



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-093

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

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Jeffrey J. Schiro, Esq., of counsel

Sussman & Watkins, attorneys for respondent, Michael H. Sussman, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Family Foundation School (Family Foundation) for the 2008-09 school year. The appeal must be sustained in part.

At the time of the impartial hearing in February 2009, the student was attending the tenth grade at Family Foundation (Tr. p. 5; Pet. Ex. C). Family Foundation is a private school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with an other health impairment is not in dispute in this appeal (34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]; see Tr. p. 5).

The student has been the subject of a previous appeal (Application of the Bd. of Educ., Appeal No. 08-051);¹ therefore, the parties' familiarity with the student's prior educational history is presumed and will not be repeated here in detail. However, some discussion of the educational history is instructive.

¹ The decision in Application of the Board of Educ., Appeal No. 08-051, is currently on appeal in Federal District Court.

The student has a history of psychological concerns and has received diagnoses of obsessive compulsive disorder, anxiety disorder, not otherwise specified (NOS); attention deficit hyperactivity disorder, inattentive type (ADHD); bipolar disorder; social phobia generalized; and oppositional defiant disorder (ODD) (Tr. pp. 232, 250, 356, 411-12, 507; Dist. Exs. 3 at p. 1; 18 at pp. 1, 2; 27). The student also has a history of substance abuse and oppositional behavior and has a history of difficulty in managing his anger (Parent Ex. A; Dist. Exs. 18; 34). The hearing record indicates that the student's full scale IQ is in the average range; however, the student's processing speed is lower than other measures of his intellectual functioning (Dist. Ex. 14 at pp. 1, 2). The student presents with deficits in the areas of oral language skills and mathematics (id. at pp. 6-8). In addition, the student's knowledge of social norms is reported to be atypically low (Parent Ex. A).

The student attended Family Foundation for the 2007-08 school year, and remained there for most of the 2008-09 school year, having been withdrawn by the parent in June 2009, allegedly for financial reasons (Parent Aff. ¶¶ 2-5; Answer ¶ 70). At the time this appeal was initiated in August 2009, the student was reportedly attending an inpatient program at a private facility for treatment of drug abuse and psychiatric instability (Parent Aff. ¶ 8).

In April 2008, the district conducted a reevaluation of the student which included a psychoeducational evaluation and a social history (Tr. pp. 241-42, 313-14). The written social history was prepared by the school psychologist on April 15, 2008, with the parent serving as informant (Tr. pp. 314-15; Dist. Ex. 15). The parent noted that the student had struggled with fears and anxiety throughout his school career which had a "major impact" on his grades (id. at p. 2). In eighth grade, the student was reportedly placed on home instruction, but could not keep up with the work (id.). The parent further reported that behaviors at home led her to place the student at Family Foundation (id.). The parent also reported that the student was doing well in the Family Foundation environment and that his grades were "good" (id.). She further indicated that the student had made connections with staff and was starting to enjoy school, especially English and writing (id.). As detailed in the social history, the parents' long term goal for the student was that he would attend college (id.). Her short term goal was for the student to integrate back into the family and learn to self-manage his behaviors (id.). With regard to educational problems, the parent indicated that the student had learning difficulties which impacted his performance, and noted that the student received OT and speech-language therapy as related services and that all of the student's academic instruction took place in a small class setting (id. at p. 3). According to the parent, she felt that the student's current placement of Family Foundation was best for meeting his needs at that time (id.). The parent indicated that she wanted the student to stay in his current placement to gain life skills (id.). According to the parent, the student was involved in family therapy through Family Foundation at that time (id.).

On April 26 and 27, 2008, the student was evaluated by a licensed clinical psychologist contracted by the district (contracted psychologist) (Dist. Ex. 14). The results of the evaluation were written in a May 5, 2008 report (id.). The report initially notes that the student was also evaluated by the same psychologist in 2004 (id. at p. 1). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following composite (and percentile) scores: verbal comprehension 100 (50th percentile), perceptual reasoning 100 (50th percentile), working memory 91 (27th percentile), processing speed 83 (13th percentile), and full scale IQ 93 (32nd percentile) (id. at p. 2). The contracted psychologist indicated that the student's WISC-IV scores were in the "Average Range," with the exception of the student's

processing speed index score which was in the "Low Average Range" (id. at p. 1). The contracted psychologist reported that the student's score on the processing speed index (83) was lower than the score attained by the student in 2004 (94) and noted that the "slowing in [the student's] ability to process information quickly was consistent with clinical impressions of [the student's] somewhat dysphoric emotional state when testing him" (id.). The contracted psychologist employed the Halstead Reitan Trail Making Test in an effort to further determine those factors that contributed to the student's lowered processing speed as compared to other measures of cognitive functioning (id. at p. 9). The contracted psychologist indicated that the student's performance on the test "clearly suggests the possibility of [the student's] difficulty with processing speed being highly influenced by the extent to which he needs to process different types of material, necessitating a switching of mental sets" (id.). He noted that there are cognitive demands in a classroom that demand switching of mental sets and that the student would require help in understanding how this area of cognitive weakness was an area of liability for him, and that he would also benefit from practicing tasks which demand switching mental sets (id.).

