



The University of the State of New York

The State Education Department State Review Officer

No. 08-028

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District.

Appearances:

Patrick E. Tydings, Esq., attorney for petitioners

Harris Beach, PLLC, attorneys for respondent, Alfred L. Streppa, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Elan School (Elan). Respondent (the district) cross-appeals and alleges, *inter alia*, that the impartial hearing officer failed to determine whether the district offered an appropriate educational program. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Elan, which is a private school with a residential program located in Poland Springs, Maine (Tr. p. 905). Elan has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (*see* 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student has for the most part, been educated in the district since kindergarten (Tr. p. 994).¹ In early 2000, the student was referred to the district's Committee on Special Education

¹ The parents' private psychologist reported that the student attended a district school until second grade (Joint Ex. 14 at p. 2). At that time the parents decided to send the student to the Children's Home Workshop (a private school) because of slow progress in the development of his reading and math skills (*id.*). The student attended the Children's Home Workshop during the 1998-99 and 1999-2000 school years, and returned to the district school for the 2000-01 school year (*id.*).

(CSE) and was classified as a student with a learning disability (LD) (Tr. p. 995; Joint Ex. 14 at p. 2).² Starting in the 2000-01 school year, the student began to receive direct supports in language arts and math as a result of this LD designation (Joint Ex. 14 at p. 2). In April 2002, the student underwent a psychoeducational evaluation and was diagnosed with Attention Deficit Disorder, Inattentive Type (Tr. pp. 830, 996; Joint Ex. 14 at p. 2).³ During the 2002-03 school year, the student received instruction for his academic coursework within a 15:1+1 classroom setting (Joint Ex. 14 at p. 2). The student also received accommodations such as books on tape, copies of class notes and extra time on tests (id.).

During the 2002-03, 2003-04, and 2004-05 school years, the student received passing grades (Dist. Exs. 34; 35; 36). According to some of the student's teachers, the student was a pleasure to have in class, displayed excellent effort and participated in class activities (id.). Other teachers commented that the student needed to develop more self-control, displayed inconsistent effort and needed to be more attentive in class (id.). During these three school years, the student's performance on the New York Statewide Testing Program yielded scores at either a Level 1 or Level 2 in both Mathematics and in English Language Arts (Parent Exs. O; P; Joint Exs. 9; 11; 12).⁴

On June 6, 2005, the CSE met to develop an individualized education program (IEP) for the student's 2005-06 school year (Parent Ex. Q). The IEP noted that the student was functioning below grade level in written expression, reading comprehension and spelling, was easily distracted by peers, could be a distraction to the other students, and had difficulty accepting criticism from adults (id. at pp. 4-5). The IEP developed after this meeting provided for daily academic instruction in 15:1 special class settings with one 40-minute group counseling session per week with the school counselor (Tr. p. 381; Parent Ex. Q at p. 1).

On January 13, 2006, as part of a triennial evaluation, the student was evaluated by the district's psychologist (Joint Ex. 13). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a verbal IQ standard score (SS) of 95 (37th percentile), a

² The impartial hearing officer's list of exhibits attached to her decision omits Joint Exhibit 7, described in the hearing record as the 2006-07 IEP from the February 28, 2007 CSE meeting and entered into evidence on December 5, 2007 (Tr. pp. 32, 207). As a result, all joint exhibits subsequent to Joint Exhibit 7 are incorrectly numbered on the impartial hearing officer's list. Citations to the joint exhibits in this decision follow the order in which they were entered into evidence during the impartial hearing (see Tr. pp. 207-08).

³ Starting in June 2002, the student began private psychotherapy sessions with a psychologist. These sessions stopped in January 2003, resumed in October 2005 and continued bi-weekly until March 2006 (Tr. pp. 830-31, 1078-79).

⁴ According to the hearing record, scores for the New York Statewide Testing Program are grouped into four levels (Parent Exs. O at pp. 1, 3; P at pp. 1, 3; Joint Exs. 9 at p. 2; 11 at p. 1; 12 at p. 1). Level 1 indicates that a student possesses the lowest level of skills (id.). Level 4 indicates that a student possesses the highest level of skills (id.). In 2003, the student's performance on the Test of New York State Standards (TONYSS) yielded a score of 13 (Level 1) in Mathematics and 22 (Level 2) in English Language Arts (Parent Ex. P at pp. 2, 4). In 2004, the student's TONYSS performance yielded a score of 18 (Level 1) in Mathematics and 19 (Level 2) in English Language Arts (Parent Ex. O at pp. 2, 4). In 2005, the student's performance for the New York Statewide Testing Program yielded a score of 687 (Level 2) in Mathematics and a score of 640 (Level 1) in English Language Arts (Joint Exs. 11 at p. 1; 12 at p. 1).

performance IQ SS of 104 (61st percentile), and a full scale IQ SS of 100 (50th percentile) (*id.* at p. 3). According to the psychologist, the results of the evaluation indicated that the student functioned within the average range of intelligence (*id.* at p. 3). The psychologist opined that the student's visual-spatial abilities were slightly better developed than his ability to express himself verbally (Tr. p. 135; Joint Ex. 13 at pp. 3, 4). The student's math and reading skills were assessed using the Woodcock-Johnson III Tests of Achievement (WJ III ACH) (Joint Ex. 13 at p. 4). The student's performance yielded a letter-word identification SS of 76 (5th percentile), a passage comprehension SS of 84 (15th percentile), a calculation SS of 75 (4th percentile), and an applied problems SS of 90 (25th percentile) (*id.*). The examiner reported that the student continued to evidence significant delays in word recognition, basic math facts, and to a lesser extent, reading comprehension (Tr. pp. 135, 169, 248; Joint Ex. 13 at pp. 3-4).⁵

On May 9, 2006, the CSE convened to develop an IEP for the student's 2006-07 school year (Parent Ex. E at p. 2). The IEP noted that the student was functioning below grade level in written expression, in reading comprehension and in spelling, that the student had difficulty completing assignments, and that the student's classroom behavior occasionally interfered with instruction (*id.* at pp. 4-5).⁶ The IEP developed at this meeting provided for daily academic instruction in 15:1 special class settings with one 40-minute group counseling session bi-monthly, which was a reduction from the weekly counseling sessions provided during the previous school year (*id.* at p. 2). In October 2006, the student's mother and the counselor orally agreed to change the group counseling to individual counseling (Tr. p. 417).

