "vocabulary;" improving her ability to make "inferences, predict and problem solve when a story [was] read;" and writing paragraphs with topic and supporting sentences (id.).

For reading, the annual goal noted that the student would "increase her reading skills to complete the 10th grade English curriculum to finish credits towards earning a high school diploma" by June 2008, and the short-term objectives targeted the student's use of "decoding strategies," using "signal words," and comparing and contrasting information to complete a project (Parent Ex. G at p. 9). The writing annual goal indicated that by June 2008, the student would "continue to improve her writing skills across [the] curriculum areas to meet [the] requirements for [the] 10th grade curriculum with modifications to acquire credits toward a [high school] diploma" (id.). The short-term objectives targeted the student's use of outlines and graphic organizers; the development and use of "individual proofreading checklists;" and the student's ability to "select, record, and organize information to write a research report" (id.). In mathematics, the annual goal indicated that by June 2008, the student would "increase her understanding of concepts and skills to complete the math curriculum for the required course for 10th grade to acquire credits towards a [high school] diploma" (id. at p. 10). The corresponding short-term objectives focused on improving the student's ability to "formulate and use an algebraic solution" to "solve a verbal problem," to "understand the properties of a geometric figure," and to apply appropriate "algebraic concepts to solve fractions" (id.). For counseling, the annual goal indicated that the student would "improve school performance through counseling" (id. at p. 11). The corresponding short-term objectives focused on the development of "age appropriate socialization skills" by December 2007, establishing "a meaningful relationship with another peer" by March 2008, improving the student's ability to take interest and the perspective of another peer by June 2008, and improving the student's "self concept and self direction" by June 2008 (id.).

Based upon the information provided, the CSE recommended placement in a 12:1+1 special class in a community school with related services of one 30-minute session of counseling per week in a group setting, one 30-minute session of speech-language therapy per week in an individual setting, and one 30-minute session of speech-language therapy per week in a group setting (Parent Ex. G at pp. 1-2, 15). In addition, the CSE noted that the student would participate in State and local assessments and recommended the following testing accommodations: "time extension (time and a half), special location, questions read and reread aloud to student except on tests measuring reading comprehension skills, use of a calculator, [and] directions read and reread

aloud" (id. at p. 15). The student's IEP included information regarding transition services, which noted that the student would earn a local diploma (id. at pp. 16-17).

By Final Notice of Recommendation (FNR) dated August 14, 2007, the district recommended a site location in which to implement the student's IEP for the 2007-08 school year (Dist. Ex. A).

By due process complaint notice dated July 15, 2008, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year based upon procedural and substantive violations (Parent Ex. A at p. 1). The parent asserted that she did not agree with the annual goals contained in the student's 2007-08 IEP and that the IEP contained inappropriate goals, which were vague, overly broad, and not consistent with the student's present functional levels (id. at pp. 1-2). The parent also alleged that she received a second FNR on or about August 18, 2007, offering placement in a 15:1 special class, which was inconsistent with the CSE's recommended placement in a 12:1+1 special class (id. at p. 2).⁵ In addition, the parent noted in the due process complaint notice that "this letter [was] notice that [the parent] has re-enrolled her daughter in the Cahal Special Education Program for the 2007-2008 school year," and further, that the parent sought an impartial hearing seeking direct payment of the student's tuition costs to CAHAL, the continued provision of the student's related services by the district, and for the district to provide transportation to and from CAHAL (id. at p. 2).

The parties proceeded to an impartial hearing on September 22, 2008, which concluded after three days on November 5, 2008 (Tr. pp. 1, 104). Both parties presented testimonial and documentary evidence (Tr. pp. 1-246; Dist. Exs. 1-6; Parent Exs. A-I).