In order to assess the student's academic achievement and oral language abilities, the contracted psychologist administered the Woodcock Johnson III-Tests of Achievement (WJ-III ACH). The student attained the following standard (and percentile) scores: oral language 69 (2nd percentile), broad reading 100 (50th percentile), broad math 81 (11th percentile), math calculation skills 88 (21st percentile), academic skills 92 (30th percentile), and academic fluency 104 (60th percentile) (Dist. Ex. 14 at p. 6). The contracted psychologist reported that overall the student demonstrated significant deficits in the areas of oral language, mathematics and academic skills; however, later indicated that the student's academic processing and fluency were average (id. at p. 8). According to the contracted psychologist, although the student's overall reading score was in the average range, the student's performance was limited on tasks requiring the ability to use syntactic and semantic cues to assist in comprehending written discourse as it is being read (id.). The contracted psychologist reported that the student's standard score for broad math was within the low to low average range and that the student's overall mathematics ability was "limited" (id.). The contracted psychologist further reported that attention and concentration were a significant factor in the student's depressed oral language scores (id.).

As indicated by the contracted psychologist, a variety of measures, including clinical interview, observation during testing, the Minnesota Multiphasic Personality Inventory (MMPI), and the Self Esteem Inventory were used to evaluate the student's psychosocial functioning (Dist. Ex. 14 at p. 9). The contracted psychologist reported that findings from the different measures indicated that the student suffered from both anxiety and depression about multiple issues, including most recently having to leave home to go to a residential school (id.). The contracted psychologist noted that the student's difficulties in school, long history of poor academic performance, and negative attitudes about school and learning contributed to the student's dysphoria (id.). The contracted psychologist stated that the student seemed not to have positive feelings about academic success and did not expect to succeed (id.). According to the contracted psychologist, the student disliked reading and studying and believed that Family Foundation staff viewed him as "lazy" (id.). The contracted psychologist noted that the student's positive feelings about attending Family Foundation centered on peer relationships (id.). The contracted psychologist stated that the student had many negative opinions about himself and exhibited some social anxiety (id.). He noted that the student was often sensitive to what other's thought of him, and often was most comfortable when he was alone (id.). According to the contracted

psychologist, the student was concerned regarding his tendency to get lost in the classroom (id.). The contracted psychologist indicated that the student was poor at initiating attention and that it wasn't clear that the student was able to maintain attention during testing (id.). According to the contracted psychologist, the student was upset that he was not looked upon as a leader and generally did not believe that his friends thought that he had good ideas (id.). The contracted psychologist opined that overall the student did not feel as though he was someone that his peers or adults liked (id. at p. 10). The contracted psychologist concluded that the psychoeducational evaluation revealed a variety of intellectual and academic strengths of the student, as well as areas of intellectual, academic, and psychosocial liabilities for the Committee on Special Education (CSE) to consider when determining a placement for the student (id.). Of note, the contracted psychologist did not offer any diagnoses of the student or provide specific educational or placement recommendations.

The hearing record indicates that an "Individual Crisis Management Plan," developed by Family Foundation for the student, was reviewed by Family Foundation in May 2008 (Dist. Ex. 45; see Tr. p. 464). The crisis management plan outlined safety concerns, potential triggers, high risk behaviors, and intervention strategies for the student (Dist. Ex. 45). The plan reflected that the student's triggers included physical contact, confrontation, intense social situations (e.g., "table topics" group discussions), and failing academically (id. at p. 1). High risk behaviors included violence against himself and others, irrational aggression, not responding to his own pain, provocative aggression, and mood changes (id.). Family Foundation determined that interventions should include quiet 1:1 or small group interaction (during the pre-crisis phase); giving the student time and space, as well as using "senior boys" for intervention, and active listening by the staff (triggering phase); an uninvolved person will remove the student from the triggering situation, and additional time and space are given to the student, and then the student will be given time to discuss the situation (escalation phase); "sometimes" demonstrating to the student the "obvious" possibility of the use of restraints, which may prompt de-escalation (outburst phase); and finally, the use of a "life space" interview in order for the student to explore his point of view and to consider the alternative points of view of others (id. at pp. 1-2).

Group counseling notes from Family Foundation, covering the period between May 9, 2008 and July 30, 2008, indicated that the student attended group sessions that focused on relationships, "spirituality," anger and resentment, relapse prevention, communication, self-esteem, identity, and trust (Dist. Ex. 11). The student's participation in the groups ranged from "verbal and appropriate" to "quiet and disconnected" (id.). The student's counselor described him as engaged and having good eye contact for some groups and distracted and demonstrating poor eye contact in others (id.). A May 30, 2008 counseling note indicated that the student gave "great feedback" about his anger at another student and was open to processing the situation (id. at p. 7). A July 18, 2008 counseling note included the comment "wanting to do violence," while a July 24, 2008 note indicated that the student spoke about his fear of anesthesia, but when he processed it he admitted that it was more about wanting the high of nitrous oxide (id. at pp. 2, 3).

A July 23, 2008 therapy note from the Family Foundation consulting psychologist indicated that the student had expressed feelings of guilt because he had acted out on a home visit (Dist. Ex. 12 at p. 1). The psychologist stated that it was notable that the student questioned his behavior instead of identifying with his actions and opined that the student seemed to have incorporated the goals of the program and was judging himself by these standards (id.).

By letter from the CSE chairperson to the student's parents dated August 18, 2008, the parents and student were advised of a reevaluation/annual review scheduled for August 25, 2008 (Dist. Exs. 6; 7). The letter included a list of people expected to attend the meeting including an un-named BOCES representative (id.). The parent reported that after receiving the letter, she contacted the CSE chairperson by telephone to express her concern that a BOCES representative would be participating in the CSE meeting because she believed that having the BOCES representative present insinuated that the district had made a decision to change the student's IEP prior to the CSE meeting (Tr. pp. 369-70). The parent stated that during their conversation, the CSE chairperson did not indicate that the district was considering a BOCES placement (Tr. pp. 370-71).