During fall 2006, the student began to fall behind in his classes (Tr. pp. 407-08, 1008-09). The first quarter report card stated that the student received a 63 in math, a 67 in English and a 67 in global studies (Dist. Ex. 37 at p. 2). An interim report card, covering the period between November 13, 2006 and December 12, 2006, reported that the student had an average of 50 or below in math and that he had missing/incomplete homework assignments and/or projects (*id.* at p. 3). During this time period, the student also committed several disciplinary infractions at school such as leaving school grounds, demonstrating disrespectful behavior on the bus, smoking, cutting classes and leaving classes without returning (Tr. pp. 141, 277-79, 285, 423, 502, 1005-07; Dist. Exs. 37 at p. 4; 52 at pp. 12-13; Parent Ex. X at p. 2). In October 2006, the student was involved in an incident in the cafeteria which resulted in him receiving three days of out-of-school suspension (Tr. pp. 1005-06).

⁵ In March 2006, the student was adjudicated a Juvenile Delinquent for an incident that had occurred in summer 2005 (Tr. pp. 142-43, 1077-79). The student was sentenced to a two-year term of probation and was mandated to undergo counseling with a psychologist as a term of his probation (Tr. pp. 1078-79, 1098, 1337-38, 1365-67; Joint Ex. 14 at p. 3). The counseling started in March 2006 and continued every other week until the student entered Elan (Tr. pp. 1078-79, 1338). The psychologist who provided this counseling was a different psychologist than the psychologist who had previously counseled the student from June 2002 to January 2003 and again from October 2005 to March 2006 (*see supra* footnote 3).

⁶ The student's final grades for the 2005-06 school year were 72 in English, 65 for Living Environments, 65 for Global Studies and 62 for General Math (Parent Ex. D).

The student was evaluated by a private psychologist over three days beginning on November 10, 2006 and ending on January 9, 2007 (Tr. p. 1028; Joint Ex. 14 at p. 1).⁷ Administration of the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) yielded a verbal IQ SS of 82 (12th percentile), a performance IQ SS of 97 (42nd percentile) and a full scale IQ SS of 88 (23rd percentile) (Joint Ex. 14 at pp. 4-5). The psychologist found that the student exhibited characteristics of Attention Deficit Hyperactivity Disorder, Combined Type (id. at p. 8). According to the psychologist, the student's overall learning aptitude continued to be within the average range (id. at p. 13). Regarding the student's English language skills, the psychologist found that the student had extensive spelling and language processing delays and that his reading skills were so limited that he could not be expected to independently read assigned coursework or read questions on tests (id. at pp. 9-10, 13). Regarding the student's math skills, the psychologist stated that the student exhibited extreme slowness and inefficiency in basic math calculations and lacked automatic mastery of basic computational facts (id. at p. 11). The psychologist reported that the student's poor school performance was leading to feelings of failure, inadequacy and incompetence (id. at p. 13). The psychologist opined that the student's poor learning performance stemmed from the student's difficulties with learning verbal terminology, his slow rate of processing information, his weaknesses in necessary background information and his inconsistent motivation (id. at p. 11).⁸ The psychologist also opined that the student's significant learning disabilities and concentration issues impacted his learning to such an extent that scores assessing previously learned information were negatively affected (id. at p. 4). The psychologist recommended that the student continue to receive extensive supports and accommodations for his listening, reading, math and organizational weaknesses (id. at p. 14).

On January 4, 2007, the student had a classroom confrontation with one of his teachers which resulted in a discipline referral (Tr. pp. 285-92; Dist. Ex. 30; Parent Ex. F).

On January 8, 2007, the student was seen by a second psychologist at the mother's behest (Tr. pp. 1017-18).⁹ The psychologist reported that the January 4, 2007 incident caused the student to experience flashbacks, restlessness and difficulty sleeping (Tr. p. 1341). The psychologist was also concerned that the student was exhibiting many of the symptoms of Acute Stress Disorder (Tr. p. 1342). She recommended that the student and the teacher remain separated and that the student be placed in either a different classroom, or receive tutoring on a temporary basis (Tr. p. 1343).

⁷ The psychologist was the same psychologist who had previously evaluated the student in 2002 and with whom the student had had counseling sessions from June 2002 to January 2003 and from October 2005 to March 2006 (Tr. p. 830; see supra footnote 3).

⁸ Despite the student's reading difficulties, and the availability of the Wilson Reading Program at the district school, the student was not participating in the Wilson Reading Program during the 2005-06 or 2006-07 school years (Tr. pp. 167-68, 262-67). After learning from a district staff member that the Wilson Reading Program might result in the student having to attend high school for an additional year, and believing that the student would receive reading instruction through remedial reading in summer school, the student's mother requested that the student be allowed to withdraw from the district Wilson Reading Program (Tr. pp. 1001-03; Dist. Ex. 2).

⁹ This was the same psychologist that provided counseling to the student as a condition of his probation (Tr. pp. 1016-18; Parent Ex. F; see supra footnote 5).

