



The University of the State of New York

The State Education Department State Review Officer

No. 08-025

Application of the NEW YORK CITY 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

The Law Offices of Melvyn W. Hoffman, attorney for respondents, Melvyn W. Hoffman, Esq., of counsel

DECISION

Petitioner (the district), appeals from that part of a decision of an impartial hearing officer which ordered the district to reimburse respondents (the parents) for their son's tuition costs at the Winston Preparatory School (Winston) and the Devereux Glenholme School (Devereux) for the 2006-07 school year. The appeal must be sustained in part.

At the commencement of the impartial hearing, respondents' son was attending Devereux (Tr. pp. 69-70). Devereux is a private school which has 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). During the time in question in this matter the student also attended Winston, 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 id.). The student's eligibility for special education services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). The impartial hearing officer's decision is dated February 14, 2008. The student attended one of the district's schools as a special education student from first to fifth grade (Tr. pp. 64-65; Dist. Ex. 8 at p. 6; Parent Ex. B at p. 2). The hearing record indicates that although his progress was inadequate, he completed the program at the specialized school (Dist. 8 at p. 6; Parent Ex. B at p. 2). When the student was in sixth grade, he received education services at home by a certified special education teacher (Dist.

Ex. 8 at p. 6). The student reportedly did well academically, but he needed socialization with peers (Tr. p. 66; Dist. Ex. 8 at p. 6; Parent Exs. B at p. 2; E at p. 1).

Preliminarily, I will address a procedural issue. The district attached two exhibits to its petition for consideration on appeal (Pet. Exs. PH1; PH2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Child with a Disability, Appeal No. 06-046; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068). Here, I find that the exhibits are not necessary for my review and I therefore decline to accept them.

A February 20, 2005 neuropsychological evaluation report indicates that during evaluations conducted in January 2005, administration of the Wechsler Intelligence Scale for Children-IV (WISC-IV) yielded a verbal comprehension index composite score (percentile rank) of 112 (79), a perceptual reasoning index composite score of 110 (75), a working memory index composite score of 88 (21), a processing speed index of 80 (9), and a full scale IQ score of 101 (53) (average) (Dist. Ex. 1 at pp. 1-4, 7; Parent Ex. N at pp. 1-4). Administration of selected cognitive and achievement subtests of the Woodcock-Johnson Battery-III (WJ-III) yielded many scores within normal limits, low scores on the visual matching (3rd percentile), rapid picture naming (0.3th percentile), and numbers reversed (6th percentile) cognitive subtests, as well as low scores on the reading fluency (1st percentile), math fluency (0.3th percentile), and writing fluency (6th percentile) achievement tests (Dist. Ex. 1 at pp. 7). The evaluator noted difficulties with attention during the administration of several subtests (Dist. Ex. 1 at p. 1; Parent Ex. N at p. 1).¹ The evaluator stated that the student's full scale IQ score of 101 was probably an underestimate of his overall intelligence (*id.*). He opined that the student's high average range scores on the verbal comprehension and perceptual reasoning indices of the WISC-IV, high scores on the spatial relations (80th percentile) and analysis-synthesis (79th percentile) cognitive subtests of the WJ-III, and strength in the phonemic awareness cluster of the WJ-III reflect that the student's strengths lay in the areas of abstract thinking and phonemic processing (Dist. Ex. 1 at pp. 1, 3-4, 7; Parent Ex. N at pp. 1, 3-4). He further opined that the underlying cognitive factors contributing to the student's slow cognitive processing were deficits in the visual speeded processing area, rapid naming, attention and working memory, reflective of his problems in speeded language processing and writing (Dist. Ex. 1 at p. 3; Parent Ex. N at p. 3).

