



The University of the State of New York

The State Education Department State Review Officer

No. 08-033

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED] Department of Education

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request for funding from respondent (the district) for her unilateral placement of her son at Xaverian High School (Xaverian) for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending the Legacy program at Xaverian in the tenth grade (IHO Decision at pp. 2, 5, 10). Xaverian is a school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 17; IHO Decision at p. 2; see 8 NYCRR 200.1[d], 200.7). The student exhibits significant cognitive and academic delays and has been given diagnoses of a cognitive disorder, a speech-language disorder, and a learning disorder, not otherwise specified (Dist. Ex. 9). The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]; Parent Ex. F at p. 1).

Preliminarily, the district asserts as affirmative defenses in its answer that the parent's petition should be dismissed because it was not served in a timely manner, was not verified and does not comply with 8 NYCRR 279.4(a) of the State regulations. The district further asserts that the additional evidence incorporated into the parent's petition should not be considered.

Turning first to the district's argument that the parent's petition fails to comply with section 279.4(a) as it "does not clearly indicate the reasons for challenging the impartial hearing officer's decision" (Answer ¶ 63), I find the district's argument unpersuasive in this case.

Additionally, I note that the district has been able to formulate a proper answer to the allegations set forth in the petition. Therefore, I decline to dismiss the petition as not conforming with section 279.4(a).

According to the district, on March 3, 2008, the parent served the district with a notice of intention to seek review (Answer ¶ 61). A notice of intention to seek review was not filed with the Office of State Review, nor did the parent file an affidavit of service of the notice of intention to seek review with the Office of State Review (see 8 NYCRR 279.2). However, the district did submit a complete hearing record in this matter to the Office of State Review (see 8 NYCRR 279.9).

Next, I will address the district's arguments that the petition was not served in a timely matter and was not verified. On or about February 29, 2008, the parent served the district with an "affidavit of verification" purportedly verifying an annexed petition.¹ This affidavit was filed with the Office of State Review on April 18, 2008 and was attached to the petition for review. However, the district asserts in its answer that no petition was annexed to the affidavit that was served on the district on February 29, 2008. Rather, the district asserts that it was served with a petition on April 18, 2008 and that this petition was not verified. Additionally, the parent's petition filed with the Office of State Review failed to include the required affidavit of service showing proof of personal service of these documents upon the district (8 NYCRR 279.4). The parent has not filed a reply to the procedural defenses raised by the district in this matter, therefore the district's assertion that the unverified petition was served on April 18, 2008 is the only indication as to when the petition was served. Furthermore, there is no indication as to whether a person not a party to this appeal served the petition (8 NYCRR 275.8[a], 279.2).

State regulations provide that a petition for review by a State Review Officer must comply with the timelines specified in section 279.2 of the regulations (8 NYCRR 279.13). To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2). 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.). A State Review Officer, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.). In addition, the petition, together with all of petitioner's affidavits, exhibits, and other supporting papers, must be served by "any person not a party to the appeal over the age of 18 years" (8 NYCRR 275.8[a]).

In this case, the impartial hearing officer's decision is dated February 21, 2008. The district asserts in its answer that the unverified petition was served on the district on April 18, 2008, beyond the timelines set forth in the State regulations. The parent has not set forth any explanation for the lateness of the petition. Therefore, the petition is untimely.

¹ The parent's affidavit of verification is not properly completed and is missing the date of verification, but was notarized on February 29, 2008 (Parent Aff.). In its answer, the district claims that it was served with the affidavit of verification on March 3, 2008 (Answer ¶ 62); however, in its memorandum of law attached to the answer, the district states that the affidavit was served on the district "on or about February 29, 2008" (Dist. Mem. of Law at p. 3). No reason for this discrepancy was given and the parent did not issue a reply to the procedural defenses raised in the district's answer.