On January 9, 2007, the student's parents met with several district staff members (Tr. p. 1018). After this meeting, the district set up a tutoring program so that the student could receive tutoring for the two classes taught by the teacher with whom the student had had the confrontation (Tr. pp. 369, 1022; Dist. Ex. 8).¹⁰

On February 28, 2007, a CSE meeting was held at the request of the student's mother (Joint Exs. 7; 16). At the meeting, the CSE concluded that the student was no longer successful in his then-existing special education program (Joint Ex 8). The CSE recommended that referral packets be sent to two potential placements – the Alternative High School (AHS), which was a Board of Cooperative Educational Services (BOCES) program (BOCES AHS) and the Norman Howard School (Norman Howard) (Tr. pp. 1035-36). It was also agreed that after the intake process was completed at the two schools, another CSE meeting would be scheduled (Tr. pp. 1036, 1250; Joint Ex. 8). In the meantime, the student would continue to receive tutoring (Tr. p. 1036).

In spring 2007, the student continued to have difficulties both in and out of school. In April 2007, the student was involved in an incident where he appeared at school intoxicated (Tr. pp. 655-57, 1060; Joint Ex. 5 at p. 1). An interim progress report for the student's Automotive Collision Repair Technology class for the period between April 2, 2007 and May 11, 2007 indicated that he failed to complete class work, missed quizzes and tests, was absent on 13 days and had a grade of 39 (Parent Ex. X at p. 1). Additionally, the weekly summaries from the student's tutoring center showed that the student was absent on 11 days in April and May (Dist. Ex. 32). The student was also involved in an incident outside of school during that time period (Tr. pp. 1060, 1077).

On April 25, 2007, the CSE reconvened to discuss the proposed school placements suggested at the February 28, 2007 CSE meeting (Joint Ex. 4).¹¹ Only the BOCES AHS program was discussed because Norman Howard had indicated that it would not accept the student (Tr. pp. 1039-40; Joint Ex. 4 at p. 1). At the meeting the student's mother indicated that she was not pleased with the 8:1+1 program at BOCES AHS because she thought that the students at BOCES AHS exhibited more severe behavioral problems than her son and because she believed that her son needed more hands-on learning than what she had witnessed during her tour of the program (Tr. p. 1046). However, the CSE recommended that the student be placed at BOCES AHS (Joint Ex. 5 at pp. 1, 4). The IEP provided that the student would receive three hours of daily educational instruction in an 8:1+1 classroom at BOCES AHS with one 40-minute group counseling session per week (Joint Ex. 4 at p. 1). The IEP indicated that the other half of

¹⁰ On February 6, 2007, the district decided that it would place the student back into his original special education classroom (Tr. pp. 1031-34). After opposition from the parents, the district opted not to return the student to the classroom and the student's tutoring resumed (Tr. p. 1032; Dist. Ex. 11). Initially the student had only received tutoring for the two classes taught by the teacher with whom he had had the confrontation; after February 8, 2007, the student received tutoring for all subject areas (Tr. p. 1212; Dist. Ex. 11).

¹¹ Meeting participants included the student's mother, her attorney, the CSE chairperson/director of pupil personnel services, an additional parent member, the school psychologist, a regular education teacher, a special education teacher, a school counselor, the assistant principal, a representative from BOCES AHS and the attorney for the school district (Joint Ex. 4 at p. 6).

the student's day would be spent at a local vocational program (Tr. p. 532). The IEP provided that these programs and services were to start on May 14, 2007 and would end on June 22, 2007 (*id.*). At the meeting, the parents indicated their disapproval of the proposed placement and further indicated that they would be requesting an impartial hearing to seek tuition reimbursement once they had located a suitable private school for the student (Joint Ex. 5 at pp. 1, 4).¹²

The district requested consent to conduct a functional behavioral assessment (FBA) of the student (Dist. Ex. 23). In a response dated May 9, 2007, the student's mother provided written consent to conduct the evaluation; however, she noted that the late notice and a pending transfer of the student out of the district's school would make the evaluation difficult to schedule (Dist. Exs. 22; 23). On May 16, 2007, the district psychologist, the special education teacher and the student's mentor teacher met to prepare a "functional behavior assessment" and to develop a "behavior intervention plan" (BIP) (Dist. Ex. 24). A "Functional Behavioral Assessment Worksheet" was completed and a "Behavior Intervention Plan" was developed (*id.*). Neither the student nor the mother was present at this meeting because five days earlier on May 11, 2007, the student had enrolled at Elan (Tr. p. 1064; Dist. Ex. 24 at p. 3).¹³

On October 11, 2007, the parents filed a due process complaint notice seeking reimbursement for tuition costs at Elan for the periods between May 2007 and August 2007, and between September 2007 and August 2008 (Joint Ex. 1 at p. 3). The parents also sought reimbursement for costs associated with four school visits and for "causally related health care expenses" (*id.*). The parents alleged that the BOCES AHS program was not an appropriate placement because it failed to provide a therapeutic environment and sufficient academic supports (*id.*). The parents also alleged that the district failed to conduct an FBA, failed to develop a BIP, failed to prepare an IEP with adequate goals and objectives for the 2006-07 school year, and failed to offer any IEP for the student's 2007-08 school year (*id.*).

An impartial hearing was held over the course of six days in December 2007 and January 2008. The impartial hearing officer rendered a decision on February 22, 2008 (IHO Decision at p. 1). The impartial hearing officer concluded that the student should continue to be classified as having a learning disability.¹⁴ However, the impartial hearing officer failed to address whether the district had offered a free appropriate public education (FAPE) to the student. According to the impartial hearing officer, she could not determine whether the BOCES AHS program was appropriate because the student had "not tried the program" (*id.* at p. 81). The impartial hearing officer further stated that the student's needs "might or might not be met at the Alternative High School" (*id.*). She concluded that the parents were not entitled to reimbursement for the tuition costs at Elan because Elan was "not providing the educational support that [the student] needs"

¹² By letter dated May 3, 2007, the parents' attorney advised the district of the parents' rejection of the proposed BOCES AHS placement (Parent Ex. N). The letter also advised the district that the parents would be seeking tuition reimbursement, but were still investigating their private placement options (*id.*).

