



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-051

### **Application of the BOARD OF EDUCATION OF THE MINISINK VALLEY CENTRAL 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:**

Shaw, Perelson, May & Lambert, LLP, attorney for petitioner, Jeffrey J. Schiro, Esq., of counsel

Sussman & Watkins, attorney for respondents, Michael H. Sussman, Esq., of counsel

#### **DECISION**

Petitioner (the district), appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Family Foundation School (Family Foundation) for the 2007-08 school year. The appeal must be sustained in part.

In dispute in this appeal are two IEPs dated July 2, 2007 and August 16, 2007 (Dist. Exs. 151; 164). At the time of the impartial hearing, the student was attending the ninth grade at Family Foundation (Tr. pp. 563, 812; Dist. Ex. 183). Family Foundation has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 426; see 8 NYCRR 200.1[d], 200.7). The student reportedly has diagnoses of bipolar disorder, anxiety disorder, social phobia and an attention deficit hyperactivity disorder (ADHD) and he has reportedly exhibited mood and behavioral problems, including aggressive behavior (Tr. pp. 241, 488, 207; Dist. Ex. 164 at p. 1). The student has also been described as oppositional, suggesting a diagnosis of oppositional defiant disorder (ODD) (Dist. Ex. 188 at pp. 1-2). He has further been reported to have demonstrated significant executive functioning deficits, difficulties with attention and remaining on task in addition to severe dyspraxia (Parent Exs. 40 at p. 8; 47 at p. 1). The student's classification and eligibility for special

education services as a student with an other health impairment (OHI) are not in dispute in this appeal (Tr. pp. 456, 459; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).<sup>1</sup>

The student attended public school in the district until the 2005-06 school year (seventh grade) when the parents enrolled him in a private school at the district's expense (Tr. pp. 457-58; Parent Ex. 40 at p. 7). In spring 2006, the student's private psychiatrist recommended that the student be returned to public school in the district to enable the student to have access to age appropriate peers (Parent Ex. 40 at p. 7).

In response to the parents' desire to return their son to a district school, the district's Committee on Special Education (CSE) convened on June 19, 2006 and August 17, 2006 to develop the student's program for the 2006-07 school year (eighth grade) (Parent Ex. 40 at pp. 7-8).<sup>2</sup> According to the parents, the district was unwilling to allow the student to return to the public school (id. at p. 10). On August 23, 2006, the parents filed a due process complaint notice against the district (id.).<sup>3</sup> In response to their due process complaint notice, on August 24, 2006, the CSE chairperson telephoned the student's mother to advise her that the CSE had agreed to provide the student with the special education services that the parents had requested in their August 2006 due process complaint notice (id.). On August 29, 2006, another CSE meeting took place and for the 2006-07 school year, the parties agreed that the student would receive academic instruction in a 15:1 setting in a district school, daily resource room support, individual counseling one time per week, as well as monthly speech therapy and occupational therapy (OT) consultations (Dist. Exs. 139 at p. 2; 178 at pp. 1-2). In addition, the student was afforded numerous program and testing accommodations (Dist. Ex. 178 at p. 2).

The student received poor grades during the first semester of the 2006-07 school year, and he was not regularly attending his classes (Tr. pp. 465-66; Dist. Exs. 155; 161 at pp. 1-4; 162 at pp. 1-2). In addition, the student received a number of in-school and out-of-school suspensions, totaling more than 20 days (Tr. p. 465; Parent Exs. 15; 21; 28). In October 2006, the district developed a functional behavioral assessment/behavioral intervention plan (FBA/BIP) for the student (Tr. pp. 461-62, 627-28; Parent Ex. 30). The parents asserted that the district was failing to implement the student's IEP, and consequently requested a CSE meeting to address this issue and communicate with their son's teachers (Parent Ex. 40 at p. 11). In response to their request, in October 2006, the CSE convened (id.).<sup>4</sup> According to the parents, during the October 2006 meeting, the student's teachers indicated that the student was unmotivated, unwilling to try and that he refused to comply (id.). However, in light of the parents' concerns that their son was not being provided with the necessary opportunities to succeed and that the district was failing to implement the student's IEP, the district agreed to provide the student with a home-based tutor for

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<sup>1</sup> The student was initially classified as a student with an OHI during his fifth grade year (Tr. p. 456).

<sup>2</sup> A copy of the resultant individualized education program (IEP) for the 2006-07 school year is not included in the hearing record.

<sup>3</sup> A copy of the parents' August 2006 due process complaint notice is not included in the hearing record.

<sup>4</sup> The hearing record is unclear as to the actual date of the October 2006 CSE meeting. By letter dated August 2, 2007 to the parents, the district's attorney stated that the CSE met on October 20, 2006 (Dist. Ex. 178 at p. 1). The hearing record does not contain a copy of the October 2006 CSE meeting minutes nor does it contain a copy of the IEP developed as a result of the meeting.

three hours per day to assist him with his homework and organization (Tr. p. 679; Parent Ex. 40 at p. 18).<sup>5</sup> Nevertheless, the student's mother testified that the student was doing very little school work at home during this time period due to his inability to focus (Tr. pp. 577-78, 679-80).

On November 20, 2006, per the parents' request, a private psychologist who served as an educational consultant for the district developed a new FBA/BIP for the student (Tr. pp. 461, 633; Parent Ex. 31). The student's mother reported that the BIP was not implemented and the student's behavior did not change as a result of the plan (Tr. pp. 633-36).

On or about December 14, 2006, the CSE chairperson met informally with the student's father and the educational consultant for the district to discuss the possibility of a residential placement for the student (Tr. pp. 584, 634, 646, 963-64). According to the student's mother, the district's educational consultant opined that the BIP that he had designed for the student could not be implemented in a public school environment (Tr. p. 634). At the time, the student's father indicated that the parents did not support a residential placement for their son (Tr. pp. 963-64). The CSE chairperson stated that, while it was discussed, no residential program was recommended at that time (Tr. pp. 963-64, 987-88).

By letter dated December 15, 2006, the parents' private educational consultant, noting that the district felt unable to serve the student in its middle school, advised the CSE chairperson that "the vast majority of [the student's] IEP had not been implemented" (Parent Ex. 33). According to the private educational consultant, in light of the district's failure to implement the student's IEP, it was premature to discuss a change in the student's placement at that time (*id.* at pp. 2, 14). Among other things, the private educational consultant requested an updated neuropsychological evaluation of the student to be conducted at district expense (*id.* at p. 14). The private educational consultant suggested that a meeting be held in early January 2007 to discuss implementing the student's IEP (*id.*). The student's mother reported that after the private educational consultant's letter was sent, she separately requested a CSE meeting (Tr. pp. 1021-22).

