The University of the State of New York

The State Education Department
State Review Officer

No. 08-050

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

Appearances:
Advocates for Children, attorneys for petitioner, Matthew Lenaghan, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request that the respondent (the district) pay her son's tuition costs at the Smith School for the 2007-08 school year. Petitioner also appeals the impartial hearing officer's declination to order the district to pay for private tutoring services at the Lindamood-Bell Learning Center (Lindamood-Bell) and transportation thereto. The appeal must be sustained in part.

At the time of the impartial hearing, the student had been recently withdrawn from his tenth grade classes at the Smith School, the private school he had attended during his eighth grade and ninth grade school years (Tr. p. 177).[1] The Smith School 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 a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[1] I note that the hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a district and parent exhibits were identical. I remind the impartial hearing officer that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious.

The student attended schools in the district prior to attending the Smith School (see Parent Ex. BB; CC). In March 2005, the district school that the student was then attending recommended that the student receive tutoring (Parent Ex. CC). Soon thereafter, the district advised the parent that it was unable to provide proper services for the student and recommended that the student's family find another school to fulfill the student's educational needs (Tr. p. 168; Parent Ex. BB). The parent began to research non-public schools that might be able to provide for her son's needs (Tr. p. 168; Parent Ex. N. at p. 5). During this search, the parent had her son evaluated at Lindamood-Bell (Tr. p. 124; Parent Ex. K at p. 5). On May 23, 2005, Lindamood-Bell evaluators administered numerous tests to determine the educational level at which the student was functioning (Parent Ex. K at p. 5). The tests revealed that the student had serious deficits in his reading and language skills (id. at pp. 5-7). Ultimately, on July 20, 2005, the parent enrolled the student at the Smith School and he began attending classes there in September 2005 (Tr. p. 169; Dist. Ex. 9 at p. 3).

During the 2005-06 school year, while the student was attending the Smith School, he received counseling, speech therapy and occupational therapy (OT) (Parent Ex. N at p. 5). The parent sought tuition payment for the 2005-06 school year and an impartial hearing was held. The impartial hearing officer (Hearing Officer 1) ordered the district to pay for the tuition costs at the Smith School as well as 240 hours of compensatory tutoring services at Lindamood-Bell (id. at pp. 4, 5).[2]

In May 2006, the Committee on Special Education (CSE) convened for a review of the student's educational program (Parent Ex. AA at p. 1). The individualized education program (IEP) reported that the student's reading comprehension abilities were at an instructional grade level of 5.5 (id. at p. 3). The IEP also indicated that the student's math facts/problem solving skills were at an instructional grade level of 5.0 (id.). The CSE recommended that that student receive educational instruction in a 15:1 special class setting in a community school, four 30-minute 1:1 sessions of OT per week, and one 30-minute 3:1 session of counseling per week (id. at p. 13). The parent disagreed with the proposed placement, continued the student at the Smith School for the 2006-07 school year and again successfully sought tuition payments for the student's 2006-07 school year (Parent Ex. N at p. 3).

On February 3, 2007, while the issue of tuition reimbursement for the 2006-07 school year was still outstanding, the district had the student evaluated by a school psychologist (Parent Ex. L).[3] Multiple tests were administered to the student to assess his educational functioning (id. at

[2] All 240 hours of the Lindamood-Bell tutoring occurred during summer 2006 (Parent Ex. N at pp. 4, 5).

[3] A social history update performed on February 3, 2007 reported that the student's mother opined that her son had progressed at the Smith School, but that he still needed to work on his reading skills, in particular his comprehension and decoding skills (Parent Ex. M at p. 1).

pp. 2-4, 6-7).[4] These tests revealed that the student still exhibited deficits in reading and in mathematics (id. at pp. 1-3). The student was also noted to have difficulty with expressive and receptive language skills and difficulty with articulation (id. at p. 2). The psychologist opined that the student's academic difficulties caused him to struggle with enhancing his self-esteem and self-image (id. at p. 5). The psychologist also opined that the student would benefit from a structured, supportive educational environment with intensive remediation, and with related services such as counseling and speech-language therapy (id.).

