



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-163

Application of a STUDENT WITH A DISABILITY, by his 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:

The Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Abbie Smith, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for respondent (the district) to reimburse them for their son's tuition costs at the Valley View School (Valley View) for the 2010-11 school year. The appeal must be dismissed.

Introduction

As expressed in greater detail below, neither party has appealed the impartial hearing officer's determination that the district denied the student a free appropriate public education (FAPE) during the 2010-11 school year (IHO Decision at p. 9). Although I have conducted a thorough, independent review of the hearing record, given the limited issues remaining in dispute in this appeal, the parties' familiarity with the student's educational history and the impartial hearing officer's decision will be presumed and only those facts necessary to render a decision will be recited.

Background

At the time of the impartial hearing, the student was attending twelfth grade at Valley View (Tr. p. 717). The Commissioner of Education has not approved Valley View as a school with which school districts may contract to instruct students with disabilities (Tr. p. 534; Parent Ex. HH; see 8 NYCRR 200.1[d], 200.7). The student demonstrates difficulties with organization,

attending, and impulsivity, as well as engaging in social interactions (Tr. pp. 646-47, 998-99). A January 2010 psychiatric evaluation resulted in an Axis I diagnosis of bipolar disorder, not otherwise specified (NOS) and reflected a history of an attention deficit hyperactivity disorder (ADHD) and an oppositional defiant disorder (ODD) (Dist. Ex. 5 at p. 5). The student's eligibility for special education programs and related services as a student with an other health-impairment (OHI) is not dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).¹

Due Process Complaint Notice

By due process complaint notice dated September 23, 2010, the parents requested an impartial hearing and sought tuition reimbursement for Valley View for the 2010-11 school year (Dist Ex. 1 at p. 2). Among other things, the parents alleged that the district failed to develop an individualized education program (IEP) for the student and failed to offer the student an appropriate school placement (id. at pp. 2, 6-8). The parents further asserted that the student's placement at Valley View was appropriate and reasonably calculated to confer an educational benefit on him (id. at p. 8). In addition, the parents argued that equitable considerations weighed in their favor (id.).

Impartial Hearing Officer Decision

On December 10, 2010, an impartial hearing convened, which concluded on September 9, 2011, after ten days of proceedings (IHO Decision at pp. 1-3; Tr. pp. 1-1289). On November 16, 2011, the impartial hearing officer rendered a decision in which she denied the parents' request for tuition reimbursement at Valley View for the 2010-11 school year (IHO Decision at p. 15). Upon a determination that the district denied the student a FAPE for the 2010-11 school year, the impartial hearing officer proceeded to find that based on the totality of the circumstances, Valley View was not an appropriate placement for the student (id. at pp. 9, 15). Although the impartial hearing officer concluded that the student had made some progress during his enrollment at Valley View, she noted that progress alone was not sufficient to establish the appropriateness of the placement (id. at p. 13). She further noted that the student had "substantial social/emotional deficits" and required therapy (id.). According to the impartial hearing officer, Valley View did not provide the student with therapy or counseling, but rather facilitated the provision of his private therapy (id.). She characterized the evidence regarding the integration of the student's private therapy with Valley View's program as "limited and vague" (id.). Moreover, despite testimony from Valley View's associate director of education (associate director) describing the extent of communication between the student's private therapists and Valley View personnel, the impartial hearing officer described these communications as "informal," and further noted that the evidence did not illustrate "how comprehensive they were with regard to this particular student" (id. at p. 14). Additionally, the impartial hearing officer found that the communications with the student's private therapists were not directly with his teacher or advisor (id.). Similarly, regarding the student's relationship with his Valley View advisor, the impartial hearing officer found no evidence regarding the frequency or nature of the student's interactions with his advisor (id.). Further, while

¹ Although the parties do not dispute the student's classification on appeal, in the due process complaint notice and during the impartial hearing, the parents alleged that the Committee on Special Education (CSE) arbitrarily changed the student's classification from a student having an emotional disturbance (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]) to a student with an other health-impairment, without any recent testing or evaluations (Tr. pp. 7-8, 127, 753-54; Dist. Ex. 1 at pp. 2, 6).

the impartial hearing officer noted testimony from the associate director regarding the student's advisor, the impartial hearing officer also found that the hearing record failed to describe the advisor's credentials and educational background (id.).

