

**UNIVERSITY OF THE STATE OF NEW YORK
STATE EDUCATION DEPARTMENT**

**IN THE MATTER OF THE IMPARTIAL
HEARING BROUGHT UPON THE
REQUEST OF PARENTS ON BEHALF
OF THEIR CHILD,**

AGAINST

**Decision and Order
Case # 49904**

**WAYNE CENTRAL
SCHOOL DISTRICT**

INTRODUCTION

This document constitutes the Decision and Order of the undersigned, the duly designated Impartial Hearing Officer (IHO) in an Impartial Hearing brought pursuant to the Individuals with Disabilities Education Act (IDEA) and the New York State Education Laws. The Wayne Central School District will be referred to as District, the parents as Parents and the student will be referred to as Student. Based on the following analysis, I find that the District did not offer the Student an appropriate education for the 2009-2010 school year, and I therefore direct tuition reimbursement in this case.

PARENTS' POSITION

The Parents rejected the District's recommended Individual Education Program (IEP) for the 2009-2010 school year and unilaterally placed their son (the Student) at the Private School. (Exhibit 1) The Parents argue that the Student was denied a free appropriate public education (FAPE) based upon procedural and substantive flaws in the IEP and the process in which it was created.

Procedurally they argue: 1.) the District failed to properly evaluate the Student prior to making placement and program recommendations, and 2.) the District improperly based the placement and program recommendations on considerations other than the Student's needs.

Regarding the substantive inadequacy of the recommendation the Parents assert: 1.) the

District's proposed program was not designed to meet the Student's needs, and 2.) integrated co-taught (ICT) classes are not the least restrictive environment (LRE) for the Student. On or about October 21, 2009, the Parents submitted an impartial hearing request in which they sought, *inter alia*, reimbursement for the private placement at the Private School, an order placing the Student at the Private School, and amendments to the IEP (Ex. 2). All other claims for relief have been resolved or withdrawn (Tr. 5-6).

DISTRICT POSITION

The District contends that it offered the Student a FAPE for the 2009-2010 school year; therefore, the unilateral placement was not warranted and tuition reimbursement should be denied.

STUDENT HISTORY

The Student was born in 1997 (Ex. 3, p. 1). At all relevant times, he has resided within the District (Ex.s 3 – 14). The Student has been receiving special education services since Kindergarten (Ex. 31) when he was placed in a half-day blended class during the morning and a self-contained special education kindergarten class in the afternoon. (2002 – 2003) The blended class continued in 1st grade. (2003 – 2004) At that time there were approximately 16 students in the classroom with a regular education teacher and a special education teacher. His special education teacher from the first grade reported that the Student's overall behavior had improved greatly throughout the year. (Ex. 31) During the second grade it appears that the program remained the same. However, there were parental concerns about the manner in which it was implemented, and the program was modified. (Tr. 752 et seq. & Ex. 3). For third (2006 – 2007) [Tr. p. 754], for fourth (2007 – 2008) and fifth grade, the Student was in an 8:1:1 self-contained class with a teacher and a teacher's aide. Here, a difference was noted in the way the programs were delivered. Apparently the Student was "pulled out" for academics in the third grade which did not seem to work very well. In the fourth grade the teachers "pushed in," and this was a significant improvement according to the Parent (mother). (Tr. p. 754 & Exs. 9 – 11)

For the sixth grade year, the year in question in this proceeding, the District recommended a hybrid placement consisting of an integrated co-taught (ICT) class for social studies and science and a self-contained class for mathematics and English language arts (ELA). (Exs. 12, 13, 14). The Student's annual review for sixth grade occurred on March 12, 2009. The CSE reconvened on June 11 and August 6, 2009. (Exs. 13, 14) The District knew that the Parents were interested in placement at the Private School (Tr. p. 234, 772).

Ultimately, the Parents rejected the placement recommendation and gave notice at the August 6, 2009 CSE of their intention to unilaterally place the Student in the Private School and to seek reimbursement (TR. 742, 743). The Parents followed with written notice dated August 21, 2009 (Ex. 1).

EVALUATIONS

In a counseling summary report dated March 14, 2008, the School Counselor reported that the Student had made significant growth that year (fourth grade). “In small group, [the Student] also does a great job of practicing and implementing different social skills... [but] [the Student] does continue to have challenges . . .” that include responding to someone who wronged him for example by “. . . tak[ing] immediate action rather than get[ting] adult help, . . . calming down when ‘really angry’, [and] . . . talking about his feelings and what got him mad . . .” (Ex. 21)

