



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-090

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

Appearances:

Partnership for Children's Rights, attorneys for petitioner, Michael D. Hampden, Esq. and Patricia J. Soussloff, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to receive reimbursement and/or funding for her daughter's tuition costs at Winston Preparatory School (Winston Prep) for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled in seventh grade at Winston Prep (Tr. p. 132). Winston Prep is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1 [d], 200.7; Tr. p. 113). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student has reportedly received diagnoses of an oculomotor dysfunction, accommodative insufficiency/infacility, and a compound myopic astigmatism (Dist. Ex. 4 at p. 1). The student's overall cognitive functioning is in the average range (id. at pp. 5, 7). She exhibits deficits in reading, spelling, and written expression as well as in her receptive and expressive language skills (id. at pp. 4, 7).

The hearing record is sparse regarding the student's early educational history. The district reportedly "initially evaluated" the student in 2004 and re-evaluated the student in October 2005

(Dist. Ex. 4 at p. 1; see Dist. Ex. 1 at p. 4). The student reportedly had one or more optometric examinations and/or evaluations in 2005, and as a result received diagnoses which included accommodative infacility and/or accommodative insufficiency, oculomotor dysfunction, and visual processing dysfunction (Dist. Exs. 4 at pp. 1, 5; 5 at p. 1; see Dist. Ex. 1 at p. 4). At some time prior to March 2007, the student was reportedly "diagnosed as being dyslexic" (Dist. Ex. 5 at p. 1; see Parent Ex. K).

The student attended public school through the 2006-07 school year when she was in fifth grade (Tr. pp. 4-5; Dist. Ex. 4 at pp. 1, 5). She attended a district public school during the 2006-07 school year, when she reportedly was enrolled in a general education class and received speech-language therapy and special education teacher support services (SETSS) (Tr. pp. 4-5; Dist. Exs. 4 at p. 1; 5 at p. 1). The student also reportedly received vision therapy and tutoring services outside of school during part of the 2006-07 school year (see Dist. Exs. 4 at pp. 1, 5; 5 at p. 1).

The parent obtained a private psychological evaluation of the student that was conducted on December 11 and 15, 2006 (Dist. Ex. 4). The resultant evaluation report reflected that the private psychologist administered a battery of intelligence, achievement, and projective tests to the student, conducted a review of the student's records and a clinical observation of the student, and also conducted a parent interview (id. at pp. 1-2, 7).

The private psychologist assessed the student's intellectual functioning by administration of select subtests of the Stanford Binet Intelligence Scales-Fourth Edition (SB-4), which yielded results in the "average" range (Dist. Ex. 4 at pp. 5, 7). Administration of the Kaufman Test of Educational Achievement-Second Edition (KTEA-II) yielded standard (and grade equivalent) subtest scores of 70 (1.7) in letter and word recognition, 72 (2.2) in reading comprehension, 102 (6.1) in math concepts and applications, 102 (6.1) in math computation, 91 in listening comprehension, and 73 (1.10) in spelling (id. at p. 7).¹ The student achieved a reading composite score of 69 and a math composite score of 101, reflecting that the student's math skills were in the average range, and commensurate with her cognitive functioning, that her reading ability was "impaired, and f[ell] below the second percentile" (id. at pp. 4, 7). The private psychologist reported that the student's average scores on cognitive tasks and tests of math calculation and problem solving were consistent with testing previously conducted by the district in November 2004 and October 2005 (id. at p. 5). He noted that although the student's ability to decode unfamiliar words had remained at the 1.7 grade level for the past three years, the student could comprehend what she read and was able to write meaningfully at "approximately the mid-second grade level" (id. at pp. 5-6). The private psychologist surmised that the student was able to "use her considerable cognitive strengths to assemble what she knows about phonics, semantics and her world to assign meaning to words beyond what she can sound out" (id. at p. 6).

A standard score of 83 ("low average" range) was obtained from administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), suggesting fine and visual-motor weaknesses (Dist. Ex. 4 at pp. 4, 7). The private psychologist assessed the student's verbal learning and short-term memory with the California Verbal Learning Test for Children (CVLT-C) and the results of that test suggested "some difficulty orienting to task, but otherwise

¹ No grade equivalent score was provided for listening comprehension (see Dist. Ex. 4 at p. 7).

strong verbal memory" and that the student's "ability to listen actively and critically, also appear[ed] to be a considerable strength"(id. at p. 3; see Dist. Ex. 4 at p. 7).

The private psychologist concluded that the student's "pattern of response across assessment instruments and the results of the optometric and other previous evaluations, indicate[d] multiple processing vulnerabilities, in the context of solidly average intelligence" (Dist. Ex. 4 at p. 5). He also concluded that the student's graphomotor skills, visual-motor integration, orienting to task, and following complex spoken language were "areas of mild deficit" (id.). The private psychologist opined that these weaknesses and a "profound impairment in phonetic analysis" contributed to the student's reading difficulties and he recommended that the student "read[] along with recordings of interest and then write[] summaries of the books she reads in this way" and that she also receive "intensive Orton-Gillingham instruction" (id. at pp. 5, 6). The private psychologist further opined that the student experienced anxiety over her learning disability because it "alienated" her from her peers and because she did not like disappointing her mother and recommended that the student "be engaged in activities that can foster a positive sense of self through accomplishment," such as art or sewing classes, or other crafts (id.).