In March 2007, the CSE reconvened for a review of the student's educational program for the 2007-08 school year (Parent Ex. Z at p. 1). The CSE recommended that the student continue to be classified as having a learning disability, receive instruction in a 15:1 special class setting, and receive one 45-minute 3:1 counseling session per week, four 45-minute 1:1 OT sessions per week, and three 45-minute 3:1 speech-language therapy sessions per week (id. at pp. 1, 6).

On April 19, 2007, an impartial hearing officer (Hearing Officer 2) ordered the district to pay for the tuition at the Smith School for the 2006-07 school year and also to pay for 200 hours of tutoring services (Parent Ex. N at pp. 8-9). The tutoring component of this order gave the parent the option of using Lindamood-Bell for the tutoring services and provided that the district was to pay Lindamood-Bell at an hourly rate of $109.00 per hour (id.). Hearing officer 2's decision also provided a tutoring expiration date of August 31, 2007 (id.). The student received the Lindamood-Bell tutoring services during the summer 2007 (Tr. pp. 140, 147).[5] Hearing Officer 2's decision was not appealed (Tr. p. 41).

On August 20, 2007, the parent's attorney notified the CSE chairperson that the parent was placing the student at the Smith School for the 2007-08 school year, and that she would seek tuition reimbursement from the district (Dist. Ex. 4; Parent Ex. B).

On February 8, 2008, the parent's attorney filed a due process complaint notice which sought tuition payment for the student's 2007-08 attendance at the Smith School, transportation to and from the school, and payment for 480 hours of Lindamood-Bell tutoring (Parent Ex. A at p.

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4 Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a verbal IQ of 86, a performance IQ of 89 and a full scale IQ of 85 (Parent Ex. L at p. 2). These scores placed him in the 16th percentile or low average range for his age (id.). Administration of the Wechsler Individual Achievement Test II (WIAT-II) yielded a standard score of 40 on the reading comprehension subtest, placing the student at a level of 0.01 of the 1st percentile of students (id. at p. 3). The student also obtained a score of 63 (1st percentile) on the mathematics composite subtest, and a score of 63 (1st percentile) on the math reasoning subtest (id.). These three subtests of the WIAT-II placed the student's abilities in the academically deficient range (id.). The student received a standard score of 104, (61st percentile, average range) for the psuedoword decoding subtest of the WIAT-II, a standard score of 75 (5th percentile, borderline range) on the numerical operations subtest of the WIAT-II, and a standard score of 93 (32nd percentile, average range) on the spelling subtest of the WIAT-II (id. at pp. 3-4).

5 On August 30, 2007, Lindamood-Bell administered another battery of testing to the student to assess his educational progress (Parent Ex. K).

2). [6,7] The parent's due process complaint notice invoked pendency at the Smith School and at Lindamood-Bell, arguing that Hearing Officer 2's unappealed decision dated April 19, 2007 constituted the student's pendency program (id.).[8]

During the 2007-08 school year, the student's behavior at the Smith School began to deteriorate (IHO Decision at p. 3). In November 2007, the student was suspended for one and one-half days (Dist. Ex. 8). The Smith School also reported behavioral incidents on February 13, 27, and 28, 2008 (Dist. Exs. 12; 14). On February 28, 2008, the principal of the Smith School wrote a letter to the parent that it had "been unanimously decided by both the administration and the staff that the Smith School is no longer a suitable placement," and that the student's "emotional issues lie beyond the scope of the school's capacity to deal with" (Dist. Ex. 7). The principal requested that the parent withdraw the student immediately (id.). The student was withdrawn from the Smith School effective March 3, 2008 (Parent Ex. R).

By letter dated March 10, 2008, the parent advised the CSE chairperson that the student was no longer attending the Smith School (Parent Ex. H). The letter also requested a new placement for the student (id.).

