



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-047

Application of the BOARD OF EDUCATION OF THE KINGSTON CITY 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:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Jeffrey J. Schiro, Esq., of counsel

Family Advocates, Inc., attorneys for respondents, RosaLee Charpentier, 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 respondents for certain travel expenses and their son's tuition costs at a private therapeutic summer program for summer 2007. The parents cross-appeal from the impartial hearing officer's determination which denied their request for reimbursement for travel expenses related to four family therapy sessions conducted at the private summer program during summer 2007. The appeal must be dismissed. The cross-appeal must be sustained.

At the time of the impartial hearing, the student attended an out-of-State private residential preparatory school (Tr. pp. 505-06). During summer 2007, the time period at issue in this appeal, the student attended the private summer program after being unilaterally placed there by his parents (Tr. pp. 308, 586-87).¹ The private summer program, which is located out-of-State, has not been approved by the Commissioner of Education as a program with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).² The student's eligibility for special education services and classification as a student with an other health impairment (OHI)

¹ In addition to its summer program, the private program also offers a regular school year program (Tr. p. 306).

² According to testimony from a senior clinical supervisor at the private summer program, the program is an approved school in New Hampshire and Massachusetts (Tr. p. 307).

are not in dispute in this proceeding (Dist. Ex. 52 at p.1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

As a young child, the student displayed speech-language delays as well as mild idiosyncracies in socialization and communication (Tr. pp. 506-07; Dist. Ex. 3 at p. 1). He received services through the Committee on Preschool Special Education (CPSE) (Tr. p. 507). The student entered a regular education kindergarten program in a district elementary school where he was "diagnosed" as speech or language impaired (Tr. pp. 508-09; Dist. Ex. 3 at p. 1). The student received speech-language therapy through the first grade (Tr. p. 511). In second grade, his program was expanded to include occupational therapy (OT) services to address dysgraphia and resource room services to address weaknesses in reading (Tr. pp. 513-14; Dist. Ex. 3 at p. 1). The student remained in the public school through the end of fourth grade (Tr. p. 530; Dist. Ex. 3 at p. 1). For fifth grade, the student's parents placed him in a private school for students with learning disabilities (Tr. pp. 530-31; Dist. Ex. 3 at pp. 1-2). Although the student reportedly made academic progress, the private school's principal indicated that the student's social functioning was "not typical" and recommended that the parents "look into social skills classes" and "look at other middle schools" (Tr. pp. 532-33). According to parent report, around this same time, the student received a diagnosis of a nonverbal learning disorder (Tr. pp. 533-34). Subsequently, the Committee of Special Education (CSE) recommended that for seventh grade the student be placed in a special class in a neighboring district that served students with Asperger's syndrome or pervasive developmental disorder (PDD) (Tr. pp. 40, 534-39). The student attended the out-of-district program for three years (Dist. Exs. 6; 18).

By the beginning of the third year, the parents felt that the out-of district program was no longer meeting the student's needs (Tr. p. 572). According to the student's mother, the student was spending four to five hours per night doing homework and had stopped participating in social activities (Tr. p. 560). She stated that the student was "depressed" and did not want to go to school anymore (Tr. p. 561). The parents contacted the CSE chairperson and began exploring possible alternative placements for the student (Tr. pp. 572, 574-76, 578).

The CSE convened on June 8, 2006 and June 16, 2006, for the student's annual review and to develop a program for the student for tenth grade (Dist. Ex. 42 at pp. 1, 10-11).³ The CSE reviewed a private neuropsychological evaluation conducted in April 2006, along with numerous progress summaries, teacher reports, and evaluations (id. at pp. 10, 11). The April 2006 neuropsychological evaluation indicated that the student's cognitive functioning was in the average range, but that the student demonstrated weaknesses in reading fluency, spelling, writing and mathematical skills (Dist. Ex. 38 at pp. 3, 4, 8, 9). The student's executive skills were described as variable, as were his memory and learning skills (id. at pp. 4, 6, 8). With respect to emotional and adaptive functioning, the evaluating psychologist indicated that as reported by the student's parents and teachers the student was distractible, fidgety, somewhat impulsive, and had difficulty making friends (id. at p. 7). The student's overall adaptive functioning was low and he had difficulties in the areas of communication, daily living and socialization (id.). According to the evaluator, the student's self-esteem among peers was diminished and he displayed poor frustration

³ Although the June 16, 2006 individualized education program (IEP) references a June 8, 2006 CSE meeting, an IEP dated June 8, 2006 was not included in the hearing record and the June 16, 2006 IEP indicated that the June 8, 2006 CSE meeting was "tabled to allow more time for discussion" (Dist. Ex. 42 at pp. 10-11).

tolerance when overwhelmed (*id.* at pp. 7, 9). The evaluator offered the following diagnoses: a PDD, not otherwise specified (NOS)/Asperger's syndrome; an attention deficit disorder, NOS; a learning disorder, NOS (nonverbal learning disability); a mathematics disorder; and a writing disorder (*id.* at p. 10).