By letter dated January 10, 2007, the district's school principal advised the parents that as a result of using inappropriate language with a staff member and a separate incident in which the student acted in a threatening manner toward a staff member wherein he punched a locker, the student received a two-day out-of-school suspension (Parent Ex. 38). In a separate letter also dated January 10, 2007, the student's private psychiatrist, based on communication with the student's mother, requested that the student be placed on homebound instruction until appropriate academic supports and placement could be determined and provided to the student (Tr. pp. 209-12, 466; Dist. Ex. 133). The private psychiatrist indicated that the student's academic experience was negatively impacting the student's medical condition (Tr. pp. 222-25; Dist. Ex. 133). In light of the student's private psychiatrist's request, for the second semester of the 2006-07 school year, the district provided the student with two hours of homebound instruction per day; however, the student's IEP was not amended to reflect this change in his program (Tr. pp. 680, 912). On or about January 26, 2007, the student began homebound instruction; however, the student's mother

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<sup>5</sup> The student's mother testified that the student "could only handle 45 minutes" of the tutoring per day (Tr. pp. 679-80).

testified that the homebound instruction did not work for her son, because the student became socially isolated, was destabilizing, and was feeling rejected (Tr. pp. 466, 680-82).

A CSE meeting and manifestation determination review (MDR) were scheduled for January 26, 2007, but later cancelled for unknown reasons (Tr. p. 160; Dist. Ex. 135). On February 5, 2007, pursuant to 8 NYCRR 200.5[l], the parents filed a complaint against the district with the New York State Education Department (NYSED) (State complaint) (Parent Ex. 40).<sup>6</sup>

The student's mother stated that on or about February 9, 2007, the CSE chairperson invited the parents to an informal meeting with the district's educational consultant to discuss the student's placement, as the student's mother reported that "he was not doing well at home" (Tr. pp. 463-65). According to the student's mother, the district's educational consultant indicated that the student's IEP could not be implemented as it was developed and there was "no way" the student could be served in his home school (Parent Ex. 47 at p. 9). The CSE chairperson reported that at the time of the meeting, the student's parents were not in favor of a residential placement and although residential placement may have been discussed, the conversation centered mainly on day program placements, as well as improving the student's program in the district (Tr. pp. 985-86). According to the student's mother, the CSE chairperson named three potential private placements for the student, which the student's mother researched with the help of a private educational consultant (Tr. pp. 462-63, 467, 646-47). After looking into the private schools suggested by the CSE chairperson, the student's mother determined that none of the proposed private schools were appropriate for her son and she advised the CSE chairperson of her determination (Tr. pp. 468, 519-20). The student's mother reported that she subsequently requested another CSE meeting (Tr. p. 469).

On February 27, 2007, a subcommittee of the CSE convened to review the student's program and conduct an MDR with respect to the January 2007 incident (Tr. pp. 581-82, 919-20; Dist. Ex. 139; Parent Ex. 41 at p. 2). The CSE chairperson, the district's educational consultant, school psychologist, speech-language therapist, principal, special education teacher, regular education teacher and the student's parents participated in the February 2007 CSE subcommittee meeting (Dist. Exs. 139 at p. 1; 140). During the February 2007 meeting, the district's outside consultant reviewed the student's behavior plan, but the hearing record does not indicate if it was modified at that time (Dist. Ex. 139 at p. 1). The February 2007 CSE subcommittee also determined that in considering the student's most recent disciplinary referrals that took place in January 2007 (Parent Ex. 38), there was a nexus between the student's behaviors and his disability (id.). The CSE subcommittee agreed to provide the student with a neuropsychological evaluation at district expense per the parents' request (Tr. p. 920; Dist. Ex. 139 at p. 1). The February 2007 meeting minutes also noted that at the time of the meeting, the student was receiving home instruction, and that his present program would remain the same (Dist. Ex. 139 at pp. 1-2). According to the student's mother, the possibility of a residential placement for the student was also discussed during the February 2007 meeting (Tr. pp. 582-85).

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<sup>6</sup> The parents' February 2007 State complaint alleged, among other things, that the district had failed to implement the student's 2006-07 IEP and that the district had failed to implement a positive BIP for the student (Parent Ex. 40 at p. 2).

An independent neuropsychological evaluation of the student was scheduled to take place on March 29, 2007 (Dist. Exs. 142; 143; 148). By letter to the CSE chairperson dated April 9, 2007, the parents indicated that the student had met with the neuropsychologists as scheduled, but that the evaluators believed the student was too "fragile" and unstable to go through testing (Dist. Ex. 143; see Dist. Ex. 148). By parent report, the evaluators opined that the student needed a therapeutic setting as soon as possible until he was stable enough to complete testing and attend school (id.). The parents asked the CSE chairperson whether a Board of Education Cooperative Services (BOCES) program could provide the student with an appropriate therapeutic program and suggested that the student would need such a program at least through summer 2007 (Tr. p. 1030; Dist. Ex. 143). The student's mother further testified that the CSE chairperson contacted BOCES and determined that there was not an opening available for the student at that time (Tr. p. 1030).

By letter dated April 30, 2007, the Special Education Quality Assurance (SEQA) division of NYSED sustained parts of the parents' February 2007 State complaint and as a corrective action, ordered the district to reconvene a CSE meeting by June 5, 2007 in order to determine appropriate long and short-term educational placements for the student and to develop a BIP that could be implemented effectively in the student's educational environment (Parent Ex. 43 at p. 5).

In developing the student's program for the 2007-08 school year, the CSE chairperson referred the student to one of the district's BOCES programs on or around May 3, 2007 and arranged an intake interview for the student with the BOCES social worker (Tr. pp. 86-87, 520-21, 912, 1042, 1046-47; Dist. Ex. 145). The neuropsychologist who had attempted to evaluate the student in March 2007 supported the BOCES placement (Tr. p. 521; Dist. Ex. 148 at p. 2). In April 2007, the student had begun seeing a new psychiatrist and that psychiatrist recommended Family Foundation to the parents (Tr. pp. 480-81, 483).<sup>7</sup> In or about May 2007, the student's mother visited Family Foundation (Tr. pp. 472, 663).

On June 11, 2007, the student took part in an interview at BOCES (Tr. p. 1049).<sup>8</sup> The student's mother reported that the BOCES social worker "felt bad" that the student did not have a school placement and offered to accept the student on a 30-day conditional basis starting in September due to concerns that the program might not be appropriate for the student (Tr. pp. 520-22, 1049).

