The University of the State of New York

The State Education Department
State Review Officer

No. 08-110

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

Law Offices of Anton Papakhin, P.C., attorney for respondent, Anton Papakhin, 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) son and ordered the district to pay Bay Ridge Preparatory School (Bay Ridge) one-half of the student's tuition costs for the 2007-08 school year. The parent cross-appeals from the impartial hearing officer's reduction of the tuition award by one-half and seeks the full amount of tuition. The appeal must be sustained in part. The cross-appeal must be dismissed.

On the first day of the impartial hearing on June 5, 2008, the student was attending Bay Ridge (Tr. pp. 1, 161, 345). The impartial hearing continued on June 18, 2008 and concluded on July 25, 2008 (Tr. pp. 1, 155, 296; IHO Decision at p. 2). By the conclusion of the impartial hearing, the student had graduated from Bay Ridge (Tr. pp. 161, 172, 197-98, 309). The parent had unilaterally placed the student in the Bridge Program at Bay Ridge for the 2007-08 school year (Tr. p. 367; Parent Ex. C). The hearing record reflects that the Bridge Program is specifically designed for students with learning disabilities and is housed within the general education high school at Bay Ridge (Tr. p. 159). The student has attended Bay Ridge since the sixth grade (Tr. pp. 344, 345-46). From kindergarten to fifth grade, the student attended the district's public schools (Tr. pp. 341-42, 344). The Commissioner of Education has not approved Bay Ridge as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services and classification as a student with a learning disability is not in dispute (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

On May 31, 2007, the Committee on Special Education (CSE) convened to review the student's educational program and to develop the student's individualized education program (IEP) for the student's twelfth grade (2007-08) school year (Dist. Ex. 3 at pp. l-2). Meeting attendees included the parent, a district representative, a school social worker, and two special education teachers from Bay Ridge (id. at p. 2). In addition, the director of the Bridge Program at Bay Ridge, who participated in the CSE meeting by telephone, was designated as the regular education teacher on the IEP (Tr. p. 188; Dist. Ex. 3 at p. 2).[1]

The May 31, 2007 CSE recommended a special class with a 15:1 staffing ratio for all areas of instruction (Dist. Ex. 3 at pp. 1, 7). The parent testified that she informed the CSE at the May 31, 2007 CSE meeting that she considered the proposed program to be inappropriate for the student (Tr. pp. 354, 395). The district issued a Final Notice of Recommendation (FNR) on May 31, 2007 recommending a specific public school site (Dist. Ex. 4).

The parent testified at the impartial hearing that she did not receive a copy of the IEP or the FNR from the district (Tr. pp. 357-58, 362-63, 364-65, 365-66, 391-92). At some point during the 2007-08 school year, her attorney obtained the IEP and the parent testified that she received it when the impartial hearing started (Tr. pp. 363, 391-92). The hearing record does not reflect that the parent received a copy of the FNR. The district's special education evaluation placement program officer (placement officer) testified that her responsibilities include supervising the clerical staff at the CSE office, whose job includes the mailing of FNRs to parents (Tr. pp. 120-21, 123). The placement officer for the district testified regarding the standard office procedures for the mailing of an FNR to a parent (Tr. pp. 122-43). The placement officer testified that the normal procedure is to send out the IEP with the FNR (Tr. pp. 129, 134, 140). The placement officer further testified that usually FNRs are generated through a computer, but that the FNR sent to the parent in this case was written by hand, and as such was "not usual" (Tr. pp. 124-26). She indicated that the office was "probably" having computer problems on that day (Tr. pp. 123-24). The placement officer testified that when the FNRs are produced, a clerical employee usually obtains the parent's mailing address from the "Child Assistance Program" (CAP), a district database, and that, on the date of her testimony in June 2008, the CAP indicated a specific mailing address for the parent (Tr. pp. 126-29, 138-39).[2] The placement officer testified that sometimes the address listed in CAP is different from the address listed on the IEP, and that the procedure is to verify the CAP address information with the address indicated on the IEP (Tr. pp. 134-35). The placement officer testified that "[i]t's good office practice to always match an IEP to the envelope" (Tr. p. 142). She testified that when the address is different, a supervisor would need to be consulted (Tr. p. 143).

