



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-101

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

#### **Appearances:**

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

Brown & Gropper, LLP, attorney for respondents, James A. Brown, 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 respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the York Preparatory School (York Prep) for the 2009-10 school year as well as reimbursement for the cost of a neuropsychological reevaluation and an auditory and language processing reevaluation. The appeal must be sustained in part.

At the time of the impartial hearing, the student was 15 years old and attending ninth grade at York Prep, a private school described in the hearing record as a "supportive, college preparatory, mainstream school" (Tr. p. 291). 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 programs and services as a student with a learning disability is not in dispute in this proceeding (Tr. pp. 6-7; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student's educational history is set forth in Application of a Student with a Disability, Appeal No. 08-082, and will not be repeated at length in this decision. During the 2007-08 school year, the student attended the Stephen Gaynor School (see Tr. pp. 307, 341; Application of a Student with a Disability, Appeal No. 08-082).

The district conducted a vocational interest assessment of the student on February 21, 2008 (Tr. p. 31; Dist. Ex. 5 see 8 NYCRR 200.4 [d][2][ix]).<sup>2</sup> The vocational interest assessment report indicated that results of administration of a vocational assessment tool revealed that the student's broad interests were in the social area and in the area of business (Dist. Ex. 5). The report noted the student had an expressed and inventoried interest in the field of nursing (id.). Additional areas of interest within the social area included cosmetology; hairstyling; coaching or sports instruction; and patient care, specifically as a registered nurse, x-ray technician, or surgical technician (id.). The assessment report noted that most of the jobs required a college degree while others required on-the-job training and/or certification (id.). The vocational interest assessment report noted that the student indicated an interest in health, math, technology, biology and finance as school subjects (id.). The student also indicated her work values to include physical activity, independence, leadership and working with people (id.). According to the vocational interest assessment report, the student expressed that she had social, computational, teaching, and language abilities and that the student was provided with information regarding career search so that she might be able to learn more on her own (id.).

Over a period of three days in March 2008, the student participated in a private neuropsychological re-evaluation (Dist. Ex. 4 at p. 1). The neuropsychological reevaluation report indicated that previous testing revealed the student was of "normal" intelligence (id. at p. 4). Current testing included administration of a variety of standardized assessment tools (see id. at pp. 6-8). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded standard score/percentile rank (SS/percentile rank) index scores of SS 112 (79th percentile) in verbal comprehension, SS 86 (18th percentile) for perceptual reasoning, SS 104 (61st) in working memory, SS 94 (34th percentile) in processing speed, SS 100 (50th percentile) for full scale IQ, and SS 100 (50th percentile) in the general abilities index (id. at pp. 2, 6). At the time of the March 2008 reevaluation, the student displayed difficulty with visuospatial and visuomotor skills, "to a significant degree" (id. at p. 4). The reevaluation report indicated that based on the evaluator's previous knowledge of the student, the student appeared to have improved in her organizational skills, but tended to engage in a time/accuracy "trade-off" when she needed to perform tasks that required good cognitive flexibility (id.). The student experienced difficulty with word retrieval, inferential understanding, and memory and retention when tasks were multi-dimensional (id.). The reevaluation report also indicated that with the exception of a gap in reading comprehension, the student's academic skills appeared to be "good," although she experienced difficulty with verbal problem solving in math (id.). The reevaluation report indicated that in the past, the student had demonstrated difficulty with verbal learning and retention, and as a result of language testing, she was noted to have difficulty with metalinguistic skills (id.).<sup>3</sup> The evaluator recommended that in order to avoid regression and frustration in dealing with day-to-day classroom demands, the student should be enrolled in a small, highly-structured program (id.).

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<sup>2</sup> The student was 15 years old at the time of the annual review by the district Committee on Special Education (CSE), and therefore, the district conducted an assessment regarding services for transition from school to post school activities (8 NYCRR 200.4 [d][ix][a]).

<sup>3</sup> The hearing record defined metalinguistic and metacognition as the ability to understand non-literal, inferential, and abstract language (Parent Ex. G at p. 4).

The evaluator characterized the recommended small program as one that should be academically geared and oriented, able to provide the student with appropriate individualization, modifications, and support with daily classroom requirements, and able to work with the student to improve her metalinguistic skills for good classroom performance and reading comprehension (id. at pp. 4-5).

According to the hearing record, the student attended York Prep during the 2008-09 school year (eighth grade) (Tr. pp. 241-42, 260-61, 342; Parent Ex. G at p. 1).<sup>4</sup> On January 20, 2009 the parents executed an enrollment contract with York Prep to enroll the student in the school for the 2009-2010 school year (Parent Exs. J; K). Pursuant to the terms of the contract, the parents were obligated to pay tuition for the entire school year in the event that they did not cancel the contract before March 8, 2008 (Parent Ex. K at p. 1). The documents also reflect that the parents chose not to participate in York Prep's tuition refund plan, which insures prepaid or unpaid tuition charges in the event of the absence, withdrawal, or dismissal of the student (Parent Exs. J; K at p. 1).

An auditory and language processing reevaluation report dated January 23, 2009 indicated that the student's hearing, language and auditory processing had been reevaluated annually between 2003 and 2009 by a speech-language pathologist/audiologist (Tr. pp. 225, 227; Parent Ex. G at pp. 1, 8). The evaluator previously identified the student as having a language processing disorder with difficulties in receptive, expressive, and executive language functions, integration and processing speed delays (Parent Ex. G at p. 1). At the time of the January 2009 auditory and language processing reevaluation, the student was in the eighth grade at York Prep and attending the "Jump Start" program (id.).<sup>5</sup> At the time of the reevaluation, the student also received individual speech-language therapy two times per week at a therapy center through a related service authorization (RSA) provided by the district (id.). The reevaluation report noted the student was working at the time on figurative language with her speech-language pathologist; that the student continued to need help reading expository texts in history and science; that explanations were needed; that the student was not as frustrated as she had been previously; that the student's classes were small and she was able to take notes; that because the student's classes at York Prep were structured it was easier for the student to remain organized; that the student reported she was doing well in school and enjoyed softball and dancing; and that the student appeared well related and personable (id.). According to the reevaluation report, the purpose of the reevaluation was to assess the status of the student's auditory and language processing skills following intervention and maturation, and to determine additional programs and/or strategies available to help the student academically (id.).

The auditory and language processing reevaluation results revealed that the student continued to present with a language processing deficit, particularly in the area of understanding metalinguistic language and an auditory processing disorder in the area of figure-ground listening, as well as a possible written language deficit (Parent Ex. G at p. 6). The student's hearing was

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<sup>4</sup> The student's dates of attendance at York Prep during the 2008-09 school are unclear (see Parent Ex. G at p. 1).