Next, although the parties did not dispute the February 2010 Committee on Special Education's (CSE's) recommendation for the provision of speech-language therapy to the student, the impartial hearing officer noted that Valley View did not offer speech-language therapy to the student, nor did the parents privately obtain this service for him (IHO Decision at p. 14). Likewise, notwithstanding her acknowledgment that a school's failure to provide every service and a parent's supplementation of services to a unilateral placement does not necessarily render a placement inappropriate, the impartial hearing officer concluded that Valley View did not provide any of the student's mandated related services (id.). Furthermore, although the impartial hearing officer was persuaded by testimony regarding the "therapeutic milieu" that existed at Valley View, she ultimately determined that it was inappropriate because the parents were required to provide what she deemed to be an essential component of the student's program (id.).

The impartial hearing officer also determined that Valley View provided the student with the same program offered to all students and therefore, the parents did not establish that it was individualized to meet the student's unique special education needs (IHO Decision at p. 15). Finally, despite the parents' claim for reimbursement for a 12-month program, the impartial hearing officer concluded that the hearing record did not describe the nature of the student's summer program at Valley View (id.). Based on the foregoing, the impartial hearing officer determined that the parents failed to establish the appropriateness of Valley View (id.).

Appeal for State-level Review

The parents appeal and request that the impartial hearing officer's decision be annulled insofar as she found that Valley View was not appropriate placement for the student for the 2010-11 school year. As relief, the parents request an order directing tuition reimbursement to them for the student's unilateral placement at Valley View for the 2010-11 school year. The parents contend that the hearing record demonstrates that Valley View was appropriate for the student for the 2010-11 school year because: (1) the curriculum at Valley View was individualized for each student, because it moved at a student's individual pace and gave students the individual help that they needed; (2) the student was similarly grouped with other students based on his academic levels and social/emotional needs; (3) the student made academic progress and was able to obtain a local diploma in June 2011; (4) Valley View assisted the student with his college applications, which was one of the student's individual needs; (5) Valley View thoroughly addressed the student's academic needs; (6) Valley View thoroughly addressed the student's social/emotional needs through its therapeutic setting, constant work on peer relations, community formation and coordination of regular therapy; (7) the student also made social/emotional progress during the 2010-11 school year; and (8) Valley View coordinated the student's private therapy sessions in addition to as-needed sessions with his Valley View advisor. The parents further argue that the impartial hearing officer failed to make a thorough or appropriate inquiry when she noted that the student's privately-obtained therapy sessions were not included in the student's tuition costs. Additionally, the parents maintain that equitable considerations warrant relief in this matter, because the hearing record does not demonstrate that they acted in bad faith or frustrated the district's efforts to offer the student an appropriate program and placement. Rather, the parents

assert that they fully cooperated with the district, by participating in the February 2010 CSE meeting, and by sharing updated evaluative data regarding the student with the district.

The district submitted an answer, in which it requests that the petition be dismissed in its entirety. The district contends that the impartial hearing officer properly found that the parents did not establish the appropriateness of Valley View for the following reasons: (1) the student's private therapists were not employees of Valley View and their services were not included among the student's tuition costs; (2) the evidence regarding the integration of the student's private therapy sessions with Valley View's program was limited and vague; (3) although the student has deficits with respect to his pragmatic speech, he did not receive speech-language therapy at Valley View nor does the hearing record suggest that he participated in group counseling to address those needs. Next, although the district acknowledges that the student made some progress during the 2010-11 school year, the district also submits that the hearing record indicates that the student regressed during the school year. Furthermore, the district alleges that there is little evidence demonstrating that Valley View's program was individualized to meet the student's unique special education needs. Lastly, notwithstanding the parents' claim for reimbursement for the 12-month school year at Valley View, the district argues that the hearing record offers little evidence regarding the student's summer program. Finally, regarding equitable considerations, the district contends that they preclude an award of relief in this matter. The district alleges that the parents had no intention of enrolling the student in a district school. Moreover, the district maintains that the parents' actions thwarted the district's efforts to offer the student a FAPE.

