



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-152

### **Application of the BOARD OF EDUCATION OF THE PATCHOGUE-MEDFORD UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Law Offices of Guerico & Guerico, LLP, attorneys for petitioner, Douglas A. Spencer, Esq., of counsel

Pamela Anne Tucker, P.C., attorneys for respondents, Pamela Anne Tucker, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for half of their son's tuition costs at the Sappo School (Sappo) for the 2007-08 school year and all of the tuition costs for the 2008-09 school year, and additionally ordered it to reimburse the parents for the costs of an independent educational evaluation (IEE).<sup>1</sup> The appeal must be dismissed.

At the start of the impartial hearing, the student had just finished the seventh grade at Sappo, a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Parent Ex. A; see 8 NYCRR 200.1[d], 200.7). The student had received diagnoses of an attention deficit hyperactivity disorder (ADHD) and a mood disorder while in grade school (Parent Ex. E). The student had also received diagnoses of a chronic motor tic disorder and an auditory processing disorder and was reported to show significant deficits in his executive functioning as well as in reading and writing, consistent

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<sup>1</sup> Independent educational evaluation means an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student (8 NYCRR 200.1[z]).

with a learning disability (Parent Ex. S at p. 1). The student's cognitive functioning is in the average range (Parent Ex. II at p. 9). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

In January 2006 during the student's fifth grade year, the parents enrolled him in district schools and he was found eligible for special education programs and services by the Committee on Special Education (CSE) (Tr. pp. 849-51; Dist. Ex. 5). The student remained in a district school until his parents unilaterally placed him at Sappo in February 2008, when he was in the seventh grade (Dist. Ex. 64).

The student was initially found eligible for special education programs and services as a student with an OHI in mid-fifth grade and received resource room services for 40 minutes per day (Dist. Ex. 5 at p. 1). He received the same services for the 2006-07 school year while in the sixth grade (Dist. Ex. 4 at p. 1). On February 1, 2007, while the student was still in the sixth grade, the CSE reconvened to consider a central auditory processing evaluation provided by the parent and although the evaluator recommended an FM system,<sup>2</sup> the CSE instead recommended "preferential seating to address the student's auditory processing needs" (Dist. Ex. 3 at p. 4). The student's teachers reported that, at the time, the student was making progress in his classes (id.).

On March 22, 2007, the CSE convened to draft the student's individualized education program (IEP) for the 2007-08 school year when he would be in seventh grade (Dist. Ex. 2). The March 2007 IEP indicated that the student's teacher had concerns regarding the student's missing assignments and difficulty with exams and quizzes (Dist. Exs. 2 at p. 4; 4 at p. 5). The March 2007 IEP also indicated that the student "required a small group or one on one setting to complete assigned work," and that he needed constant refocusing, redirection, review and reinforcement of concepts taught (Dist. Ex. 2 at pp. 3, 4). The March 2007 IEP noted that, in addition to symptoms of inattention, impulsivity and distractibility noted on a previous IEP (Dist. Ex. 4 at p. 3), the student was now exhibiting head and leg tics (Dist. Ex. 2 at p. 3). The hearing record reflects that the student was failing math and social studies at that time, and that the student was encountering other academic difficulties including missing assignments and difficulty with exams and quizzes (id. at p. 4). Nonetheless, the resultant March 2007 IEP provided for the student's resource room services to remain the same, and added the program modifications of refocusing and redirection and a testing accommodation of extended time (1.5) (id. at pp. 1, 2).

The hearing record reflects that during the course of the 2007-08 school year, the student's academic performance deteriorated; he was not completing homework, his handwriting was illegible, his effort was poor and he refused to stay for extra help (Dist. Ex. 50). An e-mail dated October 15, 2007 from the parent to the student's resource room teacher noted that the parent would communicate with the student's doctor treating his ADHD to get his opinion on how to help the student "get with it" (id.). Teacher progress reports from December 2007 and January 2008 were consistent with the student's performance indicated by the e-mail and added that he was failing or in danger of failing all of his core academic subjects (Dist. Exs. 21; 22; 23). Bi-weekly resource

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<sup>2</sup> The hearing record reveals that an FM system provides amplified sound of a teacher's voice to a student allowing the student to listen and focus with greater ease and accuracy (Dist. Ex. 15 at p. 5).

room progress reports reflected missing assignments, failing grades on tests and quizzes and comments noting a decline in effort (Dist. Ex. 58 at pp. 1-4). The student's first quarter report card indicated that he was failing science and almost failing math, English and social studies (Dist. Ex. 20).<sup>3</sup> The student's second quarter report card indicated that the student was failing English, math, science and social studies with grades of 50, 50, 61 and 50, respectively (Dist. Ex. 24).<sup>4</sup>

The hearing record also reflected a decline in the student's social/emotional functioning during the 2007-08 school year, evidenced by numerous trips to the nurse's office, which included 34 recorded visits from September 17, 2007 to February 8, 2008, for complaints of stomach aches, nausea, feeling anxious or stressed and verbal and neck tics (Dist. Ex. 61 at pp. 1-3). The student was evaluated by a child and adolescent psychiatrist on December 7, 2007 and was seen again on January 19, 2008 (Parent Ex. V). During January 2008, the student reportedly developed worsening motor tics and began to exhibit vocal tics at school (*id.*). He reportedly was having emotional outbursts at home, had "shut down" with regard to doing any academic work and was complaining that he couldn't keep up with his class (*id.*). The hearing record reflects that the student was being treated pharmacologically at the time and that his psychiatrist had recommended that the family consider a different school program which would provide a "nurturing environment" (*id.*).

The student's mother reportedly discussed the psychiatrist's concerns and the student's medication changes with the school nurse and had multiple conversations with the school nurse in December 2007 and January 2008 regarding the student's avoidance behavior, anxiety and lack of friends (Tr. pp. 874, 921). The hearing record also reflects that the district psychologist and the student's guidance counselor were made aware of the student's vocal tics and that he was going to be seen by a psychiatrist and a neurologist (Tr. pp. 37, 161).

By letter dated January 2, 2008, the parents requested an "emergency" CSE meeting because they were concerned with the difficulties their son was experiencing (Dist. Ex. 67).<sup>5</sup> A CSE meeting was scheduled for January 25, 2008 (Tr. p. 33).