A speech-language pathologist conducted an evaluation of the student on March 8, 2007, when the student was in fifth grade and participating in general education with SETSS (Dist. Ex. 5 at p. 1). According to the evaluation report, the student received speech-language therapy in school, as well as vision therapy and tutoring services outside of school (id.). The evaluating speech-language pathologist reported that the student presented with inconsistent attention and eye contact, required frequent redirection to focus, had to be asked to "speak louder" when difficult questions were presented to her, and did not often exhibit spontaneous speech (id.). Although the student was described as "strong-willed" in attempting to complete tasks presented to her, when experiencing difficulty she refused, often stating "I don't know" (id.).

Administration of the Wilson Assessment of Decoding and Encoding (WADE) by the speech-language pathologist revealed a "moderate encoding and decoding language delay," with the student attaining her lowest score in "spelling of words" (15 percent correct out of 100) (Dist. Ex. 5 at p. 2).² In "identifying sounds" the student achieved an overall score of 55 percent correct (88 percent of consonants, 67 percent of digraphs/trigraphs, 43 percent of vowels, 13 percent of additional sounds, and 81 percent of welded sounds) (id.). In "reading" she achieved an overall score of 32 percent correct (15 percent of real words, 20 percent of nonsense words, and 71 percent of sight words) (id.). The evaluating speech-language pathologist also administered the Clinical Evaluation of Language Fundamentals-4 (CELF-4) to the student "informally" (id.). The results indicated that the student had the ability to follow directions, formulate sentences, and understand spoken paragraphs (id.). The speech-language pathologist noted that the student exhibited areas of weakness in phonological awareness skills and in her knowledge of word associations and word classes (id.). Administration of the Goldman-Fristoe Test of Articulation (GFTA-2) revealed "adequate development of phonological or articulation skills" (id.).

The speech-language pathologist concluded that the student presented with "low average development of overall language skills" and exhibited difficulty in both expressive and receptive

² The evaluation report indicated that on March 21, 2007, the student was administered the Woodcock-Johnson III Tests of Achievement (W-J III ACH), "which revealed a score grade of 2.3 and a raw score of 35" (Dist. Ex. 5 at p. 1). No further information is provided with respect to that testing.

language (Dist. Ex. 5 at p. 2). She reported that the student's low average knowledge of word classes implied that she would have difficulty generating words and ideas in response to a theme or topic for speaking and writing (*id.* at p. 3). To address her receptive and expressive language delays, the speech-language pathologist recommended that the student's speech-language therapy be increased from three sessions per week in a group of three to five sessions per week in a group of four (*id.*).

The parent unilaterally placed the student at Winston Prep for the 2007-08 school year when the student was in sixth grade (Tr. pp. 5, 132; Parent Ex. K). The hearing record reflects that the student's classes at Winston Prep during that school year included a daily "Focus" class, introduction to literature, language skills, writing, basic math skills, science, history, art, and physical education (Dist. Ex. 2 at pp. 1-6).

The hearing record reflects that in December 2007, the parent commenced a prior impartial hearing to obtain tuition costs at Winston Prep for the 2007-08 school year (Parent Ex. H at p. 1). The district reportedly agreed to fund the tuition at Winston Prep for the 2007-08 school year by stipulation dated February 5, 2008 (*id.*).

A district social worker conducted a classroom observation of the student in the student's literature skills class at Winston Prep on March 27, 2008 (Dist. Ex. 3 at p. 1). According to the resultant report, the student's class was comprised of 13 students and one teacher (*id.*). The student was observed to be sitting up front at the teacher's desk and closest to the blackboard (*id.*). The social worker reported that the classroom teacher checked each student's homework and then proceeded to pose comprehension and inferential questions regarding a short story the class was reading (*id.*). While other students raised their hands to offer opinions and impressions, the student reportedly remained quiet although she appeared to be following the discussion and was observed to look frequently at the teacher while he spoke (*id.*). The social worker reported that the student became "more distracted" at one point, playing with her hair, leaning her head on her hand, and tapping her pen on her binder (*id.*). When the teacher directed students to turn to a page in the book and complete three comprehension questions, the social worker indicated that the student was slow to get started and appeared to be looking at the art in the book (*id.*). Although the social worker reported that the student "rested her head on her hand and looked bored" as other students volunteered and discussed their answers, she also reported that the student correctly replied to a question that the teacher posed to her (*id.*). When the teacher dictated and wrote the homework assignment on the board, the social worker reported that the student entered it into her "assignment book" (*id.*). The teacher reported to the social worker that it was his opinion that the student "was on task," but that inferential questions were more challenging for her (*id.*).

