



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-031

**Application of the [REDACTED] DEPARTMENT OF EDUCATION  
for review of a determination of a hearing officer relating to the provision of  
educational services to a student with a disability**

### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered the district to reimburse the parents for 90 percent of the costs of their son's homebound instruction program provided by the Smith School (Smith) for the 2007-08 school year. The parents cross-appeal from that portion of the impartial hearing officer's decision which found that based upon equitable considerations, the parents were not entitled to full reimbursement for the costs of their son's homebound instruction program for the 2007-08 school year. The appeal must be sustained. The cross-appeal must be dismissed.

During the 2007-08 school year in question, the student received 1:1 homebound instruction services provided by Smith and speech-language therapy services provided by the district through the issuance of a Related Services Authorization (RSA) (Tr. pp. 6-8, 53-54, 170-72; see Parent Ex. A at pp. 1-3). The Commissioner of Education has not approved Smith as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an emotional disturbance is not in dispute in this appeal (34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

In this case, the parents initially referred the student to the Committee on Special Education (CSE) on May 2, 2007 (Dist. Ex. 3; see Tr. pp. 226-30). At that time, the student attended a general education fourth grade classroom at a private school, The School at Columbia University (Columbia) (Dist. Exs. 1-2; 4; see Tr. p. 146). On May 23, 2007, the parents met with a district social worker, who interviewed the parents, prepared a social history report, and obtained the parents' consent to evaluate the student to determine whether he required special education services (Dist. Ex. 2; see Tr. pp. 209-13; Dist. Ex. 3). In the social history report, the social worker noted that the parents had "arranged for extensive testing which they [would] provide to [the district]" (Dist. Ex. 2; see Tr. pp. 209-10, 226-28; Dist. Ex. 3). The social history report indicated that during preschool, the student received speech-language therapy and occupational therapy (OT) through the Committee on Preschool Special Education (CPSE), but discontinued speech-language therapy at age five because the student improved his articulation and his parents "felt that he no longer needed the service" (Dist. Ex. 2; see Tr. pp. 213-14). According to the report, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) in third grade, which had been treated with a "variety of medications" (Dist. Ex. 2; see Tr. pp. 223, 238). The parents also reported that the student was currently "having difficulty" in fourth grade at Columbia (Dist. Ex. 2).<sup>1</sup> The parents explained that the student had difficulty with "personal space," he would "rock in his chair," and he was "disorganized," but academically, the student "did very well" (id.). According to the parents, the student's issues with personal space affected his ability to work on group projects at Columbia (id.). The social history report documented the parents' concerns regarding the student's increasing behavioral difficulties during the 2006-07 school year at Columbia, which the school attempted to deal with by implementing a behavior management plan, a behavior checklist, and counseling by a school psychologist (id.). The student also took medication for anxiety (id.). The parents also identified incidents when the student displayed angry outbursts and "out of control" behavior (Dist. Ex. 2; see Tr. pp. 214-16).

On June 8, 2007, the district social worker conducted a classroom observation of the student while he attended a music class at Columbia, and she spoke with the student's music teacher and a school psychologist (Dist. Ex. 1; see Tr. pp. 216-25, 231-32, 234-43). The social worker also observed the student in the lunchroom for approximately 30 minutes (Tr. pp. 239-41). According to the observation report, the student exhibited increasing difficulties with restlessness, distractibility, and his ability to focus as the music class proceeded (Dist. Ex. 1; see Tr. pp. 219-20). Toward the end of the class, the student no longer participated and refused to follow the teacher's directions for participating in a game (Dist. Ex. 1; see Tr. pp. 220-22). As a result of the student's behavior, the teacher ended the music class and took the students to "an early lunch" (Tr. pp. 221-22). Based upon her conversation with the music teacher, the social worker indicated that the student had many "social difficulties" and difficulties with "social interaction" (Dist. Ex. 1; see Tr. pp. 222-23). In her testimony at the impartial hearing, the social worker indicated that she spoke with the school psychologist at Columbia, who also identified the student's social difficulties and issues with distractibility and focusing (Tr. pp. 223-24). According to her conversation with the school psychologist, the social worker testified that staff at Columbia was "concerned" because the student exhibited "extreme difficulties in school" and efforts had been made to "reach out to the parents" (id.).

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<sup>1</sup> According to the hearing record, the student has never attended a public school (Tr. p. 172).

By letter dated June 13, 2007, the head of Columbia wrote to the parents expressing concerns about the upcoming 2007-08 school year due to the student's increasing behavior needs and the issue of whether the school could continue to meet those needs (see Dist. Ex. 4 at pp. 1-2). In the letter, the head of the school questioned whether Columbia could provide the "structure" the student needed, and he further noted, that the student needed "clear limits and boundaries," continued "conversation and intervention" with Columbia's "Child Study Team," and "perhaps, an outside therapist, so that [the student] understands his own overtures and reactions to classmates" (id. at p. 1). In addition, the head of the school indicated that Columbia staff would continue to "brainstorm . . . to put in place the specific accommodations that [were] necessary to ensure [the student's] safety and the safety of his classmates" (id.). In hopes that Columbia could continue to serve the student during the 2007-08 school year, the school issued a contract to the parents for the 2007-08 school year, but cautioned that the school would "keep [the student] here at school only as long as the Child Study Team and the administrators [were] in agreement that [the school could] serve [the student] intellectually and socially" and further, that if the student became "dangerous to himself or to others" the school would make a decision "in the best interests of all of our community" (id.).<sup>2</sup> The head of the school requested that the parents return the contract with a deposit within two weeks and noted that if the parents located another school that would better serve the student prior to the start of the school year, the deposit would be refunded (id. at p. 2).

