



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-018

**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:**

Law Offices of George Zelma, attorneys for petitioner, George Zelma, Esq., of counsel

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

### **DECISION**

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Landmark School (Landmark) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in a residential program at Landmark, where he was also receiving counseling on an as needed basis (Tr. pp. 32-33; Parent Ex. U). The Commissioner of Education has not approved Landmark as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has diagnoses of an attention deficit disorder/attention deficit hyperactivity disorder (ADD/ADHD) and a learning disability (Tr. p. 62; Parent Ex. T at p. 7). The hearing record describes the student as someone who is in constant motion, but also reveals that he is bright, sensitive, restless, fidgety, and somewhat impulsive (Tr. pp. 33-34). The student also has a tendency to become overwhelmed with the demands that are placed on him by his academic and residential programs (Tr. p. 34). Cognitively, the student's intellectual functioning is in the high average range (Parent Ex. S at p. 3). His eligibility for special education services as a

student with an other health impairment (OHI) is not at issue in this appeal (Tr. p. 405; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).<sup>1</sup>

While enrolled in the second grade and residing in a different state, the student received special education services pursuant to an individualized education program (IEP) (Tr. p. 64).<sup>2</sup> During the 2001-02 school year (fifth grade), after having moved to New York State, the student was deemed eligible for special education services; however, the hearing record does not explain the nature or the extent of the special education services that he received at that time, nor does it indicate his classification (Tr. p. 66). During the 2002-03 school year (sixth grade), when the student was enrolled in a district school, he began exhibiting impulsivity, disrupting the classroom, had difficulty with homework, and had "issues with learning" (Tr. pp. 66-67). Although entitled to receive ten hours of special education teacher support services (SETSS) pursuant to his IEP, the parent testified that the student did not receive SETSS in accordance with his IEP, and that she obtained private tutoring for him (Tr. pp. 67-69). According to the parent, in 2003, the student "failed," and she unilaterally placed him in a private school for students with learning and attention disorders, and was subsequently awarded tuition reimbursement for that school year (Tr. pp. 69-70; Parent Ex. T at p. 7). The student remained at the private school, through ninth grade, when he aged out of the school (Tr. pp. 70-71).

On January 20, 2006, a private psychologist evaluated the student (Parent Ex. S). The private psychologist reported that the student was applying to a variety of high schools, some of which required updated IQ testing as part of the application process (id. at p. 1). Administration of the Wechsler Intelligence Scale for Children–IV (WISC-IV) yielded a full scale IQ score falling in the high average range (id. at p. 2). The private psychologist reported that the student achieved index scores ranging from 83 to 129 which she opined was unusual and therefore the student's full scale IQ score was not a good indicator of his intellectual potential (id.).<sup>3</sup> The private psychologist further opined that this degree of scatter was atypical of the general population; however, it was often seen in people with learning and language disabilities, particularly among those who were bright (id. at p. 3). In the area of verbal reasoning, the student's verbal abstract conceptual abilities were very strong (superior level) (id. at p. 2). On the word reasoning subtest, the student's responses were deemed to be age appropriate, although the student was quite tired by the time he reached that subtest (id.). According to the private psychologist, in the area of visual-perceptual functioning (perceptual reasoning), the student was at his best when the tasks were untimed (id.). The private psychologist also found that the student demonstrated excellent (very superior range) visual abstract and analytic reasoning skills

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<sup>1</sup> The individualized education programs (IEPs) that were challenged during the impartial hearing in this matter indicated that the district's June 2008 and August 2008 Committees on Special Education (CSEs) determined that the student was "non-handicapped" and therefore, was not eligible to receive special education instruction and services (Parent Exs. E at p. 1; F at p. 1).

<sup>2</sup> The hearing record does not offer any description as to the nature of the special education services that the student received before moving to New York State.