The Committee on Special Education (CSE) met on April 14, 2008, for the student's annual review and to develop an individualized education program (IEP) for the 2008-09 school year (Dist. Ex. 1 at pp. 1, 2). The IEP resulting from that meeting indicated that the members of the April 2008 CSE included a school psychologist, a special education teacher or related service provider who also served as the district representative, a regular education teacher, the student's "Focus" teacher from Winston Prep who was licensed in general education, and the parent (*id.* at p. 2). The April 2008 CSE recommended that the student continue to be eligible for special education programs and services as a student with a learning disability and recommend placement

in a collaborative team teaching (CTT) class with a student to teacher ratio of 14:1 (id. at p. 1).³ The April 2008 CSE also recommended individual speech-language therapy once per week for 40 minutes and twice per week in a group of five for 40 minutes (id. at p. 16). The IEP indicated that the CSE removed vision therapy from the student's IEP, but continued a recommendation for assistive technology (id. at pp. 1, 2).

With respect to the student's present levels of academic performance, the April 2008 IEP stated, among other things, that "teacher reports indicate that [the student's] academic difficulties include decoding and encoding, reading comprehension, and writing skills" (Dist. Ex. 1 at p. 3). With respect to math, the April 2008 IEP stated that the student had "strong computational skills and a good memory for mathematical facts and terms," but that she "grapple[d] with comprehending directions and with math word problems" (id.). Based on "teacher estimate," the April 2008 IEP indicated that the student was at the second to third grade instructional level in "reading fluency/decoding," reading comprehension, and written expression, and at the fifth to sixth grade instructional level in "math composite" (id.). The April 2008 IEP provided for modifications and resources to address the student's academic management needs including "multi-modality," ample opportunity for drill and review, graphic organizers and outlines, and the break down of material and assignments into "more manageable steps" (id.).

With respect to the student's present levels of social/emotional performance, the April 2008 IEP stated that the student was described as a "quiet and respectful youngster who is aware of her difficulties in the school setting and struggles with self-esteem" (Dist. Ex. 1 at p. 5). The April 2008 IEP also indicated that the student had been "withdrawn and immature in the past, but is improving" (id.). The April 2008 IEP indicated that the student's behavior did not seriously interfere with instruction, that her behavior could be addressed by the classroom teachers, that speech-language therapy would provide behavioral support, and that a behavioral intervention plan (BIP) had not been developed (id.). With respect to the student's health and physical development, the April 2008 IEP indicated that the student was prescribed glasses, but reportedly rarely wore them and that she had received diagnoses of "oculomotor dysfunction, accommodative insufficiency, visual processing and rapid naming deficits" (id. at p. 6). It also indicated that "to assess [the student's] visuomotor and fine motor deficits," an assistive technology evaluation was recommended during the last academic year and was again being recommended for the 2008-09 school year (id.). The April 2008 IEP further indicated that the student required "assistive technology device[s]," provided for books on tape, bifocal glasses full time, "masks and markers," and an adequate distance between the student's body and tasks to be done (id.). The April 2008 IEP also provided for testing accommodations of double time, a separate location, directions read and reread, questions read aloud, and answers recorded in any manner (id. at p. 16).

By "Notice of Recommended Deferred Placement" dated April 14, 2008, the district notified the parent of the recommendations made by the CSE on April 14, 2008 for a CTT program

³ "Collaborative team teaching," also referred to in State regulation as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

with related services of speech-language therapy (Dist. Ex. 6). The notice further indicated that the parent would be receiving a Final Notice of Recommendation (FNR) "on or before" August 15, 2008, and that a copy of the "Notice of Rights as a Parent of a Child with a Disability" was attached (id.).

The hearing record reflects that the district mailed the April 2008 IEP to the parent on or about May 20, 2008 (Dist. Ex. 1 at p. 1). The parent testified that she received the April 2008 IEP at her brother's residence, an address which the parent had previously given the district (Tr. pp. 168-69). The parent also testified that the address listed on the IEP was incorrect and that she thereafter called and wrote to the district on June 28, 2008, regarding her correct address (Tr. pp. 138, 158-60, 168; see Parent Ex. M).⁴ The parent testified that her June 28, 2008 letter also advised the district that she was "waiting for the address for [her] daughter's school ... and if they didn't send it on time [she] was going to have to register in another school" (Tr. pp. 138-39; see Parent Ex. M).

By letter dated August 13, 2008, the parent, through her attorney, wrote to the district that her daughter currently attended Winston Prep and that she had been accepted at that school for the 2008-09 school year beginning September 2008 (Parent Ex. A). The parent also advised the district that she was giving notice of the parent's intention to have her daughter attend Winston Prep for the 2008-09 school year and identified concerns with the district's proposed program (id.).

By letter dated August 27, 2008, the parent, through her attorney, restated the content of her August 13, 2008 letter and additionally stated that the parent had not received an FNR offering a class placement (Parent Ex. B at p. 1).