The District occupational therapist completed an occupational therapy (OT) evaluation on March 19, 2009 using the Bruininks-Oseretsky Test of Motor Proficiency Second Edition (Ex. 29). This evaluation assessed the Student’s fine manual control (i.e. fine motor precision, fine motor integration), and manual coordination (i.e. manual dexterity, upper limb coordination). (Id.) On March 26, 2009, an occupational therapist at University of Rochester Medical Center, Kirsch Developmental Services Center (Kirsch), evaluated the Student. (Ex. 30) This occupational therapist found that the Student’s fine motor response speed was below average and that he appeared anxious and impulsive. (Id) She determined that the Student’s visual-motor control was average on the untimed tasks and that his upper limb speed and dexterity was in the low average range. She concluded that “. . . his motor responses are slower than average and that he requires extra time to complete tasks that involve a motor component.” (Id) The Student’s stanine score of 1 indicated significant delay in fine motor speed, dexterity and visual-motor control. His grip and pinch strength were below the typical range for boys his age and he had "difficulties with visual-motor coordination and strength” (Id at p. 3). This therapist reported that the Student was able to tie a bow using the two-loop method, but he was slow and awkward (Id).

In March 2005, when the Student was in first grade, a school psychologist performed a psycho-education evaluation (Ex. 31) with the following results: verbal comprehension on the WISC-IV was well below average range, perceptual reasoning fell in the average range, working memory fell at the low average range, processing speed fell at the borderline range, and the full scale score was in the borderline range. It was cautioned, however, that “. . . this global description is very misleading and should be interpreted with caution due to the significant discrepancy

between WISC-IV composite scores.” (Id., p. 3) The Student scored in the average range on the C-TONI and at the fourth percentile on the Developmental Test of Visual Motor Integration. (Id.) The school psychologist provided two scores for the Adaptive Behavior Scale: for children who are not mentally retarded and for those who are. The average range on the Adaptive Behavior Scale is 7 – 13. The Student’s scores were in the average range as compared with non-mentally retarded children for all subtests except economic activity (4), language development (5), and self-direction (4). (Id.) The Student scored below average for age and grade on all academic achievement tests except picture vocabulary. (Id., p. 5, 6)

Peter Sorman, Ph.D., a neuropsychologist, evaluated the Student in May 2006, at the end of his 2nd grade year. (Ex. 32) Dr. Sorman reported that the Student obtained lower scores on the WISC-IV than he achieved in March 2005. Dr. Sorman attributed the difference, in part, to “. . . the untoward effect of [the Student] being older and its impact on scores affected by processing speed.” (Id., p. 3) Dr. Sorman administered a developmental neuropsychological assessment, NEPSY, and found that the Student’s phonological processing of basic sounds was slightly below expectations, but his speed at naming and comprehension of instructions were well below expectations. (Id., pp. 3, 4) The Student’s memory for pictorial and verbal information was severely impaired. (Id., p. 3) He became frustrated easily but could persist with a task when encouraged. He had “considerable difficulty tracking instructions” even in a one-on-one setting. (Id.) Dr. Sorman diagnosed the Student with mixed receptive-expressive language disorder, central auditory processing deficiency, developmental coordination disorder, and reading disorder, and suspected that the Student had hypoxia at birth. (Id., p. 5) Dr. Sorman recommended, among other things, placement in a learning disabled class not to exceed six or seven children and reinforcement with methods such as Kurzweil and Captain’s Log. (Id., pp. 5, 6)

The District re-evaluated the Student in February and March 2008 (fourth grade). (Ex. 33) His scores on the WISC-IV ranged from extremely low (verbal comprehension) to low average (perceptual reasoning, processing speed). Once again, the Student’s full scale score was in the borderline range. (Id., p. 2) A different school psychologist than the one referenced above, did not administer the C-TONI though she recommended consideration of a nonverbal measure of intelligence at some other time. (Id., pp. 1, 4) This school psychologist obtained scores from a teacher and the Student’s mother on the Adaptive Behavior Assessment System II. (Id., p. 3) The Student scored in the average range on seven of ten subtests as rated by his teacher, and in the average range on five of ten subtests as rated by his mother. (Id.) The school psychologist

stated in her recommendations that the Student “. . . will benefit from a highly individualized academic program with academics being presented at a slower pace, numerous opportunities for repetition, rephrasing, practice and review.” (Id., p. 4)

The SE teacher in fourth grade administered the Woodcock-Johnson III tests of Achievement (WJ-III) in March 2008. (Id., p. 5) The Student’s scores were below average on all subtests for grade and age except calculation (86 standard score (SS), 2 percentile (% ile) for age; 88 SS for grade), word attack (85 SS, 15 % ile for age; and 85 SS for grade), and reading vocabulary (89 SS 23 % ile for age; 90 SS for grade). (Id., p. 8) A comparison with the Student’s scores of March 2005 indicates that he made gains in all areas especially arithmetic calculation. Yet, even with these gains, his March 2008 scores represented skills at 2 to 3 grades behind. (Id., p. 8, 9) The special education teacher (SE Teacher) noted that “. . . when [the Student] is in a small group and one-on-one he performs well..Based on his successes, it is recommended [sic] that [the Student] continue in a special class for the full day.” (Id., p. 9)