By letter dated June 22, 2007, the district social worker who completed the social history report and conducted the classroom observation wrote to the parents to confirm a conversation held on the same date (Dist. Ex. 3). In the letter, the social worker reminded the parents of the May 23, 2007 meeting, at which time the parents had advised that they did not want the district to evaluate the student and that they would provide the district with privately arranged assessments (see id.; see also Tr. pp. 229-30). The social worker's letter indicated that since the parents did not provide the assessment reports, the district needed to "close" the student's case (see Dist. Ex. 3; see also Tr. pp. 229-30; Dist. Exs. 1-2). In the letter, the social worker asked the parents to contact her upon either the completion of the private evaluation reports or if the parents wanted the district to conduct the evaluations, noting further that the student's case could be "reopened" by making a "formal request in writing" to the individual at the address identified (Dist. Ex. 3). At the impartial hearing, the social worker testified that she did not get any response or contact from the parents after the June 22, 2007 letter (Tr. p. 230).

On June 20th, June 27th, and July 7th, 2007, the student underwent a private neuropsychological evaluation (Parent Ex. F at p. 1). The student's private psychiatrist referred him for the neuropsychological evaluation due to the psychiatrist's concerns about "the presence of receptive language deficits" (id.; see Tr. pp. 57-58, 165-66; Parent Ex. E at pp. 1-3). The evaluator noted "impairments in interpersonal and organizational skills" as "[s]pecific concerns reported in connection with the present evaluation" (Parent Ex. F at p. 1). As reported by the parents, these identified concerns constituted a "long-standing behavioral constellation" (id.). For example, in kindergarten the student exhibited a "limited appreciation of social and physical boundaries (e.g., respect for personal space)," affecting his ability to "cultivate and maintain relationships with peers" (id. at p. 2). In first grade, the student reportedly "met academic standards," but experienced increasing difficulties with "restlessness, sustained attention,

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<sup>2</sup> The parents testified at the impartial hearing that they signed the contract with Columbia for the 2007-08 school year in February or March 2007 (Tr. pp. 175, 177).

organization, and adaptive functioning (e.g., socialization skills)" (id.). According to the evaluation, upon transferring to Columbia for second grade, the student continued to meet academic expectations; however, the staff at Columbia "repeatedly alluded to deficiencies in [the student's] social-emotional functioning" (id.). As reported by his parents, during fourth grade (2006-07 school year) at Columbia the student's "patterns of adaptive dysfunction (e.g., circumscribed interests, limited social reciprocity), restlessness, and inattention" became increasingly replaced by "pronounced episodes of emotional dysregulation (e.g., temperamental outbursts, irritability) and physical aggression (e.g., pulling his mother's hair)" (id.). The evaluator noted that at school, the staff had to "physically restrain[]" the student when he ran out of the classroom (id.). The evaluator also noted that the student exhibited difficulty disengaging from "circumscribed activities (e.g., Legos, videogames), which for the most part, constitute[d] solitary (and controlled) activities that offer[ed] limited opportunities for social interactions and modeling" (id.).

In addition to reporting the student's developmental history, family history, and medical history, the evaluator also reported the student's psychiatric history (Parent Ex. F at pp. 2-4). The evaluator described the student's psychopharmacological regimen since first grade (id. at p. 4). The history noted that the student continued to use medication, as well as weekly counseling with his psychiatrist and a school psychologist at Columbia "as an adjunct to his psychopharmacological treatment" (id.).

Turning to the student's academic and social history, the evaluator reported that the student participated in a "mainstream academic program" at Columbia (Parent Ex. F at p. 5). According to a school report, the student exhibited "strong" basic academic skills, a "curiosity and openness to new information," and an awareness that "his behavior" was an "important goal" (id.). Academically, the student met expectations in the areas of "literacy, performing arts (dance and music), science, and wellness, and often exceed[ed] expectations in mathematics" (id.). The evaluator further noted, however, that the student's "circumscribed interests, impulsivity, impoverished pragmatic communication, and imposing interpersonal style . . . hampered efforts to establish friendships that [were] reciprocal in nature" (id.). For instance, the evaluator indicated that at times, the student "lashe[d] out verbally (yelling) and physically (e.g., kicking, pushing) when his needs [were] not accommodated" and that the student displayed a "limited threshold for teasing, ostracizing, and being passed over by peers (e.g., when playing a game)" (id.).

The evaluator also reviewed the student's previous evaluative information, which referenced an initial evaluation in second grade due to concerns regarding inattention and social skills (Parent Ex. F at p. 5). At that time, the student exhibited "difficulties with inattention, fine and gross motor skills, oral and written comprehension, and impoverished understanding of mathematical concepts" (id.). Behaviorally, the student demonstrated difficulty with "social interactions (e.g., difficulty relating to adults and peers, poor eye contact and reciprocal play, struggles reading social cues) and impulsivity (e.g., touching others)" (id.). Although the evaluation in second grade did not include an assessment of the student's intellectual functioning, the student demonstrated age-appropriate language skills, but weaknesses in "attention, graphomotor skills, and social skills" (id.). More recently in March and April 2007, evaluators attempted a neuropsychological evaluation, which could not be completed due to the student's "behavioral dysregulation" (id.). However, the results obtained indicated that the student "met [the] diagnostic criteria for Pervasive Developmental Disorder, Not Otherwise Specified (PDD

NOS), along with tics . . . and features of anxiety" (id. at pp. 5-6). The March/April 2007 evaluation included the following recommendations: "(i) participation in a structured, cognitive-behaviorally oriented psychotherapy program to facilitate adaptive coping, problem-solving, anger-management, and social reciprocity; (ii) adjunctive parental assistance and scholastic consultation; (iii) involvement in a social skills group; (iv) psychological testing; (v) speech and language assessment; and (vi) a sleep study to determine the basis for dyssomnia" (id. at p. 6).