The evaluating neuropsychologist assessed the student's behavior using the self-report form, and the parent and teacher rating scales of the Behavior Assessment System for Children (BASC) (Dist. Ex. 1 at p. 1; Parent Ex. N at p. 1). Overall results of the BASC reflected the student's profile as similar to profiles of individuals with an attention deficit disorder (ADD), anxiety, hyperactivity, and similar to profiles of individuals that are concerned with medical issues (*id.*). The neuropsychological report notes some concern with depression and anxiety that might be resolved with treatment, and specified that the student's "learning disabilities are true cognitive problems and are not related to any emotional problems" (Dist. Ex. 1 at p. 5; Parent Ex. N at p. 5).

¹ Parent Ex. N is marked pp. 1-4 however, the exhibit is comprised of five pages. The third page is not marked.

Projective testing through the administration of the "Rorschach" resulted in a profile of a "relatively normal child who is experiencing stresses" and that the student may feel overwhelmed by those stresses (Dist. Ex. 1 at p. 5; Parent Ex. N at p. 5). The neuropsychological report indicates that the student needed strong reality-based therapy focusing on how to handle stresses, the development of cognitive control, and how to delay acting out on impulses (id.). The report states that the student's very high comprehension score on the WISC-IV suggests that the student "knows what the proper behavior is" (id.).

The neuropsychological report included recommendations for tutoring and remediation, psychotherapy, evaluation for medication, and extra time and a quiet room for exams (Dist. Ex. 1 at pp. 1, 5; Parent Ex. N at p. 5). The recommendation for psychotherapy noted that it should be provided by "a skilled professional" (id.).

The student began attending Winston in the beginning of the 2005-06 school year (Dist. Ex. 8 at p. 6). The Winston headmaster testified that the student adjusted quickly to Winston, especially in light of the fact that he had received education services at home by "a tutor" the previous school year (Tr. p. 28). The headmaster stated that the student had a "very successful year" at Winston during 2005-06 because he was "fully available" to learning (Tr. p. 27). The headmaster opined that the student likely found Winston to be a place where teachers understood him and how he learns (Tr. p. 28).

On March 2, 2006, a district special education teacher conducted a classroom observation at Winston that lasted almost 90 minutes during a double class period of Language and Literature (Dist. Ex. 3 at pp. 1-2). The observation report indicates that the student did not participate or contribute to class discussions, and he appeared to be disorganized and non-attentive (id. at p. 2). The observation report also notes that the classroom teacher stated that the observed behaviors were typical of the student (id.).

The Winston headmaster reported that Winston sends enrollment agreements to its families in late winter or early spring (Tr. pp. 51-52; Dist. Ex. 2 at pp. 1-2). The hearing record reflects that on April 4, 2006, the student's father signed an enrollment agreement with Winston for the 2006-07 school year (Dist. Ex. 4 at p. 1). An attached receipt indicates that the student's parents paid a deposit for \$3,875 in April 2006, and two tuition payments applicable to 2006-07 for \$17,437.50 each in May 2006 and September 2006 (id. at p. 2).

The district's Committee on Special Education (CSE) met on July 26, 2006 for the student's annual review and to plan for the 2006-07 school year (Parent Ex. M at p. 1). The CSE determined that the student was eligible for special education services as a student with an emotional

disturbance (id.; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).² The CSE considered and rejected recommending placement in a special class in a special school, finding the program "too restrictive" because the student had "made gains behaviorally" during the previous year at Winston (Parent Ex. M at p. 14). The CSE found that the student's behavior "does not seriously interfere with instruction" and could be addressed by a special education classroom teacher (id. at p. 4). However, it did note that "significant social-emotional behavioral and attentional issues" warranted non-participation in a general education environment (Parent Ex. M at p. 1). The CSE recommended a change of placement to a ten-month 12:1+1 special class placement in a community school (id.). Related services recommendations were for individual counseling for 30 minutes and group counseling (5:1) two times per week for 30 minutes, all in a separate location (id. at pp. 1, 14). Testing accommodations recommended were for extended time (double), special location, and use of a calculator (id. at p. 14).