Progress notes reviewed by the June 16, 2006 CSE and completed by the student's teachers in April 2006, indicated that the student had progressed academically, socially, and behaviorally in the 8:1+1 program (Parent Ex. Z at pp. 1, 2). The student's "global" teacher reported that the student's homework was thorough and well done (*id.* at p. 1). She indicated that the student had weak reading comprehension and written expression skills; however, she noted steady progress (*id.*). The teacher described the student as well behaved and mannerly and noted that he got along well with peers (*id.*). The teacher indicated that the student had occasional verbal disagreements and that he could become competitive with peers over grades and incentive points, which lead to verbal escalation (*id.*). According to the student's global teacher, on a few occasions the student hit a peer (*id.*). The student's biology teacher reported that the student's homework and class work were always complete and correct (*id.*). She stated that the student appropriately participated in class discussions and his ability to absorb information that was presented orally was excellent (*id.* at p. 2). The student's biology teacher indicated that due to the student's slow writing speed, he required 1:1 attention to complete written assignments (*id.*). The teacher noted that at times, the student could overreact to peers and that he easily became overwhelmed (*id.*). She noted that the student "put an incredible amount of pressure on himself" (*id.*). The student's English teacher reported that the student's homework was usually done well and that he actively participated in class discussions (*id.* at p. 3). According to the English teacher, the student was usually well behaved and usually got along well with his peers (*id.*). The teacher stated that the student appeared to be easily frustrated and often said he could not do an assignment before attempting it (*id.*). She noted that the student used an amanuensis or a laptop for written assignments in class and that class reading assignments were read aloud to the student (*id.*). The student received third marking period grades of 85 in English 9, 81 in global 9, 97 in pre-A math, and 90 in biology (Dist. Ex. 39).

A related service provider form, completed by the student's speech-language therapist in May 2006 and reviewed by the June 16, 2006 CSE, indicated that the student's "receptive and expressive knowledge and use are in the low average to average range" (Dist. Ex. 34 at p. 1). The therapist reported that the student demonstrated difficulty with speech fluency and processing speed (*id.*). She also noted that the student demonstrated possible word finding difficulties (*id.*). According to the therapist, the student's ability to apply pragmatic language skills, read nuances of nonverbal messages, and problem solve was emerging, but inconsistent (*id.* at p. 2). In addition, the therapist indicated that the student had shown progress in written expression; however, the student's written language skills continued to be below grade level (*id.*). The therapist identified spelling, the use of homonyms, and editing as relative weaknesses for the student (*id.*). She recommended that the student continue to receive speech-language therapy services noting that the student needed "continued instruction in social cognition to promote communicative success across a variety of environments and relationships and to continue developing speech fluency and intelligibility, along with written language skills" (*id.*).

The June 16, 2006 CSE recommended placement in special classes in the district's high school, along with related services and a 1:1 teaching assistant (Dist. Ex. 42 at pp. 1-2). The parents chose to unilaterally place the student at a private out-of-State residential school for

students with learning disabilities, attention deficit hyperactivity disorder and language disorders (Tr. pp. 220, 579; Parent Ex. GG at p. 10).

The student attended the out-of-State private residential school for the 2006-07 school year (Tr. pp. 223-24). The student initially had a difficult time transitioning to the school (Tr. p. 225). The associate director of the school testified that the student struggled with the morning routine and living up to expectations with respect to hygiene, room cleanliness, chore completion, and study hall behavior (*id.*). According to the associate director, the student demonstrated further difficulties with mood regulation, expressing his feelings, and engaging in effective problem solving and conflict resolution (*id.*). The associate director reported that the student "made modest progression across the course of the school year" (Tr. p. 226). In April 2007, the private school assessed the student's academic achievement (Dist. Ex. 47). Administration of the Woodcock-Johnson III Normative Update Tests of Achievement (WJ III NU) yielded the following standard scores: broad reading 88, broad math 71, and broad written language 73 (*id.* at p. 2). Toward the end of April 2007, the associate director of the private school recommended to the parents that the student attend a summer program based on the student's social/emotional needs (Tr. pp. 228-29, 581-82, 601-02).

The CSE convened for the student's annual review on June 4, 2007 (Parent Exs. EE; GG).⁴ Meeting participants included the CSE chairperson, the parents, a regular education teacher, a speech-language pathologist, a special education teacher, a school psychologist, staff members from the private school, an advocate for the parents, and an additional parent member (Tr. pp. 168-69; Parent Exs. EE; GG at pp. 1, 12). A transcript of the CSE meeting indicated that the student's mother read a statement from the parents in which she described the student's program at the private out-of-State residential school, including opportunities for social interaction and the development of activities of daily living (ADLs) (Parent Exs. A; GG at pp. 3-8). The student's mother reported that when at home on vacation, the parents observed a "dramatic regression" in the student's ability to perform ADLs and the student became totally dependent on his parents to organize social activities with peers (Parent Ex. GG at pp. 7-8). According to the student's mother, the private school staff had recommended that the student attend the private summer program for summer 2007, noting that it was the type of program that would maintain and reinforce the student's gains in independence, self-control, and frustration tolerance (Parent Exs. A; GG at p. 8).

At the June 4, 2007 CSE meeting, the student's mother and private school staff indicated that the student was doing well academically (Parent Ex. GG at pp. 9-15).⁵ In reviewing the private school reports, the student's advisor from the private school noted that with respect to performing seat work, the student's scores were "three to four, which meant that he did a lot of it on his own with some prompting" (*id.* at p. 14). The advisor reported that the student did well during lecture activities, "although at times he will try to dominate the conversation" (*id.*). According to the advisor, the student was highly motivated and helpful to other students (*id.*). With respect to reading, the advisor reported that student was "reading pretty well with the class;" however, with

⁴ There was no IEP resulting from the June 4, 2007 CSE meeting; however, a transcript of the CSE meeting and a copy of the attendance sheet was included in the hearing record (Parent Exs. EE; GG).

⁵ The CSE chairperson indicated that she had reports from the private school and it appears that the reports were reviewed at the June 4, 2007 CSE meeting, but they were not entered into the hearing record (*see* Parent Ex. GG at pp. 10, 13-15).

respect to writing, the advisor noted that the student was writing "about as minimal as he can to get the answer" (*id.*). The advisor indicated that the student's test and quiz scores were "pretty good" and homework was "usually done on time" (*id.* at p. 15). He noted that when the student got "bogged down with social/emotional issues," sometimes his homework was of lower quality or unfinished (*id.*). The advisor reviewed the student's scores on the WJ III NU and indicated that the student's report card contained "mostly As and Bs" (*id.*). Private school staff reported that the student had been placed in remedial, modified and standard classes, ranging in size from two to eight students (*id.* at p. 16).

