The University of the State of New York
The State Education Department
State Review Officer

No. 07-075

Application of a CHILD WITH A DISABILITY, by his parent, 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:
Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Daniel J. Schneider, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her son's tuition costs at the Family Foundation School (Family Foundation) for the 2006-07 school year. The appeal must be sustained in part.

Petitioner's son was 17 years old and in the eleventh grade at Family Foundation at the time of the commencement of the impartial hearing in January 2007 (Tr. p. 363; see Parent Ex. D at p. 1). Family Foundation has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 51; see 8 NYCRR 200.1[d], 200.7]). The student's eligibility for special education services as a student with an emotional disturbance (see 34 C.F.R. § 300.8[c][4];[1] 8 NYCRR 200.1[zz][4]) is not in dispute in this appeal.

The student attended Bronx High School of Science (Bronx HSS) for the 2003-04 and 2004-05 school years. At Bronx HSS, the student received failing grades, warnings of failure, and declining grades in his second year there (Tr. pp. 294-95; Parent Exs. V; W). During those two school years at Bronx HSS, his cumulative average was 68.12 percent (Parent Ex. V at p. 1). Petitioner transferred her son to City-As-School (CAS) from Bronx HSS shortly after the beginning of the 2005-06 school year after Bronx HSS had encouraged the student's transfer due

[1] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, none of the new provisions contained in the amended regulations are applicable to the issues raised in this appeal. For convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

to difficulties relating to his behavior, including graffiti, fighting, and drug possession (Tr. pp. 284, 288-89, 293, 294-95). During the 2005-06 school year at CAS, the student's grades deteriorated and he was also cutting classes, getting into trouble with other students, and dealing drugs (Tr. pp. 291-92, 296). On May 28, 2006, petitioner executed a financial agreement with Family Foundation for the student's 18-month stay (Parent Ex. H). On May 30, 2006, the student began attending Family Foundation (Tr. p. 106). Petitioner testified that she transferred the student to Family Foundation when her son's behavior at CAS put him at risk of being suspended (Tr. pp. 286, 291-93). Petitioner also testified that she selected that placement after an adolescent specialist recommended residential treatment and because Family Foundation "was the only school [petitioner] knew about at the time" and because she "was very desperate to have [her son] situated somewhere" (Tr. pp. 412, 429-30; see Parent Ex. C).

On or about June 12, 2006, petitioner referred her son to respondent's Committee on Special Education (CSE) (see Tr. pp. 297, 430-31; Dist. Ex. 5). Prior to that time, petitioner was not aware of the existence of respondent's CSE (Tr. p. 297). A respondent school social worker interviewed petitioner on June 20, 2006 for the purpose of completing a social history (Dist. Ex. 14). On June 20, 2006, petitioner provided written consent for respondent to conduct an initial evaluation of the student (Dist. Ex. 6).

A private psychologist conducted an evaluation of the student in July and August 2006 (Parent Ex. D). The report of the psychological evaluation was conveyed to respondent's CSE by letter from petitioner dated August 26, 2006 (Dist. Ex. 8). The evaluation included a classroom observation of the student at Family Foundation, a clinical interview with him, telephone interviews with petitioner, and review of school records (Parent Ex. D at p. 1). Testing by the psychologist included administration of the Wechsler Intelligence Scales for Children – Fourth Edition (WISC-IV), the Peabody Individual Achievement Test – Revised – Normative Update (PIAT-R-NU), and personality tests (id. at pp. 1, 4-6). Administration of the WISC-IV yielded a verbal comprehension composite score of 119, which was at the 90th percentile; a perceptual reasoning composite score of 125, which was at the 95th percentile; a working memory composite score of 110, which was at the 75th percentile; a processing speed composite score of 100, which was at the 50th percentile; and a full scale IQ composite score of 120, which was at the 91st percentile (id. at p. 4). On the PIAT-R-NU, the student received a standard score of 129 in reading recognition, which was at the 95th percentile; a standard score of 103 in reading comprehension, which was at the 58th percentile; a standard score of 112 in total reading, which was at the 79th percentile; a standard score of 121 in mathematics, which was at the 92nd percentile; and a standard score of 107 in spelling, which was at the 68th percentile (id.).

