



The University of the State of New York

The State Education Department State Review Officer

No. 07-098

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 child with a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Mariam Mahmood-Qureshi, Esq. and Vida Alvy, Esq., of counsel

Law Offices of Deusdedi Merced, P.C., attorney for respondent

DECISION

Petitioner, the New York City Department of Education, appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's daughter and ordered it to reimburse respondent for her daughter's tuition costs at the Communities Acting to Heighten Awareness and Learning (CAHAL) program at the Hebrew Academy of the Five Towns and Rockaway (HAFTR) for the 2006-07 school year. The appeal must be dismissed.

At the commencement of the impartial hearing on May 3, 2007, respondent's daughter was attending a CAHAL special education class at HAFTR (Tr. pp. 257-59, 399). The CAHAL program at HAFTR has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an other health impairment is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9];¹ 8 NYCRR 200.1[zz][10]).

¹ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

The student received early intervention speech-language services beginning when she was nine months old (Parent Exs. B at p. 1; G at p. 1).² In September 2003, the student became eligible for services from petitioner's Committee on Preschool Special Education (CPSE) and enrolled in a private early education center (Parent Exs. B at p. 1; E at p. 1). As of March 2005, she continued to be enrolled in that early education center and was receiving instruction in a 12:1+2 special education class as well as speech-language therapy, occupational therapy, and physical therapy as part of a 12-month program (Parent Ex. F). During the 2004-05 school year, the student underwent "a reevaluation for the turning-five transition" as she became eligible for services from petitioner's Committee on Special Education (CSE) (Parent Exs. G at pp. 1, 2; J at p. 11; see also Parent Exs. B; C; D; E; F). The hearing record indicates that the student made progress in all areas during the 2004-05 school year but that deficits and/or delays continued (Parent Exs. B at p. 4; C at pp. 1, 2; D at pp. 1, 2; E at pp. 1, 3). A number of reports prepared at the time stated that respondent's daughter had been diagnosed with Pervasive Developmental Disorder (PDD) (Parent Exs. B at p. 1; E at p. 1; F; G at p. 1). The primary source of this diagnosis is not included or referenced in the record.

For the 2005-06 school year, the student attended a 12:1+1 kindergarten CAHAL class at the Hebrew Academy of Nassau County (HANC) (Tr. p. 201; Dist. Ex. 9 at p. 1). The student's parents enrolled her at CAHAL at HANC because of their belief that petitioner did not offer their daughter a free appropriate public education (FAPE) for that school year (Parent Ex. J at pp. 1-2).³ During the 2005-06 school year, petitioner provided the student with occupational therapy, physical therapy, and speech-language therapy as related services (see Dist. Exs. 4 at p. 1; 10; 13; 14). During the second half of the 2005-06 school year, a number of evaluation reports relating to the student were prepared (Dist. Exs. 4; 5; 8; 9; 10; 11; 13; 14; Parent Ex. R). As part of the annual review process, petitioner also sent the student's parents a physical examination form and requested that it be completed by the student's physician (Tr. pp. 214-15, 228; Dist. Ex. 18). The student's parents did not return a completed physical examination form to the CSE (Tr. pp. 215, 228).

On March 9, 2006, the student's speech-language therapist prepared an annual speech-language review (Dist. Ex. 11). The student was administered a test identified as the Test of Oral Language Development-P:3 (id. at p. 2). According to the speech therapist, the student's overall language score was measured at the 5th percentile, placing her in the below average range of

² The record contains multiple duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both a District and Parent exhibit were identical. I remind the impartial hearing officer that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

³ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).