The parents, their advocate, and staff from the private school reported at the June 4, 2007 CSE meeting that the student had made gains in his social/emotional functioning and self sufficiency and expressed concern that the student would regress if he was not provided with a summer program that targeted these skill areas (Parent Ex. GG at pp. 20-26, 29). The school psychologist suggested that the student would regress socially and emotionally over the summer and that the student required extended school year (ESY) services (*id.* at pp. 30-31). At the conclusion of the June 4, 2007 meeting, the CSE chairperson indicated that the CSE would approve the student for a 12-month program and that the CSE would reconvene to talk about a specific "program" (*id.* at p. 46).

The CSE reconvened on June 20, 2007 (Parent Ex. FF). The June 20, 2007 CSE was composed of the CSE chairperson, the parents, a regular education teacher, a speech-language pathologist, a special education teacher, a school psychologist, an advocate for the parents, and an additional parent member (Tr. pp. 182-83; Parent Ex. FF). Although no individualized education program (IEP) was created as a result of the June 20, 2007 meeting, the CSE chairperson reported that the student was recommended for ESY services at the Ulster Board of Cooperative Educational Services (BOCES) program (Tr. pp. 129-30).

At the end of the June 20, 2007 CSE meeting, the parents presented the CSE chairperson with a letter indicating that they were unilaterally placing their son in the private summer program which was scheduled to begin on July 5, 2007 (Tr. pp. 133-35; Dist. Ex. 50). Following the June 20, 2007 CSE meeting, the student's mother and the advocate for the parents visited the proposed BOCES program (Tr. p. 622).

The CSE reconvened on August 13, 2007 (Dist. Ex. 52). The CSE was composed of the CSE chairperson, a special education teacher, a regular education teacher, a school psychologist, the student's father, and two parent advocates (*id.* at p. 7). The resultant IEP indicated that the CSE's recommended ESY placement for the student was an 8:1+1 special class at Ulster BOCES (*id.* at pp. 2, 7). Related service recommendations included a once monthly assistive technology consultation, individual counseling twice per six day cycle, individual speech-language therapy twice per six day cycle, and parent counseling and training once monthly (*id.* at p. 2).

In a due process complaint notice dated March 6, 2008, the parents alleged that the June 4, 2007 CSE recommended ESY services because the student exhibited significant regression during school breaks in the areas of social functioning, emotional regulation and daily living skills (IHO Ex. 1 at p. 3). The parents alleged that the summer program recommended by the CSE, a BOCES day program, did not meet those needs and was focused primarily on academic skills (*id.*). They alleged that the BOCES program lacked sufficient social skills training, counseling, mainstream interaction, and daily living skills training (*id.*). They alleged that the IEP and the BOCES program

also should have included an individualized behavioral intervention plan, parent counseling and training, and family therapy (id.). They also alleged that certain evaluative information was not included in the IEP and that the IEP was not completed and provided to the parents until after the summer program had ended (id.).

Also in their due process complaint notice, the parents alleged that their placement of the student in the private summer program was appropriate because it was specifically designed to address social interactions and emotional regulation (IHO Ex. 1 at p. 3). The parents further alleged that the CSE concurred that the private summer program was appropriate and that the only reason the CSE did not recommend the private summer program was because it was not an approved school in New York State (id.). They also alleged that the private summer program included required weekly family therapy sessions and their proposed solution requested reimbursement of the cost of the program and all associated travel expenses (id.).

An impartial hearing was held over four days from June 28, 2008 to October 17, 2008 (Tr. pp. 3, 147, 291, 438).⁶ At the impartial hearing, the district called two witnesses and entered 60 exhibits into the hearing record (Tr. pp. 22, 122; Dist. Exs. 1-60). The parents called five witnesses and entered 33 exhibits into the hearing record (Tr. pp. 218, 295, 443, 505, 601; Parent Exs. A-GG). Additionally, the impartial hearing officer entered ten exhibits into the hearing record (IHO Exs. I-X).

The impartial hearing officer issued a decision dated March 6, 2009 (IHO Decision at p. 21). In her decision, the impartial hearing officer stated the positions of the parties and summarized the evidence and testimony produced at the impartial hearing (id. at pp. 1-15). Next, the impartial hearing officer set forth the relevant law and addressed the appropriateness of the district's program, finding that the district had not offered the student a free appropriate public education (FAPE) for summer 2007 (id. at pp. 16-17). The impartial hearing officer determined that the August 2007 IEP was "simply too late," and that the district's BOCES program was inappropriate because while the IEP was directed toward preventing regression in "personal skills and social-emotional areas, in the adaptive and social living domain," the BOCES program could not address those concerns as it was "designed to keep students ... interested in academics" (id. at pp. 17-18).

Next, the impartial hearing officer addressed the appropriateness of the parental placement and found that the parents had sustained their burden to show that the private summer program provided appropriate services to the student (IHO Decision at pp. 18-19). The impartial hearing officer found that while the placement was not "perfect," it addressed the student's likely areas of regression in "personal skills and social/emotional areas in the adaptive and social living domain" (id. at p. 19). The impartial hearing officer also found that, based upon testimony from the student's mother and his clinical supervisor at the private summer program, the student had made progress during the summer program in social reasoning, self evaluation, interest in peers, hygiene, and responsibilities, and that he left the program "in a better condition to regulate his emotions" (id. at pp. 19-20). The impartial hearing officer then addressed the equities and found that the parents were "forthcoming about their intentions concerning [the student's] placement" for summer 2007

⁶ Although the due process complaint notice was dated March 6, 2008, and was received by the district on that date, the impartial hearing officer was not appointed until May 7, 2008 (Tr. pp. 268-69; IHO Exs. I-II).

and that they cooperated with the district and she found that there were no equitable considerations preventing a ruling in favor of the parents (id. at p. 20).