By decision dated January 8, 2009, the impartial hearing officer determined that the district failed to offer the student a FAPE for the 2007-08 school year (IHO Decision at pp. 5-9). The impartial hearing officer concluded that the district failed to sustain its burden to establish that the June 2007 IEP and the recommended placement in a 12:1+1 special class in a community school were reasonably calculated to enable the student to receive meaningful educational benefit or make meaningful educational progress during the 2007-08 school year (id. at pp. 5, 9). The impartial hearing officer primarily based her conclusion upon finding the annual goals and short-term objectives contained in the IEP were vague, immeasurable, or not consistent with the student's needs and abilities (id. at pp. 6-9). In particular, she found that the testimonial evidence presented at the impartial hearing contained "sufficiently detailed information about the tenth grade curriculum" to establish that the recommended speech-language goals and objectives were vague, that the counseling goals failed to indicate the "school performance to be addressed" or the "level of expected improvement," and that the academic goals and objectives for reading, mathematics, and writing were beyond the student's "skill and cognitive abilities" and not consistent with her "needs and abilities" (id. at pp. 6-7). The impartial hearing officer noted, for example, that the evidence established that the student did not have the skills necessary to "understand the tenth grade math curriculum," or to "understand and analyze the literature included in the tenth grade English curriculum" (id. at p. 8). Therefore, the impartial hearing officer found that based upon the goals and objectives contained in the student's IEP, the student "would not have received

⁵ The hearing record does not contain an FNR offering a 15:1 placement as alleged in the parent's due process complaint notice (see Dist. Exs. 1-6; Parent Exs. A-I).

meaningful education benefits in classes focused on the tenth grade" curriculum, and further, that the district's failure to include appropriate goals and objectives in the 2007-08 IEP constituted a denial of a FAPE (*id.* at p. 7). In addition to the foregoing, the impartial hearing officer also determined that although the CSE discussed the student's deficits at the CSE meeting to develop the 2007-08 IEP, the hearing record established that the CSE did not draft or discuss the goals and objectives at the meeting (*id.* at p. 9). The impartial hearing officer supported her conclusion by noting the testimonial evidence offered by CAHAL's educational coordinator who had attended the CSE meeting (*id.*). CAHAL's educational coordinator testified that the goals had not been discussed at the CSE meeting, and further, that if the goals had been discussed, "she would have advised the CSE that they were not appropriate" for the student (*id.*).⁶

Turning to the issue of the recommended placement in a 12:1+1 special class in a community school, the impartial hearing officer asserted that the evidence presented by the district—namely, that the students in the recommended 12:1+1 special class worked on goals and objectives similar to those contained in the student's IEP—directly called into question the appropriateness of the recommended placement (IHO Decision at p. 7). The impartial hearing officer was not persuaded by the testimonial evidence presented through one district witness because she found that the witness's analysis and opinion on the appropriateness of the recommended 12:1+1 special class placement was based solely upon her review of the student's 2007-08 IEP and without reviewing any of the student's "evaluations, progress reports, [or] teacher reports" (*id.* at p. 8). The impartial hearing officer was also not persuaded by the same witness's testimony regarding the instructional levels of the students in the proposed 12:1+1 special class, noting that "her testimony was no more than a general statement about the functional levels" and that she failed to recall any specific information about the students in the proposed class (*id.*). In addition, the impartial hearing officer found the hearing record to be "devoid of specific information as to the ages and cognitive functioning of the other students in the class, or about their social, academic and management needs" (*id.*).

Having determined that the district failed to offer the student a FAPE for the 2007-08 school year, the impartial hearing officer then turned to the issue of whether the parent sustained her burden to establish the appropriateness of the student's unilateral placement at CAHAL (IHO Decision at pp. 9-10). Based upon the testimonial evidence provided by CAHAL staff, the impartial hearing officer found that the CAHAL program met the student's special education needs during the 2007-08 school year (*id.* at p. 10). In particular, the impartial hearing officer noted that the student received all of her instruction at CAHAL from "licensed special education teachers or teachers seeking special education certification and working on their Masters Degree in Special Education" (*id.*). The impartial hearing officer found that the student received "a substantial amount of 1:1 support" in her mainstream global studies course and that with such support, the student successfully passed the Regents exam in global studies at the conclusion of the 2007-08 school year (*id.*). In addition, the impartial hearing officer noted that the student received instruction in an 8:1+1 classroom, that she received "individualized attention," auditorily and visually presented materials, and that her "instruction included a great deal of review, reinforcement and repetition" in order for the student to "learn and retain information" (*id.*). The