By e-mail to the vice-president of external relations and acting director of admissions at Family Foundation (director) dated June 20, 2007, the student's mother inquired as to whether Family Foundation had decided to accept the student (Dist. Ex. 175 at p. 4).

By letter to the CSE chairperson dated June 24, 2007, the parents indicated that they agreed with the district that it was unable to serve the student and that the student required a residential placement (Parent Ex. 48). The parents stated that although BOCES was willing to offer the student a 30-day provisional placement, they thought that the student's chances of being successful

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<sup>7</sup> The psychiatrist testified that at the time of the impartial hearing he had only met with the student four times and never on an individual basis because the student "wouldn't allow that, he wouldn't tolerate that" (Tr. pp. 502-03).

<sup>8</sup> An earlier attempt at a BOCES interview was unsuccessful (Parent Ex. 48 at p. 1).

with the stress of a provisional placement were negligible (id.). In addition, they noted that their son's then current psychiatrist, who was the staff psychiatrist at BOCES, stated that the program was not appropriate and that he would not support it as an educational placement for the student (id.). The parents indicated that, pursuant to their son's psychiatrist's recommendation, they had visited Family Foundation and the student had been accepted into the program (id.). The parents stated that they intended to place the student at Family Foundation at public expense on July 3, 2007 (id.). In addition, the parents requested a CSE meeting to update the student's IEP in accordance with the Individuals with Disabilities Education Act (IDEA) and the SEQA determination (id.).

A subcommittee of the CSE convened on July 2, 2007 (Dist. Ex. 151). In attendance were the CSE chairperson, the speech-language therapist who evaluated the student in spring 2007, a special education teacher, a regular education teacher, a school psychologist, and the student's mother (Dist. Exs. 151; 152). In addition, the student's private psychiatrist and the parents' advocate participated by telephone (Dist. Ex. 152). The July 2007 meeting minutes indicated that the student's psychiatrist reported that the student was socially and emotionally fragile, and the parents stated that hospitalization was being discussed (id. at p. 6). The July 2007 IEP indicated that the student required a small group special education class that provided a supportive, consistent, structured learning environment with clear learning expectations and positive redirections (Dist. Ex. 151 at p. 3). It further indicated that the student required assistance in developing organizational skills, completing and turning in assignments in a timely manner, creating study guides to assist him in preparing for tests and chunking assignments into manageable parts to complete larger assignments (id.). According to the July 2007 IEP, the student required support and guidance for social situations and needed to develop social problems solving skills and a sense of initiative (id. at p. 4). The student also needed to develop speed and legibility of cursive writing and skills necessary for keyboarding as an alternative to handwriting (id.). The July 2007 IEP contained numerous testing and program modifications as well as goals and objectives related to study skills, reading, writing, mathematics, speech-language, motor development and social/emotional/behavioral development (id. at pp. 2, 7-11). All participants agreed that the student required residential placement (Tr. pp. 81-82, 90-91, 138-39, 174-75). The CSE subcommittee determined that due to the student's emotional status, he required a residential placement with a class size ratio of 8:1+1 and related services of individual counseling two times per week and group counseling one time per week, as well as monthly OT and speech-language therapy consultations (Dist. Ex. 151 at pp. 1, 6). No specific school was recommended for the student and the resultant IEP indicated that the CSE would search for a residential placement for him (id. at p. 1).

Following the July 2007 CSE subcommittee meeting, the CSE chairperson spoke with a representative of NYSED to begin arranging residential placement for the student (Tr. pp. 969-71). Referral packets were also sent to nine in-state residential placements and one out-of-state residential placement (Tr. pp. 82-83, 97-98, 529-30; Dist Exs. 154; 165-72; 185).

On July 3, 2007, the student jumped out of his mother's car while she was attempting to drive him to a psychiatric hospital for treatment (Tr. pp. 531-32). At that time, the student's mother described him as "suicidal" and "very unstable" (Tr. p. 533). On or about July 12, 2007, mobile mental health transported the student to a psychiatric hospital (Tr. pp. 535-36; Dist. Ex. 175 at p. 3).

On July 18, 2007, the student's mother notified the director from Family Foundation by e-mail that the student had not responded to the treatment plan at the psychiatric hospital (Dist. Ex. 175 at pp. 1-2). According to the student's mother, the staff at the psychiatric hospital was recommending that the student be transferred to a psychiatric center due to fears that their facility was not secure enough for the student, and the student's mother indicated that she was not in favor of placing him in a more restrictive psychiatric center (Tr. p. 561; Dist. Ex. 175 at p. 2). On July 19, 2007, the student was released from the psychiatric hospital and in accordance with the parents' wishes, the student returned home, with the understanding that his mother would be placing him at Family Foundation as soon as possible (Tr. pp. 561-62; Parent Ex. 47 at p. 12).<sup>9</sup>

The parents were notified by letter dated July 18, 2007 that a New York State-approved residential school had expressed interest in interviewing the student (Dist. Ex. 154). A second, out-of-state school had verbally accepted the student on a conditional basis and indicated that changes to the student's IEP would be required prior to placement (Tr. pp. 146-47, 663-64; Dist. Ex. 167).

By due process complaint notice dated July 23, 2007, the parents requested that the district place the student at Family Foundation for the 2007-08 school year (Parent Ex. 47). The parents detailed numerous elements of the student's IEP which they maintained had not been implemented during the first semester of the 2006-07 school year (id. at pp. 2-8). Among other things, the parents noted that as a result of their State complaint the district was required to take corrective action, including reconvening the CSE to review the student's IEP by June 5, 2007 (id. at p. 11). The parents asserted that the district did not contact them until after the parents had provided a ten-day notice indicating that they had found an appropriate private school for the student that could meet his emotional, social, psychological and academic needs (id.). The parents proposed that the student be placed residentially at Family Foundation until he stabilized and was able to meet the expectations within a less restrictive environment (id.).

On July 26, 2007, the student entered Family Foundation (Tr. p. 447; Dist. Ex. 176; Parent Ex. 5). Around this same time, two additional New York State-approved residential schools expressed an interest in interviewing the student for possible placement (Dist. Exs. 154; 156; 157; 165). The district's supervisor of special education requested that the parents contact the schools as soon as possible to arrange for interviews (Dist. Ex. 157).

In a note to the student's education file dated August 1, 2007, the district's supervisor of special education reported that she had informed the student's father of the two additional residential schools that were interested in interviewing the student (Dist. Ex. 158). According to the supervisor of special education, the student's father indicated that the student had already been placed at Family Foundation (id.).