functioning (id.). Although subtest scores were not included in the annual review document, the speech therapist reported that the student's age equivalency scores ranged from below the three year level to the six year-six month level (id.). The speech therapist described the student as friendly and cooperative and noted that during therapy sessions the student was able to maintain eye contact and demonstrate appropriate in-seat behavior (id. at p. 1). The speech therapist noted that the student participated in conversational exchanges but rarely initiated them (id.). In addition, the speech therapist reported that the student's attention to task was variable, but that she was easily redirected and responded well to verbal praise and tangible rewards (id.). According to the speech therapist's report, the student's spontaneous speech sample was characterized by grammatical errors, and the student needed to develop her ability to identify and express similarities and differences, as well as her descriptive language (id.). The speech therapist highlighted the student's auditory sequential memory as an area in need of improvement and noted that her skills in this area were progressing (id.). The speech therapist also indicated that the student seemed to be making steady progress in phonemic awareness and concept development and that her articulation, fluency and rate of speech had been judged to be within normal limits (id.). For the 2006-07 school year, the speech therapist recommended goals related to improving the student's semantic and morphological skills, her pragmatic skills, and her auditory skills (Dist. Ex. 12).

A petitioner staff person observed the student in her kindergarten class on March 29, 2006 (Dist. Ex. 8). The observer reported that the student followed the teacher's directions and moved easily from one activity to another (id. at p. 1). With respect to the student's transitions, the student's classroom teacher advised the observer that the student needed a schedule, posted on the board in the classroom and discussed periodically (id.). The student participated in circle time activities and raised her hand to be called on (id.). During one circle time period the student wore a weighted vest (id.). According to the observer, the student appeared to get along well with her peers, was a very good listener, and had a robotic quality to her movements as she walked around the classroom (id.).

In a teacher report dated March 29, 2006, the student's kindergarten teacher at CAHAL assessed the student's academic and school related skills (Dist. Ex. 9). According to the classroom teacher, the student was developing a small sight vocabulary and had excellent grapheme-phoneme correspondence and rhyming skills (id. at p. 1). The student could decode short vowel words (id.) and also spell short vowel words with help in enunciating the parts (id. at p. 2). The teacher reported that the student understood simple details in stories, but had significant issues in processing, organizing and retelling information presented (id. at p. 1). The teacher indicated that the student's thinking was very concrete and that she could not understand inferences or cause and effect (id.). With regard to mathematics, the teacher reported that the student knew the numbers 1-12 and demonstrated 1:1 correspondence but that she had difficulty making "more" than a given number (id.). In addition, the student had difficulty seeing comparisons of sets and using math vocabulary like "fewer" and "more" to evaluate differences (id.). The teacher rated the student's work in social studies as satisfactory (id.). She reported that the student's grammar and syntax revealed errors in tense, agreement and word order (id. at p. 2). According to the classroom teacher, the student's expressive and receptive language skills were "below age level of functioning" and her answers to questions were at times tangential and sounded like memorized, robotic responses (id.). The teacher described the student as "well-motivated" and characterized her ability to show self-control, as well as her organization of work and work pace, as excellent (id.). The teacher indicated that the student followed directions well and would finish all tasks and

produce a fairly accurate paper (id.). She stated that the student required many repetitions to learn new concepts and retain them (id.). The teacher noted that the student had good attention (id.). However, she reported that at times the student would self-stimulate by shaking her head, flapping her arms and rocking (id.). According to the teacher, the student did not engage with classmates socially but would follow along in their activity (id.). The teacher reported that respondent's daughter had some anxiety but would attempt new tasks (id.).

In a related service progress report dated April 12, 2006, the student's physical therapist reported that the student continued to demonstrate gains in physical therapy including jumping forward and backward and balancing on one foot (Dist. Ex. 13). The therapist stated that the student continued to have difficulty with head/trunk dissociation and rotating during all gross motor activities (id.). She characterized the student's gross motor skills as fair (id.). The therapist recommended that the student continue to receive individual physical therapy twice weekly for 30 minute sessions (id.).

In a written report dated April 24, 2006, the student's occupational therapist reported that the student's fine motor/manipulation skills had improved and were age appropriate (Dist. Ex. 14). The therapist also reported that the student's visual motor skills had improved. However, the therapist indicated that the student continued to have some difficulty with convergence, which impacted her ability to track objects as they moved closer and farther from her body (id.). According to the occupational therapist, the student demonstrated some progress in visual perceptual skills (id.). The occupational therapist described respondent's daughter as a concrete thinker who benefited from visual cues, opportunities to practice a skill, and modeling (id.). The therapist reported that the student had difficulty with abstract concepts, following multistep directions, understanding spatial relationships and motor planning novel activities (id.). Because of the student's progress in the area of fine motor skills, the therapist recommended reducing her occupational therapy to once a week to address sensory processing and visual perceptual deficits (id.).

