



The University of the State of New York

The State Education Department State Review Officer

No. 08-070

Application of the BOARD OF EDUCATION OF THE CHAPPAQUA 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, attorneys for petitioner, Lisa Rusk, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Neal Howard Rosenberg, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Bromley Brook School (Bromley Brook) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled in the ninth grade at Bromley Brook, a residential all-girls school located in Vermont (Tr. pp. 7, 134, 142; Parent Ex. F). Bromley Brook 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. 178; see 8 NYCRR 200.1[d], 200.7). The student has previously received a variety of diagnoses, including, a mood disorder not otherwise specified (NOS) with psychotic features, an attention deficit hyperactivity disorder (ADHD), a central auditory processing disorder (CAPD), an intermittent explosive disorder, an expressive language disorder, and a learning disorder NOS (Tr. p. 25; Dist. Exs. 3 at p. 1; 4 at p. 5). Academically, the student has demonstrated weaknesses in decoding and reading comprehension; math calculation and solving word problems; and written expression including grammar and paragraph development (Dist. Ex. 22 at pp. 3-4). Handwriting difficulties have also been noted (Dist. Ex. 20 at p. 2). At the time of the June 2007 Committee on Special Education (CSE) subcommittee meeting, the student was characterized as having a friendly nature, but it was further reported that she had difficulty respecting personal boundaries, and that she faced challenges in the areas of attention and emotion (Dist. Ex. 22 at p. 5). The student's eligibility for

special education services and classification as a student with an emotional disturbance (ED) are not in dispute in this proceeding (Tr. p. 414; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The student was admitted to a psychiatric hospital in November 2004 and was subsequently referred to the district's CSE during her fifth grade (2004-05) school year (Tr. pp. 30, 86; see Dist. Exs. 3 at p. 8; 4 at pp. 2, 4). Evaluations conducted as a result of the referral revealed that the student's overall cognitive functioning was in the average range (Dist. Ex. 3 at p. 8), but that the student's fluency with regard to academic tasks was "very low" (Dist. Ex. 2 at p. 2). On measures of academic achievement, the student attained average scores in basic reading, math reasoning, basic writing and written expression (id.). The student's scores in reading comprehension, phoneme-grapheme relationships and math calculation skills were in the low average range and her broad reading skills were determined to be in the low range (id.). Responses to behavioral scales provided by the student's teachers and mother revealed that the student exhibited significant behavioral difficulties in the home environment and that school was a source of anxiety and frustration for the student (Dist. Ex. 3 at pp. 5-8). The student's teachers reported concerns regarding the student's attention, poor adaptive skills and emotional fragility (id. at p. 9). In addition, the results of two psychiatric evaluations indicated that the student had a mood disorder with possible psychosis (Dist. Exs. 1; 4 at p. 5). The first psychiatrist opined that the student would benefit from a structured 24-hour therapeutic program that would address her psychiatric problems and behavior (Dist. Ex. 4 at p. 5). The second psychiatrist recommended placement in a hospital-based day treatment program for full psychiatric evaluation and noted that if a hospital-based program could not stabilize the student then a residential treatment program should be considered (Dist. Ex. 1).

The CSE met on February 3, 2005 (Dist. Ex. 7 at p. 1). According to the parents, although no individualized education program (IEP) was developed at the February 3, 2005 CSE meeting, the CSE recommended that the student be placed in a therapeutic day program (Tr. p. 32; Dist. Ex. 7 at p. 1). Asserting that a therapeutic day program would be inappropriate for the student, the parents requested an impartial hearing and sought a residential treatment program for the student (Dist. Ex. 7 at p. 2). In their hearing request, the parents specifically requested Devereux Glenholme (Glenholme) as a potential placement and advised the district that Glenholme had accepted the student (id.; see Tr. pp. 87, 443-44; Dist. Exs. 5; 6).¹ By letter dated March 3, 2005, Glenholme's director of admissions advised the district's CSE chairperson that the student had been accepted into the program (Dist. Ex. 8). Subsequently, the CSE reconvened at the parents' request in March 2005 and recommended residential placement for the student at Glenholme for the remainder of the 2004-05 school year (Tr. pp. 31-33, 86-87). The student entered Glenholme in April 2005 (Tr. p. 65).

A June 5, 2005 review prepared by Glenholme indicated that the student was progressing at an appropriate rate in math, but had difficulty completing multi-step word problems and estimating numbers (Dist. Ex. 27 at p. 1). Glenholme also reported that the student was progressing at an appropriate rate in reading, but skipped or added words during guided reading (id.). She also had difficulty explaining the main idea of a story and difficulty sequencing and drawing

¹ The hearing record indicates that Glenholme is a private school located in Connecticut that is approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 63-64; see 8 NYCRR 200.1[d], 200.7).

conclusions (id.). With moderate staff assistance and the use of graphic organizers, the student was reported to be capable of writing multiple three to five sentence paragraphs (id.). Improvement was noted in the student's handwriting skills and the student's work was described as legible throughout all of her assignments (id.). The review also indicated that the student was easily redirected despite distractions from her peers and surroundings (id.). The student was characterized as "well-mannered" and as someone who went "out of her way to do kind and caring acts for others;" however, she was also noted to become defiant at times (id. at p. 2).

