



The University of the State of New York

The State Education Department
State Review Officer
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No. 09-045

**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 Offices of Skyer, Castro, Cutler and Gersten, attorneys for respondents, Gregory Cangiano, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for a portion of the student's tuition costs at the York Preparatory School (York Prep) for the 2008-09 school year. The appeal must be sustained in part.

The hearing record reveals that the student attended public school from kindergarten through fifth grade (Dist. Ex. 1 at p. 1). By second grade, she began to struggle academically (Tr. p. 165; Parent Ex. E at p. 5). During second grade, the student was evaluated, found eligible for special education services as a student with a learning disability, and began to receive special education teacher support services (SETSS) and testing accommodations (Tr. pp. 165-66; Parent Ex. E at p. 5). The student also began working with a private tutor (Tr. p. 165; Parent Ex. E at p. 5). Starting in sixth grade (2006-07), the student began attending York Prep and participated in its Jump Start program (Jump Start) (Dist. Ex. 1 at p. 2). According to the hearing record, Jump Start is a supplemental program to the regular education program at York Prep that provides organizational and academic support services (Tr. pp. 102, 109; Dist. Ex. 1 at p. 2). The student remained at York Prep for the 2007-08 and 2008-09 school years (Tr. p. 166).

This appeal involves a dispute over the 2008-09 school year. At the time of the impartial hearing, the student was still attending York Prep and participating in Jump Start (*id.*). York Prep is a private school which has not been approved by the Commissioner of Education as a school

with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a learning disability is in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that in January 2006, the student underwent a neuropsychological evaluation performed by a private psychologist (Parent Ex. E at p. 1). The psychologist completed assessments in the areas of intelligence, language, visual perception, motor skills, memory, oral skills, reading, written language, and executive functions (id. at pp. 1-4). Administration of the Stanford-Binet Intelligence Scale-Fifth Edition (SB-V) resulted in a verbal intelligence quotient (IQ) score of 109 (73rd percentile), a nonverbal IQ score of 117 (87th percentile), and a full scale IQ score of 113 (81st percentile) (id. at pp. 1, 7). The student's overall performance on this test placed her in the high average range of cognitive functioning (id. at pp. 7, 14; see Tr. p. 190). However, within the verbal domain, the student demonstrated a relative weakness in her verbal working memory (the ability to hold and manipulate information in short-term memory) (Parent Ex. E at pp. 1, 7, 9). Administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) resulted in receptive language scores that were in the average to high average range (id. at p. 8). However, the student's expressive language scores varied (id. at pp. 8, 14; see Tr. p. 190). She performed below age expectancy on a naming task that required her to rapidly retrieve word labels in response to printed visual stimuli and also demonstrated weaknesses in the area of auditory processing/memory (Parent Ex. E at pp. 1, 8, 14; see Tr. pp. 190-91). Administration of the Children's Memory Scale (CMS) indicated that the student performed better on measures of long-term memory, as opposed to short-term memory (Parent Ex. E at pp. 2, 9). The psychologist indicated that the student's weaknesses in auditory processing made it difficult for her to perform one-trial verbal learning tasks, to recall information verbatim, and to follow along with lengthy verbal discussions or directives (id. at pp. 9-10; see Tr. pp. 190-91). The psychologist opined that the student would likely have difficulty integrating complex data, and difficulty expressing her ideas in a well organized manner (Parent Ex. E at pp. 10-11; see Tr. pp. 190-91). The student was also administered the Wechsler Individual Achievement Test – Second Edition (WIAT-II), the Woodcock-Johnson III Tests of Achievement (WJ-III ACH), the Gray Oral Reading Tests, Fourth Edition (GORT-4), and the Test of Written Language – Third Edition (TOWL-III) (Parent Ex. E at p. 12). The psychologist reported that the student's mathematical skills, reasoning skills, and visual motor skills were areas of strength, but that she demonstrated delays in the areas of decoding, processing speed, graphomotor speed, and in writing, spelling, and grammar (id. at pp. 12, 14, 15; see Tr. pp. 188, 191). She also demonstrated weaknesses in the areas of time management and organization (Parent Ex. E at pp. 7, 14).

