



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-048

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

Appearances:

Sanford S. Stevens, P.C., attorney for petitioner, Sanford S. Stevens, Esq.

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the York Preparatory School (York Prep) for the 2007-08 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination which awarded the parent reimbursement for the portion of her son's tuition costs for his participation in York Prep's Jump Start (Jump Start) program for the 2007-08 school year. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing in December 2008, the student was enrolled in the tenth grade at York Prep (see Tr. p. 10). The student had entered York Prep at the beginning of the 2007-08 school year and had participated in Jump Start during the course of that school year (Tr. pp. 10-11). According to the hearing record, Jump Start is a supplemental program beyond the usual academic coursework at York Prep (Tr. p. 95). The Commissioner of Education has not approved York Prep 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 not in dispute in this proceeding (Tr. p. 49; Parent Ex. A at p. 1; see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

Turning to the merits of the appeal, I note preliminarily that the hearing record is sparse. It does not contain a single evaluation report of the student. The hearing record indicates that the student reportedly received a diagnosis of autism as a young child (Tr. pp. 37, 54) and that he

began receiving individual instruction using applied behavior analysis (ABA) methods at three years of age, which continued until the age of 13 (Tr. pp. 36-38). From the age of 13 through at least the time of the impartial hearing, one of the student's ABA instructors "continued to provide assistance" as a consultant (Tr. p. 37). The student attended a private special education preschool and various private special education schools through the 2006-07 school year when he was in the eighth grade (Tr. pp. 10-11, 37-39, 57). During the 2006-07 school year, the student received six months of private tutoring to prepare for the administration of an assessment referred to in the hearing record as the "Independent School Entries Exam," and to prepare for a private school's application process, which included learning how to organize his time during the length of the exam, conducting himself in an interview, and receiving tutoring in the academic subjects of the exam (Tr. pp. 64-65).

In January 2007, when the student was attending a different private school, the Committee on Special Education (CSE) conducted an annual review meeting for the balance of the 2006-07 school year (see Tr. pp. 39, 44; Parent Ex. A). According to the resultant individualized education program (IEP), the student was considered eligible for special education services as a student with a learning disability (Parent Ex. A at p. 1). The January 2007 IEP stated that the student demonstrated strengths in written mechanics and decoding, with weaknesses in "inferencing," organizational skills, and in "percentile" and "fractions" skills in math (*id.* at p. 3). The January 2007 IEP included teacher estimates of the student's skills, setting forth that he had below grade level abilities in the areas of reading comprehension, written expression, math computation and problem solving, and grade level letter-word identification skills (*id.*). The January 2007 IEP stated that the student's social problem solving skills were an area of weakness, but that his behavior did not seriously interfere with instruction (*id.* at p. 4). The January 2007 IEP included annual goals and short-term objectives for the student in the areas of reading, occupational therapy (OT), math, written expression, speech-language, social, and study skills (*id.* at pp. 7-15). The January 2007 IEP provided for testing accommodations including double time, small group setting, directions read, re-read and rephrased, and answers recorded in any manner (*id.* at p. 18). The January 2007 IEP also provided academic resources including semantic maps/outlines and visual cues/charts (*id.* at p. 3). For the remainder of the 2006-07 school year, the January 2007 IEP indicated that the student would be placed in a collaborative team teaching (CTT) class, with one group session per week of counseling, one individual session per week of OT, and two group sessions per week of speech-language therapy (*id.* at pp. 1, 2, 18). The duration of services was scheduled to be for one year with an IEP review projected for late June 2007 (*id.* at p. 2).

The student's consultant ABA instructor, after discussion with the student's teachers at his then private school at the end of the 2006-07 school year (Tr. pp. 43-44), opined that the student was "ready to go to a less restrictive environment and transition towards being in a mainstream school" and recommended that the student enroll in York Prep (Tr. p. 39). By letter dated February 14, 2007, York Prep accepted the student for the 2007-08 school year with the requirement that he initially enroll in Jump Start "to receive the support he needs in making the transition" to York Prep (Parent Ex. E). On March 1, 2007, the parent executed an enrollment contract for the student's attendance at York Prep and Jump Start during the 2007-08 school year (Parent Exs. E; G; H). In September 2007, the student began attending York Prep for the 2007-08 school year (ninth grade) and was enrolled in Jump Start (Tr. pp. 9-11; Parent Ex. G).