An August 13, 2006 letter from the student's parents to the district's CSE Chairperson indicated that they had not received the student's final individualized education program (IEP), nor had they received an appropriate program recommendation or a written notice of placement (Parent Ex. L). The letter stated that, having "no alternative," they would send the student back to Winston for the 2006-07 school year (id.). The parents also stated that they intended to seek tuition reimbursement from the district and provision of related services (id.).

The student continued attending Winston for the 2006-07 school year (Tr. p. 67; Dist. Ex. 8 at p. 6). The Winston headmaster reported that at the beginning of the 2006-07 school year, the student was involved academically, "but not nearly engaged as he had been" (Tr. p. 28). He further testified that "by the time September or pretty much October," the student became disengaged in class and became a distraction to his classmates in the classroom and in the hallways (id.). The student's parents were called into school on numerous occasions during the period of time that the student attended Winston during 2006-07 (id.). Staff at Winston took various informal steps to intervene, such as referring the student to the academic dean for curriculum oversight (Tr. pp. 29-30). The academic dean initiated a behavior contract for the student that outlined the in-school behaviors expected of students at Winston (id.).³ The behavior contract reportedly "worked for a little bit," but the student ultimately remained disengaged and his conversations with the dean were not productive (Tr. p. 30). The headmaster testified that Winston staff also asked the student to see a social worker at the school (Tr. pp. 31, 49). The headmaster testified that the consultations between the social worker and the student "didn't work" (Tr. p. 31). The headmaster further

² State regulations define an emotional disturbance as "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance:

- (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (iii) inappropriate types of behavior or feelings under normal circumstances;
- (iv) a generally pervasive mood of unhappiness or depression; or
- (v) a tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to students who are socially maladjusted, unless it is determined that they have an emotional disturbance" (8 NYCRR 200.1[zz][4]).

³ The behavior contract does not appear as a document in the record.

testified that Winston staff also recommended that the student receive outside counseling (Tr. pp. 31-32; 49). Although the student attended outside counseling, the headmaster testified that ultimately "it was unproductive" (Tr. p. 32).

A March 26, 2007 letter from the assistant headmaster of Winston to members of the district's CSE indicated that the student had become "extremely disruptive in all of his classes" (Dist. Ex. 10; Parent Ex. J). The student's behavior was described as "characteristic of a much younger child that needs constant adult supervision" (*id.*). The letter notes that the student was becoming increasingly aggressive toward his peers, and that on two separate days earlier in March 2007 he received out-of-school suspensions for fighting in the hallway with another student and for approaching another student in an antagonistic manner and then pulling that student's hair (*id.*). The letter states that after this latter suspension, which took place on March 16, 2007, "it was decided by Winston and [the student's] family that his enrollment be terminated" (*id.*). The letter describes the student as unable to generalize strategies for improvement covered during 1:1 instructional sessions into his daily school routine, unable to reflect on his behavior and the negative affect it has on the school environment, and unable to modify his increasing aggression (*id.*). The student's behavior was noted to have reached "crisis levels" (*id.*). The letter indicates the headmaster's recommendation for a 12-month residential treatment school environment and states that the student's "emotional capabilities require 24/7, round the clock structure and supervision" (*id.*).

The student's father reported that after being expelled from Winston, the student was at home without a school program, a situation he characterized as an "emergency" (Tr. pp. 80, 87). The student's father indicated that as a result, he began to visit schools (Tr. p. 84). He visited Devereux about one or two weeks after the student was expelled from Winston (Tr. pp. 82-83). After two or three visits to Devereux, both of the student's parents signed the tuition agreement form on March 26, 2007 (Tr. p. 87; Dist. Ex. 9).