¹³ The "Functional Behavioral Assessment Worksheet" indicated that a message was left on May 11, 2007 with the student's mother requesting that she contact the district so that she and her son could participate in the development of the "behavior intervention plan" (Dist. Ex. 24 at p. 1).

¹⁴ A review of the hearing record shows that the student's classification was not in dispute.

(id. at p. 87).¹⁵ The impartial hearing officer ordered that the student be referred back to the CSE for an appropriate IEP, an FBA and a BIP (id. at pp. 87-88).^{16,17}

The parents appeal, asserting that the district's failure to consider the development of a BIP amounted to a failure to offer a FAPE to the student, that the educational program at Elan was appropriate, and that their claim is supported by the equities.

The district filed an answer and cross-appeal. In its answer, the district contends that its proposed BOCES AHS placement was appropriate, that the parents' placement of the student at Elan was inappropriate, and that the parents' claim for reimbursement should be denied on equitable grounds. More specifically, the district argues that it was not required to conduct an FBA or develop a BIP because all of the student's behavioral issues occurred outside of school and therefore they were not something that the district could address. Regarding the appropriateness of Elan, the district asserts that Elan is too restrictive, does not provide special education services, provides only 4½ hours of instruction per day, provides no math instruction, provides inadequate vocational training, and does not comply with federal or State special education mandates. The district argues that the equities do not weigh in favor of the parents, alleging that the parents failed to provide the district with proper notice of the student's removal from public school. In its cross-appeal, the district alleges that the impartial hearing officer erred in failing to determine whether the district offered a FAPE to the student and failed to make a determination with respect to the equities. The district further asserts that the impartial hearing officer made three incorrect factual findings.¹⁸ Submitted with the answer and cross-appeal was an additional exhibit dated April 2, 2008.

¹⁵ The impartial hearing officer stated in her decision that "Although [the psychologist] emphasized that this 24-hour, 7 days a week, [sic] residential program is the least restrictive environment in this situation. [sic] I do not agree" (IHO Decision at p. 83). The impartial hearing officer provided no rationale for this decision.

¹⁶ Although it is clear that the impartial hearing officer derived her factual findings from the exhibits and testimony in the hearing record, she rarely cited to specific exhibits or pages in the hearing transcript to support these factual determinations. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is reminded to comply with State regulations and cite to relevant facts in the hearing record.

¹⁷ On page 88 of her decision, the impartial hearing officer incorrectly instructed that parties that they had thirty days within which to submit a petition to review her decision. State regulations provide that the petition must be served upon the respondent within thirty-five days from the date of the decision sought to be reviewed (8 NYCRR 279.2[c]). If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the period (id.).

¹⁸ The three allegedly incorrect factual findings were that the CSE failed to review one of the private psychologist's reports, that the district's psychologist failed to review the private psychologist's report, and that that the district's proposed placement did not provide emotional support (IHO Decision at pp. 13, 18, 81).

The parents submitted a reply. In their reply, the parents argue that the additional exhibit attached to the district's answer and cross-appeal did not support the district's allegation that it had offered a FAPE to the student. The parents further argue that the district's proposed placement was inappropriate, that equitable considerations were in the parents' favor, and that the impartial hearing officer's factual determinations were correct and should not be disturbed.¹⁹

Preliminarily I will address the procedural issues that arise in this appeal. First, the district attached an exhibit to its amended answer and cross-appeal, and requests that it be accepted as additional documentary evidence. The exhibit is a report of the student's grades and credits and is dated April 22, 2008. Generally, documentary evidence not presented at the 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 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 a Student with a Disability*, Appeal No. 08-003). The impartial hearing in this matter concluded on January 22, 2008. Although it appears that the exhibit was available at the time of the impartial hearing, in the exercise of my discretion, I will accept the additional evidence.

Second, the district asserts that the parents' reply to its answer exceeds the permissible scope of a reply and requests that the reply be rejected. Pursuant to State regulations, a reply is limited to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the reply does not respond to a procedural defense interposed by the district because the district did not raise procedural defenses. However, the reply does address the additional documentary evidence served with the district's answer. The reply also makes additional arguments to further support the positions originally asserted in the parents' petition. Under these circumstances, I will accept and consider the reply only to the extent that it responded to the additional exhibit that the district served with its answer (*Application of a Student Suspected of Having a Disability*, Appeal No. 08-002; *Application of a Child with a Disability*, Appeal No. 06-046).

Additionally, the district argues that the impartial hearing officer erred by not determining whether the district has offered a FAPE to the student. I agree that the impartial hearing officer's decision was deficient in that regard.

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

¹⁹ By letter addressed to the Office of State Review, the district objected to the parents' reply as being untimely and improper under 8 NYCRR 275.14(c) and 8 NYCRR 279.6. The parents responded to the district's letter and stated that their reply was timely and should be considered.

²⁰ 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;

unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

The first step in a tuition reimbursement case is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

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

(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]).

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

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).²¹

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 08-016; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 07-008).

In the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider, when appropriate, strategies, including positive behavioral interventions, and supports to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; Application of the Dep't of Educ., Appeal No. 07-120).²² Additionally, under State regulations when considering more restrictive programs or placements as a result of the student's behavior a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).²³

²¹ New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced prior to the effective date of the amendment (see Application of the Dep't. of Educ., Appeal No. 08-018).