On March 20, 2008, the CSE reconvened in order to discuss the student's educational program (Parent Exs. I; J). The CSE meeting was attended by the parent, a district representative, a special education teacher, a psychologist, a regular education teacher, an additional parent member, and a social worker (Parent Ex. J at p. 2). The CSE recommended a 15:1 special class in a community high school, one 45-minute 1:1 individual counseling session per week, one 45-minute 3:1 group counseling session per week, four 45-minute sessions of 1:1 OT per week, and three 45-minute 3:1 speech-language therapy sessions per week (id. at pp. 1, 13). These recommended services were to start in April 2008 (id. at p. 2).

The CSE also prepared an interim service plan (ISP) which provided for 1:1 home instruction two periods per day five days per week (Parent Ex. I at p. 1).[9] The ISP recommended the same related services as set forth in the IEP, but provided the student with a word processor, a typing tutorial program, a printer, a carrying case and related accessories (id. at pp. 1-2). The ISP

[6] This is not the first time the parent has sought 480 hours of Lindamood-Bell tutoring. During the 2006-07 school year, the parent also sought 480 hours of Lindamood-Bell tutoring, but this request was reduced to 200 hours of tutoring by Hearing Officer 2 (Parent Ex. N at p. 7).

[7] The due process complaint notice indicated that the district had offered her son a placement, but that after the student's mother visited the district's recommended school and spoke to school personnel, she opted to re-enroll the student at the Smith School (Parent Ex. A at p. 2).

[8] The due process hearing complaint notice referred to the "March 13, 2007 impartial hearing decision" (Parent Ex. A at p. 2). Although it appears from the hearing record that the impartial hearing occurred on March 13, 2007, Hearing Officer 2's decision was dated April 19, 2007 (id. at p. 8).

[9] This interim service plan was characterized by the CSE as "home and hospital instruction" (Parent Ex. I at p. 1). Home and hospital instruction is defined as "special education provide on an individual basis for the student with a disability confined to the home, hospital or other institution because of a disability" (8 NYCRR 200.1[w]).

stated that the projected date that these interim services would be initiated was also April 2008 (id. at p. 1).

On March 24, 2008, the CSE chairperson sent a Final Notice of Recommendation (FNR) to the parent recommending placement at an identified district school (Dist. Ex. 18). The educational program identified in the FNR is the same educational program that was previously delineated in the student's March 20, 2008 IEP with one exception; the IEP proposed one 45-minute 1:1 counseling session per week, whereas the FNR proposed three 45-minute 1:1 individual counseling sessions (compare Dist. Ex. 18, with Dist. Ex. 17 at p. 13).

The impartial hearing, that is the subject of this appeal, convened on March 26, 2008 and concluded on April 2, 2008, after two days of testimony before an impartial hearing officer (Hearing Officer 3). At the impartial hearing, the parent requested that the student remain in the educational program that had been previously ordered by Hearing Officer 2's unappealed decision dated April 19, 2007 (Tr. pp. 41-44, 51). According to the parent, pendency required the district to pay for the student's tuition costs at the Smith School (for the portion of the 2007-08 school year that the student attended that school), and for the student's Lindamood-Bell tutoring (to be paid prospectively) (Tr. pp. 51, 60, 62). In addition to this pendency argument, the parent sought reimbursement for the Smith School tuition, and asserted that the student's recent March 2008 withdrawal from the Smith School justified an increase in the number of Lindamood-Bell tutoring hours because, in the absence of a suitable educational program from the district and in the absence of instruction at the Smith School, Lindamood-Bell tutoring would be the only instruction that the student would receive during the remainder of the 2007-08 school year (Tr. pp. 72-73). The parent's attorney stated at the impartial hearing that the parent was not requesting any compensatory services (Tr. pp. 60, 268).

At the impartial hearing, the district conceded that it had failed to offer a free appropriate public education (FAPE) to the student for the portion of the 2007-08 school year between July 1, 2007 and March 24, 2008 (Tr. pp. 66, 238).[10] However, the district refused to concede the remainder of the school year, arguing that they had provided a new appropriate placement to the student as evidenced by the March 20, 2008 IEP and the March 24, 2008 FNR (Tr. pp. 238-39). The district also argued that the student's pendency rights did not attach until February 8, 2008, the date the parent filed her due process complaint notice (Tr. pp. 46, 243). The district opposed the parent's requested pendency placement on the additional ground that the student's March 2008 withdrawal from the Smith School precluded the use of pendency to obtain tuition payments at

[10] 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]).

that school (Tr. pp. 46, 241). Finally the district argued that neither the Smith School nor Lindamood-Bell were able to meet the student's unique special education needs (Tr. pp. 249-51).