On August 22, 2008, the student completed a transition plan questionnaire, noting that upon graduating with a Regents diploma, his goal was to attend a four year college (Dist. Ex. 5 at p. 1). The student indicated that his hobbies included football, music, skateboarding, and boxing (id.). The student and his Family Foundation counselor assessed his weaknesses as being in the area of preparation and organization, while his strength was in typing (id. at p. 2).

On August 25, 2008, a subcommittee of the CSE convened for the student's annual review and to develop his IEP for the 2008-09 school year (Dist. Ex. 3). The district's chairperson/director of "PPS," the district's special education supervisor, a special education teacher, a school psychologist, a regular education teacher, and the parent all participated in person, while the principal from the proposed BOCES placement, an educational advocate, the district's contracted psychologist who authored the student's May 5, 2008 psychoeducational evaluation report, and the school counselor from Family Foundation participated by telephone (Dist. Exs. 3 at p. 6; 4). The IEP developed by the subcommittee indicated that the student struggled with reading comprehension and had difficulty with expressive and receptive language, as well as math calculation and application skills (Dist. Ex. 3 at p. 3). According to the IEP, the student demonstrated relative academic strengths in reading, other than comprehension; and writing, other than spelling and sight vocabulary (id.). The IEP indicated that the student had difficulty copying class notes and that he had minimal fine motor difficulties which might impact handwriting (id. at pp. 3, 5). With respect to social development, the IEP indicated that the student struggled with anxiety and depression, which impacted upon his school performance (id. at p. 4). The IEP further indicated that the student demonstrated poor self-concept as it related to peer interaction and academic achievement, that the student demonstrated low frustration tolerance, and that the student was easily overwhelmed by environmental pressures and had limited appropriate coping mechanisms (id.). The IEP noted that the student had received the following diagnoses in 2005: bipolar disorder, NOS; anxiety disorder, NOS; ADHD inattentive type; social phobia (generalized), and obsessive compulsive disorder (id. at p. 5).

Comments reflected on the August 25, 2008 IEP indicated that at the CSE meeting, the district's contracted psychologist reviewed the results of the student's psychoeducational evaluation with respect to the student's academic and social/emotional needs (Dist. Ex. 3 at p. 6; Parent Ex. A).² In addition, the student's school counselor from Family Foundation reviewed the student's social, emotional, and academic progress at the private school (Dist. Ex. 3 at p. 6). According to the comments, the principal from the BOCES high school, who participated in the meeting by telephone, reported that based on information presented at the CSE meeting, as well

² Parent Ex. A consists of a tape recording of the August 25, 2008 CSE meeting that is at issue in this appeal.

as information reviewed in spring 2007 when the student was interviewed there, BOCES would have an appropriate placement for the student for the 2008-09 school year (id.). The CSE recommended that the student be placed into a non-integrated 6:1+1 special education class in the BOCES high school (id. at p. 1). The CSE also recommended that the student receive related services of: counseling twice per week, one session in a 1:1 setting for 30 minutes and one session in a 5:1 group setting for 45 minutes; a once monthly individual OT consultation; and a once monthly individual speech-language consultation (id. at pp. 1-2). The CSE also recommended, among other things, that the student be provided copies of class notes, modified classroom assignments (including chunking of material and notifying the parent when the student is given lengthy projects), the use of a daily planner and word processor, extended time for testing, and adult supervision on the bus due to the student's management needs (id. at pp. 1, 2). The IEP also contained annual goals related to developing study skills, reading comprehension skills, writing skills, and mathematics skills (id. at pp. 7-9). The IEP also contained speech-language, social/emotional/behavioral, and motor goals (id. at pp. 10-11). It further indicated that the student required a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) (id. at p. 6). The hearing record reflects that the parent noted her disagreement with the recommendations during the CSE meeting (Tr. pp. 210, 389; Parent Ex. A).

The student began the 2008-09 school year at Family Foundation (Tr. p. 361). Electronic logbook entries included in the hearing record indicated that on September 30, 2008, the student refused to sit in the corner but was willing to go outside of his family group "on exile" (Dist. Exs. 42 at p. 11; 46).³ The following day's entries indicated that the student was refusing to go to class and was sitting in the quiet room, that he was refusing to go to lunch, and that two other students would bring lunch over and eat with him (Dist. Exs. 42 at p. 10; 46). Subsequent entries indicated that the student did not want to be in "family four" and was going to spend the night in "family six" (Dist. Exs. 42 at pp. 5, 6; 46). The following day, the student reportedly refused to attend class (Dist. Exs. 42 at p. 4; 46). He later ran away from school, but was returned by the police approximately one hour later (Dist. Exs. 42 at p. 3; 46). The final entry for October 2, 2008, indicated that the student was willing to return to his class and his family group (Dist. Exs. 42 at p. 1; 46). No subsequent logbook entries for the 2008-09 school year were submitted into evidence.

On October 3, 2008, the student's Family Foundation family leader, sponsor, family counselor, group counselor, coordinator, and health officer created a "Profile Assessment" of the student (Dist. Ex. 47). This assessment provided a "status update" of the student and ranked how the student was doing in different categories of development (Tr. pp. 456-57).