The psychologist advised that his testing showed "above average intellectual ability predictive of good academic success" and that the achievement testing demonstrated "adequate achievement, but underachievement relative to ability predictions" (id. at p. 6). He also advised that "observations and personality testing show a significantly disordered individual with very deeply rooted hurt and depressive mood with a massive wall of aggressive, angry, antisocial behavioral compensation" (id.). The psychologist concluded that the student met the criteria for Conduct Disorder (DSM-IV 312.8) and Dysthymic Disorder (DSM-IV 300.4) (id.). He also concluded that the student met the criteria for a student with an emotional disturbance under the Individuals with Disabilities Act (IDEA) (id.). He advised that the student's "pathology is significant" and that the student "is a clever individual who can deceive and dodge efforts at

treatment and containment" (id. at p. 7). The psychologist also advised that the student's "[p]sychological and behavioral pathology as well as severe acting out leading to legal, community, family and educational problems that made it prohibitive for him to continue in his home and home school environment" (id. at p. 6).

The psychologist "highly" recommended "residential placement in a very secure environment with continued feedback and structure" (id.). He advised that the "environment must include a lack of opportunity to make connection with the outside community as [the student] would easily lose track of his therapeutic goals and would parley, and exploit all opportunities to move off track" (id.). The psychologist also advised that "[p]rimarily, behavioral control must be attained followed by working through the external aggressive defenses to the [student's] inner hurt within" and that this should be "done simultaneously with stimulating his keen cognitive ability, keeping his academics moving forward" (id.). The psychologist further advised that the student's "current placement appears to show promise of adequately addressing his therapeutic and educational needs and should be continued" (id.).

By letter dated September 15, 2006, petitioner provided the CSE with a report from Family Foundation (Dist. Ex. 10). The hearing record contains a letter dated September 14, 2006 from the Director of Counseling Services at Family Foundation (Parent Ex. E). The director, who is a licensed clinical social worker, advised that the student arrived at Family Foundation with a variety of difficulties including "defiant behavior, cutting classes, academic underachievement, and suspension from public schools" (id. at p. 1). She indicated that after an initial period of adjustment the student's "strengths and weaknesses began to emerge" (id.). She also advised that the student did well academically and displayed an interest in his studies and had offered to help other students with their school work (id.). She indicated that he had difficulty socializing with his peers, that this disregard extended to adults, and that the student's "oppositional behavior interferes with his ability to work cooperatively in a living, working, or learning environment" (id. at pp. 1, 2). The director stated that there were "family problems to consider" and that the student would be receiving family counseling and his parents would be attending parent group counseling (id. at p. 2). She also advised that at Family Foundation the student was attending weekly group counseling and that he met individually with an assigned staff member to work on problems as they arose on a daily basis (id.). The director also stated that the student would "best be served" by remaining at Family Foundation (id.). The hearing record also contains five individual class reports, each dated September 9, 2006 (Dist. Exs. 17-21). The class reports contain positive statements relative to the student's academic performance but indicate that in three of the five classes, the student had difficulty with his attitude toward school, adults, and/or other students (compare Dist. Exs. 17; 18; 19, with Dist. Exs. 20; 21).

Respondent's CSE met on September 19, 2006 (Dist. Ex. 22 at p. 1). Petitioner attended, along with an advocate (id. at p. 2). The CSE determined that the student should be classified as a student with an emotional disturbance, concluded that he required a 12-month school year and "the 24 hour per day structure and supervision of a therapeutic residential program," and deferred placement of the student to respondent's Central Based Support Team (CBST) (id. at pp. 1, 9). The CSE also recommended that the student receive individual and group counseling once a week for 30 minutes as related services (id. at p. 10). The individualized education program (IEP) resulting from this CSE meeting contained goals relating to the student's ability to understand and appropriately express his feelings, to cope with a frustrating situation, and to cope with his anger

in an appropriate manner (id. at pp. 6-7). The IEP's long term transition outcomes envisioned, among other things, that the student would earn a Regents diploma and attend a post-secondary institution for a Bachelor of Arts degree (id. at p. 11). Petitioner testified that she agreed with both the classification and the program recommended by the CSE (Tr. p. 302).

