The University of the State of New York

The State Education Department
State Review Officer

No. 07-079

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:
Educational Advocacy Service, attorney for petitioner, Anton Papakhin, Esq., of counsel,

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 Top Flight Academy (Top Flight) for the 2006-07 school year. Respondent cross-appeals from the impartial hearing officer's determinations that it failed to provide an appropriate educational program to the student for the 2006-07 school year, and that petitioner's private placement was appropriate. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the commencement of the impartial hearing on November 30, 2006, petitioner's son was attending Top Flight, a private school located in Utah, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 8 NYCRR 200.1[zz][6]).

The hearing record shows that the student has a history of truancy and engaging in gang related activities (Dist. Exs. 3 at p. 1; 6 at pp. 1, 7). On January 27, 2004, while the student was in respondent's ninth grade, respondent's Committee on Special Education (CSE) met to conduct a requested review and develop an individualized education program (IEP) for the student (Dist. Ex. 2). In summer 2004, the student was withdrawn from respondent's school by petitioner and sent to a private military school, due to petitioner's concerns over his truancy and gang related

activities (Dist. Ex. 3 at p. 1). The student remained in the military school until approximately February 2005, when he was "asked to leave" (id. at p. 2). The student then attended one of respondent's high schools until July 2005 (id.). In July 2005, petitioner placed the student in another military school where the record shows his status was changed to "withdrawal" on January 30, 2006 due to academic deficiencies (Dist. Ex. 5). Report cards from the latter military school indicate that the student failed to perform the academic work required, did not complete papers, homework or exams, and was late for classes (Dist. Ex. 4).

The student received a psychological consultation on January 9, 2006, while still attending a military school (Dist. Ex. 6). The psychologist opined that the student had an "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct" and that psycho-social stressors included, being away from family and friends while in a military academy, and a history of gang involvement (id. at p. 2). The psychologist recommended that the student receive individual cognitive-behavioral psychotherapy (id.).

By letter dated January 30, 2006, petitioner notified respondent that her son required updated evaluations, a more restrictive placement, and that his classification should be changed from a student having a learning disability to a student with an emotional disturbance (Dist. Ex. 7). Petitioner also notified respondent of her son's history of truancy and his "many emotional issues" (id.). Subsequently, respondent scheduled a psychoeducational evaluation for February 22, 2006, and a psychiatric evaluation for February 27, 2006 (Tr. pp. 57, 80; Dist. Ex. 3).

Respondent's school psychologist conducted a psychoeducational evaluation of the student on February 22, 2006 (Dist. Ex. 3). Administration of the Stanford-Binet Intelligence Scales, Fifth Edition yielded a full scale IQ score of 87, which was in the low average range of cognitive functioning (id. at p. 3). The student's verbal IQ (87) and nonverbal IQ (88) scores also fell within the low average range (id.). Factor index scores revealed weaknesses in the student's fluid reasoning, quantitative reasoning and visual spatial processing abilities (id. at pp. 3-4). Administration of selected subtests of the Woodcock-Johnson III, Tests of Achievement (WJ-III) revealed deficits in the student's decoding, reading comprehension, reading fluency, math fluency, spelling, written expression and writing fluency (id. at pp. 5-8). With regard to the student's social/emotional functioning, the psychologist reported that projectives and an interview of the student indicated that the student was a socially aware male who was cognizant of acceptable behaviors, but did not always use them (id. at p. 8). The psychologist noted that the student may act without considering the consequences of his actions or accepting responsibility for his wrongdoings (id.). She further noted that the student may engage in negative attention seeking behaviors, either as a form of emotional release or as a means of attaining control in a world in which he feels ineffectual (id.). According to the psychologist, the student was aware of his academic struggles, which may, at times, leave him feeling anxious and confused, resulting in lowered self-esteem (id.). The psychologist opined that the student needed a highly structured program that would provide him with academic, social/emotional and behavioral support, and that when recommending an appropriate placement, consideration of the student's history of truancy and gang participation should be taken into account (id. at p. 9).