Based upon the above, I find that the parent has not properly initiated the appeal because she failed to serve the petition in a timely manner and failed to serve a verification with the petition. Additionally, she failed to file proof of service. The parent has failed to comply with the State regulations, and has failed to allege any good cause to excuse the untimeliness of the petition, therefore, the petition must be dismissed (8 NYCRR 279.13; see Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at pp. *5-6 [N.D.N.Y. Dec. 19, 2006]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 0006, (S.D.N.Y. Jan. 24, 2006); see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. March 20, 2008] [upholding dismissal of late appeal from impartial hearing officer decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Alb. Co. 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

Despite dismissing the petition as untimely, I will review the merits of the parent's appeal.

The hearing record is sparse with regard to the student's educational history. The student has been receiving special education services since preschool (Tr. p. 59). He attended district schools until summer 2007 when he began attending Xaverian (Tr. pp. 57-59). From the time the student entered the district's high school through the latter half of the 2006-07 school year, his eleventh grade year, the student attended an alternate assessment program in a 12:1 class at a district high school (Tr. pp. 58, 85, 86, 90). The district high school that the student attended was described in the hearing record as a "career and technical high school" (Tr. p. 85).

In 2006, the student's neurologist referred the student for a comprehensive pediatric neuropsychological evaluation to determine the nature and extent of his neuropsychological deficits (Dist. Ex. 9 at p. 1). The evaluator administered an extensive test battery over four sessions during August, September, and October 2006, including the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), a test identified as the Wide Range Assessment of Memory and Learning (WRAML), the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), the Wechsler Individual Achievement Test – Second Edition (WIAT-II), and the Conner's Parent Rating Scale (*id.*). The resultant neuropsychological evaluation report indicated that the student had been assessed by "his school" during the student's junior year, as well as by his private psychologist, who reportedly concluded that the student exhibited borderline intellectual functioning (*id.* at p. 2). The evaluator reported that according to the student's mother, the student demonstrated difficulty with attention and concentration was easily distracted by external stimuli, demonstrated difficulty understanding and following instructions, and required repeated presentation of directions that involved numerous steps (*id.*). The student reportedly received grades between 75 and 95 in his alternate assessment special education setting at a district school; however, the student's mother reported that she believed that with services such as books on tape and multisensory tutoring, her son could be in more advanced classes (*id.* at p. 3). The student's mother also reported to the evaluator that "[the student's] IQ was always in the average to the low average range, but recently it [had] dropped below these levels" (*id.*).

The evaluator noted that during the initial interview the student seemed "somewhat reserved" (Dist. Ex. 9 at p. 4). The evaluator also reported that at times, the student interrupted his mother's report to counter her opinion, and at least one time objected to her description of his strengths (*id.*). The evaluator noted that the student exhibited intermittent eye contact throughout the entire examination and that his speech tended to be low in volume, slow in rate, and was

halting in volume (id.). The student's motor movements were described as noticeably slow, which the evaluator opined suggested psychomotor retardation (id.). The evaluator noted that the student required repeated presentation of test instructions (id. at p. 6).

Administration of the WISC-IV yielded a full scale IQ score of 55, which the evaluator characterized as in the "mildly deficient range" of intellectual functioning (Dist. Ex. 9 at p. 8). The evaluator reported that the student achieved a verbal comprehension index score of 59 and a perceptual reasoning index score of 77 and opined that as a result of the student's consistent performance in the low average range on tasks of nonverbal visio-spatial functioning, with the exception of particularly low on one task, his true intellectual performance lie in the low average range (id. at pp. 8-9).² Assessment of the student's academic functioning yielded percentile scores characterized by the evaluator as "severely compromised" (.01) in word reading and decoding, "moderately compromised" (3) in phonics, "severely compromised" (.01) in basic spelling, "severely compromised" (.01) in mathematics, and "severely compromised" (.01) in numeric operations and math computation (id. at p. 9). The evaluator opined that the student's academic achievement was lower than expected given his overall level of intellectual functioning, suggesting the presence of a learning disability (id.). The evaluator noted that based on parent report, the student's level of adaptive independence was appropriate for his age and far exceeded expectations based on his overall level of cognitive functioning (id. at p. 10). The evaluator concluded that the student's overall profile was not consistent with mental retardation, but rather with a specific cognitive disorder affecting primarily auditory and language functions (id.). The evaluator stated that the student exhibited relative strengths in visual perception, visio-constructive skills, nonverbal abstract reasoning, visio-motor integration, visual attention, and visual memory (id. at p. 11). The student's fine motor skills, working memory, auditory attention and processing, speed of information processing, verbal abilities, and multitasking abilities were determined to be compromised relative to his overall performance and to same age peers (id.).

