



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-069

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

**Appearances:**

Law Offices of Skyer, Castro, Cutler & Gersten, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

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

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Windward School (Windward) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Windward (Tr. pp. 346, 360). Windward is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz ][6]).

The hearing record shows that the student's cognitive functioning is in the average range (Dist. Ex. 12 at pp. 2, 8). Academically, the student demonstrates weaknesses in decoding, spelling, written expression, the development of basic math skills, and academic fluency (Dist. Exs. 3 at p. 3; 8; 9 at pp 9-10; 12 at pp. 7, 9; Parent Ex. H at pp. 5, 7). Her attending and planning skills have been described as "variable" (Dist. Ex. 12 at pp. 2, 5-6, 8-9). The student presents with weaknesses in expressive language and auditory processing (Dist. Exs. 8; 9). In addition, she is noted to have deficits in fine motor and visual motor functioning, as well as in sensory processing (Dist. Exs. 10; 12 at pp. 6, 9). The student also presents with deficits in pragmatic language and social/emotional functioning (Dist. Exs. 3; 7; 8; 9; 10; 11; 12; 13). The student's difficulties are

reportedly consistent with diagnoses of an attention deficit hyperactivity disorder (ADHD), predominantly inattentive type; and a developmental coordination disorder (Dist. Ex. 12 at p. 9). Her academic performance is reported to be suggestive of a learning disability, not otherwise specified (NOS) (id.).

The student attended a private "modified Montessori school," from preschool through the end of third grade (Tr. p. 345; Dist. Ex. 7). In July 2002, a private speech-language provider evaluated the student and began providing speech-language therapy to the student as a result of speech-language difficulties identified at that time (Dist. Ex. 9 at p. 1). Subsequently, in September 2003, a private clinical program conducted a "comprehensive neuropsychological and educational evaluation" of the student (Dist. Ex. 12 at p. 1). As a result of this evaluation, the student continued to receive speech-language therapy, began receiving occupational therapy (OT) and vision training, and also worked with a tutor at school (id.).

A private speech-language pathologist evaluated the student over two sessions in December 2005 to determine her then current level of linguistic functioning (Dist. Ex. 9 at p. 1). The resulting speech-language evaluation dated January 14, 2006, indicated that administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) yielded the following core and index standard scores: core language 94 (34th percentile); receptive language 108 (70th percentile); expressive language 93 (32nd percentile); language content 102 (55th percentile); language structure 98 (45th percentile); and working memory 88 (21st percentile) (id. at p. 3). Based on a discrepancy analysis, the evaluating speech-language pathologist reported that the student's receptive language skills could be considered a relative strength for the student as compared to her expressive language skills (id. at p. 5). The evaluator reported that during testing the student demonstrated difficulty expressing herself using appropriate syntax and had limited knowledge of or ability to apply syntactical rules (id.). Based on informal testing, the speech-language pathologist also reported that the student established but inconsistently maintained eye contact, that she was able to appropriately take turns speaking, and that she demonstrated a good understanding of the roles of the speaker and listener in conversation (id. at p. 9). With respect to expressive language, the evaluator reported that the student had more difficulty telling personal narratives than sequential/how to narratives (id. at pp. 9-10). The evaluator indicated that the student's personal narrative lacked all of the necessary components and that the details of her story were unclear, disorganized, and difficult to follow (id. at p. 10). According to the evaluator, the student's sentences contained many reformulations, revisions, and repetitions and the student had difficulty retrieving targeted words (id.). Likewise, the evaluator reported that the student's written narrative alluded to, but did not clearly state, many of the components of the narrative and the details were difficult to follow (id.). The student also had difficulty reading the story that she had written (id.). The evaluator also concluded that the student had difficulty with the production of oral and written narratives (id. at p. 11). She recommended that the student receive individual

speech-language therapy one to two times per week to focus on improving the student's oral and written narratives and the production of a specific speech sound (id.).<sup>1</sup>

Upon a referral by the parents for a neuropsychological and educational evaluation, the private clinical program that had evaluated the student in 2003 evaluated the student again in February 2006 for the stated purposes of developing a learning profile of the student and assisting with school placement (Dist. Ex. 12 at p. 1). A pediatric neurologist and a learning diagnostic specialist conducted the evaluation (id. at p. 11). Background information contained in the evaluation report indicated that the student was doing well in school, noting that she was in a small class and that her teacher was able to individualize instruction to meet the student's needs (id. at p. 2). Additional background information as reported by the student's mother revealed that when playing, if things did not work out as the student had planned, the student became frustrated and sometimes upset (id.). The student's mother further reported that "social issues" were of primary concern (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded the following index standard scores (SS): verbal comprehension 121 (92nd percentile); perceptual reasoning 90 (25th percentile); working memory 97 (42 percentile); and processing speed 83 (13th percentile) (id. at pp. 2-3, 12). The student's full scale IQ score of 99 (47th percentile) placed her within the average range of intellectual functioning (id.). The evaluators noted significant variability in the student's cognitive performance (id. at p. 2). Specifically, they noted that the student displayed superior verbal reasoning abilities and average nonverbal reasoning skills (id. at p. 8). Although the student's verbal comprehension and ability to express her thinking and knowledge were well developed, the student struggled with tasks that involved the accurate examination of visual-spatial information, nonverbal reasoning, and the efficient processing of simple visual information (id. at pp. 2, 3, 8). The evaluators cited variability in the student's ability to focus and maintain attention, to control "the direction" of her thoughts and regulate her actions, and to complete tasks requiring planning (id. at pp. 2, 5-6, 8-9). With respect to memory and learning, the evaluators reported that the student's ability to effectively learn and retrieve visual material was adequate, but noted that in order to learn less meaningful or structured visual images the student may require repeated exposures to the material (id. at p. 5).