By FNR dated August 14, 2008 sent to the address listed on the April 2008 IEP, the district advised the parent of its recommended program as reflected in the IEP, and included the specific recommended district school where the program would be implemented (Parent Ex. C). The hearing record reflects that the parent did not receive the district's FNR until September 11, 2008, after the school year had started, and that the FNR had been sent to the incorrect address that was listed on the IEP, which the parent had previously notified the district should be changed (Tr. pp. 136-137, 138, 158; compare Parent Ex. C at p. 2, with Dist. Ex. 1 at p. 1; see Parent Ex. M).

The hearing record reflects that the student continued her attendance at Winston Prep during the 2008-09 school year (Tr. pp. 132; Parent Ex. H at p. 1).

The parent, through her attorney, submitted a due process complaint notice dated April 27, 2009 (Parent Ex. H). The parent requested an impartial hearing and the assistance of a Spanish language interpreter (id. at pp. 1, 3). Among other things, the parent asserted that the district "mailed a final notice of recommendation on August 29, 2008 which did not arrive before the start of the school year in violation of 8 NYCRR 200.4(e)(1)" (id. at p. 2). The parent also contended that Winston Prep was an appropriate placement for the student as the student received daily 1:1 individualized remediation sessions as part of her program there and she had progressed in her

⁴ The June 28, 2008 letter from the parent to the district contained in the hearing record was written in Spanish (Tr. p. 138; see Parent Ex. M).

reading skills (id. at pp. 1-2). Lastly, the parent alleged that equitable considerations supported her request for tuition payment (id. at p. 2).

The parent requested that the impartial hearing officer order tuition payment for Winston Prep for the 2008-09 school year (Parent Ex. H at p. 3). Alternatively, the parent requested that the impartial hearing officer direct the district to reimburse the parent upon a showing of tuition payment(s) to the school (id.). The parent also requested that the district provide transportation to and from Winston Prep (id.).

The impartial hearing took place on June 16, 2009. The impartial hearing officer rendered a decision dated July 7, 2009 (IHO Decision at p. 6). The impartial hearing officer found that the district failed to offer a free appropriate public education (FAPE)⁵ to the student "in that it failed to place the [student]...in the appropriate time limits" and because the district "conceded" that there was no special education teacher at the CSE meeting (id. at p. 5). He further concluded that the student needed more attention than she would receive in a CTT environment and that she needed a "small class environment with extra help" (id.). The impartial hearing officer also found that the parent's private school placement was not appropriate because the student was "not making much progress" there (id.). The impartial hearing officer further found that the private placement was "not the least restrictive environment" because she was "isolated" from her school peers and had to travel "at least three hours each day" to and from Winston Prep (id. at pp. 3, 4, 5). The impartial hearing officer also concluded that "[w]hile the [student] made some progress in certain areas she apparently made negligible progress in the critical area[s] of reading comprehension, pseudo word decoding and apparently no progress in spelling and listening comprehension" and that she was not receiving "books on tape for comprehension" at Winston Prep (id. at pp. 4-5). He further noted that the student had been given a computer by the district during the 2007-08 school year, which apparently had not been working "for a long period of time – a fact not addressed by her private school" (id. at p. 5). The impartial hearing officer; therefore, found that the district was "not required to pay tuition for the private school for the 2008-09 school year" (id. at p. 5). He made no determination regarding the impact of the equities in the case upon the parent's claim for tuition payment. The impartial hearing officer further ordered the CSE to meet and "develop a new IEP with a more suitable placement and do so pursuant to due process guidelines of timely notice and parental participation" (id. at p. 6).

The parent appeals and asserts that the impartial hearing officer erred in finding that Winston Prep was not an appropriate placement for the student.⁶ The parent asserts that the

⁵ 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]; see 34 C.F.R. § 300.17).

⁶ On appeal, the parent does not seek relief pertaining to transportation to and from Winston Prep.

impartial hearing officer's conclusion that the parent's placement was not appropriate included "errors of fact and law," including whether the student made progress at Winston Prep and that the impartial hearing officer applied an "incorrect legal standard" relative to the parent's burden of proof with respect to a private placement.⁷ The parent also contends that the hearing record does not support the impartial hearing officer's conclusion regarding the student's travel time to and from Winston Prep. The parent requests permission to submit additional evidence regarding the amount of time needed for the student to travel to and from Winston Prep. Consistent with the parent's contention that the impartial hearing officer erred in concluding that the parent's unilateral placement was not appropriate, the parent also asserts that the impartial hearing officer should have made a determination relative to equitable considerations. The parent further asserts that equitable considerations support the parent's request for a tuition award.