<sup>5</sup> Jump Start is described in the hearing record as a program in which certified teachers meet with students with disabilities in groups ranging from 10-13 students for 45 minutes in the morning and 45 minutes in the afternoon (Tr. pp. 240, 294-95). The Jump Start teachers also consulted with their students' regular classroom teachers in order to teach them to work with the students who have disabilities (Tr. p. 296).

within normal limits bilaterally, with good discrimination in quiet and in noise (id.). The evaluator indicated that the student's difficulty in figure-ground listening implied that the student would have difficulty hearing the message clearly in less than optimum listening conditions such as a noisy classroom, and in being able to sort relevant from irrelevant information (id. at pp. 6-7). The student's phonological processing skills for decoding and sound blending were described as good and at grade level (id. at p. 7). Temporal integration skills were more developed and consistent (id.). The reevaluation report indicated the student's metalinguistic skills had improved in the areas of understanding non-literal language and inferencing, but that her understanding meaning from context was compromised and not commensurate with other skills (id.). The student's ability to understand idiomatic language was within the average range (id.). Written language deficits were noted in the areas of contextual language and story construction (id.). The evaluator described the student's prose as simple, lacking in elaboration and character development, and displays errors in grammar, spelling, punctuation, capitalization, and use of conjunctions (id.). Word retrieval difficulties were no longer observed on a rapid naming task (id.). The evaluator observed that the student had shown the capacity to learn with support services and appropriate intervention (id.). Multiple recommendations included continued placement in an educational environment with a "favorable" student-to-teacher ratio where the student would be able to receive consultative and individual services, classroom and testing accommodations due to the student's difficulty in figure-ground listening, continued individual speech-language therapy to improve the student's specific deficits related to metacognitive skills and written language, and consideration of technology support for writing and note taking (id.). The evaluator opined that the student had made gains in the educational environment in which she was placed at the time, and that with continued parental support, school accommodations, continued appropriate educational placement, and specific intervention such as speech-language therapy, prognosis for continued improvement was possible (id. at p. 8).

In a letter to the district dated May 12, 2009, the student's mother acknowledged notice of a Committee on Special Education (CSE) review for the student scheduled for May 21, 2009 (Parent Ex. B). The student's mother requested in the letter that a "placement officer" attend the meeting so that the program/placement recommendation made for the student could be explained to her (id.).

In a second letter dated May 12, 2009 to the district, the parents indicated that in response to the district's request, she was submitting the student's report card from York Prep, the January 23, 2009 auditory and language processing reevaluation report, and a medical report in preparation for the May 21, 2009 CSE review regarding the student for 2009-10 school year (Parent Ex. C).

On May 21, 2009 the CSE convened for the student's annual review and to develop the student's individualized education program (IEP) for the 2009-10 school year (Dist. Ex. 3 at p. 1). CSE meeting attendees included: a district representative who also attended the meeting as a special education teacher, a district school psychologist, a district general education teacher, the student's parents, an additional parent member, the parents' advocate, and by telephone, the school psychologist from York Prep (Tr. pp. 16, 300; Dist. Ex. 3 at p. 2). The May 2009 CSE recommended that the student's eligibility for special education programs and services as a student with a speech or language impairment be changed to that of a student with a learning disability

(Dist. Ex. 3 at pp. 1-2). The CSE further recommended a 10-month placement in an integrated co-teaching class (ICT) (12:1) in a community school, termination of the related service of counseling, continuation of the related service of individual speech-language therapy one time per week for 40 minutes and group (2:1) speech-language therapy two times per week for 40 minutes, all sessions to be conducted in a separate location (Dist. Ex. 3 at pp. 1-2, 11, 13).<sup>6, 7</sup> The IEP noted program modifications and supports for school personnel as "access to the IEP and collaboration with special education personnel" (*id.* at p. 11). Classroom accommodations included addressing the student's academic management needs with preteaching of new concepts, use of a great deal of repetition, assisting the student with organization of writing assignments through outlines and help with sequencing, and helping the student prepare for tests to alleviate test anxiety (*id.* at p. 4). The IEP indicated that the student had age appropriate social/emotional skills and that her active participation in sports was a good release for her (*id.* at p. 5). The IEP indicated the student's behavior was age appropriate and that there were no social/emotional management needs at the time of the meeting (*id.*). Recommended testing accommodations were for a separate location free of distraction, extended time (1.5), and for directions to be read and reread aloud (*id.* at p. 13). The IEP contained goals and corresponding short-term objectives to address the student's needs in math, reading comprehension, higher level language, and writing (*id.* at pp. 8-10, 16-20). Additionally, the CSE included a transition plan that described goals for the students' "[l]ong-term adult outcomes" based on the student's preferences, needs, and interests, and included transition services objectives related to the student's instructional activities, community integration, post high school career choices and independent living (*id.* at pp. 14-5).

The district sent a notice dated June 18, 2009 to the parents, which set forth the recommendations of the CSE as enumerated in the May 21, 2009 IEP and identified a specific school location for the student for the 2009-10 school year (Dist. Ex. 6).<sup>8</sup>

In a letter to the district CSE dated June 24, 2009, the student's mother acknowledged receipt of the June 2009 notice (Parent Ex. D at p. 1). The student's mother indicated that they contacted the recommended high school to arrange an appointment to view the program, but was informed that such a visit was not possible at that time (*id.*). The student's mother advised the CSE that she was unable to place the student in a program that she was unable to view and would view

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<sup>6</sup> Testimony by the district representative indicated that the ICT class was formerly called the collaborative team teaching class (CTT) (Tr. p. 35). The hearing record reflects that there would be no more than 12 students (up to 40 percent of the students in the class) in an ICT class, with the remaining 60 percent of the class consisting of general education students (Tr. pp. 48-9, 57). The hearing record also reflects that an ICT class was taught by both a licensed regular education teacher and a licensed special education teacher (Tr. p. 94).

<sup>7</sup> The May 21, 2009 IEP indicated that prior to recommending placement in an ICT class, the CSE considered and rejected placement in general education with special education teacher support services (SETSS) as the student's language processing weaknesses affected all academic areas; the student required full day support to make adequate progress academically (Tr. pp. 38-9; Dist. Ex. 3 at p. 12).