An initial speech-language review conducted by Glenholme on June 15, 2005 indicated that the student had been receiving direct speech-language therapy services on an informal basis since her admission to the school (Dist. Ex. 27 at p. 3). The student's Glenholme speech-language therapist commented that when distracted or when required to integrate ideas, the student had difficulty processing longer bits of information (id.). She further noted that the student had difficulty understanding directions the first time given (id.). The evaluator described the student's basic linguistic and lexical skills as "adequate for daily communication and academic tasks" (id.). However, she recommended that the student continue to receive speech-language therapy on an informal basis in a group setting and that the student's processing and expressive language skills continue to be monitored (id. at p. 4). The evaluator also stated that therapy goals should target the student's verbal processing and memory, supralinguistic understanding, and organization of ideas for oral and written expression (id.).

On June 16, 2005, a meeting concerning the student's progress at Glenholme took place, in which the student's mother, a social worker and special education teacher from Glenholme, and a regular education teacher and special education teacher from the district participated (Dist. Ex. 26). Meeting minutes revealed that the student's tantrum behaviors had ceased and that the student was easily redirected (id. at p. 1). In addition, it was reported that the student's pouting, crying and whining had noticeably decreased since her enrollment (id.). It was also noted that the student had made a significant shift in her isolating behavior, and that she had made many friends (id.).

The CSE continued to recommend placement at Glenholme for the 2005-06 school year and the student attended Glenholme during that school year (Tr. pp. 34, 87-88). The student's sixth grade report card indicated that by the end of the first quarter of the 2005-06 school year, the student was receiving letter grades of A or B in all of her academic classes (Dist. Ex. 17).

On December 14, 2005, a special education teacher from the district conducted a classroom observation of the student at Glenholme (Dist. Exs. 10; 11).² The district's special education teacher reported that the student responded well to all of the program modifications and that the student's teacher and social worker advised her that the student responded well to the token economy employed to reinforce positive behaviors (Dist. Exs. 10 at p. 2; 11 at p. 2). The student's teacher at Glenholme also reported to the district's special education teacher that although math was stressful for the student, the student was progressing satisfactorily toward all of the math goals enumerated in her IEP (Dist. Ex. 11 at p. 1). At the time of the classroom observation, the student was reported to be reading at a fourth grade level, and her teacher noted progress in the student's reading comprehension (id.). The student's teacher also indicated that the student could become easily frustrated and could panic when she was uncertain (id.). New directions, physical ailments

² According the hearing record, the date on Dist. Ex. 11 should read as follows: "12/14/05" (Tr. p. 41).

and unexpected events triggered anxious feelings in the student, and the student's teacher also said that change and unstructured time were difficult for the student (id.). According to the student's teacher, the student was very motivated by tangible rewards for academic and behavioral performance (id.). Lastly, Glenholme's social worker reported to the district's special education teacher that the student's overall strength was that she wanted to do well, and that it was very important to the student to please her parents (id. at p. 2).

On May 11, 2006, a subcommittee of the CSE gathered for the student's annual review and to develop her IEP for the 2006-07 school year (Dist. Exs. 9; 28). Meeting participants included the following individuals: the CSE chairperson, the student's mother, a school psychologist, special and regular education teachers, a school counselor, and a speech-language pathologist from the district (Dist. Ex. 9 at p. 6). Glenholme's special education teacher, social worker and speech-language pathologist also participated in the meeting by telephone (id.). According to minutes from the May 2006 meeting, the CSE subcommittee recognized that the student continued to face challenges in the areas of attention and emotion (id.). The CSE subcommittee concluded that the student required ongoing monitoring to identify triggers to her anger as well as work on strategies to decrease her aggressive outbursts (id.). The meeting minutes indicated that the student also required social skills instruction, and that she also reported somatic complaints as a task avoidance behavior (id.). Meeting minutes noted that the student exhibited a greater level of acceptable behavior and emotional control within the educational setting than during home visits or in the cottages in her school (id.). Regarding academics, the student was reported to have made progress in reading, decoding and spelling as well as her willingness to participate in writing activities (id.). The Glenholme staff reported weaknesses in the student's ability to process and use language (id.). With regard to transfer of treatment, Glenholme staff noted that the family had used five of the monthly family sessions offered since the student's enrollment and that the parents had attended two out of eight parent training seminars (Tr. p. 115; Dist. Ex. 28 at p. 2). In addition, according to Glenholme staff, the parents declined the in-home sessions offered to them (id.).

For the student's seventh grade (2006-07) school year, the CSE subcommittee recommended a continued 12-month placement at Glenholme in a 12:1+1 classroom with related services consisting of weekly individual counseling, weekly counseling in a group of five, and monthly parent counseling and training (Dist. Ex. 9 at pp. 1-2). Numerous program and testing modifications were also recommended in addition to the use of a word processor (id. at p. 2). Annual goals and short-term objectives were developed related to study skills, reading, writing, mathematics, and social/emotional/behavioral skills (id. at pp. 7-15). Meeting minutes indicated that all goals and services were discussed and agreed upon by the parties, and that the student's mother agreed with the placement recommendation at Glenholme (Tr. p. 98; Dist. Ex. 9 at p. 6). The student's mother reported during the meeting that there was a "systemic problem with communication" at Glenholme, and she was concerned that communication between the parents and Glenholme was not regularly scheduled (Tr. p. 96; Dist. Ex. 28 at p. 2). The hearing record reflects that the social worker from Glenholme agreed to ensure that an opportunity for parent counseling would occur each month (Dist. Ex. 28 at p. 2). The CSE subcommittee agreed to reconvene upon the completion of a speech-language evaluation, in light of Glenholme staff's concerns regarding the student's speech-language needs (Tr. p. 89; Dist. Ex. 9 at p. 6).