⁶ See generally *Application of a Child with a Disability*, Appeal No. 06-121; see also *E.G. v. City School Dist. of New Rochelle*, 2009 WL 773960, at *3 (S.D.N.Y. Mar. 16, 2009).

impartial hearing officer was also persuaded by the "credible and uncontroverted" testimonial evidence regarding the student's "progress academically, emotionally and socially" (*id.*). The impartial hearing officer was not persuaded, however, by the district's evidence regarding the student's lack of progress during the 2007-08 school year (*id.* at p. 9). Therefore, the impartial hearing officer concluded that the parent sustained her burden to establish that the student's unilateral placement at CAHAL met her special education needs during the 2007-08 school year (*id.* at p. 10).

With respect to equitable considerations, the impartial hearing officer rejected the district's contention that the parent had no "contractual obligation to pay" CAHAL's tuition expenses for the 2007-08 school year (IHO Decision at pp. 10-11). In addition, the impartial hearing officer determined that the parent's "actions" did not interfere with either the evaluation or the placement process, and thus, equitable considerations favored the parent's claim for tuition reimbursement (*id.* at p. 11). The impartial hearing officer concluded that the parent was entitled to reimbursement for the costs of the student's tuition at CAHAL for the 2007-08 school year and directed the district to remit payment directly to CAHAL as the 2007-08 school year had already concluded and educational services had already been rendered to the student (*id.* at pp. 11-12).

On appeal, the district asserts that the impartial hearing officer erred in her conclusion that the district failed to offer the student a FAPE for the 2007-08 school year, and further, that she erred in concluding that the parent sustained her burden to establish the appropriateness of the student's unilateral placement at CAHAL. The district further argues that equitable considerations do not favor the parent's claim for tuition reimbursement and that the impartial hearing officer erroneously directed the district to remit payment for the student's tuition costs directly to CAHAL. The district contends that the impartial hearing officer erroneously awarded reimbursement for the following reasons: the parent lacked standing to assert a claim for reimbursement since the parent has not sustained any out-of-pocket expenses for tuition during the 2007-08 school year; the district offered the student a FAPE; the student's unilateral placement at CAHAL was not appropriate since the student failed to make progress and CAHAL did not provide the student with related services; equitable considerations do not favor the parent's claim for tuition reimbursement since the parent failed to provide notice of the student's unilateral placement prior to her enrollment at CAHAL for the 2007-08 school year and moreover, the parent never intended to place the student in a public school; and finally, that even if the parent was entitled to tuition funding, it must be in the form of reimbursement as opposed to prospective funding. The district also notes in its appeal that any award of reimbursement for the costs of the student's tuition expenses at CAHAL, if awarded, must be reduced to account for religious instruction. The district seeks to annul the impartial hearing officer's decision in its entirety.

In her answer, the parent seeks to uphold the impartial hearing officer's decision in its entirety. The parent asserts that the impartial hearing officer's decision was supported by substantial evidence, the district failed to offer the student a FAPE, the parent sustained her burden to establish the appropriateness of the student's unilateral placement at CAHAL, and that the 10-day notice requirement does not apply in this case. The parent seeks to dismiss the district's appeal and to affirm the impartial hearing officer's decision in its entirety.

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 (*A.C. v. Bd. of Educ.*, 553 F.3d 165, 172 [2d Cir. 2009]; *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 [2d Cir. 2003]; *Perricelli v. Carmel Cent. Sch. Dist.*, 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; *E.H. v. Bd. of Educ.*, 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; *Matrejek v. Brewster Cent. Sch. Dist.*, 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 114 [2d Cir. 2008]; *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 108 [2d Cir. 2007]; *Walczak*, 142 F.3d at 132; *Patskin v. Bd. of Educ.*, 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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).