<sup>8</sup> The June 18, 2009 notice indicated the student's special education eligibility classification was "Speech or Language Impairment" (Dist. Ex. 6). However, as noted above, the CSE's determination that student was eligible for special education and related services as a student with a learning disability is not in dispute in this appeal. The May 21, 2009 IEP accurately reflected the student's classification status (Dist. Ex. 3 at pp. 1-2).

any program/placement recommended by the CSE in order to determine whether or not such program met the student's special education needs (id.). The student's mother further indicated that if an appropriate program was not offered to the student for 2009-10 in a timely manner, the parents would have no other choice but to send the student to York Prep and that they would seek reimbursement at public expense (id.). The student's mother further advised the CSE that the parents would be requesting that the district provide transportation for the student to and from the private school (id.).

In another letter to the district CSE dated August 15, 2009 and sent by certified mail, the student's mother indicated that as of the date of the letter, she had not received a response to her previous letter dated June 24, 2009, and enclosed a duplicate copy (Parent Ex. E). In their August 15, 2009 letter, the parents indicated the district had not offered the student a program/placement in a timely manner and that they would unilaterally place the student at York Prep for the 2009-10 school year (id.). The parents advised the CSE that they intended to seek tuition reimbursement at public expense and requested that the district arrange for busing the student to and from the private school (id.).

The student attended York Prep for the 2009-10 school year (Tr. pp. 262, 271, 305). The student also participated in York Prep's Independent Transition Program (ITP), a program designed to provide additional supports to students throughout the school day centered around the student's educational needs (Tr. pp. 240-41, 262).<sup>9</sup>

In a due process complaint notice dated October 26, 2009, the parents requested an impartial hearing and sought reimbursement for tuition at York Prep for the 2009-2010 school year, for the cost of evaluations, the cost of related services and/or RSAs, the cost of transportation and additionally argued that the student was entitled to bus transportation to the school she attended (Dist. Ex. 1 at pp. 1, 6). Among other things, the parents claimed that the district failed to offer the student a free appropriate public education (FAPE) because the CSE meeting and the resultant IEP were marred by procedural and substantive flaws (id. at p. 6). Specifically, the parents argued that they were deprived of the opportunity to meaningfully participate in the development of the student's IEP, because the CSE was not properly constituted, the program recommendation was predetermined, parts of the IEP were prepared prior to the CSE meeting, and because the district failed to ensure that someone from the district's placement office attended the meeting to explain the proposed program to the parents (id. at pp. 3, 5). The parents argued that the district failed to offer an appropriate program or placement for the 2009-10 school year because the goals and objectives on the IEP did not reflect all of the student's needs, the level of related services mandated

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<sup>9</sup> The student's Jump Start teacher indicated that the ITP was not a distinct service from the Jump Start program, but that the ITP was an option that York Prep offered to the student's parents for the student to receive the same services from the same teacher but with diminished frequency (Tr. pp. 240-41, 260-62). The headmaster of York Prep testified that the ITP was "cut in half" (Tr. p. 307). The headmaster also testified that the purpose of transitioning the student from Jump Start to ITP was to provide the student with the tools that she needed while gradually moving her toward independence from external supports despite her learning disability (Tr. pp. 307-08). According to the headmaster, no students at York Prep enter the school in the transition program (Tr. pp. 312-13). The headmaster's testimony described the ITP as a "device" used by the school to transition the students after one or two years into an environment with less support (Tr. p. 313).

on the IEP were inappropriate for the student, and the transition plan developed for the student was inappropriate (id. at pp. 3, 5-6). The parents further argued that the district failed to offer an appropriate placement in a timely manner and that the recommended placement was inappropriate because the student to teacher ratio was too high, the teaching methodology was improper, and the proposed classroom and school building were too large for the student (id. at p. 4). Additionally, the parents argued that the unilateral placement selected by the parents was appropriate and that the parents cooperated with the CSE and in no way impeded the CSE from offering the student a FAPE (id. at p. 6).

An impartial hearing convened for three days from March 25, 2010 until May 13, 2010 (Tr. pp. 3, 119, 266). The district called six witnesses and submitted six documents into evidence (Tr. pp. 12, 62, 92, 122, 151, 188; Dist. Exs. 1-6). The parents called six witnesses and submitted 11 documents into evidence (Tr. pp. 225, 239, 270, 290, 316, 337; Parent Exs. A-K).

In a decision dated October 18, 2010 the impartial hearing officer found in favor of the parents and ordered the district to reimburse the parents for tuition and fees at York Prep during the 2009-10 school year, for the cost of two private evaluations in amounts not to exceed \$2,500, and for the cost of public transportation to and from the home to the school (IHO Decision at p. 11).<sup>10</sup> The impartial hearing officer also ordered the district to provide the parents with RSAs for speech therapy related services or alternatively to reimburse the parents for such services during the 2009-10 school year at the rate actually paid to the therapist (id.). The impartial hearing officer found that the district failed to offer the student a FAPE because although the evaluations that identified the student's learning disabilities and auditory processing disorder and recommended a small structured class room were referenced in the IEP, the balance of the IEP "completely disregarded" them (id. at p. 5). Among other things, the impartial hearing officer also found that the IEP did not specifically address the student's most pressing speech and language needs and that the goals and objectives presupposed that the student could hear well enough to distinguish meaningful speech from background noise (id. at p. 8).

The impartial hearing officer determined that the parents' unilateral placement at York Prep was appropriate because the program was reasonably calculated to enable the child to receive educational benefits and the child was making progress in the placement (IHO Decision at pp. 8-11). Lastly, the impartial hearing officer found that the equities favored the parents because the parents had cooperated with the district, provided evaluations, and participated in the CSE meetings (id. at p. 11).

The district appeals. The district argues that it offered the student a FAPE for the 2009-10 school year because the IEP developed by the CSE incorporated the findings of the evaluations, including the private evaluations, recommended an ICT class with related services that would provide the student with enough support to follow the general education curriculum at her grade level, and offered an appropriate class placement in a district school. The district further argues

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<sup>10</sup> The decision is dated September 8, 2010. To the extent the parties contest the timeliness of the appeal, I find that the appeal was timely initiated within 35 days from the date of the impartial hearing officer's decision (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11).

that the impartial hearing officer erred in finding that the district denied the student a FAPE because the IEP did not repeatedly reference the findings of the independent evaluations because federal regulations do not require information accurately reflected in one part of an IEP to be repeated elsewhere. Additionally, the district contends that the impartial hearing officer did not identify any specific reasons for finding that the recommended placement at the proposed high school was inadequate.