On May 26, 2006, the district's speech-language therapist conducted a speech-language reevaluation of the student (Dist. Ex. 15). Administration of the Clinical Evaluation of Language

Fundamentals-Fourth Edition (CELF-4) yielded the following composite standard scores: receptive language 67, expressive language 89, language memory 76 and core language 78 (id. at p. 2). The student's receptive and expressive language skills were determined to be within the below average to low average range (id. at p. 4). According to the evaluating therapist, the student exhibited strengths in her ability to understand relationships between words and to verbally explain how two words were related (id.). The therapist also found that the student's ability to verbally generate complex and creative sentences was an area of strength, as was the student's working memory (id.). The student demonstrated weaknesses in the areas of answering comprehension questions about spoken paragraphs, inferencing, making predictions, attending to details, processing complex material and following complex, spoken directions (id.). The therapist concluded that the student would greatly benefit from direct teaching of concepts, language models, visual support, cues, encouragement, redirection to task, and clarification of directions (id.).

On May 30, 2006, Glenholme staff together with the student's mother and a representative from the district, developed a clinical treatment plan for the student (Dist. Ex. 29). According to the treatment plan, the student was intelligent and very motivated by the token economy (id. at p. 1). The treatment plan further indicated that the student desired to do well and that when focused and on task, she was capable of high level work (id.). Moreover, the treatment plan noted that the student had made improvements in many areas; principally, her social skills, as the student no longer isolated herself from her peers and had made many friends (id.). However, the treatment plan noted that the student's improvements in social skills were accompanied by an increase in "silly" behaviors (id.). The student was described as quick to frustration and although her tantrum behaviors had decreased, the treatment plan indicated that when she did not get her way, the student became argumentative with adults (id.). The student's tentative discharge criteria included the following: mastering coping skills to deal with anxiety, learning the necessary skills to successfully implement program structure at home, improving her social skills, and improving her adult relationships (id.).

On June 20, 2006, a subcommittee of the CSE reconvened to review the speech-language evaluation and finalize the student's IEP (Dist. Ex. 9 at p. 6). The June 2006 CSE subcommittee recommended that the student receive weekly individual speech-language therapy and weekly speech-language therapy in a group of four (id. at p. 2). In addition, goals related to making inferences, expressing the meaning of non-literal and ambiguous language, developing vocabulary, and recalling and comprehending a sequence of events were added to the student's IEP (id. at pp. 11-12). Minutes from the June 2006 meeting noted that no other changes were made to the student's program or services (id. at p. 6).

The student began the 2006-07 school year at Glenholme (Tr. p. 98). In October 2006, the parents sought a private psychological evaluation of the student (Dist. Ex. 12 at p. 2). The parents' private psychologist evaluated the student by means of a clinical interview, mental status examination, neurobehavioral examination, standardized testing and a review of the student's records (id. at p. 1). Evaluation of the student's mental status revealed that the student's thinking was logical, coherent and appropriately goal directed (id. at p. 3). The psychologist reported that there was no evidence of thought disturbance, that the student's mood was normal and that she expressed a full range of affect (id.). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ score of 83, placing the student within

the low average ability range (id. at p. 4). The evaluator indicated that the student demonstrated notable weaknesses in the areas of verbal and language-based abilities (id. at p. 8). The Behavior Rating Inventory for Executive Functioning (BRIEF), completed by the student's mother, revealed that the student also had impairments in executive functioning that were manifested "behaviorally and cognitively as compromised abilities to problem solve, monitor, integrate, and transition from one activity to another" and which presented the student with difficulty in unstructured situations (id. at pp. 5, 8). Regarding academic proficiencies, the psychologist reported that the student was functioning at the fifth and sixth grade level in all areas, and the psychologist further concluded that the student's reading and language-based abilities were areas of weakness for the student, as were her written language skills (id. at p. 8). The psychologist opined that both behaviorally and emotionally the student manifested many of the features of ADHD and had difficulty with mood and affect regulation (id.). As a result, the psychologist concluded that the student continued to need intensive remediation and support to move ahead academically (id.).

The psychologist noted that the student's mother reported that the student had made significant gains during the past year and a half, and that the student had developed greater self-control and was more focused (Dist. Ex. 12 at p. 2). The psychologist also stated that the student's mother noted that the student had shown positive growth and development of skills in academics (id.). The student advised the psychologist that at Glenholme, she felt nurtured and supported academically and emotionally, and that while she wanted to live at home and attend a local school, the student understood that she required a structured setting (id. at p. 3). Lastly, the psychologist determined that the student had benefitted considerably from the structured, special education setting provided at Glenholme, and she opined that the student would continue to make gains over the coming year (id. at p. 8). Recommendations for the student included a highly structured school environment that specialized in teaching students who manifest a range of learning styles and abilities in addition to continued follow-up visits with a psychiatrist for medication, and participation in structured peer group activities in order to increase the student's social skills and assist her in developing common interests with peers (id.).