A private school placement must be "proper under the Act" (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), 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. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]; Walczak, 142 F.3d at 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419 [S.D.N.Y. 2007], 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 by 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; 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., 459 F.3d at 364 [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 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 (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).

After a thorough review of the hearing record, and for the reasons set forth below, I concur with the impartial hearing officer's conclusion that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2007-08 school year (see IHO Decision at pp. 5-9). As determined by the impartial hearing officer, the student's IEP contains vague and immeasurable goals and short-term objectives, which were not consistent with the student's then-current functional levels (id. at pp. 6-9). In addition to the impartial hearing officer's findings and conclusions of law, I further note that the goals and short-term objectives in the 2007-08 IEP duplicated the goals and short-term objectives contained in the student's IEP developed for ninth grade during the 2006-07 school year, except that the grade level expectations had been changed from the ninth grade to the tenth grade for the reading, writing, and mathematics goals (compare Dist. Ex. 6 at pp. 7-11, with Parent Ex. G at pp. 8-11). I also note that several of the speech-language short-term objectives in the 2007-08 IEP reflected mastery dates contained in the student's 2006-07 IEP (compare Dist. Ex. 6 at pp. 5, 7-8, with Parent Ex. G at pp. 5, 8). Moreover, according to the hearing record, the CSE did not base the student's speech-language goals on the student's current speech-language needs, but rather relied upon unidentified previous reports contained in the student's special education file and thus those goals were not related to the student's then-current present functional levels (Tr. pp. 72-74; see Parent Ex. G at p. 5).

As further noted by the impartial hearing officer, the goals and short-term objectives developed to address the student's needs in the areas of reading, writing, and mathematics present greater concern (IHO Decision at pp. 6-8). Although the 2007-08 IEP accurately reflected that the student functioned within the third to sixth grade range academically, the reading, writing, and mathematics goals indicate that the student would complete the tenth grade curriculum for English, mathematics, and writing (see Parent Ex. G at pp. 9-10). A review of the hearing record indicates

that the district failed to present sufficient evidence to describe how these goals and short-term objectives could be meaningfully implemented given the extreme gap between the student's then-current functional levels and the expectation that the student would complete the tenth grade curriculum or what modifications or educational strategies could be employed to assist the student in making meaningful progress with regard to the goals and short-term objectives as written. Based upon the hearing record, I also note that the recommended academic goals were not based upon the student's then-current functional levels or what she could reasonably be expected to achieve in a school year, but rather appear to be written specifically to satisfy the requirement that the student achieve a high school diploma (see Tr. pp. 74-82; Parent Ex. G at pp. 9-10).

Having determined that the district failed to sustain its burden to establish that it offered the student a FAPE for the 2007-08 school year, I now turn to the issue of whether the parent sustained her burden to establish the appropriateness of the student's unilateral placement at CAHAL. After thoroughly reviewing the hearing record, I find that the impartial hearing officer erred in concluding that the parent sustained her burden (IHO Decision at pp. 9-10). Specifically, I note that although the hearing record provides general information about the student's program at CAHAL, the hearing record does not contain sufficient information regarding the educational services provided to the student or how the educational services at CAHAL met the student's identified special education needs. For example, according to the hearing record, the student attended an 8:1+1 classroom at CAHAL, but it fails to contain evidence regarding the functional levels or ages of the other students in the classroom (see Tr. p. 189). In addition, although the student's tenth grade class schedule reflects that she received academic instruction in biology, language arts, global studies, and mathematics, the hearing record contains no information or evidence regarding the student's progress in these core academic courses or how she participated in these core academic subjects, with the exception of the mainstream global studies class (see Parent Ex. F). CAHAL's educational coordinator testified that for global studies, the student received a "tremendous amount" of pre-teaching and post-teaching and that the student's teacher remained in "very close contact with the mainstream teacher" regarding the direction of the student's curriculum and to obtain notes, exams, and test modifications (see Tr. p. 192). However, the hearing record does not provide information or evidence describing the modifications employed, the pre-teaching or post-teaching strategies, or the student's curriculum.