<sup>3</sup> The private psychologist reported that most people's index scores fall within 13 points of each other and a full scale IQ score is based on a formula that assumes an even distribution of scores (Parent Ex. S at p. 2). The student's index scores reflected a 46 point difference (id.).

on the picture concepts and matrix reasoning subtests (id.). On the working memory subtests, the student achieved average scores overall (id. at p. 3). The private psychologist reported that on both subtests measuring non-verbal processing speed, the student sacrificed speed for accuracy (id.). Although no formal language testing was completed, the private psychologist reported that clinical observation highlighted deficits in the student's word retrieval and oral expressive language skills (id.). The private psychologist indicated that the student's scores reflected areas of strength in abstract reasoning and weaknesses in output speed and timed tasks (id.). She further indicated that in general, the student's memory functioning was average; however, it was significantly weaker than his abstract analytic functioning, which the private psychologist stated was a typical pattern of students with learning disabilities (id.).

Over a three-day period starting on July 10, 2006 and ending on July 12, 2006, pursuant to the parent's request, the private psychologist who evaluated the student in January 2006 conducted additional educational testing to assist in determining the student's appropriate academic placement for the tenth grade and to supplement academic testing completed by his previous school (see Parent Exs. S; T at p. 1). She administered assessments to evaluate the student's memory, executive function, attention, academics, and emotional functioning (Parent Ex. T at p. 1). With regard to the student's memory functioning, the private psychologist reported that although the student indicated that his short-term memory was poor, neuropsychological testing indicated that the student's verbal memory abilities were strong, despite requiring time for his memory to "consolidate" (id. at p. 7). However, the student's visual memory abilities were deemed highly variable and ranged from the deficient to the high average level (id. at pp. 7-8). To assess the student's executive function, the private psychologist administered the Delis-Kaplan Executive Function System (D-KEFS) (id. at p. 3). The private psychologist described the student's responses on the D-KEFS subtests as inconsistent; as the student demonstrated both good cognitive flexibility, as well as difficulty finding an effective approach or generating an appropriate number of strategies (id. at p. 7). The student's ability to inhibit automatic responses was also reported to be variable (id.). The student achieved standard scores on the D-KEFS subtests ranging from above average to below average (id. at pp. 2-3). With regard to attention, the private psychologist stated that the student continued to exhibit attention deficit behaviors characterizing him as highly distractible and physically overactive and she further noted that "his inability to self-monitor and contain his behavior was striking" (id. at p. 7). The student's self-reported responses on the Brown ADD Questionnaire indicated that despite taking medication, his scores on four of five factors were greater than one standard deviation above the mean (id.). To further assess the student's academic abilities, the private psychologist administered the Nelson-Denny Reading Test which revealed that the student's silent reading vocabulary was at grade level, but that the comprehension subtest yielded results one full year behind his grade level (id. at p. 5). However, the private psychologist reported that extending the time limits yielded a score at the late ninth grade level, which was consistent with the student's placement in school (id.).<sup>4</sup> The test also revealed that the student consistently exhibited errors on questions that called for higher-level, inferential thinking or sensitivity to language and style (id.). To assess the student's emotional functioning, the private psychologist administered the Rorschach Inkblot Test, the results of which revealed the student's tendency

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<sup>4</sup> According to the private psychologist's report, the Nelson-Denny Reading Test provided norms for standard and extended-time administration of the test (Parent Ex. T at p. 5).

toward impulsivity and a preference for action over ideation (id. at p. 7). The results also reflected that the student was having difficulty handling stress, which resulted in additional distractibility and distress, and potentially compromised his ability to make effective, appropriate decisions (id.). The private psychologist also administered an instrument identified only as the "Youth Self Report" (YSR) (id. at p. 6). The student's responses yielded only one significantly elevated factor score, which was in "Rule-Breaking Behavior" (id. at pp. 6-7). The private psychologist opined in her report that although the YSR had a specific "factor" for attention problems, "many of the Rule-Breaking Behavior questions reflect[ed] the kinds of impulsive behaviors that are typical of adolescents with ADD" (id.).