The district answers and contends that the impartial hearing officer correctly found that the parent's placement was inappropriate. The district asserts that the parent's unilateral placement of the student at Winston Prep for the 2008-09 school year was inappropriate because: (1) the student "made only minimal progress;" (2) the parent's placement was "overly restrictive;" (3) the parent's placement did not provide the student with speech-language therapy, books on tape, or a working computer; and (4) the parent failed to demonstrate that the curriculum at Winston Prep was appropriate. The district also asserts that equitable considerations favor the district. Finally, the district objects to the additional evidence proffered by the parent.

The parent submitted a reply to the district's objection to the submission of the parent's additional evidence requesting that a State Review Officer accept the additional evidence even though it could have been offered at the time of the impartial hearing because the evidence is relevant to instant case.

As a preliminary matter, I will address the parent's additional evidence attached to her petition. The district objects to such evidence, asserting that it was available at the time of the impartial hearing and is not necessary to render a decision. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I decline to accept the proffered evidence in this case as the information could have been offered at the time of the impartial hearing. Moreover, the information is not necessary to render a decision in this case.

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

⁷ The parent asserts that the impartial hearing officer erred with respect to conclusions regarding the applicability of the district's March 2008 classroom observation at Winston Prep, prior IEP's recommendations that the student be provided with books on tape, the computer that the district had provided the student in the prior year, and the composition of the student's class at Winston Prep.

them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.Y. v. New York City Bd. of Educ., 2009 WL 3233811, at * 4 [2d Cir. Oct. 9, 2009]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252-53 [2d Cir. Feb. 3, 2009]).

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]; 34 C.F.R. 300.513[a]; 8 NYCRR 200.5[j][4][ii]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Parents are to be afforded an opportunity to participate in the IEP formulation process (34 C.F.R. § 300.322; see Cerra, 427 F.3d at 192; Gavriety v. New Lebanon Sch. Dist., 2009 WL 3164435, at *29 [N.D.N.Y. Sept. 29, 2009]). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The district has not cross-appealed the impartial hearing officer's finding that it did not offer the student a FAPE for the 2008-09 school year. Therefore, that determination is final and binding upon the parties and will not be reviewed on appeal (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, the only issues before me are whether the parent's unilateral placement of the student at Winston Prep was appropriate for the student's unique needs and whether equitable considerations support the parent's claim for reimbursement.

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 10-15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 14; Matrejek, 471 F. Supp. 2d at 419-420; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105); however, the qualifications of teachers may be relevant in considering the appropriateness of instruction (Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 890625, at * 27

[N.D.N.Y. March 31, 2009). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89; see Matrejek, 471 F. Supp. 2d at 429; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660 [S.D.N.Y. 2005]).

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).

In 2007, the New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (L 2007, ch. 583, § 3); therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

I will now consider whether the parent has met her burden of proving the appropriateness of her placement of the student at Winston Prep for the 2008-09 school year (see Burlington, 471 U.S. at 369-70). For the reasons set forth below, I find that the hearing record shows that Winston Prep was appropriate in that it provided the student with educational instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to permit the student to benefit from instruction.

The hearing record reflects that Winston Prep is a school of approximately 225-230 students (Tr. p. 110). For the 2008-09 school year, the student was in a class comprised of one teacher and eleven sixth to eighth grade students who all had a primary difficulty with reading and whose comprehension and decoding skills were within one year of the student's (Tr. pp. 93, 109, 128). During the 2008-09 school year, the student's courses included literature, writing, math, US history, life sciences, and a language skills class described as a 45-minute class that specifically addressed decoding and reading (Tr. p. 93). The parent testified that prior to attending Winston Prep, the student did not want to go to school or do her homework (Tr. p. 133). The parent further testified that prior to attending Winston Prep, the student was not able to read and did not want to read in front of other students because they would laugh at her (id.). According to the parent, the student now willingly gets up for school, does her homework as soon as she gets home from school, and is more communicative (Tr. pp. 133-34).

The hearing record reflects that at the end of every day, the student participated in a "[w]raps" period, at which time teachers checked to ensure that students had all the materials needed for homework and provides students with the opportunity to ask any questions they may have had (Tr. pp. 93-94). Daily, the student also participated in a 45-minute FOCUS class where she received 1:1 instruction from the teacher in decoding, encoding, reading comprehension, and writing as well assistance in whatever subject she was having difficulty (Tr. pp. 95-96, 119). The student's FOCUS teacher utilized a combination of different structured multisensory reading programs with the student that utilized tactile, kinesthetic, visual, and auditory methods (Tr. pp. 96-97, 119). The FOCUS teacher did not use a specific reading curriculum with the student, but rather "pull[ed] from" a variety of programs such as Preventing Academic Failure (PAF), Orton-Gillingham, Wilson, and other programs to personalize it for each student depending on the student's specific needs (Tr. pp. 96-97). According to the testimony of the student's FOCUS teacher, the student's decoding skills improved during the 2008-09 school year; she increased the amount of detail in her writing, and she was more confident in expressing her thoughts (Tr. p. 120). The student's FOCUS teacher testified that the student made progress in all her classes and received "A"s and "B"s in all of her courses during the 2008-09 school year (Tr. pp. 119-20, see Parent Exs. D; E).