On May 4, 2006 petitioner's social worker conducted an updated social history with respondent serving as informant (Dist. Ex. 4 at p. 1). The update indicated that the student was doing well in her 12:1+1 classroom where she received speech-language therapy, occupational therapy, and physical therapy as related services (id.). The social worker indicated that respondent reported "a big improvement" in the student's expressive speech and some continued problems with grammatical issues and articulation (id.). Respondent felt that the student required occupational therapy for sensory issues and reported that the student had overall upper body weakness (id.). While not demonstrating overt behavior problems, the student was noted to clap her hands in class and shake her head (id.). The update indicated that the student's attention varied from activity to activity but that she was able to engage in a task for a long period of time with consistent focusing (id.). It reported that for the most part the student got along well with teachers and peers (id.). The updated social history indicated that the student did not have any unusual physical problems or illnesses (id. at pp. 1-2).

Petitioner's school psychologist conducted an evaluation of the student in May 2006 (Dist. Ex. 5). The evaluation included interviews with the student and respondent, a review of records, administration of the Woodcock Johnson III Tests of Achievement (WJ-III) and the Bender Visual-Motor Gestalt Test, Second Edition (Bender-Gestalt II), projective testing, and the use of the Gilliam Autism Rating Scale (GARS) (id. at p. 2). The school psychologist noted that the student

had a prior diagnosis of PDD (id. at p. 1). She described the student as well motivated and cooperative until the end of the evaluation (id. at pp. 1-2). She observed that the student had good eye contact, but also indicated that the student clapped her hands and shook her head a lot, and that she was fidgeting or doing dancing like movements in her seat (id. at p. 1).

The psychologist did not perform cognitive testing of the student in May 2006. Her evaluation report referenced the most recent psychological evaluation of the student conducted in July 2003 which had included the administration of the Wechsler Preschool and Primary Scale of Intelligence - Third Edition (WPPSI-3) (Dist. Ex. 5 at p. 2; see Parent Ex. A at pp. 2, 4). The psychologist reported that in the student's 2003 cognitive testing, the student had attained a full scale IQ score of 77, which had placed her in the borderline range of intellectual functioning (Dist. Ex. 5 at p. 2). The psychologist also reported that the 2003 cognitive testing had evidenced a significant 18-point discrepancy between the student's verbal (SS 88) and performance IQ scores (SS 70) with the student's verbal IQ score falling in the low average range and her nonverbal skills falling in the borderline range (id.). Administration of the WJ-III in May 2006 yielded the following standard (and percentile) scores: letter word identification 113 (81st percentile), calculation 112 (78th percentile), spelling 118 (88th percentile), passage comprehension 108 (70th percentile), applied problems 97 (42nd percentile) and writing samples 134 (97th percentile) (id. at p. 6). Based on the student's performance on the WJ-III, the psychologist concluded that the student's academic skills and her ability to apply those skills were both within the high average range when compared to others at her age level (id. at pp. 2, 5).

The student's scores on the GARS stereotyped behaviors scale (SS 8, 25th percentile) and developmental disturbances scale (SS 10, 50th percentile) suggested that her "degree of severity was average for probability of autism" (Dist. Ex. 5 at pp. 3, 4). With regard to stereotypical behaviors, respondent reported that the student frequently flicked her fingers or hands in front of her eyes, ate specific foods while refusing to eat what most people usually eat and flapped her hands or fingers in front of her face or at her sides (id. at p. 3). Regarding developmental disturbances, respondent reported delays in the student's acquisition of speech and noted that as an infant her daughter spent a great amount of time rocking when awake (id.). The student's score on the GARS communication scale (SS 6, 9th percentile) and social interaction scale (SS 6, 9th percentile) placed her in "the below average degree of severity for the probability of autism" (id. at pp. 3, 4). With respect to communication, respondent reported that the student frequently used pronouns inappropriately and sometimes repeated words or phrases (id. at p. 3). She reported that the student was seldom observed repeating words out of context, looking away or avoiding looking at a speaker when her name was called (id.). Relative to social interactions, respondent reported that the student frequently became upset when routines were changed and sometimes did things repetitively or ritualistically (id. at p. 4). However, she reported that the student was seldom observed avoiding eye contact, resisting physical contact, withdrawing in a group situation or behaving in an unreasonably fearful or frightened manner (id.). According to the psychologist, the student's autism quotient standard score of 83 (13th percentile) on the GARS indicated that the probability that the student was autistic was below average (id. at pp. 3, 5).