In addition, CAHAL's program director testified that the student often received 1:1 instruction during language arts and global studies and that the teachers met with the student during lunch to provide additional 1:1 attention, but did not explain or identify what the 1:1 instruction included or addressed (Tr. p. 154). She further testified that teachers reviewed much of the student's work orally, due to the student's relative strength in listening comprehension, and that the student required a "tremendous amount of review and reinforcement and repetition" to enable to student to achieve "some success" (Tr. pp. 140-42). According to the CAHAL program director, the student received modifications in all of her subjects, including tests and the materials used, but she failed to specifically identify or explain the modifications mentioned (id.). Although the hearing record reflects that the student's teachers spent a "tremendous amount of time working with [the student] one on one and particularly focusing on global studies," the hearing record provides little, if any, insight into what the student's self-contained curriculum included, what materials were used, or what specific methodologies or strategies or modifications were employed to address the student's specific learning needs while at CAHAL (see Tr. pp. 140-41). In addition, I find no evidence in the hearing record regarding what goals the student worked on at CAHAL or

how the student's teachers at CAHAL measured her progress. The hearing record also does not include progress reports, report cards, teacher reports, or other objective measurable data to support the testimonial evidence offered to support the parent's position that the student made progress while at CAHAL (see Application of a Student with a Disability, Appeal No. 09-015; Application of a Student with a Disability, Appeal No. 08-151). And while it is noteworthy that the student successfully passed the global studies Regents exam at the conclusion of the 2007-08 school year, this success—in and of itself—is neither sufficient nor determinative of the issue of whether the student's unilateral placement at CAHAL met the student's unique special education needs during the 2007-08 school year (see Tr. p. 195; Gagliardo, 489 F.3d at 112).

With respect to the student's recommended related services for the 2007-08 school year, the hearing record indicates that although the CSE recommended that the student continue to receive speech-language therapy and counseling services for the 2007-08 school year, it is unclear from the inconsistent testimonial evidence and absence of documentary evidence—such as progress reports—to conclusively determine whether the student actually received these services at CAHAL (see Tr. pp. 72, 83, 91, 155, 226-29). Thus, the hearing record does not contain sufficient information to determine whether the student's identified speech-language needs or counseling needs were adequately addressed at CAHAL.

In conclusion, in the absence of more specific information regarding the student's academic services, related services, or progress at CAHAL, I find that the parent failed to sustain her burden to establish that the student's unilateral placement at CAHAL during the 2007-08 school year appropriately met the student's unique, special education needs (see Matrejek v. Brewster Cent. Sch. Dist., 2008 WL 3852180, at *2 [2d Cir. Aug. 19, 2008]; Application of a Student with a Disability, Appeal No. 09-015; Application of a Student with a Disability, Appeal No. 08-151; Application of a Student with a Disability, Appeal No. 08-013; Application of the Dep't of Educ., Appeal No. 08-092 [finding that the parents failed to meet their burden to establish the appropriateness of a private placement, where the hearing record offered general information about the unilateral placement, rather than information regarding the educational services provided to the student or how the educational services at the private placement met the student's identified special education needs]).

Having determined that the parent failed to sustain her burden to establish that the CAHAL program appropriately met the student's special education needs, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parent's claim (see Burlington, 471 U.S. 359; Gagliardo, 489 F.3d at 115; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it determined that the parent sustained her burden to establish the appropriateness of the unilateral placement of her daughter at CAHAL for the 2007-08 school year; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled to the extent that it directed the district to directly remit payment to CAHAL for the student's tuition expenses for the 2007-08 school year.

Dated: **Albany, New York**
 April 7, 2009

PAUL F. KELLY
STATE REVIEW OFFICER