Hearing Officer 3 determined that the parent was not entitled to relief on several grounds. On substantive grounds, he found that the parent failed to establish that she was entitled to tuition payments for the Smith School because, although the district conceded that it did not offer an appropriate program from the beginning of the school year until March 20, 2008, the parent failed to prove that the Smith School was an appropriate placement (IHO Decision at p. 6). Hearing Officer 3 found that the Smith School was not addressing the student's reading needs (id.). He also found that the parent failed to prove that the substantive program provided by Lindamood-Bell was appropriate (id. at pp. 6-7). Hearing Officer 3 concluded that the battery of educational tests performed by Lindamood-Bell suggested that the student's progress in this tutoring program was "minimal and in some cases regressive" (id. at pp. 7-8).

Moreover, regarding pendency, the Hearing Officer 3 determined that the Smith School was not part of the student's pendency placement because the student no longer attended the school (IHO Decision at p. 5). In addition, Hearing Officer 3 concluded that services from Lindamood-Bell were no longer part of the student's pendency program because they were not stand alone services, but rather services that were delivered and intertwined with the Smith School (id.). Hearing Officer 3 did not believe that it was appropriate to order an increase in the number of hours of Lindamood-Bell tutoring pursuant to the parent's pendency rationale because he deemed the increase in Lindamood-Bell tutoring services, in the absence of instruction at the Smith School, to be a different program from that which was contained in Hearing Officer 2's order (id. at pp. 5-6). Hearing Officer 3 also concluded that such intensive day-long programming was improperly restrictive as the student would "receive only one–to-one instruction, without opportunity to interact with any other student peers, whether non-disabled or disabled" (id. at p. 8).

In addition, Hearing Officer 3 concluded that the parent did not have standing for a tuition reimbursement claim because she had not made any tuition payments to the Smith School for the 2007-08 school year and the hearing record did not reflect that she was responsible for payment (IHO Decision at p. 7).[11] Continuing with the standing analysis, Hearing Officer 3 reasoned that, given the facts of this case, the parent was bringing a claim on behalf of the Smith School by seeking an order of payment of tuition directly to the Smith School (id.). Hearing Officer 3 concluded that the Smith School also did not have standing to seek direct payment of tuition costs under the Individuals with Disabilities Education Act (IDEA) (id.).

The parent appeals, asserting that Hearing Officer 3 erred in deciding that the parent has no standing to bring a tuition claim. The parent also asserts that Hearing Officer 3 erred in deciding that the Smith School was not appropriate for the student because the evidence regarding the Smith School indicates that the student progressed academically. With regard to the appropriateness of Lindamood-Bell, the parent asserts further that Hearing Officer 3 incorrectly focused only on the student's receipt of services from Lindamood-Bell during summer 2007, and that this narrow focus was too small of a time period to determine if the student had made progress in his Lindamood-Bell tutoring. The parent argues that the student's progress should have been measured by

[11] Hearing Officer 3 also concluded that the district had no obligation to make payments for the time subsequent to the student's withdrawal from the Smith School (IHO Decision at p. 7).

comparing his educational performance levels before he started receiving services at Lindamood-Bell with his current educational performance levels. The parent also asserts that Hearing Officer 3 incorrectly ruled that Lindamood-Bell payments were inappropriate on least restrictive environment (LRE) grounds. The parent asserts that the student needed intensive remediation and that the Lindamood-Bell tutoring should have been viewed as only one part of the student's comprehensive program, which also included instruction at the Smith School. The parent further asserts that Hearing Officer 3 erred when he denied funding for the Smith School and Lindamood-Bell on pendency grounds. The parent asserts that the district should have commenced payment pursuant to pendency on August 20, 2007, the day the parent notified the district of the parent's intention to enroll the student at the Smith School for the 2007-08 school year. The parent asserts in the alternative, that if pendency does not start until February 8, 2008, the date of the due process complaint notice, then the district should pay for the Smith School from February 8, 2008 until the date that the student left the school, and pay for Lindamood-Bell tutoring from February 8, 2008 until such time as a new placement is agreed upon.

