The University of the State of New York

The State Education Department
State Review Officer

No. 08-137

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

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, G. Christopher Harriss, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which ordered the district to fund respondents' (the parents') son's applied behavior analysis services (ABA) at the Yaled V' Yalda Early Childhood Center (YVY) for the 2008-09 school year. The appeal must be sustained.

At the start of the impartial hearing, the student was attending YVY, a non-profit social services agency (Tr. pp. 42-43; Parent Exs. D at p. 1; H at p. 1; O). The hearing record reveals that YVY provides preschool education through its Head Start programs (Parent Ex. O). YVY has not been approved by the Commissioner of Education as a school with which districts may contract to instruct school-aged students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student has received diagnoses of autism, a pervasive development disorder (PDD), and mental retardation (Parent Exs. C at p. 7; H at p. 1; J at pp. 1, 3; K at p. 2). The student's eligibility for special education programs and services and his classification as a student with autism are not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

The student reportedly achieved developmental milestones "early" until age three, at which time he began to "lose speech" and became less related (Parent Ex. G at pp. 1, 5; see Parent Ex. J at p. 1). The student attended a private nursery school for one year when he was three years old, after which he attended a "therapeutic preschool" (Parent Ex. G at p. 6). From age five and one-half, the student attended a private yeshiva in a "regular" classroom of 25 students with the assistance of a 1:1 Yiddish speaking paraprofessional (id.). While at the yeshiva, the student received individual speech-language therapy in Yiddish, individual counseling in Yiddish,

individual occupational therapy (OT) in English and individual physical therapy (PT) in English as well as home-based ABA therapy from a private provider (id. at pp. 1, 6). In June 2007, the student began attending YVY where he received ABA therapy, speech-language therapy, OT and PT (Tr. p. 40; Parent Ex. J at p. 1; see Parent Ex. B at p. 3). During the 2007-08 school year, the parents sought funding for the OT, PT, speech-language therapy, ABA services and transportation services provided to the student (Parent Ex. B at p. 3).

A private psychosocial report dated December 14, 2005 noted that at home the student's family spoke Yiddish (Parent Ex. G at p. 7). The report also noted that the student knew his name and address, was able to toilet independently, put on his socks, shoes, and pants, was sometimes able to feed himself, and was able to sit through a one-course meal (id. at p. 5). The report also stated that the student had "hyperactive behavior and poor concentration," did not interact with peers, and was described as having no sense of danger and no fear of strangers (id.). The report further stated that in school and at home, 1:1 supervision was necessary to ensure that the student did not open the door and walk out (id.).[1]

On February 25, 2008, an impartial hearing officer (Hearing Officer 1) rendered a decision regarding the student's 2007-08 school year (Parent Ex. B at p. 5). Hearing Officer 1 found that the district had failed to provide the student with a FAPE for the 2007-08 school year and that the services sought by the parents were appropriate (id.). The decision ordered the district to fund 35 hours per week of "ABA SEIT services," five 30-minute 1:1 speech-language therapy sessions per week in Yiddish, four 1:1 30-minute OT sessions per week, two 1:1 30-minute PT sessions per week, and transportation services for the student (id. at pp. 4-5).[2,3]

On February 26, 2008, the Committee on Special Education (CSE) convened to address the student's 2008-09 school year (Parent Ex. C at pp. 1-2).[4] The CSE meeting was attended by a school psychologist, a district special education teacher, an additional parent member, and by telephone, the student's father and the student's "SEIT/speech teacher" from YVY (id. at p. 2). The CSE recommended a 12-month 6:1+1 special class in a specialized school, five 45-minute 1:1 sessions of speech-language therapy per week in Yiddish, two 30-minute 1:1 sessions of PT per

[1] On July 9, 2008, a service coordinator from the HASC Center Inc. in Brooklyn, New York issued a psychosocial update to this December 14, 2005 report (Parent Ex. F). The one-sentence update indicated that the service coordinator reviewed the December 14, 2005 psychosocial evaluation, and aside from the fact that the student now attended YVY and was eight and one-half years old at the time of the report, all the information in the 2005 report was correct (id.).

[2] Hearing Officer 1 ordered that the student receive "ABA SEIT" services (Parent Ex. B at p. 5). However, the student was of school age at the time of that impartial hearing (id. at p. 3). The Education Law defines special education itinerant services (commonly referred to as "SEIT") as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). Likewise, in the hearing record regarding the student's 2008-09 school year, at the impartial hearing, the parties' and the impartial hearing officer (Hearing Officer 2) referred to the requested services as "ABA SEIT" services. Because the relevant services are mischaracterized in the hearing record, I will refer to the recommended educational support service as "ABA" services.

