



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-081

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

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

Skyer, Castro, Foley & Gersten, attorney for respondents, Jesse Cole Foley, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that respondents' (the parents') unilateral placement of their daughter at Windward School (Windward) was appropriate and ordered the district to reimburse the parents for their daughter's tuition costs at Windward for the 2007-08 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending sixth grade at Windward. Windward is described in the hearing record as an independent co-educational private day school focused exclusively on offering a multisensory curriculum to students with language-based disabilities, who possess average to superior intelligence, yet are not meeting their academic potential in traditional classroom settings (Parent Ex. J at pp. 1, 3). Windward has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Parent Ex. J; 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]).

The hearing record is not well developed and it provides sparse information regarding the student's educational history and her special education needs for the 2007-08 school year. The hearing record reflects that the student's cognitive abilities were within the average range, she had been found to have dyslexia, and she had a history that included academic delays and difficulty with focus and attention (Parent Exs. E at pp. 1-2; F at p. 2; G). The student's mother testified that

the student had difficulty with reading decoding and comprehension, as well as writing (Tr. p. 24). The student's individualized education program (IEP) developed by the June 4, 2007 Committee of Special Education (CSE) indicated that she exhibited delays in reading, mild delays in math computation and had difficulty sounding out multi-syllabic words (Parent Ex. C at p. 3).

The hearing record indicates that the student has always attended private school (Tr. pp. 21-22, 26; see Parent Ex. E. at pp. 1-2). The student attended a private school other than Windward from kindergarten through fourth grade (Tr. pp. 21-22; Parent Ex. E at p. 2). The student was first evaluated by the CSE in the third grade due to academic delays and difficulty with her focus and attention (Tr. pp. 24-25; Parent Ex. E. at p. 2). The student was found eligible for special education services as a student with a learning disability and was recommended to attend a 12:1+1 program with counseling as a related service (Parent Ex. E. at p. 2). The parents placed the student in Windward for her fifth grade year in September 2006 (id.; see Tr. p. 26).

At the impartial hearing, a December 5, 2006 letter was submitted into evidence entitled "To Whom It May Concern," from a private psychologist which indicated that the psychologist had conducted a neuropsychological evaluation of the student in March 2004 (Parent Ex. G).<sup>1</sup> The letter stated that the results of the March 2004 evaluation "clearly indicated that [the student] met the criteria for a diagnosis of dyslexia" (id.). According to the December 5, 2006 letter, the recommendations made in the March 2004 evaluation were that the student "be transferred from her mainstream school to a specialized school setting" that addresses the needs of students who have learning disabilities (id.). The letter further stated that such a transition was "educationally necessary and medically driven" (id.). The letter did not indicate that the psychologist had conducted any updated evaluations of the student since his March 2004 evaluation.

On April 3, 2007, the district conducted a psychoeducational re-evaluation (Parent Ex. F at p. 1). The psychoeducational evaluation report indicated that administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score (percentile rank) of 104 (58th percentile) in the average range (id. at p. 2). Additional results included a verbal comprehension composite score of 112 (79th percentile) in the high average range, a perceptual reasoning composite score of 88 (21st percentile) in the low average range, a working memory composite score of 99 (47th percentile) in the average range, and a processing speed composite score of 109 (73rd percentile), also in the average range (id. at pp. 2, 4).

Administration of the Woodcock-Johnson Tests of Achievement (WJ-III ACH) yielded a broad reading standard score of 92 (29th percentile) with a below grade level equivalent score of 4.4; a broad math standard score of 96 (40th percentile) with an on grade level equivalent score of 5.2; and a math calculation skill standard score of 98 (46th percentile) with an on grade level equivalent score of 5.5 (Parent Ex. F at pp. 3-4).

Socially and emotionally, the student was described by the evaluator as able to interact with others appropriately and able to initiate and maintain friendships (Parent Ex. F at p. 4). The student was also described to display age appropriate behaviors and concerns (id.). The evaluator

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<sup>1</sup> The March 2004 neuropsychological evaluation referenced in the December 5, 2006 letter was not made part of the hearing record.

did not make any recommendations in the report, instead stating that recommendations would be made at the CSE meeting (id.).