The psychologist reported that the student performed in the average range on the Bender-Gestalt II (Dist. Ex. 5 at p. 5). The psychologist noted that the student had poor organizational skills and was not able to recall any designs (id. at p. 4). She concluded that the student had poor short term memory for details or was perhaps unwilling to do the task (id.). With regard to the

student's social emotional functioning, the psychologist reported that the student presented as a serious, friendly and cooperative child who appeared to enjoy individual attention (id. at pp. 4, 5). She noted that the student's relationships with peers and adults reportedly seemed to be appropriate (id.).

By notice dated May 25, 2006, petitioner's CSE Chairperson advised respondent that the CSE had scheduled a meeting to discuss the student and for her annual review (Dist. Exs. 15; 19; see also Dist. Exs. 6; 7).

Petitioner's CSE met on June 9, 2006 to develop the student's individualized education program (IEP) for the 2006-07 school year (Tr. p. 104; Dist. Ex. 1). According to the district representative/psychologist who attended the CSE meeting, the CSE reviewed reports including the social history update, the May 4, 2006 evaluation report prepared by petitioner's psychologist, the related services provider reports, and the classroom observation (Tr. pp. 103, 128).⁴ The CSE discussed the student's overall level of functioning, her speech-language issues, her behavioral concerns, her fine motor and gross motor concerns as well as the proposed 12:1+1 recommendation (Tr. pp. 129, 148). According to the district representative, the CSE prepared the student's present levels of performance and statements relating to the student's needs based on the reports and the discussion at the CSE meeting (Tr. pp. 115-20), and the CSE discussed the student's goals and objectives, except for the mastery levels and the specific timeframes by which the different objectives were targeted to be achieved (Tr. pp. 151-52, 154). A CAHAL supervisor, who attended the CSE meeting, testified that the goals were not discussed at the CSE meeting (Tr. pp. 297, 336).

The June 2006 CSE recommended that the student attend a special class with a student to staff ratio of 12:1+1 in a community school with related services (Tr. p. 113; Dist. Exs. 1 at p. 1; 20 at p. 1). The related services included individual speech-language therapy once a week for 30 minutes; speech-language therapy in a group of three, twice a week for 30 minutes; individual physical therapy, twice a week for 30 minutes; and individual occupational therapy once a week for 30 minutes (Dist. Exs. 1 at p. 19; 20 at p. 1).

Both of the student's parents attended the CSE meeting – her father in person and her mother by telephone (Tr. pp. 127-28; Dist. Ex. 1 at p. 2). The district representative testified that she did not remember any concerns being raised by the student's parents and that she did not recall anyone objecting to the program recommendation or to the classification (Tr. pp. 129, 131-32, 184). She also testified that the CSE "reviewed all the materials together ... made the recommendations together ... and that everyone that was there agreed with the recommendation" (Tr. pp. 131-32). The CSE discussed reducing the amount of occupational therapy services to be provided to the student and respondent was in agreement with that recommendation (Tr. pp. 130-31; Dist. Ex. 20 at p. 2). Respondent did not testify regarding her participation at the CSE meeting (see Tr. pp. 398-407).

By letter dated August 16, 2006 from their attorney, the student's parents advised petitioner that they were rejecting the recommendations discussed at the June 2006 CSE meeting; that they believed that the recommended services would not provide their daughter with a FAPE; that they

⁴ I note that the CAHAL supervisor who attended the CSE meeting testified that she did not recall discussing reports during the meeting (Tr. p. 389). She did recall some discussion of the student's needs (Tr. pp. 336-38).

would place their daughter in a private program, CAHAL at HAFTA, as of the first day of the 2006-07 school year; and that they would seek public funding for that unilateral placement (Parent Ex. U at pp. 1-2).