By letter dated January 14, 2008, the parents requested an IEE, at district expense in the form of an updated neuropsychological examination of the student (Dist. Ex. 46). The parents requested the evaluation in order to give the parents and the district a more complete picture than the existing evaluations provided as to why the student was failing most of his classes and to provide information on how to best help the student learn (*id.*). The parents had scheduled the neuropsychological evaluation to occur on January 22, 2008, before the January 25, 2008 CSE meeting, and asked that the district respond to their request before the evaluation date (*id.*). The

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<sup>3</sup> This progress report covered the period from September 4 through November 9, 2007 (Dist. Ex. 20).

<sup>4</sup> This progress report covered the period from November 13, 2007 through January 25, 2008 (Dist. Ex. 24).

<sup>5</sup> I note that although the letter is dated January 2, 2008 and stamped "received" by the district on January 3, 2008, the district's exhibit list incorrectly identifies the letter as dated January 12, 2008.

hearing record reflects that the district did not respond to the parents' request prior to the scheduled CSE meeting and that the evaluation was not conducted at that time (June 25, 2008 Tr. p. 49).<sup>6</sup>

On January 22, 2008, in response to the parents' request, the district's school psychologist completed an assessment of the student's reading levels and produced a written report (Parent Ex. P). The report contained behavioral observations, which revealed that although the examiner was previously known to the student and rapport was easily established, the student presented with a sad affect, poor posture, was lethargic and stated that he could "feel a tic coming on" (*id.* at p. 1). The district psychologist reported that the student was relieved when she told him that "humming did not bother her" and that the student appeared anxious about the topic of tics and shared his confusion that his tics did not occur at home (*id.*). The district psychologist deemed the evaluation an adequate assessment of the student's current functioning while noting concerns of anxiety, lethargy, and motivation (*id.*).

The district psychologist's report included background information about the student and described recent parental concerns that the student was feeling overwhelmed, was demonstrating tics in school, was often in the school nurse's office, that he verbally reported that words were "moving" around on the page, that he could not read, and that he did not understand the class work he was given (Parent Ex. P at p. 2). The report indicated that the student had been seen by a neurologist and a psychiatrist and had a pending neuropsychological evaluation to further investigate these concerns (*id.* at pp. 1-2). The report reflected that the student's academic levels were last assessed on March 5, 2007 and yielded scores on the Woodcock-McGrew-Werder Mini Battery of Achievement (MBA) in the average range in reading and math and in the borderline deficient range in written language skills (*id.* at p. 2). The student's last intelligence testing on January 24, 2006 yielded a full scale IQ score of 87 on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which indicated that his overall cognitive functioning was within the "upper extreme of the low average range" and that he demonstrated low average reasoning abilities in perceptual domains, working memory and processing speed but that his verbal reasoning abilities were "solidly" within the average range (Parent Ex. D at pp. 2-3).

To assess the student's reading ability, the district psychologist administered portions of the Kaufman Test of Educational Achievement, Second Edition (KTEA-II) on January 22, 2008, which yielded an overall reading composite score at the 27th percentile, in the "lower extreme" of the average range (Parent Ex. P at p. 3). The student's performance on all of the subtests administered fell within the average range with relative strength demonstrated in the oral fluency composite and indicated that the student had no significant deficits in reading (*id.* at pp. 3, 4, 6). The district psychologist noted that the current evaluation was consistent with previous assessments and was commensurate with the student's cognitive functioning (*id.* at p. 4). The district psychologist noted that the current behavioral observations of lethargy and emotional lability negatively impacted the student's motivation and attention to task, were consistent with his

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<sup>6</sup> The hearing transcripts in this case are consecutively numbered pages 1 through 968, for the minutes of hearings conducted from June 26, 2008 through August 7, 2008 inclusive, however, the transcript containing the minutes from the hearing conducted on June 25, 2008 are numbered pages 1 through 195. Hearing record citations that begin, "June 25, 2008 Tr." will refer to pages 1 through 195 of the minutes of the hearing conducted on June 25, 2008 only.

diagnoses of ADHD and mood disorder and that the student should be considered for counseling services to address his emotional needs (id.).

A parent/teacher conference was held on January 24, 2008 (Tr. p. 157), at which time the district psychologist reviewed her assessment of the student's reading skills and shared her concerns regarding the student's sad lethargic affect and the student's teachers indicated that they felt the district's "inclusion program," along with counseling services would be to the student's benefit (Tr. pp. 159, 162).<sup>7</sup> The hearing record reflects that the student's mother had observed the inclusion classroom the previous day and voiced reservations at the parent/teacher conference, stating she felt it would not be enough to solve all of the student's problems (Tr. p. 902).

On January 25, 2008 the CSE convened in response to the parents' January 2, 2008 letter requesting an "emergency meeting."<sup>8</sup> The meeting was attended by the interim chairperson, the district school psychologist, the student's resource room teacher, a regular education teacher, an additional parent member and both of the student's parents (Parent Ex. E at p. 4).

As a result of the updated 2007-08 IEP review conducted on January 25, 2008, the CSE recommended that beginning January 28, 2008 the student would receive direct consultant teacher services in English, math, science and social studies in an integrated setting in the "Inclusion 7" class (Parent Ex. E at p. 1).<sup>9</sup> Although the updated 2007-08 IEP stated "there were no social and emotional needs that should be addressed through special education at this time," counseling services of one 30-minute individual session per week were also recommended (June 25, 2008 Tr. p. 39; Parent Ex. E at pp. 1-2, 4). Two social/emotional/behavioral goals were added to the student's eight academic goals carried over from the March 2007 IEP (Parent Ex. E at pp. 5-7). The "Comments" section of the updated 2007-08 IEP indicated that the parents' request for neurological testing at district expense was denied because the district did not agree there was a need for the testing at that point in time (id. at p. 4).<sup>10</sup> The hearing record further reflects that the

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<sup>7</sup> The "inclusion setting" is a program where a special education teacher accompanies the students in the inclusion program to each of the core academic classes and provides small group instruction and modifications as necessary (Tr. pp. 453-55).

<sup>8</sup> Although testimony by the district psychologist reflects that it was her "understanding" that the teachers requested a CSE review for the school year and then the parents also requested a CSE meeting, testimony by the district interim CSE chairperson indicates that he set up the first January 25, 2008 CSE meeting in response to a parent letter requesting an "emergency" meeting, a parent letter requesting a neuropsychological evaluation, and a phone call with the student's mother (June 25, 2008 Tr. pp. 31-35).

