The University of the State of New York

The State Education Department
State Review Officer

No. 08-016

Application of the BOARD OF EDUCATION OF THE ROCKVILLE CENTRE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, Susan M. Gibson, Esq., of counsel

Zelma and Berlin, attorneys for respondents, David Berlin, Esq., of counsel

DECISION

Petitioner (the district), appeals from the decision of an impartial hearing officer which ordered it to reimburse respondents (the parents) for the student's tuition costs at the Family Foundation School (Family Foundation) for the 2006-07 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was repeating the eleventh grade at Family Foundation (Tr. pp. 601-02; Dist. Ex. 8). Family Foundation has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The student's emotional difficulties reportedly stem from the death of the student's mother when the student was five (Tr. pp. 130, 572). After this, the student developed a close bond with his paternal grandparents (Tr. pp. 573, 577). However, during the 2003-04 school year, both of the student's paternal grandparents died (Tr. pp. 131, 574).

During the 2003-04, 2004-05 school years, and for most of the 2005-06 school year, the student attended the Kellenberg Memorial High School (Kellenberg), a parochial school in Uniondale (Tr. pp. 575-76; Parent Ex. E at pp. 1-2). During the 2003-04 school year, the student earned a cumulative average of 70.7 (Tr. p. 423; Parent Ex. E p. 2). The student also began to exhibit symptoms of depression and anger (Tr. p. 574). During the 2004-05 school year, the

student's cumulative average was 74 (id.). In September 2004, the student began attending weekly psychotherapy sessions with a psychiatrist to address the student's symptoms of depression and anger (Tr. p. 584; Parent Ex. D). On September 29, 2005, the psychiatrist prescribed medication to control what the psychiatrist described as "episodic acting out behavior" (Parent Ex. D). The student failed to complete the 2005-06 school year, because on June 14, 2006 the student was expelled (Parent Ex. E at p. 1). At the time of this expulsion, the student was failing five of seven courses (Tr. pp. 297, 577; Dist. Ex. 6).

On June 20, 2006, the parents referred the student to the district's Committee on Special Education (CSE) (Tr. p. 74; Dist. Ex. 1). On June 22, 2006, the district completed a social history for the student by talking with the student's mother (Dist. Ex. 3). The parents enrolled the student at one of the district's schools (Dist. Ex. 8). Although the student did not take any classes at the district's school during the 2005-06 school year, the district allowed the student to take the final exams for that school year at the district's school (Tr. p. 192). The student failed all of the exams (Dist. Ex. 8). Thereafter, the parents enrolled the student in two classes at the district's school during summer 2006 (id.). The student passed one class and failed the other class (Tr. p. 45).

On July 15, 2006 and July 21, 2006, the district's psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 4). The psychologist administered the Wechsler Abbreviated Scale of Intelligence (WASI) (id. at p. 1). The student's performance yielded a verbal IQ score of 90 (25th percentile, average range), and a performance IQ score of 84 (14th percentile, low average range) for a full scale score of 85 (16th percentile, low average range) (id.). The student's performance on the Wechsler Individual Achievement Test – Second Edition (WIAT II) yielded a reading composite standard score of 106 (66th percentile), a mathematics composite score of 99 (47th percentile), and a written language composite score of 97 (42nd percentile) (id. at p. 2).

The evaluator described the student as compliant during testing, noting that the student reported difficulty paying attention and would require frequent breaks (Dist. Ex. 4 at p. 3). The evaluator reported that the student was frequently off task and required constant redirection (id.). The student became frustrated when faced with test items that he found challenging and gave up quickly, making negative comments about his own ability (id.). The evaluator recommended that the results of the evaluation be considered "minimal estimates" of the student's abilities (id.).

The evaluator assessed the student's social-emotional status through interview and formal rating scales (Dist. Ex. 4 at p. 4). During the interview, the student presented as friendly but anxious, with poor insight into the causes of the student's own academic difficulties (id.). The student's responses on the Behavioral Assessment System for Children (BASC) revealed significant difficulties related to mood, thought, and behavior, and yielded clinically significant scores for anxiety, depression, school problems, inattention, atypicality, somatization, social stress and poor personal adjustment (id.). The student stated during the interview that he hated life and had "thought about" suicide (id.). The evaluator concluded that the student was "exhibiting significant maladaptive behaviors related to thinking, feeling and behaving" and did "not display sufficient coping skills to deal with the high levels of frustration and anger [that the student was] experiencing" (id. at p. 5).