On April 3, 2007, a social history update was conducted by the district with the student's father acting as the informant (Parent Ex. E).<sup>2</sup> The evaluator indicated that the student had been evaluated in spring 2005, at the request of her parents (id. at p. 1).<sup>3</sup> The evaluator further indicated that an IEP dated May 3, 2005 classified the student as having a learning disability and recommended a 12:1+1 class, with counseling as a related service (id.). The evaluator stated that the student had been receiving these services at private schools, most recently at Windward (id.).

The student's father stated to the evaluator that his daughter had adjusted well to Windward and had "made a lot of progress" (Parent Ex. E at p. 2). Specifically, the father stated that the student participated more in class and "ha[d] a good report card" (id.). According to the student's father, "a drawback" to Windward was the amount of time that the student had to spend going to and coming home from school (id.). The student's father indicated that he would consider transferring the student to a school that had "the characteristics of Windward," but was closer to the student's home (id.). The student's father indicated that he did not believe that the student had any problems other than her learning disability and that she was not receiving counseling at that time (id.). In the social emotional domain, the student's father stated that the student behaved well at home, and although she could be stubborn at times, she had good communication with her parents (id. at p. 3). The student's father further reported to the evaluator that the student was sociable, made friends easily and was always respectful with adults (id.). The evaluation report indicated that parental rights were reviewed with the student's father (id.).

On June 4, 2007, the CSE convened to review the student's educational program and to make recommendations for the student for the 2007-08 school year (Parent Ex. C). Meeting attendees included the student's father, a district representative, a regular education teacher, an additional parent member, a school psychologist and a social worker (id. at p. 2). A special education teacher from Windward participated in the CSE meeting via telephone (id.). The June 2007 CSE continued the student's classification as a student with a learning disability, recommended that the student attend a collaborative team teaching (CTT) class with a 12:1 teacher to student ratio at a district school and removed the related service of counseling from the student's IEP (id. at pp. 1, 10).<sup>4</sup>

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<sup>2</sup> The April 3, 2007 social history update refers to a previous social history performed on February 6, 2005 (Parent Ex. E at p. 2), which is not part of the hearing record.

<sup>3</sup> Evaluations dated spring 2005 were not made part of the hearing record.

<sup>4</sup> "Collaborative team teaching," also referred to in the State regulations as "integrated co-teaching services," means "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to an integrated co-teaching class shall minimally include a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) issued an April 2008 guidance document entitled "Continuum of Special Education Services for School-Age Students with Disabilities," which further describes integrated co-teaching services (see <http://www.vesid.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

By letter dated August 20, 2007 to the CSE chairperson, the parents, through their attorney, notified the district that they rejected the IEP, would be placing their daughter at Windward as of the first day of school for the 2007-08 school year and would seek funding from the district for this placement (Parent Ex. B).

By due process complaint notice dated March 24, 2008, the parents requested an impartial hearing seeking funding for their daughter's tuition at Windward for the 2007-08 school year (Parent Ex. A at p. 1). The parents, through their attorney, alleged that the June 4, 2007 IEP contained "procedural flaws" and that the recommended placement was "substantively inappropriate," thereby resulting in a denial of a FAPE to the student (*id.*). Specifically, the parents contended that "the several pages of annual goals and short term objectives presented for [the student] are incomplete," generic and vague (*id.* at p. 2) and that the offered placement did not meet the student's instructional and social needs (*id.*).

The impartial hearing took place on June 9, 2008 (Tr. p. 1). At the impartial hearing, the district conceded, without explanation, that it had failed to offer a FAPE to the student for the 2007-08 school year (Tr. p. 14; IHO Decision at pp. 2, 3). By decision dated July 3, 2008, the impartial hearing officer determined that, as conceded by the district, a FAPE had not been offered to the student for the 2007-08 school year (IHO Decision at p. 3). The impartial hearing officer then determined that, although the parents had not presented the testimony of any witnesses from Windward, they had met their burden to show that their unilateral placement of the student at Windward was appropriate (*id.* at pp. 3-4). More specifically, the impartial hearing officer found that the testimony of the student's mother, teacher progress reports and two report cards from Windward, as well as general information about the school from its website, introduced at the impartial hearing, demonstrated that Windward offered a specifically designed program to meet the student's educational needs (*id.* at p. 3). The impartial hearing officer found that the hearing record demonstrated that "the CSE did not consider this student to have complex disabilities as reflected in its recommendation of CTT without any other supports" (*id.* at p. 4). The impartial hearing officer went on to state that she could "envision the specific program that this student is receiving to address her defined needs" and that the report cards and the student's mother's testimony demonstrated that the student was making academic and social and emotional progress (*id.*). Lastly, the impartial hearing officer found that there were no equitable considerations that barred tuition reimbursement to the parents and that the amount of tuition they were seeking was "reasonable" (*id.* at pp. 4-5). The impartial hearing officer ordered the district to reimburse the parents for their daughter's tuition costs at Windward for the 2007-08 school year upon proof of payment of such costs.