The hearing record indicates that the space where the parent's address would have been written in at the bottom of the FNR dated May 31, 2007, was left blank in the instant case (Dist. Ex. 4). The placement officer testified that the address would normally be printed in the blank space at the bottom of the FNR when it was computer generated (Tr. pp. 124-25, 126). The

[1] Although the director of the Bridge Program testified that he did not hold a "general education license," he indicated that he had worked as a regular education teacher at Bay Ridge and also at another private school (Tr. pp. 188-89, 198-200). The director of the Bridge Program further testified that he had a special education "license" (Tr. p. 189).

[2] The parent's actual address is omitted from this decision to maintain privacy.

placement officer testified that a "window" envelope is used to mail the IEP and FNR when the FNR is computer generated, and that the address at the bottom of the FNR would appear in the "window" (Tr. p. 125). The placement officer testified that there was no need to handwrite the address in the space at the bottom of the FNR because a window envelope would not be used for a handwritten FNR and, instead, the envelope would be handwritten (Tr. p. 126).

Although the placement officer testified as to the specific address for the parent reflected in the CAP system on the date of her testimony, and that, in this case, the clerk would have used the specific address reflected in the CAP system to mail the FNR to the parent, she also testified that when a new address is entered into the CAP system, prior addresses are no longer accessible, and that she had no independent knowledge as to when the FNR was mailed and the address to which it was mailed (Tr. pp. 128-29, 133, 151).

The parent testified that her home address for the past four years was the same address reflected in the CAP system, as reported by the placement officer on the date of her testimony in June 2008 (Tr. pp. 128, 138-39, 389). The hearing record indicates that the address on the student's May 31, 2007 IEP is different than the address listed in the CAP system, and that the parent has not lived at the address indicated on the IEP for four years (id.; Dist. Ex. 3 at p. 1).

The placement officer testified that her office is one block from a post office, that a clerk picks up mail from office mail baskets and hand-delivers IEPs and FNRs to the post office for mailing to parents, and that this procedure is followed every day (Tr. pp. 130-31). The placement officer testified that this process was in effect in the office in May 2007, at the time that the student's FNR was generated (Tr. p. 132). The hearing record does not show that the parent made any inquires to the district subsequent to the May 31, 2007 CSE meeting and prior to the start of the new school year as to why she had not received a copy of the IEP or the FNR (see Tr. pp. 356-57, 365).

On September 6, 2007, the student started classes at Bay Ridge for the 2007-08 school year (Parent Ex. C at p. 3). On October 25, 2007, after the student had already begun to attend classes at Bay Ridge, the parent entered into a contract with Bay Ridge for the student's enrollment for the 2007-08 school year (Parent Ex. C). The contract provided for enrollment of the student at no cost to the parent with the agreement that the parent would seek funding of tuition from the district through an impartial hearing. The headmaster at Bay Ridge testified that he oversaw the business aspects of the school (Tr. p. 302). He testified that if the parent lost her funding claim against the district, the parent would be responsible for paying the tuition (Tr. pp. 305-06). He testified that the school would attempt to work out a payment plan (Tr. pp. 306, 309). He also testified that if a parent was financially unable to pay, in some cases, the matter would go to the board for a possible reduction of tuition (Tr. p. 309). He testified that Bay Ridge could choose to commence a lawsuit against a parent for payment of tuition (Tr. p. 310).