By letter dated December 22, 2007, the parent, through her attorney, advised the district that the student was a student with a disability and was currently attending York Prep (Parent Ex. C). The parent's attorney further advised the district that the CSE had not contacted the parent regarding the development of an IEP for the student for the 2007-08 school year and requested that the CSE schedule a meeting (id.).

The impartial hearing occurred on December 17, 2008 and February 11, 2009 (Tr. pp. 1, 91). The district conceded at the impartial hearing that it had failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year (Tr. pp. 44-45, 76).

The impartial hearing officer rendered a decision dated February 26, 2009 (IHO Decision at p. 5). In light of the district's concession that it had failed to offer the student a FAPE, the impartial hearing officer limited her review to the appropriateness of the parent's placement of the student at York Prep and whether equitable considerations supported an award of tuition reimbursement to the parent (id. at pp. 4-5). The impartial hearing officer found that the parent "has proved that [the] Jump Start program provided specialized services individualized to meet the student's specific educational needs and as such is reimbursable" (id. at p. 4). With respect to the balance of the student's program at York Prep, the impartial hearing officer concluded that "the record presents the remainder of [the student's] school program as regular academic classes taught by general education teachers without any instances of modifications or the use of special strategies for this student" (id.). The impartial hearing officer also concluded that "[e]ssentially York provided regular education in small classes with the equivalent of an intensive [special education teacher support services (SETSS)] component" and stated that "[w]hile [the student] benefited from the small group instruction and made progress in academic subjects as well as socially and emotionally at York Prep, only Jump Start fits the definition of special education services" (id.). With respect to equitable considerations, the impartial hearing officer found that there was "no equitable reason to disallow reimbursement" (id.). Accordingly, the impartial hearing officer awarded the parent tuition reimbursement for only the Jump Start program at York Prep for the 2007-08 school year (id. at p. 5).

The parent appeals the impartial hearing officer's decision and asserts that the district is responsible for payment of the full tuition at York Prep. The parent essentially argues that the district failed to provide an IEP and make a placement recommendation for the 2007-08 school year, that the parent followed the advice of the student's consultant ABA instructor and teachers during the 2006-07 school year who recommended that the student enroll in York Prep; that York Prep considers Jump Start part of its regular program for students with disabilities; and that the student would not be considered for admission at York Prep without his participation in Jump Start.

The district, in its answer, contends that the parent's petition should be dismissed on procedural grounds and that the parent does not have standing to assert her tuition reimbursement claim because she herself did not pay the student's tuition. The district further alleges that the parent failed to sustain her burden to show that York Prep was appropriate for the student. In particular, the district contends that the evidence is insufficient to support the impartial hearing officer's conclusion that the student benefited from small group instruction and made progress in academic subjects as well as socially and emotionally at York Prep. Further, the district asserts that evidence of progress alone is insufficient to establish the appropriateness of a private

placement. The district further asserts that the parent did not present evidence of the student's specific educational, social, or emotional needs; how York Prep met the student's needs; and did not provide any information regarding the curriculum, interventions, teaching methodologies, teachers, or services (other than Jump Start) available at York Prep. The district also contends that York Prep was not appropriate because it did not provide the related services (counseling, speech-language, and OT) that were on the student's previous January 2007 IEP.

The district also alleges that the parent failed to establish that the equities were in her favor. In particular, the district argues that the parent did not comply with the 10-day notice requirement of the Individuals with Disabilities Education Act (IDEA) or notify the district of the student's unilateral placement in a timely matter because the parent did not notify the district of the student's enrollment at York Prep until the end of December 2007, which was three months after the beginning of the 2007-08 school year. The district also contends that the parent did not cooperate with the district or include the district in her decision-making process as evidenced by the parent signing an enrollment contract with York Prep in March 2007.

The district also cross-appeals the impartial hearing officer's decision that Jump Start was appropriate for the student.¹ The district alleges that the impartial hearing officer erroneously determined that the parent proved that Jump Start provided specialized services individualized to meet the student's specific educational needs. The district alleges that the hearing record, as it relates to Jump Start, does not show the curriculum used, the methodologies utilized, the remediation done, how Jump Start's teacher specifically addressed the student's organization and writing needs, what the student's needs were, whether the student's academics improved with the Jump Start assistance, whether Jump Start helped the student in any meaningful way, or how Jump Start addressed the student's needs related to his executive functioning, organizational skills, and learning disability.

