



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-149

**Application of the BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL DISTRICT OF MIDDLETOWN
for review of a determination of a hearing officer relating to the
provision of educational services to a student with a disability**

Appearances:

Donoghue, Thomas, Auslander & Drohan, LLP, attorneys for petitioner, James P. Drohan, Esq., of counsel

Sussman and Watkins, attorneys for respondent, Michael H. Sussman, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Franklin Academy (Franklin) for a portion of the 2009-10 school year and the 2010-11 school year. The appeal must be sustained in part.

Background

At the time of the impartial hearing, the student was enrolled in the eleventh grade at Franklin (Tr. pp. 192, 201, 205). Franklin is an out-of-State nonpublic residential school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (Dist. Ex. 9 at p. 2; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The student's educational history reflects that in November 2005 during the student's sixth grade year, the student was placed by the Committee on Special Education (CSE) at Devereux-Glenholme (Glenholme) (Tr. p. 64; Dist. Ex. 3 at pp. 1-2). Glenholme is an out-of-State nonpublic residential school which has been approved by the Commissioner of Education as a school with

which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Tr. pp. 244-45). The hearing record reflects that the student was placed at Glenholme to address her difficulties with social skills, self control, anxiety, attention as well as oppositional behavior, verbal aggression, tantrums, lying, challenging authority, social isolation and parent/child conflicts (Dist. Ex. 10 at p. 1). The student attended Glenholme from November 2005 until March 2010 (Tr. p. 259; Dist. Exs. 3-8).

On November 5, 2007, a speech-language pathologist conducted a pragmatic and spoken language evaluation of the student (Dist. Ex. 15). According to the report, the student exhibited mild delays in pragmatic language exacerbated by her difficulties with emotional functioning and behavior (id. at p. 3). The evaluator concluded that the student did not qualify for speech-language services (id.).

On April 30, 2009, a Glenholme school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 17). The school psychologist administered the Kaufman Assessment Battery for Children-Second Edition (KABC-2) and the Woodcock-Johnson Third Edition Normative Update Tests of Achievement (WJ III NU) (id. at p. 1). Regarding cognitive abilities, the student exhibited average to above average skills (id. at p. 6). Overall, the student exhibited below average skills in math, above average skills in reading, and average skills in written and oral language (id. at p. 7). Word identification, reading speed, and reading comprehension were areas of strength (id. at p. 4). The student's ability to analyze math problems was average, but she exhibited low ability to complete math calculations (id.).

In March and May 2009, the student's Glenholme teachers provided information regarding the student's academic progress (Dist. Ex. 17 at pp. 8-26). The student's English, writing, and math teachers reported that the student continued to progress (id. at pp. 8-9, 16). In English class, the student participated in class discussions and contributed "relevant and thoughtful comments" (id. at p. 8). The student demonstrated a solid understanding of math including adding, subtracting, multiplying, and dividing whole numbers, fractions, and decimals; the student also exhibited an understanding of percents and single-step algebraic functions (id. at p. 9). In writing class, the student was "enthusiastic and creative," and her work was excellent (id. at p. 16).

On May 20, 2009, the CSE convened for the student's annual review for the 2009-10 school year (tenth grade) (Dist. Ex. 8). Meeting participants included a CSE chairperson, a psychologist, a home/school liaison, a social worker/counselor, the student's mother, and the student (id. at p. 1). An occupational therapist and teacher participated in the meeting by telephone (id.). The CSE found that the student continued to be eligible for a special education program and related services as a student with a learning disability (id. at p. 2). The CSE's recommendation that the student be placed in a residential school at Glenholme included a 12:1+1 special class and provided for one 60-minute session of individual counseling per week and one 30-minute session of individual OT per week (id. at pp. 2-3).

Glenholme provided a tenth grade report card for the student's first and second quarters during the 2009-10 school year (Dist. Ex. 18). The student's first quarter grades were as follows: D in academic writing, B+ in English II, A- in core algebra, B in earth science lab, B in earth science, C+ in Spanish III, A in art, A- in writing II, B+ in physical education, and an A in chorus (id. at p. 1). The student's second quarter grades were as follows: B- in academic writing, B in

English II, A- in core algebra, A- in earth science lab, A in earth science, B- in Spanish III, A in art, A- in writing II, B+ in physical education, and an A- in chorus (id. at p. 2). The student performed "generally well" in English class including frequent participation and consistent completion of homework (id.). The student "worked hard" in algebra class most of the semester and demonstrated an understanding of the material (id.). In academic writing, during the second quarter, the student did a better job with managing her assignments and completing work in a timely manner (id.).

The district provided an undated progress report for quarters one through three regarding the student's individualized education program (IEP) goals for the 2009-10 school year (Dist. Ex. 13). Regarding the student's 14 annual goals in the areas of study skills, reading, social/emotional/behavioral, motor, and career/vocational/transition, the report indicated that the student had achieved four of her annual goals, progressed satisfactorily with one of her annual goals, and had made some progress with eight of her annual goals (id. at pp. 1-3). The report indicated that the student did not progress satisfactorily with one of her annual goals (id.).

On June 12, 2009, Glenholme conducted a psychoeducational evaluation of the student (Dist. Ex. 16). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded standard scores of 112 (high average) in verbal comprehension, 73 (borderline) in perceptual reasoning, 99 (average) in working memory, 80 (low average) in processing speed, and a full scale IQ of 89 (low average) (id. at p. 2). The student's verbal expression and comprehension skills were better developed than her short-term auditory memory, visual scanning speed, and visual motor integration skills (id.). The student exhibited difficulties with tasks related to visual-spatial relations, visual motor integration, working within time limits, and recognizing patterns within subject matter (id. at p. 3).