[3] Hearing Officer 1's decision was not appealed by either party to a State Review Officer.

[4] The individualized education program (IEP) developed by the CSE covered the time period between February 26, 2008 and February 8, 2009 (Parent Ex. C at p. 2).

week in English, and three 30-minute 1:1 sessions of OT per week in English (id. at pp. 1-2, 5-6). The CSE also recommended that the student participate in alternative assessment due to his severe cognitive delays (id. at p. 6). The CSE considered and rejected both a general education class with support, and a 12:1+1 special class, indicating that neither program would provide enough structure and supervision to meet the student's educational, motor and language needs (id. at p. 16).

The individualized education program (IEP) developed at the February 26, 2008 CSE meeting noted that the student had been observed and evaluated using the Test of Nonverbal Intelligence, Third Edition (TONI-3) on February 7, 2008 (Parent Ex. C at p. 3). [5] According to the IEP, administration of the TONI-3 yielded an age equivalent score of five years and nine months (id. at p. 3). The IEP also noted that as part of the February 7, 2008 evaluation, the student was administered parts of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), and the information subtest of the Wechsler Preschool and Primary Scale of Intelligence [Third Edition] (WPPSI-III) (id.). Although no scores were reported, the IEP indicated that the student attained a borderline score on both "block design,"[6] and a deficient score on "information" (id.).[7] The IEP also noted that the student had great difficulty learning new tasks, generalizing information, did not answer yes or no questions, and although he was able to identify many items by pointing to them, he could not vocalize words (id.).[8]

On March 27, 2008, a private psychological evaluation was conducted to assess the student's level of cognitive functioning and adaptive behavior (Parent Ex. J at p. 1). The resultant evaluation report indicated that the dominant language for the student and his family was Yiddish (id.). The private psychologist reported that the student appeared highly distracted and that it was "almost impossible" to "capture his attention and sustain any degree of focus" (id. at p. 2).[9] The evaluation report indicated that throughout the evaluation session the student rocked back and forth and avoided eye contact (id.). The student expressed isolated words and the private psychologist determined that the student's receptive language skills were "functional" for single commands and basic instructions (id.). Administration of the Stanford-Binet Intelligence Test, Fifth Edition (SB-V) yielded scores within the range of 39-51 (less than the first percentile) for his verbal IQ, his non-verbal IQ, and his full scale IQ (id.). The private psychologist reported that this placed the student's cognitive functioning level within the moderate to severe range of mental retardation (id. at pp. 2, 3). The student's adaptive functioning was assessed by the Vineland Adaptive Behavior

[5] Despite reference in the IEP to a February 7, 2008 evaluation, the hearing record does not include any reports from February 7, 2008.

[6] Presumably, this refers to the block design subtest of the WISC-IV.

[7] Presumably, this refers to the information subtest of the WPPSI-III.

[8] The IEP also noted that the student was able to point to some body parts, was able to relate his age and recently had begun to look at picture books (Parent Ex. C at p. 3). The IEP noted that the student had been observed putting together different kinds of puzzles, asked for more puzzle items in Yiddish, independently placed tokens on his reward chart for work completed, responded to social greetings with prompting, and was observed to identify a red item and a table (id.).

[9] The report also noted that during the evaluation, the student's father remained in the room and in isolated instances the student's father obtained the student's attention and elicited a response from the student (Parent Ex. J at p. 2).

Scales, Interview Edition and yielded an adaptive behavior composite standard score of 54 and domain standard scores of 50 in communication, 57 in daily living and 53 in socialization, placing the student's overall adaptive functioning in the low range (Parent Exs. I at pp. 2, 5-7; J at pp. 2-3). The private psychologist opined that because of the student's aforementioned behaviors and need for his father's presence during the evaluation, test results were reported within a range and were an "estimate" of the student's abilities (Parent Ex. J at p. 2).

By Final Notice of Recommendation (FNR) dated April 22, 2008, the district advised the parents that the student was eligible for special education services as a student with autism, and recommended a 6:1+1 special class in a specialized school with instruction in Yiddish (Parent Ex. E). The FNR advised that, due to the immediate needs of the student and the unavailability of a bilingual program, the IEP team recommended an interim 6:1+1 specialized class placement in a specific district specialized school with instruction in English (id.). The FNR also noted that the interim placement would also provide related services of individual speech-language therapy, OT, and PT (id.). This recommendation was made pending the availability of a bilingual class (id.).