A transcript from Family Foundation indicated that the student's grades in his core academic classes for the fall 2008 semester were as follows: algebra 1A (64), earth science (61), English 9 (77), and global studies I (76) (Dist. Ex. 48; Pet. Ex. B at p. 1). The student's Family Foundation transcript indicated that the student earned 1.75 credits for the fall 2008 semester (Pet. Ex. A at p. 1).

³ The Family Foundation director described "exile" as "a sanction that is used to separate a student from his family on a temporary basis" (Tr. pp. 475-76). He likened it to sending a child to their room (id.).

At some point after the CSE meeting, the parent filed a due process complaint notice and the district filed a response to the due process complaint notice; however, neither document was made part of the hearing record (Tr. p. 210; Pet. ¶¶ 25, 27; Answer ¶¶ 25, 27).⁴

An impartial hearing convened on February 5, 2009 and concluded on April 21, 2009, after three days of testimony (IHO Decision at pp. 1-2). By decision dated July 15, 2009, the impartial hearing officer determined: (1) that the district failed to offer the student a free appropriate public education (FAPE)⁵ for both procedural and substantive reasons; (2) that the parent met her burden in demonstrating that Family Foundation was an appropriate placement for the student; and (3) that equitable considerations favored an award of tuition reimbursement.

The impartial hearing officer determined that: (1) the goals enumerated in the August 2008 IEP were never discussed at the CSE meeting, which infringed upon the parent's right to participate in the development of the student's IEP; (2) the CSE chairperson unilaterally recommended the BOCES program without seeking the input of other members of the CSE and the recommendation for BOCES was inappropriate because it was based on insufficient information regarding the student and his special education needs; (3) the recommendation for BOCES was made because it was the last program that had interviewed the student in 2007 and the CSE failed to consider any changes in the student's special education needs since the June 2007 BOCES interview with the student; (4) the CSE failed to discuss or consider any other program options for the student; and (5) the CSE failed to discuss or address the student's transition from Family Foundation (which is a residential program) to a day program (IHO Decision at p. 21). The impartial hearing officer further determined that: (1) the student was conditionally accepted into the BOCES program without consideration of his particular needs; (2) the students in the proposed BOCES class functioned at a significantly lower level than the student; (3) the BOCES program was unable to meet the student's significant needs, particularly, the student's behavioral and managements needs; (4) there was no basis upon which to conclude that the student was prepared to return to a day program; and (5) the August 2008 IEP failed to accurately reflect the student's particular needs and how they would be addressed (*id.* at pp. 21-23).

The impartial hearing officer went on to find that the parent's placement of the student at Family Foundation was appropriate because the student still required a "12-month 24 hour intensive structure and therapeutic environment" (IHO Decision at p. 23). The impartial hearing officer determined that Family Foundation offered a program in the least restrictive environment (LRE) as it was closer to the student's home than "most residential programs" and because it offered exposure to non-classified students (*id.*). The impartial hearing officer also determined that the program at Family Foundation met the student's academic and behavioral needs and that

⁴ I remind the impartial hearing officer to include the due process complaint notice as part of the hearing record.

⁵ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

the student had made progress in the program (id. at pp. 23-24). Lastly, the impartial hearing officer determined that the equities favored an award of tuition reimbursement because the parent had communicated and cooperated with the district (id. at p. 24). The impartial hearing officer ordered the district to reimburse the parent for the costs associated with her son's placement at Family Foundation for the 2008-09 school year.

The district appeals, asserting that the impartial hearing officer erred in finding that: (1) the district failed to offer the student a FAPE; (2) Family Foundation was an appropriate placement; and (3) equitable considerations favored an award of tuition reimbursement. Specifically, the district contends that the CSE had sufficient evaluative information upon which to base its recommendations for the student for the 2008-09 school year and that the student was ready to transition back into a day program. The district further asserts that there is no requirement under federal law that all CSE members agree on all aspects of the recommended program. The district also contends that the students in the recommended 6:1+1 class did not function at a significantly lower level than the student, that the student would have been suitably grouped, and that the recommended placement would have met the student's behavioral needs. The district asserts that it developed annual goals with the input of the parent and that the IEP provided for transition services.

With regard to Family Foundation, the district contends that the student failed to make meaningful academic progress during his attendance there, that he failed several classes, and that he did not receive the special education support he needed. The district further alleges that the program at Family Foundation was not specially designed to meet the student's social, emotional, or management needs and that Family Foundation used sanctions to modify the student's behavior in violation of State law. The district also contends that Family Foundation failed to conduct an FBA or develop a BIP for the student. Lastly, the district contends that the equities do not favor an award of tuition reimbursement.

The parent answers and denies the district's arguments and requests that a State Review Officer dismiss the district's petition and uphold the impartial hearing officer's decision in its entirety.

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 FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a

student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; 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]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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 law 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).

In its petition, the district asserts that the impartial hearing officer erred in determining that the district failed to offer the student a FAPE for the 2008-09 school year. As more fully discussed below, I agree with the impartial hearing officer that the district did not offer the student a FAPE for the 2008-09 school year.

Regarding the appropriateness of the district's recommended BOCES program, the hearing record indicates that the student's full scale IQ score of 92 placed him in the average range of intellectual functioning (Dist. Ex. 14 at pp. 1, 2). At the August 2008 CSE meeting, the contracted psychologist who had evaluated the student indicated the student's processing speed was much lower than other measures of his intellectual functioning (Parent Ex. A). In addition, the student's knowledge of social norms was reported to be atypically low (id.). However, the contracted psychologist opined that the student's deficits had more to do with psychological issues that the student was dealing with than with his neuro-developmental functioning (id.). During the August 2008 CSE meeting, the contracted psychologist reported that the student's reading was on grade level (id.). According to the contracted psychologist, the student's academic deficits were related to oral language and mathematics (id.). The contracted psychologist noted that when testing material became more complex, the student's functioning was very low (id.). The student's counselor at Family Foundation indicated at the CSE meeting that the student's biggest obstacle was his low self-esteem and his propensity for anger (id.). She reported that the student had low frustration tolerance, but noted that the student had made significant progress in that he no longer acted out his frustration, rather he asked to talk about it (id.).

