



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-106

### **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

New York Legal Assistance Group, attorneys for respondent, Phyllis Brochstein, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to, among other relief, reimburse the parent for her daughter's tuition costs at the School for Language and Communication Development (SLCD) for the 2010-11 school year. The appeal must be sustained in part.

#### **Background**

At the time of the impartial hearing, the student was attending a 6:1+1 kindergarten classroom at SLCD, a nonpublic school which has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 221, 522, 578-79, 689, 692-93, 697; see 8 NYCRR 200.1[d], 200.7). Reportedly, the student has received the following diagnoses: (1) an autistic spectrum disorder; (2) a receptive-expressive language disorder with a weakness with respect to pragmatic language; (3) a childhood apraxia of speech (CAS) with an associated oral motor weakness accompanied by feeding difficulties; and (4) a global dyspraxia, which presents as gross and fine motor "incoordination" (Tr. pp. 362, 415, 489-90, 588-89, 621, 637; Dist. Exs. 12 at p. 12; 15 at p. 1).<sup>1, 2</sup> The student's eligibility for special education and related services as a student with a speech or language

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<sup>1</sup> The hearing record describes a childhood apraxia of speech as a verbal motor planning disorder, which results in difficulty putting "sounds into syllables [and] syllables into sounds" (Tr. pp. 415-16).

<sup>2</sup> The hearing record defines dyspraxia as "a term that describes difficulty motor planning volitional movements that can affect overall motor coordination" (Dist. Ex. 12 at p. 12).

impairment is not in dispute in this appeal (Tr. pp. 158-59, 628; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The student began receiving special education services at 2 1/2 years old through an Early Intervention Program (EIP) comprised of speech-language therapy, occupational therapy (OT), and applied behavior analysis (ABA) instruction all delivered in the home setting (Tr. pp. 618-19). After the student "aged out" of the EIP, for the 2008-09 school year, the Committee on Preschool Special Education (CPSE) recommended placement of the student in a 8:1+2 setting in a State-approved nonpublic preschool, where she also received related services consisting of speech-language therapy and OT, in addition to twice weekly after school sessions of speech-language therapy (Tr. pp. 487, 620-21, 623; Dist. Exs. 12 at p. 4; 13 at p. 1).<sup>3</sup> The student remained at the nonpublic preschool for the 2009-10 school year and at the beginning of that school year, two 45-minute sessions per week of individual speech-language therapy were added to her program, which in December 2009 were increased to a frequency of four sessions per week (Tr. p. 661; IHO Ex. X; Dist. 13 at p. 1).

A private developmental pediatrician and psychiatrist conducted a neurodevelopmental evaluation of the student over three nonconsecutive days in February and March 2009 (Tr. p. 404; Dist. Ex. 12).<sup>4</sup> Attempted formal and informal testing; review of the student's medical, developmental, and school history; and a classroom observation of the student resulted in the evaluator's impression that the student displayed a profile consistent with an autism spectrum disorder characterized by deficits in communication, reciprocal social interaction skills, and some stereotypical behaviors such as repetitive actions (Dist. Ex. 12 at pp. 1-11).<sup>5</sup> The student also displayed cognitive delays and significant delays in play skills (*id.* at p. 12). The evaluator further found that the student displayed a significant receptive/expressive language disorder characterized by receptive language skills that were "somewhat greater" than her expressive language skills (*id.*). The report indicated the student displayed a probable "Childhood Apraxia of Speech (CAS)" with associated oral motor weakness and feeding difficulties, characterized by the student's difficulty combining syllables and imitating words, a restricted sound inventory, limited syllable productions and assimilation of sounds in words, poor chewing skills, and gagging on pieces of food associated with oral motor weakness (*id.*). In addition, the evaluator indicated that the student presented with dyspraxia (*id.*). Consistent with this diagnosis, the student exhibited sensory integration dysfunction and presented primarily with oral and proprioceptive sensory-seeking behaviors (*id.*). According to the evaluator, "[the student's] diagnoses [we]re evidence of neurologic disorganization, and [we]re not simply developmental delays" (*id.*). The evaluator explained that the student required "intensive therapy" to "establish the neural circuitry necessary to learn the motor planning for oral, gross, and fine motor skills" (*id.*). She also suggested the necessity of intensive behavioral and language therapy to promote the student's ability to effectively

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<sup>3</sup> The student was also receiving twice weekly 45-minute sessions of after school speech-language therapy at that time (Tr. p. 621).

<sup>4</sup> The hearing record reflects the evaluator practiced as a speech-language pathologist prior to becoming a physician (Tr. p. 403; see Dist. Ex. 12 at p. 13).

<sup>5</sup> The evaluation report indicated that on one of the days of the evaluation the student was irritable, distractible, and uncooperative in that she displayed excessive crying when she did not get what she wanted (Dist. Ex. 12 at p. 6). According to the evaluation report, the student's mother reported that the student's behavior that day was unusual for her, as she usually recovered from a tantrum within a reasonable period of time (*id.*). Although attempted, it was not possible to complete most formal testing that required the student to respond (*id.*).

communicate and interact with peers (id.). Recommendations included the continued placement of the student in her 8:1+2 classroom setting that used a total communication approach (i.e., signs, Picture Exchange Communication System (PECS)) and natural environment teaching, and that provided "assistance throughout the day in order to complete her regular routines and instructional tasks" (id. at pp. 3, 12). The evaluator made recommendations including, among other things, the provision of five hours per week of special education itinerant teacher services (SEIT) at home and in the community, a 12-month school year, and intensive speech-language therapy provided by a speech-language pathologist trained in PROMPT therapy (id. at p. 13).<sup>6</sup>

In an April 30, 2009 speech and language progress report, the student's therapist reported that the student exhibited delayed play, pragmatic, receptive and expressive language skills (Dist. Ex. 11 at pp. 2-3). Although the therapist reported that the student engaged in parallel play, the student did not yet play or interact with other children at the time of the report (id. at p. 3). The therapist further noted that with some prompts, the student followed routine one-step commands and that she required maximum prompting to follow novel and two-step commands (id.). According to the progress report, expressively, the student spoke in single words and rote phrases and she required a model to fully express her wants and needs (id.). Recommendations included the continued provision of three weekly sessions of 1:1 speech-language therapy (id.). Lastly, goals to be addressed included the improvement of the student's play, and receptive and expressive language skills (id.).

On June 23, 2009, a private speech-language pathologist conducted a feeding evaluation of the student (Dist. Ex. 10). The speech-language pathologist noted that the student presented with a sensory-motor feeding disorder, characterized by a hyposensitive sensory system, decreased oral motor strength, and poor motor planning skills (id. at p. 2). The report further reflected that the student presented with a behavioral feeding disorder characterized by rigidity and refusal of novel foods (id.). Additionally, the speech-language pathologist opined that the student's feeding was not developmental in nature and would not remediate without therapy (id.). She recommended the provision of sensory motor-based speech/feeding therapy three times per week in addition to the speech-language therapy that the student was already receiving (id.). Other recommendations included the provision of twice weekly behavioral feeding therapy and home-based parent training to facilitate the carryover of newly acquired feeding skills (id.).

A private psychological evaluation was conducted over three nonconsecutive days in August and September 2009 "in order to assist in diagnostic clarification and appropriate educational placement and treatment planning" (Tr. p. 225; Dist. Ex. 13 at p. 1). The psychological evaluation report indicated that based on clinical observation, parental and past reports, and the results of formal quantitative evaluation, the student displayed good cognitive and learning potential, but her delays in receptive, expressive, and pragmatic language, difficulties with self-direction and attention, and underdeveloped adaptive skills negatively affected her ability to perform and to interact with others and make appropriate progress in a group or school setting (Dist. Ex. 13 at pp 7-8). The report indicated that the student's preacademic skills were consistent with age expectations, despite some variability (id. at p. 7). Administration of the Bracken Basic

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<sup>6</sup> According to the hearing record, PROMPT is an acronym for "Prompts for Restructuring Oral Musculature Phonetic Targets" (Tr. p. 583). The student's speech-language therapist at SLCD described PROMPT therapy as a therapy that incorporates a series of gesture-like cues that are performed with the hands (id.). The therapist added that she placed her hands on the oral-motor aspects of the student's face to help restructure and facilitate the oral musculature for appropriate production of sounds (Tr. pp. 583-84).