The district appeals, arguing that the parents did not meet their burden to show that Windward was an appropriate placement for the student for the 2007-08 school year. The district argues that the only witness presented by the parents, the student's mother, did not know the student's grade level in reading, decoding, listening or reading comprehension and that the documentary evidence presented only gave vague, generalized information about Windward. The district further argues that the progress reports in the hearing record should not be relied upon because progress should be measured from the likelihood of progress at the time that the student was placed at Windward, not progress made after enrollment. Furthermore, the district argues that progress itself does not demonstrate the appropriateness of a unilateral placement. The district

argues that the impartial hearing officer's statement that she could "envision" the student's program at Windward further proves that the parents' did not meet their burden.

The district further argues that the impartial hearing officer erred in considering evidence that was outside of the hearing record and thus, her decision is void as a matter of law. Specifically, the district contends that the impartial hearing officer described the Orton-Gillingham reading program in a way that was not supported by the hearing record. The district also contends that there was no information in the hearing record to support the impartial hearing officer's finding that "since Windward is NYS-approved, the classroom teachers all must be certified in special education" (IHO Decision at p. 4). The district further argues that the impartial hearing officer erred in awarding tuition reimbursement based in part on her finding that the sums sought by the parents were not significant. Lastly, the district argues that the impartial hearing officer impermissibly ordered reimbursement for the student's lunches at Windward. The district seeks annulment of the impartial hearing officer's decision in its entirety, or in the alternative, reduction of the award of tuition by the amount for lunches at Windward.

The parents answered, requesting that the impartial hearing officer's decision be upheld in its entirety.

Two primary purposes of the IDEA (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE<sup>5</sup> that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400 [d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the 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 (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

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<sup>5</sup> 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]).

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).

On August 15, 2007, 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.

In this case, the district conceded at the impartial hearing that it did not offer the student a FAPE for the 2007-08 school year (Tr. p. 14; IHO Decision at pp. 2, 3). Therefore, that issue is not before me on appeal. What remains at issue in this appeal is the appropriateness of the parents' placement of the student at Windward, and the equity considerations for tuition reimbursement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not 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 Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F. 3d 356, 364 [2d Cir. 2006][quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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])).

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).

In this case, the district argues that the parents did not meet their burden to show that Windward was an appropriate placement for the student for the 2007-08 school year. For the reasons set forth below, I do not find the district's arguments to be persuasive in this case because there is sufficient unrebutted evidence in the hearing record that shows that Windward offered specially designed instruction to meet the student's individual needs during the 2007-08 school year.

Specific to this student, the hearing record includes a 10-page progress report from Windward dated February 2008 (Parent Ex. I). In reading, the student's reading teacher described the program used by Windward staff with the student as a "multi-sensory, systematically structured program which is phonetically based and teaches the structure of English" (id. at p. 2). The student's reading teacher went on to explain in the progress report that "emphasis is placed on accurate word decoding and oral fluency" (id.). The reading program also focused on comprehension skills, on both the literal and inferential levels, and vocabulary development (id.). The progress report stated that language skills and thinking activities were essential components to the program and were incorporated into all lessons (id.). The progress report explained what the class focused on during the 2007-08 school year, including vocabulary development, decoding, and comprehension skills (id.). The progress report detailed the specific materials that the student read in class and stated that "class instruction emphasized the development strategies for predicting, sequencing information, and summarizing" (id.). The progress report further explained how specific skills such as fluency, encoding and decoding were addressed in the student's reading class (id.). Teacher comments included in the February 2008 progress report characterized the student as becoming a more active participant in reading class, indicated that she was working hard to become a more fluent decoder, and that she was reading aloud more carefully and thoughtfully (id.). The teacher stated that although the student occasionally had trouble moving beyond the literal meaning and could become confused by the sequence of events, she was generally able to make accurate predictions and draw conclusions (id.). However, the teacher further indicated that the student was not always able to demonstrate the same level of understanding in her responses when reading on her own and that she had a tendency to write

"unelaborated" answers, therefore, it was important for the student to read all of her assignments carefully and to proofread her responses aloud (id.). The teacher further commented that the student was growing in her ability to make accurate predictions and draw conclusions, and was "a pleasure to have in class" (id.).