On August 16, 2007, the district's school psychologist completed a cognitive and academic assessment of the student (Dist. Exs. 2; 3). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) by the district psychologist yielded a full scale IQ score of 107, a perceptual reasoning index standard score of 117, a working memory standard score of 99, and a processing speed standard score of 94 (Dist. Exs. 2 at p. 1; 3 at p. 3). Administration of the WJ-III ACH revealed that the student's performance in broad reading was at the 7.0 grade level, her performance in broad mathematics was at the 6.6 grade level, and her performance in math calculation skills was at the 7.8 grade level (Dist. Ex. 3 at p. 5). Behaviorally, the student was cooperative and compliant throughout the testing (id.). The psychologist also administered an informal writing test which indicated that the student demonstrated difficulty with punctuation and

grammar (id. at p. 5). The psychologist reported that the student's performance was average when compared to others at her grade level (Dist. Ex. 2 at pp. 2-8).

An academic report from York Prep dated April 11, 2008, reflected the student's grades for the first three quarters of the 2007-08 school year (Dist. Ex. 4). For the first three quarters of the 2007-08 school year, the student's quarterly grades in English were 92, 83 and 83; in math her grades were 92, 90, and 84; in Spanish her grades were 82, 81 and 80; in U.S. history her grades were 85, 88 and 71; in life science her grades were 91, 83 and 82; in visual arts her grades were 86, 89 and 90; and in physical education her grades were 88, 90 and 90 (id.). The student also received grades of 80 and 85 for music, and 75 for drama (id.). With the exception of her third quarter grade of 71 in Spanish and her third quarter grade of 75 in drama, York Prep classified the student's effort in all of her classes throughout the three quarters as either "excellent" or "satisfactory" (id.).

A collection of classroom progress reports from the student's teachers at York Prep commented on the student's achievement within the classroom (Dist. Ex. 6 at pp. 1-8).¹ The progress notes revealed that the consistency of the student's homework completion, class participation, and effort was variable (see id.).

A classroom observation dated May 29, 2008 from a district social worker reported on an observation of the student in her seventh grade math class at York Prep (Parent Ex. 5). The report noted the classroom teacher's opinion that the student's math skills were "very good" (id.). The social worker observed that the student was diligent, focused, and performed on task during the entire period (id.). The social worker also reported that she observed that on the two occasions when it was the student's turn to explain her work, the student was able to clearly explain her assigned question and how she had arrived at the answer (id.).

On May 30, 2008, the Committee on Special Education (CSE) convened for a review for the student's 2008-09 school year (Parent Ex. C at p. 1). Attendees included: the student's mother, a regular education teacher, a special education teacher, an additional parent member, and the district school psychologist who also acted as a district representative (Tr. pp. 23-24, 36, 171; Dist. Ex. 8; Parent Ex. C at p. 2). The York Prep director/psychologist participated by telephone (Parent Ex. C at p. 2). The May 2008 CSE developed an individualized education program (IEP) for the student (Parent Ex. C). The May 2008 CSE found the student no longer eligible to receive special education programs and services, designated the student as "non-handicapped," and recommended that she attend a general education program (Dist. Ex. 8; Parent Ex. C at p. 1). The May 2008 CSE noted that the student was of average to high average intellectual functioning and was "at grade level" in the areas of decoding, reading comprehension, listening comprehension, writing, math computation, and problem solving (Dist. Ex. 8; Parent Ex. C at p. 3). The May 2008 CSE further

¹ In these progress reports, all of the student's York Prep teachers evaluated the student's skills by rating the student in four categories: (1) completes homework thoroughly and on time; (2) participates meaningfully in class; (3) demonstrates an understanding of material presented; and (4) demonstrates proper classroom behavior (Parent Ex. 6 at pp. 5-8). The teachers rated the student's performance as either "outstanding," "very good," "satisfactory," or "needs improvement" (id.). All of the progress reports contained in the hearing record were printed on May 28, 2008 (id. at pp. 1-8).

indicated that the student was well-behaved, socially appropriate, and well-adjusted (Dist. Ex. 8; Parent Ex. C at p. 4).

By Final Notice of Recommendation (FNR) dated June 14, 2008, the CSE chairperson informed the parents that the CSE had determined that the student had no disabilities and was "non-handicapped" (Dist. Ex. 9). The FNR also advised that the CSE had recommended a general education program at one of the district's schools without any special education services (id.).

By letter dated August 18, 2008, the parents' attorney advised the district that the parents were unilaterally placing the student at York Prep for the 2008-09 school year and would seek tuition reimbursement from the district (Parent Ex. B at p. 1). In the letter, the parents asserted that the district denied the student a free appropriate public education (FAPE) and that there were procedural and substantive defects in the CSE process (id.). More specifically, the parents alleged that they were denied meaningful participation in the development of the student's IEP and that the district's placement recommendation did not provide "suitable and functional grouping" (id.).