²² In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][ii]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, as presented in the instant case, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

²³ In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; 8 NYCRR 201.2[a]). An FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). An FBA shall be conducted as part of an evaluations or reevaluations,

Returning to the instant case, the student began attending Elan in May 2007. The parents have requested tuition reimbursement for the period between May 2007 to August 2007 and from September 2007 to August 2008 (Joint Ex. 1 at p. 3). A school district is obligated to review a student's IEP at least annually and offer an appropriate program prior to the start of each school year (20 U.S.C. §§ 1414[d][2][a], 1414[d][4][a][1]; 34 C.F.R. §§ 300.323[a], 300.324[b][i]; 8 NYCRR 200.4[e][1][ii], [f]). At the time of the impartial hearing, the CSE had not yet conducted its annual review for the student's educational program for the 2008-09 school year, because that school year has not yet commenced. The parents' claim for tuition reimbursement for July and August 2008 is therefore premature and is dismissed (see Application of the Dep't of Educ., Appeal No. 07-037). Accordingly, I will not review the parents' claim for tuition reimbursement for a portion of the student's 2008-09 school year.

Turning to the parents' claim relating to the 2006-07 school year, the hearing record indicates that the district staff was grappling with the student's behavioral issues. In fall 2006, the student received a three-day suspension for an incident in the school cafeteria (Tr. pp. 1005-07). In spring 2007, the student appeared for school intoxicated, missed 13 sessions of his Automotive Collision Repair Technology class and 11 tutoring sessions (Tr. p. 148; Dist. Ex. 32; Parent Ex. X at p. 1; Joint Ex. 5 at p. 1). The student also had numerous other recorded behavioral and disciplinary incidents during the 2006-07 school year (Dist. Ex. 52 at pp. 12-13). The district had been dealing with the student's behavioral issues for many years; between March 21, 2002 and February 1, 2007, the district recorded 56 behavioral incidents (Dist. Ex. 52). The hearing record also indicates that the student's behaviors were interfering with his ability to make meaningful educational progress. The student's special education teacher stated that the student's attendance issues affected his progress on his IEP goals (Tr. pp. 284-85; Joint Ex. 5 at p. 2).²⁴ The district's counselor testified that as the 2006-07 year progressed, the student's missed classes impacted on his academics and began to create behavioral issues in a more consistent pattern (Tr. pp. 407-08). According to the school psychologist, the student appeared "to be out of control with respect to his own behavior" and caused management concerns for the school staff (Tr. pp. 141-42; Joint Ex. 5 at p. 3).²⁵

At the impartial hearing the district conceded that it did not conduct an FBA or develop a BIP (Tr. p. 662).²⁶ The district argues that it was unable to address the student's behavioral

in the consideration of "special factors" during the recommendation process to the board of education, or as part of disciplinary actions (see 8 NYCRR 200.4[b][1][v], 200.4[d][3][i], 200.22[a][1]).

²⁴ This teacher also stated that the student often made inappropriate comments during class and was a class leader "in a negative sense" (Tr. pp. 323-34; Joint Ex. 5 at p. 2). According to the teacher, the class was "calmer since the student left" (*id.*).

²⁵ At the February 28, 2007 CSE meeting, the CSE reported that there were "many situations/behaviors that prevented him from being successful in his current program" (Joint Ex. 8).

²⁶ The hearing record reveals that the district attempted to conduct an FBA and to develop a BIP in May 2007 (Dist. Ex. 24); however, it did not make these efforts until after the April 25, 2007 IEP had been drafted, a more restrictive public school setting had been recommended, and the student had already transferred to Elan. Neither the student nor his parents participated in this process and therefore an FBA and BIP were only prepared in draft form (Tr. pp. 18-19).

difficulties in the classroom because all of the student's major behavioral issues arose or occurred outside of school (see Tr. pp. 373-75). I am not persuaded that the facts support this argument. The district possessed an extensive record of in-school behavioral incidents involving the student (Tr. pp. 1005-07; Dist. Exs. 32; 52). Additionally, the CSE had in its possession a report from one of the student's private psychologists which indicated that the student's behavioral issues were an avoidance mechanism that the student utilized to protect himself from feeling academically inadequate or from experiencing academic failure (Joint Ex. 14 at pp. 12, 15).²⁷ The hearing record further reveals that the district's CSE members did not devote significant attention to these reports at the April 25, 2007 CSE meeting (see Joint Ex. 5). Moreover, although the school counselor testified that her counseling "revolved around behavioral incidents and issues," the hearing record does not provide any indication that she provided any significant insight to the CSE regarding the student's behavior at either the April 25, 2007 CSE meeting or at any other time (Tr. p. 394; see Joint Ex. 5). In fact, the counselor testified that she did not know how many times she saw the student during the 2006-07 school year, that she did not have any records of the dates of her consultations, and that she did not have any notes of what she covered in her counseling sessions with the student (Tr. pp. 422-24). I find that the CSE neither appropriately and adequately considered strategies, including positive behavioral interventions, and supports to address the student's behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; Application of the Dep't of Educ., Appeal No. 07-120) nor considered the development of a BIP and the concomitant FBA (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i]) during the course of the 2006-07 school year as the student's in-school behavior deteriorated. The hearing record reflects that revisions should have been made to the student's IEP at least by the February 28, 2007 CSE meeting. Additionally, the district's proposal to move the student from his then-existing 15:1 classroom setting into the more restrictive 8:1+1 BOCES AHS setting also required the district "to consider" the development of a BIP (8 NYCRR 200.22[b]). I find that the district's failure to do so amounts to a failure to properly assess the student's special education needs during the 2006-07 school year.