According to the evaluators, the student demonstrated significant weaknesses with respect to motor functioning (Dist. Ex. 12 at p. 6). The evaluators also reported that the student struggled on tests of fine motor speed, graphomotor control, and on visual-motor challenges (id. at pp. 2, 6, 7, 8). Assessment of the student's academic functioning, using the Wechsler Individual Achievement Test, Second Edition (WIAT-II) revealed a significant difference between the student's reading comprehension skills (SS 105, 63rd percentile) and her word reading abilities

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<sup>1</sup> The hearing record contains a subsequent speech-language therapy report prepared by the same agency that conducted the testing in December 2005 (Tr. pp. 5-8; Dist. Exs. 8; 9). At the time of the subsequent therapy report, the student was receiving individual speech-language therapy once per week for 45 minutes (Dist. Ex. 8). The speech-language report indicates that the student presented with weaknesses in receptive, expressive, and pragmatic language, as well as auditory processing (id.). The student's speech-language therapist indicated that the following annual goals were targeted during therapy sessions: improving auditory processing and comprehension of auditory information; improving social pragmatic language skills; and improving the knowledge, understanding, and usage of "WH" questions, especially more abstract questions such as "how" and "why" (id.). The therapist outlined additional areas targeted during therapy, which included using root words, prefixes, and suffixes; producing a personal narrative and including relevant and contingent information; and organizing and elaborating on tasks of written expression (id.).

(SS 88, 21st percentile) (id. at pp. 7, 16). The evaluators reported that the student had developed an extensive sight word vocabulary, but had "far greater difficulty" using her knowledge of phonics to read unfamiliar words or multi-syllabic words (id. at p. 7). They further noted that the student had difficulty applying her knowledge of word analysis skills when spelling (SS 89, 23rd percentile) (id. at pp. 7, 9). With respect to math, the evaluators indicated that the student was able to apply her knowledge of math concepts when solving functional word problems (math reasoning SS 97, 42nd percentile), but that the student's performance on a measure of mathematical computation was "below" average (numerical operations SS 89, 23rd percentile) (id.). The evaluators noted that the student had difficulty recalling basic math facts, difficulty adding and subtracting with regrouping, and that in some instances the student "impulsively" misread operational signs (id. at p. 7).

According to the evaluators, the student's response to formal measures of social/emotional functioning indicated that the student was experiencing mild difficulties adjusting to the demands of school, but that she did not report increased feelings of sadness, anxiety, or poor frustration tolerance (Dist. Ex. 12 at p. 8). They opined that the student appeared to have developed skills for coping with her struggles (id. at pp. 8, 9). The evaluators concluded that the student's difficulties were consistent with a diagnosis of an ADHD, predominantly inattentive type, and a developmental coordination disorder (id. at p. 9). Citing the student's weaknesses in decoding, spelling, the development of basic math skills, and academic fluency, the evaluators stated that the student's performance was also suggestive of a learning disability, NOS (id.).

Based on a referral from the student's teacher and speech-language pathologist, an occupational therapist evaluated the student in February 2006 (Dist. Ex. 10 at p. 1). The student attained the following age equivalent scores on the gross motor section of the Peabody Developmental Motor Scales, Second Edition (PDMS-2): stationary 8.4; locomotion 8.4; and object manipulation 8.3 (id. at p. 2). At the time of the evaluation, the student was 8.4 years old (id. at p. 1). With respect to fine motor development, the therapist indicated that the student lacked efficient midrange control and the ability to grade movements needed to accurately perform tasks with control and precision (id. at p. 3). The therapist noted that, at times, graphomotor skills appeared to be strenuous for the student and the student's writing was legible, but labored (id.). According to the therapist, the student experienced difficulties with letter/word placement during a timed writing assignment (id.). The therapist reported that the student had visual spatial difficulties and that she demonstrated difficulty with in-hand manipulative skills for translation and rotation of small objects (id.). With respect to perceptual motor functioning, the therapist indicated that the student had difficulty completing tasks that required visual-motor speed and accuracy (id. at p. 4). The therapist also noted that the student had some difficulty with tasks that required figure-ground perception and sequencing (id.). Administration of the Sensory Profile revealed that the student demonstrated difficulty with sensory processing related to endurance/tone, behavioral outcomes of sensory processing, and modulation of movement affecting activity level (id. at p. 5). The therapist recommended that the student receive OT services one to two times per week for 45 minutes to address the student's sensory, fine motor, and visual motor needs (id. at p. 6).

The student continued in the private school during the 2006-07 school year when she was in the third grade (Tr. p. 345; Dist. Ex. 7). The student attended a regular education class of 18 students with two full-time teachers and received 1:1 tutoring twice per week and additionally

when needed (Dist. Ex. 7). In addition, the parents provided the student with private OT once per week within the school, as well as both OT and speech-language therapy outside of school twice per week (Dist. Exs. 7; 13 at pp. 3, 4). The hearing record also reflects that during the 2006-07 school year, the student was under the care of a licensed psychologist during at least the period from November 2006 through June 7, 2007 (Dist. Ex. 11). The hearing record reflects that previous to that time period, the student was attending a social skills group (Dist. Exs. 11; 12 at p. 1; 13 at p. 3).

The hearing record contains a letter from the student's psychologist dated June 7, 2007 (Dist. Ex. 11). The psychologist reported that she had been seeing the student since November 2006 and that she had been treating the student in weekly individual psychotherapy sessions (id.). The psychologist reported that the student had a "psychiatric" diagnosis of an ADHD, combined type, and indicated that the student also had a diagnosis of a nonverbal learning disability (id.). The psychologist advised that the student's response to psychotropic medication had been "fair due to sustained side effects which [were] being addressed by her psychopharmacologist" (id.). The psychologist reported that the student had previously attended a "social skills group for which she was described to have had modest benefit and poor generalizability" (id.). The psychologist stated that the student's "inattention, impulsivity, overactive behavior and poor social functioning" were "chronic and moderately severe factors that significantly compromise[d] her overall functioning" (id.). Citing the student's difficulty in developing peer relations and in abiding by the classroom routine and structure, the psychologist indicated that maintaining the student in the classroom had required "an unsustainable investment of teacher resources and support" (id.). The psychologist further advised that the student's academic, emotional, and social progress was "at great risk of further deterioration and delay if she continue[d] in a mainstream school environment" (id.). The psychologist advised that because of her needs, the student "warrant[ed] placement in a private school setting capable of providing targeted and individualized learning and emotional/behavioral intervention for children of Average and above intellectual capacity diagnosed with a Nonverbal Learning Disability and Attention Deficit/Hyperactivity Disorder" (id.). The psychologist also advised that the student required "continued weekly individual psychotherapy and regular monitoring by a child psychiatrist" (id.).