On May 5, 2008, the student's father signed the FNR and handwrote on the form that he was "consenting without prejudice to the issuance of RSA's to cover services only" (Parent Ex. E [emphasis in original]).[10] The student's father also indicated on the FNR that by a prior impartial hearing officer decision, the student had been granted 35 hours per week of "ABA SEIT in [YVY]" (id.; see Tr. pp. 147-48).

By a due process complaint notice dated June 23, 2008, the parents, through their attorney requested an impartial hearing (Parent Ex. A). The parents alleged that the district had failed to provide the student with a FAPE in the least restrictive environment (LRE), that the "placement, program and interventions" secured by the student's parents were appropriate and that there were "no equitable circumstances that would operate to preclude or diminish a reimbursement award" (id. at pp. 1-2, 4). The parents requested declaratory, reimbursement and prospective relief for the 2008-09 school year (id. at p. 2). The parents also invoked the student's right to pendency services and asserted that the appropriate pendency entitlements were those that were detailed in Hearing Officer 1's February 25, 2008 decision (Parent Ex. A at p. 2; see Parent Ex. B). The parents asserted that the February 26, 2008 IEP was substantively and procedurally inappropriate and listed specific grounds to support this contention (Parent Ex. A at p. 3). As relief, the parents requested: "tuition for the 2008-2009 twelve month school year at Yaldeina,"[11] and reimbursement for "35 hours of ABA SEIT services" per week, five 30-minute sessions of 1:1 speech-language therapy in Yiddish, four 30-minute sessions of 1:1 OT per week, two 30-minute sessions of 1:1 PT per week, and transportation services (id. at p. 4).

A June 30, 2008 educational progress report from YVY indicated that the student was "responding well" to his intervention and "demonstrated improvement across all developmental domains" (Parent Ex. H at p. 1). The report noted that the student was able to perform a series of gross and fine motor imitations including throwing and catching a ball at close range, running,

[10] Although not clarified in the hearing record, presumably "RSA's" refers to Related Services Authorizations.

[11] On August 13, 2008, the parents' attorney sent a letter to the impartial hearing officer to clarify and correct a clerical error in the due process complaint notice which had incorrectly referred to the student's school as Yaldeina (Parent Ex. D at p. 1).

jumping, climbing and maneuvering around obstacles (id.). The report also noted that the student was able to match non-identical pictures, could scan a large field size to select a target picture, could reproduce pre-built block structures, was able to match non-identical letters and numbers, could match colors, and could perform a variety of task completion activities involving pegs, shape-sorters and puzzles with nine to ten pieces (id. at pp. 1-2). The report further noted that the student used a token reinforcement economy, was able to follow a visual activity schedule involving task completion activities, was able to follow simple one-step commands including one-step commands involving location, asked simple "where" questions to ascertain the location of unseen objects, and labeled objects and actions when requested (id. at p. 2). The student's speech intelligibility was reported as "clear" (id.). The educational progress report indicated that the student demonstrated improved ability to maintain eye contact, responded to social greetings, sought out approval, and showed affection (id.). The student also was able to engage in simple turn taking games with adult supervision and prompting, use the toilet independently, dress and undress with minimal prompting, and eat independently at the table (id.). The progress report indicated that despite the student's progress, serious concerns remained regarding his severe developmental delays (id. at pp. 2-3). Reportedly, the student did not engage in play with peers, did not orient to sounds unless the source of the sound was in front of him and previously identified, referred to all letters as "A," demonstrated extremely limited ability to engage in meaningful communication, did not consistently identify or label familiar people, required adult supervision for dressing and undressing, and demonstrated "a severe behavioral disturbance" characterized by "stealing food from bags, cabinets, and garbage" (id.). The progress report stated that the student required intensive 1:1 behavioral intervention to acquire necessary skills for academic and social functioning and "strongly recommended" that the student "continue to receive the maximum possible educational intervention providing discrete trial instruction using ABA methodology with behavioral supports to promote meaningful educational progress" (id. at p. 3). The report provided long-term goals and short-term objectives related to the student's adaptive living skills, his ability to use language to communicate, his cognitive abilities, and his social functioning (id. at pp. 4-5).