On September 15, 2006, respondent signed a tuition contract for the 2006-07 school year with CAHAL for her daughter to attend a first grade class at HAFTR (Parent Ex. Y).

By due process complaint notice dated December 18, 2006 signed by their attorney, the student's parents requested an impartial hearing (Parent Ex. W). The parents' due process complaint notice set forth that petitioner failed to offer the student a FAPE on procedural and substantive grounds (id. at p. 1). Among other things, the due process complaint notice alleged that the CSE was not properly composed, that the CSE did not provide the parents with an opportunity to meaningfully participate in the development of the student's IEP, that the IEP was inadequate, that the CSE did not provide respondent with an opportunity to participate or be involved in the group that recommended the specific class placement for the student, that the CSE did not provide the student's parents with sufficient information about the recommended class and the qualification of the student's teachers and service providers, and that petitioner did not make a timely recommended placement (id. at pp. 2-5).

The impartial hearing commenced on May 13, 2007 and concluded on May 15, 2007. The impartial hearing officer rendered a decision dated June 11, 2007 and a corrected decision dated July 12, 2007. The impartial hearing officer concluded that the CSE committed numerous procedural errors in the development of the IEP which in their entirety deprived the student of a FAPE and provided a sufficient basis for determining that the IEP was invalid (IHO Decision at p. 6). Among other things, she found that the CSE failed to conduct an appropriate psychological evaluation and failed to consider a physical examination of the student, with the result that the CSE did not have sufficient evaluative information to develop an appropriate IEP and make an appropriate recommendation for the student (id. at pp. 7-8, 12). The impartial hearing officer concluded that the CSE should have reevaluated the student's cognitive functioning (id. at p. 8); that the CSE denied the student's parents a role in the formulation of the IEP's goals and objectives (id. at pp. 10-11); that the levels of academic achievement, functional performance and individual needs on the IEP were inadequate (id. at pp. 8-9); that the IEP failed to provide any information regarding how the student's disability affects her involvement in the general curriculum, her rate of progress, and her learning style (id. at p. 9); and that the IEP's goals and objectives were inadequate (id. at pp. 9-12). The impartial hearing officer also concluded that the CAHAL program at HAFTR was appropriate to meet the student's needs (id. at pp. 13-15). Finally, the impartial hearing officer concluded that the student's parents provided petitioner with timely notice that they did not agree with the placement and were placing their daughter in the CAHAL program, cooperated with the CSE, made the student available for evaluations, and participated in the meetings (id. at p. 16).

The impartial hearing officer awarded the student's parents tuition for the student's 2006-07 school year at the CAHAL program at HAFTR (IHO Decision at p. 17). The impartial hearing officer also ordered that for the 2007-08 school year, petitioner's CSE conduct all necessary evaluations for developing a valid IEP; articulate the student's present levels of performance and needs; with the participation of the student's parents, teachers, and service providers, write annual goals with the requisite individualization and specificity; and based on a complete set of

evaluations and a properly constituted meeting, make an appropriate recommendation of classification, program, and placement (*id.*).

On appeal, petitioner argues that the evaluative data considered by the June 2006 CSE, including the May 4, 2006 evaluation by petitioner's school psychologist, was appropriate; that the June 2006 CSE did not improperly develop the goals and objectives; that the June 2006 IEP was appropriate; and that petitioner offered an appropriate placement for the student. Petitioner also argues that CAHAL at HAFTA was not an appropriate placement for the student because respondent did not prove that CAHAL was able to provide her daughter with the related services set forth on her IEP and that those services were being provided by petitioner. It further argues that equitable considerations precluded an award of tuition reimbursement to respondent.