For the current evaluation, the evaluator administered the following assessments: the Behavior Assessment System for Children—Second Edition (BASC-2); the Boston Naming Test (BNT); the California Verbal Learning Test—Children's Version (CVLT-C); selected subtests of the Children's Memory Scale (CMS); the Clinical Evaluation of Language Fundamentals—Fourth Edition (CELF-4); the Connors' Parent Rating Scale—Revised: Long (CPRS); selected subtests of the Delis-Kaplan Executive Function System (D-KEFS); the Developmental Test of Visual Motor Integration (VMI); selected subtests of the NEPSY-II (a Developmental Neuropsychological Assessment); the Purdue Pegboard Test; Scales of Independent Behavior—Revised (SIB-R); the Test of Written Language—Third Edition (TOWL-3); the Wechsler Individual Achievement Test—Second Edition (WIAT-II): Reading Comprehension; the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV); and selected subtests of the Woodcock-Johnson Tests of Achievement—Third Edition (WJ-III ACH) (Parent Ex. F at pp. 6-14, 17-19). Prior to explaining the student's performance in specific areas, the evaluator noted that due to the student's "dysregulation," the test results—"while likely indicative of his current level of functioning"—constituted a "mild to moderate underestimate of his actual abilities" (id. at pp. 6-13).

In summarizing the assessment results, the evaluator noted that the student currently functioned in the "low average" range cognitively with "significantly stronger nonverbal" intellectual abilities as compared to "verbal intellectual abilities" (Parent Ex. F at p. 13). With respect to academic achievement, the student performed within "expected levels" and displayed "strengths" in "nonverbal problem-solving, visual memory, sequencing, executive skills, and fine motor speed and dexterity" (id.). Despite these noted strengths, however, the student also displayed "a number of discrete weaknesses," which the evaluator opined were "likely both a byproduct of, and contributor to, his day-to-day difficulties" (id.). The evaluator indicated that the student's "[r]esidual deficits in receptive and expressive communication" could lead to "significant frustration" for the student, which could then "preclude him from effectively articulating his thoughts and feelings, and may ultimately predispose him to behavioral outbursts and, less frequently, physically aggressive forms of communication" (id.). In addition, the evaluator opined that the student's "rigidity, inattention, and excitability may interfere with his capacity to absorb academic details, and contribute a profile of cognitive and scholastic variability" (id.). He further noted that the student's communication difficulties coexisted with the student's "intricate constellation of behavioral impairments," which included "cognitive and emotional inflexibility, affective dysregulation (e.g., low frustration tolerance), and impoverished pragmatic communication (e.g., reciprocity, theory of mind)" (id.). Thus, the evaluator explained that the "absence of structure (as is the case in most social interactions) and/or departures from anticipated routines" for the student constituted "highly destabilizing forces," which resulted in the student turning to circumscribed activities that limited social interactions (id.). Finally, the evaluator opined that although the student's "communication deficiencies and episodes of dysregulation" could be "considered manifestations of language and/or disruptive behavior disorders, it [was] more likely that such features may more parsimoniously be

considered part of a Pervasive Developmental Disorder, which will likely require a multi-faceted program of remediation" (id. at pp. 13-14). The evaluator listed PDD-NOS and "Tic Disorder, Not Otherwise Specified" as his diagnostic impressions of the student (id. at p. 14).

Based upon the evaluation results, the evaluator included the following recommendations to assist the student: that an appropriate educational setting must balance "efforts to provide related services . . . with opportunities for adaptive role modeling and prosocial interactions;" in order to "promote the development of compensatory skills and to foster academic success," the student required placement in a 12:1+1 special education classroom with a structured classroom routine and praise for "compliance with established behavioral expectations;" the student's classroom should include a "developmentally based language curriculum;" the student required a small classroom to "foster active participation, attention, language comprehension, and expression;" the student required "1:1 remediation directed at addressing his multi-faceted language deficit," and the speech-language provider should work with the student's parents and classroom teacher to reinforce concepts introduced in therapy at home; the parents should participate in a "parent-training program" to foster the "development of techniques to help modify and manage [the student's] behavior;" the implementation of a behavioral checklist tied to a "carefully developed system of rewards and negative consequences;" the development of "behavioral interventions (e.g. school-home contracts, special seating)" to allow for "enhanced monitoring" of the student's behavior in school; the use of "simple/single commands" at home to ensure "proper comprehension;" the implementation of "manageable study sessions" at home; the student's participation in a "social skills group and extracurricular activities . . . to foster positive socialization experiences and provide exposure to positive role models;" recommended reading for the parents to assist in the management of the student's "behavioral dysregulation;" and the use of stories to improve the student's "ability to interpret the thoughts, feelings, attitudes, and intentions of others" (Parent Ex. F at pp. 14-15).

The student's private psychiatrist issued an evaluation report in conjunction with the private neuropsychological evaluation report (Parent Ex. E at p. 1). According to the report, the student started treatment with the psychiatrist in September 2006 (id.). Focusing on the student's current symptoms, treatment, and recommendations for the future, the psychiatrist reported that "attentional problems, low frustration tolerance, impulsivity, and significant difficulty interpreting social cues" as the student's "primary areas of deficit" (id.). He indicated that the student's "limited insight" of his own behavior resulted in "bullying and/or teasing in school or social situations" and that the student tended to "become impulsively aggressive" in his response (id.). The psychiatrist reported that during the year, the student's "behavioral dyscontrol became more pronounced and resulted in several incidents of aggression directed towards peers and his parents" (id.).