The impartial hearing officer awarded full tuition reimbursement for the cost of the private summer program, but only awarded travel expenses for transporting the student to and from the private summer program, after finding that there was no evidence that the four family therapy sessions the parents had attended at the private summer program were an "integral and necessary part of the program" (IHO Decision at p. 21).

The district appeals the decision of the impartial hearing officer and requests that the decision be annulled and vacated. Specifically, the district argues that the impartial hearing officer erred in finding that the August 13, 2007 IEP procedurally denied the student a FAPE because the IEP was based upon adequate evaluative materials and established annual goals which were reasonably related to the student's educational deficits; the lack of a BOCES representative at the CSE meeting caused no harm because a CSE member was familiar with the program; and the IEP was not untimely because the parents had determined at the June 20, 2007 CSE meeting that they would unilaterally place the student outside of the district for the summer program. According to the district, the parents' contention that a representative from BOCES should have attended the CSE meeting was improperly addressed by the impartial hearing officer because this argument was not set out in the due process complaint notice.

The district also argues that the impartial hearing officer erred in finding that the August 13, 2007 IEP was not substantively appropriate because the recommended BOCES program would have adequately curbed the student's regression in social skills and ADLs; was designed for students with a diagnosis of Asperger's syndrome; was attended by students who would have been appropriately grouped with the student; and included four to six community visits during the summer.

The district also argues that the impartial hearing officer erred in finding that the parents' placement at the private summer program was appropriate because the private summer program was a summer camp where academics were not the primary focus and because the student's individual needs were not appropriately addressed there. Specifically, the district contends that the private summer program failed to implement recommendations in the 2006 neuropsychological evaluation, failed to provide speech-language therapy, failed to provide OT, and failed to provide a laptop to address the student's organizational needs.

Lastly, the district argues that the impartial hearing officer erred in crediting the student's mother's testimony regarding the student's progress made at the private summer program because testimony from the program's staff described significant problems and setbacks while the student was in attendance.

In their answer, the parents ask that the impartial hearing officer's decision be affirmed with one exception and they assert multiple factual disagreements with the district's pleadings. The parents note that the district's placement offer at the BOCES summer program was invalid because the district had never sent the student's material to the program and the student was never accepted at the program. The parents also assert that the impartial hearing officer correctly found that the ESY services were intended to prevent regression in social skills, behavior and ADLs. The parents argue that the impartial hearing officer correctly found that the district's placement

was inappropriate because it failed to address the student's non-academic needs. Finally, they assert that the impartial hearing officer correctly found that the private summer program was appropriate for the student and that the student progressed there.

Additionally, the parents bring a cross-appeal that alleges that the impartial hearing officer erred in failing to award reimbursement for each of the visits the parents made to the private summer program during the student's attendance because, contrary to the impartial hearing officer's finding, the family therapy sessions were integral to the program.⁷

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., 553 F.3d 165, 172 [2d Cir. 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

⁷ The parents' cross-appeal is pleaded as a "first affirmative defense and counter-claim," but will hereinafter be referred to as a cross-appeal.

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 least restrictive environment (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; E.G. v. City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; 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).

According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[k]; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-039; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).⁸

⁸ In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID), published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

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; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the merits of the arguments raised on appeal, I note that there is no dispute in this case that the student requires ESY services. According to the parents, they met with staff from the student's private residential school in late April 2007, at which time they received "a very strong recommendation" from the associate director that the student required a summer program that focused on regulating his emotions in a variety of social situations (Tr. pp. 582, 602). The student's mother reported that the private school staff recommended that the student attend the private summer program because of the program's focus on social/emotional functioning (Tr. pp. 584-85). The associate director testified that he had reviewed the student's progress with the family and identified areas of concern, including the potential for significant regression if the student did not have some continuity and intervention specific to the student's social/emotional behavioral aspects of living (Tr. p. 228). The associate director testified that the private school staff recommended to the parents that they consider a summer program and that the private summer program was one of the programs identified that could provide effective intervention (Tr. p. 229). The student's father testified that the parents reviewed the private summer program's website, met with the families of students who had gone there, and met with a psychologist who was the director of the program (Tr. p. 602).

The CSE convened for the student's annual review on June 4, 2007 (Parent Ex. GG). A review of a transcript of that meeting reveals that the focus of discussion was on the student's eligibility for ESY services (id.). The CSE chairperson testified that the parents were helpful in providing information with respect to eligibility and that the CSE relied on information it had received from the student's private school (Tr. p. 183). The CSE chairperson testified that the CSE as a whole considered the student's academic and social/emotional needs to be equally important and also considered the student's need to maintain a daily routine of school life (Tr. p. 184). She recalled that with respect to the chief concerns regarding regression, the private school staff discussed academic skills, social skills and ADLs (Tr. p. 176). The CSE chairperson's testimony is; however, inconsistent with the testimony of other witnesses and with the hearing record. The meeting transcript reveals that the student's mother reported the student was doing well academically, as did the student's advisor (Tr. pp. 9-10, 13-15). The advocate for the parents noted that with respect to regression, the parents were focusing on the social/emotional area "because in the academic area he really doesn't lose the skills he has" (Parent Ex. GG at p. 29). Furthermore, the advocate stated throughout the CSE meeting that the student's greatest needs were related to social/emotional development and independent living (id. at pp. 32-34, 46-47). The hearing record shows that after detailing at the June 4, 2007 CSE meeting the student's social/emotional difficulties and difficulties with ADLs, the associate director of the private school expressed concern about the student's potential regression "functioning-wise" (id. at pp. 22-27). The district's school psychologist noted that the student had academic difficulty in some areas, but stated that the student's disability was "based on his social/emotional PDD-type situation" and opined that the student required ESY services (id. at p. 31). The student's father testified that as of the June 4,

2007 CSE meeting, the parents were of the opinion that the student did not need academic instruction to avoid substantial regression in academic areas (Tr. pp. 641, 642). According to the student's father, it was clearly understood by the June 4, 2007 CSE that the areas in which the student was at risk for regression were emotional regulation, frustration tolerance, and ADLs (Tr. p. 608). Testimony from the district's school psychologist supported the father's contention (Tr. pp. 451, 453-55, 484).