By due process complaint notice dated August 19, 2008, the parents' attorney requested an impartial hearing (Parent Ex. A at p. 1). The due process complaint notice alleged that the May 30, 2008 IEP was both procedurally and substantively defective and failed to offer the student a FAPE (id.). The due process complaint notice alleged that the May 2008 CSE's recommendation that the student participate in a general education program was inconsistent with the CSE's prior recommendations, that the proposed placement did not provide a suitable and functional peer group for instructional and social/emotional purposes, and that the composition of the May 2008 CSE was defective because the district's regular education teacher was not currently teaching and because the district's special education teacher had no knowledge of the student and was not responsible for implementing the IEP (id. at pp. 2-3). The parents requested reimbursement for the student's tuition at York Prep and transportation to and from the school (id. at p. 1).

The impartial hearing began on November 20, 2008 and concluded on February 9, 2009, after three days of testimony (Tr. pp. 1, 95, 160, 219). At the impartial hearing, the parents' attorney clarified that the parents were seeking only reimbursement for the Jump Start portion of the student's tuition at York Prep (Tr. p. 217; see IHO Decision at p. 5). On March 2, 2009, the impartial hearing officer rendered her decision (IHO Decision at p. 11). The impartial hearing officer determined that the district's failure to classify the student was a denial of a FAPE (id. at p. 10). She found that the evidence from the parents' private psychologist revealed that the student had weaknesses in processing (id.). She also found that evidence from the director of York Prep revealed that the student had an expressive writing difficulty (id.). The impartial hearing officer further found that the student was able to perform on grade level because she was receiving support from York Prep's Jump Start program (id.). The impartial hearing officer also found that the parents had succeeded in establishing that Jump Start was appropriate because it assisted the student in organizing her work and in addressing any issues that could arise during the school day (id. at pp. 10-11). The impartial hearing officer also found no equitable impediment to the parents' request for relief, indicating that the parents had participated at the CSE meeting and had provided notice of the student's unilateral placement (id. at p. 11). The impartial hearing officer ordered the district to reimburse the parents for the cost of Jump Start during the student's 2008-09 school year (id.).

The district appeals and asserts that the impartial hearing officer erred in determining that the student should be classified as a student with a learning disability. The district asserts that the student performed well in school and was in the honors track for several of her academic classes.² The district also asserts that the January 2006 private neuropsychological evaluation relied on by the parents was not the most recent evaluation and that the reading, writing, and math levels reflected in that evaluation were out of date. The district asserts that the more recent evaluation performed by the district's psychologist in August 2007 found that the student did not have a learning disability. According to the district, the student has difficulty with organizational skills, which are not indicative of a learning disability. The district also asserts that the parents' alleged procedural defects did not rise to the level of a denial of a FAPE because these alleged defects did not impede the parents' participation at the May 2008 CSE meeting nor did they cause a deprivation of educational benefits to the student.

The district further asserts that Jump Start is not appropriate because the student is not required to participate in Jump Start and Jump Start only provides organizational help and academic support, which are not special education services, and these services would have been provided to the student in the district's proposed program. The district also argues that if the student requires special education services, the parents have not proven that Jump Start is appropriate because they have not proven that it is specially designed to meet the student's unique needs. The district also argues that the parents are not equitably entitled to reimbursement because: (1) they failed to notify the district of their intention to re-enroll the student at York Prep; (2) they failed to describe the nature of their problem with the recommended placement; and (3) they signed a tuition contract with York Prep two months prior to the May 2008 CSE meeting which indicated that they had no intention of placing the student in a public school. The district also argues that even though the student's mother had visited the recommended placement 2½ years earlier, the parents' failure to visit the proposed placement after receipt of the FNR further suggested that they had no intention of placing the student in the district's recommended placement.