Dr. Sorman reassessed the Student in May 2009. Dr. Sorman found significant improvement in the Student’s overall cognition though issues remained with working memory and processing speed. (Ex. 34) The Student scored in the high average range on a test of nonverbal reasoning in the absence of verbal, motoric or timed requirements. (Id., p. 3) His academic achievement scores showed improvement on some skills and minimal gains on others. Using the Wechsler Individual Achievement Test II (WIAT-II), the Student displayed one year’s growth in word reading decoding in the three year interval between test administrations, and showed no improvement in reading comprehension (Id., p. 4). Using an ability-achievement discrepancy analysis, Dr. Sorman found that the Student’s “. . . composite reading, reading comprehension and written language skills were all found to be statistically at variance with his predicted abilities.” (Id.) Comparing results of the WIAT-II from 2006, the Student’s mathematical abilities improved dramatically (Id.). Dr. Sorman identified issues with fine motor dexterity and motor speed, central auditory processing, and focused concentration. (Id.) Dr. Sorman diagnosed the Student with cognitive disorder not otherwise specified, developmental coordination disorder, receptive-expressive language disorder, reading disorder, disorder of written expression, and he restated his 2006 conclusion (Ex. 32) that the Student had likely suffered hypoxia at birth. (Id., p. 5)

Dr. Sorman recommended, among other things, placement in a "small highly structured class setting that specializes in working with individuals with learning disabilities" (Id.), specifically 5

a “learning disability program, such as the [Private School], that specializes in intervention strategies to help improve [the Student’s] learning overall, but with specific remedial intervention for reading decoding, reading comprehension and expressive writing.” (Id., p. 6)

A draft of a functional behavioral assessment (FBA) was developed in March 2007. The target behaviors were identified as aggression, verbal refusal, and threatening gestures. Small group/individual instruction was identified as among the hypothesized means to reduce or eliminate the targeted behaviors. (Ex. 18) A draft behavior intervention plan (BIP) was developed in March 2007. (Id.) Previously, an FBA and BIP were created in October 2003 when the Student was in kindergarten. (Ex. 17)

Over the years, the Student had two speech-language evaluations administered by the District. The first, March 2005, showed that he “. . . demonstrate[ed] significant delays with his communication skills. His receptive and expressive language skills, phonological and auditory processing skills are significantly below age expectations. He is also demonstrating significant articulation deficits.” (Ex. 22, p. 3) His second speech-language evaluation occurred in February 2008, in the fourth grade. (Ex. 23) The Student demonstrated no improvement on the CELF-4 subtests “concepts and directions,” “recalling sentences,” “word classes – receptive,” “word classes – total.” (Compare, Ex. 22, pp. 1, 2 and Ex. 23, pp. 1, 2)

WITNESS REVIEW

The first hearing date in this case was December 14, 2009. The first District witness was a special education teacher (SE teacher) within the District who was the Student’s teacher for two years. (fourth grade - 2007-2008 & fifth grade - 2008-2009), (Tr. 9 – 92) Generally, she testified that the Student responded well in her classrooms and that he progressed adequately throughout fourth and fifth grade. (i.e., second grade reading level in fifth grade (Tr. pp.17-18); mathematics was a strength--- “. . . he got the fifth grade curriculum, but at a slower pace and broken down for him.”) (Tr. p. 18) In science “. . . we did all of the grade level material . . . and social studies we covered the same material [as prescribed by the general education curriculum].” (Tr. pp.18-19) She testified that the Student was expected to listen, follow directions and act appropriately in class and that “he usually met those expectations . . .” (Tr. p. 21) It was her opinion that the Student made great strides in the accomplishment of his social-behavioral goals in fifth grade (Tr. p. 22). She reviewed the accomplishment of academic goals during the year and the statewide testing results all of which indicated some progress but in varying degrees. (Tr. pp. 22-31) She participated in the first (March 2009) and second (June 2009) Committee on Special

Education (CSE) meetings where the 6th grade IEP was being developed, but not the third meeting (August 2009). She was aware of the particulars with respect to the proposed ICT, hybrid program for 6th grade. For ELA and mathematics the Student was placed in a self-contained classroom, and for science and social studies he was placed in an ICT class. She knows the teacher for the Student's proposed 6th grade class and assisted with the preparation necessary for transitioning him to that class. (Tr. p. 31-34) She was aware of the District's efforts to select general education students "who were receptive to students with disabilities" for placement in the 6th grade ICT, hybrid program. (Tr. p. 35) Although she testified that she was unaware of any needs of the Student which were not addressed in the proposed 6th grade program, (Tr. p. 36) her testimony concerning the propriety of the proposed 6th grade program was reserved. While she asserted her belief that the Student ". . . would have done well in mathematics and ELA in the smaller group . . ." when it came to social studies and science she expressed concern over the "bigger class size" and the need to "transition" into this environment. (Tr. 39) During cross examination the SE teacher conceded that the recommendations made for the fifth grade students going into the sixth grade were related to the availability of the programs and placements available at the middle school. (Tr. p53) When asked if she would consider recommending a self-contained class at the 6th grade for the student, she indicated that she would. (Tr. p. 54)