A March 27, 2007 letter written by the student's private psychotherapist indicates that the student had been treated by the psychotherapist once a week since October 2006 (Parent Ex. I). The psychologist opined that the student would do well in a structured school environment that provided him with an ongoing system of strategies for success. The letter further indicates that the student needed a behavioral program in an environment that offered warmth and care by authority figures, while at the same time providing clear, understandable and consistent consequences, within his learning/social environment (*id.*). While he did not specifically recommend a residential placement for the student, the therapist stated that Devereux, "as described by [the student's] father," seemed like an appropriate setting to meet the student's therapeutic needs (*id.*). On March 28, 2007, the student's mother completed an application for admission to Devereux (Dist. Ex. 8). In the application, the student's mother completed a "problematic behavioral assessment" and identified the following behaviors as being present: disruptive behaviors, difficulty responding to authority, excessive lying, school refusal, self care deficits, poor social skills, social isolation, poor peer relationships, and impulsivity (*id.*). She also noted that the student sometimes engaged in the following school behaviors, among others:

physical aggression with peers/classmates; use of profanity, disruptive behaviors, and poor grades (id.; Parent Ex. E at p.1).⁴

The student's father wrote to the district's CSE Chairperson on April 17, 2007 informing the CSE that the student was no longer attending Winston because he was required by Winston to withdraw from the school (Parent Ex. H). The letter further states that staff at Winston recommended that the student was in need of attending a residential facility and specifically recommended Devereux, a recommendation that the student's therapist agreed with (id.). The letter informed the CSE Chairperson that the student had been accepted at and would be attending Devereux (id.). The letter requested that the CSE reconvene to consider a residential therapeutic placement for the student (id.). The student's father sent a May 21, 2007 follow-up letter to the CSE Chairperson, again requesting that the CSE reconvene to consider a residential therapeutic placement for his son (Parent Ex. F). In both the April 2007 letter and the May 2007 letter, the student's father indicated that the CSE Chairperson should let him know if anything was needed from him (Parent Exs. F; H). The student's father indicated that he "eventually" received a response to the April 17, 2007 letter and that he did not receive an IEP until "about 8 months later" (Tr. p. 91; Parent Ex. A at p. 1).

On May 2, 2007, the student was admitted to Devereux (Dist. Ex. 12; Parent Exs. B at p. 2; E at p. 1).

On or about August 9, 2007, the parents submitted an amended due process complaint notice requesting to "re-open" a case regarding the student's 2006-07 school year (Parent Ex. C). The parents' initial due process complaint notice had been withdrawn pending possible settlement, but settlement negotiations had failed (id.). The amended due process complaint notice alleged that the July 26, 2006 IEP contained "procedural and substantive errors that invalidated it," that the parents had not received a written notice of placement prior to the start of the 2006-07 school year, that the student required a small nurturing school and small class environment, and that the CSE did not reconvene after the student was expelled from Winston. The parents requested tuition reimbursement for the student's 2006-07 school year at both Winston and Devereux. The amended due process complaint notice did not indicate an objection to the student's classification as a student with an emotional disturbance, nor to the identification of a need for counseling services and the recommendation for such services in an individual and group setting.

⁴ According to a July 18, 2007 evaluation report by a Devereux psychiatrist, the student's mother reported that Winston was unable to meet the student's needs (Parent Ex. E at p. 1). While not dispositive, the psychiatrist also opined that the student's "overall difficulties resides in his learning disabilities" the student's "level of care requires a residential setting that can offer him a comprehensive environment of specialized academic, behavioral, psychotherapeutic, and social skills interventions that meet his specific needs" (id.).

The impartial hearing took place on January 11, 2008.⁵ At the impartial hearing, the district conceded that it did not offer the student a free appropriate public education (FAPE) for the 2006-07 school year (Tr. p. 6; IHO Decision at p. 2). The impartial hearing officer rendered his decision on February 14, 2008 and determined that both Winston and Devereux were appropriate placements for the student (IHO Decision at pp. 4-7). The impartial hearing officer found that the student had made educational progress during the first few months of 2006-07, and that the educational progress the student had made rendered Winston an appropriate placement (*id.* at pp. 3-5). He also determined that placement at Devereux was appropriate (*id.* at pp. 6-7).