The evaluator determined that the student presented with specific neurocognitive deficits that were likely of a congenital nature and secondary to a premature birth (Dist. Ex. 9 at p. 13). She opined that the student's reported recent decline in overall intellectual functioning was likely due to decreased performance on verbal tasks and tasks requiring very quick information processing which, "tap into [the student's] weaker abilities" and was "typical for children in advanced age groups and grades" (id.). The evaluator offered diagnoses of a cognitive disorder, a speech-language disorder, a learning disorder not otherwise specified, and "dyslexia" (id.). The evaluator also made 35 recommendations which included speech-language therapy, occupational therapy (OT), counseling and social skills training; increased intellectual challenge; remediation services using the Orton-Gillingham approach for reading and spelling; individual tutoring in selected subjects; computer assistive technology; numerous testing accommodations; environmental modifications; material resources; and strategies to be carried out at home (id. at pp. 14-17).

The district's Committee on Special Education (CSE) conducted several individualized education program (IEP) meetings during the 2006-07 school year (Parent Ex. F).³ The parent

² The pediatric neuropsychological examination report lists nine tests administered to the student, but does not include a summary of subtests administered and scores achieved, report any standard scores, or consistently indicate the test that the evaluator is referencing when reporting results in the report narrative.

³ Parent exhibit F consists of one IEP listing all of the following meeting dates: December 21, 2006; January 15, 2007; January 30, 2007; February 2, 2007 and April 26, 2007 (Parent Ex. F).

testified that she met with the CSE "eight to ten times" during the 2006-07 school year (Tr. p. 66). The parent testified that she "never" felt that the alternate assessment program was appropriate for her son because he would not be able to receive a Regents diploma, and that as early as 2003, she began asking that the student be placed in a diploma bound program (Tr. pp. 60-61). By letter dated December 5, 2006 to the assistant principal of the district's school, the parent informed the assistant principal that she had obtained several updated evaluations including a "neuro-cognitive therapy update" (Dist. Ex. 6).⁴ The parent also indicated in her December 2006 letter that her son needed to be taken out of the alternate assessment program and "given an opportunity to take RCTs. Even if it means he stays in high school for (2) two more years" (*id.*).⁵ The parent indicated that she would bring the evaluations to the school and asked that a CSE meeting be scheduled (*id.*). Subsequent to the parent's letter, the CSE met on December 21, 2006 (Tr. p. 62; *see* Parent Ex. F). The parent testified that at the December 21, 2006 CSE meeting, she again requested that her son be removed from the alternate assessment program and placed in a diploma bound program (Tr. pp. 62-63). According to the parent, at the December 21, 2006 meeting, the CSE had "begun the process" of changing the student's recommendation to a diploma bound program (Tr. p. 63; *see* Parent Ex. F at p. 1). The CSE then met "several times" and in February 2007, the student began attending a diploma bound, 15:1 program with related services of OT one time per week for 60 minutes 1:1 at a separate location within the school, speech-language therapy two times per week for 30-minute sessions in a group of five at a separate location within the school, and one time per week for 60 minutes 1:1 at a location outside of the school (Tr. pp. 63, 65, 90, 91; *see* Parent Ex. F at pp. 1, 12).