At the end of June 2008, the student's father and YVY entered into a written agreement concerning the 2008-09 school year (see Tr. p. 224; Parent Ex. P). The agreement provided that YVY would provide ABA services to the student for any services that exceeded 35 hours per week (Parent Ex. P). These additional ABA services were to be paid for by the student's father (id.). The agreement stated that it was valid from July 10, 2008 through June 30, 2009 (id.).

The hearing record shows that from July 1, 2008 to September 8, 2008, the student did not receive services at YVY (Tr. p. 76). During this time period, the student attended a private residential summer camp program where he received ABA services and related services (Tr. pp. 119, 136-38, 140-41, 182). The student's ABA provider/speech-language pathologist from YVY met with the summer camp provider[12] to coordinate the delivery of ABA services to the student (Tr. pp. 75, 87-88; see Tr. pp. 182-84). While at the summer camp, the student spent time with other children for socialization purposes and he was also given the opportunity to generalize his skills (Tr. pp. 187-88, 212). The summer camp provider testified that she worked with the student

[12] The summer camp provider was referred to as a "SEIT" in the hearing record (Tr. pp. 181-82, 215-16).

"a couple hours per day," but could not state the exact number of hours she had worked with the student (Tr. p. 184).

The impartial hearing concerning the 2008-09 school year began on July 23, 2008 (Tr. p. 1; IHO Decision at p. 1). The first day of the hearing addressed the services that the student would receive during the pendency of the proceedings (IHO Decision at p. 1; see IHO Ex. I). The parties agreed that as pendency the student would receive the ABA services, all of the related services, and the transportation previously ordered by Hearing Officer 1's February 25, 2008 decision (Tr. p. 6; Parent Ex. B at pp. 4-5). Additionally, regarding the merits of the case, the district conceded that the student was entitled to the related services of OT, PT, and speech-language therapy requested by the parents and agreed to fund these services pursuant to RSAs (Tr. pp. 4-6, 59, 68). As such, the only issue that remained in dispute regarding the merits of the case was the parents' request for 35 hours per week of 1:1 ABA services at YVY (id.).

On August 4, 2008, the impartial hearing officer (Hearing Officer 2) issued a pendency order which ordered that the student was entitled to receive 35 hours per week of "ABA SEIT services," five 30-minute sessions of 1:1 speech-language therapy per week in Yiddish, four 30-minute sessions of 1:1 OT per week, and two 30-minute sessions of 1:1 PT per week, in addition to transportation services (IHO Pendency Order at p. 3).

The impartial hearing resumed to address the merits of the case on August 26, 2008 and concluded on September 22, 2008, after three additional days of testimony (Tr. pp. 32, 97, 175; IHO Decision at p. 1). When the hearing resumed, the district conceded that it had failed to offer a FAPE to the student for the 2008-09 school year (Tr. pp. 37, 146). The parties went forward on the issue of whether the student was entitled to 35 hours per week of 1:1 ABA services (Tr. p. 59).

On October 14, 2008, Hearing Officer 2 rendered a decision on the merits of the case (IHO Decision at p. 9). She determined that the parents had established that the "35 hours per week of ABA/SEIT provided at YVY, in combination with the related services recommended by the [district]" constituted an appropriate placement for the student (id. at p. 8). Hearing Officer 2 also determined that she had no jurisdiction to grant any request for funding for the student's summer 2008 educational program at the private residential summer camp because the parents had failed to request funding for this summer program in their due process complaint notice (id. at pp. 8-9).[13] Hearing Officer 2 also found that there were no equitable impediments to the parents' request for funding at YVY (id.). Accordingly, Hearing Officer 2 determined that the parents were entitled to funding for their placement of the student at YVY for the period from September 2008 through June 2009 (id. at p. 8). Hearing Officer 2 ordered that the district provide funding for the student to receive 35 hours per week of "ABA/SEIT services" at YVY during the 2008-09 school year (id. at p. 9). Because the parties had agreed that "the related services" in the student's February 26, 2008 IEP were appropriate on a 12-month basis, Hearing Officer 2 also ordered the district to issue RSAs for the funding of all of the student's related services set forth on his February 26, 2008 IEP (id.).