In their answer, the parents assert that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE. The parents assert that the composition of the May 2008 CSE was defective because the district's regular education teacher was not currently teaching in the classroom and further, because the district's special education teacher had no knowledge of the student and was not responsible for implementing the student's IEP. The parents also assert that the district's regular education teacher and special education teacher never met the student. Additionally, the parents assert that the district failed to take into account the reports from the parents, failed to consider the size of the student's current York Prep class, and failed to take into account that the student received testing modifications at York Prep. Moreover, the parents assert that the January 2006 private neuropsychological evaluation indicated that the student had a learning disability. The parents further assert that the district's August 2007 psychological

² The director at York Prep reported that there are three academic instruction levels or "tracks" at York Prep: an honors track, a one-track, and a two-track (Tr. pp. 99, 103, 131). According to the director, the honors track is the most demanding, the one-track is the middle level, and the two-track is the easiest level (Tr. p. 103). The director further testified that the students were "tracked according to ability" based on grade, standardized scores, and teacher recommendations (Tr. p. 104). The student was on the one-track for algebra, the two-track for Spanish, and on the honors track for English, history, and science (Tr. p. 130).

evaluation was insufficient because it failed to give any recommendations and simply reported test scores and functional levels.

The parents also contend that the student was able to perform at grade level in York Prep because she obtained support from Jump Start. According to the parents, Jump Start was appropriate because it provided the student with assistance in expressive writing, math, and with organization. The parents further assert that the student's participation in several honors track classes was evidence that she was making progress at York Prep. In asserting that equitable considerations support their position, the parents argue that their August 18, 2008 notice of unilateral placement was sufficient and further that they cooperated at the May 2008 CSE meeting, as evidenced by the fact that the student's mother expressed her concerns about declassification at the May 2008 CSE meeting. In countering the district's argument that the parents never visited the proposed placement, the parents assert that the student's mother had previously visited the proposed placement.

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; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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 (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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 law took effect for impartial hearings commenced on or after October 14, 2007; therefore it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

As to the student's eligibility for special education services, the hearing record reflects that the May 2008 CSE relied on an August 2007 psychological evaluation report completed by a

district psychologist, progress reports from York Prep, the district's May 2008 classroom observation conducted at York Prep, and the input of the York Prep psychologist who participated in the May 2008 CSE meeting by telephone (Tr. pp. 24, 26, 29, 70, 72, 73). Although the district's psychologist noted in the August 2007 evaluation report that the student was being tested "in order to determine the appropriateness of her present academic setting and to determine the needs for special education services," the psychologist's report does not discuss how the student's assessment results relate to her need for continued special education services or to her present academic setting, nor was such testimony provided during the impartial hearing (Dist. Ex. 3 at pp. 1, 5). Moreover, although the district psychologist administered the WISC-IV and the WJ-III ACH to assess the student's cognitive and academic abilities, the hearing record shows that in the area of written expression – the student's greatest area of deficit – the district psychologist only administered an informal writing test and reported that the student had the ability "to put down her thoughts and ideas in writing" but demonstrated difficulty with punctuation and grammar (*id.* at p. 5). Although the district argues that the January 2006 private neuropsychological evaluation is outdated and that the district conducted more recent testing, albeit testing that did not formally focus on deficits in the area of written expression, I find that the district should have more comprehensively evaluated the student in all of her previously identified areas of need prior to determining that she no longer qualified for special education services (*see* 20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]).

Accordingly, I find that the impartial hearing officer correctly determined that the district failed to sustain its burden to establish the student was no longer eligible for special education services and that the district therefore failed to offer the student a FAPE for the 2008-09 school year (IHO Decision at pp. 9-10). However, given that the hearing record demonstrates that the student's abilities in written expression were not sufficiently evaluated by the district and the differing professional opinions regarding the evaluative data contained in the hearing record, I will slightly modify the impartial hearing officer's decision to order the CSE to conduct a comprehensive updated evaluation of the student that focuses on her previously identified areas of need; specifically, in written expression, auditory processing, and organization and reconvene to determine whether the student should be classified as a student with a disability.

I now turn to the issue of whether York Prep's Jump Start program was an appropriate placement for the student for the 2008-09 school year.

A private school placement must be "proper under the Act" (*Carter*, 510 U.S. at 12, 15; *Burlington*, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (*see* *Gagliardo*, 489 F.3d at 112, 115; *Walczak*, 142 F.3d at 129; *Matrejek*, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (*Carter*, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*Carter*, 510 U.S. 7; *Application of the Bd. of Educ.*, Appeal No. 08-085; *Application of the Dep't of Educ.*, Appeal No. 08-025; *Application of the Bd. of Educ.*, Appeal No. 08-016; *Application of the Bd. of Educ.*, Appeal No. 07-097; *Application of a Child with a Disability*, Appeal No. 07-038; *Application of a Child with a Disability*, Appeal No. 02-014; *Application of a Child with a Disability*, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (*Gagliardo*, 489 F.3d at 112; *see M.S. v. Bd. of Educ.*, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject

to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...' (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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).

