



The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 08-151

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Susan Luger Associates, Inc., attorney for petitioners, Lawrence D. Weinberg, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmuller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at St. Ursula's Learning Center (St. Ursula's) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing in October 2008, the student was attending the sixth grade at St. Ursula's, a private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 6-7; see 8 NYCRR 200.1[d], 200.7). The student has diagnoses of an attention deficit hyperactivity disorder, combined type; a mild to moderate mixed type language disorder; a reading disorder; and a written expression disorder (Parent Ex. E at p. 2). The student also has a severe memory deficit (id.). The student's eligibility for special education services as a student with a speech or language impairment is not in dispute in this appeal (Tr. p. 6; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

The hearing record indicates that the student started attending St. Ursula's during the 2005-06 school year, when he was in the third grade (Tr. pp. 25, 45; Parent Ex. F at p. 1). A February 2007 classroom evaluation reportedly conducted when the student was in the fourth grade revealed that the student read at an average pace and did not need assistance (Parent Ex. F at p. 1).¹ The

¹ The hearing record does not contain a copy of the report generated as a result of the February 2007 classroom observation (Parent Ex. F at p. 1).

evaluator found that the student self-corrected, asked questions, was attentive and attempted to engage the teacher with his questions (id.). The evaluator also observed that the student read using his finger as a guide (id.).

On February 27, 2007, the parents obtained a private speech-language evaluation of the student (Parent Ex. E at p. 2). According to the therapist, the student appeared to be a "well-related boy, who was friendly, cooperative and maintained good eye contact" (id.). The therapist stated that the student's informal language comprehension appeared adequate for "functional/social communication" purposes and that the student presented with appropriate discourse skills to carry out age-level conversation (id.). However, the therapist found that the student's structural knowledge and usage as well as his narrative skills were immature for his age (id.). In addition, the therapist indicated that during decontextualized language tasks, the student did not use appropriate semantic referencing (id.). The student assumed shared knowledge and did not provide adequate background information or critical elements (id.). The therapist reported that the student exhibited increased response time and facial grimacing during formal testing, the results of which revealed that the student demonstrated weaknesses in following directions, attending to isolated details, inferencing, integrating, problem solving, and providing synonyms and definitions for presented words (id.). The therapist also noted that the student exhibited weaknesses in interpreting ambiguous sentences as well as figurative language (id.). The therapist opined that the aforementioned weaknesses would affect the student's oral and written expression as well as his academic performance and accordingly, the therapist recommended continued speech-language therapy to develop the student's ability to produce a clear and meaningful message (id.).

On April 16, 2007, the student underwent a private psychological evaluation (Parent Ex. G; see Parent Ex. E at p. 1). The private psychologist described him as polite, cooperative and attentive throughout the evaluation (Parent Exs. E at p. 1; G at pp. 1, 4). Although the private psychologist found that the student had a "positive view of himself and his family," she indicated that the student's responses to projective questions suggested that the student was aware that he was not meeting his teachers' expectations (Parent Exs. E at p. 1; G at p. 3). Completion of the Child Behavior Checklist by the student's father yielded scores in the borderline clinical range (Parent Ex. G at p. 3). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded standard composite scores of 95 (average) in verbal comprehension, 86 (low average) in perceptual reasoning, 71 (borderline) in working memory, and 88 (low average) in processing speed (Parent Exs. E at p. 1; G at p. 5). The private psychologist stated that she was unable to interpret the student's full scale IQ score because he demonstrated too much variability in his performance across the four indexes making up the score; however, she determined a general ability index (GAI) score of 90 and classified the student's general level of intellectual ability in the average range (Parent Ex. G at pp. 2, 5).² The student's visual motor skills were assessed through administration of the Human Figure Drawing Test and a test identified as the "Bender Gestalt Test (Koppitz)" which yielded results ranging from "considerably below expectations" to "within age expectations," respectively (Parent Exs. E at p. 1; G at pp. 3, 4).

On June 4, 2007, the student underwent a private psychoeducational evaluation (Parent Ex. F; see Parent Ex. E at pp. 1-2). The evaluator noted that the student separated easily from his father, and although the student was quiet, he was alert and aware of his environment (Parent Exs.

² The hearing record reflects that the GAI differs from a full scale IQ score in that it is not directly influenced by an individual's performance on working memory and processing speed tasks (Parent Ex. G at p. 2).