On August 1, 2007, the student's former psychiatrist wrote a letter supporting the parents' decision to place the student at Family Foundation, noting that Family Foundation was relatively small and close to the student's home, that the student profile was appropriate because the student population at Family Foundation did not contain juvenile offenders or "court appointed students,"

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<sup>9</sup> A discharge summary from the student's one-week stay in July 2007 at the psychiatric hospital is not included in the hearing record, although the CSE chairperson testified that the district received a copy of the student's discharge summary (Tr. p. 1007).

and that Family Foundation had programs that addressed the student's specific needs (Tr. p. 709; Dist. Ex. 176; Parent Ex. 1A at p. 1).<sup>10</sup> In addition, the psychiatrist noted that the student was already at Family Foundation where the student was adjusting and it would be "unconscionable and unethical" to move him at that time (Parent Ex. 1A at p. 2).

In an August 2, 2007 response to the parents' due process complaint notice, the district denied all of the parents' allegations (Dist. Ex. 178 at p. 1). By letter dated August 7, 2007, the CSE chairperson invited the parents to participate in a subcommittee of the CSE meeting to take place on August 16, 2007 for a review of the student's program (Parent Ex. 50).

On August 16, 2007, a subcommittee of the CSE met to determine an appropriate placement for the student's 2007-08 school year (ninth grade) (Dist. Ex. 164). Meeting participants included the following individuals: the student's father, the CSE chairperson, the district's supervisor of special education, a regular education teacher, a speech-language therapist, a school psychologist, a special education teacher, the parents' private educational consultant and the principal from Randolph Academy (Randolph), one of the possible residential placements for the student (*id.* at p. 5). The resultant IEP recommended that the student be placed in a 12:1+1 classroom at Randolph (*id.* at pp. 1, 5). Related service recommendations included two individual 30-minute counseling sessions per week, one 30-minute counseling session in a group of five per week, one 30-minute individual OT consultation per month, and one 30-minute individual speech-language consultation per month (*id.* at p. 1). Numerous program and testing modifications were also incorporated into the resultant IEP (*id.* at p. 2). Annual goals and short-term objectives were developed in the areas of study skills, reading, writing, mathematics, speech-language skills, the social/emotional/behavioral domain and motor skills (*id.* at pp. 6-10). During the August 2007 meeting, the student's father advised the CSE subcommittee that the student was enrolled in Family Foundation and that in light of the student's private psychiatrist's recommendation, the parents were against removing the student from Family Foundation to attend interviews at other schools (Tr. pp. 103-04, 106, 137, 140-41, 197-98, 959-60). According to the CSE chairperson, the student's father participated in the meeting and asked questions of the representative from Randolph, as he had not visited the school (Tr. p. 959). At the CSE subcommittee meeting, the student's father voiced his objection to the recommended placement because of its distance from the student's home, and he further stated that the student was not going to go there for "a referral" (Tr. pp. 194-95, 959-60). Based on conversations at the August 2007 meeting, the CSE chairperson concluded that the parents did not intend to take the student to Randolph for "a referral" (Tr. pp. 960-63). She also noted that according to the student's father, the student's doctor was opposed to removing him from Family Foundation (Tr. pp. 961, 983).

On August 22, 2007, the consulting psychologist for Family Foundation conducted an intake evaluation of the student pursuant to a referral from the student's "family leader" at the

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<sup>10</sup> The August 1, 2007 letter from the student's former psychiatrist is addressed "to whom it may concern" (Parent Ex. 1A).



school (Dist. Ex. 188).<sup>11</sup> According to the psychologist, the student was referred for a psychological evaluation due to the student's oppositional behavior and history of psychiatric hospitalizations (*id.* at p. 1). The psychologist described the student as cooperative and polite, while noting he would stare away from the psychologist at times, despite making eye contact at points during the evaluation (*id.*). The student also appeared anxious, but he delivered his sentences in a monotone-like cadence (*id.*). Although the psychologist found that the student did not exhibit psychosis, the psychologist found evidence of impulsiveness in the student (*id.*). The psychologist indicated that despite appearing motivated to "be good so [the student could] leave and go home," the student had little insight into his deviant and aberrant behaviors, nor the reasons for those behaviors (*id.*). The student's history also evidenced exceedingly poor judgment and oppositional behavior (*id.* at pp. 1-2). While the psychologist observed that the student clearly had issues with anger, he opined that the student's parents "were essentially run-over by him," and that they put up little resistance (*id.*).

The psychologist estimated that the student's intelligence was in the low average range (Dist. Ex. 188 at p. 2). He opined that it was entirely possible that the student would not gain a great deal of insight, as he described the student as an individual who was compromised in his self-control and driven by impulse (*id.*). Although the psychologist indicated that the student's oppositional behaviors were still operating, the student had found a different response at Family Foundation to the oppositional behaviors than he had previously experienced (*id.*). The psychologist offered the following diagnoses: ADHD – combined type, bipolar disorder, and ODD (*id.*). Regarding the student's treatment plan, the psychologist opined that while a counseling component might help the student, the psychologist recommended waiting at least one month before initiating counseling and he further noted that the issues to be addressed in counseling would probably change after the student had spent some time at the school (*id.* at p. 3). The psychologist noted that the student was just beginning to realize that his oppositional behavior would not work at Family Foundation (*id.*). Consequently, the psychologist reported that the student was making internal adjustments which could reveal a different individual than the student was upon his arrival (*id.*). The psychologist also determined that the student had never been appropriately controlled or parented, and further observed that the student lacked self-control (*id.*). According to the psychologist, internal controls would have to be built in during the student's stay at Family Foundation (*id.*). The psychologist concluded that the student would be a candidate for two support groups; however, the psychologist indicated that it would be preferable to allow the student time to settle prior to making any referrals (*id.*).

According to entries from the student's electronic logbook<sup>12</sup> at Family Foundation, between July 30, 2007 and October 1, 2007 the student was placed in the school's "quiet room" fourteen times, in the "time-out room" ten times, and on "work sanction" five times (Dist. Exs. 173 at pp. 1, 7-8, 10, 12, 13-15, 17-18, 19, 20, 22, 28, 29, 30, 32-34, 36-37, 40, 42-45, 47-48, 50-53, 55, 57-

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<sup>11</sup> According to the hearing record, all of the students at Family Foundation are divided into "family" units (Tr. p. 249). The hearing record describes the "family leader" as an adult who acts as the head of the family unit, whose primary responsibility is to oversee the family, provide direct administrative supervision to the staff within those family units and work with the students (Tr. p. 250).