The hearing record reveals that Jump Start is a supplemental program to the York Prep regular education program that provides organizational and academic support services (Tr. pp. 102, 109; Dist. Ex. 1 at p. 2). Of the 340 students at York Prep, approximately 100 participate in Jump Start (Tr. pp. 101-02, 148). Students who participate in Jump Start are assigned a teacher who sees the students individually two times per week for 45 minutes per session (Tr. pp. 102, 108-09, 112, 167-68). These individual sessions are pull-out sessions, with students being pulled out of non-academic classes like gym or music (Tr. p. 143). Jump Start students also participate in daily 45-minute group sessions in the morning and in the afternoon, before and after the school day, with the exception of Fridays (Tr. pp. 102, 108-09, 146, 167). Typically, group sessions contain ten or eleven other students (Tr. p. 102). During these sessions, Jump Start instructors provide organizational help and address academic issues that may pose a problem for students (Tr. p. 109). All Jump Start instructors have a special education certification (Tr. pp. 102, 123). The York Prep director testified that the student's Jump Start instructor provided organizational help,

expressive writing help, and algebra assistance to the student (Tr. pp. 110-11, 156). The organizational help consisted of ensuring that the student was aware of her homework assignments, what she needed to have with her during the day, and what she should bring home to complete her assignments (Tr. p. 112). The York Prep director further testified that aside from the Jump Start program, there are no special education classes at York Prep (Tr. pp. 125, 153-54).

The evidence in hearing record does not support the impartial hearing officer's finding that Jump Start was appropriate to meet the student's special education needs. Information provided by the York Prep director, the student's mother, and in two progress reports from the Jump Start instructor provides only general information and fails to specifically describe how Jump Start addressed the student's specific educational deficits as identified in the hearing record.³ Although the York Prep director testified generally that the Jump Start instructor worked with the student to address organizational difficulties and writing deficits, no specific examples were provided (Tr. pp. 105, 110, 112, 155-56). According to the York Prep director, Jump Start provided "help that is limited in scope and essentially... something that can be handled within a couple of minutes" (Tr. p. 109). According to the student's mother, Jump Start assisted the student organizationally through the use of agendas, charts and encouraging the student to clean out her school bag and locker (Tr. p. 169; see Dist. Ex. 6 at p. 4). Progress note comments from the student's Jump Start instructor revealed that the student "did not utilize Jump Start as much as she should have," that she arrived late to "check-in," and that she avoided study hall (Dist. Ex. 6 at p. 7). The student's expressive writing deficits and how those deficits were being addressed were not detailed in the two progress reports from the student's Jump Start instructor (id. at pp. 4, 7).⁴ I also note that there is no information contained in the hearing record regarding the profiles of the other students in this student's daily Jump Start group sessions, no information regarding the methodologies used by the Jump Start instructor or the curriculum followed, and no information regarding the assessment strategies or formal tests used to determine if the student was progressing in her areas of deficit, including her written expression needs. Moreover, I find that the hearing record contains no information as to how the student's processing deficits were addressed in Jump Start.

Therefore, based on the hearing record, I find that the parents have not met their burden to show that Jump Start was appropriate to meet the student's unique special education needs under the second criterion of the Burlington/Carter analysis for tuition reimbursement (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363-65; see also Matrejek, 2008 WL 3852180, at *2; Application of a Student with a Disability, Appeal No. 08-151; Application of the Dep't of Educ., Appeal No. 08-092).

Having decided that the parents failed to meet the second criterion for an award of tuition reimbursement, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

³ I note that the student's Jump Start instructor did not testify at the impartial hearing.

⁴ The student's English teacher also failed to mention how the student's alleged writing difficulties affected the student's expressive writing in the English classroom and how those difficulties were being addressed (Dist. Exs. 4; 6 at pp. 1, 5).

I have examined the parties' remaining contentions and find that it is unnecessary for me to address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision ordering the district to reimburse the parents for the cost of the Jump Start program for the 2008-09 school year is hereby annulled; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, the district shall conduct a comprehensive evaluation of the student that focuses on her previously identified areas of need, specifically, in written expression, auditory processing, and organization; convene a CSE to consider the results of the district's evaluation and any other updated evaluations of the student; and determine whether the student is eligible for special education programs and services as a student with a disability within 30 days from the date of this decision.

Dated: **Albany, New York**
 May 8, 2009

PAUL F. KELLY
STATE REVIEW OFFICER