E at p. 1; F at pp. 1, 3). Due to the student's difficulty with attention, the evaluator characterized the student's performance as "variable" (id.). According to the evaluator, the student sub-vocalized on a silent reading test and counted on his fingers in math (Parent Ex. F at p. 4). Administration of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) yielded standard (and percentile) scores of 84 (14) in broad math, 82 (11) in basic reading skills, 80 (9) in math calculation skills, and 83 (13) in academic skills (id. at p. 5). The student achieved a standard (and percentile) score of 72 (3) on the Gray Silent Reading Test, which the evaluator determined to be in the borderline range (id.). On the Test of Written Language-Third Edition, the student achieved a standard composite score in the borderline range (id.). Administration of the Clinical Evaluation of Language Fundamentals-Third Edition yielded a standard score in the below average range for the sentence repetition subtest and in the very low range for the listening to paragraphs subtest (id.).

On July 11, 2007, a "team conference" was conducted by the individuals completing the aforementioned evaluations and the resultant report offered the evaluators' diagnostic impressions of the student and recommendations that included continuation of his 12:1+1 placement at St. Ursula's, continuation of speech-language therapy, continuation of medication, scheduling of a parent conference to discuss results of current assessments, and ongoing developmental and medication follow-up with collateral visits to address issues that arise and to make recommendations for additional and/or different treatment (Parent Ex. E at pp. 2-3).

On February 5, 2008, while the student was in the fifth grade, the student's teachers from St. Ursula's completed a teacher report on the student (Dist. Ex. 1). The teacher report included the student's most recent "Iowa" test results (March 2006) which reflected grade equivalent scores of 2.9 in reading, 2.5 in mathematics, 2.5 in science, and 3.6 in social studies (id. at p. 1). The student's teachers estimated that his reading skills were at a 3.8 instructional level and his math and written expression skills were at a 2.0 instructional level (id.). According to the report, the student received speech services in school and his speech was intelligible (id. at pp. 1-2). The teachers also stated that the student had made an adequate amount of progress in academic areas, and described his homework, abilities to timely complete assignments and to accept criticism as well as his self-esteem as "good" (id. at p. 2). Additionally, the teachers described the student's overall classroom performance, motivation to do well, ability to engage in group and independent work, classroom participation, ability to follow classroom rules and direction, relationships with peers and adults, self-control, and ability to accept transitions as "fair" (id.). They characterized his attention span as "poor" (id.). The student's teachers opined that the student's placement at St. Ursula's was appropriate and that he seemed to benefit from the small group setting and multisensory approach to learning (id.).

On April 30, 2008, respondent's (the district's) Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) with an April 2008 projected date of initiation (Parent Ex. B). The student's parents, an educational advocate, an additional parent member, a district school psychologist, a bilingual regular education teacher, and a district social worker attended the April 2008 meeting (id. at p. 2).³ The student's special education teachers also participated by telephone (id.). The April 2008 CSE determined that the student was eligible for special education services as a student with a speech or language impairment and recommended placement in a 12:1 classroom with related services consisting of

³ The district's school psychologist also served as the district representative (Parent Ex. B at p. 2).

two 30-minute sessions of speech-language therapy per week in a group of three and one weekly 30-minute session of counseling in a group of three (id. at pp. 1, 15). The academic performance and learning characteristics portion of the April 2008 IEP stated that per teacher report, the student exhibited strengths in comprehension and summarizing, and despite improvement in his decoding, the student's reading lacked fluency (id. at p. 3). With regard to mathematics, the student demonstrated strengths in ordering and comparing numbers, as well as in adding; he exhibited weaknesses in subtraction with regrouping, rounding, and word problem solving (id.). According to the April 2008 IEP, in the area of "composing skills," the student was described as creative with his thoughts, but sentence structure and punctuation were weak, and the student had difficulty retrieving long-term information (id. at pp. 3-4). The IEP also stated that the student required simplification and repetition (id. at p. 4). Although the April 2008 IEP stated that the student's attention span was improving, he required seating near the teacher and calling out of his name to regain focus (id.). Academic management needs included the use of a multisensory instructional approach and a calculator as well as preferential seating (id. at p. 3). The April 2008 IEP reflected that based on teacher estimate the student's decoding and reading comprehension skills were at the 4.2-4.3 grade equivalent level, his writing skills were at the 2.3 grade equivalent level, and his computation and problem solving skills were at the 2.0-2.5 grade equivalent level (id.). Annual goals and short-term objectives were developed to address the student's deficits in mathematics, reading, writing, speech and language, and social-emotional skills (id. at pp. 7-12). A copy of the April 2008 IEP was provided to the parents at the CSE meeting (id. at p. 2). The same day of the CSE meeting, the student's mother signed a Notice of Deferred Placement, in which the CSE recommended deferring a placement recommendation for the student until September 2008 because the CSE believed it was in the student's "best interest to complete the school year in his current placement" (Parent Ex. C at p. 1).