By due process complaint notice dated January 16, 2008, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year because the CSE's placement recommendation was not reasonably calculated to confer educational benefits on the student as the program was not structured to meet the student's learning needs in the least restrictive environment (LRE) (Parent Ex. A at p. 1). The due process complaint notice alleged that the IEP was invalid on both procedural and substantive grounds (id.). The parent specifically alleged that: (1) the CSE was improperly constituted which resulted in a defective

program recommendation and denial of a FAPE; (2) the CSE failed to develop appropriate and specific transitional and post-secondary goals which resulted in a defective program recommendation and a denial of a FAPE; (3) the CSE failed to develop specific appropriate goals and objectives on the student's IEP which resulted in a defective program recommendation and a denial of a FAPE, and the goals contained in the IEP were vague and overbroad; (4) the parent was denied a meaningful opportunity to participate in the CSE meeting because the CSE did not consider the student's needs, and the CSE had predetermined that it was going to recommend a special class in a community school on the student's IEP; and (5) although the FNR was dated May 31, 2007, the parent never received it from the district (id. at pp. 1-2).

In a decision dated August 26, 2008, the impartial hearing officer concluded that the district's CSE failed to offer the student a FAPE for the 2007-08 school year, that Bay Ridge was an appropriate placement, and ordered that the sum of $14,475.00 be paid as tuition costs for the student for the 2007-08 school year directly to Bay Ridge, reflecting one-half of the tuition at the school (IHO Decision at pp. 7-8). The impartial hearing officer reduced the tuition by one-half based upon his finding that the parent allowed one-half of the school year to elapse before notifying the district of her unilateral placement of the student at Bay Ridge (id. at p. 8). The impartial hearing officer stated that "I am troubled by the parent's lack of good faith in this matter" (id. at p. 7). Furthermore, the impartial hearing officer noted that the parent has been through a succession of impartial hearings over past school years, and he found that the parent's failure to provide notification to the CSE indicated the parent's intent to continue the student at the private school (id.). The impartial hearing officer found that the district became aware of the parent's unilateral placement when the impartial hearing was commenced in January 2008 (id. at p. 8). The impartial hearing officer also found that the parent showed her lack of ability to pay the tuition based upon her income and that the parent was legally responsible for paying the tuition to Bay Ridge for the 2007-08 school year (id.).

On appeal, the district asserts that it offered the student a FAPE, that Bay Ridge was not an appropriate placement for the student, that equitable considerations preclude an award of tuition funding to the parent, and that prospective funding is not an available remedy to the parent.

The parent filed an answer and cross-appeal, asserting that the impartial hearing officer correctly found that the district failed to offer the student a FAPE for the 2007-08 school year and that the parent's unilateral placement at Bay Ridge for the 2007-08 school year was appropriate. The parent further asserted that the equities do not preclude a full award of tuition to the parent. The parent maintains that the statutory ten-day notice requirement does not apply to the instant case as the student was not removed from the public school. Moreover, the parent maintains that the notice requirement was satisfied when the parent informed the CSE at the May 31, 2007 meeting of her intent to re-enroll the student at Bay Ridge for the 2007-08 school year and rejected a self-contained 15:1 special education class as inappropriate for the student. The parent maintains that the district had notice and knowledge that the student would remain at Bay Ridge in the event that the parent disagreed with the public placement. The parent further alleges that she did not demonstrate an unwillingness to accept a public school placement by signing the enrollment agreement with Bay Ridge on October 25, 2007. The parent further asserts that a parent may be entitled to a remedy of direct or prospective tuition payment to a private school, that the impartial hearing officer correctly found that the parent showed her lack of ability to pay tuition costs at Bay

Ridge, and that the parent is contractually responsible for the tuition payment to Bay Ridge in the event that she does not prevail at the impartial hearing on her tuition claim.

The parent cross-appeals, and asserts that the impartial hearing officer erred in reducing the tuition award by one-half for her failure to notify the CSE of her intent to reject the proposed placement and place the student at Bay Ridge. The parent maintains that the impartial hearing officer erred in finding that the district became aware of the parent's unilateral placement when the impartial hearing was commenced in January 2008. The parent further alleges that the impartial hearing officer erred in finding that the district mailed the parent the IEP and FNR in the "due course of business" (see IHO Decision at p. 7).