The district conceded at the impartial hearing that it did not offer the student a FAPE for the 2007-08 school year (Tr. pp. 44-45, 76). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the only issues before me are whether the private education services obtained by the parent were appropriate for the student's needs and whether equitable considerations support the parent's claim for reimbursement.

Two purposes of the 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]).

¹ The parent has failed to comply with the requirement of 8 NYCRR 279.4(b) by failing to file an answer to the district's cross-appeal. Notwithstanding the parent's failure to answer, I am required to examine the entire hearing record and make an independent decision based on the entire hearing record (*Arlington Cent. Sch. Dist. v. State Review Officer*, 293 A.D.2d 671 [2d Dep't 2002]; see 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514).

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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). 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). 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 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"]; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002] [same]). 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 final criterion for a 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 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 S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; 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, 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]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts

have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In 2007, 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 (L 2007, ch. 583, § 3); therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

As indicated above, both parties appeal the impartial hearing officer's decision. The district appeals the impartial hearing officer's conclusion that Jump Start was appropriate for the student and that the parent should be reimbursed for the student's participation in Jump Start. The parent appeals the impartial hearing officer's denial of full reimbursement for the student's tuition at York Prep.

I will initially address the parent's appeal. The hearing record shows that the student attended York Prep and Jump Start during the 2007-08 school year (Tr. pp. 9-11). The York Prep psychologist testified that York Prep offers a "regular classroom program" with small class sizes of approximately 13-14 students in a class, which provided the student with "small classroom attention," in addition to offering a "highly structured kind of environment" (Tr. pp. 11-12, 19). According to the psychologist, in the regular classroom program the student received instruction from regular education teachers in "the five major" subjects and was required to complete homework (Tr. pp. 12-13, 19-20). York Prep offers an "ed line" that provides the parent access to upcoming assignments, reports of progress, and a method of collaboration with the student's teachers (Tr. pp. 56, 59).

Although the parent testified about the collaboration between the student's regular education teachers, herself and the Jump Start teacher, I agree with the impartial hearing officer's finding that the hearing record provides insufficient evidence that the non-Jump Start portion of the York Prep program provided specialized instruction or services to the student designed to meet the student's special education needs as identified in the hearing record (see IHO Decision at p. 4). Further, in light of my determination below that the parent has not shown that Jump Start is appropriate; I agree with the impartial hearing officer that the parent should not be reimbursed for tuition to York Prep for the 2007-08 school year.

I will now address the district's cross-appeal. I find that the hearing record does not support the impartial hearing officer determination that Jump Start was appropriate to meet the student's special education needs. In particular, for the reasons set forth below, I find that the sparse hearing record lacks sufficient information regarding the student's individual special education needs and how Jump Start provided educational services specifically designed to meet the unique needs of the student.

In addition to the student's general education program at York Prep, he also participated in Jump Start, which according to York Prep's psychologist, "involves working with a special ed certified teacher" (Tr. pp. 11, 19, 23). Approximately thirty percent of students at York Prep participate in Jump Start (Tr. p. 95). According to the psychologist, students are admitted to York Prep in three categories: those who are accepted outright, those for whom it is recommended that they participate in Jump Start, and those who are admitted to York Prep under the requirement that they participate in Jump Start (Tr. p. 99). The hearing record shows that in this case, the student's admission to York Prep required that he initially participate in Jump Start (Tr. p. 117; Parent Ex. E).

The psychologist at York Prep described Jump Start as a "supplementary program beyond the extent of the usual academic coursework that any student would take here" (Tr. p. 95). According to the psychologist, the special education teacher worked with the student individually twice per week for 45-minute sessions, met with him daily before school for 30 or 45 minutes, and met with the student four days per week after school for 45 minutes in a group of ten or eleven students (Tr. pp. 11, 18-19, 24). The psychologist testified that the special education teacher primarily addressed the student's organization and writing skills, and coordinated with the student's math and English teachers (Tr. pp. 11-12, 26). The student's Jump Start special education teacher reported, in an October 2008 e-mail to the parent, that during the 2007-08 school year, her work with the student included "[d]aily homework check, [r]egular review of student planner for assignments, [o]rganization of binders, [t]est preparation, [a]cademic tutoring and [a]dvocacy skills for academic programs" (Parent Ex. D).² According to the psychologist, the special education teacher would be there to help the student if he had a problem and work on whatever difficulties he brought to her so that "he could use his own resources to function better within the classroom itself" (Tr. pp. 24-26). The psychologist stated that during the before/after school sessions, the special education teacher "could give him some attention that would require no more than a couple of minutes to clarify" (Tr. p. 24) and assisted with organizing, writing, or with math, and as needed, facilitated communication with or spoke to his subject teachers (Tr. pp. 24, 25, 97). He further testified that the special education teacher did not provide the student with instruction in a particular curriculum, rather she worked on what the student brought to her and "what comes out of the communication that [the special education teacher] had with [the student's] teachers" (Tr. pp. 26-27).

