



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-068

### **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:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Gesher Yehuda Special Education Program (Gesher) for the 2011-12 school year. The appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; *see* 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

### III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the committee on special education (CSE) convened on May 12, 2011 to formulate the student's individual education plan (IEP) for the 2011-12 school year (see generally Dist. Ex. 1).<sup>1</sup> In a final notice of recommendation (FNR) to the parents dated July 8, 2011, the district summarized the recommendation in the May 12, 2011 IEP and notified the parent of the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 9). By letter dated August 22, 2011, the parent sent the district a ten day notice letter which indicated the parent could not observe the recommended placement because the school was not in session and she intended to enroll the student at Gesher for the 2011-12 school year (Parent Ex. C). On October 5, 2011 the parent notified the district in writing that she visited the recommended program but did not find it appropriate for the student (Parent Ex. D at p. 1). Further, the parent indicated she disagreed with the particular public school site to which the district assigned the student to attend for the 2011-12 school year and, as a result, notified the district of her intent to request an impartial hearing for tuition reimbursement for the 2011-12 school year at Gesher (Parent Ex. D).

In a due process complaint notice, dated May 18, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year alleging the 15:1 recommended class was not appropriate academically or socially (see Parent Ex. A at p. 2). Further, the parent alleged that she did not agree with the recommended goals because they were not reflective of the discussion during the May 2011 CSE and the goals were not consistent with the student's academic functioning at the time of the review (see Parent Ex. A at p. 2).

An impartial hearing convened on July 12, 2012 and concluded on March 13, 2013 after six days of proceedings (Tr. pp. 1-134). In a decision dated March 22, 2013, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that Gesher was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 10-12). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Gesher for a sum not to exceed \$36,000 for the 2011-12 school year (IHO Decision at p. 12).

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<sup>1</sup> Attached to the IHO's decision was an itemized list of districts exhibits. The list numbering and identification is inconsistent with how the district's exhibits were marked (compare IHO Decision at p. 13, with Dist. Ex. 1-6). As per the hearing record the transcript of July 12, 2012 reflected the entering of the exhibits as described in the IHO July 2012 decision (compare Tr. pp 3, 6, with IHO Decision at p. 13). Subsequently on August 9, 2012 the district representative requested that the districts evidence from the initial hearing date of July 12, 2012 be stricken from the record and documents 1-9 were entered into the record with the pagination that is reflected on the exhibits themselves (Tr. pp. 20-21). The IHO did not reflect this change in exhibits in the IHO decision (IHO Decision at p. 13). Accordingly for purposes of this decision, the district exhibits will be referenced as they are actually marked.

#### IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition is also presumed and will not be recited here.<sup>2</sup> The gravamen of the parties' dispute on appeal is (a) whether the district's recommended placement in a 15:1 special class in a community school appropriately met the specific special education needs and abilities of the student, and (b) whether the parent's unilateral placement at Gesher was appropriate. The district also appeals the IHO's determination that equitable considerations favor the parent's request for tuition reimbursement.

#### V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y.

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<sup>2</sup> In this instance, the parent was represented by an educational advocate from Educational Advocacy Service from the point of the parent's ten day notice letter through the impartial hearing (Tr. pp. 1-134; Parent Exs. A pp. 1-3; C). The parent did not submit an answer to the petition.

Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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 a student by his or her parents, if the services offered by

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

The IHO found that the proposed program of a 15:1 special class in a community school was not appropriate to meet the specific special education needs of the student and the district engaged in predetermination when developing the May 12, 2011 IEP by applying a blanket policy to determine the student's program (IHO Decision at pp. 10-11). Further, the IHO found the 15:1 program was based on an administrative policy and not in relation to the student's specific needs and abilities (IHO Decision at pp. 10-11). As further discussed below, I find the IHO's determination of predetermination was in error; however, I affirm the IHO's conclusion that the 15:1 special class in a community school was insufficient to provide the student with the individual attention required to meet the student's needs as presented the in the hearing record.

### **A. Predetermination**

Turning first to the issue of predetermination, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp.2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at \*7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at \*6-\*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at \*10-\*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP

development process" (Dirocco, 2013 WL 25959, at \*18, quoting M.M., 583 F. Supp. 2d at 506). Districts may also "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (Dirocco, 2013 WL 25959, at \*18).

With regarding to the IHO's finding of predetermination in this case, the hearing record shows that the May 2011 CSE considered various placement options for the student as identified in the May 2011 IEP (Dist. Ex. 1 at p. 18). The May 2011 IEP indicated the CSE considered a general education program without services and an integrated co-teaching placement but rejected both because the CSE opined the student required academic and language supports that would not be provided in such placements (Dist. Ex. 1 at p. 18). The May 2011 CSE also considered a general education setting with special education teacher support services; however, the CSE indicated this placement also would not adequately address the student's educational needs (*id.*). Additionally, the May 2011 CSE considered and rejected a special class in a specialized school as too restrictive of an education setting for the student (*id.*). Having considered several placements the district contends they demonstrated an "open mind" and did not engage in preselecting the student's placement.

However, while the hearing record shows that the May 2011 CSE considered multiple placements for the student for the 2011-12 school year, thereby establishing an "open mind", I concur with the conclusion reached by the IHO that the placement ultimately recommended by the CSE was insufficient to address the student's individual needs.