On April 17, 2007, the neuropsychologist who had evaluated the student in fall 2006 conducted a reevaluation and created an "addendum" to her initial report (Dist. Ex. 7 at p. 1). The evaluator reported that assessment of the student's word reading and decoding ability revealed that he continued to function within the "severely compromised" (.01 percentile) range (*id.*).⁶ The student's ability to decipher nonwords (phonics) was at the first percentile, which the evaluator noted to be lower than the student's performance on previous testing (*id.*). The evaluator further reported that the student performed in the "severely compromised" range in basic spelling (.3 percentile) and numeric operations (.1 percentile) (*id.*).

The evaluator opined that although the student scored in the mildly deficient range of overall intellectual functioning, he presented as an adolescent with much greater neuropsychological potential and did not meet the criteria for a diagnosis of mental retardation (Dist. Ex. 7 at pp. 1, 2). The evaluator stated that because the results of the student's academic testing remained lower than expected, recommendations made in the October 13, 2006 pediatric neuropsychological evaluation report "remain in effect," and noted that the student required "specific treatment modalities and academic accommodations in order to help [sic] learn to compensate for his neurocognitive deficits" (*id.* at p. 1). The evaluator recommended that

⁴ The hearing record does not contain the speech-language update, "central auditory" evaluation, or "classroom assessments by Winston Prep" that the parent references in her December 5, 2006 letter (Dist. Ex. 6). The only evaluations contained in the hearing record are a "pediatric neuropsychological examination" dated October 13, 2006 and an "Addendum to Pediatric Neuropsychological Examination Report" dated April 24, 2007 (Dist. Exs. 7; 9).

⁵ Although the hearing record does not define "RCT," it is assumed that it stands for Regents Competency Test.

⁶ The addendum to the pediatric neuropsychological examination report does not identify the standardized instruments used by the evaluator and reports no standard scores (*see* Dist. Ex. 7).

"services and treatment" be provided in small groups and that learning materials be modified (id. at p. 2). The evaluator further noted that the student benefits from being able to respond to questions in various ways, such as pointing to pictures, checking off choices, selecting multiple choices or verbally indicating his response to a scribe (id.).

On May 18, 2007, the CSE convened to review the student's educational program and to make recommendations for the student for the 2007-08 school year (Parent Ex. G). Meeting attendees included the student's parent, her advocate, a district representative, a regular education teacher, a special education teacher, an additional parent member, a school psychologist and a district supervisor of psychologists (id. at p. 2). The May 2007 CSE recommended that the student continue to attend a special class with a 15:1 teacher to student ratio and added a Special Education Teacher Support Services (SETSS) class five times per week in a group of three (id. at pp. 1, 14). The CSE further recommended that the student receive related services of OT one time per week individually for 60 minutes, speech-language therapy two times per week for 30-minute sessions in a group of five, and one time per week individually for 60 minutes, as well as assistive technology (id. at p. 16).

By letter dated June 29, 2007 to the CSE chairperson, the parent informed the district that she had received a letter from the district stating that the student had not met the promotional criteria to move on to the next grade and requesting that the student attend summer school (Parent Ex. D). The parent notified the district that she would be sending her son to a private summer program and would be requesting reimbursement (id.). By letter dated July 11, 2007, the parent informed the CSE chairperson that she had placed the student at Xaverian for summer 2007 and that he required transportation from the district (Parent Ex. C).

By due process complaint notice dated August 15, 2007, the parent requested an impartial hearing seeking funding for her son's tuition at the Legacy Program at Xaverian and "provision of transportation and related services" for the 2007-08 school year (Dist. Ex. 2). The parent, through her attorney, alleged that the May 18, 2007 IEP contained "multiple procedural and substantive errors," thereby resulting in a denial of a FAPE to the student (id.). The parent further alleged that the program recommended by the CSE on the student's May 18, 2007 IEP was not appropriate for the student (id.). Specifically, the parent contended that "this student has consistently failed to make progress in a special class setting more restrictive than the program currently recommended," therefore, the recommended program would not allow the student to make progress (id.). The parent further argued that she had requested that the student be deferred to "CBST"⁷ at the May 18, 2007 IEP meeting, but that the district had inappropriately denied that request (id.). Lastly, the parent maintained that the student required "a small, structured class in a small, nurturing environment where this student can receive full time special education and intensive individualized attention throughout the school year" (id.).