The district's answer asserts that the petition is facially defective because the parent fails to support the allegations made in the petition with specific references to the hearing record and because the petition does not have consecutively numbered pages. The district further asserts that the parent has not paid any tuition to the Smith School for the 2007-08 school year, and therefore, she is not entitled to reimbursement. The district further asserts that the parent failed to establish that the Smith School provided an appropriate educational program because the Smith School was unable to accommodate the student's behavioral problems, the school did not have a reading program to address the student's reading deficiencies, the school's classrooms were too restrictive, and the report cards demonstrated that the student was regressing in mathematics and that his reading levels were well below grade level. The district further asserts that the Lindamood-Bell tutoring was not appropriate because it failed to address the student's emotional or behavioral needs, was too restrictive, and that in spite of the Lindamood-Bell tutoring, the student had actually regressed. The district further asserts that the student's expulsion from the Smith School precluded the parent's reliance on pendency in order to obtain tuition.

A central purpose of the 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).

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 (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]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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]; see 8 NYCRR 2005[j][4][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the student 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 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).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

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, 427 F.3d at 192). "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).

The New York State Legislature amended the Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition

reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016). Here, the parent's original due process complaint notice was dated February 8, 2008 (Parent Ex. A at p. 1) and the impartial hearing was held in spring 2008 (Pet. ¶ 13). Accordingly, the district had the burden of proof to demonstrate that it offered the student a FAPE for the 2007-08 school year.

At the outset, I will address two procedural issues. First, the district has asserted in its answer that the petition should be dismissed because it fails to support the allegations made therein with specific references to the hearing record or to the exhibits, as is required by State regulations (8 NYCRR 279.8[b]). The district's argument is not supported by a review of the petition. The petition adequately cites to the hearing record, therefore, I will deny the district's application to dismiss the petition on such grounds.

Second, the district also alleges that the parent failed to consecutively number the pages in the petition (8 NYCRR 279.8[a][4]). A review of the petition reveals that the district is correct in its assertion. However, in the exercise of my discretion, I decline to dismiss the petition on these procedural grounds. I remind the parent's attorney to comply with State regulations and to consecutively number the pages of its pleadings (8 NYCRR 279.8[a][4], [b]).

I turn now to the district's argument that the parent has not incurred any out-of-pocket expenses for the student's attendance at the Smith School for the 2007-08 school year and is therefore not entitled to tuition reimbursement.[12] The principal from the Smith School testified at the impartial hearing that the Smith School has not received any payment from the parent for the 2007-08 school year (Tr. p. 92). The United States Supreme Court in Burlington held that retroactive reimbursement of private educational expenses is appropriate as an available remedy under the IDEA (Burlington, 471 U.S. at pp. 370-71; see also Gagliardo v. Arlington Cent. Sch. Dist., 2007 WL 1545988 at *6 [2d Cir. May 30, 2007] [explaining that parents who believe that their child has been denied a FAPE may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school]. However, reimbursement under the IDEA allows parents to recover only actual, not anticipated, expenses for private school tuition and related expenses (Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 32, 40 [1st Cir. 2006]; Cerra, 427 F.3d at 192 [noting the availability of "retroactive tuition reimbursement" under the IDEA]; Muller v. Comm. on Special Educ. of East Islip, 145 F.3d 95, 106 [2d Cir. 1998] [holding that compensation for "out of pocket expenses" was appropriate], Application of Dep't of Educ., Appeal No. 07-032; see 20 U.S.C. § 1412[a][10][C][ii]; see also 34 C.F.R. § 300.148[c]; see generally Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]). Therefore, because the parent has not paid any tuition, under the circumstances of this case, I find that the parent does not have standing to seek tuition reimbursement.