By Final Notice of Recommendation (FNR) dated August 15, 2008, the parents were advised of the district's recommended school (Parent Ex. C2 at p. 1). By letter dated August 18, 2008 to the CSE chairperson, the student's mother advised that she had yet to receive a placement letter from the district, and as a result, the student would be attending St. Ursula's for the 2008-09 school year (Parent Ex. C3 at p. 1). By letter dated August 20, 2008 to the CSE chairperson, the student's mother stated that someone from the district telephoned her husband the previous day regarding a possible placement for the student (Parent Ex. C4 at p. 1). Although the student's father could not recall the particulars of the conversation, the student's mother noted that they had yet to receive a placement letter for the student, and without a placement recommendation, they could not agree to consider any placement offer (id.). The student's mother further advised that given the late date, the parents would not be able to view a possible placement for their son because the schools were closed at the time (id.). Consequently, the student's mother indicated that she had no choice but to send her son to St. Ursula's for the upcoming school year (id.).

By due process complaint notice also dated August 20, 2008, the parents alleged that the April 2008 IEP was procedurally and substantively defective (Parent Ex. A at p. 2). The due process complaint notice stated that the student would be attending St. Ursula's (id. at p. 1). The parents also indicated that the student required a small special education language-based class in a small special education school setting in order to benefit from instruction (id. at p. 3). As relief, the parents requested, among other things, a finding that they were entitled to tuition reimbursement for the student's attendance at St. Ursula's for the 2008-09 school year (id.).

By letter dated August 22, 2008 to the CSE, the student's mother acknowledged receipt of the August 15, 2008 FNR and enclosed a copy of the FNR with a handwritten notation (Parent Ex.

C5 at pp. 1-2). She stated that although the schools were closed at the time, she would make every effort to contact the recommended placement at the beginning of the school year (*id.*). The student's mother noted that she would not send the student to a school that she had not had the opportunity to view or speak to someone who could address her questions and concerns (*id.*). She reminded the CSE that she planned to enroll the student in St. Ursula's (*id.*).

By letter dated September 5, 2008 to the CSE, the student's mother stated that she telephoned the district's recommended school to arrange for a visit only to learn that the school did not accommodate students beyond their fifth grade year (Parent Ex. C6 at p. 1). Since her son was in the sixth grade, the student's mother rejected the recommended placement and advised that her son would remain at St. Ursula's until an appropriate placement could be found (*id.*).

An impartial hearing was held on October 16, 2008 (Tr. p. 1). At the time of the impartial hearing, the parents made a motion for summary judgment on the basis that the district violated the Individuals with Disabilities Education Act (IDEA) by failing to serve an answer in response to their due process complaint notice (Tr. p. 13). The impartial hearing officer denied the parents' motion (*id.*; *see* IHO Decision at p. 2). By decision dated November 4, 2008, the impartial hearing officer denied the parents' request for reimbursement for the student's tuition at St. Ursula's (IHO Decision at p. 7). The impartial hearing officer found that the district conceded the first criterion of Burlington/Carter (*id.* at p. 4).⁴ Regarding the appropriateness of the private placement, she determined that St. Ursula's did not provide the student with an opportunity to interact with typically developing peers in school; therefore, St. Ursula's was an overly restrictive environment for him (*id.*). Moreover, although the student exhibited behavioral difficulties, the impartial hearing officer found no evidence showing that the student received counseling or that an individualized behavior intervention plan had been implemented for him (*id.*). Finally, although the student's need for speech-language therapy was an identified area of need, the impartial hearing officer determined that there was no evidence that the student was receiving speech-language therapy at St. Ursula's, although it was available there (*id.*). Based on the foregoing, the impartial hearing officer concluded that the parents had failed to meet their burden to establish that the private placement was appropriate for the student's special education needs (*id.*).