Concept Scale, Expressive-School Readiness Composite revealed that the student's preacademic strength was displayed in her ability to identify colors, shapes, and numbers, and in counting (id. at pp. 4, 7, 10). Weaker skills were noted for labeling letters and letter sounds, and in making size and shape comparisons (id. at pp. 7, 10). The evaluator suggested that the latter preacademic skills might be weaker skills for the student because the tasks involving understanding those concepts were more abstract and required higher levels of language comprehension, expression, and cognitive thinking, areas that were underdeveloped for the student (id. at p. 7). The evaluator also explained that "although [the student's] clinical constellation of symptoms appear[ed] as though it may fall on the autism spectrum, it seem[ed] more likely that her severe communication deficits and attention difficulties [were] currently influencing her presentation" (id.). According to the evaluator, it was "crucial" to note that the student displayed difficulty with sustained attention, a situation which might negatively affect her ability to perform in a learning environment and attain benefit from her academic curriculum, therapies, and social environment (id.).

The private psychological evaluation report indicated that administration of selected subtests of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) resulted in a general cognitive ability score in the average range of intellectual functioning, with verbal skills appearing more impaired than nonverbal skills (Dist. Ex. 13 at pp. 4, 7). Administration of the Primary Test of Nonverbal Intelligence (PTONI) revealed that the student's visual-spatial reasoning abilities were within the average range and described as "more commensurate" with typically developing peers (id. at p. 7).

Recommendations for the student included, among other things, placement in a small, language-based special education classroom setting for children with similar learning and communication difficulties as the student (Dist. Ex. 13 at p. 8). According to the evaluator, the student's program needed to provide her with intensive intervention for her language, attention, and social difficulties (id.). The evaluator further opined that the student required frequent directives to attend in the classroom, and incentives and positive reinforcement in both school and outside the classroom (id.). In addition, the evaluator suggested that the student's classroom environment should also include 1:1 behavioral support from someone experienced in behavioral modification (id.). Recommendations specific to "intensive language support" included the provision of three weekly 30-minute in-school sessions of speech-language therapy, and four 45-minute sessions outside of school within a small inclusion environment to address functional communication skills (id.). PROMPT therapy was also recommended to address the student's speech-language difficulties related to apraxia (id.). The evaluator also recommended the continued provision of OT and physical therapy (PT) (id.). Additionally, the evaluator suggested the provisions of additional support for sustained attention through hands-on or interactive activities, and visual schedules (id. at p. 9). Furthermore, the report included recommendations for parent training specific to behavior modification at home, and periodic reevaluation to monitor the student's progress and continued cognitive and educational needs (id.).

In a November 30, 2009 related services student progress report, the student's after-school speech-language therapist noted that the student exhibited severe delays in her receptive and expressive language in addition to her pragmatic skills (IHO Ex. X at p. 1). According to the therapist, the key focus of therapy for the student was to increase her functional expressive and receptive language in addition to increasing her "social-interaction and play skills" (id. at p. 2). The therapist further explained that while progress had been made in meeting the student's goals, not all of her goals had been met at that time (id.). The therapist opined that the student would

achieve her goals, with continued speech-language therapy combined with the student's motivation and familial support (id.). The therapist recommended an increase in the student's mandate for speech-language therapy to four sessions per week (id. at p. 3).

On December 17, 2009, a social worker from the student's preschool prepared an update of the student's social history with the parent serving as the informant (Dist. Ex. 9). The parent described the student as "an easy child," whose tantrums had become far less frequent (id. at p. 2). According to the report, the student's gross and fine motor skills had improved, and the student was able to use scissors and showed a "huge affinity" for arts and crafts (id. at p. 1). The parent further reported that the student ate well and no longer saw a feeding specialist, which the social worker opined reflected the student's progress (id.). Although the student required support in dressing herself, she could undress herself and manipulate Velcro independently when putting on her shoes (id.). The report also reflected that the student was fully toilet trained during the day and at night (id.). The parent also reported that the student demonstrated improvement in her expressive and receptive language and that she had shown an improved ability to appropriately play with toys (id. at pp. 1-2). Lastly, the parent indicated that she was pleased with the student's progress since the student had been in school, and the parent wished for the student to continue to receive the special education she was receiving "in order for [the student] to reach her full potential in all areas" (id. at p. 2).

In a January 5, 2010 OT progress report, the evaluator reported that the student demonstrated delays in her motor, play, and self-help skills (Dist. Ex. 8 at p. 2). The evaluator characterized the student as "an alert, happy child," and further described her eye contact as good (id. at p. 1). However, the evaluator also noted that the student would often put her head down or turn away when someone spoke to her, she did not want to do what was being asked of her, or if the person was new or unfamiliar to her (id.). With respect to the student's motor skills, the evaluator noted that the student was able to move independently, and that her range of motion was within typical limits (id.). According to the evaluator, the student exhibited a lack of mobility in her trunk that also affected her gross motor skills because it decreased her coordination and balance; affecting her ability to climb, run smoothly, and quickly change direction (id.). Regarding the student's fine motor skills, the evaluator reported that she could use mature grasps such as a pincer and a tripod grasp to manipulate objects, but that she often reverted to less mature ulnar and palmer grasps, which decreased her dexterity and manipulation (id.). Next, the evaluator indicated that the student could be rigid and predictable in her play, further noting that the student's pretend play skills were beginning to emerge and that she required facilitation to sustain this type of play (id. at p. 2). The evaluator further reported that the student engaged mostly in sensory-motor or constructive play and that she could become resistant to attempts to use new toys in a new way or to novel activities presented to her (id.). Recommendations included continuation of twice weekly OT (id.).

In a January 10, 2010 educational progress report prepared by the student's preschool teacher, the student was described as a "happy girl" (Tr. pp. 629, 641, 661; Dist. Ex. 7 at p. 2). The student's teacher also reported on the student's progress with respect to her cognitive functioning, speech-language, fine and gross motor, self-help and social/emotional skills (Dist. Ex. 7 at pp. 1-2). According to the student's teacher, she continued to work on categorizing and classifying items by feature and function, and she was able to recite the alphabet and numbers 1 through 50 (id. at p. 2). The teacher further reported that the student was able to identify colors and shapes and she could fill in response/words to songs (id.). The student's teacher also stated

that the student was continuing to work on answering "wh" questions (*id.*). With prompting, she was able to follow a visual schedule and with reminders from an adult, she could participate in cooperative play and engage in highly structured activities (*id.*). The teacher also noted that the student continued to work on speaking with intelligible speech, so that unfamiliar people may understand her (*id.*). Lastly, the student's teacher opined that the student required a highly structured, language enriched classroom setting with a focus on language to facilitate communication (*id.*).

On February 23, 2010, the parent submitted an enrollment application for the student to attend SLCD for the 2010-11 school year (Tr. p. 665; Parent Ex. L).

On March 10, 2010, a district school psychologist prepared a "Turning Five Summary Report" of the student (Dist. Ex. 5). The report was based on a parent interview, classroom observation, an interview with the student's classroom teacher, and administration of the Preschool Evaluation Scale (PES) (*id.*).<sup>7</sup> Results of the PES revealed that the student performed in the 4th percentile, a score reflecting that when compared to same-aged peers, 96 percent performed at a higher level than the student (*id.* at p. 4). The report indicated that overall, the student functioned in the low average range of preschool students (*id.*). However, the report also reflected that administration of the PES yielded a Standard Score (SS) of 8 (average ability) for both the large muscle and small muscle subscales, a SS of 4 (low average ability) on the cognitive thinking subscale, a SS of 1 for both the expressive language and the social/emotional subscales (low ability), and a SS of 5 on the self-help skills subscale (low average ability) (*id.* at pp. 2-4). The parent reported that the student had made "lots of progress with the services that she [had] been receiving," and she further characterized the student as "very social, affectionate, eager to learn and very friendly" (*id.* at p. 1). According to the parent, the student's weaknesses included poor speech with severe receptive and expressive delays, and she went on to describe her daughter's peer interactions as "limited," due to her speech delays (*id.*). The parent noted that the student's speech was her main concern (*id.*).

