The University of the State of New York

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

No. 09-033

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, Tracy Siligmueller, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Jenna L. Pantel, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's private tutoring costs for services received from Lindamood-Bell Learning Processes (Lindamood-Bell) and Partners with Parents (Partners) for the 2007-08 school year. The appeal must be dismissed.

At the beginning of the impartial hearing, during the 2007-08 school year, the student was receiving private tutoring services from Lindamood-Bell and from Partners (Tr. pp. 247-48). As of the last day of the impartial hearing, during the 2008-09 school year, the student was attending a private school in another state (Tr. p. 257). The student's eligibility for special education services as a student with a speech or language impairment during the 2007-08 school year is not in dispute in this appeal (Tr. p. 75; Dist. Ex. 9 at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Results of standardized testing conducted in November 2006 as part of a private psychological update indicated that the student demonstrated average intellectual ability, but functioned below average in reading comprehension, phonological skills, spelling, and math calculation skills due to weaknesses in the areas of verbal expression, auditory processing and processing speed (Dist. Ex. 1 at p. 6). The evaluator noted that the student could become overwhelmed and distracted by complex material, which affected his ability to complete his work in a timely manner (id.). The evaluator reported that the student's weaknesses in the areas of

language processing and attention might affect his social/emotional functioning as peer relationships became more complex and involved (id.). The standardized testing indicated that the student performed below age and grade expected levels in the areas of reading, math calculation skills, and spelling (id. at p. 5). The student also reportedly exhibited weakness in the area of fine motor skills (id. at p. 4).

According to the parents, the student began receiving home-based early intervention services at the age of two including occupational therapy (OT), speech-language therapy and physical therapy (PT) (Dist. Ex. 7 at p. 2). The student attended a private preschool from age three to age five (id.). The student reportedly experienced difficulty with language, early learning, and attention skills (Dist. Ex. 1 at p. 1). An assessment conducted when the student was five years of age revealed that he demonstrated above average cognitive skills with weaknesses in the areas of pragmatic language, auditory processing, attention, and fine motor skills (id.). At age five, the student transferred to a State-approved non-public school that he attended for the following three years (id.; Dist Ex. 7 at p. 2).

A letter from the student's mother to the Committee on Special Education (CSE) dated May 1, 2007, indicated that she had provided the CSE with the student's neurological evaluation and speech-language evaluation (Dist. Ex. 3). The student's mother stated in the letter that the "problem" with the student's non-public school was that the student's needs were "much slighter than others," that the student was "modeling behavior of those with PD/Autism," and that the "12-month program [was] hard for [the] family" (id.).

In a classroom report dated May 2007, the student's classroom teacher from the non-public school reported that the student had attended a self-contained 10:1+1 classroom since September 2004 (Dist. Ex. 6 at p. 1). The teacher reported that the student demonstrated delays in reading, writing and mathematics (id.). The teacher noted that during math and reading related tasks, the student sometimes asked for assistance before becoming frustrated or giving in to feelings of inadequacy (id.). At mid-year, the student's teachers expressed concern that the student's social/emotional behavior occasionally interfered with his learning (id.). The teacher noted that the student had expressed feelings of sadness and worthlessness (id.). The teacher also reported that during group lessons the student often appeared lethargic and uninterested, but that he was much more engaged when working on a 1:1 basis with a teacher (id.).

An OT progress report from the student's occupational therapist from the non-public school dated May 2007 reflected that although the student had made progress, he continued to have difficulty with fine motor and gross motor skills (Dist. Ex. 4 at p. 2). Additionally, the occupational therapist reported that the student displayed poor sensory integration and modulation abilities (id.). The occupational therapist recommended that the student continue to receive OT services (id.).

A May 2007 speech-language progress report by the student's speech-language pathologist from the non-public school indicated that the student demonstrated appropriate core receptive and expressive language skills, but that he demonstrated difficulty with higher level language formulation and organization, which affected his language skills and academic performance (Dist. Ex. 5 at p. 1). The speech-language pathologist recommended that the student's "classroom environment remain highly structured and language intensive with a small student-teacher ratio" (id. at p. 2). The speech-language pathologist further recommended that the student continue to receive speech-language therapy (id.).