On November 7, 2006, a meeting took place at Glenholme to review the student's progress and to make future planning recommendations for the student (Dist. Ex. 18 at p. 2). The parents, two of Glenholme's social workers, a behavior specialist and the student's special education teacher took part in the meeting (id.). Meeting notes indicated that as a result of the structures and supports in place at Glenholme, the student continued to make progress (id.). The parents advised Glenholme staff that they were considering other programs for their daughter and requested that the student's special education teacher complete some application information (id.). Glenholme staff maintained that the student continued to be appropriate for the school's program and that she required the structure and support provided there (id.).

On December 21, 2006, the parents unilaterally removed the student from Glenholme, and in January 2007, they placed her in a residential program at the Kildonan School (Kildonan), located in New York State (Tr. pp. 35, 414, 416; Dist. Ex. 19 at p. 3). The student's mother reported that the parents enrolled the student at Kildonan because they believed that the student was academically behind and they wanted their daughter to attend "a school [that] could bring her skills back up to grade" level (Tr. p. 415).

In June 2007, the student left Kildonan amid reports that she was having difficulty in the school's residence (Tr. pp. 53, 417; Dist. Ex. 21 at p. 1). Although the student made some academic

improvements, it was reported by Kildonan staff that she exhibited social and behavioral issues that they could not manage (Tr. pp. 53, 416-17; Dist. Exs. 20; 21 at p. 1; 22 at p. 6). Kildonan staff agreed to possibly invite the student to return as a day student, provided that she enrolled in "a summer experience" to work on social issues (Tr. p. 53; Dist. Ex. 21 at p. 1). On June 11, 2007, the parents enrolled the student in a therapeutic wilderness program located in North Carolina for 50 days (Tr. pp. 161, 427-28; Dist. Exs. 21 at p. 1; 24 at p. 2).

Due to the parents' uncertainty as to whether the student would be returning to Kildonan and as to the nature of her needs upon completion of the wilderness program, the parents requested that the district investigate possible day placements for the student (Tr. p. 444). By e-mail dated June 12, 2007, the student's mother advised the CSE chairperson of her interest in day programs for the student (Dist. Ex. 25).

On June 19, 2007, a subcommittee of the CSE convened for the student's annual review (Dist. Ex. 22). The CSE subcommittee chairperson, the district's director of special education, the school principal, a district special education teacher, a district regular education teacher, a school counselor, and the parents participated in the June 2007 meeting (*id.* at p. 6). For the student's eighth grade (2007-08) school year, the June 2007 CSE subcommittee recommended residential placement at Glenholme in a 12:1+1 classroom with related services consisting of two 60-minute sessions of individual counseling per week, one 60-minute session of counseling in a group of five per week, one bi-weekly 60-minute session of parent counseling and training, one 30-minute session of individual speech-language therapy per week, and one 30-minute session of speech-language therapy in a group of three per week (*id.* at pp. 1-2). The student was also approved for extended school year (ESY) services (*id.* at p. 2). Numerous program and testing modifications were also afforded to the student (*id.*). Annual goals and short-term objectives were developed related to study skills, reading, writing, mathematics, speech-language and social/emotional/behavioral skills (*id.* at pp. 7-12). Meeting minutes reflected that the parties agreed upon the goals listed in the resultant IEP (*id.* at p. 6). Minutes further indicated that according to Glenholme, the student's placement was still available (*id.*). The June 2007 CSE subcommittee agreed that the district would conduct a psychiatric evaluation of the student that they would review in August 2007 (Tr. p. 54; *see* Dist. Ex. 22 at p. 6). The parents also agreed to provide the CSE subcommittee with recent private psychiatric and psychological evaluations (Dist. Ex. 22 at p. 6). According to the June 2007 IEP, the parents objected to placing the student at Glenholme, but stated that they "look[ed] forward to working collaboratively with the district in determining the appropriate placement for their daughter" (*id.*).

On July 31, 2007, the student was discharged from the wilderness program and returned home (Tr. p. 448; Dist. Ex. 24 at p. 2). At the impartial hearing, the student's mother testified that while driving the student home from the wilderness program, she received a telephone call from the district indicating that it had arranged for intake appointments with day placements on or about August 1, 2007 and August 2, 2007 (Tr. pp. 445-46). The student's mother testified that she had cancelled the intake appointments with day placements because the student's counselor at the wilderness program recommended that the student attend an all-girls, residential placement (Tr. p. 446; *see* Tr. p. 55). With regard to the psychiatric evaluation agreed to at the June 2007 CSE subcommittee meeting, the student's mother testified that following the June 2007 CSE subcommittee meeting, she had contacted the psychiatrist recommended by the district who advised her that she would meet with the student when the student returned from the wilderness

program (Tr. p. 452). The district's director of special education testified that the student's mother cancelled the scheduled psychiatric evaluation for the student (Tr. pp. 58-59). The student's mother testified that she could not recall if the district had scheduled a psychiatric evaluation for the student on August 15, 2007 and whether she had cancelled it (Tr. pp. 452-53). The student's mother further acknowledged that she did not go to the appointment, but could not remember why she did not attend (Tr. p. 453).