During the classroom observation, the student was having a snack, and needed several reminders to throw away her food in the garbage (Dist. Ex. 5 at p. 1). The school psychologist noted that the student gave only one to two-word responses when addressed, and it was difficult to understand her; however, the school psychologist further found that the student was able to request what she wanted (*id.*). According to the school psychologist, the student required a lot of redirection, but was able to identify her name when asked, and appeared to engage with others (*id.*). The report further reflected that the student greeted a new teacher, and would at times repeat the teacher directions when they were being given to her (*id.*). The school psychologist also observed that the student initiated contact with adults (*id.* at p. 2). While the school psychologist indicated that the student sought attention, the report further revealed that with redirection, the student followed the routine and structure of the class (*id.*). The school psychologist went to describe the student's attention skills as "somewhat delayed;" however, she noted that with prompting, the student recognized shapes and colors (*id.*). The report also revealed that the student required "a lot of repetition," and that she did not always respond to questions when asked (*id.*). Despite some concerns that the student's academic and social/emotional skills were below age

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<sup>7</sup> According to the report, the PES is comprised of six subscales that encompass large muscle skills, small muscle skills, cognitive thinking, expressive language skills (encompasses receptive, expressive and communication language skills), social/emotional skills, and self-help skills (Dist. Ex. 5 at pp. 2-3).

level, the student's teacher reported that the student had made good progress (id.). The student's teacher also indicated that as a result of the student's developing language, she cried less frequently (id.). Her teacher also noted that the student's motor skills were still emerging and that the student exhibited sensory difficulties with different textiles (id.). According to the student's teacher, the student enjoyed jewelry and clothing, and was motivated by colors and jewelry (id.). Lastly, the teacher stated that at times, the student communicated with other children (id.).

In summary, the school psychologist described the student's attention, communication and social skills as "below average," and further noted that the student was performing at the 4th percentile compared to her peers (Dist. Ex. 5 at p. 4).

On March 19, 2010, the Committee on Special Education (CSE) convened for the student's annual review and to develop the student's individualized education program (IEP) for the 2010-11 school year (Parent Ex. J). The March 2010 CSE found the student eligible for special education and related services as a student with a speech or language impairment (id. at p. 1). The CSE recommended placement in a 10-month 12:1+1 special class in a community school with a 1:1 paraprofessional (id. at pp. 1, 11, 13). Related services recommendations included two 30-minute sessions of individual OT per week for 12 months, three 30-minute sessions per week of individual speech-language therapy in addition to two 30-minute sessions per week of speech-language therapy in a group of three for 12 months (id. at pp. 2, 11, 13). Before the conclusion of the meeting, the parent voiced her concerns regarding the CSE's recommendation, particularly with regard to the size of the 12:1+1 special class (Tr. p. 631).

The parent visited SLCD in late March 2010 (Tr. p. 668). On April 16, 2010, she signed a tuition agreement with SLCD and made a deposit toward the student's tuition for the 2010-11 school year (Tr. p. 666; Parent Exs. H; I). By letter dated May 11, 2010, the parent advised the district that she did not believe that the proposed IEP was appropriate for the student (see Parent Ex. F at p. 1).<sup>8</sup> The parent also requested that the CSE reconvene to discuss the student's needs (see Parent Ex. E).

By letter dated June 15, 2010 the district notified the parent of the particular school to which the district assigned the student (Tr. p. 636; see Parent Ex. F at p. 1).<sup>9</sup> On June 23, 2010, the parent, accompanied by the private psychologist who evaluated the student in fall 2009, visited the classroom at the assigned school (Tr. pp. 235, 636-37; Dist. Ex. 14 at p. 1). That same day, the private psychologist who visited the assigned school with the parent summarized her observations of the recommended placement in a psychological addendum (Dist. Ex. 14). According to the private psychologist, given the student's needs, she opined that it was vital that the student was placed in an educational environment with an intensive language program where she could "realize her academic potential and make gains" (id. at p. 2). She further concluded that the assigned school might not include the necessary structure and specialized language instruction, and that even with adult supervision the recommended placement might be too overwhelming for the student, particularly during lunch and recess (id.). Additionally, the psychologist opined that due to the student's significant language difficulties, a 12:1+1 classroom would be "too challenging," and the student required a smaller setting (id.). The psychologist recommended

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<sup>8</sup> A copy of the parent's May 2010 letter is not included in the hearing record (see Parent Exs. E; F at p. 1).

<sup>9</sup> The hearing record does not contain a copy of the June 15, 2010 letter identifying the student's assigned school.

placement in a language-based center that offered specialized attention and included specific techniques to increase functional communication on a 12-month basis (id.). She further suggested that the facility should include placement in a structured, supportive and small class for children with similar learning and communication difficulties (id.).

By letter dated June 25, 2010, the parent advised the district of her concerns regarding the assigned school (Parent Ex. F). The parent also requested additional information regarding the school (id. at pp. 1-2). In a letter dated July 7, 2010, the parent notified the district that she did not accept the recommended program and assigned school, but was willing to consider another placement if it addressed the student's needs (Parent Ex. E). She also reiterated her May 11, 2010 request to reconvene the CSE to discuss the student's needs "with a view to identifying an appropriate placement" (id.).

On July 27, 2010, the developmental pediatrician who evaluated the student in February 2009 observed the student in her 8:1+2 classroom (Tr. p. 411; Dist. Ex. 15). The physician reported that the student had demonstrated significant improvement since her 2009 evaluation (Dist. Ex. 15 at p. 1). According to the physician, the student's attention and focus had improved, she was speaking in phrases, and displayed good engagement, eye contact and social reciprocity; however, the pediatrician also opined that the student continued to exhibit a significant receptive-expressive language disorder with pragmatic weaknesses for a child her age (id.). The physician also noted that despite the student's strong communicative intent and social interactions, she experienced significant difficulty answering a variety of "wh" and open-ended questions, but she could answer simple yes/no questions and provided answers to simple questions requiring a one-word answer (id.). According to the physician, when the queries were not routine or over-learned, the student required cueing and scaffolding (id.). The physician further noted that the student continued to lack consistency in sustaining circles of communication and needed frequent refocusing (id.). Additionally, the physician reported that the student presented with a frontal lisp with anterior carriage of the tongue (id.). Lastly, the physician referenced the fall 2009 private psychological evaluation, which revealed that the student attained depressed language scores on standardized testing with close to average scores on performance (visual perceptual) and readiness skills that indicated that the student's cognitive potential when the language demands were minimal (id.).

The physician offered the following recommendations for the student's transition to kindergarten, including but not limited to: (1) an educational setting that specialized in teaching children with speech and language disorders, where she would receive intensive and appropriate treatment for her speech and language deficits; (2) a classroom with a small student-to-teacher ratio, where the speech-language pathologist became "part of the fabric of the classroom;" (3) a multisensory approach to learning; (4) an FM system; (5) speech-language therapy with a specialist in PROMPT therapy; (6) OT and PT; and (7) a 12-month school year (Dist. Ex. 15 at pp. 1-2).