<sup>9</sup> I note that the updated 2007-08 IEP indicated "consultant teacher direct" for English language arts (ELA), math, social studies and science in a non-integrated setting and also indicated the same services in an integrated setting (Parent Ex. E at p. 1). The issue of services provided in a non-integrated setting is not raised at any point in the hearing record and it appears to be a typographical error. Testimony from the interim CSE chairperson indicated that the student was placed in the "inclusion program" (June 25, 2008 Tr. p. 39) and the IEP comments section refers to placement in "Inclusion 7" (id. at p. 4).

<sup>10</sup> Although the CSE notes indicated that the parents had requested "neurological testing," the parents' letter requested an updated independent neuropsychological evaluation at district expense (Dist. Ex. 46).

CSE determined that a neuropsychological evaluation was not necessary as it had "agreed to provide a more supportive environment for the child and see how the child did" (Tr. pp. 49-50).

The hearing record reflects that following the conclusion of the updated 2007-08 CSE meeting, a new "attendance sign-in sheet" was distributed for a second meeting, described as an annual review CSE meeting, to draft the student's program for the 2008-09 school year (June 25, 2008 Tr. pp. 70-73). The student's mother testified that at that time, neither of the student's parents were aware that the updated 2007-08 IEP CSE meeting had ended and a new CSE meeting to draft the 2008-09 IEP had begun (Tr. p. 891). The student's mother testified that the parents remained unaware that a CSE meeting for the 2008-09 school year had occurred until they received a copy of the 2008-09 IEP in the mail in May 2008 (*id.*). The hearing record contains no documents, correspondence, or testimony to suggest that the parents received any kind of prior notice that the CSE intended to hold an annual review meeting on January 25, 2008 to develop the student's IEP for the 2008-09 school year.

The resultant 2008-09 IEP listed the same attendees as were present in the CSE meeting that had occurred moments before (Parent Ex. D at p. 4). The student's present levels of academic performance on the 2008-09 IEP were identical to those on the updated 2007-08 IEP (compare Parent Ex. D at p. 3, with Parent Ex. E at p. 3). The program modifications were also the same except that the notation that "the student will not be called on by teacher unless student volunteers and student will not be asked to read orally to the class" was omitted (Parent Ex. D at p. 2). However, regarding the student's social/emotional present level of performance, the 2008-09 IEP contained new information and stated that the student's abilities had changed over the past two months and ranged from extremely social to withdrawn with no participation in class (*id.* at p. 4). The social/emotional needs reflected in the 2008-09 IEP reflected significant changes from the previous IEP and included that the student needed to relate appropriately to peers in the classroom, to develop age appropriate social/emotional skills with peers, to demonstrate a positive self image, to access appropriate school personnel during stressful situations, to decrease anxiety, learn to express needs and wants, develop a positive self-concept, and that the student would benefit from in-school counseling (*id.*). Additional newly identified needs in the physical development area reflected that the student needed to improve fine and gross motor skills (writing) and auditory skills (*id.*).

The student's management needs in the 2008-09 IEP noted that the student needed individual attention, small group instruction, and teacher redirection to stay on tasks and that the student would not be called on to read aloud in order to lessen his fear of exhibiting tics<sup>11</sup> (Dist. Exs 1 at pp. 2, 3, 4; 2 at pp. 3, 4; Parent Ex. D at p. 4). The 2008-09 IEP further reflected that the student had "significant delays" which "require[d] some subjects to be taught in a small teacher-to-student ratio program with minimal distractions" and additional time to complete classroom assignments (Parent Ex. D at p. 4). For the 2008-09 school year, the CSE recommended continuation of direct consultant teacher services in English, math, science and social studies for

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<sup>11</sup> The school nurse testified that the student's mother had told her that the student's tics were anxiety induced and the CSE chairperson testified that there was a discussion at the CSE meeting which indicated that the student was nervous about responding in the classroom and that it would be better not to put him in an awkward position (June 25, 2008 Tr. p. 44; Tr. p. 20).

the 2008-09 school year in the "Inclusion 8" classroom with counseling services of one 30-minute individual session per week (Parent Ex. D at pp. 1-2). The 2008-09 IEP included four study skills goals, three writing goals which addressed spelling, short story writing and process writing, two math goals, and four social/emotional goals (id. at pp. 5-7).

The student reportedly began attending the Inclusion 7 classroom on Tuesday, January 29, 2008, but was absent due to illness on Thursday and school was closed on Friday (Tr. pp. 894-95). He attended a full week of school in the inclusion classroom the following week, reportedly going to the nurse's office multiple times a day (Tr. pp. 895, 896, 898-99). On February 8, 2008, the student's mother was informed by the nurse that the student was "building himself up to a meltdown" and when she arrived at school, the student was crouched on a bed in the nurse's office "trembling and whimpering uncontrollably" and the following day reportedly still trembled and was very withdrawn and depressed (Tr. pp. 895-99).

By letter dated February 12, 2008, the parents notified the district that at the recommendation of the student's psychiatrist, they were removing the student from the district and placing him at Sappo in an "emergency" placement due to concerns regarding his emotional well-being and that they would be seeking reimbursement from the district for the student's tuition at Sappo (Dist. Ex. 47).

On March 19, 2008, by letter through their attorney, the parents notified the district that they were requesting an impartial hearing (Dist. Ex. 48). The March 2008 due process complaint notice contained 39 "grievances" and requested reimbursement for a private evaluation that had been previously conducted, funding for a private neuropsychological evaluation to be conducted, reimbursement for the cost of tuition at Sappo for the 2007-08 and 2008-09 school years, and a request that the district conduct an assistive technology evaluation (id. at pp. 1-5).

The district challenged the sufficiency of the due process complaint notice via a notice of insufficiency dated April 1, 2008 (Dist. Ex. 59). The impartial hearing officer found the parents' due process complaint notice to be sufficient in a decision dated May 27, 2008 (Dist. Ex. 66 at p. 6).