The hearing record contains a letter from the educational director of the student's private school dated June 2007 (Dist. Ex. 7). The letter stated that the student had "significant learning issues that impact all aspects of her classroom functioning" (id.). The letter further indicated that according to the student's teachers, the student had "difficulty organizing her work and her thoughts," her "executive functioning skills [were] poor," despite medication she was not able to focus or attend, she had "pronounced" difficulties in "peer relationships," and she "struggle[d] to read social cues, and integrate into the social environment of the school" (id.). The educational director reported that the student's attending difficulties affected her classroom functioning such that she was "often asked to leave in order not to disrupt others," that she had "trouble accepting responsibility for her actions and understanding her role in situations," that her "academic level [was] well below age or grade expectancy," and that her "standardized test scores [were] also well below grade level" (id.). The letter further stated that notwithstanding the instructional personnel, resources, and related services provided to the student, as well as the accommodations made in terms of her workload, and modifications to the curriculum, the student was "unable to adequately function in the classroom" and was "far below her peers in her academics and social/emotional functioning" (id.). The letter advised that the student had been "quite unhappy" during the year,

that her self image was beginning to be affected, and that the school was concerned that the student would no longer try in school and that her performance would further deteriorate (id.). The letter indicated that the private school had recommended that the student be placed in a "full-time special education placement" as the private school could no longer meet the student's "extensive needs for additional support" within the regular classroom (id.).

The district conducted a social history in June 2007 with the student's mother acting as informant (Dist. Ex. 13 at p. 1). According to the social history, the parents had requested an evaluation because the student could no longer remain in her current school because it could not offer the services that the student needed to make academic progress (id.). The social history indicated that during the last year, the student had been experiencing intensive academic delays as well as a worsening of her socialization experiences (id.). The social history revealed that the student took medication for "concentration," that the student had always been impulsive and restless, and that the student had a diagnosis of an ADHD (id. at p. 3). The social history stated, among other things, that the student's mother believed that the student had difficulty comprehending what she reads, that her spelling was delayed, that she had problems holding a pencil, and that she needed help with her homework at times (id.). The student's mother also reported that the student's memory was good for non-academic material and that the student did best with directions given one step at a time (id.). On a "social and behavior checklist," the student's mother reported that, among other things, the student had difficulty with coordination, hyperactivity, speech-language, and relating to peers, and that the student was often teased (id.). The student's mother also reported that the student had difficulty navigating social situations, that she was teased by her peers because of her speech difficulties, and that such teasing was lowering her self-esteem (id.). According to the student's mother, the student had, among other things, "some difficulties with coordination and balance," and at home she tended to be "disorganized and forgetful" (id. at p. 4). The student's mother further reported that the student was receiving OT once per week in school and also once per week outside of school, and that she was receiving speech-language therapy twice per week (id.).

The student enrolled in Windward at the beginning of the 2007-08 school year when she was in the fourth grade (Tr. p. 345; see Dist. Ex. 6). To assess the student's academic functioning, in September 2007, Windward administered to the student the reading and math subtests of the Stanford Achievement Test Series, Tenth Edition (SAT-10), along with the Wide Range Achievement Test, Fourth Edition (WRAT-IV) (Parent Ex. E at p. 2).<sup>2</sup> The student's reading

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<sup>2</sup> Windward reported that administration of the SAT-10 in September 2007 yielded the following percentile scores for timed reading subtests: vocabulary 54 and comprehension 81 (Parent Ex. E at p. 2). Windward also reported the following untimed math percentile scores: procedures 39; problem solving 49; and total 45 (id.). A subsequent administration of the SAT-10 in May 2008 yielded the following percentile scores for timed reading subtests: vocabulary 93 and comprehension 80 (id.). Windward also reported the following untimed math percentile scores: procedures 78; problem solving 58; and total 68 (id.). On the September 2007 administration of the WRAT-IV, Windward reported that the student attained the following standard (and percentile scores): reading 94 (34th percentile); spelling 87 (19th percentile); and math 90 (25th percentile) (id.). A comparison of the student's performance on the (WRAT-IV), administered in September 2007 and again in September 2008, indicated that the student's standard score in reading increased from 94 (34th percentile) to 99 (47th percentile), in spelling from 87 (19th percentile) to 90 (25th percentile), and in math from 90 (25th percentile) to 96 (39th percentile) (id.).

ability was further assessed in December 2007 through the administration of the Gates-MacGinitie Reading Test (id.).<sup>3</sup>

A November 2007 Windward progress report detailed the student's performance in homeroom, language arts, mathematics, social studies, science, art, music, and physical education (Dist. Ex. 6). The report indicated that the student's lowest scores related to tasks involving spelling, following multi-step directions independently, drawing inferences and recognizing different points of view (social studies), expressing ideas related to a topic and word retrieval (science), writing legibly in cursive, and writing paragraphs (id. at pp. 2, 5, 6, 7, 15, 18).

On February 8, 2008, the parents executed a contract with Windward for the student's enrollment for the 2008-09 school year and paid a non-refundable deposit toward the student's tuition (Tr. pp. 375-76; Dist. Ex. 19).