On August 6, 2010, per the parent's request, the CSE reconvened (Tr. pp. 154, 639; Dist. Ex. 3 at p. 2). The parent attended the meeting accompanied by her attorney (Tr. pp. 640-41; Dist. Ex. 3 at p. 2). Other meeting attendees included a school psychologist who also acted as the district representative, a district regular education teacher, and a district special education teacher (Dist. Ex. 3 at p. 2). The private psychologist who visited the assigned school with the parent, a social worker from the student's preschool, and the student's preschool special education teacher also participated in the meeting by telephone (id.). During the August 2010 meeting, the parent requested that the matter be deferred to the Central Based Support Team (CBST), which reviewed cases for recommendation to State-approved nonpublic schools (Tr. pp. 157-58). The parent

reiterated her concerns regarding placement of the student in a 12:1+1 classroom and the recommendation for a 10-month school year (Tr. p. 642). Notwithstanding the parent's concerns, the August 2010 CSE recommended a 10-month program in a 12:1+1 classroom; however, pursuant to the parent's request, the CSE removed the recommendation for a 1:1 paraprofessional (Tr. pp. 158, 167-68, 645-46; Dist. Ex. 3 at p. 2). The August 2010 CSE also recommended the provision of five sessions per week of speech-language therapy for the student's speech-language delays, and two sessions per week of OT to address her fine motor needs (Tr. pp. 163, 168-69; Dist. Ex. 3 at p. 16). Annual goals were developed with regard to pre-reading and pre-math skills, and in the areas of speech and language and OT (Tr. pp. 170-74; Dist. Ex. 3 at pp. 10-13). Regarding the provision of an FM unit, the August 2010 CSE referred the parent to follow up with the CPSE for an assistive technology evaluation (Tr. p. 175). According to the resultant IEP, a collaborative team teaching (CTT) classroom was considered; however, the August 2010 CSE determined that the student required additional support and services to address her academic needs (Dist. Ex. 3 at p. 15). The August 2010 CSE also considered placement in a "District 75" school; however, the CSE concluded that this setting would be too restrictive for the student and would not provide her with exposure to typically developing peers (Tr. pp. 160, 177; Dist. Ex. 3 at p. 15).

### **Due Process Complaint Notice**

By due process complaint notice dated August 11, 2010, the parent requested an impartial hearing, asserting, in pertinent part, that the district failed to offer the student a free appropriate public education (FAPE) during the 2010-11 school year (Dist. Ex. 1). According to the parent, although the student demonstrated good cognitive potential, her communication difficulties and resulting distractibility negatively affected her social and academic progress absent appropriate language-based interventions (*id.* at p. 2). Additionally, the parent argued that the CSE's recommendation for placement in a 12:1+1 special class would not provide the student with a program that she needed to progress (*id.* at p. 3). The parent maintained that the student required "intensive, specialized language immersion throughout the school day taught by trained professionals," including therapists specifically trained to address her apraxia (*id.*). Moreover, the parent argued that the student required additional support to sustain her attention to tasks in order for her to attain educational benefits (*id.*). Next, the parent contended that the proposed 12:1+1 student-to-teacher ratio would not provide the student with the "constant support, redirection, and individualized attention to her communication deficits" that she needed to progress, and that the recommendation for a 10-month school year would result in regression during the summer recess (*id.*). The parent noted that upon her request to reconvene the CSE, she provided the August 2010 CSE with updated evaluative information regarding the student, and despite sharing her concerns that the student should be immersed in an intensive language-based program, the CSE improperly adhered to its recommendation for a 10-month program in a 12:1+1 classroom (*id.*).

Conversely, the parent argued that SLCD was appropriate for the student because it offered the student a 12-month program where language immersion was incorporated into all subjects and activities throughout the school day (Dist. Ex. 1 at p. 4). She further alleged that the program at SLCD focused on "improving communication in a small, structured, supportive classroom environment with highly trained teachers" and therapists who were trained to treat apraxia (*id.*). As relief, in light of her inability to afford the cost of the student's tuition at SLCD, the parent requested that the district fund the student's tuition for the 2010-11 12-month school year and roundtrip transportation (*id.*).

## Impartial Hearing Officer Decision

On November 10, 2010, the parties proceeded to an impartial hearing which concluded on June 1, 2011, after five days of testimony (Tr. pp. 1-752).<sup>10</sup> In a decision dated July 27, 2011, the impartial hearing officer ordered, among other things, that the district reimburse the parent for the portion of tuition she paid to SLCD, with the balance of the student's tuition payable by the district directly to SLCD (IHO Decision at p. 28). The impartial hearing officer characterized the district's case that it offered the student a FAPE during the 2010-11 school year as "less than convincing" (*id.* at p. 23). In reaching his determination, the impartial hearing officer concluded that the testimony and the evidence did not support the district's assertion that a 12:1+1 special class placement was reasonably calculated to provide the student with meaningful education benefits (*id.* at p. 24). Specifically, the impartial hearing officer found that although the classroom observation reflected that the student was performing at the fourth percentile while enrolled in an 8:1+2 special class, no one from the district assessed her to determine whether she could learn in the recommended 12:1+1 setting (*id.* at p. 21). He further opined that if the district was relying on its March 2010 observation, which showed that the student exhibited severe speech and learning difficulties while enrolled in a more restrictive 8:1+2 setting, it could not be assumed that the student would have received a FAPE in the "far less restrictive environment of a [12:1+1] special education class in a community school" (*id.*). The impartial hearing officer further noted that the student had a diagnosis of apraxia, which aggravated her speech and other deficits, which he opined the district did not address in its efforts to establish that it offered the student a FAPE (*id.* at p. 22). He also concluded that the parent's witnesses consistently testified that a 12:1+1 special class would be too large and overwhelming and not equipped to give the student individualized attention and instruction (*id.*). Regarding the parent's claim that the recommendation for a 10-month school year would result in regression, the impartial hearing officer found that the student needed a 12-month program to avoid regression over the summer months (*id.*).

Regarding the appropriateness of SLCD, the impartial hearing officer found that the district did not establish "by cross-examination or any other evidence that the program was not adequate

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<sup>10</sup> I note that there is nothing in the hearing record that indicates a reason for the inordinate delay between the filing of the due process complaint notice on August 11, 2010 and the end of the impartial hearing on June 1, 2011 (Tr. p. 685; Dist. Ex. 1 at p. 1). Additionally, the hearing record shows that twice during the impartial hearing, the impartial hearing officer solicited requests for an extension of the compliance date from both parties (Tr. pp. 478-79, 751). Such solicitations on the part of the impartial hearing officer violate federal and State regulations governing impartial hearings, which provide that requests for extensions be initiated by a party, and that the impartial hearing officer's written response regarding each extension request be included in the hearing record, even if granted orally (34 C.F.R. § 300.515; 8 NYCRR 200.5[j][5]). While the parties may not complain or may even agree that an extension of time is warranted, such agreements are not a basis for granting an extension and the impartial hearing officer has an independent obligation to comply with the timelines set forth in the federal and State regulations (*see* 34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][3][iii], [5]) and regulatory provisions dictating that extensions of the 45-day timeline may only be granted consistent with regulatory constraints and that she must ensure the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5]). The impartial hearing officer is reminded that it is his obligation, regardless of the parties' positions, to ensure compliance with the 45-day timeline for issuing a decision (*see Application of the Dep't of Educ.*, Appeal No. 11-037; *Application of the Dep't of Educ.*, Appeal No. 08-061; *Application of a Student with a Disability*, Appeal No. 08-064). Additionally, State regulations require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date of the record closure (8 NYCRR 200.5[j][5]; *see* Office of Special Education guidance memorandum dated August 2011 titled "Changes in the Impartial Hearing Reporting System" available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>).

to satisfy the parent's prong two obligation" (IHO Decision at p. 25). Ultimately, he found the parent's choice of SLCD was appropriate (*id.* at p. 26). Among other things, the impartial hearing officer determined that the student had made "some educational progress" at SLCD since her September 2010 admission, which included the use of more understandable words in sentences, longer phrases, and an improved ability to follow and attend to directives (*id.* at pp. 25-26).