The parent testified that the special education teacher worked with the student daily and "look[ed] at his binder to make sure that the papers were organized" and reviewed his homework requirements to make sure that it was prepared and that he knew what homework was due (Tr. pp. 60-61). In addition, the parent testified that the student was required to e-mail the special education teacher daily about homework completion and any concerns he had about his homework (Tr. pp. 58-59). According to the parent, the special education teacher responded to the student by e-mail and addressed any issues the student had in the student's daily morning group meeting (Tr. pp. 58-59, 60, 119-20). The parent testified that she also "monitored" and used the information on the "ed line" to assist the student and that this was a source of information for her (Tr. pp. 56, 59). The

² The York Prep psychologist testified that he is the only one authorized by York Prep to represent the school at impartial hearings; therefore, the hearing record does not include testimony from Jump Start's special education teacher (Tr. p. 95).

parent also testified that she spoke with the Jump Start special education teacher on average two to three times a week regarding the student's academic progress (Tr. p. 59).

The York Prep psychologist testified that when the student entered York Prep in September 2007, he had difficulties primarily with organization and "structure" and that the student's difficulties resulted in a need for help with writing, math, and English (Tr. pp. 9, 11-12, 26-27). The parent stated that during the 2007-08 school year, the student's "educational issues" were his executive functioning and organizational skills (Tr. p. 61). Other than these references to the student's difficulties, and the limited, vague description of the student's areas of weakness from the January 2007 IEP, the hearing record provides little current information about the nature, degree, and extent of the student's special education needs. The York Prep psychologist did not conduct any testing with the student (Tr. p. 27), and the hearing record contains no evaluative information regarding the student's abilities. The psychologist testified that the student's organizational deficits were "substantial," but the hearing record does not provide information as to what type of organizational difficulties the student exhibited, how this deficit affected the student in the classroom, or what individualized strategies/instruction the special education teacher provided to address this deficit.³

The consultant ABA instructor testified that the student "needed someone to sit down with him once a week and make plans for completing assignments and troubleshoot any problems that might come up in class academically and maybe possibly even socially" (Tr. p. 40). Although the consultant generally stated that Jump Start provided the student with assistance in "self-management, academic and social/emotional" skills, she did not provide information regarding the individualized instructional techniques/strategies used with the student in Jump Start to address those needs (Tr. pp. 46-48). Nor does the hearing record otherwise include such information.

For the above reasons, I find that the hearing record lacks sufficient information regarding the student's individual special education needs and how Jump Start provided educational instruction specially designed to meet the unique needs of the student. Based on this, I further find that the parent has not shown that Jump Start was appropriate to meet the student's special education needs (Gagliardo, 489 F.3d at 112; see Matrejek, 2008 WL 3852180, at *2; Application of the Dep't of Educ., Appeal No. 09-045; Application of a Student with a Disability, Appeal No. 08-151; Application of the Dep't of Educ., Appeal No. 08-092).

Without any citation to the hearing record, the impartial hearing officer also concluded that the student "made progress in academic subjects as well as socially and emotionally at York Prep" (IHO Decision at p. 4). During the 2007-08 school year, the student received grades "all in the low to middle 90s" (Tr. p. 20; Parent Ex. D). The special education teacher's October 2008 e-mail to the parent advised that the student made "tremendous progress" during his "first year in a regular education environment" in that he achieved a "95 GPA for the year, Headmaster's list for top 10% of students," that he was a broadcast announcer for the school's television station, participated in a school ski trip, and achieved perfect attendance (Parent Ex. D). The psychologist testified that the student compensated for his difficulties in organizational skills and writing, got "the help he needed to get," and "saw his teachers and worked very hard and did very well" at York Prep during

³ The psychologist testified that the student did not receive any other "special services" at York Prep (Tr. p. 20).

the 2007-08 school year (Tr. p. 21). The psychologist further testified that with the "special ed support" offered by Jump Start, the student "did very well" during the 2007-08 school year (Tr. p. 13).