The district appeals and asserts that the parents are not financially responsible for the YVY costs and therefore, they lack standing to seek funding. The district asserts that the written

[13] Hearing Officer 2 further noted that the parents had not incurred any out-of-pocket expenses for the student's summer camp placement (IHO Decision at p. 9).

agreement between the student's father and YVY reflects that the parents are only responsible for those ABA services in excess of 35 hours per week. The district also asserts that Hearing Officer 2 erred in finding that the parents' placement of the student in the YVY program was appropriate. The district asserts that YVY does not provide any academic instruction to the student and that the hearing record fails to indicate how YVY addresses the student's deficits. The district also asserts that the parents' reliance on the student's summer camp to improve the student's socialization skills demonstrates that YVY fails to meet the student's socialization needs. The district also asserts that YVY is a preschool program which provides SEIT services, and the student is of school age; therefore, such services are not appropriate. Moreover, the district asserts that YVY's 1:1 ABA services is not the student's LRE. The district also asserts that prospective funding is not available to the parents under the facts of this case.

The parents' answer asserts that the parents have standing to seek prospective funding because although the parents have not incurred any out-of-pocket expenses, they were ultimately responsible for the student's costs at YVY. The parents assert further that the district's standing argument cannot be raised on appeal because the issue of standing was not raised at the impartial hearing. The parents assert that YVY was appropriate and that Hearing Officer 2's award should be affirmed.

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]).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended statute took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).[14] This case commenced on June 23, 2008, after the statute took effect (Parent Ex. A).

The district has conceded that it has failed to offer a FAPE to the student for the 2008-09 school year. However, the district is currently providing for a portion of the student's current educational program: the student's related services of OT, PT, and speech-language therapy are funded by the district through RSAs. There is no dispute that the services provided by the district are appropriate to meet identified needs of the student and that such services will continue throughout the 2008-09 school year independent of pendency requirements. Therefore, the only issue before me is the appropriateness of the portion of the student's program at YVY that involves ABA services. (Tr. pp. 4-6, 37, 59, 146). As more fully discussed below, I find that the hearing record provides only general information about the ABA services offered at YVY and fails to show how these services provided at YVY met the student's special education needs (Tr. pp. 44-45, 52-

[14] The New York State Education Department's Office of State Review maintains a website at www.sro.nysed.gov. The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

55, 61-63, 66-67, 104-07, 112-15). Therefore, the parents did not meet their burden to show that the ABA services provided at YVY were appropriate for the student.

A private school placement must be "proper under the Act" (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112, 115 [2d Cir. 2007]; 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] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). 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. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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]).

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

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

> instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

In determining that the YVY program was appropriate, Hearing Officer 2 found that student made "meaningful progress" at YVY (IHO Decision at p. 8). However, the only indication of progress contained in the hearing record concerned the student's prior school year at YVY (2007-08). Moreover, much of the progress cited to by Hearing Officer 2 was identified by the student's related service providers whose services are being funded by the district (see Parent Exs. L; M; N; see also Application of a Child with a Disability, 07-014 [finding that either with or without publicly funded related services, the hearing record contained insufficient evidence to show that the proposed program was able to meet the student's needs]). Evidence of progress alone is also not enough to show that a parent's unilateral placement is appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

Hearing Officer 2 further found that the ABA instruction provided at YVY in conjunction with the related services of speech-language therapy and OT addressed the student's deficits in language, fine motor skills, adaptive living skills, attention and "extremely difficult behaviors which interfere with learning" (IHO Decision at p. 8). The hearing record reveals, however, that the district provided the funding for the related services for the student and, as discussed below, the hearing record does not provide sufficient information on how the ABA services provided at YVY met the student's deficits. Therefore, I disagree with Hearing Officer 2's decision.

According to the student's YVY ABA provider/speech-language pathologist, the student received 35 hours of 1:1 behavioral therapy per week (Tr. pp. 49, 52, 91; see Tr. p. 122).[15] Related services were described as being provided in addition to the ABA services (Tr. p. 55; see Tr. p. 122). Three ABA providers worked with the student daily to promote generalization of learned skills (Tr. pp. 124, 127-28). The student utilized a visual activity schedule to assist him with following routines (Tr. pp. 54-55). The student's curriculum was developed in consultation with an outside ABA consultant (Tr. pp. 61-64). However, the student's ABA provider/speech-language pathologist testified that the nature of ABA is such that a student's curriculum is constantly adjusted based on data and level of progress and that during the 2007-08 school year, the student had approximately ten to twelve instructional programs (id.). The hearing record reveals that all of YVY's ABA providers were required to collect data on a daily basis and that the student had a "binder" that reflected his progress toward his goals (Tr. pp. 44, 69). YVY staff maintained contact with the parents at monthly parent meetings and through a communication log that went home on a daily basis (Tr. p. 53).