As noted above, the August 2008 CSE recommended that the student attend a BOCES 6:1+1 special class and receive counseling services, as well as speech-language and OT consultations during the 2008-09 school year (Dist. Ex. 3 at pp. 1-2). The BOCES high school principal, along with the special education teacher of the proposed BOCES class, provided an overview of the recommended program. The BOCES principal testified that there were approximately 160 students enrolled in the BOCES high school (Tr. pp. 32, 42). The school housed 24 classrooms, each having a 6:1+1 ratio (Tr. pp. 31-32; see Parent Ex. A). The principal testified that the BOCES high school followed the New York State curriculum and students met the necessary credit requirements to obtain either a Regents or a local diploma (Tr. p. 45). The BOCES principal indicated at the CSE meeting that BOCES employed crisis staff, counseling staff, related service providers, and a consulting psychiatrist (Parent Ex. A). He explained that BOCES used a positive behavioral intervention strategies (PBIS) program, along with crisis staff for behavior intervention (id.). According to the principal, the PBIS program allowed students to pick a goal to work on and to be rewarded with various incentives as a result of accomplishing that goal (Tr. p. 59). The BOCES teacher testified that PBIS was a school-wide system and that large and small incentives were built into every student's day (Tr. pp. 104, 106). The BOCES principal reported that BOCES had students with the same problems that the student was described as having (Parent Ex. A). He testified that at BOCES, the student would receive counseling from a social worker (Tr. p. 57). He indicated at the CSE meeting that if the student

became a danger to himself or others, BOCES would seek to involve mental health and the BOCES psychiatrist (Parent Ex. A).

According to the BOCES principal, for the 2008-09 school year there were five tenth grade classrooms, one of which was "self-contained" (Tr. pp. 33-34, 35, 87). The students in the self-contained class changed classes for gym and other "specials," while the students in the other four 6:1+1 classes followed a departmentalized schedule for their academic subjects and changed classes throughout the day (Tr. pp. 34, 87-88). The principal testified that the students in the self-contained class had a need for more individualized instruction and could not handle the transitioning from period to period throughout the course of the day (Tr. p. 36). He further testified that students in the self-contained class were "possibly fragile in personality or makeup" and tended to be harassed by other students (*id.*). He testified that as a result, the students were kept in a "sheltered" environment (Tr. p. 37). According to the BOCES teacher, the students placed in her class generally required a more nurturing, structured, organized approach, "almost like a family" (Tr. p. 124).

According to the BOCES teacher, the reading levels of the students in her class ranged from fourth to seventh grade, the students' math levels ranged between fifth and ninth grade, and the students' writing skills ranged from the fourth through seventh grade levels (Tr. pp. 125, 131). The teacher described in general terms the strategies she employed to address the academic weaknesses of the students in her class. The teacher testified that as a means of developing comprehension, the teacher and students would read together and stop frequently to discuss what they had read and that the students' writing needs were addressed though the English curriculum, in which students wrote, edited, and revised essays (Tr. pp. 102, 126). In addition, the teacher indicated that she addressed the students' needs in writing and mathematics through individual attention (Tr. pp. 102). The teacher noted that she provided students with a lot of repetition and that the students required a great deal of practice and for tasks to be broken down into several steps (Tr. pp. 102-03). According to the teacher, if it was obvious that a student wasn't paying attention, she would have her para-educator sit by the student and work with them individually (*id.*). The BOCES teacher indicated that although none of the students in her class received program modifications such as copies of class notes, modified assignments, or the use of a daily planner, she could implement those modifications in her class (Tr. p. 106). The BOCES teacher was not asked, nor did she describe how she would have met the student's academic and social/emotional needs within her classroom.

The BOCES teacher reported that the students in her class had various "classifications" including emotionally disabled, learning disabled and multiply handicapped, which included students with ADHD and auditory processing disorders (Tr. pp. 99-100). The profile for the recommended class indicated that the students in the class were 15 and 16 years of age (Dist. Ex. 50). As detailed in the profile, the students' IQ standard scores ranged from 72 to 91, with one student's IQ described as "low average" (*id.*). The students' standard scores for reading ranged from 76 to 94, for spelling from 71 to 93 and for math from 46 to 91 (*id.*). While the class profile provided IQ and achievement scores from un-named tests, it did not provide information with regard to the academic, social, physical or management needs of the students in the proposed class.