The impartial hearing took place on December 10, 2007 (Tr. p. 1). At the impartial hearing, the district conceded that it had failed to offer a FAPE to the student for the 2007-08 school year (Tr. p. 9; IHO Decision at pp. 2, 11). By decision dated February 21, 2008, the impartial hearing officer determined that, as conceded by the district, a FAPE had not been offered to the student for the 2007-08 school year (IHO Decision at p. 11). The impartial hearing officer then determined that the parent had failed to meet her burden to show that her unilateral

⁷ The parent's due process complaint notice does not identify what is meant by "CBST." It is assumed that the parent was referencing respondent's Central Based Support Team.

placement of the student at Xaverian was appropriate (id. at p. 12).⁸ More specifically, the impartial hearing officer found that the student's report card submitted into evidence after the impartial hearing showed that he was failing five courses at Xaverian and that no additional evidence was presented by the parent to show that Xaverian was appropriate (id.; see Parent Ex. J at p. 14). Although the impartial hearing officer found that the parent had not met her burden to prove that Xaverian was appropriate for the student, he went on to determine that equitable considerations also did not support the parent's claim for tuition (IHO Decision at p. 12). The impartial hearing officer found that numerous CSE meetings were held at the request of the parent and that it was the parent who had requested that the student be placed in a diploma bound program, despite the fact that this program was inappropriate for the student given his cognitive deficits (id.). The impartial hearing officer held that "it would be unfair and unjust to find the [district] liable...when the parents are the initial protagonists in the student being removed from the apparently appropriate program" (id. at pp. 12-13). Based on the above, the impartial hearing officer denied the parent's request for funding for the student's tuition at Xaverian for the 2007-08 school year (id. at p. 14).

The parent, who is no longer represented by counsel, appeals, arguing that Xaverian was an appropriate placement for her son for the 2007-08 school year. The parent argues that the principal from Xaverian stated that all of the student's classes have a "15:1" teacher to student ratio and a paraprofessional. The parent further argues that the student is receiving the necessary related services of OT, counseling and speech-language therapy at Xaverian. The parent also contends that the principal from Xaverian testified that the student has made "some progress" and is in a diploma bound program where he may be able to pass all Regents or RCT exams with a fourth grade reading level. Although not explicitly stated, it appears that the parent seeks reversal of the impartial hearing officer's decision.

The district answers requesting that the impartial hearing officer's decision be upheld in its entirety and asserting the affirmative defenses discussed at the outset of this decision.

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 free appropriate public education (FAPE) (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁹

⁸ The impartial hearing officer incorrectly states in his decision that the student was attending the Ryken program at Xaverian during the 2007-08 school year (IHO Decision at p. 2); however, it is clear from the hearing record that the student was attending the Legacy program at Xaverian during 2007-08.

⁹ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

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

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]).¹⁰

In this case, the district conceded at the impartial hearing that it did not offer the student a FAPE for the 2007-08 school year (Tr. p. 9; IHO Decision at pp. 2, 11). Therefore, the only issue before me on appeal is the appropriateness of the parent's placement of the student at Xaverian. I note, however, that while the district admits that its recommendation that the student attend a diploma bound program in a 15:1 class with SETSS during the 2007-08 school year was inappropriate, it further argues that the CSE only made that recommendation in order to comply with the parent's wishes (Tr. pp. 9-12; IHO Decision at p. 2). 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; see Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]). 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'

¹⁰ On August 15, 2007, 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 before the effective date of the amendment (Application of the Dep't of Educ., Appeal No. 08-018).

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).