Upon reviewing the neuropsychological evaluation report, the psychiatrist noted the student's "deficits in receptive and expressive communication skills, and word finding difficulties" (Parent Ex. E at p. 1). The psychiatrist opined that these deficits, when "combined with cognitive rigidity, inattention, and impulsivity" predisposed the student to "becoming easily overwhelmed and resorting to behavioral outbursts and physical aggression to communicate his distress" (id.). The report then detailed the student's psychopharmacological treatment and efforts at counseling with the psychiatrist (id. at pp. 1-2). During weekly individual sessions, the psychiatrist attempted to "work through some of his anger and to help him learn how to better navigate social relationships" (id. at p. 2). According to the report, the sessions "focused on

engagement, building rapport and trust, and attempt[ing] to assist [the student] in negotiating conflict with parents and peers" (id.). The psychiatrist indicated that the student was "hostile, uncooperative, and defiant" and as a result, the student "gained little from these sessions" (id.). The psychiatrist reported more success, however, working with the parents by helping them "structure [the student's] time and in developing behavioral plans with consistent and predictable rewards and consequences for meeting expectations" (id.). In addition, the psychiatrist noted the importance of developing consistent plans "between the school and home environment" to assist the student in learning to "manage his behavior" (id.).

With respect to recommendations, the psychiatrist indicated that he "wholly agree[d]" with the recommendations issued in the neuropsychological evaluation report and reiterated the following: the student required a "small classroom with a high teacher to student ratio (12:1), and with peers who will challenge him academically;" a 12:1+1 special education classroom would "appropriately" serve the student's needs; depending upon the 12:1+1 classroom teacher's skills, the student may also require an aide to help manage the "stressors of classroom interactions;" the aide could assist the student by "effectively model[ing] appropriate social interactions and point out strengths and weaknesses in the moment;" the student's teacher would "need to be skilled in recognizing [the student's] early signs of distress" and intervene before the student becomes agitated, noting that the student's "clearest triggers . . . are being bullied or excluded by peers" and "[i]nvolving his personal space;" when frustrated or angry, the student should be allowed "time out;" the student required the use of a "safe place" at school for voluntary time outs; the student required speech-language therapy services to address "verbal comprehension, expression, and language pragmatics;" the speech-language therapy work should be "shared" with the parents and classroom teachers to "reinforce concepts at home and in the classroom setting;" the parents should engage in "parent management training to help implement behavioral plans at home" and the home behavioral plan should be consistent with the school based behavioral plan; the student should attend an appropriate social skills group and engage in extra-curricular activities requiring the student to "navigat[e] social relationships and interact[] with peers;" and finally, to continue medication management to address the student's "complex constellation of symptoms" (Parent Ex. E at pp. 2-3).

According to the hearing record, the parents received a copy of the private neuropsychological report at the end of August and provided Columbia with a copy of the report prior to the start of the 2007-08 school year (Tr. pp. 175-77). The parents testified at the impartial hearing that Columbia offered services in response to the recommendations contained in the report, such as having the psychological staff use social stories with the student so that he could "better understand language communication from peers, so as not to get overly upset or angry when people made jokes" (Tr. pp. 177-78).

At the beginning of the 2007-08 school year, the student attended Columbia (Tr. pp. 160-61). By e-mail dated September 16, 2007, the student's teacher at Columbia wrote to "check in" with the parents regarding her concerns about certain social and academic issues, indicating that the student, at times, chose "not to work," and that behaviorally, the student needed to be "aware of what, at times, manifests as tendencies to be aggressive and angry" (Dist. Ex. 5). Shortly thereafter, Columbia asked the student to leave the school due to his behavioral issues (Tr. pp. 161-62, 167-70, 173-75). The parents testified that in either late September or early October 2007, Columbia identified the student's inability to "function in the classroom, and in the social settings of school" as the reason for his dismissal (Tr. pp. 169-70, 173). In particular, the parents

testified that the student was "being disruptive," that he got "upset easily," that "it was not possible for [the school] to contain him," and that the school did not have "the resources to deal with these issues" (Tr. pp. 173-74). The parents further testified that the student got into "fights and altercations" with peers, and that the student had those same issues when he began seeing his private psychiatrist in 2006 (Tr. p. 174; see Tr. pp. 60-62).

At the impartial hearing, the parents testified that after Columbia asked the student to leave, they applied for their son's admission to approximately five or six private schools and received rejections from all of the applications (Tr. pp. 149, 167-68). Upon cross-examination, the parents further testified that prior to the student's departure from Columbia, they sought the advice of the student's psychiatrist and an impartial hearing advocate regarding potential placements for the student (Tr. pp. 168-70).<sup>3</sup> They further testified that since Smith did not admit students prior to the seventh grade, Smith did not have a classroom placement for the student, and thus, the parents had no "academic alternative" but to arrange for 1:1 homebound instruction services through Smith (Tr. pp. 149-50; see Parent Ex. I at pp. 1-2).<sup>4</sup>

By October 15, 2007, the student began receiving 1:1 homebound instruction services through Smith (Tr. p. 168; Dist. Ex. N at p. 1). By letter dated October 19, 2007, the parents wrote to the CSE requesting an evaluation of the student (Parent Ex. D at p. 1). By letter dated November 26, 2007, the parents wrote a second request to the CSE seeking an evaluation of the student (id. at p. 2). On December 12, 2007, the district completed an updated social history report, and on December 19, 2007, conducted a speech-language evaluation of the student (Parent Exs. C; G).<sup>5</sup> The updated social history report referred to the parents' privately obtained neuropsychological evaluation of the student (see Parent Ex. C at pp. 1-2). In addition, the report noted that the student had been "pulled out" of Columbia in October 2007 because he was "always in trouble during recess" and due to "constant call[s] from school regarding [the student's] social, behavioral issues" (id. at pp. 2-3). As reported by the parents, at that time the student received speech-language therapy services, attended a martial arts class and a special needs program, and met weekly with a psychiatrist (id. at p. 4).