According to the student's August 13, 2007 discharge summary prepared by a primary clinician/field supervisor from the wilderness program, upon her release, the student had completed the highest level of achievement in the program, having mastered survival, first aid and service skills, and that she had learned navigation skills, with a focus on commitment and maturity (Dist. Ex. 24 at pp. 2-3). The evaluator strongly recommended that the student continue directly on to a therapeutic boarding school (*id.* at p. 4). Other recommendations included were weekly individual and group therapy sessions (*id.*). Regarding the student's family relationships, the evaluator suggested that the parents and the student's siblings participate in all family activities offered by the therapeutic boarding school (*id.* at p. 5). The student's counselor and the student's mother indicated that the student's counselor from the wilderness program conveyed to them that placement in an all-girls school was preferable, although the hearing record does not contain a report indicating as such (Tr. pp. 191, 419).

By e-mail to the district dated August 20, 2007, the student's mother stated that the student would be attending Bromley Brook beginning on August 27, 2007 (Dist. Ex. 23). The student's mother further requested that the August 2007 CSE meeting be postponed until mid-fall, but noted that the parents wanted to maintain contact with district staff throughout the school year to see if it would be possible to return the student to the district's school in fall 2008 (*id.*). On August 25, 2007, the parents signed an agreement with Bromley Brook for the student's enrollment for the 2007-08 school year (Parent Ex. F at p. 9). The student entered Bromley Brook on or about August 25, 2007 (Tr. p. 428).³

By due process complaint notice dated October 12, 2007, the parents requested an impartial hearing, in which they asserted that the district's recommended placement for the student at Glenholme was inappropriate to meet the student's special education needs and sought tuition reimbursement for Bromley Brook (Joint Ex. 1 at p. 2).⁴ On October 18, 2007, the district moved to dismiss the parents' due process complaint notice on sufficiency grounds, arguing that the October 12, 2007 due process complaint notice failed to specify which IEP was at issue and stated facts referring to a student who was not involved in the instant matter (Joint Ex. 2).

On October 21, 2007, the parents amended their due process complaint notice, and alleged that the 2007-08 IEP failed to offer the student a free appropriate public education (FAPE) because placement at Glenholme would not have conferred educational benefits on the student, rather, it would have caused her to regress (Joint Ex. 3 at p. 2). The parents further alleged that the student had previously attended Glenholme for 20 months and during that time, Glenholme failed to

³ The student's mother testified that she did not recall the exact date that the student started at Bromley Brook (Tr. p. 428).

⁴ The parents' October 12, 2007 due process complaint notice was received by the district on October 15, 2007 (Joint Ex. 1 at p. 1).

address the student's academic and therapeutic needs and the student failed to show meaningful educational progress (id.). The parents asserted that Glenholme fails to provide "a sufficient level of integrated support in a full-time special education school" (id.). By their amended due process complaint notice, the parents sought reimbursement for the student's tuition at Bromley Brook (id. at p. 3).

By letter dated October 24, 2007, the district responded to the parents' amended due process complaint notice, maintaining that Glenholme was an appropriate placement for the student (Joint Ex. 4). On November 13, 2007, the parents issued a second amended due process complaint notice, contending that the 2006-07 and 2007-08 IEPs were deficient, and also adding a request for reimbursement for the student's tuition at Kildonan (Joint Ex. 5 at pp. 2-3).⁵

On January 16, 2008, an impartial hearing convened and after three days of testimony, concluded on March 20, 2008 (IHO Decision at p. 1). By decision dated June 15, 2008, the impartial hearing officer found that the district failed to meet its burden to demonstrate that it offered the student a FAPE during the 2007-08 school year (id. at p. 23). The impartial hearing officer found that the student's 2007-08 IEP contained the same goals as the 2006-07 IEP (id. at p. 21). The impartial hearing officer concluded that although there was evidence that the student had made some progress during her previous enrollment at Glenholme, there was also evidence of "a lack of progress in so many areas both academically and emotionally" (id. at p. 23). Noting that the district did not present any witnesses from Glenholme and that no one from the CSE had observed the student at Glenholme (id. at p. 22), the impartial hearing officer concluded that Glenholme was inappropriate to meet the student's special education needs (id. at p. 23). In addition, the impartial hearing officer concluded that placement of the student at Bromley Brook was reasonably calculated to confer educational benefits on the student (id. at p. 25). The impartial hearing officer found that Bromley Brook made adjustments to meet the student's individualized needs and that the student had made progress in reading, writing and therapeutically due to the supports that Bromley Brook had put in place for the student (id. at pp. 24-25). With respect to equitable considerations, the impartial hearing officer found in the parents' favor, describing the parents as "involved," and finding that they had cooperated with the CSE subcommittee in formulating the student's IEP and had "made it quite clear that the continued recommendation to the Devereux [Glenholme] school was not acceptable" (id. at pp. 25, 27). Accordingly, the impartial hearing officer awarded tuition reimbursement to the parents for the student's 2007-08 school year at Bromley Brook (id. at p. 27).