The district next argues that the parents did not demonstrate that York Prep provided education specifically designed to meet the student's needs. The district contends that York Prep is a general education college preparatory school that, among other things, did not provide the student with any speech and language therapy. The district alleges that York Prep offers two supplemental special education programs, Jump Start, which the student did not attend, and the less intensive ITP program that the student attended in this case. In the alternative, the district contends that only that portion of the tuition related to ITP should be reimbursed to the parent as the remainder of York Prep's program is does not provide special education to the student.

The district is not appealing from the portion of the impartial hearing officer's decision which awarded the parents reimbursement for the actual cost incurred by the parents for speech - language therapy and transportation for the student. However, the district contests reimbursement for the two private evaluations because the hearing record does not contain evidence that reimbursement for such evaluations is warranted.

The district next argues that equitable considerations did not favor the parents because the parents never seriously considered enrolling the student in a public school. The district notes that the parents did not elect to purchase York Prep's tuition refund insurance option and were financially committed to the full tuition amount for the 2009-10 school year prior to the CSE meeting when the student's annual review occurred. Additionally, the district argues that the notice provided to the district by the parents of their intent to unilaterally place the student at York Prep and seek tuition reimbursement was deficient because the parents did not identify any defects or concerns with the IEP and the proposed program.

Lastly, the district argues that the impartial hearing officer improperly awarded reimbursement to the parents for charges from York Prep regarding items that are not eligible for reimbursement under the Individuals with Disabilities Education Act (IDEA) including a "combined fee," a "bookstore" fee, and an "additional bookkeeping fee."

In their answer the parents argue that the impartial hearing officer properly found that the district failed to offer the student a FAPE because the student's IEP failed to accurately reflect her speech-language needs, specifically her auditory deficits, and because the district's proposed placement and address the student's needs that were not properly expressed on her IEP. The parents also argue that the proposed placement would have failed to group the student with other students whose learning characteristics were sufficiently similar to her own.

The parents next argue that the impartial hearing officer properly found that York Prep was an appropriate placement because the record supports the finding that York Prep offered a program that was reasonably calculated to enable the student to receive academic benefits, addressed the

student's unique needs, and that the student made progress therein. The parents also argue that York Prep's entire program addressed the student's unique needs and, therefore, the impartial hearing officer properly awarded reimbursement for the whole program.

The parents also argue that the impartial hearing officer's decision to award reimbursement to the parents should be affirmed because the equities favor the parents in that they cooperated with the CSE and made every effort to visit the proposed program. Lastly, the parents argue that the fact that they made tuition payments before the IEP was finalized does not disqualify the parents from receiving 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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 Newington, 546 F.3d at 114; 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, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), 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 a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

The impartial hearing officer determined that the district failed to provide the student with a FAPE for the 2009-10 school year because, although the May 21, 2009 IEP referenced the "most critical" evaluative information available to the CSE, the CSE's recommendations disregarded the recommendations and conclusions of the evaluators as noted in those reports (IHO Decision at p. 5). Although I find, as more fully described below, that the district failed to offer the student a FAPE for the 2009-10 school year, I concur only in part with the impartial hearing officer's analysis in regard to the IEP. The May 2009 IEP included the student's present levels of academic performance reflective of timely evaluative information regarding the student, the CSE identified the student's needs based on the evaluative information, and the CSE developed goals and objectives and classroom accommodations that were aligned to the student's identified needs (see Dist. Ex. 3). However, the CSE did not adequately address in the IEP the student's significant needs with respect to her classroom environment resulting from the student's documented language and auditory processing disorder, specifically figure-ground discrimination in which it was problematic for her to sort relevant from irrelevant information, particularly in noisy conditions (see Parent Ex. G at pp. 6-7).

The student's IEP included information about her academic performance and learning characteristics (Dist. Ex. 3 at p. 3). The IEP also indicated that, according to parent reports, the student had been attending York Prep; where she showed improvement in all areas; continued to require support with reading inferencing, understanding of new concepts across all context areas, pre-teaching and repetition of new concepts; and identifying main ideas and providing supportive ideas (id.). In addition, the IEP indicated that, according to parent report, the student experienced test anxiety that was effectively addressed by assisting her to be adequately prepared (id.). Furthermore, the IEP noted that parent and school reports indicated the student had good organization skills, although her planning skills were somewhat weaker; and the student required a great deal of support with writing assignments (id.).

The student's IEP also reflected specific information about the student's language and auditory processing needs, directly as written in the previously discussed January 2009 auditory and language processing evaluation (compare Dist. Ex. 3 at p. 3 with Parent Ex. G at pp. 6-7). In addition, the IEP reflected information from a progress report written by the student's speech-language therapist, which indicated that initially, the student required moderate to maximal cues to identify and explain the figurative language found within passages, and required cues and verbal prompts to decipher word meanings and to use novel vocabulary words in sentences (Dist. Ex. 3 at p. 4).<sup>11</sup> The IEP noted that as the semester progressed, the student's ability to identify figurative language and use novel vocabulary words improved, and she required less cuing to complete tasks (id.). The IEP indicated that short reading passages were read aloud by the speech-language therapist to allow the student to draw inferences, and that the student required moderate verbal prompting in the form of choices in order to make correct inferences (id.). Regarding the student's

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<sup>11</sup> The hearing record does not include the speech-language progress report from which the May 21, 2009 CSE obtained information about how the student's speech-language treatment goals were addressed during speech-language therapy sessions and the student's speech-language progress (see Dist. Ex. 3 at pp. 3-4).

instructional level for reading and writing, the IEP indicated a "school estimate" to "teach to upper ninth grade" for each subject area (id.).

In regard to goals included in the student's IEP, the impartial hearing officer found that all of the goals and objectives "presuppose" the student could hear well enough to distinguish meaningful speech from background noise, and that "not one witness for the district addressed that issue, even though it is clearly stated as a significant problem" in the language and auditory processing report (IHO Decision at p. 8). I disagree with the impartial hearing officer. As previously noted, the student's IEP included detailed goals and objectives to address the student's math, reading comprehension, higher level language, and writing needs (Dist. Ex. 3 at pp. 8-10, 16-20). A review of the academic goals included in the IEP reveals that the student would be provided with a variety of verbal and visual supports to assist her to internalize stratagems in reading comprehension, writing in multistep stages, and in solving word problems and algebraic algorithms containing key vocabulary words (see id. at pp. 8-10). The annual goals and corresponding short-term objectives further incorporate several of the academic management needs strategies, such as the use of outlines and help with sequencing, which address the student's language and auditory processing needs (id. at pp. 3-4, 8-10). Therefore, I find that goals and objectives included in the student's IEP were appropriate.