On January 25, 2008, the CSE convened to conduct the student's initial referral review and to develop an individualized education program (IEP) for the remainder of the 2007-08 school year (Parent Ex. B at p. 1). The CSE determined that the student was eligible to receive special education programs and services as a student with an emotional disturbance and recommended placement in a 12:1+1 special class in a community school with counseling and

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<sup>3</sup> At the impartial hearing, the parents testified that the student's psychiatrist "actually made phone calls to each one of the schools, asking them to take a look at [the student]—if he could be admitted" (Tr. p. 169). The student's psychiatrist also testified at the impartial hearing and admitted assisting the parents "in terms of the process" of locating another school, but denied making any telephone calls (Tr. pp. 78-80).

<sup>4</sup> According to the Smith School brochure submitted into evidence, Smith offered a "full-time home study program" for students with "appropriate medical documentation" (Parent Ex. I at p. 2). In addition, the brochure describes Smith as an independent day school for students in seventh through twelfth grade (id.). The brochure notes the school's guiding principle as bringing "academic success to students whose struggle with learning and emotional issues has prevented them from achieving their full potential" (id.).

<sup>5</sup> Consistent with the private neuropsychological evaluation report, the December 2007 speech-language evaluation highlighted the student's behavior and attending difficulties, in addition to his language weaknesses (Parent Ex. G at pp. 5, 6).

speech-language therapy as related services (*id.* at pp. 1-2, 9-11). In the IEP, the CSE indicated that the student could "focus and do his work in a quiet one-to-one setting, but reportedly [had] difficulty when he [had] to work with other children, even in a small group" (*id.* at p. 4). According to the hearing record, the district recommended a site location in which to implement the student's IEP and after visiting the proposed site location on February 11, 2008, the parents—by letter dated February 12, 2008—rejected the proposed placement as inappropriate because the class's academic level fell "far below" the student's abilities (Parent Ex. D at p. 3).

By due process complaint notice dated June 30, 2008, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2007-08 school year based upon procedural and substantive violations of the Individuals with Disabilities Education Act (IDEA) (Parent Ex. A at pp. 1-2). In particular, the parents alleged that the district failed to conduct a timely CSE meeting, the CSE failed to include a social worker or a teacher who had worked with the student, the parents were denied meaningful participation in the formulation of the IEP goals, and the district failed to offer an appropriate placement after the parents rejected the first recommended placement (*id.* at p. 2). The parents asserted that the student required placement in a "small, structured class with a high student teacher ratio with peers commensurate with [the student's] high cognitive functioning level" (*id.* at pp. 2-3). The parents also asserted that they cooperated with the CSE and that the homebound instruction program and speech-language services obtained during the 2007-08 school year were appropriate to meet the student's needs (*id.*). As relief, the parents requested reimbursement for the student's homebound instruction services provided by Smith and for the speech-language therapy services (*id.* at p. 3).

The parties proceeded to impartial hearing on September 3, 2008, which concluded after six days on December 19, 2008 (Tr. pp. 1, 182). At the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2007-08 school year (Tr. pp. 15, 22, 50, 53). The parents also withdrew their request for reimbursement of the costs of the student's speech-language therapy services, noting that although the due process complaint notice originally sought such relief the district "paid" for the services through the RSA issued (Tr. pp. 82-83, 170-72; *see* Parent Ex. A at p. 3).

The student's "field instructor" from Smith (tutor) testified that when she began instructing the student in October 2007, he presented with an "extreme problem in maintaining focus," required redirection "over and over and over again," displayed a particular strength in mathematics, and showed little "confidence in his ability to read" (Tr. pp. 106-08).<sup>6</sup> The tutor testified that she used a "general curriculum" with the student, and her instruction targeted improving the student's reading level and ability to focus (Tr. pp. 107-08). She instructed the student three times per week for a total of seven and one-half hours per week (Tr. p. 110).<sup>7</sup> According to her testimony, she worked with the student in "[l]anguage arts, . . . , English, vocabulary, spelling, grammar, geography, world history, general science, mathematics, and

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<sup>6</sup> According to her testimony, the "field instructor" held a Bachelor's Degree in English and a California certificate that allowed her to "substitute teach in public schools" in California for general education classes, grades "K through 12" (Tr. pp. 105, 117-18).

<sup>7</sup> As noted in the description of Smith's "home study program," "daily instruction [was] provided by The Smith School teachers once an individualized program has been coordinated by the learning specialist" (Parent Ex. I at p. 2). The hearing record does not indicate whether a Smith "learning specialist" coordinated an individualized program for the student (*see* Tr. pp. 1-261; Dist. Exs. 1-5; Parent Exs. A-L; N; IHO Exs. I-VII).

arithmetic" (Tr. p. 119; see Tr. pp. 110-12). She also noted that the student's mother "did quite a comprehensive amount" of "advanced" mathematics with him (Tr. pp. 119-21). During a typical day, the tutor attempted to divide her time equally among the subjects she covered with the student (Tr. pp. 110-12, 120-22). In addition, the tutor supplemented the student's instruction with related films and field trips (Tr. pp. 112-13). The tutor reviewed the student's January 2008 IEP after it had been developed, and she testified that because some of the goals "were pretty vague," she developed "some of [her] own things that [she] felt were the most important" for the student (Tr. pp. 113-14).

The student's tutor confirmed that the student could be oppositional and difficult to manage, but that he had "more of that kind of trouble with . . . students and people his own age" (Tr. p. 109). With an "adult or authority;" however, the tutor reported that the student would respond to a mispronunciation of his name by making comments, such as "your teeth are ugly" or "that was really stupid" (id.). The tutor testified that she talked to the student about these incidents, "helping him to understand that there [were] consequences when you say things like that, that maybe other people get angry with you, or . . . , other kids don't like you as much if you would say something like that" (Tr. pp. 109-10). According to the tutor, the parents addressed the student's ability to associate with other children through "extracurricular things with sports" (Tr. p. 114). On days that she did not instruct the student, his parents involved him in "athletic things, Tae Kwon Do" (Tr. p. 122). The tutor confirmed that although the student received related services, she did not communicate with or contact the service providers or the student's private psychiatrist, but discussed the student with his mother "almost on a daily basis" (Tr. pp. 123-25).