The impartial hearing officer also determined that the equities favored the parents (IHO Decision at pp. 7-8). The impartial hearing officer ordered that the parents be reimbursed \$43,805 for the 2006-07 school year for the cost of the student's attendance at Winston and Devereux (*id.* at p. 8).

The district appeals, contending that the impartial hearing officer relied upon the wrong legal standard in determining that Winston was an appropriate placement for the student, and that, Winston was not an appropriate placement. The district further argues that the impartial hearing officer improperly predetermined the question of where the equities lie in this matter and erred in finding that the equities favor the student's parents. The district also argues that the hearing record does not support the amount of the impartial hearing officer's tuition reimbursement award. The district requests that the award be vacated to the extent that tuition was reimbursed for the student's attendance at Winston and that the amount of the award be modified to reflect only the pro-rated tuition paid by the parents to Devereux for the 2006-07 school year.

In the present case, as noted in the impartial hearing officer's decision, the district conceded that it failed to offer the student a FAPE for the 2006-07 school year (IHO Decision at p. 2; *see* Tr. pp. 16-17). Although the district contested the appropriateness of the parents' unilateral placement at both Winston and Devereux before the impartial hearing officer, it has not appealed the impartial hearing officer's determination that Devereux was an appropriate placement for the 2006-07 school year (IHO Decision at pp. 5-7). It is well settled that an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.510[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determinations that the district did not offer the student a FAPE and that Devereux was an appropriate placement are final and binding (Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal

⁵ A procedural irregularity in this case should be noted. Federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Impartial hearing officers are strongly advised that compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (*see* 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, the impartial hearing officer failed to document in the hearing record or include in his decision information about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing and the date of the decision suggests that one or more extensions were granted. I caution the impartial hearing officer to comply with federal and State regulations.

No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

What remains at issue in this appeal is the appropriateness of the parents' unilateral placement at Winston for the 2006-07 school year, and the equity considerations for tuition reimbursement.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁶

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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the 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., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a

⁶ 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]).

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). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F. 3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 115).

In Gagliardo, the Second Circuit 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).

Turning to the question of the appropriateness of the parents' unilateral placement of the student at Winston, the district argues that the impartial hearing officer relied on an improper legal standard in finding that the parents' unilateral placement at Winston for the 2006-07 school year was appropriate. The impartial hearing officer stated that "[t]he standard requires educational progress be made" (IHO Decision at p. 3). The decision then identifies evidence in the hearing record of academic progress made by the student at Winston during the time in question and the impartial hearing officer appears to base his determination that Winston was appropriate solely upon that evidence of academic progress (id. at pp. 3-5).

The hearing record reveals that the student did make some academic progress during the first semester of the 2006-07 school year in reading comprehension, decoding, syllabification, phonemic awareness, punctuation, and in math prior to expulsion (Parent Ex. K at pp. 1-3). However, academic progress made by the student is only one factor that should be considered in determining whether Winston was an appropriate placement for the student for the time that he attended there between September 2006 and March 2007 (see Gagliardo, 489 F.3d at 115).

When the July 26, 2006 CSE met to plan for the 2006-07 school year, the student had successfully attended Winston for 2005-06 (Tr. p. 27). Information contained in the July 26, 2006 IEP, consistent with the February 2005 neuropsychological evaluation report, primarily reflects