On February 22, 2006, petitioner was interviewed during a psycho-social assessment (Dist. Ex. 11). The social worker who conducted the evaluation indicated that according to petitioner

the student presented with a history of behavioral problems, often beyond the control of his parents, and school officials, and that the student also had a history of truancy (id. at p. 2). The social worker also indicated that "[petitioner] is now seeking an appropriate private setting for [her son], and a change of his status to emotionally disturbed" (id.).

The February 27, 2006 psychiatric evaluation did not occur, as the student did not appear at the scheduled time (Tr. p. 57). On March 16, 2006 respondent's CSE met to develop an IEP for the student (Dist. Ex. 1). The CSE determined that it did not have enough evaluative information concerning the student to change his classification to that of a student having an emotional disturbance (Tr. p. 200; Dist. Ex. 1 at p. 2). The CSE determined that the student required a psychiatric evaluation before an IEP could be properly developed, therefore, the CSE developed an interim service plan (ISP) until the student could be further evaluated (Tr. p. 200; Dist. Ex. 1). The CSE recommended that the student be placed in a 15:1 special education class in a community school, that he receive both group and individual counseling once per week for 30 minutes each session, and that pending a psychiatric evaluation, he continue to be classified as a student with a learning disability (Dist. Ex. 1 at p. 1). The ISP incorporated by reference the present levels of performance and goals from the student's last IEP, developed in January 2004 (id. at p. 3). However, the recommended placement was changed from ten sessions per week in a special class to full time placement in a special class based on the CSE's determination that the student required a more restrictive setting (Tr. pp. 16, 24, 41; compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at pp. 7, 8). In addition, the ISP reflected changes in the recommended counseling services to be provided to the student. Specifically, the ISP called for a reduction in the size of the student's counseling group from eight to three and the addition of a once weekly individual counseling session (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 8).

By letter dated March 17, 2006, petitioner was formally notified of the CSE's recommended placement in a 15:1 special education class at one of respondent's high schools (Dist. Ex. 12). Respondent scheduled a psychiatric evaluation for the student on March 22, 2006; however, the student did not attend the evaluation (Tr. pp. 19-20; Dist. Ex. 10 at p. 1). Petitioner told respondent that her son missed the appointment because he was "not cooperating" (Tr. pp. 81-82; Dist. Ex. 10 at p. 2).

By letter dated April 3, 2006, petitioner notified respondent that her son could not attend the recommended placement because he had run away from home on the day of the scheduled psychiatric appointment, March 22, 2006 (Tr. pp. 82-83; Dist. Ex. 13). In the same letter, petitioner notified respondent that she would "keep [respondent] informed of the situation" (Dist. Ex. 13). Petitioner later testified at the impartial hearing that her son had run away the day before the February 27, 2006 psychiatric appointment but that she had not informed respondent because she thought he might return home (Tr. pp. 57, 80, 82).

In May 2006, petitioner's son was outside New York State, returned to New York, and then "immediately" unilaterally placed by petitioner at Top Flight (Tr. p. 60). Petitioner requested an

impartial hearing on August 15, 2006 seeking tuition reimbursement for the student's placement at Top Flight for the 2006-07 school year (Tr. p. 203).[1]

The impartial hearing began on November 30, 2006 and was completed on February 12, 2007 after three days of testimony. Respondent's special education teacher assigned to the CSE testified that although the CSE had the results of the February 22, 2006 psychoeducational evaluation and the January 9, 2006 psychological consult available for review at the March 16, 2006 IEP meeting, the CSE believed that "anecdotals" from the student's prior schools and a psychiatric evaluation were required before creating an IEP and changing the student's classification from learning disabled to emotionally disturbed (Tr. pp. 13-14, 26). She testified that the CSE believed that more information was needed concerning the emotional aspect of the student before it could appropriately change his classification (Tr. pp. 13-14). She also testified that the CSE closed his file (Tr. p. 21) after the CSE received petitioner's April 3, 2006 letter (Dist. Ex. 13) advising respondent that the student had run away and that petitioner would contact the CSE once the student returned home (Tr. p. 21).