The second witness on this day, also called by the District, is the sixth grade special education teacher at the District. (Tr. 92 – 140) She had very brief contact with the Student in making preparations for the Student to enter sixth grade at the middle school. (Tr. p. 94) She described the ICT portion of her sixth grade class that was recommended for the Student. During the 2009-2010 school year the classroom was composed of four classified students and fifteen general education students. In that class there is a general education teacher, a different person for science and social studies, a teaching assistant, an aide and the sixth Grade special education teacher. (Tr. p. 96) During her direct testimony she described a typical day in her classroom. (Tr. pp. 100-103) She participated in the March 2009 CSE meeting and the June 2009 CSE meeting for the Student. (Tr. pp. 112-113) She was asked to review the recommendations in Dr. Sorman's report (Ex. 34) and compare those with the resources and strategies available to the students in her sixth grade class. (Tr. pp. 118 -126) Virtually every recommendation was already in place or readily available in her sixth grade classroom. Based on this, she gave the guarded opinion that she thought it "was possible" to educate the Student in her sixth grade class. (Tr. p. 126)

The third witness for the day, called by the District, is the school counselor at the elementary school the Student attended. (Tr. pp. 140 – 187) He was familiar with the Student and was responsible for working toward the counseling objectives in the IEP during the fifth grade. (Tr. p. 144) He would meet with the Student one time per week in one-to-one sessions in his office and he would ‘push-in’ to the classroom at least two times a week. (Tr. p. 144) It was his opinion that the Student made great progress during the fifth grade and “. . . show[ed] a lot of growth in his goals . . .” (Tr. p. 147), notwithstanding an increase in problem behaviors during the last quarter. (Tr. p.149 but see, pp. 165-166 where he seemingly contradicts his earlier assertion.) The school counselor participated in formulating the sixth grade IEP, and he testified: “I felt that after my conversations with . . . the sixth grade counselor . . . the recommended counseling was appropriate for [the Student].” (Tr. p. 153) During cross examination he testified that issues would arise for the Student more frequently in large group settings than in small group settings. (Tr. pp. 154 & 157-158) When pressed for his understanding of what the proposed sixth grade class would look like, he admitted that he did not really understand the ICT class. (Tr. p. 159) Further, he expressed concern that even though the Student was able to progress socially in non-academic, large group settings like art, music, physical education and lunch, the Student may not be successful in academic, large group settings if there was inadequate support in such an environment. (Tr. pp. 162-163 & 181, 184 but see, pp. 168 & 183 where he indicates that from a “counseling perspective” he saw no reason to keep the Student out of the recommended program)

The fourth witness for the day, called by the District, was the school psychologist at the elementary school which the Student had attended. (Tr. 187 – 209) The school psychologist attended the March 2009 CSE meeting. Although she had not evaluated the Student herself, she was informed through review of previous evaluations (Tr. p. 190) prepared by District personnel (Ex. S 31 &33) and by the private neuropsychologist Dr. Peter Sorman. (Ex.s 32 & 34) She supported the District recommendation that the Student be placed in the ICT class for the sixth grade. (Tr. p. 191) She supported her conclusion with the rationale that the ICT class was “the next good step” for the Student. In her view, the Student would have the support staff and be integrated into the mainstream for science and social studies having previously been in a more restrictive, self-contained classroom. (Tr. p 191) She opined that it would be valuable for the Student to gain social experiences “. . . dealing with other students and other things going on around him.” (Tr. p. 192) She was asked to review nearly all of the specific recommendations of Dr. Sorman (except class size) and give her opinion of the appropriateness of the recommendations for the Student. She did so, and her opinion was that they were appropriate. 8

(Tr. p. 192 & Ex. 34 p.6) In fact, it was her belief that all the recommendations under review would have been provided in the District's program for the Student. (Tr. p. 193) She supported her opinions by stating that the District program would provide a teaching assistant who would be shared by the Student and one other student. Ultimately, she agreed that a small class was appropriate in ELA and mathematics but that a small class was not necessary in the subjects of science and social studies. (Tr. pp. 208-209)