The Committee on Special Education (CSE) convened on February 13, 2008 for an annual review and to develop an individualized education program (IEP) for the student (Tr. pp. 112-13, 115, 147; Dist. Exs. 3 at p. 2; 16).<sup>4</sup> The CSE meeting was attended by the student's mother, a special education teacher who was also the district representative, a regular education teacher, a school psychologist, a social worker, and the assistant principal/special education teacher from Windward, who participated by telephone (Tr. pp. 112-13, 115, 116, 370; Dist. Ex. 3 at p. 2). At the meeting, the CSE changed the student's classification from a student with an other health impairment to a student with a learning disability (Tr. p. 117; Dist. Ex. 3 at pp. 1, 2). The CSE recommended that the student be placed in a special class in a community school with a student to teacher ratio of 12:1 (Tr. p. 118; Dist. Ex. 3 at p. 1). It also recommended that the student be provided with OT, speech-language therapy, and counseling as related services (Tr. pp. 123-24; Dist. Ex. 3 at pp. 1, 12, 14). The CSE also recommended annual goals and short-term objectives relating to mathematics, reading and spelling, writing skills, fine motor skills, auditory processing and comprehension skills, expressive and pragmatic language, and social/emotional skills (Dist. Ex. 3 at pp. 6-11).

On or about February 14, 2008, the district sent the parents a copy of the February 13, 2008 IEP (Dist. Ex. 3 at p. 2). By notice dated July 31, 2008, which the parents stated they received in early August 2008, the district set forth the services that it was offering the student for the 2008-

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<sup>3</sup> The December 2007 administration of the Gates-MacGinitie Reading Test yielded the following timed percentile scores: vocabulary 72; comprehension 79; and total 78 (Parent Ex. E at p. 2). The student's performance declined on a second administration of the Gates MacGinitie Reading Test, given in September 2008 (id.). Her timed percentile scores for vocabulary decreased from the 72nd to the 25th percentile, her timed percentile scores for comprehension decreased from the 79th to the 43rd percentile, and the student's total score decreased from the 78th to the 33rd percentile (id.).

<sup>4</sup> The hearing record reflects that the parents had previously referred the student to the CSE and that for a prior school year, a CSE had determined the student to be eligible for special education programs and services as a student with an other health impairment and had recommended a collaborative team teaching (CTT) program for the student (Tr. pp. 5-8, 396-400, 404; see Dist. Ex. 3 at p. 2). The hearing record does not indicate the extent to which that CSE had previously recommended any related services and no prior IEP was made part of the hearing record.

09 school year and advised the parents of the specific school at which those services would be offered (Tr. pp. 377-78; Dist. Ex. 4).

By letter dated August 18, 2008, the parents, through their attorney, advised the district that they were rejecting the February 13, 2008 IEP and the district's proposed placement for the student, that they would be placing the student at Windward for the 2008-09 school year, and that they were intending to seek funding from the district for the student's tuition (Dist. Ex. 18).

The student's mother visited the proposed public school placement in September 2008, subsequent to the beginning of the 2008-09 school year (Tr. pp. 357, 382-83). She later testified that on the basis of her visit to the proposed class she did not believe it would be an appropriate class for the student (Tr. pp. 357-60).

By due process complaint notice dated December 22, 2008, the parents, through their attorney, requested an impartial hearing (Dist. Ex. 1). The parents alleged that the district did not offer the student a FAPE on procedural and substantive grounds (*id.* at p. 1). In particular, the parents contended that the composition of the February 13, 2008 CSE meeting was invalid due to the lack of a qualified regular education teacher and because there was no additional parent member (*id.* at pp. 1-3). The parents also asserted that "a structured classroom observation of [the student] was not done at any time prior to her initial classification as part of an evaluation for the current 2008-09 IEP" and that the February 13, 2008 CSE changed the student's classification and program recommendation solely on the basis of teacher opinion and not on the basis of any "objective testing or evaluations," which the parents contended were required by federal regulations (*id.* at p. 3). The parents also alleged that the annual goals and short-term objectives on the February 13, 2008 IEP were vague and insufficient; and further that they were "defective" in that they failed to include "measurable standards," did not "establish a schedule for assessing [the student's] progress," and failed to set forth "the method of measurement" for the annual goals (*id.*). Finally, the parents alleged that when they visited the proposed program they "found the population of students to be far below [their daughter's] academic, cognitive, emotional/social functioning" and that the "placement clearly would not provide [her] with a suitable and functional peer group" (*id.*).

The parents retained a private consultant to observe the student at Windward for purposes of the impartial hearing (Tr. pp. 240, 265-67). The private consultant observed the student at Windward on January 16, 2009 during four class periods, including a double period of reading and writing, a skills class, and a math class, and prepared a report based on her observation (Tr. pp. 240-42; Parent Ex. H).

The impartial hearing began on March 13, 2009, and concluded on the second day of testimony on March 27, 2009. The impartial hearing officer rendered a decision dated May 8, 2009, which denied the parents' request for reimbursement for the student's tuition at Windward for the 2008-09 school year (IHO Decision at p. 18).

The impartial hearing officer concluded that the district did not meet its burden to show that its proposed class for the student was appropriate (IHO Decision at p. 13). The impartial hearing officer concluded that the hearing record showed that there was no evidence that the students in the recommended class were at similar levels of social development or physical development, had similar management needs, or had similar learning characteristics (*id.* at p. 15).

She also concluded that the hearing record showed that the student would have been attending science class in a CTT class, rather than in a small group class with a student to staff ratio of 12:1 as provided for in the February 13, 2008 IEP and that the district had not met its burden to show that the student would be able to derive educational benefits from such a class (*id.* at p. 16). The impartial hearing officer denied the balance of the parents' contentions relative to the program offered by the district (IHO Decision at pp. 12-13).

The impartial hearing officer then found that the parents' unilateral placement of the student at Windward was not appropriate (IHO Decision at p. 18). The impartial hearing officer indicated that the only testimony at the impartial hearing with respect to the student's placement at Windward was from the private consultant who had observed the student (*id.* at p. 16). The impartial hearing officer indicated that the parents' witness testified that students at Windward were heterogeneously grouped for social studies and science, but the impartial hearing officer found that there was no evidence that such grouping in those classes would meet the student's needs (*id.*). The impartial hearing officer also concluded that the parents' witness "was unable to provide specifics regarding the class or [the student's] functioning in it to provide a full enough picture to convey whether the school [was] meeting [the student's] needs" (*id.*).