The writing program being used with the student at Windward was described in the February 2008 progress report as "multi-sensory" and "designed to raise the student's level of linguistic complexity through expository instruction in writing sequences and paragraphs" (Parent Ex. I at p. 3). The February 2008 progress report from Windward described the particular methods used in the student's writing class, including instruction in the production of various sentence types, lessons geared toward planning, outlining and drafting paragraphs and longer compositions in a sequential manner and work on proofreading and editing skills (id.). Other components of the writing program used daily with the student include vocabulary, grammar, punctuation, capitalization and spelling (id.). The progress report stated that "writing skills such as outlining, summarizing, paraphrasing, and note taking are applied across the curriculum and fully integrated throughout the content areas" (id.). The progress report elaborated on specific lessons and methods of instruction utilized in the student's writing class during the first semester of the 2007-08 school year (id.). In writing, the progress report indicated that the student was becoming a more confident and capable writer (id.). Teacher comments noted that the student had developed her ability to use the "Quick Outline" and to sequence information (id.). Though not yet an automatic skill, the student learned how to organize a single paragraph containing a good topic sentence, appropriate details and a conclusion (id.). The student was described as having the ability to form sentences orally in class and often added to the class' brainstorming discussions (id.). The student had been working on using conjunctions and adverbs to make her writing "more complex and precise;" however, her teacher stated that she still required assistance using appropriate transitions to link her ideas and sometimes her writing appeared "choppy" or disconnected (id.). The teacher reported that continued attention would be paid during the next semester to help the student learn strategies to transition her thoughts with greater fluency (id.). The teacher indicated in his report that the student was "becoming a more confident and capable writer" and that consistent work in her areas of weakness as identified in the progress report "should help her develop better, more detailed paragraphs" (id.).

The February 2008 progress report from Windward also indicated that in social studies, the student engaged in oral reading practice to improve her understanding of vocabulary (Parent Ex. I at p. 4). The teacher also noted that the student had improved her ability to search back into the text for specific information in order to answer questions (id.). The teacher did note, however, that inferential questions sometimes posed a problem for the student and that staff at Windward would continue to work on strategies to help the student "determine exactly what is being asked in a question" (id.).

The February 2008 progress report from Windward stated that the math program that the student participated in was "taught in small groups... to ensure individualized attention" (Parent Ex. I at p. 5). The teacher reported that teaching strategies used reflected "an awareness of language issues and how they impact on the development of math concepts" (id.). The progress report detailed the curriculum topics covered and the specific texts used in the student's math class, as well as the assignments given (id.). The student's math teacher reported that the student was "a



cooperative math student who makes a consistent effort on a daily basis" (id.). The teacher noted that although the student's homework had usually been completed and "neat," attention to detail was often missing, which was something they would continue to work on with the student by encouraging her to take her time and check her work (id.). The math teacher also indicated that numerous errors were noted in the student's work when multi-step procedures were involved (id.). The teacher stated that "continued practice of her basic facts should add to her confidence along with additional experience in completing multi-step algorithms" (id.). The teacher further stated that recognizing number patterns was an area of identified need for the student and was an important problem solving skill (id.). The teacher noted that while the student often saw patterns, she "struggled to generalize those insights into broader solutions to real world problems" (id.). The teacher noted that opportunities for continued practice would be offered to the student in these areas during the second semester (id.).

The February 2008 progress report reflected the student's grades for up to three out of four marking periods during the 2007-08 school year (Parent Ex. I at pp. 1-10). The report card included a rubric of various indicators of the student's progress (id. at pp. 9-10).<sup>6</sup> The 2007-08 report card reflects that the student progressed from the first marking period to the second marking period in language arts for "uses word attack skills" (S+ to G) and "reads with fluency (G- to G) (id.). In science, the student progressed in "behaves appropriately" (G- to G) (id.). In computer, the student demonstrated progress in "uses keyboarding skills accurately," "uses word processor effectively," "understands procedures," "behaves appropriately," and "shows effort" (all S to S+) (id.). Progress occurred from the second marking period to the third marking period in language arts for "understands what is read" (S to S+) (id. at p. 9). In social studies, the student made progress in "understands concepts" (G- to G) and "participates in class discussions" (id.). In math, the student improved in "understands concepts" and "behaves appropriately" (both S to S+) (id.). In computer, she improved in all areas (S+ to G) (id.). In art, the student progressed in "handles materials and tools capably," "behaves appropriately," and "shows effort" (G+ to VG) (id.).