In a social history report dated May 30, 2007, a private social worker assessed the student's school and developmental history as well as his social/emotional functioning through a parent interview with the student's mother (Dist. Ex. 7 at p. 1). The student's mother reported that the student had received a diagnosis of an attention deficit disorder (ADD) or an attention deficit hyperactivity disorder (ADHD) for which he was prescribed medication (id. at pp. 1-2).

The CSE convened on June 28, 2007 to develop the student's individualized education program (IEP) for 2007-08 school year (Dist. Ex. 9 at p. 1). Meeting attendees included a district representative who also participated as the special education teacher, a regular education teacher, and the student's mother (id. at p. 2).[1] The CSE determined that the student remained eligible for special education services as a student with a speech or language impairment and the resultant IEP contained annual goals and short-term objectives in the areas of reading, writing, math, fine/gross motor skills, sensory regulation and speech-language (id. at pp. 1, 6-14). The IEP reflected that the CSE recommended that the student receive services for a 12-month school year (id. at p. 1). Related service recommendations included speech-language therapy twice per week in a group of two for 30 minutes, OT once per week individually for 30 minutes, and OT once per week in a group of two for 30 minutes (id. at p. 17). Recommendations for the student's participation in assessments as stated on the IEP were for extended time (double), separate location, small group, directions read and reread to the student, and questions read aloud (id.). The IEP reflected that the CSE considered a general education environment for the student, but rejected that program because the student was unable to maintain grade level expectations and standards without additional support (id. at p. 16). The IEP also reflected that a special class program was considered and rejected, as it would not provide the intensive level of support required to address the student's academic delays in speech-language development and social/emotional functioning (id.). The CSE deferred the matter to the district's central based support team (CBST) for a specific non-public school placement recommendation (id. at p. 2).[2]

The hearing record indicates that the CBST provided the student's records to various State-approved private schools for review (Tr. pp. 31-32, 76-77; Dist. Ex. 13).[3] The CBST administrator stated that two of the schools responded and indicated that the student might be appropriate for its programs (Tr. pp. 33-34).

[1] There is disagreement in the hearing record as to whether someone from the student's non-public school participated in the CSE meeting (see Tr. pp. 82, 86, 150).

[2] The "CBST" is described in the hearing record as an office that receives cases from the CSE and then works with families and non-public schools to find appropriate programs for students (Tr. pp. 27-28).

[3] The exact number of schools that the CBST provided the student's records to is unclear from the hearing record. The CBST administrator testified that she remembered considering five different schools for the student (Tr. pp. 31-32). The regular education teacher who attended the June 28, 2007 CSE meeting testified that a "package" regarding the student was sent to seven different schools (Tr. pp. 76-77). Additionally, an undated contact sheet entered into evidence indicated that the student was referred to 13 different schools, including the student's prior State-approved non-public school, on August 21, 2007 (Dist. Ex. 13). I also note that the students mother testified that she had previously applied to 12 schools that were recommended for the student by the student's prior State-approved non-public school and that the student did not get accepted into any of them (Tr. p. 147).

The hearing record reflects that as of Labor Day 2007, the student had yet to be informed of a school for the student to attend (Tr. p. 240).[4] The student's mother telephoned the CBST regarding the lack of an identified school and was unable to speak with someone until the week after Labor Day (id.). On an unknown date subsequent to the conversation the student's mother had with the CBST the week after Labor Day, the CBST provided the her with the name and contact information of a non-public school to visit (Tr. p. 241).

The student's mother visited the non-public school on September 12, 2007 (Parent Ex. G). She then sent a letter dated September 17, 2007 to the district rejecting the school for multiple reasons (id.). The student's mother testified at the impartial hearing that the district did not respond to this letter (Tr. p. 243).

By letter dated September 20, 2007, the student's mother notified the district "Central Office of Home Schooling" that she intended to home school the student beginning in September 2007 and continuing until further notice (Parent Ex. F). The student's mother stated that her letter was being provided upon the recommendation of the addressee of the letter based on a telephone conversation that the student's mother had with the addressee earlier that same day, and the student's mother requested a "home schooling packet" be sent to her (id.).