I find that the district did not meet its burden of showing that the proposed BOCES class was designed to confer educational benefits upon the student. The hearing record indicates that

the student's primary needs relate to his social/emotional development and oppositional behavior (Tr. p. 411; Dist. Ex. 3; Parent Ex. A). The student's Family Foundation counselor indicated at the CSE meeting that although counseling was a helpful part of the student's program, it was more the student's immersion in a therapeutic milieu that allowed the student to make changes (Parent Ex. A).⁶ Although the proposed BOCES class was reportedly designed for students who were "fragile" there is no indication that the recommended class included a therapeutic component outside of the counseling services that were recommended on the student's IEP. Furthermore, the only distinction made between the self-contained class and the other 6:1+1 tenth grade classes at BOCES was that most of the students in the self-contained class did not change classes for academics. I note that the hearing record does not show that the district's contracted psychologist provided an opinion regarding the student's need for a residential placement versus a day program in either his written evaluation or during testimony or that he was asked by the district to provide his opinion at the CSE meeting (Tr. pp. 268-69, 294).⁷

In addition, based on the limited information regarding the needs of the students in the proposed class, I find that the district has not met its burden of showing that the student would have been suitably grouped for instruction in the proposed BOCES classroom. According to the BOCES teacher, the students in her classroom were performing below grade level in reading, mathematics and writing (Tr. pp.100, 102). The BOCES teacher estimated that the reading level of the students in her class ranged from fourth to seventh grade (Tr. p. 125). The district's contracted psychologist reported at the CSE meeting that the student was reading at a ninth grade level (Parent Ex. A). The BOCES teacher reported that there were two students in her class with management needs, one of whom had difficulty interacting with people that he did not know and another student who called out in class and interrupted instruction (Tr. pp. 104-05). The hearing record suggests that the student who is the subject of this appeal displayed more significant social/emotional needs than the other students in the proposed class, including difficulty managing his anger and the potential to cause harm to himself and others and that such needs were described at the August 2008 CSE meeting (Dist. Exs. 11 at p. 3; 45 at p. 1; Parent Ex. A). Based on the limited information in the hearing record regarding the students in the proposed class, it is not clear that the student, who presents with oppositional behavior and the potential for aggression, would have been appropriately placed with students described as "fragile" and needing a sheltered environment.

Moreover, the impartial hearing officer found that the student's IEP goals for the 2008-09 school year were not discussed at the August 2008 CSE meeting which denied meaningful parent participation in the decision-making process (IHO Decision at p. 21). According to the impartial

⁶ When asked about the student's counseling needs, the district's contracted psychologist deferred to "whoever has worked with [the student] on an ongoing basis" (Parent Ex. A). The contracted psychologist did not disagree with the counselor's statement (Parent Ex. A).

⁷ The hearing record reflects that the contracted psychologist reported that he first evaluated the student in October 2004 and subsequently became involved with the district in trying to help the student be successful in the district, including conducting an FBA and developing a BIP for the student (Tr. pp. 139, 170-71; Dist. Exs. 23; 24). The contracted psychologist conducted his April/May 2008 evaluation of the student at Family Foundation (Tr. p. 141). He testified that between the two evaluations, he had fairly extensive contact with the student (Tr. p. 170). A review of the CSE recording entered into evidence at the impartial hearing reveals that while the contracted psychologist offered his opinion that the student would benefit from mainstreaming opportunities after school at the BOCES placement, he did not offer an opinion as to the overall appropriateness of the recommended BOCES program as opposed to a residential program for the student, despite his extensive familiarity with the student's needs (Parent Ex. A).

hearing officer's decision, the CSE chairperson indicated that she would devise IEP goals for the student after the CSE meeting and later review them with the parent (*id.*). The impartial hearing officer found that the parent's assertion that no further meeting was held was not refuted by the district (*id.*).

An IEP must include measurable annual goals related to meeting the student's needs arising from his or her disability to enable the student to be involved in and progress in the general curriculum, and meeting the student's other educational needs arising from the disability (34 C.F.R. § 300.320[a][2]; *see* 8 NYCRR 200.4[d][2][iii]). The hearing record confirms that the student's goals were not devised or discussed at the August 2008 CSE meeting, and the CSE chairperson stated that the district would devise IEP goals for the student after the CSE meeting and have the parent "take a look at them" before the IEP was finalized (Parent Ex. A). The hearing record also reveals that the parent's educational advocate suggested that the CSE meeting be tabled until the parent could see the goals (*id.*). The CSE chairperson rejected the advocate's recommendation, but indicated that she would share the goals with the parent that week (*id.*). There is no indication in the hearing record that a subsequent meeting was held to review the student's IEP goals with the parent, or that the parent was otherwise able to review the goals with the district or offered any subsequent opportunity to comment on the goals. Under the circumstances of this case, I find that the student's IEP goals were developed in a manner which significantly impeded the parent's opportunity to participate in the decision-making process (IHO Decision at p. 21; 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; *E.H.*, 2008 WL 3930028, at *7; *Matrejek*, 471 F. Supp. 2d at 419).

Having determined that the district failed to meet its burden in demonstrating that it provided the student with a FAPE for the 2008-09 school year, I now move to the second criterion of the Burlington/Carter analysis.

A private school placement must be "proper under the Act" (*Carter*, 510 U.S. at 12, 15; *Burlington*, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (*see Gagliardo*, 489 F.3d at 112, 115; *Walczak*, 142 F.3d at 129; *Matrejek*, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (*Carter*, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (*Carter*, 510 U.S. 7; *Application of the Bd. of Educ.*, Appeal No. 08-085; *Application of the Dep't of Educ.*, Appeal No. 08-025; *Application of the Bd. of Educ.*, Appeal No. 08-016; *Application of the Bd. of Educ.*, Appeal No. 07-097; *Application of a Child with a Disability*, Appeal No. 07-038; *Application of a Child with a Disability*, Appeal No. 02-014; *Application of a Child with a Disability*, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (*Gagliardo*, 489 F.3d at 112; *see M.S. v. Bd. of Educ.*, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (*Gagliardo*, 489 F.3d at 112; *Frank G. v. Bd. of Educ.*, 459 F.3d at 364 [2d Cir. 2006] [quoting *Rowley*, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (*Frank G.*, 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive

educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction 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).