[15] At the time of the impartial hearing, the parents presented testimony about the YVY program from YVY's ABA provider/speech therapist and YVY's ABA Director (Tr. pp. 38-94, 100-137). These witnesses testified in August 2008, prior to the student's September 8, 2008 return to YVY for the 2008-09 school year (Tr. pp. 62-63, 74). All of the descriptions of the YVY program from these witnesses at the impartial hearing were descriptions of the program that had previously been received by the student during the 2007-08 school year. Presumably, the YVY program to be provided to the student in the 2008-09 school year, the school year at issue in the instant case, would be substantially similar in form to the 2007-08 YVY program.

Aside from general information about ABA services offered at YVY, the hearing record fails to provide sufficient information regarding the ABA services provided to the student and how the ABA services met his identified special education needs. Although the student's ABA provider/speech-language pathologist testified that the student had roughly ten to twelve instructional programs per year, the hearing record gives no description of these programs or how these programs met the student's special education needs (see Tr. p. 63). Additionally despite YVY's daily data collection and the ABA provider/speech-language pathologist's testimony that the student's data "binder" from the 2007-08 school year demonstrated "meaningful consistent progress," no objective documentary evidence or data from this "binder" was introduced (see Tr. pp. 44, 69). Although the ABA provider/speech-language pathologist testified that about 80 percent of the 35 hours per week of "SEIT" services involved ABA and the remainder of the time involved "incidental learning," incidental learning was neither defined nor explained in the hearing record (Tr. p. 44). I also note that the hearing record reflects that the student was provided with a picture activity schedule because he did not respond to verbal commands (Tr. pp. 54-55); however, the student's ABA provider/speech-language pathologist provided no testimony regarding whether the student's 1:1 instruction is provided verbally or through an alternate mode. The hearing record also reveals that the student exhibits behavior characterized by his ABA provider/speech-language pathologist as "a severe behavioral disturbance" manifested by stealing food, for which YVY developed a "functional behavior plan" (Tr. p. 60; Parent Ex. H at p. 2). However, the hearing record contains no specific information regarding how this behavior is addressed or whether it has been extinguished to any degree.

The hearing record and Hearing Officer 2's decision are also silent as to whether YVY was the LRE for the student. While parents are not held as strictly to the standard of placement in the LRE as school districts are, the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S., 231 F.3d at 105). Here, the hearing record does not indicate whether the student was receiving any instruction with other peers or was only receiving 1:1 instruction at YVY. There is nothing in the hearing record to indicate that the student could not be instructed with other peers.

Although the hearing record reveals that the student exhibits deficits in his socialization abilities, does not interact with other children, and has goals related to social interactions with peers; the hearing record does not indicate whether the student has an opportunity to interact with either disabled or nondisabled peers and provides no information regarding other students that the student encounters at YVY or how YVY addresses the student's social functioning needs during the 35 hours of 1:1 behavioral intervention and discrete trial instruction he is provided.

A unilateral 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 [emphasis added] [quoting Frank G., 459 F.3d at 365]; see also Rowley, 458 U.S. at 188-89). In view of the above information, I find that the parents did not meet their burden to demonstrate how the 1:1 ABA services provided at YVY are specially designed to meet the student's unique needs during the 2008-09 school year, and thus, the parents are not entitled to the requested funding (Gagliardo, 489 F.3d at 115).

Having decided that the parents failed to meet the second criterion for an award for funding, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations

support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). However, because the district conceded at the impartial hearing that it had not provided the student a FAPE for the 2008-08 school year and that school year has not yet ended, I will order the CSE to reconvene and develop an appropriate IEP and recommend an appropriate special education program and services for the student for the remainder of the 2008-09 school year. I also note that the hearing record reflects that the student is unable to use language to functionally or meaningfully communicate, but that the student has demonstrated the ability to follow a picture activity schedule. As such, I encourage the CSE to explore alternative augmentative communication strategies to address the student's significant deficits in communication.

In light of the determinations made herein, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED.

IT IS ORDERED, that the CSE reconvene to review all existing evaluation data, identify what additional data is needed, if any, and upon the completion of any necessary evaluations, recommend an appropriate program and placement for the student for the remainder of the 2008-09 school year within 30 days from the date of this decision.

Dated: **Albany, New York**
January 14, 2009

PAUL F. KELLY
STATE REVIEW OFFICER