Discussion

Scope of Review

Initially, neither party appeals the impartial hearing officer's determination that the district failed to meet its obligation to offer the student a FAPE for the 2010-11 school year. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also Application of a Student with a Disability, Appeal No. 11-027; Application of a Student with a Disability, Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-115; Application of a Student with a Disability, Appeal No. 10-102). Therefore, whether the district offered the student a FAPE for the 2010-11 is not at issue on appeal, and the remaining issues that are determinative of the parents' claim are whether the parents established the appropriateness of the student's unilateral placement at Valley View and if so, whether equitable considerations favor their request for tuition costs at Valley View for the 2010-11 school year.

Applicable Standards—Unilateral Placement

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 Individuals with Disabilities Education Act (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 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).

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]).

Appropriateness of Valley View

Turning to the instant case, the parents assert that the impartial hearing officer erred in concluding that the parents did not meet their burden to show the appropriateness of Valley View because the hearing record is replete with testimonial and documentary evidence demonstrating that Valley View was appropriate for the student for the 2010-11 school year and reasonably calculated to enable the student to receive educational benefits. Conversely, the district argues that Valley View was not appropriate to meet the student's needs, in pertinent part, because the hearing record fails to illustrate how the Valley View program was individualized to meet the student's unique educational needs and the school failed to furnish the student with the necessary related services. As set forth in greater detail below, upon an independent review, I find the hearing record does not contain sufficient evidence to establish that Valley View provided education instruction specially designed to meet the student's unique needs, supported by such services that were necessary to permit him to benefit from instruction.

The hearing record describes Valley View as a private residential guidance school providing a therapeutic educational environment for boys between the ages of 11 and 18 who are experiencing "difficulty getting along with their families, the world around them and themselves" (Tr. pp. 975, 985; Dist. Ex. 14 at p. 1).² According to the associate director, Valley View is comprised of "fairly gentle youngsters with attentional difficulties," who have had struggles in school, remaining on task, or being motivated (Tr. p. 973). Regarding academics, classes at Valley View focus on the development and strengthening of skills in basic subjects, including language arts, math, social and physical sciences, physical education, history, and art (Dist. Ex. 14 at p. 1). Valley View offers a 12-month program, which according to the Valley View brochure, during the summer months, consists of a combination of academic, remedial, and special-interest courses, in addition to outdoor recreation (Tr. pp. 978-79; Dist. Ex. 14 at p. 1). In addition to the school's 11 teachers and residential staff, Valley View has three psychologists in addition to a private

² Although the associate director testified that the age range of the students was between 11 and 18, Valley View's information brochure indicated that the school's population consisted of students between the ages of 11 and 16 (Dist. Ex. 14 at p. 1).

psychiatrist, who visit students on a weekly basis, but are not employed by Valley View (Tr. pp.1121, 1143, 1146, 1152).³

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). However, in the instant case, as detailed herein, there is little evidence of how Valley View's program is tailored to address the student's unique special education needs, namely his difficulty with attention and his social/emotional needs (Tr. p. 998). Specifically, Valley View's associate director admitted that all students receive the same academic and therapeutic program across the board (Tr. p. 1006). Next, although the associate director testified that he believed that the curriculum was individualized for each student due to smaller class sizes, which in turn, enabled Valley View to move at each student's own pace, an award of reimbursement is not warranted where the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any student, disabled or not (see Tr. pp. 991-92, 1007; Gagliardo, 489 F.3d at 115 [S.D.N.Y. 2007]). Further, while the associate director opined that the small classes helped the student with his attentional and organizational difficulties, the hearing record offers no description of how Valley View adapted the content, methodology, or delivery of instruction to address the student's unique needs and ensure his access to the general curriculum (Tr. p. 1007).⁴ Similarly, the associate director described a computer-based math class in which the student participated during the 2010-11 school year, and although he indicated that the program was individualized to the students' needs because it permitted students to work at their own pace, he noted that all Valley View students utilized the same program (Tr. pp. 1087-89, 1129; Parent Exs. DD at p. 4; RR at p. 4). Lastly, notwithstanding the parents' claim for reimbursement for the 12-month program at Valley View, the associate director testified that the summer program was not academic, and there is no information contained in the hearing record with respect to the student's summer program (Tr. pp. 978-79, 1102).

Regarding the therapeutic element to the student's program at Valley View, although the associate director characterized the school as a "therapeutic milieu," the hearing record offers little evidence to describe the meaning of this term (Tr. p. 1003). According to the associate director, the therapeutic milieu at Valley View consisted of "constant feedback;" however, the hearing record does not describe the nature or frequency of that feedback (Tr. pp. 1007, 1122). As part of the therapeutic milieu, all students are assigned a senior staff advisor; however, the hearing record lacks any details regarding the student's advisor's educational background or credentials (Tr. pp.