The private psychologist made recommendations for the student, which included a "highly structured, individualized curriculum that [could] address [the student's] behavioral, cognitive, emotional and academic needs" and where the structured environment extended beyond the classroom (Parent Ex. T at p. 8). She further opined that the student required a residential school rather than a day school due to the combination of his distractibility and impulsivity, and that placement in an environment where he felt overwhelmed could have severe, negative emotional consequences (id.). Lastly, the private psychologist recommended extended time for tests as well as a waiver of foreign language requirements in high school (id.).

For the 2006-07 school year (tenth grade), the student was placed at Landmark by the parent (Tr. p. 71). By letter dated February 26, 2007, Landmark's social worker stated that the student was initially referred to her for counseling on November 21, 2006 by his academic case manager pursuant to the parent's request (Parent Ex. U). The social worker stated that she had met with the student on four occasions between December 4, 2006 and February 19, 2007, and that she would continue to meet with him once per month per his request (id.). She further noted that the focus of her meetings with the student generally revolved around specific issues with which the student might be struggling and developing appropriate plans of action (id.). According to the social worker, the student benefitted from having a place where he could talk about things and strategize (id.).

On July 30, 2007, respondent's (the district's) Committee on Special Education (CSE) convened for the student's annual review and to develop his IEP for the 2007-08 school year (Parent Ex. D at p. 1). Meeting attendees included a district school psychologist who also acted as the district representative, a district social worker, a district special education teacher, an additional parent member, and the parent who was accompanied by an educational advocate (id. at p. 2). The July 2007 CSE determined that the student was eligible for special education services as a student with an OHI and recommended placement in a general education classroom with direct SETSS in an 8:1 setting, five times per week in a separate location with related services consisting of one 30-minute session of 1:1 counseling per week, as well as one 30-minute session of counseling in a group of three per week (id. at pp. 1, 9). The July 2007 IEP included goals and short-term objectives which addressed the areas of math, organizational skills, writing skills, and counseling needs (id. at pp. 4-8).<sup>5</sup>

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<sup>5</sup> The July 2007 IEP that was made part of the hearing record is missing pages, including those reflecting the student's academic and social/emotional present levels of performance (Parent Ex. D).

In a "Student Score Report" dated March 18, 2008, the student's scores on the "SAT Reasoning Test" were reported (Parent Ex. V at p. 1).<sup>6</sup> The student achieved a critical reading score (and percentile) of 490 (45), a math score of 420 (20), and a writing score of 480 (38) (id.).<sup>7</sup>

A June 2008 administration of the Woodcock Reading Mastery Test yielded the following standard (and percentile) scores: word identification, 98 (45); and word attack, 101 (53) (Parent Ex. X at p. 1). The Gray Oral Reading Test – Fourth Edition (GORT-4) was also administered to the student in June 2008, which revealed that he achieved the following standard (and percentile) scores: rate, 11 (63); accuracy, 10 (50); and fluency, 11 (63) (id.). The student's scores all fell within the average to high average range (id.).

In June 2008, the student's progress was reflected in reports prepared by each of his Landmark teachers (Parent Ex. X at pp. 3-9).<sup>8</sup> The student's language arts tutorial instructor indicated that the student was able to apply his skills independently in less structured settings with regard to decoding, spelling and for some comprehension and written composition skills, but the student needed teacher guidance in less structured settings for other comprehension skills and study skills (id. at pp. 3-4). The student's performance regarding written composition skills reflected a mix of independence levels (id. at p. 3). According to the student's language arts tutorial instructor, the student demonstrated an overall improvement in his skills, and he maintained a solid organizational system (id. at p. 4). The student earned an achievement grade of "C+" in language arts (id. at p. 5). His language arts teacher indicated that the student was generally able to apply skills with teacher guidance and cueing in less structured settings with regard to specific grammar and punctuation skills, study/research skills and content skills, composition and literature evaluation (id.). The report indicated that the student earned a "C+" in his literature course (id. at p. 6). The student's literature teacher commented that the student required a higher level of support for some study skills (id.). The student's algebra II teacher assigned the student an achievement grade of "A-" for the marking period and rated his performance in course comprehension and study skills with scores of mainly "G" and some "S" ratings (id. at p. 7). The student's chemistry teacher reported that the student performed at the independent level in comprehending factual material and in developing a "Power Point" slide show and rated the student mainly at the "G" level with some skills at the "S" level for language arts skills, study skills and science skills, and awarded the student a "B-" for the marking period (id. at p. 8). The student's world history teacher rated the student's skills as being both independent and requiring teacher guidance in several areas including comprehension skills and

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<sup>6</sup> Although not defined in the hearing record, the "SAT Reasoning Test" is presumed to be the standardized test for college admissions.