I now turn to the district's recommended placement for the last month or so of the 2006-07 school year. The student's April 25, 2007 IEP recommended that the student attend BOCES AHS and the IEP expressly provided a projected start date of May 14, 2007 and an end date of June 22, 2007 (Joint Ex. 4 at p. 1). The April 25, 2007 IEP stated a projected review date for June 30, 2007 (id.). The hearing record reveals that the BOCES AHS provides an 8:1+1 special education program for students in grades nine through twelve (Tr. p. 609). The program has four academic special education teachers who teach the core academic classes (mathematics, science, social studies, and English) (Tr. pp. 513-14, 519; Joint Ex. 5 at p. 3). Each class also has a student behavioral assistant (id.). The program has three full-time counselors, a transition counselor, and a job coach (Tr. pp. 514-16).²⁸ There is also a consulting psychiatrist and staff members who are trained to deal with students with emotional problems (Tr. p. 585). The

²⁷ The psychologist reported that the student's academic struggles "had a strong impact on his self-perceptions and on his sense of adequacy" (Joint Ex. 14 at p. 12). As a result, the student internalized negative perceptions related to his learning competence and attempted to cope with these academic difficulties by utilizing defenses such as denial, repression or avoidance (id.). According to the psychologist, the student would avoid tasks which could reveal to others that he was having difficulty with his academic work (Tr. pp. 844-45).

²⁸ The counselors are all either licensed social workers or school psychologists (Tr. pp. 514-16).

program follows the New York State curriculum, although academic courses are modified (Tr. p. 520; Joint Ex. 5 at p. 3). The program is designed for students pursuing a Regents or local diploma (Tr. pp. 516, 517, 534-35). The program addresses students' needs through individual or small group instruction involving hands-on activities (Tr. p. 540). Counseling is also a substantial part of the program (Tr. pp. 514-16). The program employs life skills intervention, ongoing therapy crisis intervention, and uses a behavior point system (Tr. p. 608; Joint Ex. 5 at p. 3). The Wilson Reading Program is available, as are reading specialists (Tr. p. 521; Joint Ex. 5 at p. 4).

The hearing record does not support a finding that the program recommended by the district met the student's special education needs. The student's April 25, 2007 IEP indicated that the student would be placed in 8:1+1 special classes for all academics and physical education; however, unlike in previous IEPs the CSE did not specify the academic course recommended for the student at BOCES AHS (Joint Ex. 4 at p. 1). Nor do meeting minutes reflect a discussion of specific details of the recommended academic program (Joint Ex. 5). It is clear that the student has serious deficits in math and reading skills. Unfortunately, there is no information in the hearing record to suggest what strategies that BOCES AHS will use to address these deficits. Although the BOCES AHS program offers the Wilson Reading Program, it is unclear from the hearing record if the student would be utilizing this instructional program. The hearing testimony indicated that the student would be instructed in small groups with other students with similar learning disabilities so that strategies could be developed to compensate for his learning deficits (Tr. p. 540). However, a class profile of the other students in the recommended special class was not included in the hearing record. Although the student has difficulty with math, failed general math in the 2005-06 school year, and was failing math during the 2006-07 school year, there are no goals in the April 25, 2007 IEP to address the student's math deficits (Dist Ex. 37 at p. 3; Parent Exs. D; O at pp. 2, 4; Joint Exs. 4 at pp. 6-8; 12 at p. 1). Additionally, the hearing record reveals that the counseling proposed in the student's April 25, 2007 IEP was not consistent with the BOCES AHS program model. Although the district recommended one 40-minute group counseling session per week, according to the social worker who performed the BOCES AHS intake, the counseling recommendation on the student's IEP would have to be changed from group counseling to individual counseling (Tr. pp. 517, 552-53, 582-83). Based on these inadequacies in the recommended placement, coupled with the district's shortcomings in considering an appropriate behavioral program, I find that the district's offered program was not adequately designed to meet the student's special education needs and the district failed to offer a FAPE to the student for the end of the 2006-07 school year.

Regarding the 2007-08 school year, the hearing record reveals that the district did not develop an IEP for the student. The district is reminded that it has an affirmative obligation to offer the student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer, 546 U.S. at 51; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d at 371). With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 C.F.R. § 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). A school district's failure to provide a student's parents with a timely IEP may afford a basis for concluding that the school district did not offer an appropriate program to the student (Application of the Bd. of Educ., Appeal No. 08-026; Application of a Child with a Disability, Appeal No. 06-030; Applications of the Board of Educ. and a Child with a Disability, Appeal Nos. 00-091 and 01-018; Application of a Child with a Disability, Appeal No. 99-81). For the

foregoing reasons, I find that the district failed to offer a FAPE to the student for the 2007-08 school year.

Having determined that the district did not offer a FAPE to the student for the 2006-07 and 2007-08 school years, I must now consider whether the parents have met their burden of proof that the placement of the student at Elan was appropriate and met his special education needs. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

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 also Frank G., 459 F.3d at 364-65).

Additionally, students with disabilities must be educated 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 200.6[a][1]; see Walczak, 142 F.3d. at 132). The IDEA "expresses a strong preference for children with

disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). While parents are not held as strictly to the LRE standard as school districts are, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105). The requirement of instruction in the LRE must, however, be balanced against the requirement that each student with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]).

In deciding whether a school district must fund a residential placement, a determination must be made as to whether the student requires the residential program to receive educational benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 08-016; Application of a Child with a Disability, Appeal No. 03-106). A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 05-081; Application of a Child with a Disability, Appeal No. 03-066; Application of a Child with a Disability, Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 03-051).

Elan is a 12-month residential program in the state of Maine (Tr. pp. 449, 730, 771). The school serves students in grades eight through twelve and the average stay at the school is 24 to 36 months (Joint Ex. 17 at p. 2). Approximately 80 students are enrolled at the school (Tr. pp. 448, 731). Students graduate from Elan with a state of Maine high school diploma (Tr. pp. 455, 763, 939). The program at Elan consists of an academic component and a residential "house" component (Tr. p. 936).

For the academic program at Elan, all classes are general education classes (Tr. pp. 449, 453, 732, 735). Special education teachers are used as consultant teachers for the students who have special education difficulties (Tr. pp. 453, 733). There are 12 teachers on staff, two of whom are special education teachers (Tr. pp. 449-50). All of the teachers are certified in their content area (Tr. p. 449). The students take three classes per semester and class size ranges from five to nine students (Tr. pp. 453-55, 767, 937). Classes are held during evening hours (Tr. pp. 967-68; Joint Ex. 17 at p. 2).