Although she determined that the parents failed to establish the appropriateness of St. Ursula's for the student, the impartial hearing officer made findings with respect to equitable considerations in order to complete the hearing record (IHO Decision at p. 6). Having determined that the parents cooperated with the district, the impartial hearing officer concluded that equitable considerations favored the parents' request for reimbursement (*id.*). However, she opined that two factors would have required her to reduce the parents' award had they been eligible to receive tuition reimbursement (*id.*). First, although the parents had notified the district in writing that the student would attend St. Ursula's for the 2008-09 school year, the impartial hearing officer found that the parents did not notify the district that they would seek reimbursement as required by the IDEA (*id.*). Second, the impartial hearing officer found that the district would not have to reimburse the parents for the 15 minutes of daily religious instruction at St. Ursula's (*id.* at pp. 6-7).

⁴ Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). These two cases are typically referred to together as the "Burlington/Carter" analysis for tuition reimbursement.

The parents appeal and request that the impartial hearing officer's decision be reversed. The parents first argue that the impartial hearing officer erred by failing to grant their motion for summary judgment. Second, the parents challenge the impartial hearing officer's determination that the private placement was not appropriate for their son. Specifically, the parents allege: (1) that St. Ursula's was not too restrictive for the student; (2) that the evidence showed that the instruction provided at St. Ursula's was tailored to meet the student's needs; (3) that the testimony that the student made social and academic progress at St. Ursula's was not contradicted; and (4) that the student received the mandated related services as set forth in his IEP, namely, speech-language therapy and counseling. The parents further contend that the impartial hearing officer erred by determining that an award of tuition reimbursement at St. Ursula's should be reduced because the parents' notice of unilateral placement to the district did not request tuition reimbursement and because there is 15 minutes of religious instruction at St. Ursula's.

The district submitted an answer, requesting that the petition be dismissed in its entirety. The district first argues that the impartial hearing officer correctly denied the parents' request for summary judgment in their favor. With respect to the parents' unilateral placement, the district asserts that the parents failed to demonstrate how the program at St. Ursula's was specifically designed to meet the student's individual educational needs, nor did they present any evidence during the impartial hearing regarding the other students in his class. Next, the district maintains that there was no evidence presented during the impartial hearing that showed whether the student was given differentiated instruction or if he was provided with the testing accommodations as prescribed by his IEP. In addition, the district contends that St. Ursula's does not provide the student with the related services that were enumerated in his IEP; rather, those services are provided by the district through related services authorizations (RSAs). Regardless of whether the student's related services are publicly funded, the district argues that the hearing record does not show that St. Ursula's meets the student's speech-language and counseling needs. Further, the district asserts that despite vague and conclusory evidence that the student progressed while attending St. Ursula's, the hearing record lacks any documentary evidence to support that contention. Lastly, the district contends that the impartial hearing officer correctly found that St. Ursula's was an overly restrictive environment for the student.

The parents filed a reply requesting that a number of allegations raised in the district's answer be stricken. In their reply, the parents assert that the district's answer alleged new material facts, which they claim are beyond the scope of an answer. Secondly, the parents also object to the additional evidence attached to the answer. Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parents' reply contains allegations that do not respond to procedural defenses interposed by the district. Therefore, the reply will be considered only to the extent that the parents raise objections to the additional evidence submitted with the answer (Application of a Student with a Disability, Appeal No. 08-102; Application of a Student Suspected of Having a Disability, Appeal No. 08-002; Application of a Child with a Disability, Appeal No. 04-064; Application of a Child with a Disability, Appeal No. 02-009; Application of a Child with a Disability, Appeal No. 98-37).

Regarding the additional evidence, the district requests consideration of the e-mails attached to its answer for the purpose of showing that the student's related services were publicly funded. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to

render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-129; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, I decline to accept the additional evidence because it is not necessary in order to render a decision in this matter.

Next, I will address the parents' claim that the impartial hearing officer erred by failing to grant their motion for summary judgment. Specifically, the parents assert that they were entitled to summary judgment because the district failed to respond to their August 2008 due process complaint notice as required by 20 U.S.C. § 1415(c)(2)(B)(i). The hearing record does not contain any response by the district to the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2][B][i][I]; 34 C.F.R. § 300.508[e]; 8 NYCRR 200.5[i][4]). However, I decline to disturb the impartial hearing officer's denial of the parents' summary judgment motion because there is no showing that the student's substantive rights have been impeded by the district's failure to respond to the due process complaint notice, thereby resulting in a denial of a free appropriate public education (FAPE) to the student (see Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261 [D.D.C. 2007]; Application of a Student with a Disability, Appeal No. 08-013). I caution the district of its obligation to file a response that contains the required descriptions and explanations related to the subject matter set forth in the due process complaint notice (see 20 U.S.C. § 1415[c][2][B][i][I]; 34 C.F.R. § 300.508[e]; 8 NYCRR 200.5[i][4]).