<sup>7</sup> According to the report, the percentile rank compared the student's scores on the three subtests to the scores of the previous year's college-bound seniors (Parent Ex. V at p. 1).

<sup>8</sup> The student's ability to independently perform specific skills related to each subject area was rated using a letter key which delineated "D" for demonstrating the skill with frequent and direct instruction in structured settings, "S" for demonstrating the skill with teacher guidance and cueing in structured settings, "G" for applying the skill with teacher guidance and cueing in less structured settings, and "I" for applying the skill independently in less structured settings (Parent Ex. X at pp. 3-9).

study skills and assigned the student a grade of "B-" for the marking period (id. at p. 9). Overall, the student's behavior and effort ratings in his classes were generally "satisfactory" to "commendable," although the student had difficulty completing daily homework in history and was late and unprepared for class at times (id. at pp. 3-9).

On June 17, 2008, the district's CSE convened to develop the student's 2008-09 IEP (Parent Ex. E). Meeting participants included the following individuals: a school psychologist who also served as the district representative, a regular education teacher, a special education teacher and an additional parent member (id. at p. 2). Meeting minutes from the June 2008 CSE meeting indicated that letters regarding the meeting were sent to Landmark and the parent, but neither responded, and that calls with messages were left with Landmark (Dist. Ex. 4). The parent testified that no one had spoken to her regarding the meeting, but that she received a message on her cell phone that the meeting was about to take place (Tr. p. 75; Parent Exs. M; O). However, due to limited cell phone reception in the building where she worked, the parent did not receive the message regarding the meeting until later in the day, after the meeting had taken place (id.). The June 2008 CSE meeting minutes also reflected that no teacher reports or other assessments were received from Landmark or the parent (Dist. Ex. 4).<sup>9</sup> The June 2008 CSE did not recommend special education services for the student; rather, the CSE recommended a "general education placement within a community school" for the student and designated him as "non handicapped" (id. at p. 1). The academic performance and learning characteristics portion of the June 2008 IEP indicated that the student's cognitive ability was overall in the high average range, and further described the student's perceptual ability as superior (id. at p. 3). The resultant IEP also reflected the results of the July 2006 administration of the Nelson-Denny Reading Test (compare Parent Ex. E at p. 3, with Parent Ex. T at p. 5). Regarding the student's social/emotional present levels of performance, the June 2008 IEP noted that the student had a diagnosis of an ADHD (Parent Ex. E at p. 4). According to the June 2008 IEP, the student was reportedly "happy," and despite the student's concerns about his memory, given the results of academic testing, the June 2008 CSE determined that the student's concerns were baseless (id.). The June 2008 IEP also noted that the student had been described as a model student, who appeared to have been successful in overcoming the results of his ADHD (id.). According to the June 2008 CSE meeting minutes, "SSAT" percentile estimates that placed the student at the 69th percentile in reading and at the 83rd percentile in math were considered in determining that the student was above average and "non-handicapped" (id.).<sup>10</sup>

On July 23, 2008, the parent received a copy of the June 2008 IEP (Tr. p. 75). The parent stated that she "was shocked [the CSE] declassified him" (id.). By letter dated July 28, 2008 to the CSE chairperson, the parent stated that she disagreed with the June 2008 CSE's program recommendation and the June 2008 IEP's factual content, as well as the district's decision to declassify (Parent Ex. O at p. 2). The parent explained that she did not know that the CSE meeting was scheduled, and despite receiving notice of the meeting, the parent stated that she

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<sup>9</sup> The meeting minutes from the June 2008 CSE meeting refer to the student by the wrong first name.