Petitioner testified that her son started having problems in school when he started ninth grade at one of respondent's high schools in 2004 (Tr. pp. 47-49). She testified that her son was becoming "lost" because respondent continually changed his program (id.). She further testified that her son then stopped attending classes, even though he was dropped off in front of the school (Tr. p. 48). She testified that she placed her son in a military school at the end of the school year but he was removed from that school for fighting, at which point he began attending classes at one of respondent's schools (Tr. pp. 49-50, 51-52). She testified that her son appeared to do well at respondent's school for approximately four weeks before he began having attendance problems again (Tr. pp. 51-52).

Petitioner testified that after her son's truancy problem recurred at respondent's school, she placed her son at a private military school, where he started receiving psychological and anger management counseling because of an incident (Tr. pp. 54-55). Petitioner stated that after her son left the military school, she contacted the CSE and subsequently, a social and psychological evaluation occurred (Tr. p. 55). Petitioner also testified that her son ran away on the day before his scheduled February 27, 2006 psychiatric evaluation (Tr. pp. 57, 80). She further testified that upon her son being located in May 2006, she directly took him to Top Flight (Tr. p. 60). Petitioner testified that she did not "go back to the CSE" at that point because "it would make no sense because he wasn't going to stay in [respondent's school], " and that "they [respondent's schools] weren't strong enough" (Tr. pp. 61-62). She testified that, while at Top Flight, her son has been receiving good grades, that he is taking a college course, and that he has become a leader (Tr. pp. 63-64). She further testified that her son receives private counseling and group counseling at Top Flight, and that his self-esteem has improved (id.).

[1] Petitioner's due process complaint notice was not entered into the hearing record.

By decision dated May 29, 2007, the impartial hearing officer determined that: a) respondent failed to offer petitioner's son a free appropriate public education (FAPE)[2] because it did not create an IEP for the 2006-07 school year; b) petitioner sustained her burden in demonstrating that Top Flight was an appropriate unilateral placement; and c) equitable considerations warranted denying petitioner tuition reimbursement for Top Flight because she failed to provide respondent with timely notice of the student's unilateral placement.

Petitioner appeals, asserting that the impartial hearing officer erred in denying tuition reimbursement for Top Flight based on equitable considerations.

Respondent cross-appeals, asserting that the impartial hearing officer erred in determining that it had failed to offer a FAPE to petitioner's son. Respondent argues that petitioner failed to make the student available for necessary evaluations. Respondent also asserts that the impartial hearing officer erred in determining that Top Flight was an appropriate placement.

The central purpose of the Individuals with Disabilities Education Act (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, 546 U.S. 49, 51 [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];[3] see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

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 to the child's needs, 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]).

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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 school, 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]).

[3] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

"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 (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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, 142 F.3d. at 132). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

Respondent asserts that the impartial hearing officer erred in finding that respondent failed to offer a FAPE to petitioner's son for the 2006-07 school year. Respondent asserts that petitioner did not make her son available for the psychiatric evaluations; therefore, respondent did not have sufficient evaluative information to create an IEP. Respondent further asserts that the impartial hearing officer improperly placed the burden of proof under Prong I on the district.[4]

The impartial hearing officer found that respondent did not provide a FAPE for the student because respondent did not prepare an IEP for the student (IHO Decision at p. 13). Whether called an ISP or IEP, the written program developed in March 2006 did not contain adequate or current information based upon the evaluative data that was within the CSE's possession at that time. Although the CSE had conducted updated psychoeducational testing in February 2006, the results of the testing were not included in the March 2006 ISP and the ISP referred back to the January 2004 IEP for the annual goals and present levels of performance. As a result, the March 2006 ISP did not accurately describe the student's then current present levels of performance, nor did it contain appropriate goals which targeted the student's identified academic deficits in reading, mathematics or writing. At the time of the March 2006 CSE meeting the CSE had sufficient evaluative data to develop an appropriate IEP for immediate implementation pending development of further evaluative material for the purpose of considering changing the student's classification. For these reasons, I find that the program created was not reasonably calculated to enable the student to receive educational benefit and, therefore, the CSE did not provide a FAPE for the student (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Having established the first prong of the Burlington/Carter tuition reimbursement analysis, I must now determine whether petitioner met her burden under the second prong of the Burlington/Carter tuition reimbursement analysis to establish the appropriateness of the services obtained for her son for the 2006-07 school year (Burlington, 471 U.S. 359). In order to meet this burden, a parent must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; see Burlington, 471 U.S. at 370), i.e., that the private services addressed 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, 471 F. Supp. at 419).