In the district's answer to the parent's cross-appeal, the district maintains that the failure of the parent to provide proper written notice of her rejection of the proposed public school program and her unilateral enrollment of the student in private school is a proper basis upon which to reduce or eliminate the award of tuition.

I will first consider the district's claim that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE for the 2007-08 school year. Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an

"appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 Mr. P. v. Newington Bd. of Educ., 2008 WL 4509089, at *7 [2d Cir. Oct. 9, 2008]; 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 (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

On August 15, 2007, New York State amended its Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016), and therefore applies to the present case.

Returning to the instant case, I find that the impartial hearing officer was correct in finding that the district did not offer the student a FAPE for the 2007-08 school year. However, I further

find that the reasoning employed by the impartial hearing officer, that the CSE recommended the student for a 15:1 special education class in a large high school, without fully considering the student's weaknesses (IHO Decision at p. 7), is not supported by the hearing record. I find other persuasive evidence in the hearing record that supports the parent's contention that the district failed to offer the student a FAPE.

Although the IEP and FNR were dated May 31, 2007, the parent testified that she did not receive them from the district (Tr. pp. 357-58, 362-63, 364-65, 365-66, 391-92). New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]). "As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing" (In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

Although the parent's claim that she did not receive the IEP and FNR is insufficient by itself to rebut the presumption of mailing (see Nassau Ins. Co., 46 N.Y.2d at 829-30), testimony by the district's placement officer did not establish that the IEP and FNR were mailed in accordance with the district's standard office procedures; thus the district is not entitled to the presumption of mailing, and therefore the district's mailing and the parent's receipt of the IEP and FNR are not supported by the hearing record. The hearing record reflects that in this case the district's routine office practice was not followed or was so careless that it would be unreasonable to assume the notice was mailed. The hearing record shows that: (1) the usual procedure was for an FNR to be computer generated and in this case the FNR was handwritten; (2) the usual procedure was for the parent's address to appear at the bottom of the FNR, and in this case the space for the address on the FNR was left blank; (3) although the address listed in the CAP system was correct as of the date of the impartial hearing, the address listed in the CAP system on May 31, 2007 when the FNR was mailed is unknown; (4) the address listed in the CAP system at the time of the impartial hearing was different than the address indicated on the May 31, 2007 IEP; and (5) the address listed on the May 31, 2007 IEP is incorrect and has been incorrect for the past four years (Tr. pp. 124-25, 126, 128, 138-39, 389; Dist. Ex. 3 at p. 1). These factors, in conjunction with the entirety of the placement officer's testimony, indicate that the "routine office practice" was not followed and, accordingly, the presumption of mailing and receipt has been rebutted.

I find that the district's failure to provide a copy of the student's May 31, 2007 IEP and notify the parent of the student's proposed placement for the 2007-08 school year resulted in a denial of a FAPE. The parent testified that she never received a completed copy of the student's May 31, 2007 IEP and FNR for the 2007-08 school year from the district, and that she did not obtain a copy of the IEP until the impartial hearing, after her attorney had obtained it (Tr. pp. 357-58, 362-63, 364-65, 365-66, 391-92). By not providing the parent with the IEP and FNR, the district failed to offer the student a placement for the beginning of the school year in September,

and therefore deprived the student of a FAPE (see Application of a Student with a Disability, Appeal No. 08-088). Accordingly, I find that the district has failed to meet its burden of proof that the student was offered a FAPE for the 2007-08 school year.

Having made the above determination, it is not necessary that I further consider the challenges raised by the district on appeal to the impartial hearing officer's decision that the student was denied a FAPE for the 2007-08 school year.

I now consider whether the parent established that Bay Ridge offered an educational program that would meet the student's special educational needs during the 2007-08 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; 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 the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F. 3d 356, 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 also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89 [emphasis added]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in

> determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The district contends that the parent failed to sustain her burden to show that Bay Ridge was appropriate because: (1) the students at Bay Ridge do not suffer academic consequences for late assignments; (2) the student's grades were artificially inflated; and (3) the student failed all of his Regents examinations despite graduating with "second honors" from Bay Ridge.