### **B. May 2011 IEP—15:1 Special Class Placement**

Turning next to the issue of the 15:1 special class placement State regulation provides that a 15:1 special class placement is designed for students "whose special education needs consist primarily of the need for specialized instruction" (8 NYCRR 200.6[h][4]). However, "[t]he maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). The hearing record in this case reflects that the student had significant delays in cognition, reading comprehension, math skills, receptive and expressive language, limited oral and written narrative skills and poor word retrieval abilities (Dist. Exs. 1 at p. 3; 2 at pp. 2-3, 5 at p. 1-2; 7 at pp. 1-2). In addition, the May 2011 IEP also indicates the student required a multisensory approach, tasks broken down into small units, task analysis, repetition and review, as well as rephrasing (Dist. Ex. 1 at p. 3). Given the student's significant academic delays and multiple management needs I find no reason to disturb the IHO's finding that the district did not establish that student's individual needs could be addressed in a 15:1 special class.

Thus, for the reasons set forth above, while I find the IHO erred in finding a denial of FAPE due to the district's predetermination of the student's placement, I find the hearing record supports the IHO's additional finding that the 15:1 placement was not individualized and was insufficient to address the student's unique needs and confer educational benefit.

### C. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA" ]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

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).

With regard to the party's dispute over whether the parent's unilateral placement of the student at for the 2011-12 school year was appropriate I affirm the IHO's finding that the Geshher program was appropriately designed to address the specific special education needs of the student (IHO Decision at p. 11).

In describing the student the evidence in the hearing record reflects that the student's cognitive functioning fell in the "deficient range", the student's reading comprehension fell at a late third grade level and math skills fell at the at the fourth grade level (Dist. Ex. 2 at pp. 2-3).<sup>3</sup> The May 2011 IEP indicates the student is a literal learner, she skips details when reading and has difficulty drawing conclusions and inferences (Dist. Ex. 1 at p. 3). In mathematics the student demonstrates difficulty with multi-step examples and requires new concepts to be broken down into small simple steps (id). The student presents with receptive and expressive language delays, limited oral and written narrative skills and poor word retrieval skills (Dist. Ex. 5 at p. 1). Due to motor weakness the student lacks the mature upper extremity integration required for complex movements and she performs poorly on graphomotor tasks (Dist. Ex. 1 at p. 3). To support the student's many needs the May 2011 IEP indicates the student requires a multisensory approach, the breaking down of tasks into smaller units, task analysis, repetition, review and rephrasing (id).

To meet the student's needs Geshher provided the student with instruction in a 6:1 special class where the instructor "slow[ed] down" the curriculum, provided the student with separate homework and tests to allow her "to meet her potential" and gave the student the information she needed "to do her best" (Tr. pp. 80, 96). The student's teacher also testified that the student's deficit in reading comprehension impacted the student's education in all subject areas and that the small classroom at Geshher allowed for individualized instruction geared towards the student's needs (Tr. p. 82). The IHO also noted that the student made academic progress as evidenced by the student passing three regents exams including algebra, global II and living environment (Tr. pp. 80-82; IHO Decision at p. 11).<sup>4</sup> In addition Geshher provided speech-language therapy and occupational

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<sup>3</sup> The hearing record reflects a significant discrepancy between teacher report and standardized testing in the areas of reading and mathematics (Dist. Ex. 1 at p. 3). While teacher report finds the student's reading performance to be a the seventh grade level the Woodcock-Johnson yielded a performance reflective of upper third grade (Dist. Ex. 1 at p. 3). In relation to mathematics the teacher estimate of instructional level for the student was sixth grade level while the Woodcock-Johnson standardized assessment yielded an instructional level at grade three (Dist. Ex. 1 at p. 3).

<sup>4</sup> While a finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308, at \*2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, at \*1 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364). However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). The Second Circuit has also explained that progress made in a



therapy to address the student's deficits in receptive and expressive language as well as fine motor needs (Tr. p. 91).

As Gesher provided the student with specialized instruction and related services to meet the student's unique special educational needs and the student demonstrated progress at Gesher I find the hearing record supports the IHO's finding that the student's unilateral placement was appropriate.

#### **D. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 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"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 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, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

Turning to the party's disagreement over equitable considerations, in this case, I find the IHO properly found that the evidence supports that the parent was cooperative, attended the IEP meeting, visited the proposed school and gave the DOE adequate notice of her intent to seek tuition reimbursement.<sup>5</sup> Therefore the equities favor the parents.

#### **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year and that Gesher provided the student with an educational program that was reasonably calculated to

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unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 [2d Cir. 2007]; see Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006])

<sup>5</sup> It appears that the IHO reduced the tuition award from \$40,000 to \$36,000 as a result of non-reimbursable religious instruction (IHO Decision at p 12; Parent Ex. E at p. 1). I do not find sufficient reason in the hearing record to disturb the IHO's decision with regard to equitable considerations.

address the student's unique needs in order to confer educational benefit the necessary inquiry is at an end. As such equitable considerations weighed in favor of the parents' request for relief.

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 16, 2014**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**