On July 22, 2006, the student and the student's father got into an argument at home and the police were called (Tr. p. 631). This episode resulted in the student being taken to a hospital

(Parent Ex. F at p. 1). On July 23, 2006, the student was transferred to another hospital for stabilization of symptoms of "severe agitation, mood swings, hyperactivity, impulsive behavior, aggression, and difficulty concentrating" (Parent Ex. G at p. 1). The student remained at this second hospital until August 1, 2006 (id.). The hospital discharge report revealed Axis I diagnoses of major depressive disorder NOS (not otherwise specified), bipolar affective disorder NOS and an attention deficit hyperactivity disorder, combined type (id. at p. 2). The student was prescribed two medications (id. at p. 1). The student's discharge plan recommended that the student return to live with the student's parents and receive outpatient treatment for medication management and individual therapy (id.).

On August 16, 2006, the district held a CSE meeting to discuss the student's educational needs (Dist. Ex. 9). The parents attended the meeting, informed the CSE of the student's recent hospitalization and indicated a desire to have the student placed in a residential setting (Tr. pp. 105, 642, 662). At the meeting, the CSE indicated a desire to have a psychiatric examination conducted (Tr. p. 111). The parents refused and no psychiatric evaluation was performed (id.).

The CSE determined that the student should be classified as a student with an emotional disturbance and developed an individualized education program (IEP) for the 2006-07 school year (Dist. Ex. 9 at p. 1). The IEP recommended a ten-month 12:1+1 integrated special education program at the district's school with a daily 40-minute academic enrichment program and two individual counseling sessions every six school days (Tr. p. 98; Dist. Ex. 9 at p. 9). Although the CSE was aware of the student's July 2006 hospitalization, and of the weekly treatments with the psychiatrist, the CSE developed the student's IEP without reviewing the hospital records or the records from the psychiatrist (Tr. pp. 208, 248, 353). The CSE also made its recommendations without input from teachers or officials at Kellenberg, the student's prior school (Tr. pp. 148-49). After the August 16, 2006 CSE meeting, the parents signed the district's Consent for Placement form (Dist. Ex. 10).

On August 18, 2006, the parents entered into a financial agreement with Family Foundation (Parent Ex. N). On August 21, 2007, the student was transported to Family Foundation (Tr. p. 611). On August 23, 2006, the district sent the parents a copy of the IEP and a copy of a Procedural Safeguards Notice (Dist. Ex. 12). On the same day, the parents faxed a completed High School Discharge form to the district indicating that the student had transferred to Family Foundation (Dist. Ex. 13). By letter dated August 24, 2006, the parents advised the district that the student had been enrolled at Family Foundation (Parent Ex. H).[1]

On November 1, 2006, the CSE reconvened (Dist. Ex. 21). Prior to this second meeting, the CSE had obtained a report from the student's treating psychiatrist and a report from Kellenberg (Parent Exs. D; E). However, the district did not obtain any medical records for the student's treatment at either hospital (Tr. pp. 96, 98). At the CSE meeting, a representative from Family Foundation participated by telephone (Tr. p. 9). Although correspondence between the parties following the August 16, 2006 CSE meeting suggested an apparent agreement that the student should be evaluated by a psychiatrist, the distance between the district and Family Foundation, as well as Family Foundation's policy of not permitting the student to leave the premises, prevented this evaluation from occurring (Dist. Exs. 17; 18; Parent Ex. I). The November 1, 2006 IEP reflects

[1] The parents did not request tuition reimbursement from the district in either the faxed High School Discharge form dated August 23, 2006 or in the letter dated August 24, 2006 (Dist. Ex. 13; Parent Ex. H).

that the CSE made the same recommendations that it had made at the August 16, 2006 CSE meeting (compare Dist. Ex. 9, with Dist. Ex. 21).

By due process complaint notice dated November 30, 2006, the parents requested an impartial hearing (Dist. Ex. 23).[2] The parents sought tuition reimbursement for the student's placement at Family Foundation for the 2006-07 school year (id. at p. 3).[3] The due process complaint notice also alleged several procedural issues including the district's failure to include the necessary CSE members, failure to review the goals, failure to provide the parents with information regarding independent evaluations, and failure to prepare a functional behavioral assessment (FBA) and a behavior intervention plan (BIP) (id.). The due process complaint notice alleged that the district had not offered an appropriate placement for the student, that the parents' placement of the student at Family Foundation was appropriate, and that the parents had cooperated with the CSE (id.).

