



The University of the State of New York

The State Education Department State Review Officer

No. 08-062

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, Emily R. Goldman, Esq., of counsel

Mayerson and Associates, attorney for respondent, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that respondent's (the parent's) unilateral placement of her son at the Windward School (Windward) was appropriate for the 2007-08 school year and awarded the parent full tuition reimbursement. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in second grade at Windward, a private coeducational day school for students with language-based disabilities (Tr. p. 116; Parent Exs. E at p. 1; Y at p. 1).¹ His eligibility for special education programs and services and his classification as a student with a learning disability (LD) are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10][i]; 8 NYCRR 200.1[zz][6]).

Between September 2005 and December 2005, while the student was attending kindergarten in one of the district's elementary schools, he participated in a neuropsychological evaluation obtained by the parent (Parent Ex. T at p. 1). The neuropsychological evaluation report indicated that at the time, the student was experiencing difficulties with letter recognition, writing his name, remembering the names of classmates, and displaying occasional temper tantrums characterized by screaming, crying and hitting (id.). The purpose of the neuropsychological

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 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 (8 NYCRR 200.5[j][3][xii][c]).

evaluation was to assess the interrelationship between the cognitive, attention, and emotional issues that affected the student's academic and social functioning, and to assist in educational planning for the student (id. at pp. 1, 3).

The student's results on the neuropsychological evaluation report indicated that his overall intellectual functioning, as assessed by the Wechsler Intelligence Scale for Children- Fourth Edition (WISC-IV), was in the average range, with a full scale IQ score of 105 (63rd percentile); his verbal comprehension index standard score of 112 (79th percentile) was in the high average range; his perceptual reasoning index standard score of 110 (75th percentile) was in the higher end of the average range; his working memory index standard score of 86 (18th percentile) was in the low average range; and his processing speed index standard score of 100 (50th percentile) placed him in the average range (Parent Ex. T at pp. 5, 15).

Administration of the Woodcock-Johnson Tests of Academic Achievement – Third Edition (WJ-III ACH) yielded low average standard scores of 82 (12th percentile) and 85 (16th percentile) for the reading skills of letter-word identification and passage comprehension, respectively (Parent Ex. T at pp. 8, 16). The student's spelling standard score of 78 (7th percentile) placed him in the borderline range (id.). His standard scores in picture vocabulary (98; 44th percentile), story recall (99; 47th percentile), and arithmetic applied problems (101; 53rd percentile) were in the average range (id.). Administration of the reading subtest of the Wide Range Achievement Test-3 (WRAT-3) produced results in the low average range, and were described as consistent with the student's reading difficulties demonstrated by the scores he achieved on the WJ-III ACH (id. at p. 8).

Additional formal testing addressed the student's attention and executive functioning, language, learning and memory, fine motor/praxis, and visual/spatial perception (Parent Ex. T at pp. 9-11). The neuropsychological evaluation report identified the student's weakest areas as fine and gross motor functioning, memory for rote verbal and visual information (such as names and faces as opposed to contextual related information), and expressive language functioning (id. at p. 11). The evaluators described the student as tending to become "rigid and impulsive," noting that he "does not elaborate on his answers without being probed" (id.). The evaluators opined that "[t]his defensive style leads to mistakes, slows him down, and hinders his performance" (id.). However, the evaluators also noted that the student's "[s]trengths include abstract reasoning, problem solving skills, visual conceptualization, and making inferences" (id.).

Regarding the student's adaptive/emotional functioning, "rating scales indicate[d] emotional control and hyperactivity problems, as well as difficulties in shifting ability" (Parent Ex. T at p. 12).

In summary, academic skills testing indicated that the student's achievement scores were generally lower than his measured cognitive functioning, that significantly weak reading and spelling difficulties compromised his functioning and were indicative of a reading disability that the evaluators defined as "dyslexia," and that although the student was sociable and cooperative during the evaluation, he had a history of immature behavior and low tolerance for frustration (Parent Ex. T at pp. 8, 12-13). The evaluators recommended that the student receive occupational therapy (OT), speech-language therapy, and "coaching" that focused on reading, spelling and behavior (id. at p. 14). Additional recommendations included regular meetings with the student's teachers to discuss his academic and social progress in school and to identify areas of difficulty, regular participation in resource room, additional reading instruction in school, careful monitoring

of the student's hyperactive tendencies in school, and preferential seating in the front of the classroom in clear view of his teacher (id.).

On March 27, 2006, the district's social worker conducted a social history after the student's teacher referred him to the Committee on Special Education (CSE) due to his observed difficulties articulating sounds and modulating his voice, retaining information, his frustration at completing tasks, and his difficulty in accepting classroom limits (Parent Ex. R at pp. 1-2). The social history report indicated that the parent informed the social worker that a neuropsychological evaluation had taken place in 2005, and that the psychologist found the student to be dyslexic (id. at p. 2). The social history report indicated that the parent requested an informal OT screening and that she informed the social worker that the student had asthma, enjoyed physical activity, and described him as "stubborn, willful, and argumentative," exhibiting "empathy" and "compassion" (id. at pp. 2-3). The social history report also confirmed that the parent was provided with a copy of the "Parents Guide to Special Ed," a medical form to be completed, and an explanation of her due process rights (id. at p. 4).