According to a winter 2009 progress report from Winston Prep, decoding and encoding skills were targeted in the student's FOCUS class by having the student complete activities with words in context and in isolation, as well as orally and in writing (Parent Ex. E at p. 1). Using the PAF and Recipe for Reading programs, the progress report indicated that the student's teacher introduced a different sound pattern each week using auditory, visual, tactile, and kinesthetic strategies for instruction such as looking at the sound, repeating it and writing it, as well as using letter cut outs to make words containing the introduced sound (id.). The progress report also indicated that the student made lists of "family patterned" and sight words on index cards to practice with at home (id.). At the start of each FOCUS session, the report indicated that the teacher drilled the student on her word cards requiring her to read the word aloud and spell select

words (id.). The FOCUS teacher also reported that she utilized literature to increase the student's decoding and encoding skills by pulling familiar words from the student's readings and having her apply decoding strategies to syllabicate the words, and by reading poems and completing activities requiring her to identify beginning and ending sounds (id.).

To address the student's reading comprehension, the progress report indicated that the FOCUS teacher had the student read aloud, stopping her often, and requesting that she summarize what she was reading or make predictions (Parent Ex. E at p. 2). Additionally, the progress report indicated that the student utilized "story maps" to aid her understanding of the characters, plot, setting, and theme; verbally sequenced events within a story; and made "text-to-self" and "text-to-world" connections to obtain realistic perspectives about what she was reading (id.). To enhance the student's listening skills and listening comprehension, the progress report indicated that the student and the FOCUS teacher would take turns reading aloud and then asking/answering questions about the selected reading (id.).

To develop the student's written language skills, the progress report indicated that the FOCUS teacher asked the student to write about a variety of situations or events as well as provided her with "story starter" ideas (Parent Ex. E at p. 2). The progress report indicated that the student was encouraged to use the "5w" questioning technique to produce more concrete and succinct pieces (id.).⁸ The progress report indicated that brainstorming and graphic organizers were used to help the student share ideas (id.). The FOCUS teacher reported that collaboration with the student's teachers and parents provided opportunities to target and generalize skills within the classroom setting (id.).

The Winston Prep dean testified that the FOCUS teacher informed the student's content area teachers at Winston Prep of what the student was specifically working on in the FOCUS class through meetings and e-mails (Tr. p. 97). Biweekly, the FOCUS teacher met with the student's content area teachers to discuss the student's progress in their classes (Tr. pp. 127-28). The Winston Prep dean further testified that the student's special education needs were met in all her classes because the teachers knew that the student needed to work on decoding (Tr. p. 94). In addition, the Winston Prep dean testified that the student's language teacher sent out a sheet of the skills and phonics elements the student was working on to the content area teachers weekly (id.). The Winston Prep content area teachers provided support for these areas of decoding utilizing multisensory techniques, such as pulling words for syllabication before any reading is done in class, as well as breaking down the information in the content areas (Tr. pp. 94-95). The Winston Prep content area teachers worked with the student on her reading needs by modifying instruction and by utilizing the same strategies for decoding and encoding that the FOCUS teacher worked on with the student during her 1:1 instruction (Tr. p. 129). By way of example, the student's FOCUS teacher testified that if the student's language teacher were working on "beginning blends," she would reinforce that in FOCUS, the literature teacher would target it through literature, and the science teacher would address it through content-based science (id.). The FOCUS teacher further testified that the skills the student is learning in FOCUS "happens" throughout her curriculum and the student's teachers try to reinforce skills and phonemic exercises through constant communication with each other (Tr. pp. 129-30).

⁸ The hearing record defines the "5w" technique as "who, what, when, where, and why" (Parent Ex. E at p. 2).

The student's literature teacher reported in the winter 2009 progress report that the study of literary elements enabled the student to improve her reading comprehension and her active reading skills (Parent Ex. E at p. 3). The progress report indicated that the student was able to accurately identify all of the story elements and state the moral of each folktale (id.). The progress report also indicated that the student frequently used the strategy of writing her thoughts in the margin of the text (id.). The literature teacher reported that she provided the student with many opportunities to read aloud which strengthened the fluency, rate, and accuracy of the student's reading (id.). The literature teacher indicated that the student increased her participation in classroom discussion, by voicing her opinions and supporting them with story evidence (id.). In addition, the literature teacher reported that the student demonstrated increased self-advocacy skills by asking questions more frequently for clarification of ideas or words in the text (id.).