In an e-mail dated January 6, 2010, Glenholme informed the parent that the student would continue to benefit from the structure and support offered at Glenholme (Parent Ex. W). The e-mail indicated that the student continued to require support in the area of social/emotional coping strategies (id.).

During three nonconsecutive days in January 2010, a clinical psychologist conducted a neuropsychological evaluation of the student, which was obtained privately by the parent (Dist. Ex. 14; Parent Ex. Y).¹ The private evaluator noted that the student had previously received several diagnoses including the following: neurological impairment with left brain strengths and right brain weaknesses; pervasive developmental disorder-not otherwise specified (PDD-NOS); Asperger's disorder; autism spectrum disorder; nonverbal learning disorder; oppositional defiant disorder (ODD); executive dysfunction; bipolar disorder; depression; and an attention deficit hyperactivity disorder (ADHD) (Dist. Ex. 14 at p. 1; Parent Ex. Y at p. 1). The private evaluator

¹ The hearing record reflects that the parent provided the district with the neuropsychological evaluation report marked into evidence as Dist. Ex. 14 (Tr. p. 508). The hearing record also indicates that the neuropsychological evaluation report was also entered as Parent Ex. Y (id.). In review of both exhibits, it appears that Parent Ex. Y contains corresponding information compared to Dist. Ex. 14; however, Parent Ex. Y at times uses different language to explain the same testing results and also provides additional information such as a data sheet containing the testing scores and lengthier narratives to explain the evaluation results (compare Dist. Ex. 14 at pp. 1-13, with Parent Ex. Y at pp. 1-72).

also noted the student's history of difficulties in the areas of learning, sensory processing, motor skills, and social skills (*id.*). Regarding medication, the evaluator noted that in the past, the student had been prescribed several medications to address her social/emotional functioning, that the student was taking such medications in the sixth grade when the student began attending Glenholme, and that due to significant progress while at Glenholme, the student no longer required such medication (Dist Ex. 14 at pp. 1-2; Parent Ex. Y at pp. 1-2).

The private evaluator administered numerous assessments including the WISC-IV; Integrated Visual and Auditory Continuous Performance Test (IVA-CPT); Delis Kaplan Executive Function System (D-KEFS); Wide Range Assessment of Memory and Learning- Second Edition (WRAML-2); Wechsler Individual Achievement Test-Third Edition (WIAT-III); a selected subtest of the Woodcock Johnson Tests of Achievement-Third Edition (WJ-III ACH); Nelson-Deny Reading Test; Bender Gestalt-Second Edition; Beery Visual Motor Integration-Fifth Edition (VMI); Test of Language Competence-Expanded Edition, level 2 (TLC); Problem Behavior Inventory; Incomplete Sentences; Behavior Assessment System for Children-Second Edition (BASC-2); Adolescent Autism Spectrum Quotient (AQ); Australian Scale for Asperger's Syndrome; Thematic Apperception Test (TAT); Rorschach Inkblot Test; and the Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A) (Dist. Ex. 14 at p. 2; Parent Ex. Y at p. 5).

Administration of the WISC-IV yielded standard scores of 134 (very superior) in verbal comprehension, 88 (low average) in perceptual reasoning, 99 (average) in working memory, and 75 (borderline) in processing speed (Dist. Ex. 14 at p. 3; Parent Ex. Y at p. 6). Based on the 46-point discrepancy between her verbal comprehension and perceptual reasoning indices, the private evaluator indicated that the student's verbal reasoning abilities were significantly better developed than her visual perceptual reasoning abilities, which was consistent with her diagnosis of a nonverbal learning disability (Dist. Ex. 14 at p. 3; Parent Ex. Y at p. 7). Additionally, the student demonstrated significantly better developed skills related to auditory processing compared to processing of visual information (*id.*). The private evaluator opined that a student's low processing speech index typically correlated with a "slow work pace" (Dist. Ex. 14 at p. 3; Parent Ex. Y at p. 8). The student exhibited advanced skills related to verbal reasoning and verbal expression (*id.*). The report noted that the student's performance on tasks related to common sense reasoning regarding social situations was significantly lower compared to her reasoning skills regarding abstract theoretical concepts (Dist. Ex. 14 at p. 4; Parent Ex. Y at p. 8). The student exhibited well developed language processing skills related to figurative language, inferential reasoning, and multiple meanings (Dist Ex. 14 at p. 4; Parent Ex. Y at p. 9).

The neuropsychological evaluation report further indicated that the student exhibited difficulties with maintaining her attention within both auditory and visual modalities (Dist. Ex. 14 at p. 5; Parent Ex. Y at p. 14). The student exhibited weakness in the area of executive functions (Dist. Ex. 14 at p. 6; Parent Ex. Y at p. 30). The student performed better with respect to verbal expression of skills compared to either graphomotor or constructional output (*id.*). The student also exhibited significant weakness in visual motor integration skills (Dist. Ex. 14 at p. 6; Parent Ex. Y at p. 31). The report indicated that the student's memory with respect to verbal information was better developed than her visual memory (Dist. Ex. 14 at p. 7; Parent Ex. Y at p. 32).

The neuropsychological evaluation report indicated, that the student's reading comprehension was very superior with an increased reading rate while reading silently compared to oral reading (Dist. Ex. 14 at p. 7; Parent Ex. Y at p. 34). The student's writing skills included "strong idea development, vocabulary, semantics, and grammar" (Dist. Ex. 14 at p. 7; Parent Ex. Y at p. 35). The student math skills were an area of overall weakness including difficulties with math concepts and computation (Dist. Ex. 14 at p. 7; Parent Ex. Y at p. 36).