Before the impartial hearing began, the parents obtained a private neuropsychological evaluation from the same neuropsychologist who had conducted an evaluation of the student in 2004 (Parent Ex. II at p. 1). The clinical neuropsychological evaluation of the student was conducted at the parents' expense on four separate examination dates in March, April and May 2008 with a resulting report prepared by the examiner dated June 5, 2008 (id.). The report reflected that the evaluation was done at the request of the parents due to concerns regarding the student's academic and emotional functioning (id.). It further reflected that the student was being followed by a psychiatrist, a neurologist, and a clinical social worker (CSW) for psychotherapy and that he was prescribed several medications to address "defining clinical characteristics" (id. at pp. 1, 9). The report indicated that the private neuropsychologist reviewed the student's records, including the previous neuropsychological examination report dated August 5, 2004, a 2006 auditory processing report, the student's 2007-08 and 2008-09 IEPs, office visit notes dated March and April 2006 from a neurologist, a December 2007 psychiatric report, a "student summary" from Sappo, a January 2008 report of academic skills from the district psychologist, and the student's January 25, 2008 report card from the district (id. at p. 2). The private neuropsychologist noted

that the student was alert, friendly, and related easily although at times his style of interaction was not appropriate and indicated that the student was poorly aware of how his behavior impacted others (id. at p. 3). The private neuropsychologist also noted that the student exhibited head twitching and rapid speech, that he stuttered and mumbled at times and that he was not able to monitor his verbal output in order to improve his speech (id. at p. 4). Due to the student's low energy level and poor participation, the private neuropsychologist had to discontinue testing during the second day, but was able to complete the evaluation on later days (id.).

The resultant neuropsychological evaluation report indicated that the examination findings were reasonably consistent with findings from the 2004 examination and that the student continued to present with "average intellectual skills with cognitive functions falling at commensurate levels with some exceptions" (Parent Ex. II at p. 9). According to the neuropsychological evaluation report, the student continued to show marked deficits in organization and executive functioning that included weak self-monitoring of behavior which was seen in speech output and behavioral/interpersonal awareness and weaknesses in phonological analysis that may have contributed to his reading and writing deficits (id.). The private neuropsychologist stated that "the untoward academic effect of executive dysfunction is glaringly evident in [the student's] failing grades, in his unsophisticated writing style and in the repeated unsuccessful attempts to make social connections that offer him opportunity to participate in school with at least some degree of enthusiasm" (id.). The private neuropsychologist determined that the student clearly presented with "a neuropsychiatric condition which markedly undermine[d] his capacity for adequate academic and social functioning" and that he was functioning "below what could be expected given an academic atmosphere that can blend his learning needs with attention to his socioemotional weakness and brain-based executive deficits" (id.). The neuropsychologist stated that the executive aspects of the student's profile were the most disturbing to his academic functioning, although the student also presented with a mood disorder not otherwise specified, a chronic motor tic disorder, and met the criteria for a diagnosis of stuttering (id. at pp. 9-10). The private neuropsychologist recommended continued psychiatric treatment with a psychotherapeutic component and communication therapy to address the self-governing quality (speed) of the student's speech (id. at p. 10). He further noted that the key to the student's academic success was in the development of his executive system functioning interrelated with all academic subjects and social/communication situations (id.). Specifically, he stated that the student "lack[ed] sufficient internal regulatory mechanisms to initiate and organize behaviors without significant structuring, cuing, reinforcement and medication support" and that the student's need to use his executive functioning skills would increase as the complexity of his curriculum increased (id.). The private neuropsychologist concluded that executive function interventions should be incorporated into the student's IEP with a focus on developing effective learning and problem solving processes, self-management, and behavioral management (id.). He opined that classic behavioral intervention methods including applied behavior analysis should be considered (id.).<sup>12</sup> He also suggested that

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<sup>12</sup> Although the private neuropsychologist's report indicated applied behavior analysis should be considered for the student, he explained in his testimony that he was referring to the use of a systematic approach to making adjustments in the student's behavior using a variety of techniques that are refined over time in order to increase their effectiveness (Tr. pp. 592-93).

an examination by an optometrist be considered, given the student's difficulty organizing complex visual stimuli (*id.*).

After the impartial hearing began and the parents received a copy of the 2008-09 IEP from the district, the parents filed a second due process complaint notice dated July 1, 2008 (Dist. Ex. 68). The parents' second due process complaint repeated the allegations that were contained in the original due process complaint notice and added 21 new allegations addressing the IEP drafted for the 2008-09 school year (*id.* at pp. 1-8). In addition to the relief requested in the first complaint, the parents requested that the district provide the student with a multisensory sequentially presented reading program and a comprehensive language evaluation (*id.*). By decision dated August 4, 2008, the impartial hearing officer consolidated the impartial hearing to address the parents' allegations regarding both the 2007-08 and the 2008-09 school years (Dist. Ex. 70 at p. 3).

An impartial hearing was conducted on eight separate dates beginning on June 25, 2008 and ending on August 7, 2008, during which the district offered testimony from 13 witnesses and submitted documentary evidence and the parents offered testimony from seven witnesses and also submitted documentary evidence (June 25, 2008 Tr. pp. 19, 117; Tr. pp. 4, 51, 55, 149, 350, 384, 405, 430, 450, 496, 517, 553, 620, 651, 699, 788, 848, 935).

In a decision dated November 11, 2008, the impartial hearing officer ordered the district to reimburse the parents for the expense of the IEE conducted by the private neuropsychologist, reimburse the parents for half of the cost of tuition at Sappo for the 2007-08 school year, and reimburse the parents for full tuition costs at Sappo for the 2008-09 school year (IHO Decision at pp. 3, 22). The impartial hearing officer found that the district failed to offer the student a free appropriate public education (FAPE) for a portion of the 2007-08 school year, beginning January 25, 2008, because the CSE failed to consider all of the evaluative information that it had before it (*id.* at pp. 17-19). The impartial hearing officer further found that the district failed to offer the student a FAPE for all of the 2008-09 school year because it impeded the parents' ability to participate in the development of the student's IEP by denying the parents' request for an IEE, among other procedural and substantive errors (*id.* at pp. 15-17). The impartial hearing officer also found the parents' placement of the student at Sappo for both the 2007-08 and 2008-09 school years was appropriate and in the least restrictive environment (LRE) (*id.* at pp. 19-20). The impartial hearing officer reduced the reimbursement for the 2007-08 school year by half, as a matter of equity, after finding that the parents did not give the district timely notice of their intention to unilaterally place the student at Sappo at public expense (*id.* at pp. 20-22). Lastly, the impartial hearing officer ordered full reimbursement for tuition expenses related to the 2008-09 school year (*id.* at pp. 22-23).