[4] The impartial hearing officer states in his decision that the burden of proof in IDEA proceedings pursuant to Schaffer lies with the parent (IHO Decision at p. 12). The impartial hearing officer then states that the district has the burden to demonstrate the appropriateness of the program recommended by the CSE (id. at p. 13). I do not need to address this contradiction because it is not dispositive in reaching a decision on the merits. Here, there is ample evidence in the record that petitioner's son was not offered a FAPE. However, I caution the impartial hearing officer to apply the correct legal standard pertaining to the burden of persuasion.

Top Flight Academy, located in Utah, is a residential treatment center for troubled male teens ages thirteen to seventeen (Tr. pp. 140, 162). The program at Top Flight consists of four components: academic, aviation, individual therapy and group therapy (Tr. pp. 140-41). The academic component is provided by the Woodland Hills School, an accredited special needs high school in the state of Utah (Tr. pp. 102, 165-66). The aviation component consists of flight and ground training and is provided by a certified flight instructor (Tr. p. 166). Individual therapy is provided to students by licensed therapists with Ph.D.s in marriage and family therapy (Tr. p. 165). The group therapy component of Top Flight is based on a positive peer culture model (Tr. pp. 141, 166-67). According to the program director, Top Flight works with students with mild to mid-range attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), depression and bipolar disorders (Tr. p. 142). At the time of the hearing 15 students were enrolled in the academy (Tr. p. 140).

Academic instruction at Top Flight takes place Monday through Friday from 8:30 a.m. to 12:30 p.m. (Tr. pp. 187, 189). On Mondays, Wednesdays, and Fridays the students receive instruction from the teachers from Woodland Hills (Tr. pp. 140-41, 145, 189). On Tuesdays and Thursdays students attend a morning study hall which is supervised by Top Flight staff, who are not teachers (Tr. pp. 189-90). On Tuesday and Thursday afternoons students attend flight school from 1 p.m. to 3 p.m. (Tr. p. 141). In addition, in the afternoon the students participate in activities such as going to the weight room or playing basketball (Tr. pp. 187-88). According to the program director at Top Flight, the teachers from Woodland Hills provide students with instruction in five subjects (Tr. p. 141). In addition, the students received four elective subject credits for aviation, psychology, P.E. and group interaction experiences provided by Top Flight (Tr. p. 141). At Top Flight students receive individual therapy one or two times a week (Tr. p. 165). Each evening for one hour students participate in group therapy where they discuss and find solutions to their problems (Tr. pp. 141, 188). The staff member who supervises the group sessions is not a therapist and does not have any degrees or credentials in therapy or counseling (Tr. pp. 175-76).

The student entered Top Flight on May 8, 2006 (Tr. p. 108). The program director at Woodland Hills testified that she received the student's December 2004 IEP (Tr. p. 104); however, did not receive a copy of the student's 2006 ISP, psychological consultation or pscyhoeducational evaluation (Tr. p. 194). Also, she did not receive any documentation regarding the student's then current instructional levels (Tr. p. 195). According to the program director, a special education teacher from Woodland Hills copied the student's goals and accommodations from his IEP onto a spreadsheet, which was then distributed to the teachers assigned to Top Flight (Tr. pp. 105, 195-97). Woodland Hills followed what was in the student's IEP (Tr. p. 105).

The program director for Top Flight indicated that he received a copy of the student's IEP from Woodland Hills indicating the type of accommodations the student would need (Tr. p. 147). The student's teacher at Top Flight, who was a certified special education teacher (Tr. p. 120), stated that she did not get a copy of the student's IEP and was not provided with information from Woodland Hills regarding the student's grade level (Tr. pp. 133-34). The student's teacher stated that she received a list of accommodations for the student which allowed for the following program modifications: extended time for work completion, the use of a calculator for math, the option of reading out loud and directions clarified (Tr. pp. 125, 133).