The parents, through their attorney, filed a due process complaint notice dated September 27, 2007 (Parent Ex. A).[5] The parents alleged that the CSE deferred the student's case to the CBST in the student's June 28, 2007 IEP and that "[t]he CBST did not identify or recommend a NY State approved day program," thereby denying the student a free appropriate public education (FAPE) (id.). As a remedy, the parents sought reimbursement for the costs of services unilaterally obtained by them and provided by Lindamood-Bell and Partners (id.). The parents listed the student's current program as "Academic Support provided by Lindamood-Bell and Partners with Parents" (id.).

The hearing record reflects that on November 1, 2007, the student's mother received a telephone call from a second non-public school regarding the possible placement of the student (Parent Ex. E). The student's mother visited the second non-public school on November 9, 2007 and subsequently sent a letter dated November 17, 2007 to the district rejecting the second non-public school for multiple reasons (id.). The student's mother testified at the impartial hearing that the district did not respond to this letter (Tr. pp. 245-46).

In a letter to the district dated November 14, 2007, the student's mother stated that she had yet to receive a "home schooling packet" and again requested that one be sent to her (Parent Ex. D).

[4] I note that Labor Day 2007 occurred on September 3, 2007.

[5] Although the due process complaint notice states that both of the student's parents requested the impartial hearing, the hearing record reflects that only the student's mother appeared on behalf of the student at the impartial hearing and the order of the impartial hearing officer was directed to the student's mother only rather than to both parents (compare Parent Ex. A, with IHO Decision). Additionally, I note that the district, in its petition, refers to the both of the parents on behalf of the student as respondents and the parents answer indicates that both parents are appearing on behalf of the student on appeal.

An impartial hearing convened for three days from March 4, 2008 to November 7, 2008 (Tr. pp. 1, 63, 134). The district called three witnesses and submitted 14 documents into evidence (Tr. pp. 26, 67, 103; Dist. Exs. 1-14). The parents called three witnesses, including the student's mother, and submitted 18 documents into evidence (Tr. pp. 139, 152, 203, 239; Parent Exs. A-R).

In a decision dated February 3, 2009, the impartial hearing officer found that the district denied the student a FAPE for the 2007-08 school year, that the private tutoring services unilaterally obtained for the student through Lindamood-Bell and Partners were appropriate, and that equitable considerations favored an award of reimbursement to the student's mother (IHO Decision at pp. 7, 14-15). With respect to the tutoring services, the impartial hearing officer found that they were appropriate because the student had made academic progress in the areas addressed by both Lindamood-Bell and Partners (id. at p. 13). He also found that the services were tailored to meet the academic needs of the student (id. at p. 14). Regarding equitable considerations, the impartial hearing officer noted the student's mother's cooperation with the district (id.). The impartial hearing officer, in a "Reimbursement Order" attached to his decision, ordered the district to reimburse the student's mother for tutoring that the student received from Lindamood-Bell and Partners for the 2007-08 school year (IHO Reimbursement Order).

This appeal ensued. The district appeals the portions of the impartial hearing officer's decision which found that the tutoring services the parents unilaterally obtained through Lindamood-Bell and Partners were appropriate, and that equitable considerations favored an award of reimbursement. The district does not appeal the finding of the impartial hearing officer that it failed to offer the student a FAPE for the 2007-08 school year.