<sup>12</sup> Although the hearing record indicates that the electronic logbook is not an official record of sanctions imposed upon a student at Family Foundation, the director testified that some of the more significant behaviors and interventions used on a student are noted in his or her electronic logbook (Tr. p. 312).

60; 181).<sup>13</sup> Additional sanctions used with the student included "corner," "sandals" and "double shadow" (Dist. Ex. 173 at pp. 11, 24, 26, 36, 45).<sup>14</sup> The hearing record reveals that on at least one occasion, the student was restrained (Tr. pp. 750, 798-99, 824-25). On September 27, 2007, the student attempted to run away and the police were notified (Tr. pp. 347-48; Dist. Ex. 173 at p. 46).

In a September 2007 letter to the parents' attorney written pursuant to the student's mother request, the student's private psychiatrist stated that he had recommended Family Foundation to the parents (Parent Ex. 7).<sup>15</sup> According to the private psychiatrist, he recommended the school at a time when the student was refusing to attend any school and participate in outpatient treatment (id.). The psychiatrist concluded that Family Foundation was an ideal therapeutic residential school for the student because of its proximity to his home which would allow the parents to participate in their son's treatment (id.). The psychiatrist also indicated that he and the parents were "thrilled" that the student was finally a "happy camper" at school, and that the student was beginning to make progress at the school by expressing loving feelings toward his parents and taking pride in his accomplishments (id.).

An impartial hearing convened on September 27, 2007 and concluded on January 30, 2008, after six days of testimony (IHO Decision at p. 1).

In a November 14, 2007 e-mail, the psychologist from Family Foundation described the student's mood as "somewhat down and apprehensive as [the student] described ways in which he has slipped recently" (Dist. Ex. 177).<sup>16</sup> The psychologist stated that due to the student's fidgety

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<sup>13</sup> The director described "sanctions" as a consequence to behaviors designed to help a student become aware of how his or her behavior is counterproductive to functioning positively with other people (Tr. p. 299). The director further testified that sanctions are meant to be an exercise that helps a student recognize the component of his or her behavior and how he or she might be able to engage in a more positive behavior, thereby having a better impact on other people (id.). According to the director, the quiet room is a place where students can go and calm down and talk with other students (Tr. p. 309). Physically, the hearing record describes the quiet room as a "sterile kind of looking environment," with a high ceiling and square footage of "a couple of feet by a couple of feet," where the door remains unlocked (Tr. pp. 358, 360). The time-out room is located in the same place as the quiet room; however, according to the director, the time-out room is more restrictive because it is used specifically when a student endangers him or herself or others; therefore, the door is locked in the time-out room (Tr. pp. 359-60). The work sanction is the highest level sanction at Family Foundation and is equivalent to an out-of-school suspension, in which students are pulled out of academic classes and placed on a work crew in which they work throughout school grounds doing some physical work until they have completed the school work in which they were delinquent (Tr. p. 308).

<sup>14</sup> With respect to "sandals," the director of admissions testified that a student must wear sandals as a sanction when he or she attempts to run away from Family Foundation as opposed to wearing regular shoes as a deterrent to elopement (Tr. p. 369). The hearing record describes a shadow as another more senior student who serves as a natural consequence to demonstrated behavior to provide an extra level of supervision, guidance, support and engagement (Tr. pp. 338-39). When the "corner" sanction is imposed, a student must sit in the corner to reflect and think (Tr. pp. 748, 824). While a student is seated in a corner, the student is accompanied by his or her junior sponsor who sits with the student placed in the corner to help the student try to figure out what is going on and the necessary steps to correct the situation (Tr. pp. 824-25).

<sup>15</sup> Although the letter is dated March 9, 2007, the private psychiatrist testified that he wrote the letter on or about September 26, 2007 (Tr. p. 485).

<sup>16</sup> The exhibit does not indicate to whom the November 2007 e-mail was written (Dist. Ex. 177).

and reactive behavior, he continued to get into trouble (id.). Although the psychologist observed that the student had made progress, the student reported to the psychologist that it was challenging to make the necessary changes (id.). The psychologist concluded that given the student's intellectual and neuropsychological profile, academics were going to continue to be a "stretch" for the student (id.). Although the psychologist stated that the student's improvement was noteworthy, the psychologist concluded that the student's prognosis was only fair for a significantly positive outcome (id.).

On April 24, 2008, the impartial hearing officer rendered a decision in which she found that the parents demonstrated that the July 2007 and August 2007 IEPs were inappropriate and as a result, the district failed to offer the student a free appropriate public education (FAPE) (IHO Decision at pp. 12, 87). Specifically, the impartial hearing officer concluded, among other things, that the parents had established that Randolph was inappropriate for the student because of the school's distance from the student's home (id. at pp. 27, 32, 78). Next, the impartial hearing officer determined that the parents had also established that Family Foundation was appropriate to meet the student's special education needs, inasmuch as the evidence adduced at the impartial hearing showed that the student had made "uncontroverted therapeutic and behavioral progress as well as ... the beginning of academic improvement" (id. at p. 80). With respect to equitable considerations, the impartial hearing officer found that the equities weighed in the parents' favor (id. at p. 83). In light of the foregoing, the impartial hearing officer awarded tuition reimbursement for Family Foundation to the parents for the 2007-08 school year (id. at pp. 87-88).

On appeal, the district argues that for the 2007-08 school year, it offered the student an appropriate program and that the placement recommendation of Randolph was reasonably calculated to confer an educational benefit upon the student. The district further asserts that Family Foundation is not appropriate to meet the student's educational needs and that equitable considerations weigh against the parents. The parents submitted an answer in which they requested that the impartial hearing officer's decision be affirmed in its entirety.

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 (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).<sup>17</sup> A student's educational program must also be provided in the least restrictive environment (LRE)

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<sup>17</sup> 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]).

(20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]).

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. § 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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

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

The 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]).<sup>18</sup>

I will first address the district's assertion that it offered the student an appropriate placement at Randolph for the 2007-08 school year. As detailed below, the hearing record is unclear as to whether a program was actually offered to the student and there is insufficient evidence in the hearing record to conclude that Randolph was an appropriate placement for the student. In this case, the CSE chairperson testified that pursuant to a conversation that took place prior to the August 2007 meeting with the admissions coordinator from Randolph, the school was prepared to accept the student based on the student's records; however, the CSE chairperson did not have any documentation memorializing that conversation (Tr. pp. 1006-07, 1010-12). In spite of her testimony, the CSE chairperson also stated that the CSE did not have any information as to whether or not the student had been admitted into Randolph (Tr. pp. 1001-02). The principal from Randolph testified that he had no knowledge as to whether the student had been accepted into the program (Tr. p. 882). He further testified that, to his knowledge, Randolph did not accept students who had not previously visited the school and the hearing record shows that the student and the parents did not visit Randolph (Tr. pp. 590-91, 881-82).