Finally, the impartial hearing officer found that the district's argument that the parent had no intention of enrolling the student in a public school placement was unsupported by the hearing record (IHO Decision at p. 26). He noted that the parent's submission of a deposit to SLCD in April 2010 created only a rebuttable presumption that the parent had definitely decided to enroll the student in SLCD (*id.*). The impartial hearing officer reasoned that the deposit merely preserved a place for the student in the event that the district "remained adamant" regarding its recommendation (*id.* at p. 27). The impartial hearing officer further concluded that the parent had supplied the district with notice letters in response to the district's letter recommending an assigned school (*id.* at p. 26). He proceeded to find that the parent attended both CSE meetings with the hope that the district would reconsider and offer the student a program and placement that would constitute a FAPE, and accordingly, through her participation, she cooperated with the district (*id.* at p. 27). In light of the foregoing, the impartial hearing officer concluded that the parent "acted reasonably and in good faith" and he concluded that equitable considerations supported the parent's request for relief (*id.* at pp. 27-28).

### **Appeal for State-level Review**

The district appeals, and maintains that it offered the student a FAPE during the 2010-11 school year. Specifically, the district asserts that the impartial hearing officer's conclusion that the student exhibited severe speech and learning difficulties in her 8:1+2 preschool program was unfounded and accordingly, the CSE's recommended 12:1+1 setting was appropriate to meet the student's special education needs. Furthermore, the district alleges that the August 2010 CSE's recommendation of a special 12:1+1 special class in a community school combined with related services consisting of OT and speech-language therapy would have provided the student with a FAPE in the least restrictive environment (LRE). The district further maintains that regardless of the parent's expert witnesses' recommendations, it was not legally obligated to maximize the student's learning potential; rather, it must offer the student an appropriate program. In addition, the district contends that the CSE's recommendation for a 10-month program was appropriate and that the parent did not send the student to SLCD's summer program during summer 2010. Furthermore, the district alleges that the assigned school would have addressed the student's speech and language needs, including her apraxia.

Regarding the parent's unilateral placement, as a threshold matter, the district alleges that the impartial hearing officer erred to the extent that he misallocated the parent's burden of demonstrating the appropriateness of SLCD. Under the circumstances, the district argues that the impartial hearing officer committed reversible error. Notwithstanding the impartial hearing officer's failure to properly allocate the burden of proof, the district asserts that SLCD was not appropriate for the student because it constituted an overly restrictive setting and did not offer the student any exposure to nondisabled peers.

Finally, the district argues that equitable considerations preclude the parent's claim for relief because she failed to afford the district notice that she would be seeking funding for the student's tuition in accordance with the Individuals with Disabilities Education Act's (IDEA's)

notice requirements. The district also submits that the impartial hearing officer erred to the extent that he awarded relief to the parent that was not specified in the due process complaint notice. Specifically, the district argues that the impartial hearing officer erred because he awarded tuition reimbursement to the parent in addition to direct funding of the student's tuition to SLCD, where the parent did not request such relief. Although the parent requested an award of direct funding of the student's tuition to SLCD, the district further argues that the impartial hearing officer erred in making such an award because the parent did not establish that she was unable to afford the student's tuition costs. In the alternative, the district alleges that if the parent is entitled to relief, an award of tuition reimbursement should be limited to the amount of tuition that she had advanced to SLCD based on the hearing record.

In an answer, the parent requests that the impartial hearing officer's decision be upheld. The parent maintains that the student was denied a FAPE for the following reasons, including but not limited to, that: (1) the recommended 10-month 12:1+1 special class placement would not have provided the student with meaningful educational benefits; (2) the proposed placement would not have addressed the student's apraxia; (3) the progress that the student demonstrated in her preschool classroom does not support the district's allegation that she no longer has severe speech and learning difficulties; (4) given the student's language deficits, the student requires an intensive language program; and (5) the student would not benefit from exposure to typically developing peers. The parent also alleges that the district developed a program for the student without consideration of the evaluative material regarding the student provided to the CSE, which in turn, resulted in a denial of a FAPE to the student.

Next, the parent alleges that the district's contention that the impartial hearing officer misallocated the burden of proof with respect to the appropriateness of SLCD lacks merit. Rather, the parent argues that the impartial hearing officer correctly placed the burden of proof on her and the hearing record demonstrates that SLCD was an appropriate placement for the student. As for the equities, the parent maintains that she afforded the district timely notice of her intent to seek reimbursement. Furthermore, the parent asserts that the impartial hearing officer correctly awarded the parent relief in the form of tuition reimbursement and direct payment to SLCD. Finally, as additional evidence, the parent attaches an affidavit from SLCD showing the amount of tuition that she has paid for the 2010-11 school year and the remaining balance.

The district submitted a reply in which it objects to the parent's offer of additional evidence. Alternatively, should the parent's submission be accepted, the district alleges in part, that the affidavit belies the parent's claim that she is unable to afford the tuition at SLCD. Lastly, the district asserts that the parent's failure to admit or deny a number of allegations in the petition renders such allegations admitted.

### **Applicable Standards**

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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; 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 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]).

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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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).

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]).

## **Discussion**

### **August 2010 IEP**

Turning to the district's contention that the recommendations of the CSE were appropriate because student did not exhibit severe speech-language and learning difficulties when enrolled in the 8:1+2 program at her therapeutic preschool, an independent review of the hearing record reflects that the student had a severe speech-language deficit that pervaded her ability to attend, learn, and functionally use her speech to effectively communicate with others. As discussed below, despite having adequate evaluative information available, the August 2010 CSE did not develop an IEP that was reasonably calculated to enable the student to receive educational benefits.

As further discussed below, the hearing record shows that the student had a diagnosis of apraxia resulting in deficits that the August 2010 IEP did not adequately address, thereby depriving the student of a FAPE (IHO Decision at p. 22). As noted above, the 2009 neurodevelopmental evaluation report, the June 2009 private feeding evaluation report, and the November 2009 private psychological evaluation report indicated the student had been given a diagnosis of CAS and had oral sensory-motor weaknesses and poor motor planning skills (Dist. Exs. 10 at p. 2; 12 at p. 12; 13 at p. 8). In addition, the student's after-school speech-language therapist noted that the student demonstrated a need that resulted in an increase in after-school speech-language services, and she worked on producing intelligible speech so that individuals who were unfamiliar with the student could understand her (Dist. Ex. 7 at p. 2; IHO Ex. X at p. 1). The hearing record includes, among other things, recommendations from the student's developmental pediatrician and private neuropsychologist for the provision of a speech-language pathologist experienced in motor speech disorders and PROMPT therapy to address the student's difficulties related to apraxia (Dist. Exs. 12 at p. 13; 13 at p. 8; 15 at p. 2). Notwithstanding the information that was before the CSE regarding the student's diagnosis of apraxia, the August 2010 IEP did not address the student's

needs as they related to her CAS nor did it describe the student's speech production skills or oral motor weaknesses that she demonstrated as a result thereof (see Dist. Ex. 3). The August 2010 IEP also failed to include information indicating the severity and pervasiveness of the student's speech-language deficits in school, academically, socially, or emotionally (see *id.*).