When asked whether the student made progress during the 2007-08 school year, the tutor noted improvements in the student's ability to read, to focus, and to cooperate with her (Tr. pp. 107-08, 114-16). In addition to the tutor's testimony regarding the student's progress, the parents also submitted four interim progress reports prepared by the tutor related to the individual subjects in which the student received instruction through December 2007 (Parent Ex. H at pp. 1-4). In world history, the progress note indicated that the student demonstrated "difficulty distinguishing between fantasy . . . and historical fact," but was "slowly making progress" in this area (id. at p. 1). At that time, the tutor reported that the student was "very easily distracted, even in a one-to-one situation" (id.). According to the mathematics progress report, the student's ability to solve problems was "good (abstract reasoning) but his language processing skills [were] weak" and thus, created "difficulty with word problems" (id. at p. 2). In English, the progress report noted that the student could follow a story line but needed "a lot of individual attention" to help him refocus (id. at p. 3). The student's tutor noted that processing skills were a "problem area" for the student and that she was working "intensively" with the student on this area (id.). In science, the tutor indicated that although the student was "interested in the subject, his recall [was] not good" (id. at p. 4). According to the progress note, the tutor addressed the student's weakness through repetition (id.).

In addition to the interim progress reports, the parents also submitted the student's 2007-08 report cards from the tutor (Parent Exs. H at pp. 5-8; L at pp. 1-12). The student's February 1, 2008 report card indicated that in world history, the student studied different civilizations, which he was very interested in, and participated by commenting on the material (Parent Ex. H at p. 5). The tutor judged the student's "effort" as "excellent," while rating his "comprehension of material," "writing skills," "behavior," and "attitude" as "good," and his "organizational skills" as

"fair" (id.). With respect to math, the tutor deemed the student's "effort" and "attitude" as "excellent," and judged his "comprehension of materials," "organizational skills," and "behavior" as "fair" (id. at p. 6). The tutor also reported that the student's math calculations were "good" but that his language processing skills were "problematic" (id.). In English, the student was rated "good" in his "effort," "writing," "behavior," and "attitude," and his "comprehension of materials" and "organizational skills" were "fair" (id. at p. 7). According to the tutor, the student tended to "guess" at questions posed during reading and resisted referring back to the text to find the correct answer (id.). The student's "effort," "comprehension of materials," "behavior," and "attitude" in general science were rated as "good" and his "organizational skills" as "fair" (id. at p. 8). At that time, the student received the following grades for test/quizzes and class participation: world history, B and A; math, A and A; English, B and B; and general science, B- and B- (id. at pp. 5-8).

Subsequent report cards indicated that the student continued to have difficulty with language processing as it related to mathematics (Parent Ex. L at p. 9). The tutor reported that she employed word problems and logic games to address the student's weaknesses in this area (id.). At the end of February 2008, the tutor reported that the student's "reading ability has taken a leap forward" and that he now read "stories, articles, plays and poems for class that [were] at a fairly complex level for his age and grade" (id. at p. 11). The tutor noted improvements in the student's performance on reading comprehension tests (id.). In May 2008, the tutor reported that in English the student continued to comprehend material presented "quite well" (id. at p. 5). She indicated that although he was making progress, the student had difficulty with materials that addressed "real life skills," such as "prioritizing jobs or understanding labels" (id.). The tutor noted the student's ability to remain focused on his work in English and in general science (id. at pp. 5, 8). The student's July 2008 report card indicated that the student's "reading ability and confidence in what he can read and understand have increased a great deal" and that the student continued to do "excellent work" in math (id. at pp. 2, 4). With respect to world history, the report card indicated that the student demonstrated a "big improvement" in his ability to "separate fiction and myth from historical facts," and in general science, the tutor noted that the student "worked hard and remained focused" (id. at pp. 1, 3). The student received the following grades for test/quizzes and class participation: world history, A- and A; math, A- and A-; general science, B and B+; and English, A and A- (id. at pp. 1-4).

The student's psychiatrist testified at the impartial hearing and when asked his opinion regarding whether the "home instruction provided by the Smith School adequately and appropriately met [the student's] academic needs," he responded, "he did quite well, academically anyway. I mean, and that's exactly where he does his best, where he's in a one-on-one, structured playing to his strengths" (Tr. pp. 64-65). The psychiatrist noted his familiarity with the 1:1 homebound instruction services provided by Smith and that he had the opportunity to review the school's mission statement, as well as the student's report cards from the 2007-08 school year (Tr. p. 64). Given a choice between placing the student in a general education mainstream setting or in a 1:1 homebound instruction setting, the psychiatrist testified that he would prefer the 1: 1 setting in light of the student's own safety and the safety of other children (Tr. pp. 70-74). Ideally, however, the psychiatrist recommended placing the student in a classroom with other students, but at that time, it was his understanding that no other option existed but for "being homeschooled" (Tr. p. 70).

Similar to the psychiatrist's testimony, the psychologist who conducted the student's neuropsychological evaluation testified that he was familiar with the student's 1:1 homebound instruction provided by Smith and that he had an opportunity to review the school's mission statement and student's 2007-08 report cards (Tr. pp. 90, 94-95). When asked his opinion regarding whether the 1:1 homebound instruction provided by Smith "appropriately [met the student's] academic needs," the psychologist responded, "I believe so" (Tr. p. 90). If no appropriate 12:1+1 classroom existed, the psychologist testified that the 1:1 homebound instruction was a preferable alternative (Tr. pp. 98-99).