<sup>10</sup> Although not defined in the hearing record, it is presumed that the "SSAT" is an admissions test, not related to the SAT Reasoning Test nor given by the College Board, administered to students in grades five through eleven to help determine their placement into independent or private junior high schools or high schools.

was "confused," because she had simultaneously reached a settlement agreement with the district regarding her tuition reimbursement claim for Landmark for the 2007-08 school year (id.). The parent advised the CSE chairperson that neither she nor a representative from Landmark, nor the student's doctor attended the June 2008 CSE meeting, and therefore, she was denied an opportunity to participate in the development of her son's IEP (id.). She further noted that the June 2008 IEP contained inaccuracies regarding her son's test scores, and she requested a new IEP for the 2008-09 school year (id.).

By Final Notice of Recommendation (FNR) dated July 28, 2008, the district reiterated its recommendation that the student be placed in a general education program and receive no special education services (Parent Ex. I). The FNR stated a specific high school that the student was recommended to attend (id.). On the bottom of the FNR contained in the hearing record, the parent handwrote "No- Do not agree," dated August 11, 2008 (id.). By letter also dated August 11, 2008, the CSE chairperson informed the parent that a CSE review meeting had been scheduled to take place on August 20, 2008 (Parent Ex. J at p. 1). According to the parent, she did not receive this letter and was unaware that a review meeting took place in August 2008 (Tr. pp. 315-16).

In separate correspondence dated August 11, 2008, the parent acknowledged receipt of the July 28, 2008 FNR and restated her concerns regarding the development of the June 2008 IEP and the reason she did not attend the meeting (Parent Ex. P). The parent indicated that she wrote to the CSE because she had yet to receive a response from the CSE regarding her request for a new meeting (Tr. p. 315). In the letter, the parent also repeated her request for a new IEP for the upcoming school year for her son (Parent Ex. P). On August 13, 2008, per the parent's request, the district's placement officer for the CSE issued a request for a "case conference;" however, the hearing record does not indicate that the parent was aware that the district had done so (Parent Ex. K).

On August 15, 2008, the parent entered into an enrollment agreement with Landmark for the 2008-09 school year (Parent Ex. Z).

On August 20, 2008, the CSE convened without the parent in attendance (Parent Ex. F at p. 2). Meeting participants included the following individuals: a school psychologist who also served as the district representative, as well as the district's regular and special education teachers (id.). The August 2008 IEP reflected information regarding the student's declassification, general education placement, and present levels of academic and social/emotional performance, which was consistent with the information included in the June 2008 IEP (compare Parent Ex. E, with Parent Ex. F). The August 2008 CSE meeting minutes stated that the parent had requested the meeting because she did not agree with the recommendation for general education or the declassification of the student (Dist. Ex. 10). According to the meeting minutes, the August 2008 CSE determined that the recommendation and classification of the student would remain the same because the parent did not attend the meeting and did not provide any updated information (id.). That same day, the CSE chairperson advised the parent by FNR of the CSE's recommendation that the student remain in general education (Parent Ex. N).

By letter dated September 8, 2008, the parent advised the CSE placement officer that she had yet to receive a response to her August 11, 2008 letter (Parent Ex. Q). The parent reiterated the concerns that she her raised in her August 11, 2008 letter (compare Parent Ex. Q, with Parent Ex. P).

By due process complaint notice dated September 8, 2008, the parent, through her attorney, requested an impartial hearing (Dist Ex. 1). The parent alleged that the June 2008 CSE developed a procedurally and substantively deficient IEP, which resulted in a denial of a free appropriate public education (FAPE) to the student (id.).<sup>11</sup> According to the parent, the student's classification as a student with an OHI should not have been changed (id. at p. 3). She asserted that the student required a residential, small, language-based special education program in order to make academic progress (id.). Accordingly, the parent maintained that Landmark, "a college preparatory program located in Massachusetts," was a therapeutic language-based residential placement that was appropriate to meet the student's needs, and was providing him with educational benefits (id.). As relief, the parent requested both tuition reimbursement for Landmark for the 2008-09 school year and direct tuition payment of her son's tuition for Landmark (id. at p. 4).