On May 11, 2006, a speech-language evaluation was conducted (Parent Ex. Q). The speech-language evaluator indicated that the student presented with average expressive language skills, and a "very mild receptive language delay in the area of processing word classes" (id. at p. 2). The student's "expressive-receptive vocabulary [was] at age level" (id.). The evaluator observed that the student's "auditory recall for complex/compound sentences [was] good," and that his "[a]uditory processing [was] intact for following multi-level directions with linguistic concepts and comprehension of underlying sentence structures" (id.). The evaluator opined that the student's ability to formulate complex sentences with cued words was "adequate," and that the student's use of grammar/syntax and story narration was "fair" (id.). The evaluator noted that the student's speech exhibited some misarticulations, due mostly to missing upper teeth (id.). The evaluator did not recommend speech-language services at that time (id.).

The district's school social worker conducted a 25-minute classroom observation of the student on May 23, 2006 (Parent Ex. P). The observation report described the student during situations when he was playing with toys, interacting and playing with other children, speaking with the teacher, and listening to a story and watching the reader, but contained no conclusions derived from said observation (id.).

According to the student's kindergarten report card from the 2005-06 school year (Parent Ex. N), the student received final grades of "3" (indicating that the student "meets grade-level standards") in science, social studies, and English as a Second Language (ESL) (id. at p. 3); he received grades of "2" (indicating that the student "approaches grade-level standards") in reading, writing, listening and speaking, and mathematics (id. at p. 4). In the category of "personal and social growth," the report card reveals that the student met grade-level standards for "work[ing] and play[ing] cooperatively with others," "mov[ing] easily from one activity to another," and "respect[ing] class and school rules," and exceeded grade-level standards by "demonstrate[ing] effort and complet[ing] homework" (id. at p. 3).

On June 5, 2006, the district conducted an OT evaluation per the parent's request (Parent Ex. M). The OT evaluation report indicated that the student's teacher observed the student's "great difficulty functioning in class," as he displayed "difficulties with fine motor, visual perceptual/perceptual motor activities, and self-care skills" (id. at p. 1). The teacher noted that the

student "ha[d] a hard time following classroom routines, directions, and require[d] repeated verbal prompts to remain on task" (id.). During the administration of the Developmental Test of Visual Motor Integration (VMI), the evaluator observed that the student "attempted all activities which were presented to him, but required extra time to complete most tasks," and sometimes "required demonstration and prompting by the therapist" (id. at p. 2). The student "completed most of the evaluation at a very slow pace and wanted to write as little as possible" (id.). Although it contained no test scores, the OT evaluation report indicated that the student "present[ed] with a delay in fine motor coordination skills," "decreased spatial awareness," and "decreased visual perceptual/visual motor skills" (id. at p. 3). Regarding self-care, the evaluator reported the student to be independent with eating and dressing, but unable to lace or tie his shoes and to fasten small buttons (id.). At times, he requested assistance with opening difficult packages and containers and had "considerable difficulty following classroom routines" (id.). The evaluator recommended individual OT twice per week for 30 minutes, focusing on improving the student's "fine motor, visual perceptual/visual motor, bilateral integration skills, motor planning, and self-care skills for increased independence in the school environment" (id.).

On June 7, 2006, the CSE convened for the student's initial review (Parent Ex. D). In attendance were the parent, the district's regular education teacher, special education teacher, and school psychologist, a social worker, and the examining neuropsychologist (id. at p. 1). The CSE determined that the student was eligible to receive special education services as a student with an LD (id.). In its June 7, 2006 individualized education program (IEP), the CSE recommended general education with special education teacher support services (SETSS) five times per week in an 8:1 setting, speech-language therapy twice per week for 30 minutes in a 3:1 group setting, and individual OT twice per week for 30 minutes per session (Tr. p. 238; Parent Ex. D at pp. 1-2, 12-13). Testing accommodations were for double time and separate location, and the standard criteria would be applied when considering the student for promotion (Parent Ex. D at p. 13).

The CSE convened on January 23, 2007 for the student's annual review and to create an IEP for the remainder of the 2006-07 school year through January 2008 (Parent Ex. B). The meeting was personally attended by the district representative, and district regular education and special education teachers, with the parent participating telephonically (id. at p. 2). The January 23, 2007 CSE maintained the student's LD classification; made essentially identical program recommendations for general education with SETSS and OT as had been recommended on the previous June 7, 2006 IEP; and recommended a modification of the weekly speech-language therapy sessions from the previous IEP, recommending that for 2007-08 the student receive one individual speech-language therapy session and one group session (3:1) instead of two group sessions (id. at pp. 1-2, 11-12).