Respondent's CBST provided information relative to the student to a number of different New York State-approved residential schools (Tr. pp. 267-68; see also Dist. Ex. 4). During the period October through November 21, 2006, at least five New York State-approved schools contacted or attempted to contact petitioner (Tr. pp. 260, 261, 303, 309-310; Dist. Exs. 4; 27; 28; 29; Parent Exs. F; G). Petitioner or her husband visited each school that had expressed an interest in their son during this period (Tr. pp. 302-09, 311-13; see Parent Exs. F; G). By letters dated November 9 and November 21, 2006, petitioner provided respondent's CBST with information regarding her visits and advised the CBST that she did not believe that any of them were appropriate (Parent Exs. F; G). Petitioner's November 21, 2006 letter also advised the CBST that one of the schools had sent information to the wrong address, that the materials from this school were being resent, and that petitioner would set up an interview when that information was received (Parent Ex. G at p. 1; see Parent Ex. CC). The CBST provided copies of petitioner's letters to the CSE (Tr. pp. 276-77, 279). Berkshire Farm Center and Services for Youth (Berkshire Farm), one of the schools that petitioner did not believe was appropriate for her son, advised the CBST that it had accepted the student and this information was provided to the CSE (Tr. p. 314; Dist. Ex. 30).

By notice dated November 21, 2006, respondent advised petitioner that it had scheduled a CSE meeting for December 7, 2006, the purpose of which was to "place Berkshire Farm on the student's IEP" (Tr. pp. 314, 315; Dist. Ex. 23). On December 7, 2006, the CSE convened and recommended that the student attend Berkshire Farm (Parent Ex. B at p. 1). Petitioner and an advocate attended this CSE meeting (id. at p. 2). The IEP resulting from the meeting continued the recommendations in the September 19, 2006 IEP for a 12-month school year and for individual and group counseling as related services (id.). It also continued the goals and objectives and the long-term adult outcomes from the previous September 2006 IEP (compare Parent Ex. B at pp. 6-7, 11, with Dist. Ex. 22 at pp. 6-7, 11). At the December 2006 CSE meeting, petitioner disagreed with the CSE's recommendation that the student attend Berkshire Farm (see Parent Ex. A at p. 3).

By due process complaint notice dated December 8, 2006, petitioner requested an impartial hearing (Parent Ex. A). Among other things, petitioner's due process complaint notice indicated that the CSE had not offered an appropriate placement for the student, that "accordingly [the student] remains enrolled at [Family Foundation]," that Family Foundation was appropriate for the student, that the parents had cooperated with the CSE, and that they were entitled to tuition reimbursement for Family Foundation for the 2006-07 school year (id. at pp. 3, 4).

The impartial hearing commenced on January 23, 2007, continued on March 2 and 16, 2007, and concluded on April 3, 2007. The impartial hearing officer rendered a decision on May 29, 2007. The impartial hearing officer concluded that respondent failed to offer the student a free

appropriate public education (FAPE)[2] for the 2006-07 school year because Berkshire Farm did not adequately address the student's educational needs (IHO Decision at pp. 16-17). The impartial hearing officer also concluded that petitioner failed to meet her burden to show that Family Foundation was appropriate for her son's needs (id. at pp. 17-20). Although the impartial hearing officer indicated that she did not have to decide whether the equities favored an award of tuition reimbursement, she found that petitioner did not provide respondent with timely notice of the student's unilateral placement (id. at p. 20).

Petitioner argues on appeal that the impartial hearing officer was biased. Petitioner also appeals the impartial hearing officer's conclusion that Family Foundation was an inappropriate placement and that equitable considerations do not support an award of tuition reimbursement. Respondent has submitted an answer denying petitioner's material allegations and asserting affirmative defenses, but has not filed a cross-appeal challenging the impartial hearing officer's determination that it did not offer petitioner's son an appropriate program.

I will first consider petitioner's allegation of bias on the part of the impartial hearing officer. Petitioner challenges the impartial hearing officer's impartiality on the basis that she had counseled respondent's attorney by "stepping in and suggesting" that the attorney find another witness to provide additional testimony in support of her case. Petitioner also argues that the impartial hearing officer showed bias when she asked questions that respondent's attorney did not ask regarding the professional certification of Family Foundation staff members involved in her son's counseling and then relied on the answers to those questions in her decision that Family Foundation was not an appropriate placement. As further examples of bias, petitioner asserts that the impartial hearing officer misconstrued testimony at the impartial hearing relating to whether Family Foundation addressed the student's IEP, erroneously concluded that petitioner had required "a locked facility" for her son, and misstated the amount of tuition reimbursement requested by petitioner by 50 percent.

An impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 04-010; Application of a Child Suspected of Having a Disability, Appeal No. 03-071), and must render a decision based on the hearing record (see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). A hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the hearing officer interacts in an official capacity and must perform all duties without

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[2] The term "free appropriate public education" means special education and related services that -

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401[9].

bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021; see 8 NYCRR 200.1[x]; see also 22 NYCRR 100.3[B]). At all stages of the hearing, an impartial hearing officer may assist an unrepresented party by providing information relating only to the hearing process (8 NYCRR 200.5[j][3][vii]). State regulations do not impair or limit the authority of an impartial hearing officer to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (id.).

Upon careful review of the hearing record, I do not agree with petitioner's contentions that the impartial hearing officer acted with bias. Petitioner was represented by counsel at all times during the impartial hearing. At no time during the impartial hearing did petitioner or her counsel raise any objection to the impartial hearing officer requesting additional respondent testimony or examining petitioner's witnesses. With respect to petitioner's claim that the impartial hearing officer sought out additional witness testimony from respondent, I note that the impartial hearing officer specifically stated that she was "not telling [respondent's counsel] how to run [her] case" (Tr. p. 248). Additionally, the impartial hearing officer did not limit her statements evidencing an interest in additional witness testimony to respondent's case; she also indicated an interest in receiving additional information with respect to petitioner's case (see Tr. p. 406). In addition to asking questions of petitioner's witnesses, the impartial hearing officer asked numerous questions from the intake coordinator of Berkshire Farm, a witness called by respondent (Tr. pp. 197, 198-99, 216-18, 238-43). Finally, with respect to those impartial hearing officer conclusions of fact which petitioner states are erroneous, even if that were the case, on this record that would not support a finding of bias.

Having decided that petitioner's assertion of bias lacks merit, I will now turn to the substance of the appeal. The central purpose of the IDEA (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 531, 536-37 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo 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 child a FAPE (id.; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

As noted, the impartial hearing officer concluded that respondent did not offer petitioner's son a FAPE for the 2006-07 school year. Pursuant to federal and state regulations, 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]). As set forth above, respondent has neither appealed nor cross-appealed from this determination. Consequently, the impartial hearing officer's finding that respondent failed to offer petitioner's son a FAPE for the 2006-07 school year, is final and binding (Application of a Child with a Disability, Appeal No. 07-070; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Accordingly, I find that petitioner has prevailed with respect to the first criterion of the Burlington/Carter analysis for tuition reimbursement.

I must now consider whether petitioner has met her burden of demonstrating that the placement selected for the student for the 2006-07 school year was appropriate (Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). The 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 child's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]). A parent's failure to select a program approved by the state in favor of an unapproved option is not 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 a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]). However, this must be balanced against the requirement that each child with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]). The test for a parental placement is that it is appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S., 231 F.3d at 105).

As indicated above, the student has a strong cognitive profile suggestive of good academic potential (Parent Ex. D at p. 4). However, according to the private psychologist who conducted a psychological evaluation of the student in summer 2006, the student's significant pathology and emotional disturbance has interfered with his ability to satisfactorily participate in respondent's non-residential educational programming (id.).

Family Foundation is a 12-month, college preparatory boarding school for middle school and high school age children (Tr. pp. 21, 35-36, 39; Parent Ex. L at pp. 1, 7). The school serves students ages 12 through 17 who have difficulty managing behavior resulting in academic underachievement, difficulty following rules, and being defiant and oppositional to authority figures (Tr. pp. 21-22). Approximately 60 percent of the students at the school have diagnosed emotional conditions, and about 15 to 20 percent have special education classifications (Tr. pp. 22, 34, 40-41, 94; Parent Ex. L at p. 1). All students have at least average or above cognitive abilities (Tr. pp. 22, 118). Staff is present 24 hours a day, seven days a week; 12 staff members reside on campus (Tr. p. 87). The campus is in a rural setting, with a single access road, and the buildings are alarmed at night (Tr. pp. 87-88, 115). Except for the most senior students, students are always with others when walking around campus (Tr. pp. 384-85). The school monitors the students' entertainment related activities including reading and television, and has a dress code (Tr. p. 364).