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 district asserts that the impartial hearing officer erred in determining that the parent met her burden in demonstrating the appropriateness of Family Foundation.

Family Foundation is described in the hearing record as a college preparatory therapeutic boarding school for students in middle and high school between the ages of 12 and 17 (Parent Ex. B at p. 247).⁸ Approximately twenty percent of the students at Family Foundation have been classified as eligible for special education programs and services by their school districts, while the remaining students have a variety of behavioral and emotional difficulties, but have not been classified by their school districts (*id.*). According to the vice president and director of admissions at Family Foundation (director), most of the students in the school are oppositional or defiant and have received diagnoses that include ADHD, ODD, anxiety, depression, and mood disorders (Tr. pp. 489-90). In addition, students at the school present with substance abuse problems, as well

⁸ Parent Ex. B consists of a copy of a portion of the transcript from the prior impartial hearing that was the subject of Application of the Bd. of Educ., Appeal No. 08-051, which addressed the student's placement at Family Foundation during the 2007-08 school year.

as eating disorders, self-mutilating behaviors, truancy, and academic underachievement (Tr. p. 490). The director testified that the academic portion of the Family Foundation program runs from 8:00 in the morning until approximately 4:30 in the afternoon (Tr. p. 423). In the late afternoon and evening, there is a structure in place that provides for quiet study hall and tutorial time (*id.*). Study hall is required for students who are failing classes or who do not turn in their homework (Tr. pp. 423-24). According to the director, Family Foundation is not a State-approved school, but the school is registered with the New York State Department of Education as a "Regents school" and offers only Regents classes (Tr. pp. 436, 437). The director testified that class make up at Family Foundation is determined by grade (Tr. p. 435) and ninth and tenth graders typically have between eight and ten students in their classes (*id.*). The director further testified that the school does not have teacher assistants or teacher aides (Tr. p. 443).

As described by the director, Family Foundation is a cognitive, behavioral oriented program that has counseling support and a 12-step philosophy at its foundation (Parent Ex. B at p. 252). The program includes traditional kinds of group counseling and 1:1 counseling is available (Tr. pp. 414, 417). In addition, all students are assigned a sponsor who provides the student with counseling specifically designed around the 12-step program (Tr. p. 415). The Family Foundation program includes a "very strong" positive peer support model, as well as family counseling (Tr. pp. 415-16). The program also offers specialty counseling groups such as anger management (Tr. pp. 416-17). All of the students at the school are divided into "families" and program staff is integrated into the families, helping to create a consistent therapeutic milieu across environments (Tr. p. 413). Within each family, there are specific types of individual and group therapeutic interventions that are established twice per day, referred to as "table topics" (Tr. p. 414; *see* Parent Ex. B at pp. 254-55). The director testified that as part of its disciplinary code of conduct the school employs "sanctions" (Tr. p. 431; Parent Ex. B at p. 299; *see* Dist. Ex. 53). The director described sanctions as "a restriction of some sort" (Tr. p. 431). He indicated that the philosophy behind the sanctioning model was that is was "a reward consequence, kind of natural consequence based, cognitive behavioral thing" (Tr. pp. 431-32).⁹

The director of Family Foundation testified that he thought that the school continued to remain appropriate for the student at the end of the 2007-08 school year (Tr. p. 411). He noted that the student struggled "pretty significantly with oppositionality and defiance and learning how to manage himself in a rule-based environment (*id.*). According to the director, one of the issues Family Foundation was helping the student with was character development (Tr. p. 418). The director indicated that the student had no sense of self or internal values that gave him purpose or direction in life (Tr. p. 419). He noted that the student tended to gravitate toward the negative element in the environments that he was in and also that the student would "kind of seek to press against the establishment" (*id.*). The director stated that the structure of Family Foundation was designed to assist the student in developing a sense of self so that he had values and principles to guide his behavior and no longer needed the environmental structure that the school provided (*id.*). He opined that the sameness and consistency of the program was stabilizing (Tr. p. 420). He further opined that as students stabilize emotionally and behaviorally, they are better able to attend to academic work (Tr. p. 421).

⁹ Although the district argues that Family Foundation used "sanctions" or "aversives" with the student in contravention of State law, I need not address this argument given the determination that the hearing record does not demonstrate that Family Foundation was substantively appropriate on other grounds.

Despite the program's structure, the director reported that the student's achievement at Family Foundation had "waxed and waned" over time (Tr. p. 425). He indicated that there were times when the student made some progress, which manifested itself academically and in a reduction of incidents in which the student was involved (*id.*). However, he also noted that the student was one of the more difficult students with regard to oppositional behavior that he had encountered during his time at the school (Tr. pp. 426-27). Given the complexity of the student's needs and the difficulty that the student had encountered, the director opined that the student would be at Family Foundation longer than the average stay of 24 months (Tr. p. 427). The director reported that the student continued to have real academic delays, but when he fully applied himself and wanted to do well he performed much better than when he lapsed into an "I don't care about this" attitude (Tr. p. 412). The director opined that the student was "at risk of getting into a lot of trouble in unstructured environments" and that the residential nature of the Family Foundation program was important to help the student stay on track emotionally (Tr. pp. 422-23). He reported that overall the student was becoming more compliant, but that he had a long way to go before he could be an independent learner (Tr. pp. 487-88; *see* Tr. p. 468). He reported that the student's "manipulation" had decreased from the 2007-08 school year (Tr. p. 491).