In January 2007, correspondence from the principal of the district school that the student attended during 2006-07 notified the parent that the student might not meet the requirements for promotion to the next grade, and that it was possible that "he may be held over in the same grade" for 2007-08 (Parent Ex. K at p. 1). The first grade report appended to the correspondence indicated that although the student had made "tremendous progress academically he is still not on grade level" (id. at p. 3). The first grade report proffered no suggestion that the student's promotion to second grade was in jeopardy, instead focusing on the student's strengths and academic potential (id. at pp. 2-3).

The CSE reconvened on May 7, 2007 for the student's annual review for 2007-08 (Parent Ex. C).² The CSE was comprised of the parent, district representative, district regular education and special education teachers, occupational therapist, and speech-language therapist (*id.* at p. 2). The May 7, 2007 CSE maintained the student's LD classification; recommended a general education program and speech-language therapy services as contained in the previous IEP of January 23, 2007; recommended increasing the student's SETSS services from the previous IEP from five to ten times per week; and recommended modifying OT services to one individual session for 30 minutes and one group session (3:1) for 30 minutes per week instead of two individual sessions as in the previous IEP (Parent Ex. C at pp. 1-2, 14-16).

On or about June 16, 2007, the parent signed an enrollment contract with Windward for the 2007-08 school year (Tr. p. 260; Parent Ex. I at p. 2). In August, 2007, the parent notified the district via letter that the student would be attending the Windward School, and that she would be "looking to the district for reimbursement" (Dist. Ex. 4). On or about August 28, 2007, the CSE chairperson responded to said notification, and advised the parent that the district was adopting the position that her notification was deficient under 34 C.F.R. § 300.148(d)(1)(i), (ii) because the parent "failed to state [her] concerns which would apprise the CSE of [her] reasons for rejecting the [May 7, 2007] IEP and/or placement for this particular [student]" (Dist. Ex. 5). The district's response also invited the parent "to contact the CSE within two (2) days of receipt of this letter so that we may address your concerns prior to the beginning of the school year" (*id.*).

By due process complaint notice dated October 23, 2007, the parent, through her attorney, requested an impartial hearing (Parent Ex. A). The parent formally rejected the district's May 7, 2007 IEP, advised the district of the student's private placement at Windward, and requested reimbursement (*id.* at pp. 3-4). She alleged that the district deprived the student of a free appropriate public education (FAPE) on numerous procedural and substantive grounds, including: (1) failure to properly and timely evaluate and assess student's present levels of performance prior to the CSE; (2) failure of the CSE to include an additional parent member; (3) failure of the CSE to include a social worker; (4) failure of the CSE to include a school psychologist; (5) failure of the placement and program recommended by the CSE to meet the student's individual needs, specifically, his dyslexia; (6) failure of the IEP to denote when a copy of same was given to the student's parents; (7) failure of the IEP to indicate the student's health management needs;³ (8) failure of the CSE to allow for the meaningful participation and involvement of the student's mother in the formulation of the student's IEP goals and objectives; (9) failure of the CSE to develop IEP goals that were "clear, unambiguous, and sufficiently challenging;" (10) failure of the CSE to indicate the method of measuring and determining the student's progress toward the proposed goals and objectives; (11) failure of the IEP to indicate the number of progress reports and to identify the person(s) responsible for determining the student's progress; and (12) that the CSE engaged in "predetermination" (*id.*). The parent also sought a pendency determination with respect to the related SETSS, OT, and speech-language therapy services that the student was already receiving under the January 23, 2007 IEP (*id.* at p. 2).

² The hearing record offers no explanation as to why the district reconvened in May 2007 and held another annual review for the 2007-08 school year. However, the May 7, 2007 IEP indicates that the recommendations on that IEP were effective on May 8, 2007 through May 8, 2008 (Parent Ex. C at p. 2).

³ The due process complaint notice references a previous diagnosis of severe asthma (Parent Ex. A. at p. 3).

An impartial hearing was convened on March 13, 2008 and concluded on May 16, 2008, after three days of testimony. During the impartial hearing, the district conceded that it did not offer the student a FAPE for the 2007-08 school year (Tr. pp. 14-15, 24, 37). By decision dated May 27, 2008, the impartial hearing officer determined that: (1) as conceded by the district, it failed to offer the student a FAPE; (2) the parent met her burden and established that her unilateral placement of the student at Windward was appropriate; and (3) that equities favored the parent and entitled her to tuition reimbursement for the student's 2007-08 school year at Windward (IHO Decision at pp. 2, 6-7, 8).⁴

The district appeals from the impartial hearing officer's decision, asserting that: (1) the parent failed to meet her burden of proving that the Windward program was appropriate for the student; (2) the parent made payments to Windward prior to notifying the district of her concerns about its recommended program, thus illustrating her lack of cooperation; (3) the parent failed to provide proper notice to the district of her unilateral placement under 20 U.S.C. § 1412(a)(10)(C)(iii)(I) and 34 C.F.R. § 300.148(d)(1) in that her notice failed to specifically state the nature of her concerns with the district's proposed placement; and (4) the parent was not entitled to tuition reimbursement.