Two purposes of the 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 board of education may be required to reimburse parents for their expenditures for private educational services obtained for a 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 (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; 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).

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; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

The hearing record supports the impartial hearing officer's finding that the district conceded that it did not offer the student a FAPE for the 2008-09 school year (Tr. p. 6; IHO Decision at p. 4). I concur with the impartial hearing officer that the parents therefore have prevailed with respect to the first Burlington/Carter criterion for reimbursement of the student's tuition costs at St. Ursula's for the 2008-09 school year.

I must now consider whether the parents have met their burden of proving the appropriateness of their placement of the student at St. Ursula's (Burlington, 471 U.S. 359). While 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), the school must offer appropriate individualized services to meet the student's unique, special education needs. Although the sparsely developed hearing record provides general information about St. Ursula's, I find it contains insufficient information regarding the educational services provided to the student or how the educational services at St. Ursula's met the student's identified special education needs.

According to a brochure in the hearing record, St. Ursula's provides education only for students identified as "Learning Disabled, MIS 1, with a recommendation of Special Class" (Parent Ex. D at p. 9). The school encompasses grades one to eight and students range in age from six to fifteen (id. at p. 10). School staff includes four certified special education teachers, a certified physical education teacher, four teacher assistants, two speech-language therapists, a school social worker, and an occupational therapist (id.). Sixth grade students from a nearby elementary school occupy space at St. Ursula's and have access to the bathrooms, hallways, and lunchroom; however, the student does not eat lunch with these typically developing peers (Tr. pp. 24, 32).

For the 2008-09 school year, the student is in a self-contained class for "most of the day" with a total of fourteen students and two teachers (Tr. pp. 18-19, 39). The student's teacher testified that all of the students in the class have IEPs and classifications that include learning disabled and speech or language impaired (Tr. p. 19). According to the teacher's testimony, all of the students in the class have similar learning problems, although each student "is unique with regard to his or her disability and learning style" (id.). Grouping within the classroom is dependent upon what they are doing and the "task and objectives at-hand" (id.). The student's teacher described the days as "very structured" (Tr. p. 20). Each morning begins with a "daily journal" and morning work, which would be a worksheet or "some sort of review" (id.). The students then separate into reading groups (id.). Following reading, the students have a light snack (id.). The students may then separate again into small groups for writing and math "depending on the task at hand" (id.). The students have lunch and recess that last approximately one hour (id.). In the afternoon, they have science and social studies (id.). Religious instruction is provided for 15 minutes each day and the student receives counseling and speech-language services onsite (Tr. p. 25). According to the student's mother, the student receives counseling in a group, which focuses on learning structured ways to handle situations such as name-calling (Tr. p. 50).

A review of the hearing record supports the district's claim that there was insufficient evidence presented during the impartial hearing showing that the student was provided with instruction specifically designed to meet his unique needs at St. Ursula's or with the testing

accommodations listed in his IEP. When asked to specifically describe the student's learning needs, the teacher testified only that the student benefited from a multisensory approach and "hands-on" work and that he required small group settings (Tr. pp. 20-21). The student's teacher stated that she uses small group settings, constant reinforcement, hands-on tasks, and multisensory approaches to address his special education needs (Tr. p. 21). To address the student's distractibility and poor attention span, without offering any specific details, the teacher stated that he needed constant reinforcement and small group settings (Tr. p. 33).

The student's teacher also testified that the students use the PAF program for reading and are visually engaged, orally repeating and reciting sounds and words, and using their hands to "skywrite" (Tr. p. 21).⁵ The reading groups are comprised of approximately six to seven students (Tr. p. 33). The student's teacher further testified that in math, students use manipulatives; in science, they do experiments; and in social studies, they use hands-on approaches such as dramas and skits (Tr. p. 21).