On October 7, 2008, an impartial hearing began and concluded after three days of testimony (Tr. pp. 1-442; IHO Decision at p. 1). During the impartial hearing, the district conceded that it failed to offer the student a FAPE during the 2008-09 school year (Tr. pp. 22-25, 97, 400, 404-05, 409; IHO Decision at p. 7). The impartial hearing officer rendered her decision on January 6, 2009, in which she denied the parent's request for tuition reimbursement for Landmark for the 2008-09 school year (IHO Decision at p. 8). With regard to whether the parent had established that Landmark appropriately met the student's special education needs, the impartial hearing officer first found that notwithstanding testimony from the student's teachers indicating that the student required supportive services, there was neither testimony showing that the student needed such a restrictive environment as a 6:1 classroom nor evidence that the student "would not succeed in a less restrictive environment with support services" (id.). She further determined that the student was "academically capable of attending the most difficult math and science classes" (id.).

The impartial hearing officer found no basis to award "reimbursement to the parent for the residential portion of the student's placement for the 1999-2000 school year" (IHO Decision at pp. 7-8).<sup>12</sup> In particular, she characterized the testimony regarding the student's need for residential placement as "vague" (id. at p. 7). The impartial hearing officer also cited testimony indicating that the student's participation at Landmark was advantageous to him, because Landmark was designed for students to be residents (id.).

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<sup>11</sup> The parent testified that at the time that she commenced the impartial hearing, she was not aware that the August 2008 CSE meeting had taken place, and further stated that at no time was she given notice of any additional CSE meeting (Tr. pp. 80-81).

<sup>12</sup> In the context of the hearing record, which indicates that the parent is seeking tuition reimbursement for the 2008-09 school year, it is presumed that the impartial hearing officer made a typographical error, and that she understood that the 2008-09 school year was the school year at issue during the impartial hearing (IHO Decision at p. 2).

The impartial hearing officer also made findings with respect to whether equitable considerations supported the parent's claim for tuition reimbursement (IHO Decision at p. 8). She described the parent as an individual who was "fully familiar with the special education process and aware that every year an IEP was created for her son" (id.). According to the impartial hearing officer, the parent's testimony that she was confused when she received the first notice of the IEP meeting was "conflicting" (id.). She further determined that the parent's testimony regarding the August 2008 CSE meeting was "not credible in light of the parent's sophistication with the process and her contact with her attorney" (id.). Lastly, the impartial hearing officer noted that as relief, the parent originally requested direct funding of the student's tuition at Landmark and then amended her request to seek tuition reimbursement (id.).

The parent appeals and requests an annulment of the impartial hearing officer's decision. The parent argues that Landmark was reasonably calculated to confer educational benefits to the student, and that the residential placement was appropriate to meet his special education needs. Contrary to the impartial hearing officer's conclusion, the parent asserts that the student requires a residential self-contained special education program as his least restrictive environment (LRE). Moreover, the parent claims that the student needs a residential program in order to receive the benefits of instruction and to make progress. The parent contends that Landmark's program is specially designed to meet the student's unique needs, and that the student has made academic and emotional progress there.

The parent also disputes the impartial hearing officer's conclusions with respect to equitable considerations and the denial of reimbursement based on equitable grounds. The parent maintains that she has cooperated with the CSE and that she has been honest and credible in all her dealings with the CSE throughout the years. She claims that she would have attended the June 2008 and August 2008 CSE meetings; however, the parent was not notified and was confused regarding the scheduling of the CSE meetings. Additionally, the parent contends that the impartial hearing officer erred by overlooking the procedural and substantive defects surrounding the development of the student's 2008-09 IEP, and that she should not be held accountable for the district's errors in failing to afford her meaningful participation in the development of her son's IEP. Lastly, the parent asserts that, as a whole, the impartial hearing officer's decision was biased; baseless; not careful, thorough or fair; nor was it based on any legal standards.