The second hearing date was December 15, 2009. The first witness for the day, called by the District, was the Director of Student Services for the District (CSE chair). (Tr. 223 – 325) She has had contact and has been involved with the Student since preschool times; she was active in program management, observations and chairing of meetings. (Tr. p. 223) She chaired all three relevant CSE meetings regarding the Student's transition into the sixth grade. (Tr. p. 297) In her testimony she explained that the ICT program was created that year for the students advancing into the middle school from fifth grade. (Tr. p. 224) Traditionally, the District has offered a consultant teacher who has acted to provide one special education support for those students who are classified and have been integrated into a general education setting. With the ICT model there would be three special education supports in the integrated classroom --- a special education teacher, a teacher's aide, and a teacher's assistant. (Tr. p 227) The ratio of classified students in the class was set at 8:1:1. (Tr. P. 229) She was the chair of the March 2009 annual review (Tr. p. 230) when the ICT program was recommended for the Student. The meeting reconvened in June 2009 following the Parents' decision to oppose the recommendation. (Tr. p. 231) At that meeting, self-contained class options were explored, and the Parents indicated their intent to have the Student attend the Private School. (Tr. p. 234) Although the District is familiar with the Private School and occasionally sends their students there, the CSE chair did not agree with the Parents. Instead, she and the District made another option available through the "consortium" (other nearby districts that mutually support each other). (Tr. p. 232) In August the CSE met again and finalized the program recommendation for the ICT class over the further objection of the Parents. In answer to the question : 'Why did the CSE settle on the integrated co-teaching model?' the Director of Student Services stated "When we take a look at a placement . . . [we] . . . look at how the student is achieving . . . what they have accomplished. . . [and] . . . what is the next step." (Tr. p. 237) She continued to explain that the Student was meeting academic benchmarks and socially making gains in the District. On the other hand, the Private School was comprised entirely of students with disabilities, and consequently, there would not be the opportunity for the Student to work with typical peers there. (Tr. pp. 237-238) Further, she went on to explain that the District, like the Private School, offered the Wilson

reading program. (Tr. p. 238) She justified the ICT class as the next step even though two of his four academic subjects were tested at a “lower level” during his fifth grade year; specifically, the two were social studies (fourth grade level) and ELA (alternate assessment). (Tr. p. 242) She testified that there was a lengthy process in selecting the students who would comprise the ICT class. (Tr. p. 243) She met with the middle school principal and began talking about creating a classroom that would be “. . . successful for students with disabilities coming over, talking about class size.” (Tr. p. 243) They had “. . . first talked about it being a 15. Later then after – indicating the class size coming over, we knew we needed to increase it to be able to meet the needs of all the students.” (Tr. pp. 244 & 255-256, 268, 285-291, 308-312 & 317-322) During her testimony she declared that the Private School did not strike her as being an inappropriate placement. (Tr. p. 245) The Director of Student Services for the District also reviewed the recommendations of Dr. Sorman which the CSE had considered before proposing the ICT program for the Student. Like the school psychologist at the elementary school which the Student attended, this witness confirmed the availability of all of Dr. Sorman’s recommendations save the small class size. (Tr. pp. 246-250) Regarding the profile of the special class component of the ICT, hybrid sixth grade class, she testified that one student was classified as mentally retarded, one was classified with Autism and two had diagnoses of ADHD. (Tr. p. 273) During further examination, she offered some insight into the concerns of the Parents. With respect to the “consortium” self-contained classes that were observed, the Parents were concerned that to place the Student with students with behavior issues might lead to the adoption of such negative behaviors by the Student. With respect to the ICT class, the Parents were concerned that the Student might feel the frustration and distraction that he had felt in early elementary school when he was in an integrated class. (Tr. pp. 299-305)

The District then rested its case. (Tr. 326)

The second witness for the day was called by the Parents. She is the co-head of the Private School. (Tr. pp. 326 – 371) She explained the Private School philosophy and its practice of assessing a student’s strengths and areas of need. The Private School looks to remediate basic skills while focusing on the “whole child” and concentrates on the social, emotional learning that needs to occur. (Tr. p. 329) For the most part the staff has been trained to view a student from a neuro-developmental perspective. (Tr. p. 330). The school is approved for students aged ten to twenty-one years, and its then current total enrollment was approximately one hundred and twenty-six students. (Tr. p. 330) At the time of testimony, there were twelve students in the sixth grade divided into two sections. (Tr. pp. 330-331) While the Private School is independent, it

is a NY State-approved special education placement. (Tr. p. 331) Basically, the program is meant to serve youngsters whose primary issue lies in the area of learning, but not behavior. (Tr. p. 332) The Private School uses modern technology in the classrooms including computers with Kurzweil and Dragon Naturally Speaking software, writing labs, Smart Boards and Thinking Maps. (Tr. p. 336) At the Private School the staff individualizes each student's program and follows the student's IEP. (Tr. p. 340) She discussed the Student's ". . . struggles transitioning into new situations . . ." and indicated that his program is 'very individualized' but it 'is working.' (Tr. p. 343) At the Private School the Student is educated in groups of five or less for English and social studies, an individual class (one-to-one) for reading and a slightly larger class for science (probably 7). The witness did not recall the size of the mathematics class. (Tr. p. 354) Regarding the concept of least restrictive setting the witness understood that the Private School was a segregated setting and therefore restrictive, but she indicated that for the Student ". . . it really enables him to fully participate in a program . . . [and to be] fully part of the school community . . ." (Tr. pp. 356-357)