On appeal, the district requests that the impartial hearing officer's decision be annulled and contends that the impartial hearing officer erred in holding that the district's alleged failure to identify and report the student's known needs at the updated 2007-08 CSE meeting constituted a denial of a FAPE for the 2007-08 school year. The district also argues that the impartial hearing officer erred in holding that the district's alleged failure to authorize an IEE constituted a denial of a FAPE for the 2008-09 school year and erred in awarding the parents reimbursement for the costs of the neuropsychological evaluation they had obtained. The district asserts that the impartial hearing officer's finding that the parents' unilateral placement at Sappo was appropriate for the 2007-08 and 2008-09 school years was also an error. The district also argues that the parents'

failure to give the district notice of their intent to unilaterally place the student for the remainder of the 2007-08 school year ought to have warranted a total denial of tuition reimbursement for that school year and that the impartial hearing officer erred in awarding tuition reimbursement for the 2008-09 school year in the absence of evidence presented by the parents regarding costs incurred by them.

In their answer, the parents contend that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for both the 2007-08 and 2008-09 school years because the district failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) for the student and because both the updated 2007-08 IEP and the 2008-09 IEP failed to accurately reflect the results of evaluations and thereby failed to identify the student's needs. Additionally, the parents allege that there were numerous procedural violations, including the district's failure to comply with the State regulations regarding the parents' request for an IEE, which the parents argue prevented them from participating fully at either IEP meeting. The parents also argue that the impartial hearing officer correctly found the parents' unilateral placement at Sappo to be appropriate for the student and that the impartial hearing officer correctly determined that the parents were entitled full reimbursement for the 2008-09 school year. The parents do not contest the impartial hearing officer's decision to reduce the reimbursement award for the 2007-08 school year by half. Lastly, the parents contend that the impartial hearing officer correctly awarded reimbursement for the IEE obtained by the parents because the district failed to comply with State regulations concerning IEEs.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 2008 WL 5505470, at \*4 [2d Cir. Jan. 16, 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C.

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

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).<sup>13</sup>

A student's IEP must be reviewed periodically, but not less than on an annual basis to determine whether the student is achieving annual goals and to revise the IEP as appropriate (34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]). A CSE may meet during a school year, prior to an annual review, to consider revising an IEP when appropriate (8 NYCRR 200.4[f][2]; Application of a Child with a Disability, Appeal No. 07-012 [finding a denial of a FAPE by district in failing to review IEP prior to annual CSE meeting where student exhibited increased dysfluent speech]). Except in limited circumstances, the membership of a CSE must include the parent of the student (34 C.F.R. § 300.321; 8 NYCRR 200.3[a][1][i]). School districts must take steps to ensure that parents are afforded the opportunity to participate in the CSE meeting that develops

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<sup>13</sup> The New York State Education Department's Office of State Review maintains a website at [www.sro.nysed.gov](http://www.sro.nysed.gov). The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

the student's IEP (Cerra, 427 F.3d at 192-93) including providing timely notification to the parents of the purpose of the meeting (34 CFR § 300.322[b][1][i], 300.501[b]; 8 NYCRR 200.5[c][2][i]; Application of a Child with a Disability, Appeal No 04-083).

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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

The district argues that the impartial hearing officer's finding that it failed to offer the student a FAPE for a portion of the 2007-08 school year because the January 25, 2008 CSE failed to consider all of the evaluative material that was available, was an error because the evaluation that was considered (the reading evaluation conducted by the district psychologist on January 22, 2008) was "more comprehensive" than the evaluation that was not considered (an evaluation identified in the hearing record as the Woodcock-Johnson III-Brief Achievement Battery administered by the student's special education teacher and also dated January 22, 2008).

The district also argues that the impartial hearing officer's finding that the district did not offer the student a FAPE for the 2008-09 school year was an error because the alleged district failure to provide the parents with an IEE was, at worst, a procedural violation that did not rise to the level of a denial of FAPE. I find this argument persuasive. There is simply insufficient evidence in the hearing record demonstrating that the district's declination to pay for an IEE significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

I do, however, for other reasons, concur with the impartial hearing officer's finding the district failed to offer the student a FAPE for a portion of the 2007-08 school year and for the entire 2008-09 school year for the reasons set forth below.

The hearing record demonstrates that for both the updated 2007-08 IEP and for the 2008-09 IEP, that the CSE failed to adequately assess and identify the student's academic and

social/emotional needs.<sup>14</sup> Although the two IEPs were completed within minutes of each other, they were inconsistent in terms of their substantive content. The hearing record reveals that both IEPs do not reflect the same levels of need for the student. Rather, although the description of the student's present levels of academic performance is consistent between both IEPs created on January 25, 2008, the new test results provided by the student's special education teacher were reflected only in the 2008-09 IEP in the form of academic needs which were not evident in the updated 2007-08 IEP, prepared just moments earlier (compare Parent Ex. D at p. 3, with Parent Ex. E at p. 3). Furthermore, the student's needs according to his present level of physical development indicated on the 2008-09 IEP were not reflected on the updated 2007-08 IEP (compare Parent Ex. D at p. 4, with Parent Ex. E at p. 4). Moreover, a comparison of the two IEPs reveals significant differences in the student's present level of social/emotional performance and needs as well as in the student's management needs (compare Parent Ex. D at p. 3, with Parent Ex. E at pp. 3-4).

I will first address the student's updated 2007-08 IEP. The hearing record reflects that the student's present levels of academic performance, social/emotional levels and abilities, and management needs on the updated 2007-08 IEP were duplicative of those listed on his previous IEP dated March 22, 2007 (compare Parent Ex. E at pp. 2-4, with Parent Ex. F at pp. 2-4). Notably, the student's social/emotional functioning continued to be deemed within age appropriate expectations on the updated 2007-08 IEP and that IEP continued to state that the student was friendly, outgoing, had friends in school, and played in the school band (Parent Ex. E at pp. 3-4). The updated 2007-08 IEP, however, included a new notation that the student would not be called on by a teacher unless the student volunteered and that the student would not be asked to read orally to the class (Parent Ex. E at pp. 1, 2). It further indicated under the area of "Special Alerts" that the student was prescribed medication for ADHD, motor tics, and a mood disorder and also reflected that the student was now exempt from foreign language (id.).