The parent answers, contending that she met her burden to demonstrate the appropriateness of the Windward placement, and that she sufficiently communicated her concerns and dissatisfaction with the district's proposed placement to the student's prior teacher, thereby placing the district on notice and discharging her duty under the Individuals with Disabilities Education Act (IDEA) and federal and State regulations.

As noted above, the district conceded that it failed to offer the student a FAPE for the 2007-08 school year (Tr. pp. 14-15, 24, 37; IHO Decision at pp. 2; 6-7). Therefore, that issue is not before me on appeal. What remains at issue in this appeal is the appropriateness of the parent's unilateral placement at Windward for the 2007-08 school year, and the equity considerations for tuition reimbursement.

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 that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living (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]).⁵

⁴ The impartial hearing officer's decision also addressed the pendency issue raised in the parent's due process complaint notice; however, as neither party is appealing his ruling on that issue, I need not discuss it further in my decision.

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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

New York State amended its 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 law took effect for impartial hearings commenced on or after October 14, 2007 and therefore applies to the present case.

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. 2008]). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; 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). 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 (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]).

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; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

Windward is a private school which addresses the needs of "children with language-based learning disabilities, who possess average to superior intelligence, and are not meeting their academic potential in a regular school setting" (Parent Ex. E at p. 1). Staff at Windward use the Preventing Academic Failure (PAF) methodology, which is a multisensory Orton-Gillingham (OG) based program, to teach reading (id. at pp. 1-2).

The hearing record indicates that during the 2007-08 school year, the student received "direct and explicit instruction" in all areas of the language-based curriculum (Parent Ex. E at p. 4). In addition to language arts and mathematics, the student had regularly scheduled periods of social studies, science, art, music, library, and physical education (id.). All areas of the curriculum were described in the hearing record as "language-based, sequential, and highly structured" (id.). In a report from the division head of Windward's lower school dated January 2008, he described the type of language-based programming used at Windward as "imperative" for the student because "language skills [were] key tools that [would] help [the student] to develop and express his reasoning and problem-solving abilities in all areas of the curriculum" (id.).

The hearing record reflects that the student had three 45-minute periods of language arts instruction every day focusing on oral language, reading, spelling and writing (Dist. Ex. 10; Parent Ex. E at p. 1). The PAF methodology provided the student with systematic instruction in fundamental writing and helped to develop expository writing skills (Parent Ex. E at p. 2). PAF was described as a program that "focuse[d] on the construction of sentences, paragraphs and longer compositions," and "develop[ed] the skills necessary to plan and organize information to formulate outlines and generate coherent paragraphs and compositions" (id.). Windward's division head advised that at Windward, "[a]s reading and writing skills are learned, they are reinforced in all academic areas" (id.).

According to the hearing record, Windward placed the student in an instructional group for language arts with other children with similar needs and abilities (Parent Ex. E at p. 3). Regarding

mathematics, the student received a daily period of instruction in a group based on instructional level and rate of progress (*id.*). The student used a second grade edition of a mathematics textbook that was part of a math program designed to develop a strong understanding of the "language and vocabulary of math" (*id.*). Concepts were broken down and introduced step-by-step (*id.*). Computation skills were reinforced with "manipulatives, visual and pictorial cues" (*id.*). Windward's philosophy emphasized "understanding the language of word problems," and focused "on identifying key words and operations and identifying important information" (*id.* at pp. 3-4). Review and reinforcement of previously taught material was built into Windward's program (*id.* at p. 4).

On January 15, 2008, the parent's private consultant conducted a classroom observation of the student in his educational setting at Windward (Tr. p. 100; Parent Ex. Z). She observed the student for two contiguous 45-minute class periods, namely "skills" and reading classes, taught by a language arts teacher (Parent Ex. Z at p. 2). In her January 15, 2008 evaluative report, the consultant observed that in the classroom, children were noted to interact with each other in a "supportive," "patient," and "kind" manner (*id.*). She characterized the teacher's implementation of the lessons that day as "flawless," and considered the amount of time that the teacher was able to engage the students in their lessons prior to their need for a two-minute stretch (70 minutes) as "remarkable" (*id.*). She noted that the clear majority of class time was directed toward "the planned, hierarchical, multi-sensory phonics lesson" (*id.*). During the 90-minute observation period, the consultant counted 13 clearly defined aspects of sequentially related instruction presented by the teacher (*id.*). The consultant also conferred with the student's language arts teacher, who noted a decrease in the student's episodes of frustration in her class, attributing this development to his realization that Windward "[was] a safe place to make mistakes" (*id.* at p. 5). The language arts teacher reported to the consultant that attention was not an issue for the student, and described him as always remaining "on task," and as having mastered the school's predictable routines (*id.*).