The third hearing date was January 21, 2010. All witnesses from this point were called by the Parents. The first witness of the day is the Student's counselor and social studies teacher at the Private School. (Tr. pp. 383 – 445) He is certified to teach sixth grade to twelfth grade in U.S. History. (Tr. p. 384) He integrates his curriculum with that of the writing and ELA teacher. (Tr. p. 393) He is familiar with the Student's strengths and deficits, and his testimony indicated that the Student was often overwhelmed by transitions and dealing with the school environment. (Tr. pp. 399-405) Of note was his impression that the Student performed better in November when the Private School added another sixth grader and reduced the class size from eleven students to the current configuration of two sections with approximately six per section. ". . . it seemed to me that [the Student] took more pride in his work in a smaller classroom. . . Now [in] the smaller classroom he doesn't say, 'I can't do it. I don't know how.' He will self advocate. . . He has flowered as an individual but also as a student." (Tr. pp. 405-406) During his testimony it was learned that the Student is dealing with a "medical issue." (Tr. pp.424-426) This causes the Student embarrassment, but it is being managed. (Tr. pp. 430-434)

The next witness was an ELA and writing teacher at the Private School. (Tr. 446 – 491) She is a state-certified teacher for grades "seven through twelve [in] English, elementary education and reading." (Tr. p. 447) At the Private School she teaches ELA and writing. Like the counselor and social studies teacher for the Student at the Private School, she too has noticed a change in working with the Student since the November split of the class into smaller groups. ". . . since 11

[then] I have been really . . . able to assess what his actual level of knowledge is when it comes to a topic of study.” (Tr. pp. 459-460) She testified that “. . . in larger group and that was a group of 11 . . . it was very difficult.” (Tr. p. 460) It is her perception that the reduction in class size has improved the Student’s ability to transition back into the classroom following the interruptions that are frequently occasioned by the Student’s medical condition. (Tr. p. 477)

The third witness was a speech pathologist working at the Private School. She also teaches strategies for language. (Tr. 492 – 556) She provides services to the Student in accordance with his IEP. (Tr. p.498) Specifically, she works with the Student to develop articulation skills (Tr. p. 499), receptive and expressive language skills (Tr. p. 499), and pragmatic language skills. (Tr. p. 499) Much of her testimony was a description of the Student and the strategies she employs in teaching him. In her opinion the Student has progressed in the areas of articulation and expressive language skills. (Tr. 524) Significantly, the witness reviewed the goals and objectives proposed by the District for speech and language, and she found no fault with the goals or the amount of services offered in the public school setting. (Tr. pp. 538-543 & Ex. 14)

The fourth hearing date was January 22, 2010. The first witness was Peter Sorman a neuropsychologist who evaluated the Student twice. (Tr. pp. 564 – 676) He testified that the first referral was from the Student’s primary care physician in 2005. (Tr. p. 578) The evaluation that followed resulted in a report in evidence. (Ex. 32) The witness explained that as early as that first testing it was apparent that the Student objectively had difficulty “. . . separating out or filtering out distraction in order to focus and concentrate.” (Tr. p. 581) Even a class of twelve to fifteen students would have presented difficulties for the Student “. . . with just normal shuffling of the students and visual stimuli, auditory stimuli . . .” (Tr. p. 581) His recommendation at that time was that the Student attend a classroom not to exceed six or seven students. (Tr. p. 581) A second evaluation of the Student was completed by Dr. Sorman in May of 2009. (Ex. 34) In comparison with the earlier evaluation he noted some improvements in functioning. (Tr. p. 584) He testified that “When I thought of [the Student], I wasn’t just thinking about a small class. I was thinking about a small school. Limited number of students overall . . .” (Tr. p. 588 & 591-593) Later in his testimony he was asked if the Student was dyslexic. He responded that the Student’s decoding problem was “even more primitive than that . . .” (Tr. pp. 640, 660) With respect to how the Student would perceive, interpret and react to sounds in group settings, Dr. Sorman testified that it would be a problem for the Student even in a small group setting of six or seven students. (Tr. p. 661) He was aware that the Student was exhibiting “enuretic” behavior for nearly one year, but it was his impression that it was at home in bed. While he offered some

comments about the impact of this behavior at school, they were inconclusive and not based upon his own analysis. (Tr. pp.628-636) On a different topic, it was his testimony that the Student would benefit from modeling non-disabled peers but he suggested that that should take place in a non-academic setting and that “. . . he would be a fish out of water . . .” in a setting designed for learning. (Tr. p. 662-663) During cross-examination he allowed that the Student could benefit socially if properly supervised. (Tr. pp. 660-673) However, the thrust of his testimony supported his recommendation that the Student should be in a small setting such as that which the Private School offered.