The residential portion of the program includes a life skills curriculum designed to teach students to permanently change attitudes and life patterns (Tr. p. 1137; Joint Ex. 17 at p. 2). The residential program is staffed by nine staff members in addition to a director for each of two houses (Tr. pp. 735-36). There are three social workers on staff and each house has a social worker (Tr. p. 1125). As part of the residential program, students participate in two kinds of group counseling – "encounter groups" and "static groups" (Tr. p. 492). There are four two-hour group counseling sessions per week (Tr. p. 1123). This counseling occurs in the afternoon (Tr. p. 1114). Two of the counseling sessions are encounter groups, in which students are encouraged to express their feelings (Tr. p. 1123). The other two group sessions are static groups in which topics such as adoption issues, expectations of parents and cooperation with others are discussed (Tr. pp. 492, 1123). A clinical psychologist oversees the program, but does

not directly supervise the groups (Tr. pp. 494, 1124). The groups are usually led by house staff, but they are sometimes led by the clinical psychologist or chief social worker (Tr. p. 1174). Student behavioral issues are also dealt with in the residential "house" program (Tr. pp. 483, 1317). Students discipline one another when a behavioral issue arises (Tr. pp. 740-41). The discipline usually involves talking to the student to discuss how the event or issue could have been handled differently (Tr. p. 741). The students are evaluated on whether they are able to assist other students in exhibiting appropriate behavior (Tr. p. 958). In order to teach organization skills and other life skills, Elan requires its students to perform an assigned job (Tr. pp. 490-91, 963; Parent Ex. K). Each job has a series of prescribed duties and responsibilities (Parent Ex. K). The students' performance on these jobs is monitored by other students above them in their job hierarchy (Tr. pp. 957-58). As students move up the job hierarchy they earn additional privileges (Tr. pp. 764, 1185, 1300).

The student entered Elan in May 2007 (Tr. p. 457); therefore, he only attended Elan for approximately one month of the 2006-07 school year. Elan's director of education reported that at that time he was aware that the student had special education difficulties and was dyslexic (*id.*). The student was initially placed in classes that would allow him to "try out what was going on" at Elan and "look at what [Elan's] requirements were" (*id.*). The chosen classes included composition, economics and history (Tr. p. 458). Educational progress reports from both the economics teacher and the history teacher indicated that the student had difficulty with reading and writing (Joint Ex. 19 at pp. 1, 3). The education progress report from the composition teacher did not comment on the student's reading or writings skills other than stating that the student's understanding of the subject was "poor" and that his homework quality and testing performance was "average" (*id.* at p. 2). It does not appear that any of the courses that the student took during the limited period of time that he attended Elan during the 2006-07 school year addressed his academic needs relative to reading and mathematics (Joint Ex. 19). Based on the course description, it appears that some of the student's writing needs may have been addressed by his composition class (*id.* at p. 2). An undated Elan report card for the 2006-07 school year and a progress report dated June 15, 2007 indicated that the student received a grade of 70 in Composition and a grade of 65 in both Economics and United States History II (Joint Exs. 18; 19). The student was not at the school long enough to earn credits for the spring 2007 semester (Tr. pp. 457-58).

A program plan developed for the student by Elan when he first entered the school included one educational and four behavioral goals (Parent Ex. I).²⁹ The hearing record suggests that the goals contained in the plan were not written specifically for the student, rather that they were basic program goals used for many of the students in the program (Tr. pp. 1289-90, 1292-95, 1323). There is no indication that the student received specially designed instruction during that part of the 2006-07 school year that he attended Elan, nor is there any indication that the student's math and reading needs were addressed by the program at Elan during that time period. Therefore, I find that the parents have not met their burden in proving that Elan was appropriate for the student during the limited amount of time that he attended the school during the 2006-07 school year.

²⁹ Although the exhibit includes an "IEP start date," staff from Elan testified that this was not an IEP (Tr. pp. 1289, 1292, 1323). Staff further testified that IEPs were not developed for students who were unilaterally placed at Elan by their parents (Tr. pp. 1328-30).

I will now turn to the appropriateness of Elan for the 2007-08 school year. During summer 2007, the student took two classes - The Vietnam War and Health (Joint Ex. 20). The educational progress reports dated August 10, 2007 for these two classes indicated that the student had difficulty in reading (id.). The student received a final grade of 84 in The Vietnam War and an 88 in Health (Parent Ex. A).³⁰ There is no evidence in the hearing record that Elan provided the student with reading instruction or modified his class work to accommodate his reading deficits. In addition, there is no evidence that the student's other academic needs relative to math, written expression or study skills were addressed during summer 2007. I find that there is no indication in the hearing record that the student's special education needs were met by the summer 2007 program provided by Elan.

During fall 2007, the student was enrolled in study skills, Spanish I, United States History II and a physical education class (Tr. p. 468; Parent Ex. A). The study skills class contained two students and included instruction in note taking, outlining, test taking strategies and reading instruction using the Wilson Reading Program (Tr. pp. 458, 468, 768, 769; Parent Ex. B; Joint Ex. 21). The Wilson Reading Program portion of the instruction was provided by a certified Wilson instructor (Tr. p. 471).