The student's language skills and writing teacher reported in the winter 2009 progress report that she instructed the student by combining methods from the PAF, Solving Learning Difficulties (SLD), and Recipe for Reading programs (Parent Ex. E at p. 3). The teacher reported that she began the semester with in-depth instruction on syllables and syllabication rules that the student was expected to apply to her everyday reading and writing tasks (id.). The language skills teacher reported that the student practiced encoding through dictation lessons made up of word lists from SLD that the student recorded in her language skills binder (id.). The teacher utilized short stories for the student to practice decoding in context and reported that the student responded well to collaborative activities such as hands-on word making tasks and grammar games (id.). To encourage the student's knowledge of vocabulary meaning in addition to fluency, the language skills teacher required the student to use her literature short story vocabulary words to find synonyms, determine parts of speech, and use the words correctly in sentences (id. at p. 4). Within the language skills class, the student's language skills and writing teacher reported that the student also worked on self-reflective exercises for regulating focus and attention, as well as problem solving activities (id.). Additionally, the teacher reported that the student's conversational skills were addressed through regular group work whereby peers "graded" each other using a "conversation rubric" (id.).

The student's math teacher reported in the winter 2009 progress report that the student's curriculum focused on basic skills review and pre-algebra skills (Parent Ex. E at p. 4). The teacher indicated that proportional word problems were the most challenging for the student because the student had to "transfer written language into a numeric proportion with an algebraic variable" (id. at pp. 4-5). The teacher reported that she emphasized note taking and comprehension for the student and that she utilized visual representations, teacher made handouts, oral explanations, and daily drill and practice to enhance understanding (id. at p. 5).

In science, the student's teacher noted in the winter 2009 progress report that the student was working on improving her decoding and reading fluency, reading comprehension, and note-taking skills through the content material presented (Parent Ex. E at p. 5). The student's science teacher reported that prior to reading assignments, she presented the student with vocabulary from the text, discussed what the meanings of the words were, and that the meanings were written in the text to aid with comprehension (id.). The teacher reported that while reading, she required the student to answer a variety of questions about each short section with an emphasis on drawing conclusions or stating her opinion (id.). To assist the student with comprehending the science material from the text, the teacher reported that she instructed the student in strategies such as

putting information into a chart to see patterns and draw conclusions, as well as drawing pictures (id.).

The student's US history teacher reported in the winter 2009 progress report that the student was developing and remediating her academic skills, specifically decoding, reading comprehension, note taking, and study skills (Parent Ex. E at p. 6). According to the teacher, the student utilized a consistent strategy to break down and analyze information in her chapters: she pre-read the text, broke down targeted words into syllables, defined the words, and used them in context (id.). Additionally, the student identified the main components (who, what, when, where, why) of each chapter by highlighting important passages, creating margin notes, and organizing and categorizing information (id.). The student also enhanced her ability to sequence important events by creating timelines (id.).

According to the student's FOCUS teacher, the student was "very organized" and was "always consistent" in doing her homework (Tr. p. 120). The teacher reported that the student participated in class, was considered a leader, and was a strong advocate for herself as well as for other students (Tr. p. 121). The Winston Prep dean testified that the student had made progress in all areas except spelling, she was reading more fluently, and in comparison to her test scores, the student performed better in her class, which the dean opined was because the student felt more comfortable in class (Tr. pp. 98, 105, 106). The dean testified that all of the students were at the same level and made mistakes in decoding, so there was no embarrassment (Tr. pp. 112-13). The dean further testified that the student was comfortable reading aloud, answering questions, and asking for help (Tr. p. 113).

The district contends that Winston Prep was not appropriate to meet the student's needs because it did not offer speech-language therapy. However, the hearing record reflects that many of the student's speech-language therapy annual goals and short-term objectives identified in the student's April 2008 IEP were adequately addressed within her classes at Winston Prep during the 2008-09 school year. The student's April 2008 IEP proposed annual goals and corresponding short-term objectives to improve the student's receptive and expressive language skills in order to further her academic performance; specifically to build her vocabulary, form sentences with a given word, increase her word finding skills, retell a story in an organized and sequential manner, comprehend "wh" questions, comprehend the main idea of short stories accompanied by picture cues, comprehend the salient features of narratives, and follow two-three step directions when given prompts/cues (Dist. Ex. 1 at p. 13). As described above, the student was required to verbally sequence events within a story with her FOCUS teacher, participate in group work in her language skills and writing class whereby peers "graded" each other using a "conversation rubric" to enhance the development of her conversational skills, answer questions in science about short sections of text with an emphasis on drawing conclusions or stating her opinion, and identify the main components of chapters read in U.S. history indicating who, what, when, where, and why as well as sequencing events (Parent Ex. E at pp. 3, 4, 5). The student also used the "5w" questioning technique to produce more concrete and succinct written pieces with her FOCUS teacher (id. at p. 2). The hearing record reflects that the student asked questions more frequently for clarification of ideas or words, advocated for herself and other students, and that she was talkative and social with other students (Tr. pp. 113, 121; Parent Ex. E at p. 3).