The hearing record reflects that the parent's private consultant spoke directly only with the student's language arts teacher, and neither observed the student in any other classes nor interviewed any of his other instructors (Tr. pp. 134-35, 155). The consultant testified that at the time of the classroom observation, she was aware that the student "ha[d] some struggles with math" (*see* Tr. pp. 154-55; Parent Ex. Z at p. 5), yet did not make any effort to speak with the student's mathematics teacher (Tr. pp. 133-34). Consequently, she conceded that while she was aware of Windward's general approach used in the school, she was not aware what specific methods the school used to address the student's difficulties in mathematics (Tr. pp. 134-37, 154-55).

The hearing record includes a 16-page progress report from Windward dated February 2008 that reflected the student's grades from November 2007 and February 2008 (Parent Ex. V at pp. 1-16; *see also* Parent Ex. F. at pp. 1-16). The report card included a rubric of various indicators of the student's progress (Parent Ex. V at pp. 1-2, 4-7, 9-10, 12-16). The February 2008 progress report reflected that the student progressed from November 2007 in language arts as demonstrated by improvement in working independently ("occasionally" progressed to "usually") (*id.* at p. 2). The student also demonstrated effort in skills and writing, and maintained attention and focus in skills, reading and writing (all areas progressed from "usually" to "always") (*id.* at p. 3). The student further showed progress in writing his full name (progressed from "occasionally" to "usually") (*id.* at p. 5), and writing a statement with a capital letter at the beginning and a period at the end, and distinguishing between a statement and a question (progressed from "needs frequent

teacher support" to "completes structured activities with some teacher support") (id. at p. 7). Teacher comments included on the February 2008 progress report characterized the student as a "hard worker who [was] making steady progress in language arts. He [was] reading with more expression, and he [was] becoming more aware of his miscues during oral reading" (id. at p. 8).

In mathematics, the February 2008 progress report reflected the student's progress in math as exemplified by his identification of groups from 10 to 100, his writing of numbers as tens and ones, as standard numerals, and "in a variety of other ways" (progressed from "completes structured activities with some teacher support" to "completes structured activities successfully") (Parent Ex. V at p. 10). Teacher comments in this section characterized the student as "making good progress in math" and "usually motivated to do his work" (id. at p. 11).

In science, according to the February 2008 progress report, the student demonstrated progress in his understanding and application of concepts for life science, his working cooperatively and effectively in a group, and his class participation (all progressed from "occasionally" to "usually"), and in his asking questions to expand his scientific literacy (progressed from "rarely" to "occasionally") (Parent Ex. V at p. 13).

In art, according to the February 2008 progress report, the student demonstrated progress in following classroom routines, completing in-class assignments in a timely manner, and participating appropriately (all progressed from "usually" to "always") (Parent Ex. V at p. 14). In music, the student progressed in demonstrating effort (progressed from "usually" to "always") (id. at p. 15). In physical education, the student progressed in working cooperatively in group activities, participating appropriately, and maintaining attention and focus (all progressed from "occasionally" to "usually") (id. at p. 16).

The district contends that Windward was not an appropriate placement during 2007-08 because it did not offer the related services, specifically speech-language therapy and OT, that the student required in order to receive meaningful educational benefit (Tr. p. 146).⁶ Under the facts of this case, the district's argument is not persuasive. Speech-language therapy services were not recommended in the May 11, 2006 speech-language evaluation report (Parent Ex. Q at p 2). Both the June 7, 2006 and the January 23, 2007 IEPs included academic performance and learning characteristics specific to the student's speech-language needs that reflected the May 11, 2006 evaluation report (Parent Exs. B at p. 4; D at p. 4). Although the June 7, 2006 IEP and the January 23, 2007 IEP recommended speech-language therapy as a related service, neither contained a clear rationale for the recommendations; in fact, each IEP contradicted the other, insofar as each indicated in one section that the student demonstrated average expressive language skills, a "very mild" delay in the area of processing word classes, and some "misarticulations" due to missing teeth, and, in another section, indicated "below average" articulation (compare Parent Ex. B at pp. 4, 11-12, with Parent Ex. D at pp. 4, 10-12). However, the hearing record offers no updated evaluative information regarding any articulation or other speech-language need demonstrated by the student and the resultant at the time of the June 7, 2006 and January 23, 2007 IEPs, and neither IEP contained speech-language goals (see Parent Exs. B; D).

⁶ It appears from the hearing record that the district furnished the parent with authorizations for the student to receive speech-language therapy and OT from a district approved provider at district expense at the time of the impartial hearing (Tr. pp. 27-28).