Family Foundation describes itself as a therapeutic school and its counseling format utilizes a cognitive behavioral model (Tr. pp. 12, 22-23; Parent Ex. L at p. 1). The school includes approximately 240 students, who are divided into eight "families" or units of approximately 30 students each (Tr. pp. 25, 53, 93; Parent Ex. L at p. 5). "[F]amily leaders" oversee the different individual units, which also have a number of individual staff persons assigned to them (Tr. pp. 29-30, 388; Parent Ex. L. at p. 5). The individual unit defines those students and staff who students live with and who they spend their time with eating, sleeping, and participating in study hall and weekend entertainment and recreational activities (Tr. pp. 25, 110-11, 328-330; Parent Ex. L at p. 5). The teaching staff also has affiliations with the school's different units (Tr. p. 33).

Family Foundation adheres to the guiding principles of the 12-steps of Alcoholics Anonymous and applies the philosophy underlying that program to address the different types of behavioral issues faced by its students (Tr. pp. 23-25, 28; Parent Ex. L at p. 3). It also utilizes a positive peer support model to effect change in students' behavior (Tr. pp. 30-31). The school's program is a minimum of 18 months; the average stay is 22 months (Tr. pp. 112, 365-66; Parent Ex. L at p. 3).

The school's vice president for external relations and acting director of admissions, who has a masters degree in clinical psychology, testified that the school's program for all students includes: (1) "a modified group counseling process" called "table topics," which takes place twice a day and involves all of the students in a particular unit; (2) weekly group counseling involving 8 to 10 students and (3) weekly individual counseling with a staff sponsor (Tr. pp. 25-27, 42, 43, 45, 54; see also 344-45, 347, 350, 352-53, 373-74, 396, 397; Parent Ex. L at pp. 4, 5). In addition, he testified that students can also participate in specialized topical group counseling for issues including anger management, adoption, or grief; and that individual psychotherapy is also available (Tr. pp. 27, 43-44, 55-56). Family Foundation's director of counseling, who is a licensed social worker (Tr. pp. 29, 52), supervises and oversees the specialized topical group counseling, the smaller group counseling, and the individual psychotherapy (Tr. pp. 29, 52-53, 348, 392-93, 405). The school's vice president testified that the staff who provide the students with the small group counseling have "a minimum of a master's degree in psychology or social work and experience working with this population" (Tr. p. 53). He testified that a "more senior" person in the 12-step program supervises the staff sponsors who provide students with individual counseling (Tr. p. 29). The unit leaders supervise the larger, "table topics" informal group counseling (Tr. pp.

29-30, 54, 388). Family Foundation also has a required program of family counseling and of counseling for parent groups (Tr. pp. 37, 355-57; Parent Ex. L at p. 10). The family group counseling is led by one of the school's group counselors and is supervised by the school's director of counseling (Tr. pp. 358-59). A consulting psychologist monitors medication and is available for office visits when necessary in a crisis (Tr. pp. 34, 393). The school has a consulting psychiatrist (Tr. p. 394). Each student has a "junior" sponsor, who is a more senior student and who assists other students in the school's program (Tr. pp. 30, 350).

Family Foundation follows the New York State Regents curriculum and awards Regents and Regents "with honors" diplomas (Tr. p. 32). Its passing grade is 75 percent and its curriculum is accredited by the Middle States Association of Colleges and Secondary Schools (Tr. pp. 32, 342, 363; Parent Ex. L at p. 7). One hundred percent of the school's students are accepted into college (Tr. pp. 32-33).

The family leader who oversees the unit that houses petitioner's son, testified at the impartial hearing (Tr. pp. 325, 327, 330, 348). The student's family leader testified that the student was a part of the school's daily informal larger group counseling, table topics program and also received smaller group counseling for an hour, once a week (Tr. pp. 25-26, 54, 345, 346, 347, 363, 390-92, 392-93, 394). The student received individual counseling from a sponsor at least once a week (Tr. pp. 26-27, 347, 350, 363, 396-97, 352-53). Petitioner's son also participated in the school's program of group counseling along with his parents (Tr. pp. 356-59). The student's family leader testified that additional counseling opportunities, including additional individual counseling by the psychologist or the licensed social worker were available for the student but that this had not been necessary (Tr. pp. 395-96). Petitioner and her husband had participated in the school's program of family group counseling and parent group counseling (Tr. pp. 414, 415-16).