the student's learning disability needs rather than needs indicative of an emotional disturbance (Dist. Ex. 1 at p. 5; Parent Ex. N at p. 5). The July 26, 2006 IEP states that the student's academic progress at Winston was monitored by continuous observations, discussions and ongoing evaluations that illustrated "moderate improvement in academic and social skills" (Parent Ex. M at p. 3). In addition, at the time of the July 2006 CSE, the student displayed "great effort" in learning new material, but continued to struggle with organizational and study skills needed to advance to grade level (id.). The July 26, 2006 IEP also indicates that the student continued to have difficulty with reading comprehension, mechanics of writing, vocabulary and essay writing (id.). The student had a good grasp of basic computation skills, but continued to struggle with decimals, word problems and retention of skills throughout the mathematical process (id.). The July 26, 2006 IEP reports that "[o]verall, [the student's] attentional, impulsive, and hyperactive deficits interfere with his academic abilities in that his inability to focus causes a lack of attention to detail, inability to retain material discussed in class without redirection from staff and increased frustration with learning unknown skills" (id.). The July 26, 2006 IEP further states that the student's behavior "does not seriously interfere with instruction" and could be addressed by a special education classroom teacher and recommends counseling as an social/emotional management need (id. at p. 4). The July 26, 2006 IEP also indicates that at that time the student displayed feelings of insecurity and that socially and emotionally, the student needed encouragement to attend to tasks, positive attention from staff, to speak up for himself, to take responsibility for his actions, and to be more organized in class (id.). The July 26, 2006 IEP recommends counseling as a social/emotional management need (id.).

The July 26, 2006 IEP indicates that the CSE considered a special class in a special school (Parent Ex. M at p. 14). However, the CSE described this option as "too restrictive" because the student had "made gains behaviorally" (id.). The CSE's recommended change of placement to a ten-month 12:1+1 special class placement in a community school constituted a change from a more restrictive private school environment to a less restrictive community school (id. at pp. 1, 15).⁷

At the beginning of the 2006-07 school year, the student was involved academically, "but not nearly engaged as he had been" (Tr. p. 28). The Winston headmaster testified that "by the time September or pretty much October," the student became disengaged in class and became a distraction to his classmates in the classroom and in the hallways (id.). The hearing record reflects that Winston attempted to meet the student's changing needs (Tr. p. 50). The student's parents were called into school on numerous occasions (id.). Staff at Winston took various steps to intervene, such as referring the student to the academic dean for curriculum oversight (Tr. pp. 29-30). The academic dean initiated a behavior contract for the student that outlined the in-school behaviors expected of students at Winston (id.). The behavior contract reportedly "worked for a little bit," but the student ultimately remained disengaged and his conversations with the dean were not productive (Tr. p. 30). The headmaster testified that rather than the issue being that the student was doing poorly in his work, "he just wasn't doing work" (id.). The student also "shut down" with his Focus⁸ teacher, with whom he worked individually for 45 minutes daily on his academics

⁷ The last page in Parent Ex. M is marked "M-14." However, it appears that it is page 15 of the exhibit.

⁸ Testimony by the Winston headmaster indicates that each student attends "Focus," a daily class consisting of 1:1 academic instruction for 45 minutes, to "flesh out" areas of difficulty and what is happening in the student's classrooms (Tr. pp. 30-31).

(Tr. p. 31). The student met with Winston's social worker on a short-term basis (Tr. p. 49). The headmaster testified that the consultations between the social worker and the student "didn't work" (Tr. p. 31). Winston staff also recommended that the student receive outside counseling (Tr. pp. 31-32, 49). The headmaster testified that outside counseling was recommended because the social worker felt that the student's difficulties were not only related to Winston (Tr. p. 49). Although the student attended outside counseling, the headmaster testified that ultimately "it was unproductive" (Tr. p. 32).

An undated Winston report card encompassing the fall 2006 semester reflected that the student earned grades of 72 (C-) in math, 74 (C) in American history, 52 (F) in language and literature, 85 (B) in art, 79 (C+) in Focus, 61 (D-) in chemistry, and 65 (D) in physical education (Dist. Ex. 5). The hearing record reflects that only after exhausting various alternatives available at Winston to meet the student's escalating behavioral needs did Winston expel the student (Dist. Exs. 7 at pp. 1-4; 10; Parent Exs. J; K at pp. 1-4). The hearing record also reflects that Winston did not offer, and was not able to offer, the level of counseling services recommended by the CSE.