The district also asserts that Winston Prep is not appropriate because it did not provide the student with books on tape or a working computer. Although the parent argues that the student

only required books on tape because she was not regularly wearing her glasses and not for reading comprehension, as found by the impartial hearing officer; the hearing record does not support her argument. In a report resulting from a private psychological evaluation of the student conducted in December 2006, the evaluator noted that "multiple processing vulnerabilities" and a "profound impairment in phonetic analysis" contributed to the student's reading difficulty and recommended that the student "read[] along with recordings of interest, and then write[] summaries of the books that she reads in this way" (Dist. Ex. 4 at pp. 5, 6). I find however, that the hearing record in this case shows, as discussed above, that Winston Prep provided the student with instruction specific to her deficits in reading comprehension and that the student demonstrated progress in this area of need (Parent Ex. E at p. 2; compare Parent Ex. L at p. 1, with Tr. p. 99).

The impartial hearing officer also noted that the student had been given a computer by the district during the 2007-08 school year, which apparently had not been working "for a long period of time – a fact not addressed by her private school" (IHO Decision at p. 5). A review of the hearing record does not support the impartial hearing officer's finding (see Tr. p. 157). Moreover, although the student's April 2008 IEP recommended the student receive an assistive technology evaluation to assess her "visuomotor and fine motor deficits," the IEP did not recommend a computer for the student nor does the hearing record show that the student would require a computer (see Dist. Ex 1 at p. 6).

Accordingly, as indicated above, I find that the hearing record shows that Winston Prep was appropriate for the student in this case for the 2008-09 school year in that it provided the student with educational instruction specially designed to meet her unique needs, supported by such services as are necessary to permit the child to benefit from instruction (see Gagliardo, 489 F.3d at 112, citing Frank G., 459 F.3d at 364-65).

The impartial hearing officer concluded that the student had not made "substantial" progress in the "critical areas" of her disability and found that the private school placement "resulted in minimal progress in substantial language areas" (IHO Decision at p. 5). However, as noted above, while evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 citing Berger, 348 F.3d at 522; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; Green v. New York City Dep't of Educ., 2008 WL 919609, at *8 [S.D.N.Y. Mar. 31, 2008]; Omidian, 2009 WL 890625, at *28). As detailed above, Winston Prep offered specially designed instruction to meet the student's unique needs during the 2008-09 school year, including her language needs. Further, I note that the impartial hearing officer arrived at his conclusions with respect to the student's progress by comparing the grade equivalent scores attained by the student on a variety of reading subtests from different achievement tests administered between 2004 and 2009, results of cognitive testing, and teacher estimates of the student's reading instructional levels (IHO Decision at p. 4). I note that the parent correctly asserts that a comparison of the student's results from administration of the Wechsler Individual Achievement Test (WIAT) in spring 2008 and spring 2009 showed progress in the word reading, reading comprehension, pseudoword decoding, written expression, and oral expression subtests; demonstrating that the student had increased her skills in her areas of need during the 2008-09 school year (Tr. pp. 98-100; see Parent Ex L at p. 1).

Finally, the district contends that least restrictive environment (LRE) considerations require a finding that Winston Prep is not appropriate. While parents are not held as strictly to the standard of placement in the LRE as school districts, the restrictiveness of the parental placement

may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]). The impartial hearing officer found that the evidence presented indicated that the private placement was "not the least restrictive environment" and stated that the parent testified that the student must travel approximately three hours each day to and from Winston Prep (IHO Decision at pp. 3, 5). The impartial hearing officer further noted the student's "isolation" and "lack of contact outside of school with school peers" (id. at pp. 4, 5). I agree with the parent's contention that the hearing record does not support the impartial hearing officer's conclusion that the student was required to ride a bus for 1 1/2 hours each way to and from Winston Prep (see Tr. pp. 155-56). Moreover, the district admits in its answer that the hearing record does not show that the student was required to ride the bus 1 1/2 hours back and forth from Winston Prep (Answer ¶ 48). Regarding the impartial hearing officer's conclusion that the student was isolated from and lacked contact with her non-disabled school peers, I find that in light of the needs of this particular student, LRE considerations do not preclude a finding that the parent's unilateral placement of the student at Winston Prep for the 2008-09 school year was appropriate.

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 Individuals with Disabilities Education Act (IDEA) (Forest Grove, 129 S. Ct. at 2496; 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 A.H. v. New York City Dep't of Educ., 2009 WL 2602256, at *12-*13 [E.D.N.Y., Aug. 21, 2009]; S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *11, *14 [S.D.N.Y. Mar. 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181 at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner, 363 F. Supp. 2d at 660-61; 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]).

I have reviewed the arguments of both parties, and given the hearing record, I find that equitable considerations do not preclude an award of tuition reimbursement under the circumstances of this case.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated July 7, 2009 which found that the parent's placement of the student at Winston Prep was not appropriate and dismissed the parent's claim for payment of the student's tuition at Winston Prep for the 2008-09 school year are annulled; and

IT IS FURTHER ORDERED that the district shall, upon proof of payment provided by the parent, reimburse the parent for the cost of the student's tuition at Winston Prep for the 2008-09 school year.

Dated: **Albany, New York**
 October 13, 2009

PAUL F. KELLY
STATE REVIEW OFFICER