Regarding social/emotional functioning, BASC-2 results were not indicative of a behavior or emotional disorder, but the student's mother expressed concerns regarding her hyperactivity, adaptability, anger control, executive functions, and resiliency (Dist. Ex. 14 at p. 8; Parent Ex. Y at p. 39). Additionally, on rating scales assessing an Autism Spectrum Disorder (ASD), the parent's ratings supported a diagnosis of Asperger's disorder (*id.*). Results of projective testing indicated that the student exhibited an "exaggerated concern around dependency/independency and separation/individuation issues" (Dist. Ex. 14 at p. 9; Parent Ex. Y at p. 41).

The private evaluator indicated that the student's neurocognitive profile was highly consistent with a diagnosis of a "nonverbal learning disorder" (Dist. Ex. 14 at p. 10; Parent Ex. Y at p. 57). In addition, the student's emotional dysregulation appeared to be secondary to neurocognitive deficits (*id.*). The report indicated that the student met the criteria for a diagnosis of Asperger's disorder (Dist. Ex. 14 at pp. 10-11; Parent Ex. Y at p. 57). The student received a diagnosis of ADHD combined type based on delays in attention, regulation, and executive functioning (Dist. Ex. 14 at pp. 10-11; Parent Ex. Y at p. 58). The student was at risk for a generalized anxiety disorder due to hypersensitivity to stimuli, which resulted in vulnerability to sensory overload that magnified her feelings of anxiety (Dist. Ex. 14 at p. 11; Parent Ex. Y at p. 58).

The private evaluator recommended a residential program for the student with expertise in working with students with "nonverbal learning disorders" and/or Asperger's disorder (Dist. Ex. 14 at p. 11; Parent Ex. Y at p. 58). The private evaluator noted that the student should not be in a school with students whose primary disability was an emotional impairment as the interventions used in such a program would be inappropriate for a student with a nonverbal learning disability (*id.*). It was recommended that the student receive systematic instruction in math and writing with use of graphic organizers, class notes, and a word processor (*id.*). It was also recommended that the student be provided with structure and a routine (*id.*). The private evaluator recommended explicit instruction of social skills and occupational therapy (OT) (Dist. Ex. 14 at p. 12; Parent Ex. Y at p. 59). The report indicated that the student's behavior would be better managed through manipulating antecedents rather than consequences (*id.*). The report also indicated that the student needed routines to assist with organization, breaks when feeling overwhelmed, and to read to address anxiety (*id.*). Recommended testing accommodations included extended time, breaks, small distraction free environment, use of a word processor, and math questions read (Dist. Ex. 14 at p. 13; Parent Ex. Y at pp. 59-60).

In an e-mail dated January 12, 2010, the student's mother advised the district that she was having a neuropsychological evaluation done and requested that a CSE meeting scheduled for February 2010 be rescheduled to a later date when the report would be available (Parent Ex. X).

In a written application to Franklin dated January 23, 2010, the parent indicated that the student was halfway through a comprehensive neuropsychological evaluation, and that she had retained a lawyer to help obtain "monetary support" from the district for the student's attendance at Franklin since Franklin was not on the list of approved New York schools (Parent Ex. F at p. 8).

In March 2010, Glenholme provided information regarding the student's progress in algebra class (Dist. Ex. 10 at pp. 4-5). The report indicated that the student performed well in math during the 2009-10 school year (id. at p. 4). The student's greatest difficulty with math was her lack of self-confidence (id.). The student utilized her strength in language to assist her in understanding math concepts such as using word associations and mnemonics to learn new math concepts (id.). The student sometimes felt overwhelmed and frustrated, but with cues was better able to cope with emotions (id.). The student demonstrated a solid understanding of integers, graphs, and percents (id.). The student was provided with one-to-one instruction when new material was introduced (id.). The student was also provided with larger graph paper, a calculator, and use of a math notebook for assignments and tests in and out of class (id.). It was recommended the student work in a small group with an individualized math program as she became confused by oral directions and large group instruction (id.).

In March 2010, Glenholme provided a report regarding the student's performance in writing class (Dist. Ex. 10 at p. 6). The student's class worked on content expository and persuasive writing (id.). The report indicated that the student performed well in writing class during the 2009-10 school year (id.). The student also worked on developing and applying prewriting strategies, organizational tools, more advanced sentence structure, editing strategies, and effective application of content area vocabulary (id.). The student exhibited leadership qualities and successfully engaged in cooperative groups and classroom discussions (id.). The student was ready to complete class assignments, appreciated challenges, and utilized teacher directed strategies to complete work (id.).

On March 29, 2010, the parent withdrew the student from Glenholme (Tr. p. 259; Dist. Ex. 11 at p. 1).

In April 2010, the student's Glenholme teachers prepared a report of the student's progress in English for the 2009-10 school year (Dist. Ex. 10 at p. 3). The report indicated that the student frequently participated in class, demonstrated good understanding of the class materials/lessons, and exhibited motivation (id.). During English class, the student developed connections between the subject matter to other subjects, events, and personal experiences when focused and engaged (id.). The student continued to work on speaking impulsively as well as expressing herself in a positive manner when frustrated, annoyed, or preoccupied with outside issues (id.). The student's written expression often exhibited creativity and good comprehension (id.). The student continued to benefit from the use of rubrics, graphic organizers, and editing sheets to assist her with organization, sentence structure, and basic writing mechanics (id.). The student interacted well with peers; however, she was sometimes sarcastic or condescending, but usually was easily redirected (id.). The student worked best within a small structured class with clear academic, social, and behavioral expectations (id.).