The impartial hearing officer also concluded that while testing indicated that the student had made some progress in basic skills, it was not clear that Windward was addressing all of the student's deficits (IHO Decision at p. 17). The impartial hearing officer concluded that because the student did not receive speech-language therapy, OT, and counseling, this rendered her placement at Windward inappropriate (*id.*). With respect to speech-language therapy, the impartial hearing officer noted that the speech-language evaluation dated January 2006 had recommended that the student receive 1:1 speech-language therapy one to two times a week (*id.*). She also concluded that the private consultant's observation of the student at Windward indicated that narratives continued to be a difficulty for the student and further that there was no evidence that relevant speech-language annual goals on the February 13, 2008 IEP were being addressed (*id.*). With respect to OT, the impartial hearing officer indicated that both the OT evaluation and the private neuropsychological evaluation recommended OT services for the student (*id.* at pp. 17-18). The impartial hearing officer also concluded that the February 13, 2008 IEP included an annual goal related to fine motor skills and handwriting and that, other than the testimony by the student's mother that the student voluntarily attended a handwriting workshop and the assertion by the private consultant that review of the student's work indicated that the student's handwriting had improved, there was no evidence that this need was being appropriately addressed (*id.* at p. 18). The impartial hearing officer also indicated that the student's November 2007 Windward progress report showed that the student had a "particular weakness" in cursive writing as it related to legibility and automaticity (*id.*). With respect to counseling, the impartial hearing officer indicated that there was no evidence that the annual goal in the February 13, 2008 IEP relating to the student's social/emotional skills was being addressed (*id.*). The impartial hearing officer concluded that the student had weaknesses in following multi-step directions independently in both science and art class and in recognizing different points of view in social studies class and that there was "no evidence that these sorts of deficits [were] being addressed" (*id.*).

The parents appeal the impartial hearing officer's determination that they failed to prove that Windward was an appropriate placement for the student. The parents assert that the impartial hearing officer's determination that there was no evidence that the heterogeneous grouping of

students in social studies and science at Windward would meet the student's needs was improperly based upon a November 2007 progress report. The parents further contend that their witness was not required to provide specific information regarding the functional grade levels of the students in the class at Windward in order to prove the appropriateness of the program. Further, the parents allege that documentary evidence contained in the hearing record supports the appropriateness of the student's placement at Windward. The parents further allege that it was inappropriate for the impartial hearing officer to determine that Windward was not appropriate because the student does not receive speech-language therapy, OT, and counseling at Windward. Rather, the parents contend that their witness' testimony and documentary evidence show that the student's related service needs were being met in the program at Windward and that she was progressing in those areas. Lastly, the parents contend that equitable considerations support the parents' claim for tuition reimbursement.

The district answers and denies many of the allegations in the parents' petition. The district asserts that the impartial hearing officer's determination that Windward was not an appropriate placement for the student for the 2008-09 school year should be affirmed. Specifically, the district contends that the evidence in the hearing record supports the impartial hearing officer's determination that Windward was not appropriate because it did not provide related services to the student. Further, the district contends that the parents' witness testified that the student had regressed between the 2007-08 and 2008-09 school years while attending Windward. The district also alleges that the parents presented only vague information about the program the student was receiving at Windward. Lastly, the district contends that the equities preclude an award of tuition reimbursement in this case.

The district has not cross-appealed the impartial hearing officer's finding that it did not offer the student a FAPE for the 2008-09 school year. Therefore, that determination is final and binding upon the parties and will not be reviewed on appeal (see 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Accordingly, the only issues before me are whether the parents' unilateral placement of the student at Windward was appropriate for the student's needs and whether equitable considerations support the parents' claim for reimbursement.

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

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F.

Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 [1982] 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 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).

In 2007, 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 (L 2007, ch. 583, § 3); therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

I must now consider whether the parents have met their burden of proving the appropriateness of their placement of the student at Windward for the 2008-09 school year (see Burlington, 471 U.S. at 369-70). Based on a careful review of the record, I find that while Windward addressed several of the student's academic needs, for the reasons discussed below, the hearing record does not show that Windward addressed the student's language weaknesses or deficits related to social-emotional development, therefore, the private placement was not appropriate.

The hearing record reflects that the student has been offered diagnoses of a learning disability, NOS; an ADHD, predominantly inattentive type; and a developmental coordination disorder (Dist. Exs. 11; 12 at p. 9). The hearing record further reflects that she has academic weaknesses in decoding, spelling, written expression, the development of basic mathematics skills, and academic fluency (Dist. Exs. 3 at p. 3; 8; 9 at pp. 10, 11; 12 at pp. 7, 9, 16; Parent Ex. H at pp. 5, 7). The student also has speech-language needs related to deficits in expressive and pragmatic language (Dist. Exs. 3 at p. 4; 8; 9 at pp. 9, 10, 11). The student has difficulty with peer interactions and understanding others' feelings (Dist. Exs. 3 at p. 4; 7; 11; 13 at p. 3). She has fine motor weaknesses and difficulty with graphomotor tasks (Dist. Exs. 10; 12 at pp. 6, 9).