The student was described as easily distracted and as struggling to stay on task (Tr. p. 164; Dist. Exs. 1 at p. 1; 3 at p. 3). In addition, the student's long-term memory was weak and he had difficulty recalling information (Dist. Ex. 3 at p. 3). Cognitively, the student demonstrated average intellectual functioning (id.). With regard to academics, he demonstrated weak decoding skills and, although relatively stronger, his comprehension skills were below grade level (Tr. p. 164; Dist. Ex. 3 at p. 3). The student's estimated instructional level for reading was at the ninth/tenth (Dist. Ex. 3 at p. 3). With regard to mathematics, the student had the greatest difficulty with abstraction, applying and generalizing learned techniques, and understanding language as it related to math (Tr. pp. 164-65). Although the student's IEP indicated that his estimated level of functioning for mathematics was at the sixth to eighth grade level, the director of the Bridge Program testified that at the time that the May 31, 2007 IEP was generated the student was already in a "Math A" course which was essentially a ninth and tenth grade level math course (Tr. p. 191; Dist. Ex. 3 at p. 3). The student was described as disorganized and transitioning to new classes reportedly caused some anxiety and difficulty for the student (Tr. pp. 165, 168).

The Bridge Program includes students with needs related to decoding, comprehension, mathematics and organizational skills (Tr. p. 159). Classes in the Bridge Program are generally limited to a maximum of 12 students and the school attempts to "customize" the program to each student's needs using a variety of support systems and structured classes (Tr. p. 160). According to the program director, accommodations are a regular part of the Bridge Program curriculum and repetition and review are standard in most of the classes (Tr. p. 177). The director noted that the teachers generally give out organizers or outlines and that they pre-teach (Tr. p. 178). Students are given the accommodations listed on their IEPs (id.). Students are given extended time to complete written assignments and are typically given an "incomplete" rather than a lower grade (id.).

During the 2007-08 school year, the student took classes in finance, modified history, chemistry, senior writing, modified English, current events, reading, computer science, gym, art and poetry (Tr. p. 170; Parent Ex. F at p. 1). The student also attended a planning and organizational period for 15 minutes at the end of each day (id.). The size of the student's classes ranged from three students in reading to fifteen students in finance (Tr. p. 170).

The Bridge Program provided the student with a 45-minute reading group three times per week designed to address the student's weaknesses in reading, language, and organizational skills (Tr. pp. 171, 183, 185). The group consists of three students and was run by a speech-language therapist (Tr. p. 171). In addition to the reading group, the student's schedule included a daily modified English class and daily senior writing class (Parent Ex. F). The student was instructed using a language program which included elements of Wilson and Orton-Gillingham (Tr. pp. 175, 186, 200).

According to the director of the Bridge Program, the student's English class was based on the New York State curriculum requirements and recommendations (Tr. pp. 173, 175). The class differed from a typical mainstream twelfth grade English class in that it offered more repetition and review, including a review of concepts initially taught in ninth and tenth grades (Tr. p. 174). Classroom strategies included guided reading, shared reading, playing parts or roles, analysis in groups as opposed to individual analysis and writing assistance (Tr. pp. 174-75).

With regard to mathematics, the hearing record indicates that the student had difficulty with abstraction (Tr. p. 164). The director of the Bridge Program testified that the program's multi-modal approach included the use of manipulatives, concrete examples or conducting actual mathematical measurements in a math class (Tr. p. 177).