The parents presented the student's mother as their only witness at the impartial hearing. She testified that students in her daughter's classes are grouped at similar levels academically (Tr. pp. 45, 51-52). The student's mother further testified that reading and writing is incorporated into and reinforced in each subject every day (Tr. p. 39). The student's mother did not know the specific levels at which the student functioned in decoding, reading and listening comprehension, math computation and problem solving (Tr. pp. 42-44, 46). The student's mother testified that she knew the student's teachers, and that she had visited Windward and observed her daughter in her reading class which consisted of five students and one teacher (Tr. p. 51). The student's mother testified that she was knowledgeable about multisensory learning and that she specifically sought an educational environment that would offer multisensory learning to her daughter (Tr. pp. 46-47, 49-50).

Further testimony by the student's mother indicated that prior to attending Windward, the student's notebook had been "a complete mess" (Tr. p. 53). She described the student at Windward as someone whose "sentences make sense," "who is getting more on paper," and who has a neat

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<sup>6</sup> According to the report card, "VG" is defined as meaning "very good"; "G" means "good"; "S" means "satisfactory"; "NI" means "needs improvement", and "NA" means "not applicable" (Parent Ex. I at pp. 9-10).

notebook (Tr. pp. 53-54). She opined that while there is still room for growth, the student has improved in her reading, writing and penmanship skills (Tr. p. 31). The student's mother explained that the student talks about tests and her performance, and appears to feel good about herself and school (Tr. pp. 31-32). The student's mother also indicated that the description of the student regarding her reading abilities from the February 2008 Windward progress report was a "true and honest representation" of the student (Tr. pp. 33-34; see Parent Ex. I at p. 1).

The student's progress reports and report cards in evidence contain sufficiently detailed information about the types of programs and curriculum being followed in the student's classes; the student's identified special education needs, such as decoding, reading comprehension, writing skills and solving multi-step problems; how her teachers were striving to meet those needs; and how the student was performing in those classes. In view of the forgoing, I conclude that the hearing record provides sufficient evidence of the educational instruction that was provided to the student at Windward and was specifically designed to address her deficits (see Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364; see also Application of the Dep't of Educ., Appeal No. 08-062; Application of the Bd. of Educ., Appeal No. 05-092; Application of a Child with a Disability, Appeal No. 02-093; Application of a Child with a Disability, Appeal No. 97-2; Application of the Bd. of Educ., Appeal No. 96-9). Consequently, I concur with the impartial hearing officer's determination that the parents met their burden of proof and demonstrated that Windward was an appropriate placement for the student during the 2007-08 school year.

The final criterion for a tuition reimbursement award is that the parents' claim must 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. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also 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 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; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The district argues that the impartial hearing officer erred in considering the reasonableness of the amount of tuition costs sought by the parents. In this case, the hearing record reveals that the parents were granted financial aid from Windward that covered a large portion of the tuition costs (Tr. pp. 47-48; Parent Ex. H). The parents only sought reimbursement for the amount of tuition that was not covered by the financial aid award (Tr. p. 57). In her decision, the impartial hearing officer stated that the tuition sought by the parents was "reasonable" and that since the family was given "substantial financial aid," the amount of tuition that they sought was "quite moderate" (IHO Decision at p. 5). Contrary to the district's assertion, the reasonableness of the

cost of services that a parent has obtained is to be considered in determining whether equitable considerations support the parent's claim for tuition reimbursement (Carter, 510 U.S. at 7). Therefore, I do not find the district's argument to be persuasive.

Lastly, I note that the impartial hearing officer stated in her decision that Windward is a "NYS-approved" school and therefore, she concluded that the classroom teachers at Windward must be certified in special education (IHO Decision at p. 4). The impartial hearing officer erred in making these findings because neither finding is supported by the hearing record. Although the impartial hearing officer erred in making this determination, I have conducted an independent review of the hearing record and have found sufficient evidence to conclude that Windward was an appropriate placement for the student for the 2007-08 school year under the IDEA.

I have considered the district's remaining contentions and find that they are without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 19, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**