The district submitted an answer in which it denies many of the parent's allegations and further requests that the petition be dismissed in its entirety. As an initial matter, the district argues that the parent's claim for tuition reimbursement to Landmark must fail because she had not made any payments to Landmark and therefore, she has not sustained any out-of-pocket costs. Next, the district asserts that the parent failed to satisfy her burden of demonstrating that Landmark was an appropriate placement for the student, because the residential program with a classroom ratio of 6:1 was an overly restrictive environment for the student. The district maintains that there was insufficient evidence in the hearing record demonstrating that the student required a residential placement in order to obtain educational benefits. Additionally, the district claims that the parent presented very little evidence regarding the academic instruction

that the student was receiving at Landmark, or any evidence of the progress that the student was making. Finally, with regard to the issue of the appropriateness of Landmark, the district argues that Landmark did not provide the student with sufficient counseling, an identified area of need for the student.

Lastly, the district argues that equitable considerations weigh against the parent's claim for tuition reimbursement for the following reasons: (1) the parent's testimony was not credible; (2) her claim for prospective payment of the student's tuition was disingenuous; (3) the parent failed to afford the district adequate notice of her intent to re-enroll her son at Landmark; and (4) the parent never intended to place the student in a public school.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra 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 student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak 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] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate"

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

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

Turning to the instant case, the district conceded that it did not offer the student a FAPE for the 2008-09 school year (Tr. pp. 22-25, 97, 400, 404-05, 409; IHO Decision at p. 7). Accordingly, I concur with the impartial hearing officer that the parent has prevailed with respect to the first Burlington/Carter criterion for reimbursement of the student's tuition costs at Landmark for the 2008-09 school year.

I must now consider whether the parent has met her burden of proving the appropriateness of the student's placement at Landmark (Burlington, 471 U.S. 359). The parent argues that the student needs the residential language-based special education program with small class sizes that Landmark offers. Conversely, the district asserts that the evidence adduced at the impartial hearing does not support the parent's contention that the student requires Landmark's highly restrictive residential placement in order to receive educational benefits. Thus, the central issue in dispute is whether the student required a residential setting in order to receive educational benefits from his program and whether the residential placement provided education instruction that was specifically designed to meet the student's unique special education needs. 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. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Bd. of Educ., Appeal No. 08-016; Application of a Child with a Disability, Appeal No. 06-138; 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). Although parents are not held as strictly as school districts to the standard of placement in the LRE, 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]). The impartial hearing officer determined that there was no basis on which to award reimbursement for the residential portion of the student's program at Landmark for the 2008-09 school year because the testimony regarding the necessity of such a placement was vague. After a careful review of the hearing record, I agree with the conclusion of the impartial hearing officer that the parent failed to establish that the student required a residential setting in order to receive educational benefits.

According to the hearing record, Landmark is a residential and day school for students who have some type of language-based learning disability, attention problems including ADD or ADHD or executive function problems (Tr. pp. 29-30). Students at Landmark typically have average to above average intelligence, but for reasons related to their disability do not perform as well as expected (Tr. p. 30). Landmark has approximately 300 students at the high school campus and is described as very structured (id.). The student's counselor at Landmark testified that for residential students, the structure begins in the dorms at the beginning of the day when the students are expected to leave their room in reasonable order before school starts and to get out of the dorm on time, and continues throughout the academic day (id.). After school, all students must be involved in various activities (id.). The counselor further testified that the school employs a six-level residential system where all students begin at level one (Tr. p. 56). If a student wants to advance to a higher level, he must demonstrate and get feedback from

dormitory and academic staff that he is able to accomplish goals related to time management, completion of homework, keeping his room clean, and being a good citizen (Tr. pp. 56-58). The level system rewards students for responsible behavior with privileges such as a later bedtime (Tr. p. 105).