The district appeals, asserting that the impartial hearing officer erred in finding that it failed to offer the student a FAPE for the 2007-08 school year, that Bromley Brook was appropriate for the student, and that equitable considerations weighed in favor of the parents. Specifically, the district alleges that the parents only challenged the district's placement recommendation at Glenholme, and therefore the impartial hearing officer erred in making findings with respect to issues such as goals, that were not raised in the parents' due process complaint notice. The district further argues that the impartial hearing officer's decision is not supported by the hearing record, as the hearing record amply demonstrates that the student had made meaningful therapeutic and

⁵ Although the parents' second amended due process complaint notice sought tuition reimbursement for the period in 2006-07 that the student attended Kildonan, during the impartial hearing, the parents withdrew their request for tuition reimbursement for Kildonan (Tr. p. 413; Joint Ex. 5 at p. 3).

educational progress during her prior enrollment at Glenholme. The district also alleges that the impartial hearing officer erred to the extent that she found Glenholme inappropriate because no one from Glenholme testified on behalf of the district at the impartial hearing and based on her finding that the district had not observed the student during her previous enrollment at Glenholme.

With respect to the parents' unilateral placement, the district maintains that the parents did not meet their burden to demonstrate that Bromley Brook was appropriate for the student. The district argues that Bromley Brook did not have a clear understanding of the student's academic needs or how to address them, nor could the school properly respond to her social and emotional needs. Lastly, the district asserts that equitable considerations weigh against the parents because the parents failed to make the student available for intake interviews, failed to timely advise the district of their unilateral placement of the student at Bromley Brook, and cancelled a CSE meeting scheduled for August 2007. As relief, the district requests reversal of the impartial hearing officer's award of tuition reimbursement for Bromley Brook for the 2007-08 school year.

In their answer, the parents deny many allegations in the petition and argue that the district failed to offer a FAPE to the student, that the student's placement at Bromley Brook was appropriate and that equitable considerations support an award of tuition reimbursement. The parents argue that the district failed to sustain its burden to demonstrate that it recommended an appropriate placement by failing to produce a single witness from Glenholme at the impartial hearing. The parents further argue that Glenholme failed to meet the student's academic and therapeutic needs in the past and that the parents had a history of poor communication with Glenholme staff. According to the parents, the student is making progress at Bromley Brook. With respect to equitable considerations, the parents assert that they cooperated with the district at all times; that they only cancelled the intake interviews with day treatment programs because the student's therapist at the wilderness program recommended that the student attend a residential program; and that they did not cancel the August 2007 CSE meeting, instead they merely requested that it be postponed. The parents further allege that they advised the June 2007 CSE subcommittee that they were rejecting the district's recommended placement at Glenholme and explained to the CSE subcommittee the reasons for their rejection. The parents assert that they did not decide to enroll the student at Bromley Brook until late August 2007 and provided the district with written notice on August 20, 2007. As relief, the parents request that the district's petition be dismissed in its entirety.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are 1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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). 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). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see 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).

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).

Returning to the instant case, I will first address the district's argument that the impartial hearing officer erred by making findings on issues that were not raised in the parents' due process complaint notice. Pursuant to the IDEA, a party requesting an impartial hearing may not raise issues at an impartial hearing that were not raised in its original due process complaint notice unless the original complaint is amended prior to the impartial hearing (20 U.S.C. § 1415[c][2][E]), or the other party otherwise agrees (20 U.S.C. § 1415[f][3][B]). "[T]he purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" (S. Rep. 108-185, Individuals with Disabilities Education Act Senate Report No. 108-185, "Notice of Complaint," [November 3, 2003]).

A review of the hearing record reveals that the parents amended their due process complaint notice two times (Joint Exs. 1; 3; 5). With each subsequent amendment, the parents continued to challenge the district's recommended placement at Glenholme, alleging that their daughter failed to make educational and therapeutic progress during her previous attendance at Glenholme (id.). At no time did the parents raise any assertions in their due process complaint notices concerning the student's goals enumerated on her June 2007 IEP (id.). On appeal, the district alleges that the impartial hearing officer erred in making findings on issues that were not raised in the parents' due process complaint notice. Although the district's director of special education did testify that the June 2007 CSE subcommittee discussed the student's goals and that no one, including the parents, objected to the proposed goals (Tr. pp. 56-57), the hearing record does not indicate that either party raised any arguments concerning the appropriateness of the goals. Accordingly, the impartial hearing officer should have confined her determination to issues raised in the parents' due process complaint notice and erred by making a finding regarding the goals (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060).

Next, I will address the parents' request that a presumption be drawn against the district because it did not produce a witness from Glenholme to testify at the impartial hearing (Ans. ¶ 36). The district's failure to produce a witness from Glenholme does not automatically result in a finding that the program was not appropriate to meet the student's special education needs (see Application of the Dep't of Educ., Appeal No. 08-081 [parental placement found to be appropriate by a State Review Officer despite the parents' failure to produce any witnesses from the private placement]; Application of the Bd. of Educ., Appeal No. 05-092; Application of a Child with a Disability, Appeal No. 97-2; Application of the Bd. of Educ., Appeal No. 96-9).