As part of the Bridge Program, the student attended a planning and organization period designed to coach and monitor students on a daily basis (Tr. p. 179). The planning and organization period was held five days per week for the last 15 minutes of the day (Tr. p. 179; Parent Ex. F at p. 1). The assigned mentor generally stays with the same class for four years, which allows him to develop a close working relationship with the students (Tr. p. 181). The director reported that the student had the same planning and organization teacher throughout his four years of high school (id.). Following the introduction of basic organizational skills, the focus of the organization and planning period turned to helping students develop study skills and plan ahead for college (Tr. p. 180). To address the student's school-related anxiety, the Bridge Program provided the student with informal counseling opportunities, which the student took advantage of (Tr. p. 168). The program director reported that with regard to the Regents Competency Tests the student was afforded the accommodations contained in his May 31, 2007 IEP, which included extended time, the use of a calculator, and directions and questions read (Tr. pp. 202-03).

Additionally, according to the program director the student "did well" at Bay Ridge during the 2007-08 school year (Tr. p. 161; Parent Ex. E at p. 1). The director testified that the student's final grades were in the "B" range for most courses, that the student passed all of his State required exams and that he completed the New York State required course of study for graduation with a local diploma (Tr. pp. 161, 188, 200-02). The student earned "second honors" for the third and fourth quarters of the 2007-08 school year, which means that the student maintained a "B" average with no grades below a "B" (Tr. pp. 215, 217). The student's performance as reflected in his official report card for the 2007-08 school year, with regard to homework, conduct, attentiveness to lecture, influence on other students, punctuality and dress code was generally rated "satisfactory" to "excellent" across all classes (Parent Ex. E at p. 1). During the first quarter of the 2007-08 school year, the student's English IV homework was rated "less than satisfactory," as was his attentiveness to lecture in English IV and modified modern history, and his punctuality in art (id.). The student demonstrated progress during the second quarter and by the third quarter his performance was rated as "satisfactory" to "excellent" in all areas (id. at p. 2).

As to the district's claim that students at Bay Ridge do not suffer academic consequences for late assignments, I find that this argument is without merit. The program director testified that in addition to getting extended time for exams, students in the Bridge Program were afforded extra time for written assignments (Tr. p. 178). He explained that a student would typically receive an "incomplete" rather than a lower grade if additional time to complete work was needed (id.). He noted that this accommodation allowed students to "fully demonstrate their potential" (id.).

With respect to the district's allegation that the student's grades were inflated, during the impartial hearing, the district questioned the student's first semester grade in finance for the 2007-08 school year (Tr. p. 204). For his finance class, the student's report card reflected a first quarter grade of "B," a second quarter grade of "B+" and a semester grade of "A" (Parent Ex. E at p. 1). The program director explained that the semester grade was a combination of the student's performance during the first and second quarters, along with the mid-year exam and any term projects given by the teacher (Tr. pp. 204-05). The district did not question any of the student's other 2007-08 grades. I do not find that the district's allegation of grade inflation supports a finding that Bay Ridge was not an appropriate placement for the student for the 2007-08 school year.

In addition, the district questions the student's ability to earn "second honors" and graduate from Bay Ridge while failing all of his Regents examinations. While the hearing record indicates that the student did fail the Regents examinations, he was able to pass six Regents Competency Tests (Tr. pp. 188, 200-02). Notably, the student met all of the New York State requirements for a local diploma, graduated in June 2008 and was accepted into college (Tr. pp. 161, 172, 188, 197-98, 372).

Lastly, I note that in determining the appropriateness of Bay Ridge for the student, I have considered the restrictiveness of the parental placement and balanced the restrictiveness against the requirement that the student receive an appropriate education, and find that, under the facts of this case, the private placement selected by the parent for the student for the 2007-08 school year was appropriate to meet the student's special education needs (see M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; see also Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]); Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). The student attended the Bridge Program, which is specifically designed for students with learning disabilities; however, the Bridge Program, similar to the district's proposed 15:1 special class in the district's public high school, is housed within the general education high school at Bay Ridge (Tr. p. 159). The student was mainstreamed in gym and lunch (Tr. p. 187). Additionally, the hearing record reflects that over the course of the student's years of attendance at Bay Ridge, he participated in different classes such as health and computers with mainstream students (id.). Based on the foregoing, I find that the hearing record supports the conclusion that Bay Ridge was an appropriate placement for the student for the 2007-08 school year.