The hearing record reflects that in addition to documents previously considered at the student's March 2007 CSE meeting, the January 25, 2008 CSE considered the January 22, 2008 reading evaluation completed by the district psychologist which reflected reading scores in the average range, in developing the updated 2007-08 IEP (Tr. pp. 180, 181, 183; Parent Ex. E. at pp. 3, 4). Testimony by the CSE chairperson revealed that the parents' request for the CSE meeting, the student's report card and the last IEP were also considered at the review, although the updated 2007-08 IEP does not include those documents on the list of materials considered nor does it reflect the information contained in those reports (June 25, 2008 Tr. p. 36; Parent Ex. E at p. 4). The district psychologist testified that in addition to her testing and the student's report card, the student's progress reports and teacher input sheets specifically developed for the CSE meeting were also reviewed (Tr. p. 184). The student's second quarter 2007-08 report card reflected failing grades in English, math, science and social studies, and a marked decline from his first quarter report card, which reflected he was failing only science (Dist. Exs. 20; 24). The majority of the student's progress reports indicated that the student had frequent missing assignments and was

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<sup>14</sup> As previously indicated, there are two IEPs dated January 25, 2008 contained in the hearing record. The first pertains to the period of January 28, 2008 through June 27, 2008 of the 2007-08 school year (Parent Ex. E at p.1). The second IEP was also produced on January 25, 2008 pertaining to the period of September 4, 2008 through June 26, 2009 of the 2008-09 school year (Parent Ex. D. at p. 1). To avoid confusion, Parent Exhibit E will be referred to as the "updated 2007-08 IEP" and Parent Ex. D will be referred to as the "2008-09 IEP."

either failing or in danger of failing his core academic classes, that he was inattentive, disruptive, and that he lacked effort (Dist. Exs. 21; 22; 23; Parent Exs. M at pp. 1-5; X).<sup>15</sup> Teacher input sheets prepared specifically for the January 25, 2008 CSE meetings reflected information consistent with the progress reports and included behavioral comments indicating that the student often complained and asked to go to the bathroom or get a drink, that his average had shown in the "last 2 weeks, big time decline" and that the student had stated he couldn't complete his work because he was "having difficulty reading (words floating all over the page)" (Dist. Exs. 40-42).

I note that although the district psychologist's report indicated results consistent with prior academic testing performed on March 5, 2007 as well as the student's January 24, 2006 intelligence testing, the results were inconsistent with information pertaining to the student's then current academic decline. The behavioral observations and background information regarding the student's diagnoses, anxiety, tics, frequent trips to the nurse, lethargy and sad affect were included in her report, indicating that she was aware of the severity of the student's social/emotional decline and the student's increasing academic and social/emotional issues; however, the report did not adequately address the inconsistency (Parent Ex. P at pp. 1, 2, 4).

The hearing record further reveals that although the two CSE meetings conducted on January 25, 2008 to develop the updated 2007-08 IEP and the 2008-09 IEP were held only minutes apart, the documents considered in developing the two IEPs were not the same for both of the meetings. Notably, an education report dated January 22, 2008 reflecting the student's performance on the "Woodcock-Johnson III-Brief Achievement Battery" administered by the student's special education teacher, was not presented or considered at the updated 2007-08 CSE meeting, but the results of that testing were included in the 2008-09 IEP (Parent Exs. D at p. 4; E at p. 4).<sup>16</sup> Moreover, the student's performance on the "Woodcock-Johnson III-Brief Achievement Battery" yielded standard scores in spelling, passage comprehension and calculation of 73 (4th percentile), 72 (3rd percentile), and 72 (3rd percentile) respectively, indicating deficits in these areas that appeared disparate with the results reflected by the reading assessment conducted by the district psychologist (Parent Exs. D at p. 3; P at p. 6).

In light of the above, it is clear that significant evaluative information which was available to the January 25, 2008 CSE was not disclosed or considered in developing the updated 2007-08 IEP. Therefore, I find that the district failed to appropriately identify the student's known academic needs at the January 25, 2008 CSE meeting held to develop the student's updated 2007-08 IEP. Furthermore, testimony by the guidance counselor (June 25, 2008 Tr. pp. 136, 137), the student's mother (Tr. pp. 873-877), the school nurse (Tr. pp. 41-42), and the district psychologist (Tr. pp. 159-161) all reflected that the severity of the student's social/emotional needs was not fully addressed in either January 25, 2008 IEP. Additionally, testimony by the district psychologist

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<sup>15</sup> The hearing record includes a variety of types of progress reports, including the student's recent middle school progress reports dated December 15, 2007 and January 22, 2008 (Dist. Exs. 21; 22; 23), resource room biweekly progress reports which were filled out by the student's regular education teachers (Parent Ex. M at pp. 1-5), and the student's first and second progress report for IEP goals (Parent Ex. X).

<sup>16</sup> The hearing record reflects that a January 3, 2008 teacher report was also used at the 2008-09 IEP meeting, but not at the updated 2007-08 IEP meeting (Parent Ex. D at p. 4). However, the report is not included in the hearing record.

reflected that at the January 25, 2008 CSE meetings the student's teachers were in agreement that the student's behavior interfered with his ability to function within the classroom, however the CSE did not consider whether an FBA should be conducted (Tr. pp. 241-42).<sup>17</sup> Although the district psychologist noted in her report that the CSE could determine whether school-based counseling services would benefit the student, the information that the psychologist had available to her indicated that a more extensive investigation of the student's social/emotional and behavioral status was warranted to adequately identify the student's needs and plan a program that would be reasonably calculated to address those needs (Parent Ex. P at pp. 1, 2, 4). However, the student's recent severe academic decline, which contrasted with the psychologist's average range test results; his frequent requests to leave the room for a drink or to go to the bathroom; and his comments regarding "words floating on the page" indicated a need for further evaluation into the causes of the student's difficulties, although the hearing record reflects that no further evaluations of any kind were considered or recommended by the CSE and the parents' request for an IEE was denied (Dist. Exs. 40-42; Parent Exs. E at p. 4; P at pp. 1, 2, 3).