The student's family leader testified that the school was appropriate for the student and that the student had made both behavioral or emotional and academic progress (Tr. pp. 343, 359, 404). He testified that when the student arrived, he was very angry, into some destructive behavior, sarcastic, "very mad" at his family, anti-authoritarian, judgmental, argumentative, and sometimes belligerent (Tr. pp. 331-34). He testified that the student responded to the school's environment and counseling activities and, while he was not perfect, that he has slowly changed his behavior, including that in the classroom (Tr. pp. 335-38, 383-84). The family leader testified that he no longer receives teacher comments that the student is a problem, instead the comments state that the student is "a pleasure" to have in class, that the teachers "enjoy his creative side," and that he does a good job in participating (Tr. pp. 334-35). He also indicated that petitioner's son more actively participates in the "table topics" counseling process, where he is now a support and provides help in assisting newer students, which is different than when he first arrived (Tr. pp. 345-46). The family leader reported that the student is now truthful regarding misbehavior; conscientious; and that he now shows compassion for, cares about, and is willing to help other people (Tr. pp. 351-52, 404). As a result of his changed behavior, the student has become a "junior sponsor" and in that role helps and assists other students (Tr. pp. 350-52, 353; see also Tr. pp. 329, 374, Parent Ex. L at p. 5). Petitioner testified that her son had responded positively to the family counseling and that he was "digging deeper" into himself and "finally" talking to his parents about the decisions and choices that he had made (Tr. pp. 416-17).

The family leader also testified that the student has made academic progress, that he was at the top of his class and that because of his academic proficiency he was a student tutor (Tr. pp.

340, 343, 371, 372). He also reported that the student was successfully using his talent in art by illustrating a book being prepared by a school staff member and also in other ways (Tr. p. 339). The family leader testified that the student is "on track" to complete the school's program in an average length of stay (Tr. pp. 366, 368) and that he is "dealing with" the behavior that resulted in him being at the school (Tr. p. 400). Unlike when he first arrived, the family leader testified that the student is "entertaining the possibility of going to college" (Tr. p. 349).

When factoring in his Regents exams, the student's final grades for fall 2006 included 97 in math; 93 in both physics and English 11; 91 in United States History; 90 in kitchen prep; 87 in Spanish III; 85 in both physical education and art; 81 in home economics; and 77 in living skills (Parent Ex. Y). The student's grades for the January and February months of the spring 2007 term were, respectively, 99 and 94 in calculus; 96 and 89 in government and economics; 96 and 83 in physics; 94 and 92 in English 12; 93 and 94 in kitchen prep; 92 and 90 in Spanish III; 84 and 92 in physical education; 80 and 82 in living skills; and 75 for both months in home economics (Parent Ex. Z). The student achieved a 97 in his math Regents exam, a 94 in his English 11 Regents exam, and a 93 in his United States History Regents exam (Parent Ex. Y).

As noted above, the psychologist who conducted the student's private evaluation indicated that his current placement, which was at Family Foundation, appeared to show promise of adequately addressing the student's therapeutic and educational needs and should be continued (Parent Ex. D at p. 7). This psychologist also testified about the student at the impartial hearing (see Tr. pp. 122-78). His testified that the student needed an environment that was controlled, where program response to behavior was immediate and consistent, that was highly secure and not allowing of elopement, that was away from and unconnected with contrary influences, that provided the student with appropriate role models and showed the student people who had made progress, that included positive peer interaction, and that had a strong academic program (Tr. pp. 144-46, 148-49, 151-52, 153-54, 154-55, 155-56, 156). He also indicated that for someone like petitioner's son, only after environmental control was obtained and the behavior settled down could underlying issues regarding feelings be addressed (Tr. pp. 144-45). He testified that the student did not require "substance abuse counseling as such" but "a deeper degree of counseling about what produced his conduct disorder in the first place and some of the choices he was making" (Tr. p. 170). He stated that "specific individual counseling per se as apart from an overall program [was] not really what [he] was thinking about" (id.). Based on his observation of students at the school and his discussion with Family Foundation staff, the psychologist indicated that the school was very structured and very secure; had immediate consequences for student behaviors; used directed peer feedback, which he indicated could be a "pretty powerful" tool; and had "a pretty rigorous academic environment" (Tr. pp. 156-58). The psychologist testified that Family Foundation was "a good choice" for the student (Tr. p. 159; see also Tr. p. 178). I note here that respondent did not present any testimony contrary to this conclusion at the impartial hearing.