I now turn to the appropriateness of the proposed ICT placement. The district special education teacher assigned to the CSE who attended the May 21, 2009 CSE meeting as the district representative and as the special education teacher indicated that he had good knowledge of the district's continuum of services in all classes; that all CSE participants had the opportunity to make meaningful contributions to the development of the student's IEP; that participants discussed the student's strengths and weaknesses, and that goals were based on the student's struggles (Tr. pp 13-17). The district special education teacher also indicated that the May 21, 2009 CSE used all of the information in the student's "disclosure packet" (Tr. p. 21). However, the district special education teacher indicated he did not have specific independent recollection of "exactly the papers that were used" or if there were any district evaluations at that time (id.). On cross examination and upon review of the student's present level of academic performance on the IEP, the district special education teacher was unable to explain the meaning of the phrase "an auditory processing disorder in the area of figure-ground listening" referred to in the IEP, instead indicating that it was a "specialty area" and that he would need to consult with a speech-language pathologist or audiologist, or actually have the evaluation report (Tr. p. 25). He also testified that the CSE considered and rejected a general education class with SETSS because the type of weaknesses the student showed would effect her academic needs, and that her needs would be addressed in a program where there was full-time exposure to a regular education teacher and a special education teacher (Tr. pp. 38-9). However, the IEP and the remainder of the hearing record reflect that the CSE did not consider any other placement options or additional supports for the student (see Tr. pp. 38-9; Dist. Ex. 3 at p. 12).

I note that the language and auditory processing reevaluation report indicated that the student's hearing was within normal limits bilaterally (Parent Ex. G at pp. 2, 6). However, the speech-language/audiology evaluator indicated that the student's auditory processing deficit was particularly problematic for the student in figure-ground listening, whereby the student would have

difficulty with focus, attention, and sorting relevant from irrelevant information when in a noisy classroom environment (id. at pp. 6-7). The impartial hearing officer indicated that despite the specific recommendations of the evaluator who conducted the March 2008 neuropsychological reevaluation, the CSE offered "no consideration . . . to keeping the student in a small structured classroom with intensive individual attention" (IHO Decision at p. 6; see Dist. Ex. 4 at p. 4). I agree. The hearing record reflects that although the CSE did not consider a more restrictive setting than the ICT class in a community school, in its recommendation for a 12:1 ICT class, the CSE attempted to address the student's need for small groupings (Tr. pp. 52-3). However, the CSE did not adequately consider the effect of the student's primary language and auditory processing deficits upon her ability to perform in a classroom, particularly in an ICT environment that the hearing record shows can contain up to 34 students (see Tr. pp. 57-8, 79, 132, 203).<sup>12</sup> Under the circumstances, in the instant case, and in consideration of the needs of this particular student at the time of the May 21, 2009 CSE meeting, as well as in consideration of the hearing record before me, I find the recommended supports modifications and accommodations on the May 2009 IEP were insufficient.

Although the opinions of the district personnel describe how it may have been possible to instruct the student in an ICT setting, the hearing record, as discussed below, reflects that a 12:1 ICT class, without also identifying additional support in the student's IEP, would not have been an appropriate academic environment for the student in this particular case. In addition, I note that the CSE did not recommend any assistive technology such as supports to assist with visualization or an auditory FM unit to filter out the teacher's voice from background noise during ICT class instruction, nor did it recommend that the student use published programs such as those recommended in the language and auditory processing reevaluation report to support the student in writing and note-taking (see Dist. Exs. G at p. 7; I at pp. 4-7; see e.g., Application of a Student with a Disability, Appeal No. 09-095).

In addition, the January 23, 2009 language and auditory processing reevaluation shows that the student had a long history of presenting with a language and auditory processing deficit (Parent Ex. G at pp. 1, 6). At the time of the May 21, 2009 CSE meeting, timely evaluative information from the January 23, 2009 language and auditory processing reevaluation report was available to the CSE and revealed in part, that the student had particular difficulty with understanding meaning from context (metalinguage) and an auditory processing disorder in figure-ground listening (id. at p. 6). The reevaluation report indicated that the student's deficit in figure-ground listening implied she would have difficulty hearing the message clearly in less than optimum listening conditions such as in a noisy classroom and in sorting relevant from irrelevant information (id. at pp. 6-7). Testimony by the speech-language/audiology professional who conducted six annual language and auditory processing evaluations of the student, including the January 23, 2009 reevaluation available to the May 21, 2009 CSE, indicated that, despite some improvement in the student's phonological, temporal integration skills, and metalinguistic language skills; the student continued to display language difficulties pertaining to her ability to understand and derive meanings; the ability to use language on a more sophisticated level that would be appropriate for her age and that

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<sup>12</sup> The hearing record reflects that ICT classes can have up to a "60-40" ratio of regular education to special education students in a class (Tr. pp. 48, 57).

her grades were deficient (Tr. pp. 227-29; Dist. Ex. G at pp. 1-7). The speech-language/audiology evaluator also indicated that the student's difficulties would manifest in the classroom in that it would be difficult for the student to focus and attend well if there was noise or distractions, or "lots of things" going on, because it would be hard for the student to block out background noise (Tr. p. 230). In addition, it would be hard for the student to express herself using good grammar and language structure, particularly in areas where the student would need to use more sophisticated language skills such as understanding contextual nuances and abstract meanings, double-meaning words, figures of speech, as well as the message behind a passage of literature, so that she could understand and conceptualize the abstract intent of the author (Tr. pp. 230-31). Additional difficulties for the student would involve idioms and being able to put her thoughts together in an organized written language form (Tr. p. 230). Furthermore, the speech-language/audiology evaluator indicated that in regard to the student's difficulties with focus and attention identified by the results of the January 23, 2009 reevaluation, that the student's difficulty in the classroom would be "double hard" because her difficulty attending was compounded by her difficulty in blocking out or filtering the message from noise (Tr. pp. 231-32). The evaluator noted that when an individual has attention and processing problems, filtering meaning from noise is a problem; listening becomes more challenging; it is difficult to pay attention easily because the individual does not "get it;" if an individual does not "get it" they are "not focused on it" (*id.*).