A private consultant retained by the parents testified at the impartial hearing with respect to the student's placement at Windward. The private consultant testified that she is on the staff of the Windward "Teacher Training Institute" and served as an "in-house" language consultant to Windward until 2007 (Tr. pp. 223, 227, 273-74; Parent Ex. I). The private consultant described Windward as a multisensory structured program for students who have language and learning disabilities, including dyslexia (Tr. p. 227). In addition to course content, students are taught "how to learn content" and are provided with strategy instruction (Tr. pp. 227, 244, 247-48; Parent Ex. H at p. 2). According to the private consultant, the school serves students who have average to above average intellectual ability (Tr. p. 228). She testified that students are screened for admission to ensure that they do not have behavioral or emotional difficulties, to confirm that they are able to respond in a small group setting, and to ascertain who the student is as a person and a learner (Tr. pp. 228-30). The private consultant further testified that students at Windward are grouped homogeneously by age and ability level for language arts and math (Tr. pp. 228, 256, 320-21; see Parent Ex. A). However, she testified that for social studies and science, the students are grouped heterogeneously (Tr. p. 303). The private consultant testified that the school uses the Orton-Gillingham methodology to teach students to read, and that writing is taught using the "Basic Writing Skills" program (Tr. pp. 227-28, 258). According to the private consultant, as a rule there are ten students in a class and most of the teachers at Windward are certified special education teachers (Tr. pp. 243, 330). The private consultant described the classrooms at Windward as uncluttered, but not austere (Tr. p. 243). She indicated that as a rule, the students sit in rows and aisles facing a blackboard and the teacher teaches from the front of the room (Tr. p. 242). The private consultant noted that the students' work is located in the rear of the room so as

not be visually overwhelming and strategy cards written in black and white are hung along the side of the walls (Tr. pp. 242-43).

The hearing record reflects that during the 2008-09 school year, the student's schedule included academic classes in reading, language arts, math, Orton-Gillingham skills, science, and social studies (Parent Ex. F). The student's classes ranged between nine and thirteen students (Parent Ex. A). Although the parents' private consultant testified that historically students at Windward were grouped homogenously, she acknowledged that she did not have personal knowledge of the specifics of the grouping in this student's classes (Tr. pp. 303-05, 320-26). The student did not receive speech-language therapy, OT, or counseling either privately or through Windward (Tr. pp. 372-73).

The hearing record indicates that the student has a history of decoding and spelling difficulties (Dist. Ex. 3 at pp. 3, 7; 8; 12 at pp. 7, 9). In addition, she is reported to have difficulty with written expression, specifically with organizing her thoughts on paper and "getting to the point" (Dist. Ex. 9 at pp. 2, 10, 11). The student's language arts teacher described the school's reading program as a multisensory, systematically structured program, which was phonetically based and taught the structure of English (Parent Ex. D at p. 2). The teacher further indicated that emphasis was placed on accurate word decoding and oral fluency and that "special attention" was also given to the development of comprehension and vocabulary skills (*id.*). In the 2008-09 mid-year progress report, the student's language arts teacher reported that during the first semester of the 2008-09 school year, the student's class practiced reading word, phrase, and sentence lists while incorporating a review of spelling rules, rules of syllabication, phonograms, and suffix endings (*id.*). The private consultant's observation report confirmed that instruction in spelling, syllabication, and root words took place in the student's language arts and skills classes (Parent Ex. H at pp. 3, 6-7). According to the student's language arts teacher, during the first semester, the focus of the student's writing class was on composing sentences and paragraphs using varied language structure and precise vocabulary (Parent Ex. D at p. 2). The teacher noted that the students practiced specific sentence skills in order to create linguistically complex sentences and also received instruction in the use of proper syntax to improve sentence structure (*id.*). The teacher further noted that the class practiced brainstorming for the purpose of categorization; note-taking; and outlining skills to organize and sequence information, compose topic and concluding sentences, and draft single paragraphs (*id.*). The private consultant's observation report confirmed that instruction related to paragraph development and the sequence of writing steps took place in the student's writing class (Parent Ex. H at p. 4). Additionally, the private consultant noted that the student maintained a writing notebook in which each page identified the book, chapter, and pages the written work was related to and included a series of questions regarding those pages to be answered (*id.*). Based on the above, I find that the language arts instruction provided by Windward appropriately targeted the student's deficits in written expression, decoding, and spelling.

I further find that the math instruction at Windward appropriately addressed the student's difficulties with respect to mathematics. The hearing record indicates that the student had difficulty recalling basic math facts and computing written math problems (Dist. Ex. 12 at p. 7). The student's math teacher indicated in the 2008-09 mid-year progress report that fraction concepts were introduced during the first semester and that classroom activities were designed to support the development of math vocabulary needed to formulate oral explanations and facilitate problem

solving (Parent Ex. D at p. 9). The teacher further reported that students were "supported" in using basic math facts to develop practical skills related to time, money, and measurement (id.). The private consultant reported in her observation that students were given a "warm up" activity which consisted of 10 calculations of basic mathematical operations in numbers or in words, as well as several word problems (Parent Ex. H at p. 5). The private consultant also reported that during the observation, the teacher presented a lesson on the "Language of Fractions" in which students used a word bank to help define terms such as "numerator" and "denominator" (id.). She noted that the teacher guided the students' thinking with "carefully worded questions which were often repeated and rephrased" and that the teacher made "frequent references to prior learning" (id. at p. 6). According to the private consultant, when the student became confused with a presented item, the teacher "walked her through the concept with examples and drawings" (id.). As noted above, I find that Windward appropriately addressed the student's needs in mathematics, in addition to other academic areas.

However, as explained below, the parents did not meet their burden to show that Windward addressed the student's deficits in speech-language development and social emotional functioning. The CSE recommended related services to address the student's deficits in these areas, as well as handwriting deficits, and the student's mother did not object at the February 13, 2008 CSE meeting to the inclusion of these services on the student's IEP (Tr. pp. 373-74; Dist. Ex. 3 at p. 14). The student's mother confirmed that the student was not receiving speech-language therapy, OT, or counseling, either privately or at Windward (Tr. pp. 372-73).