On April 26, 2010, the CSE convened for the student's reevaluation and program review (Dist. Ex. 9). Meeting participants included a CSE chairperson, a psychologist, a home school

liaison, a social worker/counselor, an assistant director, a district director of special education, the student's mother, a family friend, and the parents' attorney (*id.* at p. 1). The Glenholme assistant director and other school personnel from Glenholme participated in the meeting by telephone (*id.*). The CSE continued the student's eligibility for a special education program and related services as a student with a learning disability (*id.* at p. 2). The CSE recommended that the student receive home instruction until the end of the 2009-10 school year (*id.*). The CSE also recommended that the student receive a one hour session of individual counseling per week and one 30-minute session of OT consultation per month (*id.*). The CSE meeting minutes indicated that the home instruction recommendation was made pending acceptance of the student into an appropriate residential placement (*id.*). The IEP indicates that the parents declined the home instruction and related services (*id.*).

On May 3, 2010, the student began attending Franklin (Tr. p. 192).

On June 1, 2010, Glenholme provided a discharge report of the student (Dist. Ex. 10). The report indicated that the student would benefit from the following: a structured, supportive environment; positive behavior supports; individual counseling to address coping skills; decision/problem solving skills; social skills; family counseling; and participation in community/extracurricular activities (*id.* at p. 2).

Due Process Complaint Notice

In a due process complaint notice dated May 12, 2010, the student's mother requested an impartial hearing and asserted that the district failed to identify and fund an appropriate placement for the student (IHO Ex. i at p. 2). As relief, the parent requested reimbursement for tuition and board at Franklin (*id.*).

In a response to the due process complaint notice dated May 10, 2010, the district asserted, among other things, that the following factors were relevant to the district's refusal to pay for Franklin: Glenholme was an appropriate placement; even if it were not, there were appropriate State-approved residential placements; Franklin was not appropriate for the student; and the parents may not have cooperated fully in the CSE process (IHO Exhibit ii at pp. 1, 2). The district also asserted, among other things, that the parents had predetermined that Franklin was the only appropriate placement (*id.* at p. 1).

Impartial Hearing Officer Decision

An impartial hearing convened on August 31, 2010 and concluded on August 10, 2011, after five days of proceedings (Tr. pp. 1-755). In an October 11, 2011 decision,² the impartial hearing officer determined that the district did not offer the student an appropriate program or residential placement for the portion of the 2009-10 school year that the student attended Franklin (IHO Decision at p. 14). Regarding the district's assertion that Glenholme was an available and appropriate placement, the impartial hearing officer found that it was not the placement recommended by the CSE at the April 26, 2010 meeting, that there was no specific

² The decision is dated October 11, 2010, but it is clear from the hearing record that the correct year of the decision is 2011.

recommendation at the April 2010 CSE meeting, and that although the district argued that the placement at Glenholme was appropriate and available, the district could not retrospectively change the CSE's recommendation (id.). As to the appropriateness of Glenholme, the impartial hearing officer found that the program at Glenholme no longer met the student's needs (id.). The impartial hearing officer indicated that after four years at Glenholme, the student needed greater independence to begin the transition from the protective environment of a therapeutic boarding school to the demands of post-secondary living (id.). Also, the impartial hearing officer found that Glenholme no longer met the student's needs because both the parent and the student were dissatisfied with the level of restriction in the program (id.). The impartial hearing officer also noted the parent and the student's "increased perception" that Glenholme was not properly meeting the student's medical needs, causing them both anxiety so as to interfere with the student's participation in the educational program (id.).

Regarding the 2010-11 school year, the impartial hearing officer found that the district failed to offer the student a free appropriate public education (FAPE), based upon findings that the CSE did not meet or develop an IEP for the student, that home instruction was not provided, and that an appropriate residential placement was not recommended (IHO Decision at pp. 14-15). Next, the impartial hearing officer found that the parent met her burden of proving that Franklin was an appropriate placement for the student (id. at p. 20). In support of her finding, the impartial hearing officer concluded that the program offered by Franklin met the student's needs and that the student made progress in the program (id. at pp. 17-19). In addition, the impartial hearing officer noted, among other things, that the program offered at Franklin was consistent with the findings and recommendations of the student's most recent January 2010 neuropsychological evaluation (id. at p. 18). Next, the impartial hearing officer found that, as to the equitable considerations, the parents cooperated with the district and had not "predetermined" that the student would attend Franklin (id. at pp. 19-24).

Appeal for State-Level Review

The district appeals from the impartial hearing officer's decision and in its petition asserts that the impartial hearing officer ignored the parents' unjustifiable and unilateral removal of the student from a State-approved residential school where the student had made educational progress and could have continued to make progress; that the impartial hearing officer ignored extensive evidence in the hearing record that the student's mother had predetermined that the student would be attending the unapproved nonpublic school before she would allow the CSE to reconvene to consider her purported dissatisfaction with Glenholme; that the impartial hearing officer ignored that Glenholme was an appropriate placement for the student, but could no longer be accessed because of the parents' unjustified unilateral removal of the student from the program; and that the parents failed to demonstrate the appropriateness of Franklin. In addition, the district asserts that the parents did not cooperate with the CSE.

In an answer, the parents admit some and deny some of the district's allegations. The parents assert, among other things, that while the student had progressed at Glenholme, the progress had lessened significantly at the time that the parent removed the student from the school; that the student had been mistreated and alienated from the Glenholme facility; and that the student needed a place where she could have greater independence. The parents further asserts that they did not predetermine the student's removal, but had discussed the course of action with the staff of

Glenholme, including its psychiatrist, who agreed that the student needed to be in a less constrained environment, with greater independence; that the district did not recommend continuation of the student at Glenholme at its April 2010 meeting or thereafter; and that the district did not propose any other appropriate placement. In addition, the parents assert that Franklin was an appropriate setting for the student; that the student's short-term use of medication to assist her in transitioning was medically justified; that Franklin provided a highly appropriate program; and that the student made progress. The parents also assert that they did not fail to cooperate with the CSE; that the CSE failed to convene a meeting after April 2010; and that the CSE never provided the student with an appropriate placement for the 2010-11 school year.