Additionally, while the August 2010 CSE included a narrative description of the skills the student performed on the PES and used other evaluative information in developing the student's IEP, the resultant IEP lacked information regarding the student's needs and services that were designed to address the student's neurologic disorganization" and the March 2009 neuropsychological evaluation supports the conclusion that the student required additional supports to "learn motor planning for oral, gross, and fine motor skills" (see Dist. Exs. 3 at pp. 3-6; 12 at pp. 12-13). Furthermore, prior to the August 2010 meeting, the school psychologist reviewed evaluation reports and progress reports documented in the hearing record (Tr. pp. 152, 154-56; Dist Exs. 5-15). Although she indicated that the student's abilities were a consideration in the CSE's determination for 10-month placement in a 12:1+1 special class in a community school, she further testified that evaluation results revealed the student's cognitive and readiness skills were "close to average," and therefore, the recommended placement would have been appropriate for the student because it would have provided her with a differentiated curriculum and the opportunity to interact with typically developing peers (Tr. pp. 159-60). The school psychologist also testified that the CSE recommended speech-language therapy and OT to address the student's speech-language and fine motor deficits (Tr. p. 163). However, consistent with the impartial hearing officer's conclusion that the district failed to address the student's needs related to her apraxia, the school psychologist focused on the student's "receptive and expressive language delays" instead of speech-language needs related to her apraxia (Tr. pp. 162-63, 169-70, 185).<sup>11</sup> Moreover, the school psychologist did not otherwise recall discussion about the student's apraxia and the needs that resulted from it during the August 2010 CSE meeting (Tr. pp. 194-95). Additionally, the August 2010 CSE maintained its recommendation for a 12:1+1 special class in a community school notwithstanding the March 2010 PES results that indicated that the student was performing at the 4th percentile compared to her peers (Dist. Ex. 5 at p. 4).

The failure to describe the student's needs as they relate to the student's apraxia in the present levels of performance was not cured in any other portions of the IEP. Although the August 2010 IEP contained speech-language goals and management needs the goals and management needs did not target the student's oral motor speech or feeding deficits; and therefore were not sufficiently tailored to address the student's unique needs (Tr. pp. 172-73, 246; see Dist. Ex. 3 at pp. 8-13). Based on the foregoing, the hearing record supports the impartial hearing officer's conclusion that the student exhibited severe speech and learning difficulties that the August 2010 CSE failed to address in developing her IEP (IHO Decision at p. 21).

### **Extended School Year Services**

Turning next to the district's contention that the hearing record supports the August 2010 CSE's recommendation for a 10-month program, a review of the hearing record shows that student

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<sup>11</sup> The clinical neuropsychologist who supervised the neuropsychologist that conducted the November 2009 psychological evaluation also testified that the student's language deficits were not "just a delay" (Tr. p. 344). He indicated the student's deficits interfered with her ability to learn "in all areas;" in her "ability to partake of therapies, her ability to interact with peers, all areas of social, emotional, and educational functioning" (Tr. p. 345).

would have substantially regressed had she not received extended school year (ESY) services; therefore, the recommendation for a 10-month school year was not designed to confer educational benefits to the student.

Pursuant to State regulations, students "shall be considered for [ESY/] 12-month special services and/or programs in accordance with their need to prevent substantial regression, . . . who, because of their disabilities, exhibit the need for a 12-month special service and/or program provided in a structured learning environment of up to 12 months duration in order to prevent substantial regression as determined by the committee on special education" (8 NYCRR 200.6[k][1], [k][1][v]; see Application of the Bd. of Educ., Appeal No. 11-058; Application of a Student with a Disability, Appeal No. 09-088; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-047; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-073; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 C.F.R. § 300.106 [defining ESY]).<sup>12</sup>

Despite recommendations from the student's private evaluators that called for 12-month programming for the student because without it, she would regress,<sup>13</sup> the school psychologist testified that in light of the student's cognitive ability and academic readiness, the CSE believed there would not be any "significant regression" if the student did not receive services over the summer (Tr. pp. 161; Dist. Exs. 12 at p. 13; 14 at p. 2; 15 at p. 2). Consistent with the student's developmental pediatrician's testimony, the parent testified that the student experienced some regression during regular school breaks (Tr. pp. 409, 642-43). The student's speech-language pathologist testified that the student had regressed following a one week vacation, and therefore, she opined that the student "would [not] benefit from being off for an entire summer" and that material needed to be taught to the student at a much slower pace, thereby necessitating 12-month programming (Tr. p. 598). The student's classroom teacher at SLCD also indicated that anything

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<sup>12</sup> The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.p12.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

<sup>13</sup> Testimony by the neuropsychologist indicated that the student needed 12-month programming because she required "coordination of care," "intensive therapy," and "intensive programming" throughout the curriculum to make appropriate gains, maintain what she already learned, and not regress and without 12-month programming, the student would regress (Tr. pp. 234-35, 240-41, 243, 286-87).

less than 12-month instruction would result in regression for the student (Tr. pp. 699-700, 726). Furthermore, the social worker from the student's center-based preschool program indicated that at the August 2010 CSE meeting, she advocated for the student to attend a 12-month program to avoid regression over the summer (Tr. pp. 494-95). The evidence in the hearing record relevant to the issue of ESY services supports the conclusion that the student would have substantially regressed if not provided with 12-month services. Accordingly, based on the above evidence demonstrating that the student would have experienced substantial regression without ESY services, I find that the hearing record supports the impartial hearing officer's determination that the district's decision not to offer 12-month services denied the student a FAPE.

Based on the foregoing deficiencies in the student's IEP, the hearing record does not support a finding that the district offered the student a FAPE during the 2010-11 school year.<sup>14</sup>

### **Appropriateness of the Parent's Unilateral Placement**

Having found that the district failed to offer the student a FAPE, I turn now to the appropriateness of the parent's placement of the student at SLCD. A unilateral 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 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). 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

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<sup>14</sup> I do not agree with the impartial hearing officer's conclusion that the evidence in the hearing record adequately shows one way or the other whether the student can be placed in a 12:1+1 special class setting, provided that her IEP had otherwise been appropriate. The impartial hearing officer concluded that the district was required to "assess" the student prior to recommending placing her in a 12:1+1 special class setting (IHO Decision at p. 21). The impartial hearing officer essentially held the district to a standard of having to guarantee that the student would progress by conducting an assessment to prove that a particular placement would result in progress, however, there is no such requirement, and there is no claim in this case that the district failed to consider appropriate evaluative information when formulating the student's IEP. I also note that the impartial hearing officer's discussion of LRE had little, if anything, to do with the student's access to her nondisabled peers (IHO Decision at p. 21; see Newington, 546 F.3d at 119-20).

[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"]]).

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).

Initially, the district claims that the impartial hearing officer misallocated the burden of proof regarding the appropriateness of SLCD. Although the impartial hearing officer may have used less than optimal language in describing the district's cross examination in one instance, upon review of the impartial hearing officer's decision in its entirety, it does not amount to "reversible" error and it is clear that the impartial hearing officer recited the proper standard at the outset of his discussion of SLCD (IHO Decision at pp. 24, 25). Moreover, I have independently reviewed the evidence in the hearing record, and find that regardless of which party bore the burden of proof with respect to this issue, the evidence in the hearing record reflects that SLCD provided the student with specially designed instruction designed to meet her unique educational needs.

According to the hearing record, SLCD services students with speech and language impairments characterized by severe speech-language difficulties and the school's class ratios are 12:2+2 and 6:1+1 (Tr. pp. 514-15). The school year runs from September through August (Tr. p. 530). The SLCD psychologist indicated that "language encompasses all of learning" and that everything presented across all subject areas at SLCD is presented through language immersion (Tr. pp. 521, 527). She noted that SLCD provides intensity of instruction and individualized attention and offered "a lot of language stimulation throughout the entire day" (Tr. p. 515). The psychologist also described the use of a "transdisciplinary" approach, whereby everyone in the building, regardless of the subject area, used language strategies in their instruction (Tr. p. 516; Parent Ex. U). Students were also grouped based on their cognitive and functional levels, and their language needs (Tr. p. 517). As part of the transdisciplinary program, the psychologist testified that material was presented in shorter and simpler syntactic forms (*id.*). She also described the utilization of a multisensory approach to compensate for students' auditory linguistic processing weaknesses, which involved the use of visual, tactile, and mnemonic devices (Tr. pp. 517-18). The hearing record also reflects that instruction was broken down and verbally presented slowly in short, syntactically simplified ways to accommodate students with language processing difficulties

(Tr. p. 518). The SLCD psychologist also noted that as part of instruction, staff rephrased and expanded the language expressed by the students to compensate for their expressive organizational and narrative weaknesses, to build upon their weaknesses, and to teach them to speak (*id.*). She added that cuing was also provided to students to assist their recognition of information and language development, instead of relying on students' weak recall abilities (Tr. pp. 518-19). The SLCD psychologist testified that the students' attention was "actively sought," given that many students experienced difficulty with attention (Tr. p. 519). Staff also repeated essential concepts in a verbally simplified manner and provided structure to reduce distraction (*id.*). The SLCD psychologist noted that SLCD taught "over-learning" strategies, so that various concepts became rote for students with memory and retrieval language difficulties in addition to phonetic principles and decoding strategies to enable students to automatically decode (Tr. p. 520). Furthermore, the SLCD psychologist described the constant communication between parents and teachers through communication books, video, meetings, and parent training (*id.*). The SLCD psychologist also described the provision of related services available at SLCD, and the provision of related services with respect to the student in the instant case who received three individual speech-language therapy sessions and two group (3:1) speech-language therapy sessions per week, as well as two individual OT sessions per week (Tr. pp. 521, 528, 553-54).