The next witness is a social worker at the Private School for grades 5 through 12. (Tr. 676 – 731) She holds a license as a clinical social worker and she is a New York State certified school counselor. (Tr. 678) She is actively involved in teaching “. . . social emotional skills . . . communication skills and . . . frustration tolerance.” (Tr. p. 679) She is the Student’s counselor at the Private School. (Tr. p. 681) She follows a behavior intervention plan (BIP) at the Private School. (Ex. 49 & Tr. p 685) She testified that the Student has a “wetting problem” for which she counsels him. (Tr. pp. 689, 707, 715-717) She testified that “Large groups are hard for him.” (Tr. p. 691) and offered a couple of examples: one, his reaction to being in a group of thirteen students with four or five teachers and another, in the lunchroom. (Tr. pp. 691-693 & 708-709)

The final hearing date was January 27, 2010. The only witness called for that day is the Student’s mother. (Tr. pp. 738 – 812) At the outset she described the medical issue (wetting) that has plagued her son “always” (Tr. pp. 740 & 801) In school this has been an issue since kindergarten. (Tr. p. 740) In fifth grade the SE teacher was aware of the issue. (Tr. p. 741 & Ex. 38) She reported that the Student loves going to the Private School in contrast to his feelings about his fifth grade school class that he did not like. (Tr. p.746) The mother recalled that early in the Student’s academic career he was in a ‘blended class’. (Tr. p.753) She stated that the Student was not successful in that environment. (Tr. p.753) At one point the Parents sought out extra help for the Student’s difficulties with speech. (Tr. p. 756) This lasted for several years and the District personnel were aware of the extra help. (Tr. p. 757) During the summers the Parents also sought alternate environments for the Student. (Tr. p. 757) As early as February 2009 she began discussions with the SE teacher about the possibilities for sixth grade programming. (Tr. p. 761) She related her recollection that the SE teacher had advised her that a self-contained class would be appropriate for the sixth grade. (Tr. p. 762) At the March 2009 CSE meeting she gave her opinion that she did not think the ICT program would be appropriate because of the larger class size that was being contemplated. (Tr. pp. 767-768) During the March CSE meeting the

number of total students slated for the ICT class was to be fifteen. Weeks later in an e-mail from the CSE chair the mother was informed that the total students would be twenty in the ICT class. (Tr. p. 769) Cooperating with the District the mother then contacted five or six other school to inquire regarding potential programs. (Tr. p. 771) During this time period, after she was advised that the several programs were not a proper fit, she began to focus on the Private School and advised the District of her intentions. (Tr. p. 772) She also contracted with Dr. Sorman for a second evaluation (he previously evaluated the Student). (Tr. p. 778) She delivered the report of Dr. Sorman to the District before the June 2009 CSE meeting. (Tr. p. 784) During summer school in the summer of 2009 the Student had about three or four students in his class. (Tr. p. 786) The mother reported that she had a conversation with an aide from the summer school class who told her that the large class would not be appropriate in the fall. (Tr. p. 780) Likewise, the counselor from the fifth grade class advised her to "fight" the ICT placement in an off the record conversation. (Tr. p. 793)

LEGAL FRAMEWORK

Reimbursement Generally

This case deals with reimbursement by the District to the Parents for tuition and related expenses incurred in the placement of the Student in a Private School. With respect to the issue of reimbursement for money spent on educational services, the standard is set forth in School Committee of the Town of Burlington vs. Department of Education Massachusetts, 471 US 359 (1985); Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d Cir. 2005): [A] "Board of Education may be required to pay for educational services obtained for a child by the child's parents, if the services offered by the Board of Education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parents' claim."

IDEA

The "IDEA" is a comprehensive statutory framework established by Congress to aid the states in providing disabled children with a FAPE. 20 U.S.C. § 1412(a)(1). "A [FAPE] is available to all children with disabilities residing in the state between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). The IDEA defines a FAPE as special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge,

- (B) meet the standards of the state educational agency,
- (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and
- (D) are provided in conformity with the individualized education program required under § 1414(d) of this title. 20 U.S.C. § 1401(9).¹

A FAPE is crafted through the collaboration of the disabled student's parents, teachers, and school district administrators and is recorded in an IEP (20 U.S.C. § 614(d)). The "core of the statute . . . is the cooperative process that [IDEA] establishes between parents and schools." Schaffer v. Weast, 546 U.S. 49, 53 (2005). The IEP is, in brief, a comprehensive statement of the educational needs of a disabled child and the specially designed instruction and related services to be employed to meet those needs. 20 U.S.C. § 601(14). In New York State, the IEP is produced by a CSE, whose members are appointed by the board of education or trustees of the school district (N. Y. Educ. Law § 4402(1)(b)(1) (McKinney Supp. 2005)).

The IDEA provides numerous procedural safeguards to protect the due process rights of disabled children and their parents (See generally 20 U.S.C. § 1415). These procedures include the opportunity for parents to obtain an independent educational evaluation of the child (20 U.S.C. § 1415(b)(1)) and file a complaint with the state or local educational agency (20 U.S.C. § 1415(b)(6)). Any such complaint is resolved through an "impartial due process hearing" in which parents of disabled children have "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." (20 U.S.C. § 1415(b)(6)). Parties to an administrative proceeding under the IDEA have the right to written findings of fact and decisions on any complaint about the provision of a FAPE. Polera v. Board of Education Newburgh, 288 F.3d 478, 482 (2nd Cir. 2002).