As for the most recent May 7, 2007 IEP, a speech provider was in attendance at that CSE meeting (Parent Ex. C at p. 2). Although the hearing record does not include an updated speech-language evaluation report, the May 7, 2007 IEP indicates that on April 30, 2007 results of the "PASP"⁷ indicated that the student's instructional level in the area of phonemic awareness was "Level C," and that similar to the May 11, 2006 speech-language evaluation, informal assessment discovered "mild delays" in the student's expressive language and articulation (*id.* at p. 5). The May 7, 2007 IEP included information regarding the student's ability to recall and organize auditory information of increased length and complexity, sentence and word structure, work on verb tense and plurality, word order in sentences, phonemic awareness skills, and discrimination and manipulation of syllables in multi-syllabic words (*id.*). It characterized his articulation as "mostly intelligible" with "some errors" for the sounds represented by "r," "s," "th," and "v" and sequencing multi-syllabic words (*id.*). The May 2007 IEP recommended that the student receive speech-language therapy once per week for 30-minute sessions in a 3:1 group setting and once per week for 30-minute sessions individually, with a focus on repeating past tense, plural, and articulation sounds (*see* Parent Ex. C at pp. 1-2, 4-5, 11, 14-16). The hearing record offers no explanation as to why the May 7, 2007 CSE made a recommendation for speech-language therapy, as the speech-language evaluator did not recommend speech-language therapy for the student in the May 11, 2006 evaluation report and there is no updated speech-language evaluative information to demonstrate the student's need for speech-language as a related service. I further note that the June 2006 and January 2007 CSE meetings that occurred after the May 11, 2006 speech-language evaluation included no speech-language goals and objectives (*see* Parent Exs. B at pp. 7-10; D at pp. 7-10). However, speech-language goals and objectives were included in the May 7, 2007 IEP (Parent Ex. C at p. 11).

From my review of the February 2008 Windward report card rubric, it appears that skills similar to the speech-language goals and objectives contained in the student's May 7, 2007 IEP were addressed by the student's language arts program at Windward (*see* Parent Ex. V at pp. 2-8). For example, the May 7, 2007 IEP addressed the student's need to "retell complex and lengthy information in structured tasks," to "generate complex sentences with correct word order in structured conversation," and to "discriminate beginning and final consonants in single- syllable spoken words" (Parent Ex. C at p. 11). The Windward report card indicated that students were introduced to phonetically regular elements of English in a carefully structured sequence and included specific skills on the language arts progress note that focused on common suffixes pertaining to plurals and verb tenses (e.g., hats/mixes/mixing/mixed), which was an area of expressive difficulty for the student noted in the January 15, 2008 school observation report written by the parent's private educational consultant (*see* Parent Ex. Z at pp. 5-6). The report card further indicates that students were directly taught strategies to derive meaning from oral language and text (Parent Ex. V at pp. 5-6). The Windward program addressed the production of linguistically correct oral and written sentences, and the writing program was related to listening, speaking and reading activities (*id.* at p. 7). Mathematics, science and social studies classes developed the student's skills in word retrieval, ability to ask pertinent questions, expressing thoughts clearly and expressing ideas related to a topic (*id.* at pp. 9, 12-13). Regarding the student's articulation, the May 7, 2007 IEP noted an April 30, 2007 "informal assessment" of the student's articulation

⁷ The hearing record does not contain a definition or explanation of the acronym "PASP," nor does it explain the classification "Level C."

characterizing his then current level of performance as a "mild delay" and "mostly intelligible" (Parent Ex. C at p. 5).⁸

Considering the above, although speech-language therapy may have been an appropriate related service for the student, the hearing record does not demonstrate that speech-language was a primary need for the student. Furthermore, even though Windward did not provide speech-language therapy to the student, it is evident from the hearing record that its educational program did address several of the student's speech-language needs within its classroom structure. Therefore, under the circumstances of this case, I find that the lack of speech-language therapy services at Windward did not render the private placement inappropriate for this student.

Regarding OT services, on June 5, 2006 the district conducted an OT evaluation per the parent's request (Parent Ex. M at p. 1). At that time, the focus of treatment was to improve the student's fine motor, visual perceptual/visual motor, bilateral integration skills, motor planning, and self-care skills for increased independence in the school environment (*id.* at p. 3). Although almost one year later, the May 7, 2007 IEP recommended that the student receive OT services once per week for 30-minute sessions in a 3:1 group setting and once per week for 30-minute individual sessions, and included OT goals and objectives (*see* Parent Ex. C at pp. 7, 12-13), the hearing record offers little information regarding the student's level of performance relating to OT at that time and does not indicate his primary OT needs. Similar to some of the skills targeted in the OT goals and objectives on the May 7, 2007 IEP, the February 2008 Windward report card rubric shows that the Windward program addressed the student's skills in the areas of handwriting, following class routines, interacting positively with peers, and following single and multi-level directions (Parent Ex. V at pp. 1-3, 5, 7, 9-10, 12-16). Accordingly, even though Windward did not provide OT services to the student, its program nevertheless addressed several of the student's OT needs and I find that the lack of OT services did not render the private placement inappropriate for this student.