In her decision dated February 2, 2009, the impartial hearing officer noted that given the parents' burden to establish that the 1:1 homebound instruction services met the student's special education needs, she determined that the "Smith program" provided the student with an "appropriate and meaningful placement . . . , given the lack of any identifiable and available school-based programs" (IHO Decision at p. 12). The impartial hearing officer did not find persuasive the district's assertion that the student's homebound instruction program was unduly restrictive and inconsistent with the least restrictive environment (LRE) principles (*id.* at pp. 12-13). To the contrary, the impartial hearing officer concluded that the "credible testimony" suggested that no other program existed and that the student was "better served in the protective environment of home instruction" (*id.* at pp. 12-13). She further noted that the district failed to "produce any testimony or evidence that such a program was even available" and thus, in the absence of "any special education alternatives, home instruction was an appropriate placement" (*id.* at p. 13). The impartial hearing officer then analyzed whether equitable considerations barred the parents' recovery of tuition reimbursement (*id.* at pp. 13-16). She discussed and discounted the district's argument that the parents failed to provide Smith with the necessary medical documentation that Smith required as a pre-condition to receiving its home study program (*id.* at pp. 13-14). The impartial hearing officer also found unpersuasive the district's argument that the Smith tutor was an inappropriate instructor for the student, noting that the district failed to "elicit any testimony regarding the nature of Smith's home instruction program and its experience with the grades it services" (*id.* at p. 14). Finally, the impartial hearing officer noted that given the student's "long history of difficult behavioral issues, notwithstanding his intact cognitive abilities" and that "[n]o one disputed [the student's] need for supportive services," the parents' failure to timely provide the district with the student's privately obtained neuropsychological evaluation report constituted an equitable bar to their request for tuition reimbursement (*id.* at pp. 15-16). In her decision, the impartial hearing officer indicated that had the parents provided the district with the evaluation report in September 2007, "perhaps the CSE could have provided the educational supports (eg. a paraprofessional or "shadow") which would have facilitated [the student's] ability to continue at Columbia" (*id.*). The impartial hearing officer also determined that the parents' failure to provide notice of their unilaterally arranged private educational services, although a "*de minimus* violation," limited the parents' right to recovery in this case (*id.* at p. 17). Therefore, based upon her findings and conclusions of law, the impartial hearing officer granted the parents' request for tuition reimbursement, but reduced the award by ten percent of the full tuition costs (*id.*).<sup>8</sup>

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<sup>8</sup> In her decision, the impartial hearing officer also determined that the parents were precluded from seeking reimbursement for the costs of the student's participation in a Manhattan JCC sports program based upon the parents' failure to include such request in their June 2008 due process complaint notice and the district's objections to raising that issue at the impartial hearing (IHO Decision at pp. 10, 16-17). The parents did not assert this issue as a basis upon which to cross-appeal the impartial hearing officer's decision (Answer ¶¶ 1-82).

On appeal, the district asserts that the impartial hearing officer erred in concluding that the parents sustained their burden to establish the appropriateness of the 1:1 homebound instruction services provided by Smith. The district argues that notwithstanding the district's concession that it failed to offer the student a FAPE for the 2007-08 school year, the parents still retain the burden to establish that the homebound instruction services were appropriate and met the student's special education needs in order to receive an award of tuition reimbursement. The district asserts that the 1:1 homebound instruction services, in this case, constituted a "default" placement upon the student's expulsion from Columbia. In addition, the district alleges that the evidence reflects that the student required a 12:1+1 classroom environment with exposure to peers commensurate with the student's cognitive abilities. The district also contends that the 1:1 homebound instruction services were overly restrictive and failed to provide the student with any opportunities to interact with his peers, that the general curriculum used by the tutor was not tailored to meet the student's unique needs, and that the "paucity" of instruction cast "serious doubt as to its appropriateness for a fifth grader." In addition, the district contends that Smith did not provide for the student's related service needs. Turning to equitable considerations, the district argues that the impartial hearing officer should have completely barred the parents' recovery of tuition reimbursement. The district asserts that the parents' failure to timely provide the neuropsychological evaluation report coupled with the parents' failure to comply with the 10-day notice provisions should act as a complete bar to recovery in this case. The district seeks to annul the impartial hearing officer's decision finding that the parents sustained their burden to establish the appropriateness of the 1:1 homebound instruction services, or in the alternative, uphold the impartial hearing officer's decision regarding equitable considerations, but annul any award of tuition reimbursement to the parents.

In their answer, the parents contend that the impartial hearing officer's decision should be upheld in its entirety, but cross-appeal that portion of the decision reducing the amount of the tuition reimbursement award by ten percent based upon the parents' failure to timely provide the privately obtained neuropsychological evaluation report to the district. The parents contend that the district bore the burden to establish that the parents failed to timely provide the evaluation report, and that the hearing record is devoid of evidence that the parents did not provide the CSE with the evaluation report in a timely manner because the district failed to ask the parents at the impartial hearing when they submitted the report to the CSE. As affirmative defenses, the parents contend that the 10-day notice provision does not apply in this case because compliance would have likely resulted in physical or serious emotional harm to the student. In addition, the parents assert that the student made progress in the homebound instruction program and that parents are not held under the law to the same LRE standard as a school district. The parents also assert that "home schooling" is a valid educational placement and refer to the recently codified statutory provisions for home-instructed students, noting that such law was not in effect during the 2007-08 school year in question. The parents seek to uphold the impartial hearing officer's decision to the extent that it determined the parents sustained their burden to establish the appropriateness of the homebound instruction services, but seek to annul that portion of the decision reducing the tuition reimbursement award by ten percent and to recover the full costs of the student's tuition for the homebound instruction services provided by Smith.