[12] I note that the adequacy of the March 20, 2008 IEP and ISP are not before me. While there was some discussion at the impartial hearing about the March 20, 2008 IEP and ISP, there has been no due process complaint filed pertaining to the two documents, nor has the original due process complaint notice been amended to allege a denial of a FAPE pertaining to them. I also note that there is nothing in the hearing record that supports a conclusion that this student cannot be appropriately educated in a public school setting with related services.

I turn next to the issue of whether the parent has standing to bring a claim for prospective payment of tuition by the district to the Smith School. I concur with Hearing Officer 3 that the student no longer attends the Smith School, therefore, the issue is moot. In addition, the principal of the Smith School testified that the school "assumed that the mother was going to pay," and that she would request an impartial hearing (Tr. p. 92). The principal testified that the school was owed $29,000.00 and that in the prior two years it had received its tuition for the student from the district (Tr. p. 93).[13] This testimony reveals that it was the Smith School who incurred the financial burden, not the student or the parent. The Smith School is not a party in this case and is therefore not entitled to relief under the IDEA. Parents cannot assert a claim for relief on behalf of a private entity that lacks standing under the IDEA to maintain a claim against a school district in its own right (see Emery, 432 F.3d at 299; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]); see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]). The IDEA provides that "a court or a hearing officer may require the [school district] to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the [school district] had not made a [FAPE] available to the child in a timely manner prior to that enrollment" (emphasis added) (20 U.S.C. § 1412[a][10][C][ii]; see 34 C.F.R. § 300.148[c]; see also Application of the Dep't. of Educ. Appeal No. 07-032).

The parent contests that she is entitled to prospective funding under Connors v. Mills (Connors, 34 F. Supp. 2d 795, 805-06 (N.D.N.Y. 1998). In Connors, the Court dismissed the parents' claim for tuition and in dicta discussed the concept of "prospective" tuition payment after the Court made a finding that the school district conceded that it could not provide an appropriate education for the student and that the private placement could (Connors, 34 F. Supp. 2d at 806). In the instant case, the district has conceded the first Burlington criterion with respect to only the first seven months of the 2007-08 school year (Tr. pp. 238-39). Moreover, the district disputes the appropriateness of the parent's proposed placement at the Smith School and the parent's proposed tutoring at Lindamood-Bell (Tr. pp. 249-51). Therefore, under the circumstances of this case, the parent is not entitled to prospective payment of tuition at the Smith School (20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.403[c]; see generally Burlington, 471 U.S. 359; Carter, 510 U.S. 7; A.A. v. Bd. of Educ., 196 F. Supp. 2d 259 [E.D.N.Y. 2002]; Application of the Dep't. of Educ., Appeal No. 07-032).

I now turn to the issue of the student's pendency placement. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and

[13] The hearing record also contains an affidavit signed by the Smith School principal indicating that the parent and the district had entered into a "Settlement Agreement" for payment of the Smith School tuition (Parent Ex. R). There is no indication that the district made such a settlement. Aside from this exhibit, the hearing record and the existence of this appeal suggests that there is no settlement.

"strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed impartial hearing officer's decision can establish a pendency placement (Letter to Hampden, 49 IDELR 197, [OSEP 2007]; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134). During the pendency of administrative and judicial proceedings, a student remains at his current educational placement, "unless the State or local educational agency and the parents or guardian otherwise agree" (20 U.S.C. § 1415[e][3]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]).

In this case, the parent contends that pendency began on August 20, 2007, the date that she notified the district that she was unilaterally placing the student at the Smith School (Tr. pp. 50-51, 58-59). In order to invoke the pendency provisions of the IDEA, a due process proceeding must be pending (see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; Application of a Child with a Disability, Appeal No. 07-136). In this case, the proceeding began on February 8, 2008, the date that the parent filed the due process complaint notice (Parent Ex. A). Therefore, I find that the parent's pendency claim did not arise until February 8, 2008, the date that she filed her due process complaint notice (Application of a Child with a Disability, Appeal No. 07-136).