The special education teacher from Woodland Hills provided the student with instruction in math, art, science and history (Tr. pp. 121-22). The teacher reported that in addition to the student, there were between four to seven other students in her classroom, ranging in age from 15-17 years old (Tr. p. 122). According to the special education teacher the math curriculum targeted concepts and skills development and included a substantial amount of practice (Tr. p. 124). She divided the student in her class into levels based on reading ability (Tr. p. 124). The teacher stated that she typically ran two programs at a time, one designed for special education students, the other designed for those students who were primarily on grade level (Tr. pp. 124-25, 135-36).

The program director reported that the classroom teacher tested the student to find out where he was in math (Tr. p. 148). The student's reading skills were not tested (Tr. p. 149). The student's special education teacher reported that she could tell the student was having some learning difficulties because his scores were not as high as the other students (Tr. p. 125). She did not have any diagnostic information available to determine what level he was on (Tr. p. 125). The teacher stated that she was inclined to have the student work more on an individual basis as far as taking his time and following the materials (Tr. p. 125). The teacher stated that the student had some attention deficits, difficulty with reading and comprehension, and his vocabulary needed to be enlarged (Tr. p. 129). She opined that the materials she was using were at an appropriate reading level for the student, which she estimated to be at the ninth grade level (Tr. pp. 130-31). The teacher reported that she chose a reading curriculum designed for students with learning disabilities although the curriculum did not indicate that is was written at a specific grade level (Tr. pp. 131-32). The Top Flight program director reported that in order to address the student's reading comprehension needs, the teachers allowed the student to read out loud so he could hear himself (Tr. p. 150). The student was also allowed extended time to complete assignments and staff attempted to seat him in the classroom where he would not be distracted (Tr. p. 150). The teacher reported that the student was an auditory learner and that he benefited from having directions read out loud (Tr. pp. 125-26, 130). In addition to the teacher, there was always one additional staff member present in the classroom (Tr. p. 123).

The teacher stated that the student had demonstrated progress academically, as evidenced by his improvement in tests scores, and in his ability to seek assistance when needed (Tr. p. 126). She noted that the student was more apt to participate in class than he was at the beginning of the school year (Tr. p. 126). The teacher reported that the student received grades in the B to A range and that he did well in art and geometry (Tr. p. 136).

The Top Flight program director reported that when the student entered the program he was getting into trouble, was very defensive, had a hard time accepting feedback or being criticized, and had a problem with drugs (Tr. pp. 143, 163-64, 171). He noted that the student also had a learning disability and struggled with reading (Tr. p. 143). According to the program director, the student performed better when he could read out loud or listen to someone else read (Tr. p. 143). He reported that staff provided the student with one-on-one attention, read things and explained things to the student (Tr. pp. 143-44). The program director reported that the student had made a lot of progress academically and therapeutically (Tr. p. 144). He reported that the student's motivation had improved in relation to school work and the student went from earning Cs and Bs to earning Bs and As (Tr. pp. 144-45). The program director reported that the student was a great leader in his Positive Peer Culture group and provided peers with a lot of good feedback

(Tr. p. 145). He opined that the student was one of the top two or three students in terms of leadership (Tr. p. 145).

The program director confirmed that the primary goal of Top Flight was to deal with at-risk behavior, which with respect to the student included running away and drug use (Tr. p. 153). However, he opined that even without the at-risk behaviors the student would be an appropriate candidate for the school based on his academic needs (Tr. p. 154). He reported that students did well academically at Top Flight because of the one on one attention they received (Tr. p. 154).

The executive director at Top Flight reported that the student had made a lot of progress in communication with his peer group and solving problems (Tr. p. 169). He reported that the student was applying himself in school as well (Tr. p. 169). However, he opined that the student needed to continue to work on working well within the group and following the rules at Top Flight thoroughly, as well as striving harder to complete his academic goals (Tr. pp. 184-86).

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). However, while evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 112). In addition, 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).

I disagree with the impartial hearing officer's determination that Top Flight appropriately addressed the student's special education needs. Although the student attended small classes and reportedly received individualized instruction, his teacher testified that she was unaware of the student's instructional levels and did not perform diagnostic testing to ascertain the student's academic needs. In addition, the record lacks information regarding the specific academic skills addressed by the teachers, as well as specific information regarding the materials and instructional strategies used to address the student's deficits in reading, mathematics and writing. The record is void of progress notes or report cards documenting the student's educational achievement.[5] The student's individual counselor, the only licensed mental health professional working with the student, did not testify at the hearing nor were any treatment notes, treatments summaries or treatment recommendations entered into evidence. As such, I cannot conclude from the record that the program chosen by the petitioner met the student's identified special education needs.