The speech-language/audiology evaluator further noted that students with attention disorder or processing problems tend to do better in smaller-size classes with little distraction, more individualized instruction, quiet in the area where the teacher can be heard, fewer disruptive students in the class and less frequent breaking up into subgroups (Tr. p. 233). The evaluator indicated that a student's ability to stay focused tended to be "greatly enhanced when there are just fewer things to focus on;" the ability to filter out is enhanced when there is not a lot that needs to be filtered, so that when a classroom is quiet, the delivery of the message is clear, delivered at a slower pace, with clear directives of what is expected (Tr. p. 233). The evaluator opined that there was an absolute difference between a class of 15 or 16 students and a class consisting of 24 to 30 students, because more students make more noise, creating a noisier environment (Tr. pp. 233-34). The evaluator stated,

And when you have trouble filtering, that is a problem because it's more intolerable to deal with everybody's breathing and coughing and sneezing and moving chairs about, and, particularly, in classrooms that are not well insulated.

And, also, the attention is spread around, so that there is never that close relationship that one can get to a teacher who can adapt and adjust the delivery of the information in the message to children. It's much easier to teach 15 children than it is 30.

(Tr. p. 234).

Furthermore, the speech-language/audiology evaluator revealed that she was familiar with the ICT teaching model and stated her opinion that an ICT class would present difficulties for the student (Tr. p. 234). The evaluator indicated that an ICT class would be distracting; there would be "pockets" or assorted things going on around the class because groups would be meeting; there would be noise; there would be talking; and there would be visual and auditory stimulation that would exacerbate (the student's) problem with distractibility (Tr. p. 235).

In light of the evidence above in regard to the proposed 12:1 ICT classroom placement for this student without additional supports or accommodations to address her deficits related to figure-ground listening, I find that the district did not offer the student a FAPE for the 2009-10 school year.

Turning next to whether the unilateral placement obtained by the parents was appropriate for the student, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). 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).

A review of the hearing record reveals that York Prep, in conjunction with its ITP component, provided the student with an appropriate educational program that enabled her to make progress during the 2009-10 school year.

York Prep's headmaster testified that the private school created a supportive environment for students by "tracking" them in different subject areas, according to their abilities, within their grade (Tr. pp. 291-92). Each subject area had four "tracks" ranging from honors to slightly remedial (Tr. p. 292). A student could be in one level track for one subject and a different level track for another subject (id.). The headmaster indicated that York Prep's goal was to place students in classes where they would be challenged, and if they worked hard and succeeded at their track level they had opportunity to move to a higher track (id.). He also described the Jump Start program whereby students with executive function weaknesses were seen by certified special education specialists, two times per day in groups to address organization and homework difficulties (Tr. pp. 294-95). In addition, the Jump Start special education teachers saw students two times per week in regard to each student's particular learning difficulty (Tr. p. 295). The headmaster stated that the special education learning specialists were considered members of the school faculty and acted as tutors and liaisons with the students and as liaisons with other faculty (id.). He also described the school's "Ed-line" program, a password protected on-line component where teachers documented each student's grades, quizzes, homework and attendance (id.).<sup>13</sup> Ed Line also provided teacher comments and regular reports about students, student accomplishments, and goals for the upcoming week and organization help for students such as what books to bring to class (Tr. pp. 295-96). According to the headmaster, Ed Line informed students "where they st[oo]d" and allowed students and parent to review the information (id.). The headmaster indicated

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<sup>13</sup> The transcript employs various spellings of York Prep's Ed Line program, for ease of reference the program will be referred to as "Ed Line" herein (see Tr. pp. 256, 295).

York Prep used its Jump Start teachers as well as outside specialists to teach the school's regular education teachers how to help the students with learning disabilities (Tr. p. 296).

According to the headmaster, York Prep required students to have a psychoeducational evaluation conducted before placement in Jump Start (Tr. p. 297).<sup>14</sup> The headmaster indicated that there were 345 students enrolled in York Prep, with approximately 100 or 30 percent of those students in the Jump Start program (*id.*). He indicated that the York Prep school psychologist met with classroom teachers at the beginning of each year and identified which students in their classes had learning disabilities as well as the strategies that should be used for the individual students (Tr. p. 300). The headmaster explained that the Jump Start teachers participated in classes with their students and advised teachers as necessary on the strategies, accommodations, and modifications they should implement to help the student (Tr. pp. 302-03). The headmaster testified that York Prep's "hope" was that as students acquired the strategies to help them learn, they would internalize the strategies and tools to be successful and learn to self-implement them such that they could function as mainstream students (Tr. p. 301).

The student's Jump Start teacher testified in regard to the student's transition from the Jump Start program to the ITP (Tr. pp. 241, 260).<sup>15</sup> The Jump Start teacher indicated that the student's three most significant learning difficulties were related to reading comprehension, writing skills, and overall organization or executive function and explained in detail how the student's specific learning difficulties affected her school performance (Tr. pp. 242-44). The Jump Start teacher opined that given her educational background and training she was able to address the student's special needs and provided the student with learning strategies that she responded to and that worked for her (Tr. pp. 244, 247-48). The Jump Start teacher testified about various special education strategies she used with the student for reading comprehension and inferencing that included providing material in smaller amounts, highlighting and annotating text (Tr. pp. 244-46). For writing, the Jump Start teacher indicated that she assisted the student in the planning, organizing, editing and revising steps involved in the writing process used school-wide at York Prep (Tr. p. 246). To address the student's executive function needs, the Jump Start teacher indicated that she stressed the use of a daily planner, reviewed and recorded the student's homework responsibilities in the planner, and provided the student with two sets of textbooks for home and school (*id.*). The Jump Start teacher indicated that although the teacher and the student were scheduled to meet once a week, there were many weeks when they met more frequently because the student was very good at identifying what her weaknesses were as well as identifying when she needed help (Tr. p. 248).

The headmaster noted it was the Jump Start teachers' responsibility to communicate with the classroom teachers as well (Tr. p. 300). The Jump Start teacher indicated that the teachers at York Prep communicated often both verbally and by e-mail (Tr. p. 250). The headmaster indicated

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<sup>14</sup> Testimony by the York Prep headmaster referred to the Jump Start program at the time of its inception as a model inclusion program (Tr. p. 294). At the time of the impartial hearing, the headmaster opined that inclusion was a generally accepted model (Tr. p. 303).

<sup>15</sup> The student's Jump Start teacher indicated she had two Masters Degrees; one in special education and one in reading; she held a license as a literacy teacher and was certified in the Wilson Reading Program (Tr. p. 240).

that the teachers at York Prep used various techniques for the students in their classes who had learning disabilities that included chunking, repetition, modeling, and provided accommodations such as preferential seating, use of a computer, and extended time on exams for students with slow processing speed (Tr. pp. 297-300). The Jump Start teacher testified that the student's classroom teachers had experience working with students who had deficits similar to the student's difficulties and noted that because York Prep was an inclusion school, the teachers were "armed with the sort . . . Special Ed skills to be able to reach all kids" (Tr. p. 251). The Jump Start teacher testified that the school's classroom teachers used strategies that included multisensory teaching, repetition for learning and to refocus attention, handouts and outlines, use of SMART boards, and checks for understanding (Tr. pp. 251-52, 254-55).