Respondent's answer asserts that the impartial hearing officer's decision was proper. Respondent also objects to petitioner's argument that the unilateral placement at CAHAL is not appropriate, arguing that petitioner did not raise this argument at the impartial hearing and that the student is receiving related services in accordance with New York State Education Law, Section 3602-c.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A 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, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 child, 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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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 child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

A CSE must have adequate and timely evaluative data to prepare an appropriate IEP for a child (Application of a Child with a Disability, Appeal No. 05-087; Application of a Child with a Disability, Appeal No. 05-025; Application of the Bd. of Educ., Appeal No. 99-94; Application of a Child with a Disability, Appeal No. 99-05; see Application of a Child with a Handicapping Condition, Appeal No. 91-25). Moreover, in order to make an appropriate recommendation, it is necessary to have appropriate evaluative information (Application of the Bd. of Educ., Appeal No. 05-118; Application of a Child with a Disability, Appeal No. 02-114; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-044). Consistent with this, a CSE must arrange for an appropriate reevaluation of each student with a disability if conditions warrant a reevaluation, or if the student, parent, or teacher requests a reevaluation, but at least once every three years (34 C.F.R § 300.303[a] and [b]; 8 NYCRR 200.4[b][4]).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

I concur with the impartial hearing officer in the instant case that given the student's young age at the time of her most recent cognitive evaluation in July 2003, and the discrepancy between her tested ability and academic performance revealed by petitioner's May 4, 2006 evaluation by its school psychologist, the CSE should have conducted a reevaluation of the student's cognitive functioning. I note here that a description of the WJ-III achievement test contained in petitioner's May 4, 2006 evaluation by its school psychologist indicates that scores obtained on that test are "closely related to IQ" (Dist. Ex. 5 at p. 2). The testing revealed a significant discrepancy between the student's 2006 achievement test scores and her 2003 IQ scores that was not reconciled by petitioner's assessment. Further, the district representative at the June 9, 2006 CSE meeting, who was certified in special education and a licensed school psychologist (Tr. p. 102), testified at the impartial hearing that the results of the student's July 2003 cognitive testing, done when the child was less than three years old, "may not be a true depiction" of the student's current cognitive functioning and that research indicated that cognitive functioning can change in children up to the age of eight (Tr. pp. 102, 139, 145-46; Parent Ex. A at p. 1). I also note that at the time of the 2003 cognitive testing, the student was reported to be impulsive, that she did not demonstrate understanding of the evaluator's requests or expectations, and that she was unable to respond verbally to presented test items (Parent Ex. A at pp. 1, 4). However, when the May 2006 testing was done by petitioner's school psychologist, although the student was reported to be fidgety, she was noted to speak in complete sentences and was reported to be motivated and cooperative (Dist. Ex. 5 at pp. 1-2). Although it had not yet been three years since the student's cognitive abilities had been tested, as indicated above, the circumstances of this case show that additional cognitive testing of the student was warranted (see 34 C.F.R. § 300.303[a][1]; 8 NYCRR 200.4[b][4]).

I also concur with the impartial hearing officer that in the circumstances of this case, petitioner's June 9, 2006 CSE did not have adequate and timely information with respect to the cognitive functioning of the student and as a result did not have sufficient and timely evaluative information necessary to develop an appropriate IEP and to make an appropriate recommendation for the student. Such appropriate cognitive information would have provided petitioner's CSE with appropriate information regarding the student's processing and reasoning abilities, her memory and learning style, and her ability to participate and progress in the general education curriculum. Consistent with this, I also find that the hearing record shows that the June 2006 IEP does not accurately present the student's present levels of academic performance or needs with respect to the student's cognitive development (see Appeal of the Bd. of Educ., Appeal No. 05-118).

Based on the foregoing, I agree with the impartial hearing officer and find that the hearing record shows that petitioner did not offer the student a FAPE for the 2006-07 school year. Having made the above determination, it is not necessary that I further consider petitioner's challenges to the impartial hearing officer's decision. Accordingly, I also find that respondent has prevailed with respect to the first criterion of the Burlington/Carter analysis for tuition reimbursement.

I must now consider whether respondent has met her burden of demonstrating that the placement selected for the student for the 2006-07 school year was appropriate (Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a

Disability, Appeal No. 02-080). The 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 child's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, 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 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105).