The parent argues that Xaverian was an appropriate placement for the student for the 2007-08 school year. For the reasons set forth below, I do not find the parent's arguments to be persuasive. The principal of specialized studies at Xaverian (the principal) testified that the Legacy program is a 15:1+1 special education program for "college bound" students with disabilities (Tr. pp. 18, 23, 30).¹¹ Students graduating from the Legacy program are eligible to receive either an advanced Regents diploma, a regular Regents diploma, or a local diploma which requires passing RCT exams (Tr. pp. 20, 47). The principal indicated that all of the student's classes during the 2007-08 school year were tenth grade Regents classes and included culture and ethics,¹² global studies, math A, living environment, and English 10 (Tr. p. 29). She testified that the student also took American Sign Language to meet the New York State language requirement, physical education and "tech," which is described in the hearing record as a "computer period" (Tr. p. 30).¹³ The student received counseling; however, the hearing record does not indicate the frequency or duration of the counseling services that the student received, the counselor's qualifications or what needs the counseling addressed (Tr. p. 24). The principal

¹¹ There is a discrepancy in the hearing record as to the size of the student's classes at Xaverian. While the principal of Xaverian testified at one point that the Legacy program is a 12:1+1 program, he later testified that it is a 15:1+1 program (Tr. pp. 19, 23, 30). The student's mother testified that Xaverian is a 12:1+1 program (Tr. p. 73), but asserts on appeal that it is a 15:1 program (Pet. ¶ 14). These discrepancies were not further clarified in the hearing record.

¹² Described in the hearing record as "the language, religion, art, ... of the global studies curriculum."

¹³ The student's report card submitted after the close of testimony indicates that the student was taking Spanish, not American Sign Language, and does not indicate a "tech" course (Parent Ex. J at p. 14).

further testified that the student had not been receiving OT up to the date of the impartial hearing, but that he was scheduled to begin receiving OT with a State certified and licensed occupational therapist at the frequency and duration indicated on his district IEP (Tr. p. 25). She testified that the student received speech-language therapy with a State certified and licensed speech therapist at the frequency and duration indicated on his IEP (*id.*). She further testified that related services at Xaverian are provided during nonacademic periods and no portion of the day is spent in religious instruction (Tr. pp. 26, 45). The hearing record reflects that the student also received private services outside of school that included cognitive training, "some Orton," and counseling (Tr. p. 74).

The principal testified that at the time of the student's admission to the Legacy program, she felt that addressing the student's special education needs would be "challenging," but that they could be addressed at Xaverian (Tr. pp. 21-22). Due to the student's poor skills and because he had not met the Regents exam standards required by the end of the "sophomore year" at the district's school, Xaverian determined that the student would repeat the tenth grade to prepare for the Regents examinations in "Living Environment, Global Studies and Math Ed" given in June 2008 (Tr. pp. 22, 72).¹⁴ The principal testified that given the student's speech-language and processing delays, he might not be able to achieve the sixty-five points required on all five Regents exams in order to receive a Regents diploma (Tr. p. 45).¹⁵ She further testified that the student is eligible to take the RCTs and if he passes, he would receive a local diploma (Tr. p. 47). The principal testified that if the student does not pass the Regents or RCT exams, he will not graduate because Xaverian does not offer a "special ed" diploma (Tr. p. 48).

The principal from Xaverian testified that during the 2007-08 school year, the student's first class of the day was a homeroom period at which time students would go through their schedule and planner with the teacher and the assistant to ensure that they have the materials and books they need for their classes (Tr. p. 27). Monday through Thursday, the student stayed beyond the end of the school day to attend a reading class and a "homework help" class (Tr. pp. 31-32). The reading class was comprised of four students, met for approximately forty-five minutes to one hour, and utilized the Lindamood-Bell methodology (Tr. p. 31). The principal testified that the Legacy program provided the student with "multi-modal instruction," handouts, and "wait time," as well as accommodations that included one hundred percent extended time, a reader, direction and questions read, a scribe, and use of a calculator (Tr. pp. 30-32). She further testified that the student's classroom contained "smart boards," which she described as a large computer screen in the front of the room (Tr. p. 33). The principal indicated that all instructional lessons were presented in a multi-modal manner, both visually and auditorily and included handouts (*id.*). The principal explained that smart boards were important for the student because he has both language and processing delays and his strength is "visual perceptual" (Tr. p. 34). The smart board provided the student with visual input enhanced by auditory input and at the end of the lesson provided him with a printout of the material covered (*id.*). The student took "word" notes, writing down key words that became retrievable cues for him, rather than full notes in order to allow him to process (Tr. p. 35). The classroom paraprofessional assisted the student in taking notes and preparing to answer questions (Tr. p. 33). The principal testified that the