Specifically, regarding instruction for the student in the instant case, the Jump Start teacher stated that the student was able to "see it, hear it" and that she took good notes, therefore acquiring material in "three different ways" (Tr. p. 252). In addition, the student's teachers uploaded their PowerPoint notes on Ed Line, so that the student was able to download and access it again if she needed the information (Tr. p. 256). The Jump Start teacher testified that in light of the student's comprehension problems, multisensory information was important for her because the visual piece of instruction (i.e. graphic organizers) allowed her to see verbal information organized in a clear way (Tr. pp. 253-54). She also stated that access to Ed Line helped the student seek information about assignments and stay organized (Tr. p. 257).

The hearing record reflects that the classes at York Prep addressed the student's individual needs and were consistent with recommendations in the January 23, 2009 language and auditory processing reevaluation report (Parent Ex. G at p. 7). According to the student's Jump Start teacher, all of the student's classmates were in ninth grade (Tr. p. 262). Testimony by the student's English teacher at York Prep revealed that there were 15 student's in the student's ninth grade English class, half of which had learning disabilities (Tr. p. 271). Half of the class read on a ninth grade reading level and the other half of the class read at approximately an eighth grade level (Tr. pp. 285-86). The students' functional writing levels were similar to her reading levels (Tr. p. 286). Testimony from the student's ninth grade social studies teacher reflected that there were 14 students in the class, ten of which had either weakness or diagnosed learning disabilities that required some kind of accommodations (Tr. p. 318).

Testimony by the student's English teacher and social studies teacher at York Prep was consistent with the testimony of the student's Jump Start teacher regarding the student's learning deficits, how her learning deficits were manifested in class, and the strategies implemented in each class to instruct the student successfully (Tr. pp. 272-83, 319-20). Teaching strategies included grouping material into smaller amounts or chunking, previewing information, repetition, step-by-step instruction, visualization through the use of assistive technology (i.e. overhead projection of textbook pages and use of a SMART board), modeling, use of textbooks that have an audio component, use of various graphic organizers, highlighting, underlining, annotated text and open book tests, 1:1 instruction, slower paced instruction, use of laptop computers, and extra time for tests (Tr. pp. 272-83, 320-332).

The district asserts that the student had speech-language needs that required remediation with speech-language therapy and that York Prep did not provide the student with this related service. However, the student received speech-language therapy one time per week for 45 minutes at a center that the student's mother affirmed was a district-approved provider (Tr. pp. 347-48). The hearing record is limited in regard to the student's related services and unclear about whether at the time of the impartial hearing, the student received speech-language therapy through an RSA provided by the district or if the related service was obtained privately (see Tr. p. 348).<sup>16</sup> Neither party described in detail how the student received speech-language therapy. However, the student's mother testified that the student's speech-language pathologist helped the student with her writing and inferencing skills (Tr. p. 348). According to the student's May 2009 IEP, a speech-language pathologist would have addressed the student's higher level language deficits and, as previously discussed, the IEP included academic goals and objectives that addressed the student's language needs (see Dist. Ex. 3 at pp. 3, 8-10, 16-20). As discussed previously, testimony by the student's Jump Start and regular education teachers at York Prep indicates that the student's difficulties in writing and inferencing, as well as in comprehension and organization were addressed as part of classroom instruction and through the ITP (Tr. pp. 244-48). In light of this evidence, I find that York Prep adequately addressed the student's speech-language and that lack of formal speech-language therapy specifically carried out by York Prep personnel does not, in this instance, rise to the level of finding that the school is an inappropriate placement for the student, particularly when the student is receiving speech-language therapy from an another provider (see Frank G., 459 F.3d at 364-65).

The hearing record also reflects that the student made progress at York Prep during the 2009-10 school year, at least up to the time of the impartial hearing. Review of the student's York Prep academic report covering the first and second quarters of the 2009-10 school year revealed that the student achieved first semester grades as follows (academic subject (grade)): English 9 (84); Algebra II H (92); Spanish 9 (85); History 9 (89); Physical Science (93), and an overall average of 89 in her major courses (Parent Ex. H). Furthermore, testimony by the York Prep headmaster revealed that by the time of the impartial hearing the student had made "strides" at York Prep as she moved up from being in the weakest academic tracks to the middle tracks (Tr. p. 310).

According to York Prep's headmaster, the student had done "very well" at York Prep (Tr. p. 305). The headmaster indicated that after two years in the full Jump Start program, the student was ready for a transitional program whereby Jump Start was "cut in half" (Tr. pp. 306-07).<sup>17</sup> In the ITP and in order to foster the student's independence, the student would see a Jump Start teacher every day either in the morning or in the afternoon as well as individually one time weekly, as opposed to double that time in the Jump Start program (Tr. pp. 306-07, 309; see also Tr. pp. 294-

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<sup>16</sup> The January 23, 2009 language and auditory processing reevaluation report indicated that when the student was in eighth grade she received speech-language therapy through an RSA provided by the district (Parent Ex. G at p. 1).

<sup>17</sup> The headmaster testified that to avoid potential for dependency, York Prep tries to ensure that no Jump Start teacher sees a student for more than two years (Tr. pp. 308-09).

95). Consistent with his previous testimony, the headmaster indicated that York Prep was trying to provide the student with the emotional and strategic tools to become a student who did not need all of the extreme support mechanisms the school provides (Tr. pp. 307-08). In that effort, the student went into the ITP (Tr. pp. 306-08).

Testimony by the student's Jump Start teacher indicated that the student benefited from the special education techniques used and that the student "improved dramatically" over the past two years at York Prep (Tr. pp. 248-49). The Jump Start teacher described the student as "very driven," and when frustrated, able to use the special education strategies she learned at the private school (Tr. pp. 249, 258). The Jump Start teacher also opined that the student appeared more self-confident in her academic and social skills, that York Prep was appropriate for the student because the teachers were experienced in working with students with learning disabilities, provided multisensory instruction and strategies for learning, and that the small classes at York Prep fostered a good working relationship between teachers and students (Tr. pp. 259-260).