Applicable Standards

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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist.,

873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; 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, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Recommended Placement 2009-10 school year

First, I will address the impartial hearing officer's finding that the district did not offer the student an appropriate program or residential placement for the portion of the 2009-10 school year that the student attended Franklin after removal from Glenholme by the student's parent (see IHO Decision at p. 14). On appeal, the district asserts that it offered the student an appropriate program for the 2009-10 school year and that the findings of the impartial hearing officer do not acknowledge that the parent unjustifiably and unilaterally removed the student from a State-approved residential school where the student had made educational progress and could have continued to make progress. Upon review, I find that the hearing record does not support the impartial hearing officer's finding.

In determining whether the district offered the student a FAPE and specifically whether Glenholme was an appropriate placement for the student for the portion of the 2009-10 school year that the student attended Franklin after the parents' removal of her from Glenholme, I have considered the evidence and find that the district provided personalized instruction with sufficient support services to permit the student to benefit educationally during the period of time that the student attended Glenholme for the 2009-10 school year and that the parents' removal of the student from Glenholme in March 2010 prevented the district from providing such instruction and services for the remainder of the 2009-10 school year. I also note that although the student's mother requested home instruction after she removed the student from Glenholme, and the CSE recommended home instruction pending acceptance of the student into an appropriate residential placement, home instruction was declined (Dist. Ex. 9 at p. 2).

Initially, I note that the parents do not assert that the district failed to provide an IEP that accurately reflected the results of evaluations to identify the student's needs (see 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), established annual goals related to those needs (see 34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provided for the use of appropriate special education services (see 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]). In addition, the hearing record reflects that the CSE recommendations were based on the student's needs as described in numerous evaluations including a psychological, educational, OT, medical, assistive technology, speech-language, and observation report (Dist. Ex. 7 at pp. 1-5).

I will now consider the impartial hearing officer's finding that Glenholme no longer met the student's needs (see IHO Decision at p. 14). Upon review, I find that the hearing record reflects that Glenholme appropriately addressed the student's difficulties in social/emotional functioning, behavior, nonverbal reasoning, math skills, and processing speed (see Tr. pp. 260-61, 263-64; Dist. Ex. 14 at pp. 1-13; Parent Ex. Y at pp. 1-72).

Regarding the appropriateness of Glenholme, I note that Glenholme provides services to students with a profile of a "complex fragile child," and that many of the students at Glenholme, like the student, have received diagnoses of Asperger's disorder and a nonverbal learning disorder (Tr. p. 245; Dist. Ex. 14 at pp. 1, 10-11; Parent Ex. Y at p. 58). In addition, I note that the student's private evaluator recommended a residential program for the student with expertise in working

with students with nonverbal learning disorders and/or Asperger's disorder, and that this recommendation was based upon the student's January 2010 neuropsychological evaluation (Dist. Ex. 14 at p. 11; Parent Ex. Y at p. 58). The hearing record further reflects that Glenholme provides a maximum class size of a 12:1+1, which is the class size recommended by the May 2009 CSE (Tr. p. 244; Dist. Ex. 8 at p. 2). Moreover, regarding the student's social emotional needs, Glenholme students have access to eight staff clinicians as well as two psychologists, a social services supervisor, and a psychiatrist (Tr. pp. 247-48).

Regarding the specific academic and behavioral needs of the student, the hearing record shows that the student performed well academically and the student's behaviors significantly decreased while at Glenholme (Tr. p. 270; Dist. Exs. 10 at pp. 3-6; 17 at pp. 8-13). Upon review, I find that the hearing record reflects that the student was provided with the accommodations as indicated on her IEP related to her difficulties with math and processing speed and note that the parents do not assert on appeal that Glenholme failed to provide the student with the recommended accommodations (Tr. pp. 264-65). Regarding math, which the hearing record reflects was a particular academic need of the student, a March 2010 progress report indicated that in algebra class the student performed well during the 2009-10 school year (10th grade) and demonstrated a solid understanding of integers, graphs, and percents (Dist. Ex. 10 at pp. 4-5). To meet the student's individual needs, I note that the student was provided with one-to-one instruction when new material was introduced, larger graph paper, a calculator, and use of a math notebook for assignments and tests in and out of class (id. at p. 4). In addition, a March 2010 Glenholme report regarding the student's performance in writing class indicated that the student performed well in writing class during the 2009-10 school year (id. at p. 6). In April 2010, the student's Glenholme teachers prepared a report of the student's progress in English for the 2009-10 school year (Dist. Ex. 10 at p. 3). The report indicated that the student frequently participated in class, demonstrated good understanding of the class materials/lessons, and exhibited motivation (id.). The student continued to benefit from the use of rubrics, graphic organizers, and editing sheets to assist her with organization, sentence structure, and basic writing mechanics (id.). The student worked best within a small structured class with clear academic, social, and behavioral expectations (id.).