Turning to the 2008-09 IEP, the hearing record shows that, in this case, it was premature for the CSE to draft an IEP for the 2008-09 school year considering the change in the student's program effected by the updated 2007-08 IEP, and the length of time remaining in the 2007-08 school year. The 2008-09 IEP was not based on the student's performance at the end of the 2007-08 school year and no time was allowed between the two meetings to evaluate the student's progress regarding the goals listed on the updated 2007-08 IEP or his ability to function in the newly recommended inclusion program. As such, the 2008-09 IEP did not accurately depict the student's present levels of performance or needs for the upcoming 2008-09 school year. Furthermore, the contents of the 2008-09 IEP presupposes that the student would not benefit from the intervention provided by the services delineated in the updated 2007-08 IEP because the 2008-09 IEP indicated an increase in the student's needs and an increase in the goals to address those needs (Parent Ex. D at pp. 3-7). I note also that although the 2008-09 IEP indicated it was based upon an education report dated January 22, 2008 reflecting the student's performance on the WJ-III, which revealed additional areas of delay, the student's present level of academic performance in the 2008-09 IEP did not reflect those needs (*id.* at p. 3). Additionally, testimony taken from district representatives in attendance at both meetings, as well as from the parents reveal that the discrepancy between the relatively high scores on the testing conducted by the district psychologist and the much lower scores on the testing conducted by the resource room teacher was not discussed or adequately considered by the CSE at either of the January 25, 2008 meetings (June 25, 2008 Tr. p. 96; Tr. pp. 226, 290, 893). Furthermore, testimony by the student's mother indicates that she was unaware of these lower test results until she received the student's 2008-09 IEP in the mail in May 2008 (Tr. p. 894).

I also find that the process of formulating the 2008-09 IEP was significantly flawed because the parents were not properly informed that the January 25, 2008 CSE had convened, in part, for the purpose of developing the student's program for the next school year (34 CFR § 300.322[b][1][i], 300.501[b]; 8 NYCRR 200.5[c][2][i]). The hearing record demonstrates that the parent's opportunity to participate in the decision-making process regarding the program development for the student's 2008-09 school year was significantly impeded because they were

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<sup>17</sup> See 8 NYCRR 200.4(b)(1)(v).

not aware that the student's program for 2008-09 school year was being developed at the meeting in which they were in attendance.

Therefore, after a review of the entirety of the hearing record, I find that the district failed to offer the student a FAPE for the 2007-08 school year beginning January 25, 2008 and failed to offer the student a FAPE for the 2008-09 school year.

Accordingly, I will next address the appropriateness of the parents' unilateral placement at Sappo.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419 [S.D.N.Y. 2007]). A parent's failure to select a program approved by the state in favor of an unapproved option is not by 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). 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., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 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).

The hearing record indicates that Sappo had the student's updated 2007-08 IEP and a "neuropsych summary" available to them for the purpose of determining the student's needs when he began attending the program (Tr. pp. 816-17).<sup>18</sup> In addition to this, the Sappo student services administrator testified that either he or the director usually conducted a parental interview at intake to get a history about a student's functions, difficulties and the reason for searching for an alternative environment, in order to determine if Sappo is a good fit for the student (Tr. p. 804). He further testified that the director of Sappo performed the student's intake in this case (*id.*). The student services administrator testified that he generated a "student summary" based on the student's updated 2007-08 IEP (Tr. p. 816; Parent Ex. HH). However, the student's teacher at Sappo testified that after working with the student, he recognized that, contrary to the updated 2007-08 IEP, the student had social/emotional needs (Tr. p. 783).

The hearing record contains a written description of Sappo, indicating that the school utilizes a therapeutic educational program that addresses the psychological, social, emotional, and academic realms and specializes in "children of average or above average intelligence who have affective, interpersonal, and/or socio/psychological difficulties that prevent them from progressing and mastering academic disciplines" (Parent Ex. GG at p. 1). Testimony by the student services administrator at Sappo reflects that the Sappo teachers are provided training during the summer, at weekly meetings, and daily consultations (Tr. p. 796). He testified that the school had "outside experts come in this year during the summer and that every summer there is a four day period that teachers come in for training, for teacher training and throughout the year training is going on" (Tr. p. 798). The student's teacher at Sappo testified that all of the teachers complete a seminar in the summer that familiarizes them with the program used at Sappo, that all teachers meet every day to "bounce ideas off of each other" and to get information from more experienced teachers on how to "deal" with similar circumstances, and they attend a formal meeting once a week to discuss the needs of individual students that lasts a few hours (Tr. p. 703). The teachers at Sappo follow the New York State curriculum (Tr. p. 708) and testimony by the student services administrator indicates that the student's coursework was modified to his instructional level and his frustration tolerance level (Tr. pp. 806-07). The student's teacher testified that he made accommodations for

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<sup>18</sup> Testimony by the student services administrator from Sappo reflected that a "neuropsych. summary" was part of the data compiled on the student, although the hearing record does not include the date of this report (Tr. p. 817). However, a subsequent neuropsychological evaluation dated June 5, 2008 indicated that the student was seen for a neuropsychological examination in August 2004 (Parent Ex. II at p. 2).

the student's individual needs that included preferential seating, refocusing and redirection, checking for understanding and extra time on tests (Tr. pp. 781-82). The teacher testified that the student sits directly in front of his desk, that he breaks his tests into two days and that he has been able to slow the student down by showing the student the difference in his scores when he rushes through his work and by explaining to him that he would not be allowed to leave the room when he finished so there was no reward for finishing quickly (Tr. p. 782). The student's teacher further testified that he addressed the student's test anxiety by making him feel more confident prior to a test by asking the student questions that the teacher knew the student could answer and making the student feel prepared so that if something did go wrong, "it wasn't the end of the world" (Tr. pp. 752-53). The teacher also testified that he changed the curriculum and the classwork in order to meet the needs of his students, such as by using multiple choice questions or verbal responses with a student for whom writing tasks were a problem and for this student, limiting homework to short answers (Tr. pp. 705, 753). The hearing record also reflects that Sappo provided the student with a class comprised of an 8:1 student/teacher ratio with students ranging in age from 12-15 years (Tr. p. 742).

The hearing record reflects that Sappo addresses the student's social/emotional needs in a variety of ways. The student's self-esteem is addressed using a "4/1" commendation/criticism ratio, which refers to the practice that a student must be commended four times before a teacher can say something negative (Tr. p. 712; Parent Ex. GG at p. 3). The student's teacher testified that he "would always commend [the student] on his work ethic, how he constantly handed in assignments, particularly with art," as well as his attention to details (Tr. p. 713). The teacher also testified that he addressed the student's academic and social/emotional needs using the "10/5" program, which he indicated was used with students who had difficulty paying attention or behaving in class (Tr. pp. 711-12). The teacher explained that if a student "gave" ten quality minutes in the classroom, they could leave the classroom or put their head down for five minutes and that over time, the teacher increased the amount of class time the student was required to "give," with the eventual goal for the student to remain in the class full time (Tr. p. 712). The teacher testified that the student had improved over time and that "towards the end [of the year] he [was] in the class full-time" (*id.*). To further address the student's social/emotional needs, the teacher testified that he had researched tic disorders and learned that they could be made worse or brought on by anxiety and that if the student was made to feel comfortable, the frequency of tics might be reduced (Tr. p. 704). He stated that when the student first came to his classroom he tried to make him feel safe, "open the lines of communication," and show an interest in him (Tr. p. 707). He testified that over time, the student began to come to class before school started to talk about sports, an art project, and to "bounce ideas" off the teacher (Tr. p. 708). The teacher indicated that the student later made a friend in the class and slowly began to interact with the other students as well, both in and outside of the classroom (*id.*).