When asked what reinforcers she used with the student, the student's teacher testified that a behavior modification system is used in the student's classroom, which the teacher described as a "card pulling system" (Tr. p. 34). If students "maintain all of their index cards" for an entire day they receive a star (*id.*). Accumulated stars are cashed in for prizes (*id.*). The teacher further testified that she also employed positive reinforcement with the student, making sure that "when [the student] does a good job, we make sure he knows it" (*id.*). The testimony regarding the card system was general in nature and its applicability to the student was not developed. The hearing record does not disclose what behavioral needs of the student were being addressed by the card system or how the card system addressed his needs. Based on the foregoing set of circumstances, a review of the hearing record reflects that the description of special education services offered to the student at St. Ursula's is vague, and as noted by the district, the hearing record also does not articulate how the program is tailored to address the student's needs (*see Matrejek v. Brewster Cent. Sch. Dist.*, 2008 WL 3852180, at *2 [2d Cir. Aug. 19, 2008]; *Application of the Dep't of Educ.*, Appeal No. 08-092 [finding that the parents failed to meet their burden to establish the appropriateness of a private placement, where the hearing record offered general information about the unilateral placement, rather than information regarding the educational services provided to the student or how the educational services at the private placement met the student's identified special education needs]).

As an additional matter, the hearing record is devoid of any documentary or objective evidence showing that the student had progressed while attending St. Ursula's. When asked to describe the student's progress, the teacher testified that the student has shown improvement in his maturity, he relates better to his peers, and he is able to socialize and be friendlier with less frustration and agitation (Tr. p. 22). She indicated that the student had made academic improvements and that although he struggles with math she "can see him working really hard and making improvements there" (*id.*). The student's teacher further testified that she estimated that the student was performing at the fifth grade level in reading, the late third grade level in writing, and the beginning to middle third grade level in math (Tr. pp. 25-26). She stated that estimated grade levels are determined by assessments that are conducted several times each year, including teacher observations, teacher-made tests, and an informal reading inventory (Tr. p. 28). She indicated that standardized assessments are also administered, but testified that her estimates of

⁵ Although not defined in the hearing record, it is assumed that PAF refers to Preventing Academic Failure.

the student's functioning levels in reading, writing, and math are not based on standardized testing (Tr. p. 29).⁶ Under the circumstances presented herein, notwithstanding the student's teacher's testimony that the student progressed at St. Ursula's, the hearing record does not contain any objective evidence such as progress reports, written teacher reports, or any measurable data supporting the teacher's statements regarding his progress.

While the student's special education teacher concluded that the student had made progress academically (Tr. p. 22), the evidence does not demonstrate how she reached this conclusion. Similarly, testimony by the student's mother indicates that the student now feels more comfortable in school, strives each year to do better than he did the year before, and is bringing home grades in the 80s and 90s (Tr. pp. 44-45); however, the hearing record does not contain the student's report card, progress reports or other current objective evidence that supports the parent's and teacher's statements regarding the student's progress. The hearing record reflects that the student receives group instruction in reading utilizing the PAF curriculum; however, there is no specific information in the hearing record that identifies the instruction provided to address the student's individual needs in math, writing, science, or social studies. Additionally, although the student's special education teacher testified that the student receives group instruction in reading, math, and writing, the hearing record does not include a description of or any other specific information regarding the functioning levels of the other students in the class and the students with whom he is grouped for instruction to demonstrate that the grouping is appropriate.

Considering the above information, I note that while the hearing record provides general information about St. Ursula's, the parents failed to meet their burden to establish that the program and services provided to the student are specially designed to meet his unique needs. Moreover, as noted by the impartial hearing officer, the student has no real opportunity to interact with typically developing peers in school, despite their presence in the St. Ursula's building. Although parents are not held as strictly as school districts to the standard of placement in the least restrictive environment (LRE), the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]). Here, the hearing record reflects that the student is able to make friends with typically developing peers (Tr. p. 48) but he has insufficient opportunity to interact with non-disabled peers during the school day. As such, I agree with the impartial hearing officer's finding that St. Ursula's is more restrictive than necessary for the student.

Based on the foregoing, I concur with the impartial hearing officer that the parents have not met their burden to demonstrate that St. Ursula's met the student's special education needs, and, therefore, the second criterion of the Burlington/Carter analysis has not been met (see Burlington, 471 U.S. 359; Gagliardo, 489 F.3d at 115). Having decided that the parents failed to meet the second criterion for an award of tuition reimbursement, 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]).

⁶ The hearing record reflects that St. Ursula's administers "formal testing" utilizing instruments identified as the "Einstein Assessment of School-Related Skills," the "WJ-R Tests of Cognitive Ability," the "WJ-R Tests of Achievement," the "Slingerland," the "Gates-MacGinitie," and the "Revised Key Math" (Parent Ex. D at p. 10).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 February 25, 2009

PAUL F. KELLY
STATE REVIEW OFFICER