A thorough review of the hearing record demonstrates that the June 2007 CSE subcommittee properly constructed an IEP with parental input that reflected the results of current evaluations and information regarding the student's academic and social/emotional needs. Moreover, the IEP developed by the June 2007 CSE subcommittee was modeled after the previous IEP that recommended placement at Glenholme and was agreed to by the parties. The CSE subcommittee met for the student's annual review on June 19, 2007 (Dist. Ex. 22 at p. 1). Meeting participants included the CSE subcommittee chairperson, the director of special education who was also a school psychologist, the school principal, a special education teacher, a regular education teacher, a school counselor and the student's parents (*id.* at p. 6). The hearing record does not demonstrate that a representative from Kildonan participated at the June 2007 CSE subcommittee meeting; however, the district's director of special education indicated that the June 2007 CSE subcommittee reviewed progress reports from Kildonan (Tr. p. 49; Dist. Ex. 20). Additional information considered by the June 2007 CSE subcommittee included an October 2006 independent psychological evaluation provided by the student's parents (Dist. Ex. 12), an October 2006 profile report of the student based on the Conners' Rating Scales-Revised (Dist. Ex. 13), a May 2007 social history update (Dist. Ex. 14), a May 2006 speech-language evaluation (Dist. Ex. 15), a December 2004 medical report of a physical examination of the student (Dist. Ex. 16), an undated report card from Glenholme (Dist. Ex. 17), a November 2006 progress update from Glenholme (Dist. Ex. 18), and a January 2007 treatment summary from Glenholme (Dist. Ex. 19), (Tr. pp. 41-50).

Collectively, the reports indicated that the student had demonstrated academic progress and improvement in social emotional skills during the time period in which she attended Glenholme. The October 11, 2006 psychological report furnished by the parents indicated that according to the student's mother the student had made significant gains during the time she was at Glenholme, that the student had developed greater self-control and was more focused, and that academically the student had shown positive growth and development of skills (Dist. Ex. 12 at p. 2). The student reported feeling nurtured and supported academically and emotionally at Glenholme (*id.* at p. 3). Based on her evaluation which included a clinical interview of the student, standardized testing and a review of the student's records, the evaluator concluded that the student had made significant gains while attending Glenholme (*id.* at p. 8). The evaluator suggested that the student had benefited greatly from the structured special education setting offered by the school and opined that the student would continue to make gains over the coming year (*id.* at p. 8).

A November 2006 IEP progress report, generated by Glenholme, indicated that the student had mastered five math goals and was demonstrating some progress on the majority of her remaining IEP goals (Dist. Ex. 18 at pp. 3-8). A January 2, 2007 treatment summary, written by the student's Glenholme social workers, indicated that the student had made some gains during her time in the program, specifically that the student's use of somatic complaints to avoid tasks had decreased and the frequency and duration of the student's rude and disrespectful behavior had decreased (Dist. Ex. 19 at p. 2). The student reportedly required the support of a token economy to ignore and manage distractions (*id.*). The student was able to move up in the behavior modification system on several occasions, but had difficulty maintaining 95 percent of her token earnings for extended periods of time (*id.* at pp. 2-3). According to the social workers, with the help of relaxation techniques, the student had developed the ability to talk through her frustration and anxiety (*id.* at p. 3). The social workers indicated that "in vivo" therapy, which included the use of coaching and cue cards, was employed to teach the student to transfer skills learned in

counseling sessions (id.). The social workers provided a description of family therapy, which focused on behavioral strategies and setting expectations within the home (id.). According to the Glenholme social workers, the student's parents reported significant improvements in the student's home behavior prior to her discharge (id.). The social workers concluded that the student would benefit from continued individual therapy to further address coping skills, frustration management skills and social difficulties; family therapy to assist the parents in utilizing a structured system of behavioral strategies in the home; and a supportive educational environment that would enhance the student's ability to experience success (id.). The student's Glenholme speech-language therapist indicated that the student had received speech two times per week and made progress with regard to understanding figurative and ambiguous language, using strategies for processing complex auditory information and asking for clarification during classroom based lessons (id. at p. 5). The therapist noted that the student's language comprehension was greater than scores from the May 2006 evaluation indicated particularly when supports were provided (id.). With regard to academics, Glenholme staff indicated that the student benefited from small group instruction with frequent direct instruction (id. at p. 6). The student's teacher noted that the student had learned to use strategies independently when overwhelmed by academics and had made strides toward mastery of her IEP objectives (id.). The teacher reported that the student had done well with the school's behavioral program and recommended that a positive reinforcement plan be used with the student in the future (id.).