In response to the parents' cross-appeal, the district served an answer and argued that the cross-appeal should be dismissed as it is unduly vague, ambiguous, and failed to sufficiently identify the reasons for challenging the impartial hearing officer's decision. The district also

argued that the parents were required to comply with the 10-day notice provision even though the student re-enrolled in a private school setting.

In this case, since the district conceded at the impartial hearing that it failed to offer the student a FAPE for the 2007-08 school year, I will proceed directly to the district's appeal, which contends that the parents failed to sustain their burden to establish that the 1:1 homebound instruction services were appropriate and met the student's special education needs in order to receive an award of tuition reimbursement. A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [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; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); 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 by 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; 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., 459 F.3d at 364). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at

115 [emphasis in original] citing Frank G., 459 F.3d at 365 quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 188-89 [1982]). Parents are not held as strictly to the standard of placement in the least restrictive environment (LRE) as school districts are; however, 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 [1st Cir. 2002]; M.S., 231 F.3d at 105 [2d Cir. 2000]).

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).

Upon review and consideration of the hearing record, I find that the impartial hearing officer improperly determined that the parents sustained their burden to establish that the 1:1 homebound instruction services provided by Smith were appropriate to meet the student's special education needs (see Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007; Gagliardo, 489 F.3d at 112; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; 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. 08-019; Application of the Bd. of Educ., Appeal No. 05-081).

Here, the hearing record indicates that at the time the parents enrolled the student in the 1:1 homebound instruction program in October 2007, they had the private neuropsychological evaluation report, which contained numerous recommendations highlighting specific considerations for an appropriate educational setting for the student (Tr. pp. 173-75; Parent Ex. F at pp. 14-15). A review of the report reveals that in addition to specifically recommending 1:1 speech-language therapy to remediate the student's multi-faceted language deficits, the remaining recommendations focused upon addressing the student's significant behavioral needs and specifically dealt with the student's primary source of difficulty within an educational setting—namely, his social interactions with peers (see Parent Ex. F at pp. 15-16). For example, the report recommends that the student's classroom provide opportunities for adaptive role modeling and prosocial interactions; that the classroom implement a structured classroom routine with praise given for compliance with behavior expectations; that the classroom should be no larger than a 12:1+1 in order to foster the student's active participation, attention, language

comprehension, and expression; that the parents participate in training to develop techniques to modify and manage the student's behavior; the implementation of an individualized behavioral checklist to target the elimination or proliferation of specific behaviors; that the parents work collaboratively with the student's classroom teacher to implement behavioral interventions across multiple environments; the student's participation in a social skills group and extracurricular activities to foster positive socialization experiences and exposure to positive role models; and the use of stories to improve the student's ability to interpret the thoughts, feelings, attitudes, and intentions of others (id.).

In addition to the above recommendations, the hearing record further indicates that the student's private psychiatrist—who had treated the student since September 2006—wholly agreed with the recommendations contained in the neuropsychological evaluation report (Parent Ex. E at pp. 1-2). Based upon his own experience with the student, the psychiatrist made additional recommendations focusing on the student's behavioral needs, including a classroom aide to help the student manage classroom stressors and to effectively model appropriate social interactions for the student (id. at p. 2). The psychiatrist also recommended identifying a safe place at school for the student to voluntarily take time outs (id.). The psychiatrist also noted that the student's classroom teacher would require skills in recognizing the student's early signs of distress in order to intervene, that the parents should continue to attend parent management training, and that the student should attend a social skills group in addition to extracurricular activities (id. at p. 3). While the hearing record indicates that the student participated in extracurricular activities and a special needs program characterized by the parents as a "physical education program," the parents offered no discussion or information as to how these activities addressed the student's difficulties with peer interaction or emotional dysregulation (see Tr. pp. 153, 159). The psychiatrist could not recall if the student participated in a social skills class during the 2007-08 school year (Tr. pp. 72-73). The student's tutor testified that she did not provide training to the student's parents (Tr. p. 125).

While the hearing record demonstrates through testimonial and documentary evidence that the 1:1 homebound instruction met the student's academic needs and that the student made progress academically during the 2007-08 school year, the hearing record does not contain sufficient information to determine how the 1:1 homebound instruction services—or any other services procured by the family during the 2007-08 school year—addressed the student's significant behavioral needs, which ultimately led the parents to seek assistance from the CSE in May, October, and November 2007 (see Dist. Exs. 1-3; Parent Exs. C; D at pp. 1-2). Placing the student in an educational setting that merely eliminated the student's social interaction with peers—and thus, the student's impulsivity, aggression, and inability to interact socially—is not sufficient in this case to meet the parents' burden to establish that the 1:1 homebound instruction program was "education instruction specifically designed to meet the unique needs of a handicapped child" (Gagliardo, 489 F.3d at 115 [emphasis in original] citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89). Therefore, a review of the hearing record indicates that the parents' unilateral placement in the 1:1 homebound instruction program did not provide services specifically designed to address the student's significant behavioral needs or emotional dysregulation, and as such, the parents are not entitled to reimbursement for the costs of the student's 1:1 homebound instruction program provided by Smith.

Having determined that the parents failed to sustain their burden to establish that the 1:1 homebound instruction services provided by Smith appropriately met the student's special

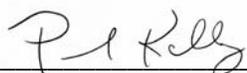
education needs, the necessary inquiry is at an end and I need not reach the issue asserted in the parents' cross-appeal regarding whether equitable considerations support their claim for full tuition reimbursement (see Burlington, 471 U.S. 359; Gagliardo, 489 F.3d at 115; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision, dated February 2, 2009, is annulled to the extent that it determined that the parents sustained their burden to establish the appropriateness of the privately obtained 1:1 homebound instruction services provided by Smith during the 2007-08 school year and ordered the district to reimburse the parents for 90 percent of the tuition costs.

**Dated:** Albany, New York  
May 18, 2009

  
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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**