Other progress reports dated February 2009, March 2009, and May 2009 regarding the 2008-09 school year (9th grade) at Glenholme (the student's last complete year in attendance) also support a finding that the student made academic progress (see Dist. Ex. 17 at pp. 8-25). In addition, during the 2008-09 school year at Glenholme, the student's grades of As and Bs placed her on the honor roll (Tr. p. 263; Dist Ex. 12 at pp. 1-2).³

Next, I will consider the impartial hearing officer's finding that the student needed greater independence and that the program at Glenholme was too restrictive (see IHO Decision at p. 14). Upon review of the hearing record, I find that the program at Glenholme was designed to provide the student with preparation for further education, employment, and independent living, and that the impartial hearing officer's finding that the student needed greater independence in order to begin transitioning from the therapeutic boarding school to post-secondary living is not supported by the hearing record (id.). The hearing record reflects that during the student's "initial adjustment

³ The hearing record indicates that the student's academic performance declined near the end of the 2009-10 school year as a result of her "negative" attitude and dissatisfaction with Glenholme (Tr. pp. 346-47; Dist. Ex. 10 at pp. 7-8).

period" the student exhibited physical aggression toward the staff and environment typically in response to a consequence or task demand (Dist. Ex. 10 at p. 1). Glenholme had implemented a positive behavior support model based upon applied behavior analysis (ABA) theory and the model included a "token economy system" (Tr. pp. 248-49; see Dist. Ex. 10 at pp. 1-2). The token economy was utilized to decrease the frequency of the student's behaviors including pouting, whining/crying, overeating, making excuses, talking down to peers, overly involved in peer issues, and seeking excessive attention (Dist. Ex. 10 at p. 1). At Glenholme, the students entered the program on the lowest level of "phrase three," which was the most adult-directed part of the program, and progressed to "phase two," "phase one" and ultimately to the "self-dependent" level of the program which no longer used a token economy (Tr. pp. 249-51). On the self-dependent level, the students learned to complete a functional behavior assessment including identification of triggers, maintenance of consequences, identification of replacement behaviors as well as checking the data and making modifications as needed and the objective was for the students to become self-dependent, which typically took a student between one to two years (Tr. pp. 251-52). During the self-dependent level, the students were provided with structure as they learned to become self-dependent and continued to work on generalization of acquired skills to all other settings, which lead to a less restrictive environment (Tr. pp. 252-54).

March 2009 CSE minutes reflect that the student's negative behaviors had decreased as a result of Glenholme's token economy system (Dist. Ex. 7 at p. 1). The behavioral goal was for the student to become "self-dependent" including generalizing acquired skills into other settings (Tr. p. 249). The hearing record reflects that while at Glenholme, the student progressed through the token economy system and had reached self-dependent status (Dist. Ex. 10 at p. 1). Although the student was removed from Glenholme by her parents on March 29, 2010, (Tr. p. 259), and expressed concerns described as the restrictiveness of Glenholme (Tr. pp. 550-55), the hearing record reflects that in March 2010, the student was just beginning the self-dependent level of the program and continued to exhibit behaviors including emotional reactivity (Tr. pp. 260-61). The student continued to work on managing frustration, accepting feedback, and social skills (Dist. Ex. 10 at p. 1). The hearing record further reflects that the student continued to need to work on her emotional reactivity as that continued to be a treatment concern (*id.*). Additionally, the hearing record reflects that the student required further instruction regarding coping strategies including relaxation techniques and deep breathing exercises (Tr. pp. 261-62).

To address the student's behavior, Glenholme provided instruction to the student to assist her to become self-dependent and included identification of the antecedents of her behaviors (Tr. p. 255). In addition, I note that the assistant director testified that neither the student's mother nor the student were informed that the student had "maxed out" with respect to her development at Glenholme (Tr. p. 260). The assistant director also testified that the student's mother and student were not advised that the student could not return to Glenholme (Tr. p. 269).

In addition, the hearing record reflects that while at Glenholme, to address the student's social/emotional functioning and behavioral concerns, the student received individual counseling one hour per week to address the student's behavior, coping skills, social skills, and peer/adult interactions (Tr. p. 259; Dist. Ex. 10 at p. 2). The hearing record further reflects that the student exhibited progress with respect to her behavior both at school and at home (Tr. p. 265). In addition, based on the student's progress, she was slowly taken off all psychotropic medication while at Glenholme (Tr. p. 266). I note that the parent reportedly indicated that the student exhibited

"substantial improvement" with respect to her social/emotional functioning and academic performance while at Glenholme (Dist. Ex. 14 at pp. 1-2; Parent Ex. Y at pp. 1-2). Progress regarding her behavior while at Glenholme included a decrease in oppositional behaviors, verbal aggression, tantrums, poor self-control, anxiety as well as her difficulties with social skills and attention (Tr. p. 270). Additionally, the report indicated that student had exhibited severe tantrums in the home environment, but with the use of behavior intervention techniques the student's behavior improved within the home environment and the student's progress included the ability to generalize her acquired skills resulting in an increase in positive behaviors within the home environment (Tr. p. 265; Dist. Ex. 10 at p. 1). At home, Glenholme had provided the parent with a parent points program which consisted of a token economy system (Tr. pp. 270-71). The student's mother testified that she had thanked the Glenholme staff for helping the student (Tr. p. 616).

Regarding the impartial hearing officer's finding referencing an increased perception that Glenholme was not properly meeting the student's medical needs pertaining to the administration of the student's asthma medication, the evidence in the hearing record reflects that upon an investigation conducted by the Connecticut Department of Children and Families, a determination was made that the complaint was unsubstantiated and it was dismissed (Tr. pp. 268-69).

Accordingly, based upon the above, I find that the impartial hearing officer's finding that the program at Glenholme no longer met the student's needs for the part of the 2009-10 school year that the student was removed by her parent and attended Franklin is not supported by the hearing record. Moreover, I find that the hearing record reflects that the staff at Glenholme never advised that the student could not return after the parent removed the student (Tr. pp.223, 269).

In sum, the hearing record supports a finding that the district offered the student a FAPE for the 2009-10 school year. While the parent remained free to decline the special education services recommended by the district (see, e.g., 34 C.F.R. 300.300[b]), the evidence shows that parents' unilateral decision to remove the student from an appropriate residential setting at Glenholme in March 2010 and thereafter demand home-based instruction in no small part prevented the district from providing the student with appropriate services that had been recommended for the student. However well intentioned the parents' motives, under these circumstances I cannot conclude that the district should be held liable for a denial of a FAPE for the remainder of the 2009-10 school year after removing the student from the publicly funded placement at Glenholme while the parents completed the unilateral placement of the student at Franklin.