Based on the evidence in the hearing record, particularly the undisputed testimony from the private psychologist who opined that Family Foundation is an appropriate placement for the student, I find for the reasons discussed below that Family Foundation is an appropriate placement for purposes of tuition reimbursement. Petitioners' private psychologist provided testimony regarding the student's need for a structured environment and also regarding the style of counseling which may be most beneficial for this student. The psychologist was not questioned, either by respondent or by the impartial hearing officer, as to whether, as a licensed mental health

professional, he found it appropriate for this counseling to be conducted by unlicensed staff. Because respondent did not explore this concern, I am constrained to find that Family Foundation is an appropriate placement for purposes of tuition reimbursement. Family Foundation is a secure environment and has and enforces rules for the student. Its academic program is appropriate for the student and the structure of, and program at, the school has facilitated the student's ability to receive educational benefits so that he has excelled in his schoolwork and is using his creative talents. The school's curriculum and the student's grades are consistent with the receipt of a Regents diploma and the student's attendance at a post-secondary institution as envisioned in respondent's IEP. For this student, the counseling activities provided at the school, which included counselor and peer feedback, have, in conjunction with the other elements of the Family Foundation program environment, been sufficient to support this student in his ability to focus on and pay attention to his academic studies and to make significant educational progress. The counseling activities at the school have also assisted the student in engaging in appropriate classroom and out-of-classroom behavior, which is consistent with the social and emotional goals and objectives on respondent's IEP.

The impartial hearing officer's conclusion that petitioner did not satisfy her burden to show that Family Foundation was an appropriate program for her son was affected by the fact that the student did not receive any counseling services by licensed personnel or persons qualified to provide the counseling services recommended in the student's IEP (see IHO Decision at pp. 17-18, 19). I have in the past determined that Family Foundation was not an appropriate program due to the fact that it did not provide counseling services by qualified personnel to a particular student (see Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of the Bd. of Educ., Appeal No. 06-043; Application of a Child with a Disability, Appeal No. 03-106). However, the hearing record in this case, including the evaluation by and the testimony of the private psychologist as well as the testimony of the two witnesses from Family Foundation supports a finding that the counseling provided to the student was at the time of the impartial hearing contributing to the control of his behavior (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

The impartial hearing officer also concluded that "there was no testimony as to the ability of [Family Foundation] to meet the student's counseling goals" (IHO Decision at p. 19). However, as indicated above, the record shows that the student's behavior, which was the focus of specific social/emotional goals on his IEP, had improved (see, e.g., Tr. pp. 331-38, 345-46, 351-52, 353, 400; see also Parent Ex. B at pp. 6-7).

With respect to the appropriateness of a private school placement, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G, 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). For the reasons discussed above, I find that Family Foundation is an appropriate program for petitioner's son for the 2006-07 school year and that petitioner has therefore prevailed with respect to the second criterion of the Burlington/Carter analysis for an award of tuition reimbursement.

The final criterion for an award of tuition reimbursement is that petitioner's claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at 363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd 2006 WL 2335140 [2d Cir. 2006]). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter,

510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d at 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S. 359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417).

With respect to equitable considerations, the IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Mrs. C., 226 F.3d at n. 9). Regarding the former, tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]).

With respect to the equities, the impartial hearing officer found that petitioner did not prove that the student's unilateral placement was appropriate and therefore indicated that she did not need to decide whether the equities supported an award of tuition reimbursement. However, she also noted the requirements of 34 C.F.R. § 300.148(d) regarding petitioner's obligation to give notice to respondent of her intent to enroll the student in Family Foundation at public expense (IHO Decision at p. 20). The impartial hearing officer found that petitioner participated in both the September and December 2006 CSE meetings and did not inform respondent of the student's unilateral placement and also that petitioner had already placed the student at Family Foundation prior to the referral to the CSE (id.).

Petitioner referred her son to respondent's CSE on or about June 12, 2006. Following the referral, a social history was obtained, which indicated that the student was attending Family Foundation, a private psychoeducational evaluation was conducted, and other information was provided to respondent. The CSE met on September 19, 2006, and among other things, determined that the student should be classified as a student with a disability and with no objection from petitioner, deferred placement of the student to its CBST. At that time, the student continued to be enrolled at Family Foundation, which provided information to the CSE and a Family Foundation staff member participated at the September 2006 CSE meeting. (see Dist. Exs. 10; 22

at p. 2). The CSE reconvened on December 7, 2006 and recommended that the student attend Berkshire Farm for the one-year period beginning December 2006. The notice scheduling the December 7, 2006 CSE meeting indicated that the student was attending Family Foundation (Dist. Ex. 23). A Family Foundation staff member attended the December 7, 2006 CSE meeting (Parent Ex. B at p. 2).