In addition to reports from Glenholme and the student's private psychologist detailing the student's progress at the residential placement, the June 2007 CSE subcommittee considered progress reports from Kildonan, which at the time of the June 2007 CSE subcommittee meeting was the student's most recent educational placement (Tr. p. 49). The student's Kildonan language training instructor reported in June 2007 that the student's behavior was initially inappropriate, but had improved over the course of the semester (Dist. Ex. 20 at p. 2). According to the language tutor, the student's handwriting had improved but legibility decreased when the student became tired (id.). The instructor reported that the student could identify learned phonetic concepts at a rapid pace and she could also state the rules that accompanied the skills (id.). The instructor reported that the student made satisfactory progress in spelling and that the quality of the student's writing continued to improve (id.). To improve the student's comprehension, the tutor assisted the student with taking notes and outlining text (id.). The student's math teacher reported that the student had difficulty concentrating, but that when focused she performed well (id. at p. 3). The teacher indicated that although the student could "find common denominators and reduce fractions with the best of them," the student had difficulty on the term exam that required her to add, subtract, multiply and divide fractions and mixed numbers (id.). The student's literature teacher also noted the student's problem with remaining focused (id. at p. 4). She indicated that daily journal writing was an area of strength for the student (id.). The literature teacher noted that although the student's weekend assignments were submitted on time, "they were often hastily completed" (id.). The student's history teacher reported that the student had "persistent difficulty identifying certain countries on maps," that her class participation was highly variable and that she had difficulty limiting her conversations with peers during class lectures (id. at p. 5). The student's earth science teacher reported that the student struggled with the concepts and vocabulary of the course (id. at p. 6). The dean of students reported that the student was usually able to follow dorm schedules, but continued to have difficulty with the social interactions of dorm life (id.). He noted that the student constantly sought the attention of other residents and faculty without realizing when she was inappropriately intrusive (id. at p. 8). According to the dean, when the student perceived that

she was in trouble she would often yell, scream and cry to the extent that it disrupted other students (id.). The dean cited the student's lack of social skills and independence as interfering with the student's ability to successfully participate in dorm life (id.).

According to the district's director of special education at the time of the June 2007 CSE subcommittee meeting, the student "was presenting with very significant social-emotional and behavioral challenges," but academically the student was "doing nicely" (Tr. p. 57). The present levels of performance on the student's IEP were updated to reflect information provided by Kildonan (compare Dist Ex. 22 at pp. 3-5, with Dist. Exs. 20; 21).

The hearing record indicates that the parties were in agreement that the student required a residential placement (Tr. pp. 6-7, 78, 414). The June 2007 CSE subcommittee developed an IEP that recommended placement in a State approved residential placement at Glenholme (Tr. pp. 63-64; Dist. Ex. 22 at p. 1). According to the district's director of special education, Glenholme was very good at providing "intensive behavioral systems but in a humanistic therapeutic way" and did "very good family work" (Tr. pp. 57, 63).

At the impartial hearing, the district presented reports of the student's past success at Glenholme as evidence of the appropriateness of the program for the 2007-08 school year. Both the June 2006 and June 2007 CSE subcommittees recommended that the student be placed in a 12:1+1 classroom at Glenholme (Dist. Exs. 9 at p. 1; 22 at p. 1). In comparison to the student's June 2006 IEP, the June 2007 IEP likewise included recommendations for related services including speech-language therapy, counseling, and parent counseling and training (id.). The June 2007 IEP recommended an increase from one to two individual weekly counseling sessions and from monthly to bi-weekly parent counseling and training sessions (compare Dist. Ex. 9 at pp. 1-2, with Dist. Ex. 22 at pp. 1-2). In addition, the recommended size of the student's speech-language group was reduced (compare Dist. Ex. 9 at p. 2, with Dist. Ex. 22 at p. 2).

As explained above, with respect to the district's recommended program for the student, the parents only challenged the district's placement recommendation at Glenholme in their due process complaint notices. The parties do not dispute that the student requires a residential placement (Pet. ¶¶ 6, 7; Answer ¶ 5). According to the district's chairperson of the May 2006 CSE subcommittee meeting, at no time did the parents raise any concerns with regard to the student's safety at Glenholme nor did the parents raise any concerns regarding the training of Glenholme staff (Tr. p. 99). On appeal and throughout the impartial hearing, the district maintains that Glenholme is an appropriate placement for the student because the student had made academic and therapeutic progress while she attended Glenholme from April 2005 until December 2006. Contrary to the impartial hearing officer's conclusion, as detailed above, I find that the hearing record sufficiently demonstrates that the student had made progress previously at Glenholme (see Dist. Exs. 12; 18; 19; see generally Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008] [noting that although not dispositive, an IEP that is modeled upon an IEP that generated some progress in the past is likely to continue to confer educational benefit]). Under the circumstances of this case, where the student's need for residential placement is undisputed and given the meaningful educational progress that the student attained during her prior enrollment at Glenholme, I find that the district's recommended special education program and placement at Glenholme in the proposed June 19, 2007 IEP, at the time it was formulated, was reasonably calculated to confer educational benefits to the student in the LRE (see Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006] citing to J.R. v. Bd. of Educ., 345 F. Supp.

2d 386, 395 n.13 [S.D.N.Y. 2004]; Antonaccio v. Bd. of Educ., 281 F. Supp. 2d 710, 724-25 [S.D.N.Y. 2003]).

In conclusion, I do not find that the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2007-08 school year is supported by the hearing record. Having determined that the district offered the student a FAPE in the LRE for the 2007-08 school year, I need not reach the issue of whether Bromley Brook was appropriate, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled in its entirety.

Dated: **Albany, New York**
 October 2, 2008

PAUL F. KELLY
STATE REVIEW OFFICER