The hearing record reflects that the student participated in "Peer Circle" once a week where the students discussed their feelings with each other, as well as "Smaller Circle" which is facilitated by a counselor and addresses a smaller focus (Tr. p. 715). The teacher also testified that Sappo teachers are encouraged to do "target bonding" described as taking a lead in interacting with a specific student based on information presented at child study team meetings (Tr. p. 808). The student's math teacher, who is also a certified special education teacher and a counselor, provided this service to the student (*id.*).

The hearing record also reflects that the student made academic and social/emotional progress while at Sappo. His third and fourth quarter report cards for the 2007-08 school year indicated overall averages of 92 and 91 respectively, which according to his teacher, were based on a grading system that reflected the student's performance on homework, classroom performance and tests and projects (Tr. p. 709; Parent Exs. Y; SS). Teacher comments on the two report cards reflected that the student had excellent participation in class, was hard working, completed all assignments, was a good worker and an attentive listener, and also reflected that he needed to show his math work, slow down on tests to be more accurate, and to raise his hand rather than call out during class (Parent Exs. Y; SS). The fourth quarter report card for the 2007-08 school year indicated that the student's anxiety was more evident during that quarter, but that he had made "great strides" concerning his test taking skills (Parent Ex. SS).

A teacher report dated June 18, 2008 indicated the student came to Sappo with high anxiety, low esteem, lack of confidence and poor self image, but that he has had an "incredible adjustment, and is well mannered, has made some friends, does most homework, relates well to teachers, is an active participant in class and eager to please" (Parent Ex. TT at p. 1). The report noted that the student continued to have some "physical ailments after lunch but is able to complete his class and stay focused" (*id.* at p. 2). The report also noted that the student had continued areas of need in organizational skills and rushing his work, and although he received a test average of just 67, the report stated that this was great improvement for this student (*id.*). The student was reported to be functioning on a low seventh grade level at that time (*id.*). The student's teacher testified that the student had progressed in making friends in class and in lunch and that his demeanor had become more interactive and energetic and that the student made attempts to engage socially with others and showed improvement in participation in classes (Tr. pp. 708, 717, 811).

A review of letters contained in the hearing record that were sent between February 29, 2008 and March 4, 2008 to the district from the student's psychiatrist, neurologic physician's assistant, and the CSW who provided his psychotherapy, shows that the student's medical professionals had confirmed his intense social-emotional needs, had supported his placement at Sappo and had noted significant improvements in his academic performance and social behavior and a significant reduction in tics and vocalizations (Parent Exs. U; V; JJ).

In light of the foregoing, I find that the parents met their burden to demonstrate that their unilateral placement at Sappo provided educational instruction specially designed to meet the unique needs of the student and allowed him to progress.

Turning to the district's arguments on the equities, 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 [S.D.N.Y. 2005], *aff'd*, 192 Fed. Appx. 62, at \*1 [2d Cir. 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]).

In the present case, the district argues that the parents' failure to give statutorily required notice to the district of their intention to unilaterally place the student at public expense prior to removing the student from the district program should have resulted in a denial of tuition reimbursement as a matter of equity (see 20 U.S.C. § 1412[a][10][C][iii]). The impartial hearing officer noted that the statute requires the parents to give written notice of their intention to remove the student and seek reimbursement for their placement ten days before removal and that in the absence of the notice a tuition reimbursement award may be denied or reduced (IHO Decision at pp. 20-22). The impartial hearing officer also determined that a reimbursement award need not be denied or reduced if compliance with the notice requirement "would likely result in serious emotional harm to the [student]" (see 20 U.S.C. § 1412[a][10][C][iv][II][bb]) and found that in the present case complying with the notice requirement would likely have resulted in serious emotional harm to the student (*id.* at p. 21). Nonetheless, the impartial hearing officer reduced the tuition reimbursement award for the 2007-08 school year by half, and, notably, the parents do not contest that portion of the decision. Upon due consideration, I will not disturb the reduced tuition award for the 2007-08 school year.

As a final matter, I will address the district's argument that the impartial hearing officer erred in awarding reimbursement for the costs of the IEE because the parents remained silent at the January 25, 2008 CSE meeting after the CSE interim chairperson denied the parents' request for the evaluation. Subject to certain limitations, federal and State regulations provide that a parent has a right to obtain an IEE at public expense if a parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[a], [b]; 8 NYCRR 200.5[g][1]). A district may request the reason that the parent(s) disagree with an evaluation, but may not require an answer from the parents or impose any additional conditions prior to providing an IEE at public expense (8 NYCRR 200.5[g][1][ii], [iii]). Rather:

[i]f a parent requests an independent educational evaluation at public expense, the school district must, without unnecessary delay, either ensure an independent educational evaluation is provided at public expense or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria.

(8 NYCRR 200.5[g][1][iv]).

In the present case, the district verbally denied the parents' request for an IEE at the January 25, 2008 CSE meeting. It is not clear from the hearing record that the parents have withdrawn their request for an IEE. Therefore, I concur with the impartial hearing officer and find that the district failed to either promptly ensure an IEE was provided at public expense or file a due process complaint notice to defend its own evaluations. Accordingly, the parents must be reimbursed for the costs they incurred for obtaining the private neuropsychologist's evaluation at their own

expense (see Application of a Student with a Disability, Appeal No. 08-101; Application of a Student with a Disability, Appeal No. 08-087; Application of a Student with a Disability, Appeal No. 08-046).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determinations herein. The parents shall be reimbursed as directed by the impartial hearing officer for both tuition and the cost of the private neuropsychologist's evaluation upon submission by the parents to the district of proper proof of payment.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
January 26, 2009**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**