Recommended Placement 2010-11 school year

I will next consider whether the district offered the student a FAPE for the 2010-11 school year. Under the IDEA and State regulations, the "CSE must review each child's educational program at least once each year to determine its adequacy and to recommend an educational program for the next school year" (34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). A district must have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating "[a]n education department's delay does not violate the IDEA so long as the department

'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September''; Application of the Bd. of Educ., Appeal No. 10-006; Application of a Student with a Disability, Appeal No. 09-111; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088). As a matter of State law, a school year runs from July 1 through June 30 (Educ. Law § 2[15]).

In the instant case, the hearing record reflects that the CSE did not have a placement in effect for the student for the beginning of the 2010-11 school year school on July 1, 2010 (see Educ. Law § 2[15]). Although the April 2010 CSE recommended home instruction for the student pending a residential placement (Dist. Ex. 9 at p. 2), the CSE failed to make a recommendation regarding the student's placement in a residential school subsequent to the April 2010 CSE meeting (Tr. pp. 83-85, 164-65).

Although the hearing record reflects that the district provided placement packages to several residential schools seeking an interim emergency placement (Tr. pp. 83-85, 88; Parent Ex. A at pp. 1-2) and that two of the residential schools responded that their school program was not appropriate for the student (Parent Exs. B; C), a review of the hearing record does not include evidence that the district thereafter followed up with any further efforts regarding placement of the student in a residential school for the 2010-11 school year (Tr. pp. 83-85, 88, 98-99, 108-110, 152).⁴

Accordingly, upon review of the hearing record, I find that the impartial hearing officer's finding that the district did not provide the student with a FAPE for the 2010-11 school year is supported by the hearing record.

Parent's Unilateral Placement 2010-11 School Year

I will next consider the impartial hearing officer's finding that the parents met their burden of proving that Franklin was an appropriate placement for the student (see IHO Decision at pp. 15-19). 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, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). 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"

⁴ There is no information in the hearing record whether a spot at Glenholme would have been available or could have been offered to the student for the 2010-11 school year in the event that the parent become willing to accept such a placement, but the evidence of the student's progress there under an appropriate IEP until March 2010 nevertheless begs the question of whether it was a possible placement in light of the parties apparent agreement that the student continued to require a residential setting for the 2010-11 school year.

(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 Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 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 specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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).

Although the hearing record shows that the student's profile is consistent with the majority of students enrolled at Franklin (non-verbal learning disability and/or Asperger's diagnosis) (Tr. pp. 361, 366; Dist. Ex. 14 at pp. 1, 10-11; Parent Ex. Y at p. 58), upon review, I find that the hearing record does not support a finding that Franklin provided educational instruction specially designed to meet the unique needs of the student (see 20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15).

First, regarding the student's academic needs, I find that the hearing record reflects that the student did not receive educational instruction specially designed to meet her unique needs in math, an academic area of deficit (see Tr. p. 233, 401; Parent Ex. F at pp. 46, 57). A specific example of Franklin's failure to provide such instruction concerns the student's math class. During the third quint of the 2010-11 school year,⁵ the hearing record reflects that the student had received a grade of "no credit" and "unsatisfactory" in Applied Math I (Parent Ex. F at p. 57; Tr. p, 401). Applied math students studied analytic geometry (Parent Ex. F at p. 46). Analytic geometry included the study of points of intersection between two functions, properties of the slope-intercept form of linear equations and basic geometric figures and their properties (*id.*). The student's applied math teacher indicated that the student's performance was unsatisfactory, including seven unexcused absences and a grade point average of approximately 25 percent (Parent Ex. F at p. 46). The student's math delays and anxiety were negatively affecting her attendance, work production, and attitude toward class (*id.*). The student was instructed to report triggers for anxiety, engage in journal writing regarding peer interactions, and provided with note taking strategies (*id.*). However, the report indicated that the student was "unable to use these strategies effectively during class" (*id.*). The hearing record did not indicate that additional strategies were implemented when the student was not able to perform in math class or cope with her anxiety (*id.*). The student received no credit for the math course resulting in her enrollment in a less demanding consumer math class during quint four of 2010-11 (Tr. pp. 400, 450; Parent Ex. F at p. 47).

The student's consumer math teacher reported that the student was consistent in her performance in some areas but was finding other areas challenging (Parent Ex. F at p. 47). The student was provided with readiness checks to assist the student to focus (*id.*). Consumer math included instruction in basic calculations of addition, subtraction, multiplication, writing checks, balancing checkbooks, savings accounts and investments (Tr. p. 450). Although the student struggled somewhat within the consumer math class at Franklin, I note that while at Glenholme the student took algebra and received a grade of A- (Dist. Ex. 18 at p. 1). A March 2010 progress report indicated that in algebra class the student demonstrated a solid understanding of integers, graphs, and percents (Dist. Ex. 10 at pp. 4-5). Accordingly, upon review of the hearing record, I find that rather than provide the student with educational instruction specially designed to meet the student's unique needs in math, including accommodations and modifications within the Applied Math I class, the student was moved to a lower level math class.

While evidence of progress at Franklin, or a lack thereof, would not by itself be sufficient to establish that Franklin was appropriate; progress is nevertheless a relevant factor that may be considered (see Gagliardo, 489 F.3d at 115; Stevens, 2010 WL 1005165, at *8-*9; see also Application of the Dep't of Educ., Appeal No. 11-051). Here, while the hearing record offers some information regarding the student's progress, the grading system at Franklin does not provide an objective means to measure the student's progress at Franklin. Upon review of the progress reports and skills assessment reports from Franklin for the 2009-10 and 2010-11 school years, I find that Franklin's rating system does not provide specific information from which to gauge the degree of the student's progress (see Parent Ex. F at pp. 21-27, 32-53, 57-58). I note that the progress reports indicated the rating system for the student's grades as advanced, high pass, pass, and no credit (*id.* at pp. 21, 57). The progress reports also had a rating scale for effort including ratings of excellent, satisfactory, needs improvement, and unsatisfactory (*id.*). In addition, regarding skills assessment,

⁵ It appears that Franklin's school year consists of quints one through five (Tr. p. 201).