On February 8, 2007, the parties held a prehearing conference (Tr. pp. 1-19). The parties agreed that for purposes of determining the issues raised in the parents' due process complaint notice, the future hearing(s) would focus on the IEP developed at the August 16, 2006 CSE meeting because the November 1, 2006 CSE meeting occurred after the student had already been placed at Family Foundation (Tr. pp. 12-13).

The impartial hearing commenced on March 20, 2007 and concluded on November 19, 2007. The impartial hearing officer rendered a decision on January 29, 2008 (IHO Decision at p. 36). The impartial hearing officer concluded that the district failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year because the district's August 16, 2006 IEP did not adequately address the student's emotional needs (id. at pp. 24, 26). The impartial hearing officer determined that the August 16, 2006 IEP was developed without sufficient information and evaluations (id. at p. 15). The impartial hearing officer also concluded that the parents successfully established that Family Foundation was an appropriate placement (id. at p. 34). The impartial hearing officer did not find Family Foundation "to be too restrictive for [the student]" (id.). The impartial hearing officer determined that the student needed "the constant meetings, counseling, family groups and structure that Foundation provided" and that "Foundation is a way of life that could not be accomplished in a day setting" (id.). The impartial hearing officer further found that equitable factors supported the parents' claim because the parents had cooperated with the district during the CSE process (id. at p. 35). The impartial hearing officer excused the parents' failure to timely notify the district that the student was being placed at Family Foundation and that they were seeking tuition reimbursement because the parents had notified the district at the August 16, 2006 CSE meeting that they wanted a residential placement for the student (id.). The impartial hearing officer ordered the district to reimburse the parents for the student's tuition costs at Family Foundation from August 21, 2006 through June 30, 2007 (id. at p. 36).

The district appeals, asserting that its recommended program was appropriate and that the CSE had sufficient information before it upon which to make its determination. The district further asserts that the parents' placement of the student at Family Foundation was not appropriate because

[2] The letter is incorrectly dated November 30, 2007.

[3] The parents' due process complaint notice did not specify whether they were challenging the August 16, 2006 IEP, November 1, 2006 IEP, or both IEPs.

a residential placement is too restrictive for the student, and further Family Foundation does not meet the student's special education needs because it offers no psychiatric treatment and no individual counseling. The district also asserts that the parents failed to give adequate notice of the unilateral placement.

The parents answer, alleging that the district failed to offer a FAPE and failed to consider their request for a residential placement. The parents also allege that prior to the August 16, 2006 CSE meeting, the district failed to seek out pertinent information and/or records from Kellenberg, from the student's psychiatrist, and from the student's July 2006 hospitalization. The parents further allege that the student's academic progress and weight loss demonstrated that Family Foundation was an appropriate placement. The parents claim that they were cooperative and that any perceived lack of cooperation was actually the result of the parents' lack of understanding about the CSE process.

A 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]).[4] 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).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 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 student received a FAPE (20 U.S.C.

---

[4] 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]).

§ 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (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, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of 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]).[5]

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. 07-008; Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. 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

[5] New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced prior to the effective date of the amendment.

a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

When a student suspected of having a disability is referred to a CSE, the CSE must ensure that an individual evaluation of the referred student is performed (Application of the Dep't. of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063; Application of a Child Suspected of Having a Disability, Appeal No. 04-059). A "full and individual initial evaluation" must be conducted (20 U.S.C. § 1414[a][1][A]; see 34 C.F.R. § 300.301[a]) and must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i-v]; Application of the Dep't. of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063). The student must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 C.F.R. § 300.304[c][6]; see 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation the IEP team must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; see 8 NYCRR 200.4[b][5][i]).

I agree with the impartial hearing officer's finding that the district did not offer a FAPE to the student for the 2006-07 school year (IHO Decision at p. 12).[6] The district failed to consider existing records and did not sufficiently consult with the persons or organizations who could have offered information about the student's school performance and medical/psychiatric treatment prior to the August 16, 2006 CSE meeting. The district did not consult the student's treating psychiatrist, the student's prior teachers and counselors at Kellenberg, and did not request the student's hospital records.

The district argues that the parents did not provide any records to the CSE and therefore the district should be absolved of having insufficient evaluative data. (Tr. pp. 48, 56, 57). The impartial hearing officer correctly found this argument unpersuasive. The CSE was required to develop an IEP that accurately reflects the student's special education needs (34 C.F.R. §

[6] In their due process complaint notice, the parents raised the lack of an FBA and a BIP as further evidence that the initial evaluation was not properly performed (Dist. Ex. 23 at p. 3). The impartial hearing officer found that because these issues were not developed by sufficient evidence at the impartial hearing, they did not rise to the level of denying the student a FAPE (IHO Decision at p. 14). I agree with the impartial hearing officer that the lack of evidence in the record makes it impossible to determine if these components of an initial evaluation were required. Therefore, I will decline to address whether an FBA or a BIP were required as part of the initial evaluation in this case.