The student's English teacher at York Prep testified that the student was performing "pretty solidly" in her class, appeared more confident academically in English, and was coping better with her frustration (Tr. pp. 284-85). The student's social studies teacher testified that the student "definitely" made progress in her social studies class at York Prep and that at the beginning of the school year the student seemed "quite shy," and due to the student's difficulties with comprehension "she oftentimes was reluctant to speak up" (Tr. p. 334-35). By the time of the impartial hearing, the social studies teacher had observed the student speak up more in class (id.).

In consideration of the evidence in the hearing record, which is consistent with the language and auditory processing reevaluation, York Prep addressed the student's auditory processing needs by providing the student with an educational environment conducive to addressing the student's educational needs, where consultative and individual services were provided (see Parent Ex. G at p. 7). In addition, testimony by the student's Jump Start and regular education teachers showed that York Prep, in conjunction with its ITP, addressed the student's academic needs by implementing special education strategies and accommodations in classroom environments appropriate for the student, consistent with recommendations included in the January 23, 2009 language and auditory processing reevaluation as well as the student's IEP (see Parent Ex. G at p. 7; Dist. Ex. 3 at pp. 3-4). Accordingly, I find that the parents have meet their burden to establish that York Prep and the ITP program were appropriate.

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 [S.D.N.Y. 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]).

The district contends that equitable considerations do not weigh in favor of reimbursement for the parents because the parents never seriously considered placing the student in a public school and because the parents gave insufficient notice of their intention to unilaterally place the student and seek tuition reimbursement because their notice never specified the concerns they had with the recommended program. Prior to the May 21, 2009 CSE meeting to discuss the student's recommended placement for the 2009-10 school year, the parents executed an enrollment contract with York Prep that obligated them to pay the full tuition for the 2009-10 school year at the private school (Parent Exs. J; K).<sup>18</sup> The student's mother testified that she and her husband attended the CSE meeting and participated in the meeting and provided the CSE with current evaluations of the student (Tr. pp. 351-52). At the CSE meeting, the parents discussed their concerns with the proposed program with the CSE, specifically; that they believed the "program and school size" in the recommended placement would be too large for the student (Tr. p. 37). After receiving a notice from the district on June 23, 2009, that identified the specific school location recommended for the student for the 2009-10 school year, the student's mother wrote to the CSE by letter dated June 24, 2009 and stated that she had been told by the recommended school that she could not "view

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<sup>18</sup> According to the terms of the contract, the parent declined to participate in York Prep's "tuition refund plan" (Parent Exs. J; K at p. 1).

the recommended program" (Tr. pp. 352-56; Parent Ex. D). In the same letter, the student's mother informed the district that she unable to place in the absence of a visit, that she was interested in visiting the proposed placement, and in the event an appropriate program was not offered by the district, the parent would place the student at York Prep and seek tuition reimbursement (Parent Ex. D; see Parent Ex. E). The hearing record also shows that the student's mother did not reject the placement recommended in the May 2009 IEP or communicate any of the concerns she had with the May 2009 CSE process that were set forth in the student's due process complaint notice until after the student had been unilaterally placed (Dist. Ex. 1 at pp. 3-5). The student's mother testified that thereafter she made multiple attempts to arrange for a visit of the proposed school but that she did not succeed in finding anyone at the school who was willing to make an appointment (Tr. pp. 352-57). In a letter to the CSE dated August 15, 2009, prior to the start of classes for the 2009-10 school year, the student's mother stated that she had had no response to her prior letter had not been offered a placement in a timely manner, and had therefore unilaterally placed the student at York Prep for the 2009-10 school year and would seek tuition reimbursement at public expense (Parent Ex. E at p. 1). I find that the parent provided evaluations to the district and was cooperative with the CSE when meeting to develop the student's May 2009 IEP. Although the hearing record shows that parent disclosed to the CSE that she might place the student at the York Prep, the evidence in the hearing record shows she did not satisfy the notice requirements by informing the district of her concerns with the IEP and the CSE process placement prior to placing the student at York Prep for the 2009-10 school year.<sup>19</sup> In view of the forgoing evidence, and in the exercise of my discretion, I will modify the impartial hearing officer's determination and find that the parents should be reimbursed for 90 percent of the costs of student's York Prep and the ITP program for the 2009-10 school year (Wood v. Kingston City School Dist., 2010 WL 3907829, at \*9 [N.D.N.Y. Sept. 29, 2010]).

I now turn to two remaining arguments brought forth by the district on appeal. First, the district contends that the impartial hearing officer erred in awarding reimbursement for two private evaluations obtained by the parents because the evaluations were not reimbursable as independent educational evaluations (IEEs). I agree with the district. Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). There is nothing in the hearing record before me that identifies what, if any, evaluation conducted by the district or any other public agency with which the parents disagree (Tr. p. 359). Accordingly, I will also modify that portion of the impartial hearing officer's order that provides for the reimbursement for the private evaluations.

Second, the district argues that the impartial hearing officer erred by including several expenses charged to the parents by York Prep to the reimbursement amount because the expenses

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<sup>19</sup> The impartial hearing officer did not address whether the notice of unilateral requirements was satisfied.

are not properly reimbursable under the IDEA. These charges are set forth on York Prep's tuition and fees statement and are described as a "combined fee", a "bookstore" fee and an "additional bookkeeping fee" (Parent Ex. J).<sup>20</sup> I agree that the sum charged by York Prep included fees that may not be properly reimbursable. Therefore, I will modify the impartial hearing officer's order and limit reimbursement to the cost of the student's tuition and only those portions of the "combined fee" that cover additional costs for the classes the student participated in during the 2009-10 school year, if any such costs are included in the "combined fee" (see Application of a Child with a Disability, Appeal No. 99-021; Application of a Child with a Disability, Appeal No. 98-79; Application of a Child with a Disability, Appeal No. 97-28).

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

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

**IT IS ORDERED** that the portion of the impartial hearing officer's decision dated September 8, 2010 which ordered the district to reimburse the parents for the cost of a neuropsychological reevaluation performed on March 17, 19 and 25, 2008 and an auditory and language process reevaluation performed on January 23, 2009, is hereby annulled; and

**IT IS FURTHER ORDERED** that the portion of the impartial hearing officer's decision dated September 8, 2010 which ordered the district to reimburse the parents for the cost of tuition and fees for their daughter's attendance at York Prep during the 2009-10 school year is modified in that the district shall, upon proof of payment provided by the parents, reimburse the parents for the 90 percent of the cost of the student's tuition for York Prep and the ITP program during the 2009-10 school year, as further described in the body of this decision.

**Dated: Albany, New York  
December 13, 2010**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

<sup>20</sup> The "combined fee" is described as "combined activity & student accident insurance & parent association dues" (Parent Ex. J).