With regard to the academic program at Landmark, a teacher from Landmark testified that students are grouped according to age level (within two years), learning style and current functional level, in classrooms with teacher-to-student ratios ranging from 6:1 to 10:1 (Tr. p. 122). The school focuses on six primary teaching principles or techniques which include providing opportunities for students to be academically successful, using multiple modalities, using "micro-units" or breaking down tasks into the smallest possible steps, ensuring that students "overlearn" an activity, modeling, and including students in the learning process (Tr. pp. 124-26). Students are also provided an opportunity to learn about their own learning style and how it affects them (Tr. p. 31).

The student's counselor also stated that she thought the student benefited from the small classes, the availability of the adults around him, the opportunity to establish positive relationships with adults, as well as the individual help and mentoring; however, she did not comment on whether the student required the residential component in order to receive educational benefits (Tr. p. 45). When asked for his opinion regarding the student's need for the residential component of the program, the student's academic case manager responded as follows:

Landmark is designed for students to be residents. Although some students are day students, the ones who are residents benefit the most. And the reason being is that every minute of their day, from the minute they wake up to the minute they go to sleep, is structured and designed. They do not have to make any decisions.

(Tr. p. 135).

I find that the hearing record is insufficient to show that this intense level of programming is required in order to meet the student's special education needs. Additionally, I note that there is no indication in the hearing record that students are mainstreamed at Landmark for either academic or nonacademic activities or have opportunities to interact with typically developing peers. The student's mother testified that the student had benefitted from the level program in the residential component and that the residential structure had been helpful for him; however, she did not indicate how or why the student required the residential program in order to receive educational benefits from his day program (Tr. p. 103). Accordingly, I find the hearing record lacks sufficient evidence to support that the student required the residential program at Landmark in order to meet his special education needs.

Additionally, the parent argues that the student needs a residential setting in order for his behavioral, cognitive, emotional and academic needs to be met. The parent requested that the student receive counseling due to her concerns with the student's tendency to become frustrated and overwhelmed (Tr. p. 32). The student's counselor reported that the problems the student

discusses with her revolve around his frustration with school demands and expectations (Tr. p. 34). According to the student's counselor, she had met with the student three times since the beginning of the 2008-09 school year, and she and the student had agreed that he could seek her out on an as needed basis (Tr. pp. 33, 58). The counselor further stated that the student had done a very nice job of getting to her and asking if he could meet with her (Tr. p. 33).

Although the psychologist who performed the student's educational evaluation recommended a structured environment that extended beyond the classroom and reported that the student required a residential placement, I note that the evaluation was completed in July 2006 and that the hearing record does not reflect that the student has had a more recent psychological evaluation (Parent Ex. T at p. 1). Although the evaluation reflected that the student "could have severe, negative emotional consequences" if he were placed in an environment where he felt overwhelmed, the hearing record does not support that this assertion was accurate at the time of the school year at issue (*id.* at p. 8). The student's counselor testified that she believed the student still had a tendency to feel overwhelmed and frustrated, but that he was learning how to express that more appropriately and that he was learning to take responsibility for his behavior and develop a plan of action (Tr. pp. 50-51). As indicated above, the student's counselor had reduced the frequency of her sessions with him to an "as needed basis" and had only seen him three times since the beginning of the school year (Tr. pp. 32-33, 58). In light of the foregoing, given that the hearing record reflects that the student had made progress in his ability to handle being "overwhelmed," especially considering the reduction of his counseling sessions, there is no basis in the hearing record to support the parent's claim that the student required a residential setting in order for his emotional, cognitive and behavioral needs to be met.

Based on the foregoing, I concur with the impartial hearing officer that placement at Landmark was overly restrictive and that the parent has not met her burden to demonstrate that the unilateral placement was appropriate, and, therefore, the second criterion of the Burlington/Carter analysis has not been met (see Burlington, 471 U.S. 359; Gagliardo, 489 F.3d at 115). Having decided that the parent failed to meet the second criterion for an award of tuition reimbursement, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

In conclusion, all of the arguments raised by the parties have been considered. To the extent that they are not specifically addressed herein, the arguments are either without merit or improperly raised for the first time on appeal.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 8, 2009**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**