With respect to the appropriateness of the services obtained by the parents, the district alleges that the parents did not meet their burden of showing that the services were appropriate to meet the student's needs. Specifically, it alleges, among other things, that: (1) the placement, consisting of instruction on a 1:1 basis at home and at Lindamood-Bell, was too restrictive for the student; (2) the majority of the student's instruction was in math and reading only, and Lindamood-Bell was not "trying to address all the things that a special education teacher, a speech language pathologist might be trying to address;" (3) there was no communication between the student's tutors at Lindamood-Bell and Partners despite the fact that the student's private evaluation stated that ongoing communication between the student's reading instructor and his teacher was imperative; (4) the hearing record is devoid of details of the student's curriculum through Partners, how the curriculum was created and how it was designed to meet the student's unique educational needs; (5) only some of the student's instructors at Lindamood-Bell have bachelor's degrees and none have masters degrees, none of the student's instructors have any teaching certifications, and the student's instructor from Partners has no experience working with special education students; and (6) there is no objective, documentary evidence of educational progress made by the student during the 2007-08 school year as a result of the Partners services and, although there is some documentary evidence that the student progressed at Lindamood-Bell, this progress did not, per se, prove that the program was appropriate. With regard to equitable considerations, the district alleges that the parents did not give the district the requisite notice of the unilateral placement at district expense.

The parents, in their answer, allege that their placement of the student was appropriate and that equitable considerations favor an award of reimbursement to the parents. As an affirmative defense, the parents allege that the district failed to comply with the service requirements of the

State regulations. The parents allege that the district failed to personally serve them in the statutorily required time frame for appeal and that leave to effectuate alternative service should not have been granted because the district did not demonstrate a diligent effort to personally serve the petition upon the parents. The parents also allege as an affirmative defense that the petition was not timely served. I note that the parents also allege that two specific allegations of the district, namely, that the unilateral placement of the student was inappropriate because, among other things, the majority of the student's instruction for the 2007-08 school year was in math and reading only, and that equitable considerations do not favor an award of reimbursement because the parents did not give the district requisite notice of their unilateral placement of the student, should not be considered on appeal because those allegations were not raised at the impartial hearing.

The district filed a reply to the procedural defenses raised by the parents in their answer. Specifically, the district alleges that the petition was properly served, the petition was timely served, the district's argument that the unilateral placement was inappropriate because, among other things, the majority of the student's instruction for the 2007-08 school year was in math and reading only is properly raised on appeal, and the district's argument that equitable considerations do not favor an award of reimbursement to the parents because the parents did not give the district requisite notice of their unilateral placement of the student is properly raised on appeal.

I will first address the parents' affirmative defenses related to service. Governing regulations state that a

> copy of the petition, together with all of petitioner's affidavits, exhibits, and other supporting papers, except a memorandum of law or affidavit in support of a reply, shall be personally served upon each named respondent, or, if a named respondent cannot be found upon diligent search, by delivering and leaving the same at the respondent's residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the commissioner

(8 NYCRR 275.8[a], 279.1[a]). The petition must also "be personally served upon the parent within 35 days from the date of the impartial hearing officer's decision" (8 NYCRR 279.2[c]).

In this matter, the impartial hearing officer's decision is dated February 3, 2009. Under the provisions of 8 NYCRR 279.2(c), the petition was to be served no later than March 10, 2009. The district sent two letters, dated March 10, 2009 and March 11, 2009, to the Office of State Review seeking permission from a State Review Officer for alternative service pursuant to 8 NYCRR 275.8(a) and 8 NYCRR 279.1(a). Attorneys for the parents, who had purportedly not yet been retained in this appeal, also sent a letter dated March 10, 2009 to the Office of State Review arguing that alternative service should not be granted. On March 11, 2009, after consideration of the aforementioned correspondence, the district's request for alternative service was granted and the district was directed how service was to be effectuated. The Affidavit of Service and Declaration of Service filed with the petition in this matter reflect that alternative service was made, over the course of March 10, 2009 and March 11, 2009, in accordance with the alternative service granted. As such, I find that service was timely and proper and it is unnecessary to address the matter further.

Having found that service of this appeal was timely and proper, I now turn to the substantive issues of this appeal.

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 (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; 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]; 8 NYCRR 200.5[j][4][ii]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132;]; E.G. v.