The hearing record also demonstrates that after the August 16, 2007 CSE subcommittee meeting, the student's mother reported that she spoke with someone on the telephone from Randolph (Tr. p. 609). She testified that she explained to Randolph's admissions coordinator that the student's psychiatrist advised against the student visiting Randolph and the student's mother further inquired whether the student could be accepted without visiting the school (id.). According to the student's mother, Randolph's admissions coordinator indicated that the parents were required to visit the program so the school could learn more about the student, meet the family and decide if the student would be a good fit (Tr. p. 610). The admissions coordinator reportedly indicated to the student's mother that Randolph's long distance from the student's home could be problematic with regard to family counseling (id.). The student's mother also reported that the admissions coordinator would not answer her questions regarding the class profile at Randolph (Tr. p. 611).

Further review of the hearing record also reveals that the interview was an essential component of the evaluative process at Randolph, specifically in light of an August 16, 2007 letter from the admissions coordinator to the CSE chairperson in which he requested a pre-placement interview for the student, describing the interview as "a necessary step in the intake process to determine appropriateness" (Dist. Ex. 187). Moreover, Randolph's principal also testified that he did not advise the August 2007 CSE subcommittee that the student had been accepted into the program (Tr. p. 883). Based on the aforementioned set of circumstances, the hearing record is

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<sup>18</sup> On August 15, 2007, 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. Although the parents maintain in their answer that in light of the recently amended law, the district should have borne the burden of proving that it offered the student an appropriate program, I note that the burden was properly placed on the parents who filed their due process complaint notice prior to the effective date of the amendment (IHO Decision at pp. 8-9; Tr. p. 28; see Application of the Dep't of Educ., Appeal No. 08-018).

equivocal as to whether a placement at Randolph was actually offered to the student for the 2007-08 school year.

In addition, after a thorough review of the hearing record, there is insufficient evidence in the hearing record to determine whether Randolph was appropriate to meet the student's special education needs. The hearing record reflects that the district only presented one witness, the school's principal, from Randolph, who demonstrated that he had very little knowledge of the student's special education needs (Tr. pp. 831-95). Randolph's principal testified that although he had participated in the August 2007 CSE subcommittee meeting by telephone, he had not previously had contact with the district regarding the student, and the principal had only received an information packet regarding the student the day before he gave his testimony (Tr. pp. 877-79). Moreover, the principal stated that he had never interviewed the student or his parents (Tr. p. 881). Nor did the principal know whether or not the student had been evaluated by Randolph or if any of his colleagues had reviewed the student's educational records prior to the August 2007 CSE meeting (Tr. p. 882). The Randolph principal also testified that he did not run the residential program (Tr. pp. 886-87). He further acknowledged that he could not speak with any level of expertise regarding Randolph's residential program and that there were people who were more qualified to speak about the residential aspects of the program (Tr. pp. 858, 887). Although a portion of the program was described in the record, overall there is insufficient information in the hearing record to establish whether Randolph was appropriate to meet the student's special education needs.

In light of the aforementioned circumstances, the hearing record demonstrates that the district failed to offer the student a FAPE during the 2007-08 school year.

Having determined that the district did not offer a FAPE to the student for the 2007-08 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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038). 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]). In addition, parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). 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 to meet a student's unique special education needs (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 also Frank G., 459 F.3d at 364-65).

The hearing record describes Family Foundation as a college preparatory boarding school for students in middle and high school between the ages of 12 and 17 (Tr. p. 247). The school serves approximately 245 students, twenty percent of whom have been classified by their school districts (id.). The remaining students, while not classified, have a variety of behavioral and emotional difficulties (id.). Sixty to sixty-five percent of the students have a drug or alcohol problem (Tr. p. 431). All of the students have average IQs or above; however, many of them are academic underachievers or have become truant (Tr. p. 258). Student diagnoses include ADHD, ODD and mood disorders (Tr. pp. 258-59). The minimum length of stay as Family Foundation is 18 months, with the average length of stay spanning 24 months (Tr. p. 269).

Witnesses from Family Foundation described the school as a therapeutic school that offers cognitive behavioral counseling with a 12-step philosophy at its foundation (Tr. pp. 247, 252, 754). The cognitive behavioral approach is supported by positive and negative consequences (Tr. p. 754). As part of its disciplinary code of conduct, the school employs sanctions (Tr. p. 299; see footnotes 14, 15 supra). The highest sanction, the work sanction, is equivalent to an out-of-school suspension (Tr. pp. 308, 355-56). Staff is trained in crisis management techniques, including verbal "escalation" and physical restraint (Tr. p. 308). Students are assigned sponsors, who are staff members who have experience "working" the 12 steps (Tr. p. 252).

Residentially, the students are divided into eight "family units" of approximately 30 students each (Tr. p. 249). The family units are designed to help each student participate in a

positive and healthy way within a family unit (*id.*). The families eat and engage in recreational activities together (Tr. pp. 249, 251, 743). All students are assigned chores to do, such as working in the kitchen or laundry (Tr. pp. 387-88). There is a designated person in each family who is responsible for conducting small counseling groups with the students, family contact work with the parents, and family counseling (Tr. p. 250). In addition, there is an academic coordinator who is in charge of keeping track of and monitoring students' grades and credits (Tr. pp. 250-51).

According to the director, Family Foundation "exist[s]" primarily for re-strengthening relationships between parents and their children (Tr. p. 264). The school offers small and large group counseling sessions, family counseling and counseling for specialty groups (Tr. pp. 254, 738-40, 823). All students are required to have one small group counseling session per week (Tr. p. 739). The group counseling lasts for approximately one hour and there are usually six to ten students in a group that is led by a school counselor (Tr. pp. 613, 739). The social phobia group is comprised of students who experience significant anxiety in school interactions and is led by a Family Foundation staff member (Tr. pp. 739, 787). Large group counseling, referred to as "table topics" takes place during lunch and dinner (Tr. pp. 254-55). Table topics provide staff and students the opportunity to share with each other difficulties and successes, talk about problems, generate possible solutions and hold each other accountable for their actions (*id.*). Parent counseling is also an integral component of the Family Foundation program (Tr. p. 738). Parents are required to be on campus every four to six weeks to participate in traditional family counseling as well as parent groups, which focuses on developing parenting skills (Tr. pp. 264-65). In family counseling, school staff works with the students on strengthening their relationship with their parents (Tr. p. 738). The school's counseling department includes a consulting psychiatrist, a part-time psychologist, three licensed clinical social workers and additional staff members with master's degrees in psychology or social work (Tr. pp. 296, 433-34; Dist. Ex. 184 at p. 7). The psychologist is at the school two to three days per week providing direct assessment, student counseling and staff training (Tr. pp. 433-34). The consulting psychiatrist comes to the school every three weeks to do medication management, and students with an acute need can be brought to his office located approximately 45 minutes away (Tr. pp. 434-35).