The final criterion for a tuition reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that 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 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 [S.D.N.Y. 2005], aff'd, 192 Fed. Appx. 62, at *1 [2d Cir. 2006]; 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]).

The parent asserts that the notice provisions of 20 U.S.C. § 1412[a][10][C][iii] are inapplicable because the student was not removed from a public school and unilaterally placed in a private school. I find that the requirements of 20 U.S.C. § 1412[a][10][C][iii] apply in this instance and, in any event, case law provides a further equitable basis to bar reimbursement when parents have unilaterally arranged for private educational services without notifying the district (Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140, at *1 [2d Cir. 2006]); citing Mrs. C., 226 F.3d at 68; and Frank G., 459 F.3d at 376).

Under the facts in this case, I note that there is no evidence in the hearing record to indicate that the parent provided timely notice to the district of her intent to enroll the student in a private placement at public expense. Although the parent testified that at the May 31, 2007 CSE meeting she informed the CSE that she considered the proposed program to be inappropriate (Tr. pp. 354, 395), there is no indication in the hearing record that she informed the May 31, 2007 CSE that she would seek to enroll the student at Bay Ridge at public expense. The due process complaint notice dated January 16, 2008 is the only written notice contained in the hearing record where the parent informed the district that she had enrolled the student at Bay Ridge for the 2007-08 school year and would be seeking funding for the tuition costs (see Parent Ex. A). I find that such written notice, more than four months after the student began attending classes at Bay Ridge, does not comply with the notice provisions of 20 U.S.C. § 1412[a][10][C][iii] and, in any event, are not in accord with equitable considerations denoted by case law (see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402 [S.D.N.Y. 2005], aff'd, 192 Fed. Appx. 62, at *1 [2d Cir. 2006]); Frank G., 459 F.3d at 376). Moreover, this is the second time that the parent has failed to provide appropriate notice to the district (see Application of the Dep't of Educ., Appeal No. 07-032). Therefore, I find that equitable considerations do not support an award of tuition costs.

Additionally, I reject the parent's contention that the district had actual knowledge, based upon the student's prior attendance at Bay Ridge during prior school years, that the student would continue to attend Bay Ridge during the 2007-08 school year. The impartial hearing officer found that the district became aware of the parent's unilateral placement when the impartial hearing was commenced in January 2008 and the hearing record supports his finding (IHO Decision at p. 8). Accordingly, I find that the parent failed to provide the required notice.

I further concur with the impartial hearing officer's statement that he was "troubled by the parent's lack of good faith in this matter" (IHO Decision at p. 7). The impartial hearing officer added that "[a]lthough, she has been through a succession of years in impartial hearing reviews, her failure to notify the CSE of her intent to reject the proposed placement and place him at [Bay Ridge] indicates her intent to continue him at the private school" (IHO Decision at p. 7). Although I agree with the impartial hearing officer's finding that the parent showed a "lack of good faith," I find that the impartial hearing officer erred by awarding the parent one-half of the total tuition

costs at Bay Ridge for the 2007-08 school year. In the exercise of my discretion, I will preclude the entire of award of tuition costs because of the demonstrated lack of good faith shown by the parent under the facts of the instant case. I note also that the impartial hearing officer specifically found that the parent intended to continue the student's enrollment at Bay Ridge for the 2007-08 school year (IHO Decision at p. 7). As such, it would be inequitable to permit reimbursement where the parent intended to continue the student at the private school and failed to request tuition funding in a timely manner (see Frank G., 459 F.3d at 376).

In light of my decision herein, it is not necessary for me to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that he directed the district to pay one-half of the tuition costs to Bay Ridge for the 2007-08 school year.

Dated: **Albany, New York**
November 3, 2008

PAUL F. KELLY
STATE REVIEW OFFICER