300.306[c][2]; 8 NYCRR 200.4[d][2]). Incumbent with that duty is the mandate that the IEP "shall report the present levels of academic achievement and the functional performance and indicate the individual needs of the student" (8 NYCRR 200.4[d][2]; see 34 C.F.R. § 300.320[a][1]). The parents provided written consent to the district's CSE for the release of the student's records and information (Dist. Ex. 3 at p. 7). The district was free to make a written request for records. Moreover, the parents provided written consent for the district to evaluate the student (Dist. Ex. 1). If the necessary records were unattainable, the district had parental consent to conduct its own evaluations of the student to determine his present levels of performance and special education needs.

The district's failure to adequately seek out and consider significant existing educational and medical information, compromised the district's ability to adequately evaluate and identify the student's individual needs. This failure to properly assess and identify the student's special education needs impeded the district's ability to develop an appropriate IEP to address those needs. I agree with the impartial hearing officer's analysis that the student's significant socio/emotional needs would not have been addressed by the program recommended in the August 16, 2006 IEP and therefore, the district did not offer a FAPE to the student for the 2006-07 school year.

Having determined that the district did not offer a FAPE to the student for the 2006-07 school year, I must now consider whether the parents have met their burden of proving that placement of the student at Family Foundation was appropriate. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

Additionally, students with disabilities must be educated 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 IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). While parents are not held as strictly to the LRE standard as school districts are, 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, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105). The requirement of instruction in the LRE must, however, be balanced against the requirement that each student with a disability receive an appropriate education (Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]).

In deciding whether a school district must fund a residential placement, a determination must be made as to whether the student requires the residential program to receive educational benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 [2d Cir. 1997]; Application of a

Child with a Disability, Appeal No. 03-106; Application of a Child with a Disability, Appeal No. 95-19). A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 06-017; Application of the Bd. of Educ., Appeal No. 05-081; Application of a Child with a Disability, Appeal No. 03-066; Application of a Child with a Disability, Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 03-051; Application of a Child with a Disability, Appeal No. 01-083; Application of a Child with a Disability, Appeal No. 98-2; Application of a Child with a Disability, Appeal No. 95-33).

I agree with the impartial hearing officer's decision that a residential placement was not too restrictive for the student (IHO Decision at pp. 27-28, 34). The student's need for an intense therapeutic residential environment is supported by the hearing record; specifically, the letter from the student's psychiatrist, and the testimony provided by the student's former teacher/counselor from Kellenberg, and by the student's father (Tr. pp. 438, 463-64, 580, 597; Parent Ex. D). The student's psychiatrist "strongly recommended" that the student be admitted to a "longer term residential treatment facility" (Parent Ex. D). This recommendation came after nearly two years of psychiatric treatment (id.). The student's former teacher/counselor from Kellenberg opined that after three years of observing and counseling the student at Kellenberg, she believed that the student needed "full time" treatment "24 hours a day" (Tr. pp. 416, 438). The student's father described the student as "a kid in crisis" who needed "intense help" (Tr. p. 597). I find that the above testimony and evidence, coupled with the serious medical diagnoses and evidence concerning the student's disability, support the impartial hearing officer's conclusion that a residential program was not too restrictive for this student.

I turn now to whether the program provided by Family Foundation met the student's special education needs. Family Foundation is a residential school that accepts students between the ages of 12 and 19 who exhibit behavioral or emotional difficulties (Parent Ex. K at p. 1). Family Foundation's mission and philosophy is based on the principles of the Twelve-step programs utilized by Alcoholics Anonymous organizations (id. at p. 2). The school believes that the Twelve-step program can work for many behavioral problems because the program helps students to accept responsibility for their own behavior (id.). At the time of the impartial hearing there were 245 students attending Family Foundation (Tr. p. 481). Family Foundation has two licensed social workers, a part-time psychologist who works one or two days a week, and a consulting psychiatrist (Tr. pp. 483, 490). Class sizes are generally between 12 to 15 students (Parent Ex. K at p. 5). Family Foundation offers a New York State Regents curriculum (Tr. p. 485).

Therapeutic sessions at Family Foundation are provided through staff mentors and through student/peer mentors (Tr. p. 486). At Family Foundation, the entire student body is divided into eight separate "families" (Tr. pp. 479, 487). During the 2006-07 school year, the student's family consisted of thirty-two students (Tr. p. 525). At mealtimes the student's family eats together in a large therapeutic group where the family members' issues are discussed (Tr. p. 486). These family discussion sessions are called "table topics" and they occur twice per day for about an hour and a half at each session (Tr. pp. 486, 489). The student is also involved in smaller therapeutic sessions called "peer groups" where eight students meet for about one hour once per week (Tr. p. 488). Furthermore, the student is also involved in a specialty grief group for students who have lost a parent (Tr. p. 494). The student's grief group is headed by Family Foundation's Student Counseling

Coordinator (Counseling Coordinator) and has 15 members (Tr. pp. 493-94). The hearing record is unclear as to how frequently the grief group meets. Finally, the student also meets with the student's own biological family members for counseling every six weeks (Tr. p. 488). In total, the student is receiving group counseling for about four hours per day, seven days per week (Tr. p. 521).

The student's father testified that Family Foundation provided the student with an appropriate program for the 2006-07 school year (Tr. pp. 580, 599-600). To support this position, the student's father pointed to the student's improved grades, weight loss, that the student came to grips with his anger toward his father, that the student is now assisting other students with their problems, and that the student was planning to go to college (Tr. pp. 580, 599-604).

The Counseling Coordinator also testified that the student's attendance at Family Foundation helped the student to improve (Tr. p. 519). According to the Counseling Coordinator, through the grief group sessions, the student was able to talk to other students about his own sadness so that the student began to relate to and trust the other students (Tr. p. 499). As the student talked about these difficulties, the student became less angry and was able to talk through the issues that caused the anger (id.). The Counseling Coordinator also testified that the student had lost 50 pounds, gained confidence, stopped physically acting out, had begun to trust the staff, and had worked through the grief issues (Tr. p. 502). The student reportedly did better academically and was passing all classes (id.).[7] The student was reportedly bound for college (Tr. pp. 502-03; Parent Ex. L).

No one factor is necessarily dispositive in determining whether parents' unilateral placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364-65, citing Rowley, 458 U.S. at 207). 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). 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). They need only demonstrate that the placement provides "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction" (Frank G., 459 F.3d at 364-65, citing Rowley, 458 U.S. at 188-89). As noted above, the student has diagnoses of dysthemic disorder, major depressive disorder, bipolar affective disorder, and an attention deficit hyperactivity disorder (Parent Exs. D; G at p. 2). Both the student's former teacher/counselor from Kellenberg and the district's psychologist noted that that student had thought about suicide (Tr. pp. 428, 438; Dist. Ex. 4 at p. 4). Both the hospital and the student's psychiatrist treated the student with medication, and the hospital's aftercare plan for the student provided for "individual therapy" and "medication management" (Parent Ex. G at p. 1; D). An appropriate placement which meets this student's special education needs must take into account these serious medical issues and prior treatments. There is insufficient evidence in the hearing record demonstrating that Family Foundation adequately addressed these needs.

Prior to the student's arrival, Family Foundation did not meet with the student to conduct an evaluation to determine what educational program, medication management, or other medical

[7] When the student's father testified, he indicated that the student's grades had gone up, but that the student "had failed math in one month" and was "failing physics still up until June" (Tr. p. 600).

treatments were appropriate for the student (Tr. p. 610). The hearing record is also unclear as to whether Family Foundation received any documentation describing the nature or extent of the student's special education classification or needs (Tr. pp. 610-11). Despite the student's multiple medical diagnoses prior to his arrival at Family Foundation, according to the Counseling Coordinator, when the student arrived at the school, his most prominent issue was "a little underlying sadness" (Tr. p. 495). Although the student's psychiatrist recommended a residential treatment facility for the student, the Counseling Coordinator testified that Family Foundation was a school not a treatment facility and it did not provide intensive psychiatric treatment (Tr. pp. 523, 535, 562-63; Parent Ex. D). Further, although the hospital's aftercare plan recommended "individual therapy" for the student, at Family Foundation, the student was receiving his therapy in large group-counseling sessions and received no individual counseling (Tr. p. 530).

Further, the hearing record does not indicate that the student received counseling from any accredited or certified counselors. The district's psychologist testified that he did not believe that untrained or uncertified counselors could appropriately address the student's social and emotional needs (Tr. pp. 260-61).

Although the student's "family" contained more than a dozen faculty members, two of which functioned as "leaders," it is unclear as to whether any of these faculty members were certified or adequately trained mental health providers (Tr. pp. 524-29).[8] The hearing record is also unclear as to whether the student's peer groups and grief group have any certified or adequately trained mental health providers (Tr. p. 494).[9] Upon his arrival at the school, the student met with Family Foundation's Director of Counseling, a licensed social worker; however, the hearing record is unclear as to whether any follow-up sessions were held (Tr. p. 527). Regarding psychological counseling, other than the initial sessions that were held when the student first arrived at Family Foundation, the hearing record is also unclear as to whether the student received any follow-up treatment with Family Foundation's psychologist (Tr. p. 530). Similarly, the hearing record is also unclear as to whether the student saw Family Foundation's psychiatrist (Tr. p. 529).

The impartial hearing officer indicated that the student's "private psychiatrist and counselors from [the student's] prior high school recommended Foundation despite the lack of proper certificates of its staff" (IHO Decision at p. 34). Upon my review of the hearing record, I do not find this statement to be accurate. The record reveals that neither the psychiatrist nor the counselors from the prior high school had any knowledge about the mental health training of the counselors at Family Foundation. The teacher/counselor from Kellenberg testified that she was unaware that Family Foundation's counselors lacked formal mental health training (Tr. p. 464). Additionally, there is no indication that the psychiatrist had any knowledge about the credentials of Family Foundation's counselors. The one-page report from the psychiatrist does not mention Family Foundation (Parent Ex. D). Although the teacher/counselor from Kellenberg wrote a letter to the district indicating that Kellenberg supported the parents' decision to place the student at

[8] The Counseling Coordinator explained that the student's two family leaders both hold Ph.D. degrees, one in sociology and the other in drama (Tr. p. 526). The Counseling Coordinator also testified that there were no qualifications to hold the position of a family leader (Tr. p. 524). The Counseling Coordinator was unsure if there were any qualifications required to hold the position of a family counselor (Tr. pp. 524-25).

[9] The student's grief group is run by the Counseling Coordinator who has a Bachelor's degree in psychology and a Master's degree in public health (Tr. pp. 494, 525). The Counseling Coordinator has no mental health certifications (Tr. p. 526).

Family Foundation, the teacher/counselor testified that she had relied on the research of the psychiatrist and another counselor at Kellenberg that Family Foundation would provide a benefit to the student (Tr. pp. 461, 467; Parent Ex. E at 3). Neither of these two witnesses testified. Moreover, although the father testified that he discussed Family Foundation with the psychiatrist and with the counselors from Kellenberg, the father never indicated that the topic of Family Foundation staff qualifications was discussed (see Tr. pp. 585-86; 612).

In the past, depending on the unique special education needs of the student, Family Foundation was not shown to be an appropriate placement because it did not provide counseling services by qualified personnel (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. 05-075; Application of the Bd. of Educ., Appeal No. 04-070; Application of a Child with a Disability, Appeal No. 03-106). In other appeals, the record supported a finding that Family Foundation was an appropriate placement (see Application of a Child with a Disability, Appeal No. 07-075; Application of the Bd. of Educ., Appeal No. 05-081; Application of a Child with a Disability, Appeal No. 03-107; Application of a Child with a Disability, Appeal No. 99-73). Based on the individual facts in this case, including the severity of the student's emotional needs and the lack of sufficient proof of the services offered and delivered to the student, the record does not support the decision of the impartial hearing officer that Family Foundation was an appropriate placement for this student during the 2006-07 school year. Although the hearing record demonstrates that a residential placement was not too restrictive for the student, the record does not support a determination that the student's program at Family Foundation during the 2006-07 school year was appropriate to meet the student's special education needs. Family Foundation failed to provide appropriate counseling and psychiatric/psychological services by qualified personnel to address the student's significant emotional needs. Accordingly, the parents have not provided enough evidence to meet their burden of proof under the second criterion of the Burlington/Carter analysis for an award of tuition reimbursement.

Since the parents have not met the second criterion of the Burlington/Carter analysis, the necessary inquiry is at an end (Mrs. C. V. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-039).

I have considered the district's and the parents' remaining contentions and find that it is unnecessary to address them in light of my determination.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it determined that the parents' unilateral placement of the student at Family Foundation was appropriate and ordered the district to reimburse the parents for tuition at Family Foundation for the 2006-07 school year.

Dated: **Albany, New York**
April 21, 2008

PAUL F. KELLY
STATE REVIEW OFFICER