With regard to the student in this case, the student's SLCD speech-language pathologist testified regarding the use of specially designed instruction that was designed to address the student's speech-language needs related to her apraxia. For example, the student's speech-language pathologist addressed her feeding difficulties by consistently providing her with verbal and physical cues during the ingestion process (Tr. pp. 282-83). To address the student's apraxia and motor planning for speech purposes, the speech-language pathologist indicated that using principles of PROMPT therapy, she placed her hands on the oral motor aspects of the student's face (lips, chin, cheeks) to help restructure and facilitate her oral musculature for appropriate (speech) sound production and to decrease the student's use of jargon (Tr. pp. 583-84). To target speech sounds with the student, the therapist described the use of repetition and visual, tactile, and sensory cues (Tr. p. 589). In her speech-language therapy sessions, the student used scripts modeled by the speech-language pathologist during role-play of various social situations such as playing on the playground, cooking, and playing house, in order to help the student increase her functional use of language so that she might communicate her wants and needs and decrease her frustration in different situations (Tr. p. 584).

The speech-language pathologist further noted that each classroom at SLCD has an FM (amplification) system, which projected the teacher's voice in order to help students focus and increase their attention, to which the student in this case responded well (Tr. p. 585). Moreover, the speech-language pathologist used a classroom behavior management plan in the student's speech-language therapy sessions to increase her attention, in-seat behaviors, and ability to follow directions and complete tasks (Tr. pp. 585-86). Additional strategies used included scaffolding instruction, use of resources and guides and templates to support the student's learning of different concepts and skills which were gradually faded as she demonstrated success with a particular task; however, tasks were often revisited to ensure the student's comprehension and knowledge of newly learned skills (Tr. p. 586).

The speech-language pathologist also testified that she presented information slowly to the student during therapy sessions to enable her to process information and give her time to respond to questions (Tr. p. 587). The student was also provided with repetition, rephrasing and expansion

of information to help clarify the message (*id.*). According to the speech-language pathologist, she presented new material within the context of previously learned information, combined with cuing presented in a hierarchy to provide the student the opportunity to participate in an "optimal thought process with as little support as needed" (*id.*). Although the speech-language pathologist's main objective for the student was for the student to respond independently, she provided more explicit prompting to the student as needed (Tr. p. 588). In addition, the speech-language pathologist met regularly with the student's classroom teacher on a formal and informal basis to discuss the student's strengths, weaknesses, the instructional strategies used, and make recommendations on how to reach goals (Tr. pp. 590-91).

### **Restrictiveness of SLCD**

Turning next to the district's contention that SLCD constituted an overly restrictive setting for the student because she would not be exposed to nondisabled peers, while parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (*Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 [1st Cir. 2002]; *M.S. v. Bd. of Educ.*, 231 F.3d 96, 105 [2d Cir. 2000]). In this case, the hearing record reflects that the student required a structured classroom and substantial individualized attention to address among other things, her high distractibility (Tr. p. 699). According to the student's classroom teacher at SLCD, in her 6:1+1 class the student was grouped with classmates between the ages of five and six years old with similar social, language and communication skills, as well as similar academic skills (Tr. pp. 701, 732; *see* Parent Ex. T). The student's 6:1+1 class was also comprised of students with reading levels that ranged between pre-readiness to kindergarten, and math levels that were at kindergarten level and emerging (Tr. p. 701).<sup>15</sup> The teacher noted that the student was better able to focus in the 6:1+1 class given the lack of distractions, and the provision of constant redirection and support to maintain her on task for longer periods of time (Tr. p. 699). She further noted that in light of the student's difficulty eating in front of the other five students in her class at SLCD with whom she was familiar, it was unlikely the student would achieve satisfactorily in mainstreaming situations for special subject areas with regular kindergarten class students with whom she was unfamiliar (Tr. pp. 597-98, 605-06). Under the circumstances presented above, I decline to find that the parent's placement of the student at SLCD was not appropriate because it was overly restrictive.

### **Progress at SLCD**

Finally, while evidence of progress at SLCD, or a lack thereof, would not by itself be sufficient to establish that SLCD was appropriate; progress is nevertheless a relevant factor that may be considered (*see Gagliardo*, 489 F.3d at 115; *Stevens v. New York City Dep't of Educ.*, 2010 WL 1005165, at \*8-\*9 [S.D.N.Y. Mar. 18, 2010]; *see also Application of the Dep't of Educ.*, Appeal No. 11-051). The hearing record in this case supports the impartial hearing officer's finding that the student demonstrated progress in her identified areas of need at SLCD for the 2010-11 school year (IHO Decision at p. 26). For example, the student's February 2011 progress report from SLCD revealed that since September 2010, the student was making various degrees of progress on 63 annual goals that addressed her needs related to speech-language,

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<sup>15</sup> The student's special education classroom teacher from SLCD testified that the student was on the kindergarten level for reading and math (Tr. p. 738).

social/emotional/behavioral, motor, and basic cognitive/daily living skills (Parent Exs. Z at pp. 2-11; AA at pp. 2-11).

According to the psychologist from SLCD, when the student first arrived at the school, she engaged in echolalia, used jargon and made-up nonsense language, and exhibited expressive and receptive language difficulties (Tr. p. 522). The student also relied on contextual visuals, only followed one-step directions, was easily distracted, and showed some oppositional behavior (*id.*). Consequently, the student was placed in a 6:1+1 class in order to receive the intensity of instruction that she required with fewer distractions (*id.*). Based on her observations of the student since starting at SLCD, the psychologist testified that the student's oppositional behavior had decreased and she participated more in class (Tr. p. 528).

Additionally, the student's speech-language pathologist testified that she had established "a great rapport" with the student (Tr. p. 594). The speech-language pathologist stated the student responded well to tasks that involved hands-on activities and included manipulatives, as well as verbal praise and tangible rewards such as stickers or gummy fruit snacks (Tr. pp. 581, 602-03). In terms of the student's progress since starting at SLCD in September 2010, the speech-language pathologist described the student's speech as more intelligible and noted that the student experienced fewer communication breakdowns (Tr. pp. 578-79, 592). Despite the student's continued use of jargon, she used more understandable words in her sentences and longer phrases (Tr. p. 593). According to the speech-language pathologist, the student was also starting to pair nouns with actions, and demonstrated a better understanding of categories and objects that belonged within certain categories, which was seen in her ability to use different noun and verb endings, in counting, in spelling, in reading, and in phonological awareness skills (*id.*). In addition, the speech-language pathologist also described tremendous improvement in the student's letter-sound correspondence and in her ability to identify and comprehend basic concepts (*id.*). The student was also using phrases to comment more on her surrounding environment (*id.*). The speech-language pathologist also noted improvement regarding the student's ability to follow and attend to directions and with respect to her in-seat behaviors, which she attributed to the utilization of SLCD's classroom management strategies (Tr. p. 594). Additionally, she characterized the student's use of functional communication as "somewhat improved," and explained that the student displayed the ability to request certain desired items, and to greet and comment (*id.*). Consistent with the speech-language pathologist's testimony, the student's classroom teacher from SLCD indicated the student was making "slow and steady progress" in her 6:1+1 class academically and in all of her developmental domains, including feeding (Tr. pp. 723, 726).