City Sch. Dist. of New Rochelle, 2009 WL 773960, at *4 [S.D.N.Y. Mar. 16, 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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 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 district does not appeal the finding of the impartial hearing officer that it failed to offer the student a FAPE for the 2007-08 school year. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, the impartial hearing officer's decision that the district failed to offer a FAPE to the student is final and binding upon the parties (see Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). I now turn to the issue of whether the program obtained by the parents for the student for the 2007-08 school year was appropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Walczak, 142 F.3d at 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 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 by itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105); however, the qualifications of teachers may be relevant in considering the appropriateness of instruction (Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 890625, at * 27

[N.D.N.Y. March 31, 2009). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original] citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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).

Moreover, parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of reimbursement (M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482 [S.D.N.Y. 2007]).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter,

510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at * 13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005] aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [SDNY 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

For the 2007-08 school year, the student's mother testified that, in the absence of a school placement offered by the district, she "tried to create a program for [the student] to help on the most basic level" (Tr. p. 247). The program she created consisted of reading services at Lindamood-Bell; mathematics as well as some writing, science and history tutoring services from Partners; team sports; an art history program; and visual tracking therapy (Tr. pp. 205-06, 247-49, 252-53). The hearing record indicates that the student's mother never intended to have the student in the unilateral program for the entire 2007-08 school year and that she remained willing to work with the district in finding an appropriate placement for the student (Tr. pp. 248, 253; see Dist. Exs. 3; 12; Parent Exs. E; G).

The parents have not sought to be reimbursed for the student's sports, art history program or visual tracking therapy. Therefore, I will review only the Lindamood-Bell reading services and the Partners tutoring services portions of the program created by the parents.

Standardized testing completed as part of a private psychological update in November 2006 indicated that the student performed below average compared to peers his same age in the areas of reading and phonological skills (Dist. Ex. 1 at p. 5). The evaluator reported that the student can become overwhelmed and distracted by complex material which affects his ability to complete his work in a timely manner (id. at p. 6). The evaluator indicated that the student "will need structured, consistent help in developing strategies to compensate for his difficulties" (id.). The evaluator recommended that the student receive 1:1 support in the area of reading to address deficits in decoding skills and sight word vocabulary (id.).[6]

In April 2007, the student underwent "pre-testing" conducted by Lindamood-Bell, which indicated that the student demonstrated difficulty in the areas of language expression, following directions, critical thinking, and reading comprehension due to weak concept imagery (Tr. p. 162). The Lindamood-Bell director testified that the student displayed weak phonological processing and symbol imagery, which negatively affected his decoding skills and sight word vocabulary (Tr. pp. 162-63). The "pre-testing" also indicated that spelling, math computation and reading accuracy were all areas of severe weakness for the student (Tr. p. 163).

The student attended Lindamood-Bell five days per week for four hours per day during the 2007-08 school year (Tr. pp. 160-61). The hearing record reflects that the student participated in the "Seeing Stars" and "Visualizing and Verbalizing" programs at Lindamood-Bell (Tr. pp. 155, 164). The director of Lindamood-Bell testified that the Seeing Stars program "develops phoneme awareness and symbol imagery" and that the Visualizing and Verbalizing program "develops concept imagery" (Tr. p. 159). The director reported that the student's diagnostic evaluation indicated that the student exhibited weakness in the underlying processes of phoneme awareness, symbol imagery, and concept imagery, which negatively affect his ability to learn academic skills including reading skills (Tr. pp. 156-58, 161). Results of standardized testing conducted during a private psychological update in November 2006 indicated that in the area of reading and phonological skills that the student performed below age and grade expected levels (Dist. Ex. 1 at p. 5). Moreover, the private evaluator reported that the student "scored at the 12th percentile (1:9 grade level) on a single word reading task. [He] performed at the 9th percentile (1:0 grade level) on a task assessing the phonetic decoding of nonsense syllables" (Dist. Ex. 1 at p. 5).

The director of Lindamood-Bell testified that the student's "receptive and expressive vocabulary" are areas of relative strength for him (Tr. p. 163). The director testified that the student's testing results supported enrolling the student in the Seeing Stars program and the Visualizing and Verbalizing program at Lindamood-Bell (Tr. p. 164). The director further testified that the Seeing Stars program and the Visualizing and Verbalizing program addressed the student's areas of weakness in reading, spelling, oral language comprehension, and reading comprehension (id.).