The hearing record shows that Family Foundation is not a special education school and the teachers are not certified in special education (Tr. p. 292). The school day runs from 7:45 a.m. through 6:00 p.m. and consists of nine periods which include all core academic classes, elective courses, counseling and a study hall (Tr. p. 261). The program offers Regents level academic instruction and varsity level sports (Tr. p. 262).

According to the school counselor, upon his arrival at Family Foundation, the student was "dazed" during the first few days (Tr. p. 745). She described the student as appearing heavily medicated, quiet and withdrawn (*id.*). She reported that once the student's "head had cleared", he followed the basic pattern of the school, but within the first few weeks, the student began to demonstrate resistance (Tr. p. 746). Once the student was placed in academic classes and he was no longer free to choose what he wanted to eat, the student's angry, defiant behavior surfaced (Tr. p. 747). The student threatened people and shoved desks (*id.*). On numerous occasions, the hearing record shows that the student was escorted to the school's quiet room, placed in a locked time-out room or put on sanctions (Dist. Exs. 173; 181).

At the impartial hearing, the student's certified school counselor from Family Foundation testified that the student participated in student group counseling, family counseling and a social



phobia group (Tr. pp. 737, 779-80). The hearing record does not indicate how often the student participated in student group counseling sessions nor does it offer any details regarding the focus of the sessions. With regard to family counseling, the school counselor reported that the student's mother had been extremely involved in the program and that the student's father also participated (Tr. pp. 761-62). She noted that the student had a lot of guilt related to his behavior and the impact on his family and that family counseling was an important part of the student's program (Tr. pp. 758, 762, 823-24). The student's mother testified that she had been to the school on five occasions to participate in family counseling sessions, which lasted for an hour to an hour and one half (Tr. p. 613). The student's mother further testified that she had participated in parent training, where parents learn the rules of the school and about their child's disability and how to work with it (Tr. pp. 614-16). According to the student's mother, during parent counseling and training, parents discuss being team members with Family Foundation and what to expect at each stage of growth and healing (Tr. p. 616). Beginning in August 2007, the student participated in a social phobia group of ten to twelve students on a weekly basis (Tr. p. 741). The social phobia group focused on desensitization and included a social skills component (Tr. pp. 739-40). The counselor reported that the student had participated in at least seven large group "table topic" sessions for which she was present and on one occasion the student had volunteered to talk at the table (Tr. pp. 791-92). At least one table topic session focused on the student's poor attitude toward doing chores (Tr. pp. 753-54).

According to Family Foundation records, the school psychologist saw the student on at least four occasions to assess the student's emotional status during his enrollment in Family Foundation and the consulting psychiatrist also saw the student at least four occasions for the purpose of medication management (Tr. pp. 297-98; Parent Exs. 3; 4). Nevertheless, the school counselor indicated that no counseling or treatment plan had been developed for the student and Family Foundation was not a treatment facility (Tr. p. 786). Although notes were reportedly kept on group counseling sessions, they were not entered into the hearing record (Tr. p. 788).

The hearing record also shows that the student was enrolled in primarily ninth grade classes at Family Foundation (Tr. pp. 718-19). Ninth grade classes at Family Foundation typically have a ratio of eight students to one teacher (Tr. p. 291). New students receive standardized academic testing (Tr. p. 372). According to Family Foundation's director of admissions, the testing is not used for instructional purposes; rather, the testing is used by the registrar in conjunction with a student's transcript to ensure competency in academic subject areas (Tr. pp. 372-74). The director was not aware of any subsequent standardized testing administered to the student to assess his academic progress (Tr. p. 374). The student's school schedule included English 9, Global Studies 1, Algebra 1A, Spanish 1, and Earth Science courses in addition to chores and study halls (Dist. Ex. 183). The student was also assigned a tutor to assist him in developing study/test taking skills and a peer to assist him with organizational skills in the classroom (Tr. pp. 766, 807-08, 812-14). To address the student's reluctance to go to class, the student was also assigned a "buddy" to escort him to class or in the alternative, to the quiet room (Tr. pp. 802-03). The hearing record reflects that the student received the following academic grades for the fall 2007 semester: Algebra 1A: 45, Earth Science: 35, English 9: 52, Global Studies I: 38 (Dist. Ex. 179). The school counselor acknowledged that an individualized academic program for the student had not been developed (Tr. p. 799). According to the student's mother, the student attended regular classes with the exception of his individual tutoring where the student received some remedial math and English instruction related to eighth grade (Tr. pp. 719-20).

The student's school counselor reported that since enrolling in Family Foundation, the student had made progress in many areas: behaviorally, the student was able to comply with many rules and regulations; academically, the student was willing to do homework; and socially the student was interacting with peers (Tr. p. 752). With regard to chores, the student initially had a poor attitude and was not doing what was required of him, but improved following a large group counseling session (Tr. p. 753). According to the school counselor, the student did not initially engage in the social phobia group, but over time he had begun to participate by discussing his own concerns and giving feedback to others (Tr. pp. 741-42). The school counselor opined that after five months at Family Foundation, the student was socially interactive and more responsible about himself (Tr. p. 768). In addition, the school counselor indicated that the student's self-esteem had improved and he was assigned to shadow another student (Tr. pp. 756-57). The counselor opined that the cognitive part of the program helped the student to challenge the automatic thinking that occurred as a result of his obsessive compulsive disorder (OCD) (Tr. p. 754; see Dist. Ex. 71 at p. 3). She indicated that although the student was controlling his anger on a behavioral level, the student continued to have problems with perceptions and negative attitude and was scheduled for enrollment in an anger management group (Tr. pp. 755, 786-87, 826-27). The school counselor reported that although the student had "not needed to go in the quiet room for quite a while," his behavior was "up and down all along," and further acknowledged that the student continued to "go through challenging periods" (Tr. p. 824).