At the time of the impartial hearing, the parent testified she had already attended two parent-teacher conferences discussing the student at Windward, most recently four to six weeks prior to the hearing (Tr. pp. 217-18). She explained that she had met with the student's homeroom, language arts, mathematics and social studies teachers; all of whom told her that the student was doing well in school (Tr. p. 218), and none of whom had ever reported to her that the student was not progressing (Tr. p. 220). The parent also testified that her son's mathematics teacher sent home several notes with the student's work citing his progress (Tr. p. 218).

The parent's educational consultant, who holds a doctorate in philosophy, speech pathology, and audiology (Parent Ex. BB at p. 1), not only conducted the classroom observation of the student (Tr. p. 100; Parent Ex. Z), but also testified on behalf of the parent during the impartial hearing (Tr. pp. 77-183). She was familiar with the Windward program and testified about the school and its ability to help the student (Tr. pp. 95-96, 109-12, 118, 133, 134-35, 153-55). She identified the student's reading disability and his dyslexia as his two greatest deficits (Tr. p. 161). She testified as to the details of how the program dealt with the student's reading and writing issues (Tr. pp. 111-12), and how the classroom environment created by the student's

⁸ This assessment is not contained in the hearing record.

language arts teacher addressed the student's needs (Tr. pp. 113-18). She opined that the student was appropriately placed at Windward (Tr. pp. 110,118, 133).

The district argues that several deficiencies render the educational consultant's classroom observation of the student defective, including: (1) the two hour duration of the observation (Tr. p. 147); (2) that the educational consultant met only with the student's language arts teacher (Tr. pp. 133-34); (3) that she did not meet the student personally prior to conducting her observation (Tr. p. 98); and (4) that she admitted her lack of knowledge of the student's behavioral difficulties in mathematics and the manner in which Windward was addressing those behaviors (Tr. pp. 133-37, 154-55; Parent Ex. Z at p. 5).

I concur that the parent's educational consultant's report could have addressed the student's overall program at Windward more effectively had the consultant interviewed the student himself, as well as his other teachers, particularly his mathematics teacher. However, the consultant's report did address the specific methods employed by Windward to address the student's reading and behavioral needs. Additionally, I note that the Windward progress reports contained in the hearing record provided detailed descriptions of the methodologies and focus points addressed by his teachers and documented measurable progress made by the student across multiple academic and behavioral categories not addressed in the consultant's report (see Parent Exs. F; V).

After carefully considering the totality of the evidence contained in the hearing record, it is apparent that the Windward placement was reasonably calculated to enable the student to receive educational benefit. Consequently, I am inclined to concur with the impartial hearing officer's determination that the parent met her burden of persuasion and demonstrated that Windward was an appropriate placement for the student during the 2007-08 school year, and therefore prevailed with respect to the second Burlington criterion for an award of tuition reimbursement (IHO Decision at pp. 2, 7-8).

The final criterion for a reimbursement award is that the parent's claim be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d at 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). With respect to equitable considerations, the IDEA provides that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, fail to engage with potential placements offered by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181 at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; see also Voluntown, 226 F.3d at n.9).

The IDEA allows that tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); Application of a Child with a Disability, Appeal No. 07-133; Application of the Dep't of Educ., Appeal No. 07-120; Application of the Dep't of Educ., Appeal No. 07-115; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 07-079; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 07-038; Application of the Dep't of Educ., Appeal No. 07-032; Application of the Bd. of Educ., Appeal No. 06-122; Application of a Child with a Disability, Appeal No. 06-069; Application of the Dep't of Educ., Appeal No. 06-057; Application of a Child with a Disability, Appeal No. 06-042; Application of a Child with a Disability, Appeal No. 06-041; Application of a Child with a Disability, Appeal No. 06-035; Application of the Bd. of Educ., Appeal No. 05-092; Application of the Bd. of Educ., Appeal No. 04-022).

In the instant appeal, the district's equitable arguments against tuition reimbursement are essentially twofold: (1) the parent's tuition payments to Windward made prior to her notifying the district of the unilateral private placement demonstrated her unwillingness to cooperate with the district in formulating an appropriate special education program for her son; and (2) the parent's August 2007 notification to the district of her unilateral placement of the student violated the requirements of the IDEA and federal regulations (see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 C.F.R. § 300.148[d][1]).