Franklin provided reports for the student for the 2009-10 and 2010-11 school years and the reports indicated the rating system had a five point scale in the areas of academic performance, social/emotional skills, and residential adjustment (*id.* at pp. 27, 58). A rating of one indicated the student needed significant assistance, a rating of two indicated the student required excessive assistance, a rating of three indicated that the student met basic standards, a rating of four indicated good task performance, and a rating of five indicated that the performance was above expectations (*id.*).

I have reviewed the student's progress reports and skills assessment reports in the hearing record and note a few examples which show that the rating system does not provide sufficient information to gauge the student's progress. For quint five of the 2009-10 school year, the student earned all grades of pass in her seven courses (Parent Ex. F at p. 21). In addition, for quint five of the 2009-10 school year, the student was rated as requiring excessive prompts in four areas and meeting basic expectation in three of the areas (*id.* at p. 27). In the area of academics, the student earned ratings of required excessive prompts in the area of transitions (*id.*). In addition, the student earned ratings of met expectations and good task performance with minor supervision in the areas of class participation, following directions, and effective work production (*id.*).

Regarding the 2010-11 school year, the student's final grades at Franklin consisted of all passes and one high pass (Parent Ex. F at p. 57). In her first quint during the 2010-11 school year, the hearing record reflects that the student required excessive teacher/supervisor prompts to accomplish basic tasks, and exhibited low engagement in transitions to a new activity, an understanding of the code of conduct, regulating emotions, adapting to community guidelines, and tolerating separation from home/parents (Parent Ex. F at p. 58). During the student's first quint in Humanities II, the student's performance was described as "N" needs improvement and the student exhibited problems with "focus" during class, time management and attendance (*id.* at p. 33). As to Integrated Science I, the student's performance was described as "S" satisfactory and the student struggled with staying in class and participating appropriately, missing two classes and having to leave class in three other instances (*id.* at p. 34). Moreover, I note that by the end of quint I, during the 2010-11 school year, Franklin reported that at times the student became so overwhelmed with her emotions that she was unable to remain engaged or act appropriate in class or to complete her homework. An episode was noted toward the end of the quint where the student felt frustrated and angry and began screaming in the dorm and using offensive language in reference to the teacher on duty. (*id.* at p. 35).

The student's 2010-11 quint five ratings were: met expectations and good task performance with minor supervision in social/emotional functioning, met expectations through performed above expectations with minimal adult assistance in academic functioning, and met expectations through performed above expectations with minimal adult assistance in residential adjustment (Parent Ex. F at p. 58). While these ratings are an improvement when compared with the ratings from quint one, I find such evidence is insufficient to demonstrate that the student made educational progress. The hearing record shows that the student continued to demonstrate significant difficulties in the area of social/emotional functioning which negatively affected her academic progress (Tr. pp. 229, 406; Parent Ex. F at pp. 28, 41, 46). Accordingly, I do not find that the hearing record supports a finding that the student progressed while at Franklin upon review of the student's grades and I find that specific information from which to gauge the degree of the student's progress is lacking.

Although not dispositive with regard to the student's social emotional needs, while the student had discontinued using psychotropic medications for several years while at Glenholme, the student was placed back on psychotropic medications while at Franklin (Tr. pp. 432-33). As to counseling, the hearing record reflects individual counseling was not provided as part of her program on a weekly basis (Tr. p. 467). The student testified that a counselor is available to meet with her at Franklin but that she was not required to meet with the counselor on a regular basis (Tr. p. 196). In addition, the student did not have individual goals in the area of social/emotional functioning while at Franklin (Tr. p. 429-31). Upon review of the hearing record, I find that during the 2010-11 school year, the student lack of emotional regulation negatively affected the student's academic performance as well as interaction with others including a verbal outburst towards a teacher (Parent Ex. F at p. 35).

In a June 2010 letter to the student, Franklin staff indicated that emotional regulation was the student's "biggest challenge" (Parent Ex. F at p. 28). I find that despite identifying the student's social/emotional functioning as a significant area of need, the evidence does not show that Franklin appropriately addressed the student's needs in the areas of emotional functioning, social skills, behavior, and academics. The student's teachers at Franklin provided some strategies for the student with minimal success but did not modify nor develop additional strategies based on the student's needs and performance in class (see Tr. pp. 193, 367-68, 378-82; see also Parent Ex. F at pp. 23, 25, 47). Accordingly, I find that the impartial hearing officer's determination that the parents met their burden of proving that Franklin was appropriate for the student is not supported by the hearing record.

Conclusion

In summary, the district offered the student a FAPE for the 2009-10 school year. Regarding the 2010-11 school year, the district did not offer the student a FAPE because it did not have a placement for the student at the beginning of the school year. The parents' unilateral placement at Franklin, however, was not appropriate as the hearing record does not support a finding that Franklin provided educational instruction specially designed to meet the unique needs of the student.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's October 11, 2011 decision which determined that the district denied the student a FAPE for part of the 2009-10 school year; and which determined that Franklin was appropriate and ordered tuition reimbursement for part of the 2009-10 school year and the 2010-11 school year is annulled.

**Dated: Albany, New York
December 15, 2011**

**JUSTYN P. BATES
STATE REVIEW OFFICER**