The counselor also acknowledged that the student's grades did not reflect "a whole lot of progress" and that the student would likely be required to repeat ninth grade (Tr. pp. 764, 812). However, she noted that the student was attending classes and completing class and homework assignments (Tr. pp. 765-66, 802). The school counselor indicated that with regard to academics, the student's greatest challenge was his studying and test-taking skills and indicated that the student was assigned a staff tutor to assist him (Tr. pp. 766, 810, 812-13). The school counselor opined that the behavioral component of the Family Foundation program had helped the student develop the necessary skills to begin to be a successful student (Tr. pp. 802-03). The student's counselor acknowledged that the priority of Family Foundation was to address a student's behavior first and then academics (Tr. pp. 800-01). The student's mother confirmed that addressing the student's behavior was a priority over academics (Tr. p. 717).

Family Foundation's director of admissions testified that "we have seen [the student] really struggle emotionally and behaviorally and we have seen him make progress" (Tr. p. 278). The director opined that Family Foundation had been able to successfully manage the student's behavior differently than previously had been done, and that the student had responded to the environment in a way that was promising and conducive to future growth and maturation (Tr. p. 419). The director also testified that the student had made some positive changes and had recently gone on a school trip, which he stated was "reflective of the staff's ability to trust him" (Tr. pp. 416-17).

The hearing record also shows that the school psychologist's notes suggested that in September 2007, the student was at risk of slipping to the "a point of a full melt down" because the student could not cope with the program (Parent Ex. 4 at p. 3). Two and one half weeks later, the psychologist reported that the student had demonstrated a "dramatic turn around," in recognizing that he had taken no responsibility for his actions and that the student was "endeavoring to work the program" (id. at p. 2). A November 2007 note from the psychologist

indicated that the student continued to get into mild trouble due to his fidgety behavior and reactivity when spoken to (Dist. Ex. 177).

According to the student's mother, the student was slowly improving academically (Tr. p. 566). While noting significant changes, the student's mother also confirmed that the student was still not passing all his classes and still had emotional issues to deal with (Tr. p. 639). The student's mother reported that she had discussed with Family Foundation that academics came second and the primary concern at the time was getting the student stable and "feeling good about himself" (Tr. p. 717). The student's mother stated that the student was reading for the first time in three years, that he was writing, that he was caring about his work and that he wanted to learn (Tr. p. 718). She reported that the first time she saw the student after he entered Family Foundation, he was "a new kid," characterizing him as respectful, hopeful and demonstrating manners (Tr. pp. 564-65). The student's mother described the changes in the student as "nothing short of a miracle" and indicated that the student was "stable ... not manic ... and thinking rationally" (Tr. pp. 617-18). The student's mother reported that as of November 1, 2007, the student's discipline problems had ceased and that he been assigned to support new students (Tr. p. 620).

The student has been reported to have significant executive functioning deficits, difficulties with attention and remaining on task, in addition to severe dyspraxia (Parent Exs. 40 at p. 8; 47 at p. 1). According to the student's July 2007 IEP, he requires assistance in developing organizational skills, completing and turning in assignments in a timely manner, creating study guides to assist him in preparing for tests and chunking assignments into manageable parts to complete larger assignments (Dist. Ex. 151 at p. 3). The July 2007 IEP also indicated that he required support and guidance in social situations and that he needed to improve the speed and legibility of his cursive handwriting, as well as the motor skills necessary for using a computer keyboard as an alternate means to handwriting (*id.* at p. 4). There is little discussion or evidence in the hearing record detailing the educational services provided to the student or otherwise available at Family Foundation. Although the hearing record shows that the student was assigned a tutor to assist him with study skills and test taking, there is no evidence in the hearing record regarding the content of the tutoring sessions. In addition, the hearing record indicates that the tutor's only qualification was that she wrote a bachelor's level thesis on study skills (Tr. pp. 766, 812-13). Moreover, although the hearing record shows that the student has exhibited fine motor difficulties that affect his handwriting (Dist. Ex. 151 at p. 2), there is no indication in the hearing record that the student's writing skills were addressed in any manner at Family Foundation. Lastly, the parents' claim in their answer that the student's report card "shows plain progress" and his grades "demonstrate improvement from month to month," is not supported by the student's report card (Dist. Ex. 179). The fall 2007 report card showed that the student's grades fluctuated over the four months of the fall semester and the student's only consistent academic progress was in English 9, in which he received a semester grade of 52 (*id.*). Based on the above, the hearing record does not support a finding that the student's academic needs were being adequately addressed at Family Foundation or that the student received specially designed instruction to meet his unique needs.

The hearing record does not include counseling notes nor is there testimony regarding the content of the student's group counseling sessions. The student's family counseling sessions addressed his behavior as it related to his family (Tr. p. 758). The hearing record suggests the student's social phobia group included some social skills training, but does not indicate what the training consisted of. The director testified that if a therapeutic assessment of the student's social emotional progress had been done, it had not been made available to him (Tr. p. 393).

Although the student's mother and school counselor noted that behavior was a primary area of concern for the student, the hearing record demonstrates that Family Foundation did not conduct an FBA of the student nor develop a BIP (Tr. pp. 369-70). Nevertheless, many of the student's inappropriate behaviors were addressed through placement in a quiet room, a locked time-out room and the administration of sanctions (Dist. Ex. 173). I note that despite the program's reliance on these interventions, the student only saw the psychologist on four occasions (Tr. pp. 297-98; Parent Ex. 4). The director testified that there was no written policy detailing when a specific sanction should be used or for how long, no official record maintained of a student being put on a sanction, and no policy limitations for the amount of time a student could be removed to the quiet room or time-out room (Tr. pp. 301, 313-14, 357). Further review of the hearing record reveals that the electronic logbook suggested that on one occasion, the student remained in a time-out room for six hours (Dist. Ex. 173 at pp. 50-53).<sup>19</sup> Due to the lack of details surrounding the content of the student's counseling sessions, coupled with the program's reliance on sanctions and time-out to address the student's inappropriate behavior and the lack of objective assessment of the student's behavioral needs and social emotional progress, I am constrained to find that the parents failed to establish at the impartial hearing that the Family Foundation program adequately addressed the student's social emotional needs.

Having determined that the Family Foundation is not appropriate for the student because the parents have not established that it adequately addressed the student's academic and emotional needs, I need not reach the issue of whether equitable considerations support the parents' 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; see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have reviewed the parties' remaining contentions, and find that I need not reach them in light of my determination.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated April 24, 2008 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 2007-08 school year.

**Dated: Albany, New York  
August 1, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>19</sup> According to the electronic log book, during the six-hour period that the student was confined to the time-out room, the room was unlocked for an unspecified period of time (Dist. Ex. 173 at pp. 50-53).