³ The hearing record is not clear regarding the employment relationship between the three psychologists and the psychiatrists and Valley View. Although the associate director testified that these individuals were not part of the Valley View staff and had their own private practices, he also referred to them as "kind of adjunct staff," who visited students on campus (Tr. pp. 1121, 1143). Additionally, the student's private therapist wrote the student's progress reports on Valley View letterhead (Parent Exs. RR at p. 3; DD at p. 3; Dist Ex. 53 at p. 6).

⁴ The associate director also testified that Valley View followed the same curriculum employed by the local school district high school (Tr. p. 991).

1006-07, 1013; Dist. Ex. 15 at p. 2).⁵ Although the associate director noted that the purpose of the advisor visits was to work with students on a daily basis and devise long and short-term goals, he testified that meetings between students and advisors were not regularly scheduled, nor does the hearing record reveal how often the student met with his advisor (Tr. pp. 1147-48). Moreover, while the student took part in weekly visits with a private psychologist, as part of the "therapeutic process," the associate director conceded that he did not know the purpose of the student's therapy visits, and the hearing record offers few details with respect to the private psychologist's educational background or experience (Tr. pp. 1003-04, 1014, 1060-61). Lastly, notwithstanding the presumption that the student's therapy sessions were part of Valley View's therapeutic milieu, the parent also noted that the student's private therapy sessions were not included as part of the student's tuition costs at Valley View; rather, the parents paid for this service separately (Tr. p. 725).⁶

With respect to speech-language therapy, the hearing record suggests that the student demonstrated delays in responding to questions, as well as pragmatic language difficulties (Dist. Exs. 3 at pp. 1, 4; 8 at p. 5). The CSE recommended that the student receive speech-language therapy two times per week and included goals related to improving the student's use of language in social situations in the student's February 2010 IEP (Tr. p. 537; Dist. Ex. 8 at pp. 9, 12). Minutes from the February 2010 CSE meeting stated that the parent and the CSE would coordinate speech-language and occupational therapy evaluations for the student; however, if those evaluations took place they were not entered into the hearing record (Dist. Ex. 9 at p. 3). The student's private psychologist noted in his first and second quarter progress reports for the 2010-11 school year that the student had difficulty in the "perceptual decoding of auditory input and in the encoding of his thoughts in preparing them for expression" (Parent Exs. DD at p. 3; RR at p. 3). There is no evidence that Valley View assessed the student's speech and language needs and the associate director testified that the student did not receive any speech-language therapy at the school (Tr. p. 1081). Here, the impartial hearing officer correctly noted that a private placement's failure to provide every related services does not necessarily compel a conclusion that the private placement is not appropriate; however, the hearing record also substantiates her finding that Valley View provided the student with none of the related services that the student required (IHO Decision at p. 14; see Application of the Dep't of Educ., Appeal No. 11-051).

Under the circumstances, to the extent that there is only limited information in the hearing record regarding how the Valley View program was designed to address the student's academic needs, social/emotional needs and speech-language needs, the evidence weighs against a finding that Valley View was reasonably calculated to enable the student to receive educational benefits.

Progress at Valley View

The impartial hearing officer stated that while she was persuaded that the student made certain progress at Valley View, she ultimately determined that the parents failed to meet their burden of demonstrating that the school was appropriate for the student (IHO Decision at pp. 13-

⁵ According to the hearing record, the student's advisor has worked at Valley View for approximately 23 years (Tr. p. 1013).

⁶ The parent testified that she is not seeking reimbursement for the cost of the student's therapy sessions (Tr. p. 726).

15). The hearing record reflects that in comparison with previous school years, the student made some progress with respect to his academic and social/emotional performance at Valley View; however, during the 2010-11 school year, he experienced both periods of progress and regression (compare Dist. Exs. 10-11, 49, with Dist. Exs. 51-53; Parent Exs. DD; RR; FFF). The parent and associate director attested to the student's academic and social/emotional progress, while the student's progress notes indicated that he struggled to complete his work and accept guidance from adults (Tr. pp. 730-33, 1009-11; Dist. Exs. 52; 53). The student's mother testified that the student made academic progress during the 2010-11 school year at Valley View and explained that the student decided that he wanted to go to college and knew that in order to do so, he had to complete his credit requirements (Tr. pp. 730-31). She reported that the student worked really hard to sit down, focus, and do the work required of him (Tr. p. 731). The parent added that the student got a lot of "green" progress reports during the 2010-11 school year which meant he was getting A's or B+'s (id.). The parent further testified that the student made social/emotional progress in that he joined a basketball team, formed a band and was also involved in other activities in which he would not have participated in the past (Tr. pp. 732-33).