Based on the foregoing, I find that the hearing record contains sufficient information to conclude that the parent has met her burden to show that SLCD was an appropriate unilateral placement for the student for the 2010-11 school year. In reaching this conclusion, I have considered the "totality of the circumstances" and have determined that the placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the student's unique needs, supported by such services as were necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

### **Equitable Considerations**

The final criterion for a reimbursement award is that the parent's 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, 315 F.3d at 27; see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at \* 13 [E.D. Pa. Oct. 22, 2007]).

Here, the district contends that equitable considerations should preclude relief because the parent failed to provide notice of her intent to seek funding for the student's tuition at SLCD in accordance with the IDEA; however, as detailed below, the hearing record does not substantiate the district's claim. Here, the hearing record reflects that following the March 2010 CSE meeting, the parent repeatedly communicated her concerns to the CSE, availed herself of the opportunity to visit the assigned school, and timely notified the district of her intention to enroll the student at SLCD (Parent Exs. E; F). Subsequent to the August 2010 CSE meeting during which time the district recommended the same program to which the parent had been objecting, on August 11, 2010, through her attorney, the parent requested an impartial hearing in which she advised that she would be seeking funding from the district for the student's tuition at SLCD, where she planned to unilaterally place the student for the upcoming school year (Dist. Ex. 1 at pp. 1, 4; see Application of a Student with a Disability, Appeal No. 11-017 [noting that the due process complaint notice served as the 10-day notice where the student had not yet been removed from the school district at the time the complaint was filed]). Additionally, by letter dated August 23, 2010, the parent

followed up her request for an impartial hearing, reiterating her concerns regarding the challenged IEP and assigned school and again advised the district of her intention to place the student at SLCD (Parent Ex. X). On September 20, 2010, the student began attending SLCD (Parent Exs. V; W at p. 2).<sup>16</sup> Based on the foregoing, I will not disturb the impartial hearing officer's conclusion that the equitable considerations favor the parent's claim for relief.

### **Additional Evidence**

Before considering the relief in this case, as additional evidence, the parent has submitted with her answer an affidavit signed by the bookkeeper from SLCD, showing the tuition that she has paid to SLCD and the remaining balance. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 11-096; Application of a Student with a Disability, Appeal No. 10-096; Application of a Student with a Disability, Appeal No. 09-098; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The affidavit was not available at the time of the impartial hearing, however, I will accept the affidavit because it contains information that is necessary and relevant to a decision in this matter.<sup>17</sup>

### **Relief**

As relief, the parent requests tuition reimbursement in addition to direct funding of the balance of the student's tuition at SLCD. The district alleges that by awarding partial tuition reimbursement to the parent, the impartial hearing officer improperly awarded the parent relief that she did not request in her due process complaint notice. However, during the impartial hearing, the parent submitted evidence that she incurred some out-of-pocket expense for the student's tuition, and the district did not object to her offer of proof (Tr. pp. 635-36; Parent Exs. A; H). While the parent was required to describe the nature of the problem in her due process complaint notice, she was only required to state her proposed resolution to the extent it was known to her at the time of the complaint (B.W. v. New York City Dept. of Educ., 716 F.Supp.2d 336, 347 [S.D.N.Y. 2010]; see 20 U.S.C. § 1415[b][7][A][ii][IV]; 34 C.F.R. § 300.508[b][5][6]; 8 NYCRR 200.5[i][1][v]). Moreover, the impartial hearing officer's award of partial reimbursement upon proof of payment is consistent with the IDEA's grant of authority to fashion appropriate relief, and accordingly, I decline to disturb it on the basis of how the parent framed her claim for the costs of the student's tuition at SLCD (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy"]; see also Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 388 [N.D.N.Y. 2001]).

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<sup>16</sup> The parent testified that the student's start date at SLCD was delayed due to confusion regarding the student's bus transportation (Tr. pp. 654-55).

<sup>17</sup> Although attached as a new exhibit to the parent's answer, for convenience, I will refer to the exhibit in this decision consistent with the parent's reference of "Parent Ex. DD" (Answer ¶ 119).

The district further alleges that the parent has not presented evidence that sufficiently proves that she is financially unable to front the cost of the unilateral placement. In a case of first impression, one court has recently held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A v. New York City Dep't of Educ., 2011 WL 321137 at \*22 [S.D.N.Y. Feb 1, 2011]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 358-60 [S.D.N.Y. 2009]). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A, 2011 WL 321137 at \*24).<sup>18</sup> Since the parent has selected SLCD as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether she has the financial resources to "front" the costs of SLCD (Application of a Student with a Disability, Appeal No. 11-041).

Although unnecessary to my determination in this case, I note that in Mr. and Mrs. A., the court did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F.Supp.2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]; Application of a Student with a Disability, Appeal No. 11-041).

The district claims that the tuition payments made by the parent undermine her allegation that she is financially unable to afford the student's tuition. On April 5, 2010, the refundable deposit was made to SLCD (Tr. pp. 635-36; Parent Ex. H). On April 16, 2010, the parent entered into a tuition agreement with SLCD (Parent Ex. I). According to the affidavit signed by the SLCD bookkeeper, the parent has paid \$22, 994.90 toward the student's 2010-11 school year tuition; however, it is not clear whether the parent made these payments or whether a third party made the payments (Pet. Ex. DD). According to the evidence, a balance of \$20,695.60 remains (id.). The hearing record further reveals that during the 2010-11 school year, the parent was not married and had another child residing at home (Dist. Ex. 12 at p. 6; Parent Exs. L at p. 2; O at p. 1). The parent was employed and for 2010, she reported a taxable income of \$13,000 and listed her filing status as head of the household (Parent Ex. CC at p. 1). While the forgoing presents a partial

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<sup>18</sup> The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

picture of the parent's financial resources as it relates to the education of the student, it does not provide sufficient information for a meaningful analysis of the parent's request for relief. For example, the hearing record indicates that the student's father saw her frequently but he did not reside in the home (Dist. Ex. 12 at p. 6; Parent Ex. O). Regarding the student's father, the hearing record shows that he was employed; however, it offers no information regarding his income, financial resources, or the parents' custodial arrangements or the allocation of responsibilities regarding the student (Dist. Ex. 12 at p. 6). In short, when a single parent seeks direct funding due to a lack of financial resources, there should be some evidence showing why the other parent's financial resources, or lack thereof, should or should not be considered before determining that the student's placement should be directly funded at public expense due to the parents' financial circumstances. Under these circumstances, I am constrained to agree with the district that the parent has not met her burden to establish that there were insufficient financial resources to "front" the student's tuition costs for the 2010-11 school year (Mr. and Mrs. A, 2011 WL 321137, at \*22). Accordingly, I will direct relief in the form of reimbursement upon proof of payment.

### **Conclusion**

In summary, I find that the district failed to offer the student a FAPE, that the parents' unilateral placement at SLCD was appropriate, and that equitable considerations support the parent's claim; however, the parent failed to establish that she lacked the financial resources to front the student's tuition costs at SLCD for the 2010-11 school year. I will direct that the district reimburse the parent for \$22,994.90 of the student's tuition costs at SLCD for the 2010-11 school year. The district shall reimburse the parent for the remaining balance of the student's outstanding tuition costs for the 2010-11 school year upon the parents' submission of proof of payment. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

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

**IT IS ORDERED** that the impartial hearing officer's decision dated July 27, 2011 is annulled to the extent that he ordered the district to directly fund a portion of the student's tuition costs at SLCD for the 2010-11 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the remaining costs associated with the student's tuition at SLCD for the 2010-11 school year upon the parent's submission of proof of payment.

**Dated:** Albany, New York  
November 2, 2011

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**