¹⁴ The hearing record reflects that the student was attending the 11th grade at the district's school during the 2006-07 school year (Tr. p. 58; Parent Exs. F at p. 1; G at p. 1).

¹⁵ The principal later testified that she believed that the student could pass the Regents examinations even though he may never read "beyond a fourth grade level" on his own (Tr. pp. 50-51). She did not elaborate the basis for her belief.

student's grades on his report card are based primarily on test performance and might include partial credit for homework (Tr. pp. 53-54).

The principal indicated that the student is lacking in a significant amount of "background material" required to be successful in high school, that he entered Xaverian with little self-confidence in his ability to learn in a classroom and needed a lot of reinforcement (Tr. p. 23). The principal further testified that the student was socially immature and did not make good eye contact (Tr. p. 24). According to the principal, the student has made "fairly significant progress," was "beginning to be willing to offer answers" and "has gone from not even feeling that he could pass tests to putting in the effort" (Tr. pp. 30, 35). She testified that the student's teachers have reported that they have seen "significant improvement" in the student's ability to handle the material, to seek help, to provide responses in class, to take notes, and in his belief in his abilities (Tr. p. 35). She further testified that emotionally, the student is very comfortable at Xaverian and that he has friends both in the class and outside of the program (Tr. pp. 36, 39-40). During the 2007-08 school year, the student joined activities during the day such as a club that puts on dances, and he took the initiative to seek assistance and make sure that "he gets what he needs" (Tr. p. 40). The principal stated that she believes that the student made academic, social, and emotional progress because the method of instruction at Xaverian is "perfect" for a student with such significant speech-language and processing delays and the environment is very nurturing (*id.*). The student's mother also provided testimony regarding the student's progress at Xaverian (Tr. pp. 76-77). She stated that she has seen the most progress in the student's homework, that the student is more engaged with his peers, and that he exhibits much more confidence in his reading (*id.*).

The principal testified that according to the student's English teacher, the student had started to produce written material equivalent to a student with a disability at "maybe the sixth grade" during the 2007-08 school year (Tr. pp. 49-50). She also testified that postsecondary education was a goal for the student, despite the fact that he does not "get" approximately 60 percent of what is presented to him verbally (Tr. p. 51). The principal indicated that school staff would likely suggest a postsecondary program for the student similar to one offered by a local college for students with learning disabilities that provides multi-modal instruction and opportunities for the students to work part time in a technological field (Tr. pp. 51-52). However, the principal testified that Xaverian does not provide an alternate assessment program for its students (Tr. pp. 47-48).

The impartial hearing officer found that the parent had presented no evidence that the student had made academic progress at Xaverian during the 2007-08 school year (IHO Decision at p. 12). I agree. Despite the parent's and the principal's testimony that the student exhibited progress at Xaverian, the student's first trimester report card indicates that the student achieved an overall grade point average (GPA) of 58.6 (IHO Decision at p. 12; Parent Ex. J at p. 14).¹⁶ The report card reflects comments stating that the student did not meet minimum class requirements in English; that he had poor quiz/test grades in English and global studies; that more effort was needed in study, homework, and/or practice in mathematics; and that the student

¹⁶ The student's report card was not available at the time that testimony was taken, but was available a short time after testimony concluded (Tr. pp. 35, 39, 53, 55, 130, 133). At the impartial hearing officer's request, the parent's attorney submitted into evidence the student's first trimester report card from Xaverian as a post-hearing submission and the impartial hearing officer considered it in rendering his decision (Parent Ex. J at p. 14; IHO Decision at p. 12).