The parent testified that she first communicated her intention to seek an alternative placement for her son after receiving the district's January 2007 letter advising her that her son's promotion to second grade may be in doubt (Tr. p. 203; Parent Ex. K at p. 1). The parent testified that she voiced her concerns with the proposed program when she attended a conference with the student's first grade teacher (Tr. pp. 202-04), and that she further voiced dissatisfaction with the proposed program at the May 7, 2007 CSE meeting (Tr. pp. 206-08).⁹

She further testified that during the May 7, 2007 CSE meeting, she inquired about the availability of other public programs to address the student's needs, but was informed that "there was nothing available at the school" (Tr. pp. 241-42). However, the parent denied an unwillingness to accept a placement at any school other than Windward, contending that the district never offered

⁹ According to her testimony at the impartial hearing, the parent was dissatisfied because the student's first grade teacher informed her that "[n]one of the nine pull outs that [the student] had [during the school day] and the four times after school ever addressed the [student's] dyslexia" (Tr. p. 207).

her an alternative (Tr. pp. 242, 245-46). The parent conceded that she executed the Windward enrollment contract and made two payments to the school before she notified the district of the unilateral placement (Tr. pp. 258-65).¹⁰ She added that, pursuant to the district's request set forth in its letter of August 28, 2007, which responded to the parent's mid- August 2007 notice of unilateral placement (Dist. Ex. 5), she immediately telephoned the CSE chairperson upon her receipt of the letter on two separate occasions over two days at the telephone number listed thereon, leaving two telephone messages that went unanswered (Tr. pp. 210-16, 265-68). She testified that she did not receive any response from the district subsequent to her leaving the telephone messages until she received the district's November 6, 2007 response to her due process complaint notice (Tr. p. 216; Dist. Ex. 2).

The district proffered no testimonial or documentary evidence to contradict this testimony.

Based on the foregoing, I do not find the district's first argument alleging the unwillingness of the parent to cooperate with the CSE, to be sufficiently supported by the hearing record. The hearing record indicates that the parent personally attended the May 7, 2007 CSE meeting (Tr. p. 206; Parent Ex. C at p. 2), and that she complied with the district's request to contact it pursuant to its August 28, 2007 correspondence (Tr. pp. 210-16, 265-68). The hearing record does not show why the parent waited three months after the May 7, 2007 CSE meeting to advise the district that she was rejecting the IEP or why she did not advise the district of her June and July 2007 actions regarding private placement. However, the hearing record does not show that the timing of her mid-August 2007 notice of unilateral placement was designed to impede the district from responding in a timely manner to reconvene a CSE to address her concerns. Moreover, the parent's decision to privately place the student apparently came about subsequent to the May 7, 2007 CSE meeting; therefore, the parent did not withhold relevant information during the meeting (see Application of a Child with a Disability, Appeal No. 07-038).

I now turn to the district's argument that the parent's notice of unilateral placement was late and further, was substantively defective in that it did not specify her concerns regarding the proposed placement. The parent testified that she forwarded her notification letter to the district "in the middle of August" 2007 (Tr. p. 212). Windward opened for the 2007-08 school year on September 10, 2007 (Parent Ex. J at p. 1). Based on the hearing record, I conclude that the parent's notification to the district satisfied the temporal requirement under 34 C.F.R. § 300.148(d)(1) in that it was provided at least ten business days prior to the student's removal from the public placement.

With respect to its substantive content, the parent's August 2007 letter failed to state her concerns regarding the proposed public placement and was therefore not in compliance with notification requirements. Upon receipt of the parent's notice, the district properly inquired of the parent what her concerns were. However, the hearing record indicates that it was the district that failed to follow-up on two telephone messages left by the parent in response to its August 28, 2007 correspondence, and it was the district that took no further action in response to the parent's notification until issuing its November 6, 2007 response to her due process complaint notice (Tr.

¹⁰ The hearing record indicates that the parent made two payments to Windward prior to her notification of the district of the private placement, one for \$2,500.00 on June 21, 2007 (Tr. p. 263; Dist. Ex. 9 at p. 1; Parent Exs. X; DD at p. 9) (contemporaneous with her signing of the Windward enrollment contract), and one for \$3,677.00 on July 31, 2007 (Tr. p. 264; Dist. Ex. 9 at p. 1; Parent Exs. X; DD at p. 8).

pp. 210-16, 265-68). I note that the CSE could have met at any time prior to the beginning of the 2007-08 school year to address the parent's concerns, or possibly shortly thereafter.

Under these circumstances, I concur with the impartial hearing officer that the parent should not be denied tuition reimbursement based on equitable reasons (IHO Decision at pp. 6-8). I do not however concur with the impartial hearing officer's suggestion that a district's concession that it did not offer the student a FAPE should always preclude the district from reasonably developing the hearing record as to why the district did not offer a FAPE or as to why the equities might preclude reimbursement.

Lastly, I will address a concern with respect to the impartial hearing officer's decision. Although it is clear that the impartial hearing officer derived his factual findings from the exhibits and testimony in the hearing record, he failed to cite to any specific exhibits or pages in the hearing transcript to support the factual determinations contained in his decision. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer is reminded to comply with State regulations and cite to relevant exhibits and page numbers in the hearing record in future decisions (Application of a Student with a Disability, Appeal No. 08-028).

I have considered the district's remaining contentions and I find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 27, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**