Although I have found that respondent failed to offer petitioner's son a FAPE and that petitioner did not meet her burden in proving that Top Flight was an appropriate private placement under Prong II of the Burlington analysis, I will address the equities portion of the impartial hearing officer's decision, as this is petitioner's principal argument on appeal.

[5] At the beginning of the hearing petitioner attempted to introduce documentary evidence; however, were prevented from doing so when respondent objected stating that the documents had not been disclosed five days in advance (Tr. pp. 4-5). Although the impartial hearing officer indicated that the petitioner's evidence could be addressed again later in the hearing, it does not appear that the issue was revisited.

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]).

In this case, the impartial hearing officer found that petitioner did not give respondent adequate notice of the placement of the student at a private school at public expense (IHO Decision at pp. 13-14). Petitioner asserts that the notice provisions of 20 U.S.C. § 1412[a][10][C][iii] are inapplicable because the student was not removed from a public school and unilaterally placed in a private school. I need not discuss the applicability of 20 U.S.C. § 1412[a][10][C][iii] in this instance because case law provides a basis to bar reimbursement when parents have unilaterally arranged for private educational services without notifying the district (Carmel Central Sch. Dist. v. V.P., 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; citing Mrs. C., 226 F.3d at 68; and Frank G., 459 F.3d at 376).

The IDEA envisions a process where parents and public school educators will work "collaboratively" and with a "cooperative approach" with respect to the duties and obligations of the CSE and the development of educational programs for students with disabilities such that the important goals of that statute will be realized (Burlington, 471 U.S. at 369; Frank G., 459 F.3d at 363). "Courts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with the child's IEP" (Mrs. C., 226 F.3d at 68; see also Frank G., 459 F.3d at 376). Here, it is undisputed that petitioner placed her son at Top Flight without giving notice to respondent of either the placement or her objection to the offered program prior to the placement. Petitioner placed her son at Top Flight on May 6, 2006, and did not notify respondent of this placement until she filed a due process complaint notice on August 15, 2006. I agree with the impartial hearing officer that, under the circumstances of this case, petitioner should have notified respondent that she was unilaterally placing her son in a private school before the date of the hearing request to give respondent an opportunity to reconvene and develop an appropriate educational program.

Petitioner further asserts that her testimony sufficed to meet the requirements of the statutory and regulatory harm exception (20 U.S.C. § 1412[a][10][C][iv][I][cc]). I am not persuaded by petitioner's assertions. In the instant appeal, the impartial hearing officer noted that the exception of physical harm was available to petitioner, however, he also noted that petitioner did not cite to the exception at the impartial hearing nor did she prove that her placement of the student at Top Flight prevented the student from "physical or serious harm" (IHO Decision at p. 14). I note that the record does not reflect that petitioner's decision to place the student at Top Flight was borne out of a concern for the student's physical safety. Furthermore, she did not raise this argument in her due process complaint notice or at the impartial hearing. Therefore, the exception to the 10 day notice does not apply to this case.

Additionally, the hearing record shows that respondent's CSE acted in good faith in attempting to schedule the psychiatric evaluation but was unable to do so due to the unavailability of the student. Finally, petitioner declined to notify respondent that her son had run away and that was why he had missed the February and March 2006 psychiatric evaluation appointments until April 3, 2006 (Tr. p. 82). Although petitioner indicated in her April 2006 letter that she would keep respondent apprised of the situation regarding her son, she did not do so. Given these facts, I agree with the impartial hearing officer's determination that petitioner is not equitably entitled to tuition reimbursement.

I have considered the parties' remaining contentions and find that it is either unnecessary to address them in light of my decision or that they are without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that he found Top Flight was an appropriate placement.

Dated: **Albany, New York**
September 6, 2007

PAUL F. KELLY
STATE REVIEW OFFICER