The record does not indicate whether petitioner did more than state her objections to a placement of her son at Berkshire Farm at the December 7, 2006 CSE meeting. However, by letter from her attorney to respondent dated December 8, 2006, the day after the CSE meeting, petitioner, among other things, indicated her objections to the CSE's recommended placement at Berkshire Farm, and requested tuition reimbursement for her son's attendance at Family Foundation for the 2006-07 school year (Parent Ex. A at pp. 1, 3, 4). By virtue of petitioner's December 8, 2006 letter to respondent, under the circumstances of this case, petitioner gave adequate notice regarding the second half of the school year at Family School.

Respondent's answer also asserts that petitioner refused to have the student evaluated by prospective placements. Equitable principles dictate that parents cannot deliberately withhold their child from an intake interview and impede a district's ability to offer a FAPE and also secure a future award of tuition reimbursement at a private school of their choosing (Application of a Child with a Disability, Appeal No. 06-025; Application of the Bd. of Educ., Appeal No. 05-116; Application of a Child with A Disability, Appeal No. 05-075; Application of the Bd. of Educ., Appeal No. 96-9). The record contains letters from Vanderheyden Hall and Mountain Lake, two of the schools which the CBST had provided information about the student, advising petitioner of their interest in interviewing the student (see Dist. Exs. 27; 28). Petitioner testified that she spoke with the CBST staff person as well as the schools that she visited, which included Mountain Lake, and that these schools and the CBST agreed that an interview of the student would take place after petitioner had made a determination that a particular placement was appropriate (Tr. pp. 434-35). I note that the CBST staff person testified at the impartial hearing and did not dispute petitioner's testimony regarding such an agreement. Additionally, and with respect to Vanderheyden Hall, because that school initially sent its letter to petitioner to the wrong address, petitioner did not receive it until after petitioner was advised that a CSE meeting had been scheduled for the purpose of putting Berkshire Farm on the student's IEP (see Tr. p. 310; Dist. Ex. 32). In light of petitioner's unrebutted testimony regarding her conversation with the CBST staff person and petitioner's visits to a number of CBST-generated possible schools during the period October through November 21, 2006, I find that petitioner should not be denied tuition reimbursement on the basis that she deliberately withheld her son from an intake interview.

Petitioner referred her son to respondent's CSE when she became aware of that entity (Tr. p. 297). She made herself available so that respondent could prepare a social history and advised respondent that her son was attending Family Foundation (see Dist. Exs. 14 at p. 1; 26 at p. 1). She consented to an evaluation of her son and provided the CSE with the results of a current private evaluation and observation of her son (see Dist. Exs. 6; 8; Parent Ex. D). In response to its request, she also provided the CSE with information regarding her son's attendance at Family Foundation and a medical report (see Dist. Exs. 9; 10; 15; Parent Ex. E). She attended respondent's September 19, 2006 CSE meeting (Dist. Ex. 22 at p. 2). As indicated above, petitioner or her husband visited a number of private schools proposed by the CBST and communicated her opinion of those possible placements to respondent (Tr. pp. 302-09, 311-13; Parent Exs. F; G). She attended

respondent's December 7, 2006 CSE meeting and expressed her opinion with respect to her son's placement at Berkshire Farm (Parent Ex. B at p. 2; see Parent Ex. A at p. 3).

Given the facts and circumstances of this case as set forth above, I find that equitable considerations support an award of tuition reimbursement to petitioner for her son's attendance at Family Foundation, but limited to that part of the 2006-07 school year commencing on December 21, 2006 and extending through June 30, 2007 (see Application of a Child with a Disability, Appeal No. 05-070; see also 20 U.S.C. § 1412[a][10][C][iii][I][bb], 34 C.F.R. § 300.148[d][1][ii]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled to the extent that it found that petitioner failed to establish the appropriateness of the student's placement at the Family Foundation School for the 2006-07 school year and that equitable considerations do not support an award of tuition reimbursement to the student; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioner for the cost of her son's tuition at the Family Foundation School for that part of the 2006-07 school year commencing on December 21, 2006 and extending through June 30, 2007 upon submission of proper proof of payment by petitioner.

Dated: **Albany, New York**
August 24, 2007

PAUL F. KELLY
STATE REVIEW OFFICER