The director testified that Family Foundation did not develop individual academic plans (Tr. pp. 465-66). He further testified that the school did not have formal treatment plans, but that the school identified counseling goals for students (*id.*). The director testified that the student participated in an anger management group at Family Foundation, held once weekly, during the 2008-09 school year (Tr. p. 444). He further testified that the student participated in the "family" group counseling sessions (Tr. p. 446). The director confirmed that the student had been assigned a sponsor, as well as a junior sponsor for the 2008-09 academic year (Tr. pp. 448, 450). The director was not aware of the student participating in any specialty groups, other than anger management, during the 2008-09 school year (Tr. p. 453). He did not know if the student had engaged in 1:1 counseling with the school psychologist; however, he reported that he had provided 1:1 counseling to the student between 10-12 times during the 2008-09 school year to follow up with the student on "incidents, difficulties, anger, crises" (Tr. pp. 453-54). The director indicated that he was unable to answer, without consulting records, whether the consulting psychiatrist had provided the student with medication management and review during the 2008-09 school year or whether the student was on any psychotropic medications (Tr. pp. 455-56). He further indicated that he could not speak to the specifics of the academic interventions provided to the student (Tr. p. 471). Although the director testified that Family Foundation employed a part-time special education consultant, he did not know if the consultant provided any direct or indirect support to the student during the 2008-09 academic year (Tr. pp. 439, 462). The parent testified that the student had met with the Family Foundation consulting psychiatrist once per month, but recently he had begun to meet with the psychiatrist more frequently (Tr. pp. 504-05). She testified that in addition to monitoring the student's medication, the psychiatrist provided psychotherapy to the student (Tr. pp. 505, 515). The parent reported that the student continued to see the Family Foundation psychologist once approximately every three weeks (Tr. p. 524). She stated that she had attended three parent workshops at Family Foundation during the time period that the student had been at the school (Tr. pp. 502, 525).

At the impartial hearing, the parent submitted an "individual crisis management plan" developed by Family Foundation (Dist. Ex. 45). According to the Family Foundation director, the purpose of the plan was to identify "the triggers and the preferred intervention method to help

a student navigate through a crisis" (id.). A notation on the plan indicated that it was last reviewed in May 2008 (id.). The hearing record does not indicate the extent to which the plan was implemented during the 2008-09 school year, if at all. The parent also submitted a "profile assessment report" dated October 3, 2008 (Dist. Ex. 47). The director described the profile as a "status update," which ranked how the student was doing in different categories of development (Tr. pp. 456-57). The document indicated that no ratings were found for the academic and spiritual categories, and that the staff rating for the physical and external support categories was a "4" (Dist. Ex. 47). The director indicated that he did not participate in the development of the profile and that he did not know the scale for the staff ratings (Tr. pp. 457, 460).

The hearing record contains four group counseling notes from July 2008 (Dist. Ex. 11 at pp. 1-4). There are no additional group counseling notes for the 2008-09 school year contained in the hearing record, nor is there any information regarding the content of subsequent group counseling sessions, if they took place. Likewise, the hearing record contains a July 2008 counseling note from Family Foundation's consulting psychologist, but there is no documentary evidence detailing subsequent sessions which may have taken place during the 2008-09 school year, including therapy goals or progress summaries (Dist. Ex. 12 at p. 1).

Entries in the Family Foundation electronic logbook indicated that the student was put on "exile" at the beginning of the 2008-09 school year (Dist. Ex. 42 at p. 10). The logbook also indicated that on October 2, 2008, the student ran away from Family Foundation, but was later returned by the police (Dist. Exs. 42 at pp. 2, 3; 46). There are no subsequent logbook entries contained in the hearing record.

The hearing record includes the student's spring 2009 Family Foundation schedule (Dist. Ex. 51). According to the schedule the student was assigned to the following core academic classes: earth science, English 10, global II, and algebra 1A (Dist. Ex. 51). I note that the student has been enrolled at Family Foundation in algebra 1A and earth science since the fall 2007 semester and has not yet earned any credits for these courses (see Dist. Exs. 43; 48; 49; Pet. Exs. A; C). While the hearing record provided a global description of the student's courses at Family Foundation, the parent did not produce any evidence from the private school that described the student's specific academic program. As a result, there is no description of any modifications or accommodations provided to the student to address his slow processing speed, difficulty following directions, and weaknesses in mathematics. Based on all of the above, I find that the parent has not adequately established that Family Foundation addressed the student's academic and social/emotional needs.

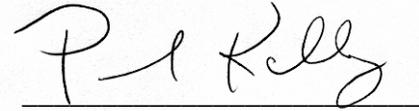
Having determined that Family Foundation is not appropriate for the student because the parent has not established that it adequately addressed the student's academic and emotional needs, I need not reach the issue of whether equitable considerations support the parent's claim for reimbursement, and the necessary inquiry is at an end (Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119; see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

In light of my determinations made herein, it is not necessary that I address the remaining issues raised by the parties.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated July 15, 2009 is annulled to the extent that it determined that the parent's unilateral placement of the student at Family Foundation was appropriate and ordered the district to reimburse the parent for tuition at Family Foundation for the 2008-09 school year.

Dated: **Albany, New York**
 September 21, 2009

A handwritten signature in black ink that reads "Paul Kelly". The signature is written in a cursive style with a horizontal line underneath it.

PAUL F. KELLY
STATE REVIEW OFFICER