Elan staff testified that many of the student's needs, as outlined by the April 25, 2007 IEP were addressed by the structure of the Elan program (Tr. pp. 477-85, 1132-43, 1315-18). Elan's psychologist testified that the student confided in him that at his prior school the student would "try to avoid and evade the classroom because his self esteem would go downhill if he stayed in class" (Tr. pp. 1135-36). The psychologist testified that Elan provided the academic structure that the student needed (id.). He further testified that Elan's small class sizes reduced social distractions and the student remained focused because the assigned job program encouraged promotions based not only on job performance, but also on academic performance and on social and emotional growth (Tr. pp. 1134-36). The psychologist indicated that the student was successful in Spanish and that this success had increased the student's confidence level (Tr. p. 1129). Elan's Director of Special Education also noted the student's success in Spanish (Tr. p. 957). She testified that the student had also made gains in reading and pointed to the student's advancement through Levels Four and Five of the Wilson Reading Program (id.). The student was scheduled to start Level Six in the Wilson Reading Program (id.).

The student's first quarter report card from Elan for the 2007-08 school year indicated that he received the following grades: Spanish I 70, study skills 91 and United States History II 76 (Parent Ex. A). The student's history teacher reported that the student had done a good job, had shown interest in class and was very attentive (Parent Ex. B at p. 1). He opined that the student's written work required more detail and the student needed to better prepare for tests (id.). The student's Spanish teacher suggested that the student needed to focus and engage in the class on a more consistent basis (id. at p. 2). The student's study skills teacher stated that although the student preferred not to read orally, he participated whenever he was asked to read (id. at p. 3). She noted that the student worked hard on his written work and had written some

³⁰ The exact starting and end dates for these two classes is not provided in the hearing record, therefore it is unclear if these classes took place solely during the 2007-08 school year or if they occurred during a portion of both the 2006-07 and 2007-08 school years.

good sentences for his vocabulary homework (*id.*). During the second quarter, the student received the following grades: Spanish I 77, study skills 85 and United States History II 75 (Parent Ex. AA at p. 1). The student's history teacher commented that the student had difficulty focusing on his work, which affected the quality and presentation (*id.* at p. 4). He further stated that the student appeared to have more ability than he was able to access to complete his school work (*id.* at p. 1). The history teacher described the student's performance as average and indicated that the student was usually attentive in class and participated in class discussions (*id.* at p. 4). The student's Spanish teacher reported that it was difficult for the student to learn Spanish and characterized the student's understanding of the subject as poor (*id.* at p. 2). He commended the student for his hard work and opined that the student's greatest challenge was maintaining a positive attitude and not letting negativity paralyze his ability (*id.*). According to the student's study skills teacher, the student was less resistant to reading orally and his reading was improving daily (*id.* at p. 3). She described the student's written work as "complete and legible" (*id.*). The hearing record is silent regarding the grade level of the classes that the student was taking during the 2007-08 school year. The Elan director of special education testified that the student's tutor had developed an instructional plan for the student; however, a copy of the plan is not contained in the hearing record (Tr. p. 1323). While the hearing record indicates that the student is ready to move to level six of the Wilson program, there is little additional evidence regarding the reading or writing instruction provided to the student during the 2007-08 school year, including how the student's specific deficits in reading comprehension and written expression were addressed. It is of significant concern that as of January 2008, the student had received no instruction in mathematics at Elan (Tr. p. 1304). The private psychologist who evaluated the student between November 2006 and January 2007 stated that the student's math skills had declined since he last evaluated the student four years earlier (Tr. pp. 839-40; *see* Joint Ex. 14 at p. 14). He opined that it was "essential that the further development of math and reading skills is strongly emphasized during the remainder of [the student's] schooling" (Joint Ex. 14 at p. 15). As indicated above, Elan failed to provide the student with any formal math instruction.

With regard to the educational objectives contained in the student's Elan program plan, the student "achieved" no unexcused absences during the first semester and had no more than one behavioral incident monthly (Tr. pp. 1196, 1290-92). The student did not meet the objective of achieving grades of 85 in all subject areas (Tr. p. 1291). With regard to the behavioral goals contained in the plan, an October 2007 review of the plan indicated that the student was making less than satisfactory to satisfactory progress toward improving overall school behavior, limited to satisfactory progress toward demonstrating appropriate peer relationships, less than satisfactory to satisfactory progress toward demonstrating appropriate relationships with authority figures and less than satisfactory to satisfactory progress toward exhibiting appropriate relationships with the family unit (Parent Ex. I). With regard to counseling for the 2007-08 school year, the hearing record suggests that the student attended encounter groups two times per week and static groups designed to discuss honesty, men's issues and family dynamics (Parent Ex. AA at p. 6). The purpose of the encounter groups was to help the student learn how to verbalize his feelings and resolve issues with peers (*id.*). The static groups provided the student with the opportunity to relate to peers about himself and receive and give help to students with similar issues (*id.*). A letter from Elan, detailing the student's performance between September 21, 2007 and December 21, 2007 indicated that the student maintained a pattern of lying throughout most of the report period and his behavior was so severe that he was the subject of a

general meeting in November 2007 (id. at p. 5). It is not clear whether the majority of the student's counseling services were provided by mental health professionals or by house staff (Tr. pp. 492-94, 1123, 1174-75, 1297).³¹ In addition, there is no indication that either the encounter or static groups addressed the student's feelings of inadequacy as they related to academics, which was identified as a primary contributor to the student's poor academic performance. Based on the foregoing, I find that the parents did not meet their burden of persuasion to show that Elan was an appropriate placement for the student for the 2007-08 school year.

Since I have found for the district with respect to the second criterion of the Burlington/Carter analysis, the necessary inquiry is at an end (Mrs. C., 226 F.3d at 66; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-039).

In light of my decision, it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision dated February 22, 2008 is annulled in its entirety.

Dated: **Albany, New York**
 May 29, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

³¹ The hearing record indicates the house groups are usually run by staff, sometimes by a staff member who might be an educational technician III (Tr. p. 1174). House staff members are certified as educational technicians (Tr. p. 1297). Educational technicians are described as being the same as a teacher aide (id.). Educational technicians III are described as having four years of college and passing certain experience and character standards (Tr. pp. 1174-75).