At the close of the June 4, 2007 CSE meeting, the CSE determined that the student was eligible for ESY services (Parent Ex. GG at pp. 46-47). The CSE chairperson testified that the private summer program was discussed at the June 4, 2007 meeting, but that the CSE did not make a determination about the program at that time (Tr. p. 178). She recalled advising the CSE that a placement at the private summer program might be possible and that she would follow up with a contact in the New York State Education Department (NYSED) regarding obtaining approval for an unapproved program or assistance identifying program options (Tr. p. 180; see Parent Ex. GG at pp. 45-47). She indicated that she wanted to find out if the private summer program was on the "[S]tate-approved list" (Tr. p. 181). The student's father testified that BOCES was mentioned at the CSE meeting, but there was a concern that it did not "emphasize the area" of the student's needs and there was no one at the meeting who could talk about it (Tr. p. 611; see Parent Ex. GG at pp. 33-34, 40-42).

The CSE reconvened on June 20, 2007 (Parent Ex. FF). The hearing record reflects that an IEP was not developed as a result of that meeting and no transcript of the meeting was entered into the hearing record. The CSE chairperson testified that she had checked to see if the private summer program was on the list of State-approved schools and found that it was not (Tr. pp. 205-06). She further testified that she had reached out to her contact at NYSED, but that she did not receive a response from him (Tr. p. 206).⁹

The CSE chairperson testified that the June 20, 2007 CSE understood the student's Asperger's diagnosis to mean that student had a "hard time" with social skills and judgment and that he also required some academic support (Tr. p. 126). She further testified that as of the June 20, 2007 CSE meeting, the CSE understood the student's skills in reading and writing to be below average (Tr. p. 127). She described the student's receptive and expressive language skills as "strong" (id.). According to the CSE chairperson, mathematics was challenging for the student and the student's social/emotional needs were an area of concern (id.). Specifically, the CSE chairperson testified that "when [the student] needed to be redirected or guided socially his frustration level would cause him to melt down or get stuck where he was so those needed to be addressed carefully" (Tr. p. 128). The CSE chairperson further testified that the parents had shared concerns regarding the student's ADLs, but that she did not know if that was as much of an issue in school as it was at home (id.).

According to the CSE chairperson, the student was recommended for ESY services at Ulster BOCES (Tr. pp. 129-30). Referring to the August 13, 2007 IEP, the chairperson testified that the CSE recommended an assistive technology consult to make sure that assistive technology

⁹ The student's father recalled in testimony that the CSE chairperson reported at the June 20, 2007 CSE meeting that the contact at NYSED had presented her with a recommendation for an alternative BOCES program (Tr. pp. 612-13).

was in place if the student needed it; individual counseling to address any additional needs the student had outside of social skills training; parent counseling and training to assist the parents with regard to the student's ADLs or attempts to manage the student's behavior at home; and individual speech-language therapy services to address the student's needs related to pragmatic skills, turn taking, and conversation skills (Tr. pp. 131-33).

At the impartial hearing, the CSE chairperson opined that the recommended BOCES program had a "nice combination of hands-on experiences as well as situational support in the event that [the student] needed support during the school day" (Tr. p. 130). She noted that the program also provided the student with academic support (id.). The CSE chairperson acknowledged that the student's daily routine of waking up and going to school was particularly challenging for the family and reported that the CSE believed that the BOCES program could help with all of those needs (Tr. p. 184). The CSE chairperson suggested that if the district met with BOCES and detailed the student's specific needs, that BOCES would tailor a program to meet the student's needs (Tr. pp. 196, 197). With regard to the student's difficulty with waking up and showering, the CSE chairperson stated that she believed BOCES would have provided training within the student's home (id.). However, she acknowledged that a plan for those services had not been developed (id.).

The student's father recalled being told at the June 20, 2007 CSE meeting that the recommended program was an academic program which included field trips (Tr. pp. 613-14). According to the student's father, the parents raised concerns that a self-contained BOCES program "would not provide [the student] with the variety of interactions, bumps on the emotional screen that he faces everyday that he has to learn how to control" (Tr. p. 615). The student's father suggested that there was no discussion of how the student's ADLs, social skills or life skills would be addressed in the BOCES program (Tr. p. 614). The student's father testified further that the school psychologist stated at the June 20, 2007 CSE meeting that BOCES needed to be shown the student's adaptive scores to see if or how it could address the student's needs (Tr. pp. 614, 618). When asked if the program would have addressed the student's specific areas of concern for summer regression, the school psychologist responded, consistent with the father's testimony, that BOCES would have to review the student's IEP and look to how he would fit in their program (Tr. p. 457). The student's father testified that the CSE could not answer the parents' questions and the parents were told that they should look at the recommended program (Tr. p. 614). The CSE chairperson indicated that the parents voiced their concerns over the CSE's refusal to provide a plan to address the student's ADLs (Tr. p. 200). The student's father reported that at the CSE meeting, there was concern that there had not been enough exploring of alternative programs by the CSE chairperson and the contact at NYSED she reached out to (Tr. p. 613). The student's father testified that twice during the June 20, 2007 meeting, the CSE chairperson indicated that she would reach out to her contact at NYSED to find out if there were any alternative programs with an emphasis like the private summer program (Tr. p. 620). According to the student's father, the CSE chairperson stated, "I am going to put down BOCES as our recommendation so that you have something" (Tr. pp. 617, 647).

The CSE chairperson testified that the recommended BOCES program was an academic program for student's with Asperger's syndrome and that it that focused on academics, social skills, and ADLs to prevent regression during the summer (Tr. p. 187). She noted that the class worked as a group throughout the day on specific projects and that the program included counseling and speech-language therapy to address pragmatics and social skills (id.). She also indicated that

ADLs were addressed in accordance with a student's IEP (Tr. pp. 187-88). However, the CSE chairperson confirmed that she had not visited the summer program nor had she spoken to anyone about it at the time of the June 20, 2007 CSE meeting (Tr. p. 186). She indicated that she relied on "literature" from BOCES in terms of presenting information to the parents about the nature and components of the BOCES summer program (Tr. p. 207). It appears that the recommended program was a new program in its first year, as the CSE chairperson testified in July 2008 that "last year was its first year" (Tr. pp. 215, 455).

Although the parents informed the CSE at the close of the June 20, 2007 meeting that they intended to unilaterally place the student in the private summer program, subsequent to that meeting the student's father spoke with the teacher of the recommended BOCES class and the student's mother visited the recommended program, along with the parents' advocate (Tr. p. 622; IHO Ex. 1 at p. 4). The student's father reported that he was told by the teacher that the recommended program was going to be an academic program (Tr. p. 623). He indicated that according to the teacher, the proposed curriculum for summer did not include plans to address the parents' concerns regarding the student's difficulty with grooming, dressing and getting to school (*id.*). The teacher reportedly indicated that none of the students in the recommended program had those issues (Tr. p. 624).¹⁰ Furthermore, the student's father reported that when he told the teacher about the student's problems with emotional regulation, she indicated that that was not the primary emphasis of the program (Tr. p. 624). According to the student's father, the teacher indicated that the recommended program was an academic program designed to keep students who had been in the program during the school year interested in academics and she did not indicate how she would address the student's behaviors (Tr. pp. 624-25). The student's father reported that the parents were given a class schedule that included six periods per day (Tr. p. 626). One period per day was devoted to social skills and all the others were for academic subjects except for physical education (*id.*; see Parent Ex. M). He reported that there was no ADL curriculum on the schedule nor were the parents told there would be an ADL curriculum (Tr. pp. 626-27). The student's father testified that he learned from his wife that the program would include a social skills class and that BOCES could try to put something together to address the student ADLs (Tr. pp. 630-31). The student's father reported that in terms of getting the student to school, BOCES suggested that they would provide a checklist that the student should follow in the morning (Tr. p. 632).

At the impartial hearing, the district called the director of special and alternative education (director) for Ulster BOCES as a witness (Tr. pp. 18, 22). The director testified that she was "very familiar" with the 8:1+1 special class recommended for the student as she was the supervisor of the program (Tr. p. 26). She reported that the program was designed for students with Asperger's syndrome or a diagnosis on the autism spectrum (Tr. p. 28). She stated that typically the students presented with average to above average academic and cognitive abilities and some difficulties with social skills (*id.*). According to the director, the class was specifically designed to meet the social/emotional needs of students on the autism spectrum (Tr. pp. 28-29). She stated that there was "a fully involved curriculum provided by the classroom teacher that speaks to that part of the program working with our school counselor and our social worker," as well as a piece that addresses speech-language delays and academic instruction that focuses on themed content units (Tr. p. 29). The director reported that during summer 2007 there were six students enrolled in the recommended class, all of them male (Tr. p. 33). She indicated that the students in the class had

¹⁰ The district did not call the teacher of the recommended BOCES class as a witness at the impartial hearing.

minimal academic needs and that a lot of the academic work was really maintenance work designed to keep the student's engaged in the educational process (id.).

Based on a review of the student's 2007-08 IEP, the BOCES director opined that the BOCES program would have met the student's needs and curbed substantial regression (Tr. p. 44). The director was not asked, nor did she describe how the BOCES program would meet the student's specific social/emotional and ADL needs. In addition, the hearing record suggests that the director's testimony was inconsistent with information provided to the parents by the teacher of the recommended BOCES class. Specifically, the class schedule from the teacher indicated that the program included daily social skills training, while the director indicated that the training took place twice per week and the parent recalled being told that there was no ADL curriculum, while the director testified that one half-hour per day was spent on ADLs (Tr. pp. 37, 52, 626-27, 656; Parent Ex. M). Although the teacher of the proposed class did not testify and the discrepancies are not otherwise reconciled in the hearing record, I note that these details were not available to the CSE or the parents when the recommendation that the student be placed at Ulster BOCES was made at the June 20, 2007 CSE meeting.

The impartial hearing officer determined that the district failed to demonstrate the appropriateness of the recommend BOCES program (IHO Decision at pp. 16-18). I concur and find that the evidence in the hearing record does not show that the district has met its burden to demonstrate that it offered a program that would meet the student's special education needs. The CSE chairperson characterized the recommended program as "academic" and the hearing record is clear that the student required a summer program whose primary focus was on social/emotional skills and ADLs, not academics. In addition, the BOCES director testified that she thought the primary areas of concern with regard to substantial regression were the student's mathematical ability, writing ability and broad reading skills (Tr. p. 50). Further, she stated that her opinion that the BOCES program would have met the student's needs and "curbed substantial regression" was based on the student's cognitive and academic ability (Tr. p. 45).

Additionally, although the CSE recommended the student for placement in the BOCES program at the June 20, 2007 CSE meeting, it had not yet sent a referral packet to the BOCES program at that time (Tr. p. 202). The CSE chairperson confirmed that as of the date of her testimony in July 2008 she did not know if the student would have been accepted at BOCES (Tr. pp. 202-03). The CSE chairperson testified that efforts to develop a program for the student stopped after the parents notified the district at the close of the June 20, 2007 CSE meeting that they intended to send the student to the private summer program (Tr. pp. 208-12). As a result, no final IEP existed for the student until a third CSE meeting was held on August 13, 2007 (Dist. Ex. 52). Although the impartial hearing officer based her decision that the district did not offer a FAPE, in part, on her finding that the IEP was "simply too late" (IHO Decision at p. 17), I need not address the various arguments put forth by the parties regarding this and other alleged procedural irregularities and base my finding that the district failed to meet its burden to demonstrate that it offered the student a FAPE on the substantive grounds set forth above.

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. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Walczak, 142 F.3d at 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 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 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). 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 [emphasis in original] citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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 private summer program is described in the hearing record as offering "a comprehensive therapeutic environment for children struggling with difficulties including: attention deficits, learning differences, impulse control problems, negativity, academic-under achievement, low self-esteem and poor social skills" (Parent Ex. E at p. 1). According to the

private summer program's brochure, the program also provides specialized programming for children with atypical developmental disorders (*id.*). As detailed in the brochure, the basic daily structure of the summer program "consists of wake-up routines, mealtimes, group-based activities, individually selected activities, school, daily group therapy, swim time, evening games, earned rewards, cabin chores and bedtime preparations" (*id.*). Students in the program attend academic classes five days per week for one hour and 45 minutes each day (Tr. p. 348; Parent Ex. E at p. 1). According to the senior clinical supervisor, the program is "highly structured" and provides multiple opportunities for students to practice their social skills and to receive direct feedback and support related to interactions and social pragmatics (Tr. p. 348). Family therapy is an essential part of the program and families of students accepted into the program are required to participate in some kind of family therapy or parental support (Tr. p. 330; Parent Ex. E at p. 2). The summer program for students lasts for 45 days (Tr. pp. 356-57).

During summer 2007, approximately 150 students attended the private summer program and the students were divided into 15 clinical groups (Tr. p. 299). Staffing for each group included the clinical supervisor, the lead staff and three to four cabin (direct care) staff (Tr. p. 302). Additional staffing included activity staff—who were in and out of the group throughout the day—as well as a staff person from the private summer program school (Tr. pp. 330, 302-03). The overall student to staff ratio was two students to one staff person (Tr. p. 300). The senior clinical supervisor testified that she was a licensed independent clinical social worker and that for summer 2007 her lead staff was a Masters level clinician (Tr. pp. 301, 305). According to the supervisor, the school portion of the program is "licensed by the Department of Education" and the teachers in the school are typically either teachers in training or teachers who have worked in school districts who are looking for an opportunity to work in the summer (Tr. pp. 306-07). The majority of the students in the program are funded by their public schools (*id.*).

With respect to the student's private summer program school component, the supervisor reported that there were six to eight students in the student's class and the classrooms were organized based on the academic levels of the students (Tr. pp. 349-50). She noted that students' specific IEP objectives were incorporated into classroom work (Tr. pp. 351-52). The school curriculum consisted primarily of math and language arts instruction (Tr. p. 352). According to the supervisor, the goal of the school component was to keep students in a routine attending and being committed to learning and to prevent regression (Tr. p. 353).

According to the supervisor, the 2007 private summer program was made up of four developmental groups: "Mastery," "Charter," "Focus," and "Crossroads" (Tr. p. 300). The student was in the "Focus" program which was for 14-16 year olds (*id.*). The supervisor testified that the private summer program included a daily routine and schedule that was predictable and consistent, and designed to ensure a sense of psychological and physical safety; a competency-based curriculum and experiential activities to "capture success and help students develop a sense of mastery;" and opportunities for students to practice their social skills and receive "the support they need in order to manage themselves successfully through a day" (Tr. p. 304). The supervisor reported that the private summer program was based on the applied behavior analysis (ABA) model of understanding behavior and developing treatment plans (Tr. p. 347). She reported that the program employed a hierarchy of behavioral interventions and treatment strategies designed to provide students with consistent feedback and cueing, as well as to highlight patterns of behavior (Tr. p. 304). The supervisor indicated that the interventions were designed to reinforce desirable behaviors and reduce undesirable behaviors (Tr. p. 305). Therapeutic approaches used to address

inappropriate behavior included labeling behavior, reminding students of choice points, giving time outs, processing chains of events leading to upsets, and discussing alternative behavioral options (Tr. pp. 370-75; Parent Ex. E at p. 3).

The private summer program included a daily therapy group, which took place for one hour per day (Tr. p. 316). The hearing record indicates that central to the private summer program was a cognitive behavioral checklist program (Tr. p. 317). The supervisor reported that at the beginning of the summer, the program employed a group checklist that she described as "a bidirectional model of feedback" designed to encourage self-assessment and self-awareness, as well as to provide the student with systematic feedback from staff (id.). The checklist included credit areas, described as prosocial behaviors that the program was looking to reinforce; and detour areas, described as problematic behaviors the program was hoping to reduce (id.; Parent Ex. F at p. 1). Credit areas included: participation, which referred to a student's timely participation in all required activities; communication which meant using words (rather than the body) to express thoughts and feelings; listening to staff, which meant listening to what adults have to say, following their direction and accepting limits set by adults; and positive appearance, which referred to personal cleanliness and the neatness of the student's belongings and personal space (Tr. p. 317; Parent Ex. F at p. 1). Detours included: verbal aggression, which referred to the use of words to hurt, intimidate or dominate; physical aggression, which included the use of the body to hurt, intimidate or dominate; withdrawal, which referred to pulling oneself away from a given event or activity physically or mentally; and disorganized speech, which referred to speech that is tangential, off-track or obsessive (Tr. p. 317; Parent Ex. F at p. 2). Students assessed themselves three times per day (Tr. p. 317; Parent Ex. F at pp. 3, 4). Staff then reviewed the student's self-assessment and provided their own assessment of the student's behavior (Tr. pp. 317-18). The more closely aligned the student's assessment was with the staff person's assessment, the more points the student received (Tr. pp. 319-20; Parent Ex. F at p. 3). In addition, to reinforce students for sitting through the feedback process, students were able to earn additional points if they were able to listen to staff feedback without becoming oppositional (Tr. p. 317; Parent Ex. F at p. 2). The group checklist was used for the duration of the program (Tr. pp. 321, 323). In order to earn "arcade time" students had to be above a certain number of credit behaviors and below a certain number of detour behaviors (Tr. pp. 321-22). "Arcade time" was described as an opportunity for students to socialize with peers in a highly structured and supportive environment (id.).

The supervisor testified that midway through the summer, the private program develops "individual constellation contracts" (Tr. p. 324). The individual contract reflects student's individual goals and strengths (id.). The individual contracts also contain a checklist and allow students to earn individual incentives (Tr. p. 325). In addition to the group checklist, students review their individual checklists three times per day (Tr. p. 326).

The student's individual contract outlined the following three credits or prosocial behaviors for the student to work on: 1) listening carefully when others are talking, accepting feedback and considering the perspective of others; 2) staying organized by sticking to a schedule, taking care of yourself, belongings and personal space; and 3) sharing your knowledge in helpful and thoughtful ways, communicating with respectful words and tone, and encouraging others (Parent Exs. F at p. 5; H at pp. 3-4). The plan also outlined the following detours or problematic behaviors which the student demonstrated: 1) perseverating on specific ideas or thoughts and blaming others instead of taking responsibility; 2) interrupting others, whining, being oppositional, ignoring direction and rejecting feedback; and 3) yelling and making rude comments and threats, and using

a defiant and aggressive tone (Parent Exs. F at p. 6; H at pp. 4-5). The student's individual contract spanned the last ten days of the program (Tr. p. 326).

The supervisor reported that the private summer program requires all families of students accepted into the program to participate in some kind of family therapy or parental support (Tr. p. 330). She noted that she was in regular phone contact with the parents and the parents came to the private summer program for a series of family meetings over the summer (*id.*). According to the supervisor, the meetings allowed the supervisor and the parents to talk about the work the student was doing at the private summer program, connect it to the student's difficulties at home and at the private school, and provide recommendations for how the parents could take what the student was working on at the private summer program and implement it at home (Tr. pp. 330-31).

The supervisor reported the student came to the private summer program with an already existing checklist of ADLs, but that he needed a lot of reminders to follow up with them (Tr. p. 418). She indicated that there was a group plan for ADLs in the form of posters hanging in the cabins, like a basic checklist (Tr. pp. 418-19). According to the supervisor, a "huge" part of the student's program was focused around basic life, independent living skills, hygiene, taking care of his belongings and his area, and his ability to organize himself and prepare for school or daily activities (Tr. p. 337).

In light of the above, I concur with the impartial hearing officer and find that the parents have sustained their burden of showing that the private summer program provided the student with appropriate services to prevent substantial regression that necessitated ESY services (*see* 8 NYCRR 200.6 [k][1][v]). The hearing record reflects that the private summer program included therapeutic interventions designed to assist the student in developing appropriate social skills, and to regulate his emotions. In addition, the program targeted the student's ADLs.

Moreover, the hearing record shows that the student made progress at the private program during summer 2007. The hearing record contains a 2007 summer program report generated by the private summer program (Parent Ex. I). The program report highlights areas of strength, risk factors, gains made throughout the summer, and particular interventions and treatment strategies that were particularly helpful for the student (Tr. pp. 332-33; Parent Ex. I). The senior clinical supervisor reported that the student was able to make gains in his social reasoning and social judgment, and in his capacity for reflection and self-evaluation (Tr. pp. 335-36; Parent Ex, I at pp. 10-12). In addition, she noted that the student made progress in keeping friends (Tr. p. 336). The supervisor reported that staff saw improvements in the student's self-esteem, ability to try new things and perseverance (*id.*). According to the supervisor, the student embraced his individual contract and was able to successfully complete his contract, earn his incentives and internalize "to some degree" the behaviors contained in the contract (Tr. p. 332). She reported that the student "made very good progress in his ability to follow his hygiene routine, his daily responsibilities within the cabin and his different chores," but that he was very dependent on adult reminders, cues and "nagging" to follow though (Tr. p. 337). She noted that the student was capable of following the routines, but required a lot of support from staff to encourage him, as well as to set very clear limits and consequences when he was not able to do it (*id.*). The associate director from the student's private residential school, observed that the student's summer program "had the intended effect of preventing regression" (Tr. p. 238).

The district correctly points out that the student suffered setbacks and difficulties while at the private summer program (see, e.g., Tr. pp. 329, 410, 412-13); however, I find after reviewing the hearing record as a whole, that the impartial hearing officer's finding that the student made progress while attending the program is supported.

As to the parents' claim, the parents bring a cross-appeal that alleges that the impartial hearing officer erred in failing to award reimbursement for each of the four visits the parents made to the private summer program over the course of the summer to attend family therapy. Contrary to the impartial hearing officer's finding, evidence in the hearing record shows that family therapy was an integral component of the private summer program (Tr. p. 330; Parent Ex. E at p. 2). The parents' assertion that they attended family therapy sessions four times at the private summer program was uncontroverted by the hearing record. Therefore, under the circumstances of this case, I find that the parents are entitled to be reimbursed for their gas and mileage to and from the four family therapy sessions (Tr. p. 635; see IHO Decision at p. 21).

Finally, I find that the equities in this case do not preclude reimbursement.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it denied a portion of the parents' application for travel related expenses; and

IT IS FURTHER ORDERED that if it has not done so already, the district, upon the parents' submission of proof of gas and mileage, reimburse the parents for their transportation costs related to each of the four family therapy sessions conducted at the private summer program during summer 2007.

Dated: Albany, New York
May 13, 2009

PAUL F. KELLY
STATE REVIEW OFFICER