The hearing record reflects that the student was administered assessments at Lindamood-Bell after the April 2007 "pre-testing" (Tr. p. 165). Two follow-up assessments, one in December 2007 and one in June 2008, indicated that the student had improved in several areas including

[6] The evaluator also recommended that the student continue to receive speech-language therapy to assist him in the development of pragmatic language skills (Dist. Ex. 1 at p. 7). In addition, the evaluator stated that the student's fine motor skills were an area of weakness and recommended the continuation of OT (id.). He further recommended "group work" to assist the student in the development of his social skills (id.).

critical thinking skills, word attack skills and reading comprehension (id.). The student's word attack standard score of 88 on an assessment administered in April 2007 increased to a standard score of 95 on the June 2008 assessment (Parent Exs. J at p. 2; P at p. 1). On an assessment administered in April 2007, the student's score on the reading comprehension subtest yielded a percentile rank of 25 (Parent Ex. J at p. 3). The reading comprehension subtest was administered again in June 2008 and the student's score yielded a percentile rank of 63 (Parent Ex. P at p. 2).

The student's mother testified that the reading program the student received focused on teaching the student "how to read, to recognize words" and how to "sound out words" (Tr. pp. 249-50). She also testified that the program "gave him such confidence," and that the student "made huge progress" (Tr. p. 250). The student's mother reported that the student "dramatically" progressed in the area of speech-language (Tr. p. 252). She further noted that the student was "a more organized thinker" and demonstrated improved eye contact after receiving the reading services (id.).

The student also received tutoring services from Partners to address his deficits in mathematics (Tr. p. 248). A tutor worked with the student four days per week for 90 minutes each session during the 2007-08 school year (Tr. p. 206).[7] The tutor testified that although the primary focus of the tutoring services was in mathematics; some instruction in writing, reading comprehension, science, and history was also provided to the student (Tr. pp. 205-06, 212). The tutor indicated that the student was below grade level in mathematics when he began receiving the Partners tutoring services (Tr. pp. 206, 210-11). The tutor stated that the student's areas of weakness include the ability to focus and the completion of multi-step tasks, both of which negatively affected the student's ability to complete assignments (Tr. p. 209). The tutor testified that he assessed the student's areas of need and progress once per week through observation and quizzes (Tr. p. 211).[8] Regarding science and history assignments, the tutor worked on these subjects based on the student's areas of interest (Tr. pp. 214, 216).

The tutor testified that the student's assignments included written reports, which focused on proper spacing, capitalization and punctuation (Tr. p. 220). The tutor reported that the 1:1 instruction the student received assisted the student in focusing and in increasing in his confidence (Tr. p. 228). The tutor further testified that the student made "significant progress" in mathematics and displayed increased confidence as a student (Tr. pp. 231, 233).

In addition to the services for which the parents seek reimbursement, the parents also arranged for the student to participate in team sports with other children for four days per week to address the student's deficits in social skills, an art history program, and visual tracking therapy from the State University of New York (SUNY) Eye Institute once per week for 90 minutes (Tr. pp. 249, 252-53). The student's mother testified at the impartial hearing that the visual tracking therapy improved the student's reading skills (Tr. pp. 253).

I concur with the impartial hearing officer's finding that the program offered to the student by the parents for the 2007-08 year met the student's needs as identified in the hearing record.

[7] I note that the hearing record reflects that the Partners tutor had experience working with students with IEPs (Tr. pp. 236-37).

[8] The observations and quizzes the tutor referred to are not in the hearing record.

Given the circumstances of this case, in part where the parent made continuing efforts to work with the district during the school year to secure services from the district as an alternative to the private services the parent originally obtained as a temporary measure (Tr. pp. 248, 253), I concur with the impartial hearing officer that LRE principles do not preclude reimbursement. Moreover, I have reviewed the hearing record and given the circumstances of this case, I decline to modify the impartial hearing officer's decision that equitable considerations do not warrant a denial of reimbursement to the parents in this case.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 7, 2009

PAUL F. KELLY
STATE REVIEW OFFICER