Valley View's associate director also testified that the student made academic progress during the 2010-11 school year at Valley View (Tr. pp. 1009-10). He reported that the student was finishing up his senior year in high school and "doing a good job with it" (Tr. p. 1010). He further testified that the student had made social/emotional progress in that he had become more appropriately social and less abrasive, despite continued struggles in this area (id.). According to the associate director, the student had improved his ability to advocate for himself (id.). He further noted that the student spent a considerable amount of time looking at colleges and preparing for college life (Tr. pp. 1084-85). The associate director explained that with his high school diploma, the student would be able to attend a four-year college and indicated that he believed the student had been accepted to college (Tr. pp. 1014-15). The associate director also noted improvement in the student's motivation (Tr. pp. 1110-11). However, the associate director also acknowledged that the student's progress reports indicated that he regressed during portions of the school year (Tr. pp. 1093-94, 1100-02, 1104). The associate director testified that the periods of regression experienced by the student during the 2010-11 school year were part of the normal "ups and downs" of a student in their senior year of high school (Tr. p. 1104).

The hearing record includes three progress reports for the student's senior year at Valley View dated November 5, 2010, January 28, 2011, and April 15, 2011 (Dist. Ex. 53; Parent Exs. DD; RR). The progress reports included a review of the student's academic performance and behavior, as well as advisor and therapist reports (Dist. Ex. 53; Parent Exs. DD; RR). As detailed in the progress reports, the student's first quarter grades ranged from an A+ to a C with his teachers noting generally that he met the standards for conduct and effort (Dist. Ex. 50; Parent Ex. DD at pp. 4-7). However, the report also indicated that the student received three detentions for failure to complete homework (Parent Ex. DD at p. 1). According to the student's advisor, when the student returned from August vacation he had his life "entirely figured out," had determined that he no longer needed Valley View, and was marking time until he could leave (id. at p. 2). The advisor opined that in the process, the student "provided continual, overt reminders as to precisely what his challenges are" (id.). The advisor also noted that the student engaged in repeated struggles with a new roommate and that the two were "heedless" that the conflicts were of their own creation (id.). The advisor reported that by October, 2010, the student seemed to get a sense of his downslide and made an effort to regain lost ground (id. at p. 2). He noted that the student's more

mature choices were reflected in his behavioral ratings and concomitantly, the student's roommate issues improved (*id.*). In addition, he noted the student's positive shift was reflected in his investment in the campus work system (*id.*). He reported that the student's account balance had taken a "significant upward turn," and that his funds allowed him to participate in a variety of off campus trips (*id.*). The advisor reported that staff was pleased with the student's new found efforts and the fact that the student had "relinquished his quintessential teen perspective of knowing it all" (*id.*). He opined that only by conceding that there was more to learn, would the student be open to growth (*id.*). As part of the first quarter progress report, the student's private psychologist reported that the student's self confidence and comfort in social situations had increased dramatically (*id.* at p. 3). According to the psychologist, the student's participation in a band added to his confidence (*id.*). He noted that the student managed his celebrity in a low-key way rather than seeking to laud it over his peers (*id.*). He indicated that the student had difficulty with the "perceptual decoding of auditory input and in the encoding of his thoughts in preparing them for expression" and that these difficulties resulted in a "noticeable and often awkward lag in conversation" that invited misinterpretation by others (*id.*). The psychologist noted, however, that the student had recently lessened his tendency to compensate by "defensively coloring interactions with a challenging demeanor" (*id.*). The psychologist commented that as a result, there was much improvement in the student's relationship with peers, but that the student's perceptual problems persisted and he would likely need to enroll in a college program that had ongoing resource help available (*id.*).