With respect to the student's speech-language needs, the hearing record indicates that the student began receiving speech-language services following a July 2002 evaluation which revealed that the student demonstrated difficulty with articulation, oral motor skills, word retrieval, production of narratives, and the use of past tense verbs and pronouns (Dist. Ex. 9 at p. 1). A speech-language evaluation dated January 2006 indicated that the student had difficulty with expressive language, including the production of oral and written narratives (Dist. Ex. 9 at pp. 9-11). A subsequent speech-language report submitted to the district indicated that the student presented with receptive, expressive, auditory processing, and pragmatic language weaknesses (Tr. pp. 5-8; Dist. Ex. 8). The February 13, 2008 CSE recommended that the student receive speech-language therapy one time per week in a group and one time per week individually (Dist. Ex. 3 at p. 14). I note that the district representative testified that the recommended speech-language services were discussed with the Windward representative at the February 13, 2008 CSE meeting and that the student's mother and the Windward representative agreed with the recommendation (Tr. pp. 123-24). The February 13, 2008 CSE also determined that relevant short-term objectives should target, among other things, the student's ability to include relevant, specific, and accurate information while engaged in conversations; to organize and sequence thoughts/ideas while producing narratives; and to produce short responses, complete sentences and longer responses in written expression (Dist. Ex. 3 at p. 10). The district representative testified that with respect to related services, the February 13, 2008 CSE identified which annual goals from the student's previous IEP were met and which remained salient, and that the February 13, 2008 annual goals were based on that information (Tr. pp. 166-67). The hearing record also reflects that the February 13, 2008 IEP's annual goals and short-term objectives were discussed with the Windward representative and the student's mother at the February 13, 2008 CSE meeting and that there was no objection to them (Tr. pp. 129-30).

The hearing record indicates that the student continued to have difficulty with oral expression and higher level language tasks at Windward during the 2008-09 school year (Parent Exs. D at p. 3; H at pp. 5, 6). In particular, according to the private consultant, the student's skills teacher at Windward reported that the student could "become so invested in asking questions about her somewhat circuitous route to figuring out something ... that she can confuse herself and the others around her" (Parent Ex. H at p. 7). Further, the student's teachers for her language arts, mathematics, and skills classes at Windward all reported that the student could be "quite literal" and that her thinking was "inflexible" (*id.* at pp. 5, 6, 7). The student's language arts teacher also indicated that the student's ability to infer causal relationships, make accurate predictions, draw conclusions, and understand inferential material was inconsistent (Parent Ex. D at p. 3). Notwithstanding the above, the hearing record does not include information relating to whether, how, and to what extent Windward addressed the student's speech-language needs. Therefore, I find that the hearing record does not show that Windward met the student's speech-language needs.

The hearing record also reflects that the student demonstrated deficits in pragmatic language skills and social/emotional development. The student was initially referred for a private neuropsychological and educational evaluation in 2003, due in part to parental concerns about the student's ability to control her behavior when upset (Dist. Ex. 12 at p. 1). At the time of the February 2006 private neuropsychological and educational evaluation, the student's social needs were reported to be "of primary concern" (*id.* at p. 2). Subsequent reports from the student's mother, psychotherapist, and the director of the student's previous private school indicated that the student had deficits in social-emotional development and the ability to interact with peers, which interfered with her ability to function in school (Dist. Exs. 7; 11; 13 at p. 3). While the student's November 2007 progress report from Windward indicated that the student "always" or "usually" worked cooperatively in a small group and interacted positively with peers (Dist. Ex. 6 at pp. 1, 2, 3, 5, 7, 8), the February 13, 2008 IEP reflected that the student's "major difficulties" were with social interactions (Dist. Ex. 3 at p. 4). The February 13, 2008 IEP also stated that although it was not her intention, the student could be "curt" and "rude" when interacting with peers, that the student had not yet developed the skill of using appropriate language in social situations, and that the student did not understand the feelings and emotions of others (*id.*). I note that the February 13, 2008 IEP recommended that the student receive individual counseling once per week to address the student's understanding of emotions and to enhance her social interaction skills (*id.* at pp. 4, 14). The February 13, 2008 IEP also included pragmatic language short-term objectives related to initiating and sustaining conversation and social/emotional short-term objectives related to the ability of the student to describe her feelings, as well as the feelings of others (*id.* at pp. 10, 11). As with speech-language services and goals, the hearing record reflects that the February 13, 2008 CSE's recommendations for counseling were discussed with both the Windward representative and the student's mother at the CSE meeting and that there was no objection (Tr. pp. 123-24, 129-30). I also note that the parents have not disputed the accuracy of the statement of the student's social/emotional needs, as identified on the February 13, 2008 IEP, at the impartial hearing or on appeal.

Moreover, the hearing record reflects that the student had difficulty with other students at Windward during the 2008-09 school year. The student's mother testified the student was having a hard time socially at school (Tr. p. 361). She attributed it to a "falling out" between the student and a group of girls from the previous year (Tr. pp. 361, 387). According to the student's mother, the girls were disregarding the student and the student was having a "very hard time" finding a

friend (Tr. p. 361). The student's mother further testified that the guidance counselor at the school was "involved" and that the school had taken "a very active role" in guiding the student through the process of making friends (Tr. pp. 361-62). However, there is no indication in the hearing record that Windward provided the student with any related services to address the student's deficits in the areas of pragmatic language and social/emotional development or addressed those areas programmatically. Given the student's long history of social/emotional deficits, the severity of those deficits as reflected in the hearing record, and the student's ongoing social difficulties, I find that the student required a greater level of intervention in the areas of pragmatic language and social/emotional development than the hearing record shows was being provided by Windward.

The hearing record also reflects that the student has a history of fine motor weaknesses and difficulty with graphomotor tasks (Dist. Exs. 10; 12 at pp. 1, 2, 6). The February 13, 2008 CSE recommended that the student receive individual OT twice weekly (Dist. Ex. 3 at p. 14). The February 13, 2008 IEP included an annual goal targeting the student's fine motor skills, as well as short-term objectives related to writing with adequate spacing, writing on a line with appropriate sizing, and using an appropriate mix of upper and lower case letters (*id.* at p. 8). I note that the hearing record reflects that the February 13, 2008 CSE's recommendations for OT, the annual goal relating to the student's fine motor skills, and the short-term objectives related to handwriting were discussed with both the Windward representative at the February 13, 2008 CSE meeting and the student's mother, and that they did not voice disagreement with the CSE's recommendations (Tr. pp. 129-30). The student's November 2007 Windward progress report indicated that with respect to cursive writing, the student needed "frequent teacher support" to write legibly or with automaticity (Dist. Ex. 6 at p. 15). However, the hearing record includes limited information regarding the extent to which Windward addressed the student's handwriting difficulties. The student's mother testified that at the time of the first 2008-09 parent-teacher conference, the student's handwriting was "bad" and did not compare to the rest of the students (Tr. pp. 366-67). Thereafter, the student voluntarily attended a writing workshop at Windward and the student's mother testified that the student's handwriting had improved (Tr. pp. 367-68). The student's mother also testified that the student's writing was on the line, that the letters were the same size, and that the student's writing was more fluid (Tr. p. 367). Based on her review of the student's classroom writing notebook, the parents' private consultant reported that between September 2008 and January 2009, the student's writing reflected considerable improvement with regard to handwriting, in addition to other areas (Parent Ex. H at p. 4). The February 2009 Windward progress report did not include handwriting as a skill to be assessed; however, the progress report indicated that the student's homework was "usually" "neat and legible" (Dist. Ex. D at pp. 4, 8, 11). It is not clear from the hearing record whether the student's graphomotor skills had improved to the extent that she no longer required therapeutic intervention.

The parents contend that the student made progress at Windward. As indicated above, the hearing record contains a Windward progress report dated February 2009, the student's report card for the first two marking periods of the 2008-09 school year, and the results of certain standardized testing conducted during 2007, and the 2007-08 and 2008-09 school years (Parent Exs. C; D; E).

The February 2009 progress report provides information relating to the student's progress at Windward (Parent Ex. D). With respect to language arts, the report indicated that the student's effort and participation met classroom expectations, that the student was attentive and motivated, and that she self-monitored her behavior (*id.* at p. 5). The report indicated that the student was

"usually" able to demonstrate numerous language arts skills including applying decoding strategies, reading fluently, summarizing information and paraphrasing ideas, and generating topic and concluding sentences (id. at p. 4). The student "inconsistently" demonstrated skills related to spelling, identifying the main idea and relevant details, understanding inferential material and making accurate predictions, and using strategies presented to write complete and varied sentences (id.). The report characterized the student's ability to use keyboarding skills efficiently as "infrequent" (id.). The report indicated that in social studies, the student "usually" comprehended historical, economic, and geographical concepts; understood the parts, functions, and principles of government; was able to infer causal relationships, summarize information, and draw conclusions; and was able to interpret maps, graphs, and political cartoons (id. at p. 7). The student inconsistently understood the sequence of historical events, made connections among geography, socio-economic, and historical factors, and maintained an organized notebook (id.). The student was described as "usually" being motivated and attentive and as "always" self-monitoring her behavior (id. at p. 8). The progress report indicated that in math, the student "usually" retrieved basic math facts automatically, accurately added and subtracted whole numbers, and solved basic word problems accurately (id. at p. 11). The student "inconsistently" applied mental math strategies, solved multi-step word problems accurately, took accurate notes, or self-monitored her behavior (id.). The progress report indicated that in science, the student always expressed ideas related to a topic, followed laboratory safety rules, and completed notes (id. at p. 13). The student was "inconsistently attentive" in science class (id.).

The student's report card from Windward for the first two marking periods of the 2008-09 school year indicated second marking period improvements in the student's reading fluency, vocabulary, paragraph writing, homework completion, effort in language arts, understanding of concepts in mathematics, ability to solve word problems, understanding of science concepts, participation in science activities, effort in science, use of accurate keyboarding skills, and understanding of computer class procedures (Parent Ex. C). The student's in-class behavior ranged from "satisfactory" to "very good" (id.). I also note that the private consultant, based on her personal observation and conversations with the student's teachers, reported that the student was able to read fluently with inflection and that her writing had improved (Parent Ex. H at pp. 3, 4). The private consultant also reported that the student continued to exhibit deficits in spelling and that the rate at which she could generate basic math facts was slow (id. at pp. 5, 6).

With respect to a comparison of the student's performance on the standardized tests administered by Windward in February 2007, during the 2007-08 school year, and at the beginning of the 2008-09 school year (Parent Ex. E at p. 2), the impartial hearing officer concluded that such testing "indicated that the student had made some progress in basic skills" (IHO Decision at p. 17). I note, however, that the standardized testing in the hearing record does not provide information relative to measured changes in the student's performance that included any significant period during the 2008-09 school year, the school year for which the parents are seeking tuition reimbursement. Moreover, it is not clear that the documentary evidence contained in the hearing record, including a progress report from November 2007 and a subsequent report from February 2009, assessed the same skills or whether the skills that appear similar were assessed in the same manner.

Although I have considered the parents' argument that the student made progress at Windward, while "a child's progress is relevant" to my review, "such progress does not itself

demonstrate that a private placement [is] appropriate" (Gagliardo, 489 F.3d at 115; Green v. New York City Dep't of Educ., 2008 WL 919609 [N.D.N.Y. Mar. 31, 2008]; see Application of a Child with a Disability, Appeal No. 07-034). Under the circumstances of this case, I find that while the hearing record shows that Windward addressed some of the student's needs, as discussed above, it does not show that Windward addressed the student's needs in the areas of expressive language, pragmatic language, and social-emotional functioning. I therefore find that the parents have not demonstrated that the student's placement at Windward "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, citing Frank G., 459 F.3d at 364-65; see Matrejeck, 2008 WL 3852180 at \*2; R.C. and M.B. v. Bd. of Educ., 2008 U.S. Dist. LEXIS 52084, 50 IDELR 225 [S.D.N.Y. July 7, 2008]; Application of the Bd. of Educ., Appeal No. 08-055; Application of a Child with a Disability, Appeal No. 07-034). I will therefore uphold the impartial hearing officer's decision to deny the parents' request for tuition reimbursement.

Having decided that the parents failed to show that their placement of the student at Windward was appropriate, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made above. Lastly, based on the hearing record, the student can be educated in the public school in the least restrictive environment. I encourage the parties to collaborate in good faith to devise an appropriate educational program for the student.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
August 7, 2009

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**