CAHAL is a special education program (Tr. p. 269) which consists of 12 self-contained classes housed in several different private day schools (Tr. p. 254). The classes are small with a ratio of one teacher for every four students (Tr. pp. 254, 271). For the 2006-07 school year, the student attended a class composed of nine students, one teacher and two teacher assistants (Tr. pp. 260-61, 283). The children in the class ranged between six and seven years old and most of them were classified as having a speech language or other health impairment (Tr. p. 285). The children in the class functioned within a low average range of intellectual ability (Tr. p. 287) and learned at a slower rate than "typical" children (Tr. p. 285). The CAHAL program follows the New York State standards (Tr. p. 333) and wherever possible tries to parallel the mainstream curriculum (*id.*). To address the students' slower learning rate, the school provides the students with repetition and groups them according to their learning rate for academic instruction (Tr. pp. 285, 392-93). The CAHAL program also provides children with mainstreaming opportunities for all non-academic activities that take place within the school building (Tr. pp. 259-60).

The primary focus of the student's curriculum at CAHAL was learning "key" first grade skills (Tr. pp. 258-59). Respondent's daughter was working on how to write a sentence and when to use a period or question mark (Tr. p. 377). The student was also working on recognizing the difference between upper and lowercase letters (Tr. p. 378). The student received instruction regarding proper spacing between words when writing (Tr. p. 380). With respect to money, the student was given instruction related to identifying coins (Tr. p. 382). For reading instruction, the student used a basal reader and worked on reading short vowel sounds with automaticity (Tr. p. 383). To address the student's stereotypical behaviors, CAHAL provided her with one-on-one attention so that she was always busy and did not become anxious (Tr. p. 292). Integration was used as a means of addressing the student's reserved nature (Tr. p. 293). To assist the student with transitioning, the class schedule was put on the board (*id.*). At CAHAL the student was in a small class and program staff broke down information into small chunks and provided a lot of repetition

(Tr. p. 331). The CAHAL supervisor reported that the student had made good progress at CAHAL (id.).⁵

With respect to the appropriateness of a private placement, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). "A unilateral private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115, citing Frank G., 459 F.3d at 365). For the reasons discussed above, I concur with the decision of the impartial hearing officer and find that CAHAL at HAFTR was an appropriate program for the student for the 2006-07 school year and that respondent has therefore prevailed with respect to the second criterion of the Burlington/Carter analysis for an award of tuition reimbursement.

The final criterion for an award of tuition reimbursement is that the parents' claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at 363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417).

With respect to equitable considerations, the IDEA allows that tuition 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 Mrs. C., 226 F.3d at n. 9). The IDEA allows that tuition 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 child 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

⁵ The hearing record indicates that petitioner provided the student with related services (Tr. p. 262). Petitioner argues that CAHAL is an inappropriate placement for the student because respondent did not prove that CAHAL was able to provide the student with the related services identified on her IEP. To support its argument, petitioner relies on Application of a Child with a Disability, Appeal No. 07-014 and Application of a Child with a Disability, Appeal No. 07-018. I decline to consider petitioner's argument in this case because it was not properly raised below and was first raised on appeal.

reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]).

With respect to the equities in the instant case, the impartial hearing officer concluded that the student's parents provided petitioner with timely notification of the student's unilateral placement, cooperated with the CSE, made the student available for evaluations, and participated in meetings (IHO Decision at p. 16). Petitioner argues that the equities preclude an award of tuition reimbursement for respondent because she did not respond to the CSE's request that she return a completed physical examination form (see Tr. pp. 214-15, 228). Petitioner did not make this argument to the impartial hearing officer below and I decline to consider it on appeal (see IHO Ex. II at p. 7).

Based on the above and in the circumstances of this case, I agree with the impartial hearing officer and find that equitable considerations do not preclude an award of tuition reimbursement to respondent for her daughter's attendance at CAHAL at HAFTR for the 2006-07 school year. I note that at the impartial hearing respondent indicated that partial payment of tuition costs had been made and that respondent could secure funds to complete full tuition payment. Petitioner is therefore responsible for reimbursing respondent for the full tuition costs upon respondent's submission of proper proof of payment.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 11, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**