On February 8, 2008, the student's "then current educational placement" consisted of placement at the Smith School and five hours of tutoring services per week, as ordered by Hearing Officer 2 in his decision dated April 17, 2007 (Parent Ex. N at pp. 7-8). Therefore, I find that from February 8, 2008, the date that the impartial hearing was commenced, until March 3, 2008, the date that the student withdrew from the Smith School, the district should have paid for a pro-rata

portion of the student's tuition costs at the Smith School and a pro-rata portion of his tutoring costs at Lindamood-Bell (see Parent Ex. N at p. 7).[14]

I now turn to the parent's claims regarding pendency for the time period between March 3, 2008, the date of the student's withdrawal from the Smith School and June 30, 2008, the end of the school year.

The parent concedes that she has no entitlement to payment for tuition at the Smith School subsequent to the student's withdrawal from the school on March 3, 2008 (Tr. pp. 60-61). However, the parent asserts that despite the student's withdrawal from the Smith School, the tutoring component of Hearing Officer 2's decision should continue under pendency (Tr. pp. 61-62). The parent further asserts that in the absence of attendance at the Smith School, the student's tutoring becomes even more crucial and therefore, the student should receive 480 hours of Lindamood-Bell tutoring, an increase from the 200 hours previously awarded by Hearing Officer 2 in his April 19, 2007 decision (Tr. pp. 72-73).

I find for the reasons explained below, that the parent, by proposing the 480 hours of Lindamood-Bell tutoring as a pendency program, is proposing a program that is not "substantially similar" in order for the new placement to be deemed a proper pendency placement.

The district asserts that the student's withdrawal or expulsion from the Smith School during the 2007-08 school year bars the parent from invoking pendency for tuition at that school (Tr. pp. 46, 241). In its answer, the district cites Application of the Bd. of Educ., Appeal No. 03-028 for the proposition that when a student is expelled and pendency is invoked with respect to a new placement or program, the new placement must be "substantially similar." The district asserts that the parent's request for a program of exclusively Lindamood-Bell tutoring cannot be a "substantially similar" placement to that which was awarded by Hearing Officer 2 because this placement lacks the Smith School portion that was awarded by Hearing Officer 2.

Although the student's withdrawal from the Smith School is factually similar to the expulsion of the student in Application of the Bd. of Educ., Appeal No. 03-028, in the instant case the student's withdrawal only frustrates a portion of his then-existing placement contained in the prior April 17, 2007 decision by Hearing Officer 2. In Application of the Bd. of Educ., Appeal No. 03-028, the parent invoked pendency for a student that was expelled from one school and placed in an entirely different school. In the instant case, the Lindamood-Bell tutoring component of the prior April 17, 2007 decision by Hearing Officer 2 remained undisturbed. I do note, however, that the parent has not objected to the March 20, 2008 IEP and has not invoked due process pertaining to that IEP. Based on the hearing record, I conclude that the parent has agreed to that program, at least pending implementation. Therefore, I find that from February 8, 2008, the date that the parent filed her due process complaint notice, until March 20, 2008, the date that a new IEP was formulated, the district should have paid for any Lindamood-Bell services that were delivered within that timeframe.

[14] Under pendency doctrine, school districts may be required to directly fund pendency placements (see Bd. of Educ. v. Schutz, 290 F.3d 476, 482-84 [2d Cir. 2002]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 200-01 [2d Cir. 2002]).

As a final note, the hearing record indicates that the student can be appropriately educated in a public school setting and there is no evidence suggesting that the district cannot meet the student's special education needs. Accordingly, a CSE should reconvene as soon as possible, if it has not already done so, and offer the student an appropriate special education program and placement for the 2008-09 school year consistent with the requirements of the IDEA.

I have examined the parties' remaining contentions and find that I need not address them in light of my decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision of the impartial hearing officer dated April 28, 2008 is hereby modified to order the district to pay tuition for the pro-rata portion of the student's Smith School tuition between February 8, 2008 and March 3, 2008 and to pay for the pro-rata portion of tutoring services that were delivered between February 8, 2008 and March 20, 2008.

Dated: **Albany, New York**
July 23, 2008

PAUL F. KELLY
STATE REVIEW OFFICER