For the second quarter of the 2010-11 school year, the student earned A's and B's (Parent Ex. RR at pp. 4-6). He continued to meet Valley View's standards for conduct; however, his algebra II and anatomy teachers expressed concern regarding his effort (Dist. Ex. 51; Parent Ex. RR at pp. 4-5). The student received eight detentions due to his failure to complete homework (Parent Ex. RR at p. 1). The student's advisor reported that the student seemed to be "coasting somewhat" during the second quarter (*id.* at p. 2). He noted that in the autumn, the student had enjoyed a brief period of social engagement with others, but then retracted into a "shell of isolation" (*id.*). The advisor acknowledged that the student's frustration of being surrounded by younger students and new students with social problems was understandable, but noted that the student fell short in gleaning what he could from social interaction with adults (*id.*). While he characterized the student's behavior as a disappointment, the student advisor did find this to be a major setback (*id.*). Although the student had experienced two disappointments, his advisor reported that the student had continued to manage himself with an even temperament and relatively mature perspective (*id.*). According to the advisor, the student did not react defensively to the recommendation that he assign high importance to support services available for students with learning disabilities when considering colleges (*id.*). The psychologist again noted the student's difficulties with perceptual decoding and encoding and the resultant lag in information processing and conversation (*id.* at p. 3).

According to Valley View progress reports, the student's academic performance declined during the third quarter of the 2010-11 school year, and he received grades of Bs and Cs (Dist. Exs. 52; 53 at pp. 1-2). The student also received nine detentions for failure to complete homework (Dist. Ex. 53 at p. 4). The student's advisor reported that the student had shown signs of maturation while working on long-standing issues (*id.* at p. 5). He indicated that the student had discovered a passion for music, and was interested in all aspects of it (*id.*). According to his advisor, one of the student's more noticeable quirks was a peculiar "removed entitlement" (*id.*). He characterized

the number of times the student turned to adults for input as "sparse," and noted that the student's removal from interactions with adults hampered his ability to make the most of guidance around him (id.). The advisor further opined that the student could learn more in his last months if he took an active role in soliciting input and life experience from Valley View staff (id.). The student's private psychologist reported that the last few months had provided the student with a kind of vindication for his perseverance and for having resisted past temptations to abandon the effort to succeed in the face of seemingly daunting challenges (id. at p. 6). He noted that the student's acceptance by several colleges provided him with a firm basis for self confidence and improved self esteem (id.). Regarding his academics for fourth marking period, the student's fourth midterm report for the 2010-11 school year indicated that the student continued to receive B and C grades and that he had not completed the expected amount of work in algebra II (Parent Ex. FFF).

Here, while evidence of progress at Valley View, or a lack thereof, is a relevant factor that may be considered it is not by itself sufficient to establish that Valley View was appropriate (see Gagliardo, 489 F.3d at 115; see also Application of the Bd. of Educ., Appeal No. 11-078; Application of the Dep't of Educ., Appeal No. 11-051). Based on the Valley View curriculum, which mirrored that of the local school district, the student was able to obtain a diploma and graduate from high school. However, the student's mother and the associate director of Valley View provided conclusory testimony regarding the student's progress at Valley View and documentary evidence regarding the student's performance shows that it was variable during the 2010-11 school year. In light of the above, although the hearing record reflects that the student progressed in areas of significant need, namely within the social/emotional domain, the evidence further suggests that the student experienced regression as well. Accordingly, evidence of the student's progress is not dispositive of the parents' claim that Valley View was appropriate to meet his special education needs, and it does not overcome the inadequacies of the evidence regarding how Valley View provided the student with special education and related services that were tailored to address his unique needs.

Conclusion

Having determined that the parents failed to sustain their burden to establish the appropriateness of the student's unilateral placement at Valley View for the 2010-11 school year, the necessary inquiry is at an end and it is not necessary to address the district's arguments regarding whether equitable considerations preclude relief in this circumstance (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).⁷

⁷ Although a full discussion of whether equitable considerations would favor the parents' request for relief is not warranted here, in this case, even if it was necessary to review the issue, the evidence suggests that equitable considerations would weigh against the district, in part because the hearing record suggests that the district did not communicate with the parents during the period of May 2010 until August 2010 and the CSE did not reconvene to formally offer the student a placement following his acceptance at a nonpublic school (Tr. pp. 587-88; 1199-1200; Dist. Ex. 17; Parent Ex. II).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of the determinations herein.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
 February 10, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER