The University of the State of New York

The State Education Department
State Review Officer

No. 08-042

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligmueller, Esq., of counsel

Law Offices of Melissa Brown, attorney for respondent, Melissa Brown, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that respondent's (the parent's) son is eligible for special education programs and services as a student with an emotional disturbance, that the district failed to offer an appropriate educational program to the student and ordered the district to reimburse the parent for the student's tuition costs at the John Dewey Academy (JDA) for the 2006-07 school year. The appeal must be sustained.

During the 2006-07 school year, the student was attending eleventh grade at JDA (Tr. pp. 264-65). JDA has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Tr. pp. 372-73). The student's eligibility for special education services as a student with an emotional disturbance (ED) is in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The hearing record is sparse regarding the student's educational history, consisting largely of his father's testimony at the impartial hearing, the psychological report of a private psychologist who evaluated the student on January 6, 2007 (Parent Ex. D), and the student's social history obtained by the district on April 30, 2007 (Dist. Ex. 2).

The student has never attended a public school (Tr. pp. 302-04). The parent had not sought assistance from the district's Committee on Special Education (CSE) prior to the instant matter (Tr. p. 321), and the hearing record suggests that the parent's sole purpose in referring the student

to the CSE was to obtain funding for the placement at JDA. During the impartial hearing, the parent was asked on cross-examination "Was your sole purpose in referring [student] to the Committee on Special Education, was your sole purpose to obtain [district] funding of his education at JDA," to which he responded, "If he was entitled to it, yes" (Tr. p. 322). The hearing record also indicates that as of the date of the impartial hearing, the student had gained acceptance to a private university (Tr. pp. 356-57, 365).

The student's father described his son as "angry" and "temperamental" following his parents' separation when the student was 2 ½ years old (Tr. p. 179; Parent Ex. D at p. 2). The student attended a private preschool program where, the psychological report noted, he reportedly demonstrated "uncooperative" and "aggressive" behavior and, consequently, was asked to leave (Parent Ex. D at p. 2). When the student reached first grade, he began to see a therapist (id.). The private psychologist noted that while the student exhibited disruptive behaviors at home, including manifestations of aggression against his younger brother, the student was described as "bright, capable, and behaviorally challenging" (id.). The private psychological report indicated that by the time he reached sixth grade, the student's academic performance declined, as he generally did neither class work nor homework, but he "performed well on examinations" (id.). During the seventh and eighth grades, the student reportedly stayed in bed for days at a time, missed school, and his grades "declined toward failure" (id.). The private psychologist reported that it was at this time that the student began manifesting signs of a "significant mood disorder" (id.). The private psychological report indicated that the student continued to perform "marginally" in a private general education high school setting (Tr. p. 302), achieving fluctuating grades, challenging authority in school and at home, and engaging in drug use (Parent Ex. D at pp. 2-3). The psychological report indicated that in tenth grade, the student moved out of his mother's home and in with his father, and appeared to adjust positively; however, the student was "covertly engaging in continual problems and deviancy," as demonstrated by his stealing of a family car in April 2006 (Dist. Ex. 2 at p. 2; Parent Ex. D at p. 3).

The student's father testified that during the latter part of the student's final year at his private general education school, the student performed "poorly," was "just doing enough to get by," and inconsistently showed up for school and completed homework (Tr. p. 266). The parent recalled that with respect to grades, the student received "'C's, he got a 'B' in something. I think it was physics and he – the rest were 'C's and 'D's and an 'F'" (id.). According to the parent, on those occasions when the student actually attended school, he "was acting out a lot" and "was very disruptive in class," experienced "outbursts in class," was "disrespectful," and was "[n]ot doing his work" (Tr. pp. 267-68). The parent revealed that the student's high school principal warned him that the student was in danger of not being allowed to return to the private school for the 2006-07 school year, partly due to the student's behavior and the school's belief that the student might be taking drugs (Tr. p. 268). At home, his father described the student as "belligerent," and noted that the student ceased speaking to his mother, disappeared from home for days at a time, abused drugs and alcohol, and engaged in criminal activity (Tr. p. 269; Dist. Ex. 2 at p. 1). During this time, the parent was taking him to counseling sessions with a private counselor (Tr. p. 270). The private psychologist noted that in May 2006, the student was arrested for marijuana possession (Tr. p. 186), and the parent testified that he subsequently hired escorts to transport the student to a private residential facility which the parent described as a "lock down facility" for "troubled teens," and "like a prison" (Tr. pp. 277-78; Dist. Ex. 2 at p. 2; Parent Ex. D at p. 3). In September 2006, the parent transferred the student to JDA (Dist. Ex. 2 at p. 2).

On November 20, 2006, the parent sent a written request for a CSE evaluation of the student (Tr. p. 285; Parent Ex. L at p. 1). Having received no response, the parent forwarded a second letter requesting a CSE evaluation on or about January 5, 2007 (Tr. pp. 285-86; Parent Ex. C).

As part of the January 6, 2007 private psychological evaluation of the student (Parent Ex. D at p. 1), the private psychologist administered an extensive battery of assessments, interviewed the student and both parents, reviewed correspondence from the president of JDA, and reviewed the student's "school records from 1999 through 2005" (id. at pp. 1-2).

On the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III), the student achieved a full scale IQ score of 114 (high average), a verbal IQ score of 130 (very superior), a performance IQ score of 95 (average), a verbal comprehension index score of 136 (very superior), a perceptual organization index score of 103 (average), a working memory index score of 97 (average), and a processing speed index score of 86 (low average) (Parent Ex. D at pp. 1, 5). Results from achievement testing reflected that the student's academic functioning was also in the average to very superior range as measured by the Peabody Individual Achievement Test – Revised – Normative Update (PIAT-R-NU), on which he achieved standard (and percentile) subtest scores of 131 (98) in reading recognition, 108 (70) in reading comprehension, 117 (87) in total reading, 109 (73) in mathematics, and 99 (47) in spelling (id.).

Both of the student's parents completed the Behavior Assessment System for Children – Second Edition – Parent Rating Scale – Adolescent (BASC-2-PRS-A) and the Conners Parent Rating Scale – Revised: Long version (CPRS-R:L) (Parent Ex. D at pp. 1, 5-6). The private psychologist noted that parental responses on the CPRS-R:L showed elevations in several significant categories, including on the oppositional, hyperactive, anxious, and impulsive scales (id. at pp. 5-6). Their responses on the BASC-2-PRS-A also revealed elevations in similar areas; including on the conduct problem, attention deficit, hyperactivity, and atypicality scales (id. at p. 6). In contrast to the parents' responses, behavior inventories completed by a JDA faculty member noted no evidence of conduct disorder, oppositional, impulsive, or hyperactive behavior, and no indication of compromised attention (id.). The teacher from JDA described the student as "studious, in control, focused, and motivated," as well as highly compliant toward authority within JDA's structured environment (id.).

The private psychologist also interviewed the student, whom he described as "cooperative and forthcoming" (Parent Ex. D at p. 3). The student "acknowledged that his behavior and performance were negatively out of control;" that he frequently used drugs, including marijuana and cocaine; and that he was disrespectful to authority, especially to his father, whom he described as a "bully" (id.). He admitted to stealing his father's car, to stealing money from both of his parents, and to his arrest for marijuana possession in May 2006 (id.). The student conceded that he "underachieved in school, did virtually no work, and basically attended school as a way to get out of his home" (id.). He admitted that "for years he did not make attempts academically, and primarily sought attention by acting out, rebelling, clowning around, and defying authority" (id. at p. 4). The private psychologist noted that the student "made a point of emphasizing his anger and feelings of alienation from his parents" (id. at p. 3).

Based on the interview of the student and results of projective testing, the private psychologist opined that the student presented as "a vulnerable feeling, somewhat defenseless individual, seeing himself at the mercy of powers far greater than himself" (Parent Ex. D at p. 6).

The student "view[ed] himself as unattractive, ha[d] poor self confidence, fe[lt] useless, with little to offer," and "believe[d] he ha[d] no innate ability, and c[ould] do nothing well" (id.). The private psychologist opined that "the existence of undiagnosed learning difficulties" complicated the picture, and that the student's "performance never matched expectations and he disappointed everyone around him" (id. at p. 7). "Once [the student] reached adolescence," the private psychologist wrote, "poor self esteem, and little belief in himself, lead to an explosion of negativity" (id.).

The private psychologist proffered Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) Axis I diagnoses of an oppositional defiant disorder (ODD) and a depressive disorder, not otherwise specified (NOS), and Axis II diagnoses of a learning disorder, not otherwise specified (NOS)[2] and an avoidant personality disorder (Parent Ex. D at p. 8). He opined that the student "[met the] criteria for [ED] under the [Individuals with Disabilities Education Act] IDEA education law" (id. at pp. 8-9). Specifically, the private psychologist attributed the student's truancy and poor academic performance to the student's depression, extremely poor self-esteem, and oppositional-passive-aggressive noncompliance. The private psychologist further opined that: (1) the student's poor sense of self and belief in the hopelessness of his efforts prompted him to withdraw from others and prevented him from maintaining real connection with others; (2) the student's behaviors, though inappropriate throughout his educational career, became increasingly so through adolescence; and (3) the student harbored an underlying mood of depression for most of his life (id.). The private psychologist recommended a residential school environment featuring "emotional therapeutics," and further opined that any educational setting other than a controlled residential school environment would encourage the student's reversion to "deviancy" and render him "unable to pursue educational goals" (id. at p. 9).

After receiving no response to his second letter to the CSE dated January 5, 2007 (Tr. p. 287), the parent, through his attorney, filed a due process complaint notice dated March 26, 2007 and requested an impartial hearing seeking an order that the district "immediately" conduct evaluations of the student and develop an appropriate individualized education program (IEP) (Tr. p. 288; Parent Ex. B). On or about April 12, 2007, the district forwarded an appointment letter to the parent, scheduling an appointment for social history, psychological, and educational assessments (Tr. pp. 288-89; Parent Ex. I).

On April 30, 2007, as part of the district's evaluation process, a district social worker conducted a 2 ½ hour interview with the student's father to develop the student's social history (Tr. p. 290; Dist. Ex. 2). The social history report supplemented the information presented in the January 6, 2007 psychological evaluation report. In the social history report, the parent described his son as without any regard or remorse for the consequences of his actions (Dist. Ex. 2 at p. 1). The parent explained to the social worker that he placed the student in a residential facility because he believed the student "was becoming a danger to himself and others" and "[the parent] felt strongly that he needed to protect [the student] from himself as well as the need to protect the rest of the family from [the student]" (id.). The parent researched "facilities for troubled teens" with the help of the student's therapist and placed the student in May 2006 at a private residential facility, where he resided until September 2006 when he transferred to JDA (id. at p. 2). The social

[2] During the impartial hearing, the private psychologist testified that the diagnosis of a learning disorder - NOS should have been listed in his evaluative report as part of the Axis I diagnosis (Tr. p. 156).

history report also indicated that the student had been a "ward of the court" and that "the judge" had agreed to the student's placement in a residential facility (id.).

The CSE convened on May 29, 2007 (Dist. Ex. 1 at p. 1). The CSE meeting was attended by the student's father, who was accompanied by an educational advocate; an additional parent member; and the district's school psychologist, school social worker, and special education teacher (id. at p. 2). Faculty from JDA participated telephonically and included the student's English teacher, a dean, and the school president, who also served as the student's primary therapist (id.).[3] The CSE determined that the student was ineligible for special education services under the IDEA (Tr. p. 401; Dist. Ex. 1 at p. 1; see 20 U.S.C. §§ 1400-1482). The hearing record reflects that the CSE considered the following information in making its determination: the private psychological evaluation report dated January 6, 2007 (Tr. pp. 56, 69-70, 295, 297; Parent Ex. D); telephonic reports from the JDA faculty (Tr. pp. 10-11, 28-30, 41, 56-57, 69, 295-96); the student's report cards from JDA (Tr. pp. 41, 56-57; Parent Ex. G at p. 3); and the social history dated April 30, 2007 (Tr. pp. 55, 70, 297; Dist. Ex. 2). Other than the aforementioned social history, the district did not conduct any evaluations of the student prior to the May 29, 2007 CSE meeting (Tr. pp. 55-56, 297, 399-400).

By a second due process complaint notice dated July 23, 2007, the parent, through an educational advocate, again requested an impartial hearing (Parent Ex. A).[4] In the July 23, 2007 due process complaint notice, the parent sought an order from the impartial hearing officer: (1) finding the student eligible for special education services as a student with an ED under 8 NYCRR 200.1(zz)(4); (2) determining that the parent's unilateral placement of the student at JDA was appropriate; and (3) that the district must reimburse the parent for the student's tuition at JDA for the 2006-07 school year (id. at pp. 1-2).

An impartial hearing was convened on October 24, 2007 and concluded on December 19, 2007 after three days of testimony.[5]

---

[3] Contrary to what is listed on the student's "IEP," the parent testified that the dean was the student's primary therapist (Tr. p. 284).

[4] The hearing record does not clarify if the initial due process complaint notice dated March 26, 2007 was resolved or withdrawn by the parent. The July 23, 2007 due process complaint notice is not labeled as an amendment to the initial complaint.

[5] Federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (see 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, the impartial hearing officer did not document in the hearing record or include in his decision information about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing and the date of the decision suggests that one or more extensions were granted. I remind the impartial hearing officer to comply with federal and State regulations.

In his decision dated April 17, 2008,[6] the impartial hearing officer determined that: (1) the CSE's failure to initially evaluate the student within 60 days after receiving parental consent deprived the student of access to a free appropriate public education (FAPE) (IHO Decision at p. 13); (2) the student was improperly evaluated by the district, and in fact met the eligibility criteria to receive special education services as a student with an ED under 8 NYCRR 200.1(zz)(4)[7] for the 2006-07 school year (id. at pp. 16-17); (3) the CSE lacked a "proper" regular education teacher, and therefore was not duly comprised under 8 NYCRR 200.3(a)(1)(ii), thereby invalidating the May 29, 2007 IEP (id. at pp. 16, 18); (4) the parent met his burden of establishing that JDA was an appropriate placement for the student (id. at pp. 17-18); and (5) equitable considerations supported the parent's claim for tuition reimbursement for the student's 2006-07 school year at JDA (id. at p. 18).

The district appeals and seeks to overturn the impartial hearing officer's decision in its entirety. Specifically, the district asserts that: (1) the impartial hearing officer erred in determining that the student was eligible for special education services as a student with an ED because the parent failed to meet his burden of showing that the student's educational performance was affected by any emotional difficulties; (2) the impartial hearing officer incorrectly placed the burden of proving that a FAPE had been offered to the student upon the district; (3) the impartial hearing officer erred in determining that the procedural errors alleged by the parent – namely, the failures of the district to conduct its own psychological examination of the student and to initially evaluate the student within the 60-day timeline, and the alleged improper composition of the CSE team – deprived the student of a FAPE; (4) even if the student was eligible for special education services under the IDEA, the parent failed to meet his burden of proving that his unilateral placement of the student at JDA was appropriate for the student's special education needs; and (5) even if the parent was entitled to reimbursement, the award should be reduced to include only the period beginning 60 school days after the district received the parent's signed consent to evaluate the student.

The parent answers, arguing that numerous alleged procedural deficiencies on the part of the district deprived the student of a FAPE, including: (1) the district's failure to evaluate the student within 60 days after receipt of the parent's request pursuant to 8 NYCRR 200.4(b)(7), and to recommend an appropriate program and placement within 60 school days of the parent's request pursuant to 8 NYCRR 200.4(d); (2) the district's failure to conduct a physical examination, a psychological examination, a classroom observation, and an educational evaluation; (3) that the

[6] The impartial hearing officer issued an initial decision on April 15, 2008, which was substantively identical to his decision of April 17, 2008, except that the April 15, 2008 decision contained an inaccurate index of exhibits (see April 15, 2008 IHO Decision at p. 20). The impartial hearing officer issued his amended decision on April 17, 2008 which incorporated the entirety of the April 15, 2008 decision but for the corrected exhibit index (see April 17, 2008 IHO Decision at pp. 20-21). Because neither party appeals the correction made to the initial decision, and the decisions are otherwise identical, the decision herein applies to both the April 15 and April 17, 2008 impartial hearing officer decisions.

[7] In his decision, the impartial hearing officer inaccurately cites to the applicable regulation as "Part 200.1(22)(4)" (IHO Decision at p. 13).

district conducted the CSE meeting in a cursory and rushed manner; (4) the district's failure to obtain the student's educational records and data from his previous private general education high school to be considered at the CSE meeting; and (5) the district's failure to include a regular education teacher at the CSE meeting. The parent also contends that: (1) the student met the criteria to be classified as having an ED; (2) the parent's placement of the student at JDA was appropriate; (3) equitable considerations favored the parent and justified full tuition reimbursement; and (4) the district's argument for limiting the amount of tuition reimbursement pursuant to 8 NYCRR 200.4(d) should not be entertained on appeal because it was not raised below, it has no statutory basis, and it would contravene the impartial hearing officer's exercise of his discretion.

The district replies, contending that its argument for limiting the amount of tuition reimbursement should be considered on appeal because: (1) it was the party that filed the due process complaint notice (in this case, the parent) that was bound by the requirement to raise all factual claims at the impartial hearing, not the responding party; (2) even if the requirement applied to the district, all of the facts upon which this claim is based were fully developed in the hearing record, and are therefore readily determinable on appeal; and (3) the district could not be expected to anticipate the decision of the impartial hearing officer, and therefore, it was not feasible for the district to raise this argument below because the impartial hearing officer's decision giving rise to the argument did not yet exist.

Initially I will address the district's contention that the impartial hearing officer incorrectly placed the burden of proof upon the district to show that its determination that the student was ineligible for special education programs and services was appropriate. The New York State Legislature amended the 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 statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of a Student with a Disability, Appeal No. 08-030; Application of the Bd. of Educ., Appeal No. 08-029; Application of the Bd. of Educ., Appeal No. 08-016). Here, the parent's initial due process complaint notice was dated March 26, 2007 (Parent Ex. B), and his second due process complaint notice was dated July 23, 2007 (Parent Ex. A). Accordingly, the parent had the burden of proof to demonstrate that the district did not properly determine eligibility as both due process complaint notices predated the effective date of the amended statute, and the impartial hearing officer's placement of the burden upon the district was erroneous. A misapplication of the burden of proof is reversible error (see M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 [8th Cir. 2008]), and as such, the impartial hearing officer's decision regarding the student's eligibility for special education programs and services is annulled.

Although I have found that the impartial hearing officer's misapplication of the burden of proof is grounds for annulling his decision regarding the student's eligibility, I will review the parties' contentions raised on appeal.

A central purpose of the IDEA (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE[8] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living (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 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]; E.H. v. Bd. of Educ., 2008 WL 3930028 at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

[8] 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]).

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 (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (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).

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 Bd. of Educ., Appeal No. 08-016; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of the Dep't of Educ., Appeal No. 06-093; Application of the Dep't of Educ., Appeal No. 06-077; 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 Bd. of Educ., Appeal No. 08-016; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of the Dep't of Educ., Appeal No. 06-093; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of the Dep't of Educ., Appeal No. 06-077; 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]).

In the case at bar, the hearing record indicates that the district performed the student's social history on April 30, 2007 (Dist. Ex. 2). However, the district did not perform its own individual

psychological evaluation, physical evaluation, or observation of the student in his current educational setting (Tr. pp. 55-56, 457, 459-60).

The hearing record indicates that the district declined to conduct its own individual psychological evaluation because it did not wish to duplicate the previous efforts of the private psychologist who evaluated the student on January 6, 2007, just under five months prior to the May 29, 2007 CSE meeting (Tr. p. 457), and because no further evaluation was recommended in the private psychologist's report (Tr. pp. 80-81). As part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 C.F.R. § 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). A board of education may conduct its own evaluations rather than simply accepting private evaluations (DuBois v. Connecticut State Bd. of Ed., 727 F.2d 48 [2d Cir. 1984]; Rettig v. Kent City Sch. Dist., 720 F.2d 466 [6th Cir. 1983]; Vander Malle v. Ambach, 673 F.2d 49 [2d Cir. 1982]). Nevertheless, a CSE must be careful to avoid overly repetitive testing (Healey v. Ambach, 103 A.D.2d 565 [3d Dep't 1984]; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of a Child with a Disability, Appeal No. 01-076). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child Suspected of Having a Disability, Appeal No. 06-087). Here, the hearing record does not show that the district needed to conduct an additional psychological evaluation when the CSE considered the parent's private psychological evaluation and I therefore decline to find that the district's decision not to conduct its own individual psychological assessment was in violation of State or federal regulations.

With respect to the classroom observation, the district contended it was not obligated to conduct an observation because the student was already in his out-of-state private placement at JDA at the time he was referred to the CSE (Tr. pp. 459-60). The hearing record demonstrates that in September 2006, the parent transferred the student to JDA (Dist. Ex. 2 at p. 2). It was not until November 20, 2006, at the earliest, that the parent sent a written request for a CSE evaluation of the student (Tr. p. 285; Parent Ex. L at p. 1).

Furthermore, the hearing record demonstrates that three of the student's teachers from JDA actively participated telephonically in the May 29, 2007 CSE meeting, and that the CSE considered their input and observations in arriving at its determination (Tr. pp. 10-11, 28-30, 41, 56-57, 69-70; Dist. Ex. 1 at p. 2). The active participation of the student's teachers from JDA at the CSE meeting sufficiently compensated for lack of a classroom observation by the district and mitigated any potential harm to the student.

The hearing record also indicates that the district did not conduct a physical examination of the student (Tr. pp. 55-57, 289-90; Dist. Ex. 1 at p. 5). The hearing record contains no evidence that the lack of a physical examination in any way compromised the CSE's ability to conduct a meaningful evaluation of the student. The hearing record establishes that the CSE considered a thorough private psychological evaluation which included educational assessments, a detailed social history, discussions with the student's current teachers from JDA, and report cards from JDA (Tr. pp. 10-11, 28-30, 41, 56-57, 69-70). Based on the foregoing, I conclude that the hearing record

contains no indication that the lack of a physical examination caused the CSE to reach an incorrect conclusion regarding the student's eligibility for special education services. A procedural violation does not, standing alone, establish a failure to provide a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek, 471 F. Supp. 2d at 419). Moreover, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 [9th Cir. 2007]). Consequently, under the circumstances of this case, the absence of a physical examination did not deprive the student of a FAPE.

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]). In order to be found eligible for special education programs and services, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon a student's educational performance to the extent that he or she requires special services and programs (34 C.F.R. § 300.8[a],[c]; see 8 NYCRR 200.1[zz]; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; Application of a Child Suspected of Having a Disability, Appeal No. 07-042; Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of a Child with a Disability, Appeal No. 06-139; Application of the Bd. of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child Suspected of Having a Disability, Appeal No. 01-107; Application of a Child Suspected of Having a Disability, Appeal No. 94-42; Application of a Child Suspected of Having a Disability, Appeal No. 94-36).

A child with a disability having an ED, pursuant to federal regulations, means "a child evaluated . . . as having . . . a serious emotional disturbance . . . and who, by reason thereof, needs special education and related services" (34 C.F.R. § 300.8[a]). An ED, in turn, is defined as

> (i) a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
> (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section (34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through

regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67), others do not, and instead resolve the issue on a "case-by-case" basis (R.B., 496 F.3d at 944; see, e.g., Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 157-58 [1st Cir. 2004]; Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each student is different and the effect of each student's particular impairment on his or her educational performance is different]; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y. 2004]). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibly for classification as a student with an ED (N.C., 473 F. Supp. 2d at 546). Moreover, as recently noted by the U.S. Department of Education's Office of Special Education Programs, "the term 'educational performance' as used in the IDEA and its implementing regulations is not limited to academic performance" and whether an impairment adversely affects educational performance "must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas" (Letter to Clarke, 48 IDELR 77).

In the case at bar, the parties do not dispute the private psychologist's diagnoses of an ODD, a depressive disorder-NOS, a learning disorder-NOS, and an avoidant personality disorder (Parent Ex. D at p. 8). Furthermore, the parties do not dispute the impartial hearing officer's finding that the student demonstrated "inappropriate types of behavior or feelings under normal circumstances" and "a generally pervasive mood of unhappiness or depression" (IHO Decision at p. 14). However, the parties do not agree that the student's educational performance has been adversely affected as a result of his condition and that the student, for that reason, requires special education. Consequently, I will next examine those two issues.

In determining that the student did meet the classification requirements, the impartial hearing officer pointed to Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906 (M.D. Tenn. 2000), which held that a student with satisfactory grades, who was unable to remain in school, was eligible for classification as a student with an ED (IHO Decision at p. 15). However, in reaching its conclusion, the Johnson court relied upon a broad definition of "adverse affect on educational performance," which had been established by the State of Tennessee. Here, I find that it is not appropriate to apply the policy set forth by a different state, and the parties do not point to an authoritative definition of "adverse affect on educational performance" that should be applied in this case. Thus, I must resolve the issue based on the evidence presented by the parties.

The hearing record is conspicuously lacking relative to the student's educational performance, particularly with regard to academics. The parent's case for classification, as well as the impartial hearing officer's decision, are predicated almost entirely on the parent's own testimony and the testimony and report of the parent's private psychologist. With respect to the student's educational career prior to his September 2006 enrollment at JDA, the hearing record does not contain any transcripts or progress reports from other schools attended by the student, nor is there any documentary evidence relative to the student's actual grades. The hearing record also

lacks any testimony, narratives, or anecdotal records from any of the student's teachers prior to his enrollment at JDA that might provide insight into his academic needs, nor does it contain any evaluative records or reports from the private counselor who treated the student while he was enrolled at one of the prior schools (Tr. p. 270) or from the psychologist who treated the student as far back as kindergarten or first grade (Tr. p. 162). Although the parent speculated that the student "would have been left back in the eleventh grade" (Tr. p. 313),[9] he also conceded that during the student's previous academic career, spent entirely within the general education setting and with general education supports, the student achieved passing grades, was promoted from grade to grade, and was never held back (Tr. pp. 312-13).

The psychologist who privately evaluated the student in January 2007 testified on behalf of the parent. The sources he utilized for the student's evaluation included parental inventory forms filled out by both parents, telephone conversations with both parents, a behavioral assessment form and teacher's rating scale obtained from one of the student's teachers at JDA, a six hour interview with the student, and "some records from his previous education" (Tr. pp. 155-56; Parent Ex. D at pp. 1-2). He stated that he "pieced together" the student's history contained in his evaluation report after speaking with the parents and "filtering through each of their versions" (Tr. p. 179). In opining that the student met the criteria for a student with an ED, the psychologist testified that the student's depression, hopelessness, and feelings of avoidance developed to a "place where it was bigger than him" which explained why he was unable to perform (Tr. p. 176). However, the private psychologist also conceded that he was "not aware of what [the student's] scores were in school" (Tr. p. 220), but based his opinion neither upon the student's academic scores or those achieved during his testing battery, but rather "upon comments about [the student's] behavior, his ability to show up ready to participate in school, his truancy, and his absences" (Tr. p. 226). The hearing record also reflects that the student's father did not in fact provide the private psychologist with the student's grades from his prior, private general education high school when he retained the psychologist to evaluate the student (Tr. p. 307). The private psychologist testified that according to the student's mother, the student's behavior was at times "out of context," and "not relevant to the flow of what was going on in the circumstance" (Tr. pp. 238-39). However, although the private psychologist confirmed that the student had exhibited minor instances of "acting out" for a relatively long time, he also testified that major incidents did not occur over a long period of time (Tr. p. 239).

Clinically, the student's scores on the WAIS-III indicated a high average full scale IQ score; very superior verbal IQ and verbal comprehension index scores; average performance IQ, perceptual organization index, and working memory index scores; and a low average processing speed index score (Parent Ex. D at pp. 1, 5). His scores from the PIAT-R-NU achievement testing reflected academic functioning in the average to very superior range (id.).

During his interview with the psychologist, the student acknowledged that he "underachieved in school, did virtually no work, and basically attended school as a way to get out of his home" (Parent Ex. D at p. 3). He admitted that "for years he did not make attempts

[9] The parent testified that the student attended the private general education high school for grades nine, ten, eleven, and that because of the curriculum used there the student would have to repeat the eleventh grade if he were placed in a different school (Tr. pp. 265, 314). The hearing record reflects that on December 5, 2007 the student was a "senior" at JDA (Dist. Ex. 15).

academically, and primarily sought attention by acting out, rebelling, clowning around, and defying authority" (id. at p. 4).

Although the parent's private psychologist conducted a comprehensive evaluation of the student, administering an extensive test battery, he unduly relied on the subjective history information provided by the student's parents. Further, the hearing record documents no attempt made by the private psychologist to obtain independent verification of the student's educational performance, school attendance, or inappropriate behavior he purportedly demonstrated at his prior school and residential facility, or to secure records from the student's previous psychological treatment provider and counselor. The hearing record does not show that the student's educational performance was adversely impacted.

The president of JDA also testified at the impartial hearing on behalf of the parent. When asked the cause of the student's social emotional difficulties, he opined that the student's parents had "contradictory expectations" of the student and that they were "overzealous" in communicating those expectations such that the student was "confused and conflicted" (Tr. pp. 355-56). When asked to respond to a hypothetical situation – namely, what would have happened to the student if he had been returned to a general education environment during the 2006-07 school year -- the president of JDA testified that "Do I think he [the student] would have done well academically? No. Do I think he could have gotten through academically? Yes" (Tr. p. 358). With regard to the admissions policy at JDA, the president acknowledged that students who are "organically damaged" or have "true metabolic disorders" or "possess less than average intelligence" are not considered as suitable candidates for admission to JDA (Tr. p. 362). Notably, he contended that the student was not in need of special education, and identified the student's attitude as his primary problem (Tr. p. 364). The JDA president further testified that although the student may have wanted to act out at JDA, he was so terrified that his father would return him to his previous residential facility that it was "as if somebody was standing there with a gun pointed to the back of his head" (Tr. p. 381). The hearing record reflects that after enrolling at JDA, the student achieved grades of A- or better in six of eight classes, with two "P" grades in the remaining classes in January 2007 (Parent Ex. G at p. 3); seven grades of A- or better in ten classes, with one B+ and two P grades in June 2007 (id. at p. 2); and eight grades of A- or better in ten classes, with two P grades in August 2007 (id. at p. 1).

District witnesses at the impartial hearing testified that, based upon the evaluative data considered, they believed that the student was academically capable, and that at the time of the May 29, 2007 CSE meeting, JDA staff and the student's father reported that the student was performing well in school, was cooperative, was making friends, and was not exhibiting any of the behavioral difficulties previously manifested (Tr. pp. 12-13, 68). The hearing record reflects that the student was taking honors classes, completing his work, and functioning on and above grade level in all academic areas (Tr. pp. 29-30, 56-57, 74; Parent Ex. D at p. 4). The district's special education teacher who attended the May 29, 2007 CSE meeting testified that a review of the private psychological evaluation report indicated the same (Tr. p. 57). The district's school psychologist testified that the parent requested that his son be reviewed because of "emotional and learning problems;" however, based upon her review of the materials presented to the CSE, she did not believe that the student met the criteria to be classified as a student with a disability (Tr. p. 69). She opined that the psychological evaluation report indicated that historically, the student had difficulties coping with family "issues" and stated that the information provided by the JDA faculty

was "key" in the CSE's determination that the student was ineligible for special education and related services (Tr. pp. 71-72, 80). She further noted that when she advised the student's father that his son was not disabled and was capable of functioning in a general education environment, the father "completely disregard[ed] this idea," and told her that "he needs a residential placement" (Tr. pp. 77-78).

While I agree with the impartial hearing officer and the parent's private psychologist that the student exhibited emotional problems stemming from his familial relationships, the parent has not demonstrated that these difficulties affected his educational performance to the extent that he required special education (see Alvin Ind. Sch. Dist. v. A.D., 503 F.3d 378, 382-84 [5th Cir. 2007]; A.P. v. Woodstock Bd. of Ed., 2008 WL 3870694 at *3 [D. Conn. Aug. 19, 2008]; M.P. v. North East Ind. Sch. Dist., 2007 WL 4199774 at *5 [W.D. Tex. Nov. 27, 2007]; N.C., 473 F. Supp. 2d 532; Application of a Child with a Disability, Appeal No. 07-019; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child Suspected of Having a Disability, Appeal No. 05-047). The hearing record lacks sufficient documentary or testimonial evidence citing specific academic or educational problems experienced by the student. The hearing record also does not show or suggest that specially designed individual instruction, or special education programs or services, were needed to meet the unique needs of the student. Moreover, at the time of the May 29, 2007 CSE meeting, the behavioral assessment form completed by a JDA faculty member (which, according to the hearing record, was considered by the CSE) demonstrated that the student was performing on or above grade level academically and was not exhibiting any of the behaviors previously reported (Parent Ex. D at p. 6).

Based upon the foregoing, I find that the student was not properly classified as a student with an ED. The hearing record does not afford a basis for classifying the student as a child with an ED under any of the definitions of that term in federal or State regulations. Consequently, the impartial hearing officer's decision to classify the student as a student with an ED is not supported by the hearing record. Therefore, the parent is not entitled to tuition reimbursement (20 U.S.C. § 1412[a][10][C]; see Carter, 510 U.S. 7; Burlington, 471 U.S. at 370; Application of the Dep't of Educ., Appeal No. 06-120; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of the Dep't of Educ., Appeal No. 06-077; Application of a Child Suspected of Having a Disability, Appeal No. 05-122; Application of the Bd. of Educ., Appeal No. 04-098).

Assuming, arguendo, that the hearing record demonstrated that the student required special education services, I have nevertheless reviewed whether the JDA placement was appropriate to meet the student's special education needs. For the reasons more fully described below, I disagree with the impartial hearing officer's determination that the parent sufficiently established that JDA met the student's special education needs in the area of his social-emotional functioning as identified by the private psychologist (see IHO Decision at pp. 17-18).

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 Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ.,

Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

In testimony, JDA's president described the placement as a 12-month therapeutic college-preparatory school (Tr. p. 338). He stated that the students admitted to JDA present with "poor attitudes" and "have committed themselves to doing some very foolish things" caused by a negative attitude about themselves, their family, about society, and about the future (Tr. pp. 338-39). He opined that these emotional problems are largely "derived [from the student's] family" and "poor peer associations" (Tr. p. 339). JDA's president further testified that students at JDA may be depressed, but that their depression is not "bio-chemically inspired" but rather because

they know "they've hurt themselves," "they've hurt their family," and they know "they've ruined their future" (Tr. p. 362).

At the time of the impartial hearing, JDA served approximately 35 students in classes comprised of between 1 and 10 students, with an average of 5 to 7 students per class (Tr. p. 340). JDA employed nine to ten academic teachers, most of whom hold doctorates in their field of study (Tr. pp. 341, 351, 352). None of the teachers had post-secondary certification in special education instruction (Tr. pp. 374, 385). JDA's president described the academic curriculum as "enriched" and "more rigorous than perhaps high schools and probably prep schools as well" (Tr. pp. 351, 370).

When asked about the therapeutic aspect of the school, the president testified, "Simply stated, we have escalating high expectations. Kids come in, as I said, with negative attitudes, some dysfunctional behavior, and we expect that they're going to change that. We expect that they're going to study a minimum of three hours a day every day. We just expect the best from kids" (Tr. p. 341). JDA's president further testified that the school employed three full-time and one part-time mental health professionals whose role was provide individual, group, and family counseling, as well as to assist teachers (Tr. p. 342).

The frequency of each student's individual counseling with a "primary" therapist is determined by the student or the therapist and occurs mostly on a one-to-one basis although at times the sessions may include friends in accordance with JDA's "peer self-help" model (Tr. pp. 344-46). Students also participate in a variety of "groups" described by JDA's president as "[k]ids get[ting] together and discuss[ing] attitudes and problems" (Tr. p. 347). The whole school community, including JDA's mental health professionals, meets regularly three times per week and often either on Saturday or Sunday, or on both weekend days (Tr. p. 348). All students also participate in "peer groups" which meet six time per week for approximately 1 to 1 ½ hours without JDA's professional staff present (Tr. p. 349). JDA's president testified that students are not permitted to confront each other in the peer groups but "[help] each other to really do what they need to" (id.). In addition students may participate in "male" or "female" groups or a group specifically for "seniors" to discuss "leadership problems," "letting go of their leadership," and "how to survive stresses, temptations, no accountability when they attend college (Tr. pp. 347-48). Every six weeks JDA mental health professionals provide a variety of family counseling groups, which include students, mothers, fathers, siblings, and extended family members (Tr. pp. 350-51).

JDA's president testified that the students "play a major role in running the school" (Tr. p. 353). He indicated that students sit in on intake interviews and their input is considered when determining whether to accept a new student (id.). Students order and prepare the food, clean the school, and are responsible for simple maintenance (id.). Students are also responsible for shoveling snow, raking leaves, and cutting the grass (id.). The president opined that as a result the students learn skills which they need when they get older, are empowered to feel that they are part of something larger than themselves, and acting out and alienation are reduced (Tr. pp. 353-54).

Considering the above information, I note that while the hearing record provides general information about the form and type of therapy available to all students at JDA, the hearing record fails to specifically indicate the amount and type of counseling provided to the student. Moreover, I note that both JDA's president and the parent testified that the student's fear of being returned to

his previous residential placement was primarily responsible for his compliance at JDA (Tr. pp. 308, 381).

Upon reviewing the paucity of relevant information contained in the hearing record in its totality, I note that the description of special education services offered to the student at JDA was, at best, vague. Other than three JDA report cards (Parent Ex. G.), the school contract (Parent Ex. H), and a letter from a JDA financial administrator regarding the student's tuition balance (Parent Ex. J), the hearing record contained no documentary evidence whatsoever that even specifically referenced the student in the instant appeal by name. Furthermore, neither the documentary record nor the testimony of JDA's president addressed the specific ways in which the educational program at JDA treated the student's multiple diagnoses. While I concur with the impartial hearing officer's determination that academically, the student excelled at JDA, I disagree with his contention that JDA "has the appropriate supports" and that the president's testimony "established the appropriateness of said school" (IHO Decision at pp. 17-18) because these conclusions were simply not substantiated by the hearing record.

In view of the forgoing, and upon reviewing the evidence in the hearing record regarding the student's attendance at JDA as a whole, I conclude that the hearing record does not provide sufficient evidence of educational instruction at JDA that is specifically designed to meet the needs of the student (see Gagliardo, 489 F.3d at 113; Frank G., 459 F.3d at 364; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Student with a Disability, Appeal No. 08-021). Consequently, I find that the parent did not establish that JDA was an appropriate placement for the student, and that the impartial hearing officer's determination to the contrary was erroneous.

Lastly, I note that generally, having already determined that the student was ineligible to receive special education and related services for the 2006-07 school year, and that the parent's unilateral placement of the student was inappropriate, I need not reach the issue of whether equitable considerations support the parent's claim for reimbursement and the necessary inquiry is at an end (Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119). However in this matter I note that the parent would be precluded from obtaining an award of tuition reimbursement because the hearing record does not show that he ever intended to place the student in public school (see Thies v. New York City Bd. of Educ., 2008 WL 344728, at *4 [S.D.N.Y. Feb. 4, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]). The parent's testimony reveals that in referring his son to the CSE, he was seeking funding for private school, not special education services (Tr. p. 322). In addition, the content of his second due process complaint notice dated July 23, 2007 reveals that the parent only sought private school funding, not access to appropriate public school special education services (Parent Ex. A).

In light of the foregoing, it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision is hereby annulled.

Dated: **Albany, New York**
September 5, 2008

_____
PAUL F. KELLY
STATE REVIEW OFFICER