was not prepared and/or had frequent absences in physical education in which he has received an F (id.). The principal testified that the student's grades were based on his "actual class performance" (Tr. p. 53). I also agree with the impartial hearing officer's finding that Xaverian only has a diploma bound program in which the student is not doing well (IHO Decision at p. 12). Moreover, I note that the description of the Legacy program is similar to the general education program provided to the student by the district from February 2007 through June 2006 and recommended for the 2007-08 school year, which both the district and the parent agreed was inappropriate to meet the student's special education needs (Tr. p. 9; Dist. Ex. 2; IHO Decision at pp. 2, 11).

The impartial hearing officer further found that the parent did not submit sufficient evidence to establish that Xaverian is an appropriate placement for the 2007-08 school year (IHO Decision at p. 12). The hearing record supports that determination. In this case, the parent failed to present sufficient objective evidence to establish that Xaverian's program met the student's special education needs. Although the hearing record provides general information about Xaverian, the record contains insufficient information regarding the educational services provided to the student or how the educational services at Xaverian met the student's identified special education needs. In this case, the student has identified deficits in his cognitive abilities and his academic skills of reading, spelling, and mathematics (Dist. Ex. 9 at pp. 8-9). The principal at Xaverian also testified that the student lacked "a significant amount of background material" needed for high school success; however, there is no information in the hearing record describing how Xaverian is assisting the student to gain the "background material" he lacked or specifically what it is that he lacked (Tr. p. 23). Although the student reportedly attended a daily reading class which used the Lindamood-Bell methodology, the hearing record provides no description of Lindamood-Bell beyond the principal stating "which is kind of like Orton Gillingham except it's a little more sophisticated for this age group," nor does the hearing record identify how the student's specific reading deficits were being addressed through the use of this methodology or provide any objective evidence of progress made by the student in reading during the 2007-08 school year (Tr. p. 31). Despite the principal opining that the method of instruction at Xaverian is "perfect" for a student with such significant speech-language and processing delays, she provided no description of the instruction other than a smart board, or what assessment strategies or formal tests were used to determine the student's needs or to measure his progress in any area, including mathematics (Tr. p. 40). I note that the principal testified that she was not a teacher of the student and that she was not sure of the student's classification, but she testified incorrectly that she thought that he was "speech-language impaired" (Tr. pp. 23, 45). Additionally, although she described the student's speech-language needs as "significant," the hearing record does not reflect the deficits being addressed by the student's speech-language therapist or indicate what progress, if any, the student made in this area (id.). Furthermore, although the principal testified that the student received counseling (Tr. p. 24), the hearing record does not indicate how the counseling was appropriate to meet the student's needs in this area. The hearing record also does not reveal the frequency or duration of the counseling services that the student received or the counselor's qualifications. The principal further testified that the student had not been receiving OT up to the date of the hearing (Tr. p. 25). Therefore, the hearing record does not reveal that the student has been receiving the related services that were recommended in the evaluations (Dist. Exs. 7; 9 at pp. 14-17).

Considering the above information, I note that while the hearing record provides general information about Xaverian, the hearing record fails to specifically indicate how the program and services provided are specially designed to meet the student's unique needs for the 2007-08

school year. Moreover, the Xaverian principal testified that if the student is unable to pass the Regents examinations or RCTs, he will not graduate (Tr. p. 48). In light of the student's first trimester report card grades and testimony by the district's assistant principal indicating that after being transferred into the district's diploma bound program, the student took Regents or RCT exams in June 2007,¹⁷ but did not pass any of them (Tr. pp. 92-93; Parent Ex. J at p. 14), it appears that the student may not be able to graduate from Xaverian and Xaverian does not offer alternative educational programming.

Having found that the parent failed to meet her burden to prove that Xaverian was an appropriate placement for the student for the 2007-08 school year, I need not reach the issue of whether equitable considerations preclude the funding of tuition at Xaverian (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 15, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**

¹⁷ The hearing record does not clarify whether the student took RCT, Regents exams or both.