At the time of the hearing, 238 students were enrolled at Winston (Tr. p. 56). There were 10 to 15 students on a waiting list (id.). Winston had 21 different groups of students grouped by learning style and need so that the student in the instant case was in class with students that were also struggling with language processing difficulties (Tr. pp. 29, 56). In addition to the Focus class, the Winston headmaster indicated that classrooms consisted of twelve students to one teacher (Tr. p. 29). In addition, Winston had six deans responsible for overseeing the curriculum for one to four classes, and with whom the classroom teachers consulted when problems arose (id.). The headmaster noted that he met with each dean weekly (Tr. p. 41).

Winston has three report periods and meets with parents in November and April (Tr. pp. 39-40). In addition, Winston maintains an e-mail communication system, moderated by each student's Focus teacher, through which academic subject teachers can comment about a particular student (Tr. p. 46). Testimony by the headmaster indicated that staff are able to have conversations regarding the students "without needing to sit down," and at the same time affording the deans the opportunity to "keep tabs" on their 40 to 50 students for whom they are responsible (id.).

Although academically the student progressed, Winston lacked a counseling and therapy program as recommended by both the 2005 neuropsychologist evaluation and the July 26, 2006 IEP. While 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), the school must offer appropriate individualized services to meet the student's unique, special education needs. Here, when the student began to exhibit significant behavioral problems, Winston was unable to provide the appropriate and requisite services to meet the student's needs and the student regressed to the point of crisis, at which time he was expelled by Winston. Under the circumstance of this case, the hearing record does not support a determination that placement at Winston was appropriate to meet the student's needs for the 2006-07 school year. The hearing record reveals that Winston did not have appropriate services in place at the beginning of the school year to meet the student's social/emotional management needs and therefore was unable to meet the student's intensifying needs as the year progressed. While the IDEA does not require a district to "guarantee totally successful results" likewise, the parents' choice of unilateral placement is not held to that standard (see Walczak, 142 F.3d at 133). However, the circumstances of this case do not involve a lack of

success despite the provisions of appropriate services, it involves a lack of appropriate services to meet the student's significant social/emotional management needs and a resultant lack of progress in this area (see M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

For the reasons stated above, I find that the hearing record does not support the impartial hearing officer's determination that Winston was an appropriate unilateral placement for the student for the 2006-07 school year.

Having found that the placement at Winston was not appropriate, I need not address the district's argument that the impartial hearing officer predetermined his decision on the equities and/or that he erred in finding that the equities favor the parents.

The district further argues that the hearing record does not support the specific amount of tuition awarded by the impartial hearing officer and requests that the award be vacated to the extent that tuition was reimbursed for the student's attendance at Winston. The district requests that the amount of the award be modified to reflect only the pro-rated tuition paid by the student's parents to Devereux for the 2006-07 school year.⁹

The hearing record reveals that the impartial hearing officer held that the hearing record would "remain open" for 10 days after testimony had concluded in order to take documentary evidence regarding tuition paid to Winston and Devereux (Tr. p. 99; IHO Decision at pp. 7-8). The impartial hearing officer's decision does not explain how the specific dollar amount of reimbursement was determined, nor does it clarify what the parents paid to each school during which time period. Given the lack of clarity on this issue, I will annul that portion of the impartial hearing officer's decision that awarded \$43,805 in tuition reimbursement for both Winston and Devereux. Further, I will order that the parents be reimbursed for the tuition costs at Devereux pro rated from May 2, 2007 to June 30, 2007, upon proper proof of payment.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, the portion of the impartial hearing officer's decision awarding \$43,805 is hereby annulled; and

IT IS FURTHER ORDERED that, respondents not be reimbursed for the tuition paid at Winston for the time period of September 2006 through March 2007, and that they be reimbursed for their tuition costs at Devereux pro rated from May 2, 2007 to June 30, 2007, upon proper proof of payment.

Dated: **Albany, New York**
 May 2, 2008

PAUL F. KELLY
STATE REVIEW OFFICER

⁹ I note that the district does not suggest a pro rated amount.