While the hearing record generally references the student's performance during 2007-08 school year at York Prep, it affords no basis or starting benchmark for comparison such that a finding of progress can be made related to the student's special education needs. I also note that the hearing record contains no documentary or objective evidence such as report cards, progress reports, or other information with respect to the 2007-08 school year for comparison to establish that progress was made, or that it was made in his special education need areas. As it relates to the student's social/emotional needs, I find that the hearing record is devoid of information about the student's social/emotional status and needs and that the impartial hearing officer's conclusion that the student made social/emotional progress is not supported by the hearing record. Moreover, as noted above, 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). Further, as described above, the parent has not met her burden to show that Jump Start or York Prep provided educational instruction specifically designed to meet the student's unique needs (see Gagliardo, 489 F.3d at 112). Under the totality of the circumstances here, I find that the parent has not shown that the student's placement at York Prep and Jump Start was reasonably calculated to enable the student to receive educational benefits related to his special education needs (see id. at pp. 364-65).

Based on the foregoing, I find that the parent has not met her burden to demonstrate that her placement of the student at York Prep with the Jump Start program met the student's special education needs, and, therefore, the second criterion of the Burlington/Carter analysis has not been met.

I have also given consideration to the district's argument that equities do not favor reimbursement because the parent did not give adequate notice of her intent to enroll the student in a private school at district expense. Here, the hearing record reflects that the parent did not give notice to the district of her intent to enroll the student in a private school at district expense until more than three months after the start of the student's unilateral placement at York Prep. The parent does not refute that the delay in providing notice is an equitable factor weighing against reimbursement. Upon review of the hearing record and the facts herein, I find that the parent failed to provide the notice required by the IDEA and, therefore, is not entitled to an award on reimbursement on that basis (Voluntown Bd. of Educ., 226 F.3d 60, 68; S.W., 2009 WL 857549, at *12-14).

I also note that the district raised on appeal the affirmative defense that the parent did not file a petition on review that conformed with the content requirements of 8 NYCRR 279.4 and 8 NYCRR 279.8. I note further that the parent did not file a reply to the district's procedural defense.⁴ While there are inadequacies in the petition for review, in the exercise of my discretion, I need not dismiss the petition on procedural grounds in light of my decision on the substantive issues herein (8 NYCRR 279.8[a]). However, the parent's attorney has filed prior appeals with this office and is presumed to be familiar with the State regulations pertaining to the practice on

⁴ A petitioner may serve and file a reply for consideration by a State Review Officer to any procedural defenses interposed by a respondent (see 8 NYCRR 279.6).

review of hearings for students with disabilities (see, e.g., Application of a Student with a Disability, Appeal No. 08-093; Application of a Child with a Disability, Appeal No 07-093; Application of a Child with a Disability, Appeal No 07-066; Application of the Dep't of Educ., Appeal No 07-046);⁵ counsel for the parent is cautioned to comply with 8 NYCRR 279 in any future appeals.⁶

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations. Lastly, there is nothing in the hearing record to indicate that the student can not be appropriately educated in a public school setting and there is no evidence suggesting that the district cannot meet the student's special education needs. Accordingly, a CSE should reconvene as soon as possible, if it has not already done so, and offer the student an appropriate special education program and placement for the 2009-10 school year consistent with the requirements of the IDEA.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it ordered the district to reimburse the parent for tuition at Jump Start for the 2007-08 school year.

Dated: **Albany, New York**
 May 12, 2009

PAUL F. KELLY
STATE REVIEW OFFICER

⁵ By memorandum opinion and order dated June 10, 2008, Judge Cote for the Southern District Court of New York dismissed the appeal of Application of the Dep't of Educ., Appeal No. 07-046, brought by the parent's counsel for improper service (Pierre v. Dep't of Educ., 2008 WL 2369224 [S.D.N.Y. June 10, 2008]).

⁶ The parent did not file: a petition for review that conformed to the Part 279 content requirements; an answer to the cross-appeal; a reply to procedural defenses raised; and did not cite any legal authority in support of the parent's appeal.