¹ "special education" is defined by the IDEA as specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education. The term "related services" is defined as transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. 20 U.S.C. § 1401(26).

In New York State “The board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing. . . .” NY Educ. Law § 4404 (1)(c) thereby modifying the rule enunciated in Schaffer where “The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief” Schaffer, 546 U.S. at 537. However, when “. . . seeking tuition reimbursement for a unilateral parental placement. . . [the parents] shall have the burden of persuasion and burden of production on the appropriateness of such placement”, NY Educ. Law § 4404 (1)(c).

With respect to due process hearings, the IDEA permits each state to determine whether it will provide a single-tier or two-tier administrative review process (20 U.S.C. § 1415(g)). New York has elected to employ the two-tier approach (N. Y. Educ. Law § 4404 (McKinney Supp. 2005)); accord Heldman v. Sobol, 962 F.2d 148, 152 (2nd Cir., 1992). Under the New York scheme a parent who wishes to challenge his or her child's IEP is entitled to a due process hearing conducted by a hearing officer appointed by the local board of education (N. Y. Educ. Law § 4404(1) (McKinney Supp. 2005)). A party dissatisfied with the decision of the hearing officer has the right to appeal the hearing officer's decision to a State Review Officer (SRO) (N. Y. Educ. Law § 4404(2) (McKinney Supp. 2005)). After these administrative remedies have been exhausted, a party may bring a proceeding pursuant to Civil Practice Law and Rules Article 4 in state court or a federal action under Section 1415(i)(2) of the IDEA (20 U.S.C. § 1415(i)(2)(A); N.Y. Educ. Law § 4404(3) (McKinney Supp. 2004)).

ANALYSIS

In this matter the Parents have unilaterally placed the Student in a private school, and they are requesting reimbursement of tuition resulting from that placement. This situation is governed by Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985) that lays out a three prong test to determine if reimbursement of tuition is warranted. The first determination to be made is that of appropriateness of the District's recommended program. Secondly, the appropriateness of the services provided by the unilateral placement must be examined. Finally, a weighing of the equities must be completed.

Prong I

I now examine if the District provided a FAPE to the Student for the 2009-2010 school year. My analysis is ordered according to the specific issues raised by the Parents. (Ex 2 & Tr. pp 5-6)

Application of the Bd. of Educ., Appeal No. 07-114 (The impartial hearing officer should confine his determination to issues raised in respondents' due process complaint notice) The issue is not whether the Private School is a superior placement, but whether the District proved that their IEP offered enough in the way of educational services to afford the Student a FAPE.

Did the District fail to properly evaluate the Student prior to making placement and program recommendations?

The District did not fail to properly evaluate the Student. 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) See also, Application of A Student with a Disability, 09-142

In fact, I cannot say that the CSE made any significant procedural errors in the series of the three meetings. At least none were made which would compromise the Student's right to an unimpeded FAPE, thwart the Parents participation, or deprive the Student of educational benefits.

In support of the District's efforts I note that the CSE did consider a significant number of evaluations and reports which, taken together, provide a fair composite of the Student. "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]; Application of A Student with a Disability, 09-109 @ p. 17

Although the CSE did not conduct a new triennial evaluation prior to making the 2009-2010 recommendation, the record indicates that the CSE had available the following evaluative

materials: an aide request worksheet (Ex. 12, p. 6); a NYSAA Assessment (Id.); the data from prior evaluations (Id., p. 4); a counseling progress summary (Ex. 21); an educational summary (Ex. 15), an extended school year summary; an OT progress summary (Ex. 30); and, a speech/language progress summary. (Ex. 25b)

Additionally, the Parents had secured and provided the District with their own privately obtained evaluation from Dr. Sorman. This evaluation is largely consistent with that of the District's prior evaluation, as reviewed by the District's school psychologist who had prepared for and attended the relevant CSE meetings. (Compare ex. 33 - 2008 – District's psycho-educational evaluation with Ex. 34 2009 Dr. Sorman's neuro-psychological evaluation) Despite obvious differences, such as the professional point of view of the evaluator (i.e., school psychologist vs. neuro-psychologist), these evaluations each identify the Student's needs consistently (for example, there is substantial agreement among evaluators regarding the need for related services and educational strategies) The main difference, and the central issue in this case, is that the District evaluator suggested that the Student capitalize on opportunities “. . . to socialize with typical peers . . .” (Ex. 33 p.4) while Dr. Sorman emphasizes a “learning disability program” that does not offer the public school based opportunities for social integration with typical peers. (Ex. 34 p.6) In conclusion, I find that the CSE had adequate evaluative material to identify the Student's needs during their deliberations.

I make this finding in the context that the District took rather elaborate steps to ensure wide representation at the three CSE meetings. The final meeting in August 2009 included both Parents, their attorney, the CSE chair, two District special education teachers, a District school psychologist and an occupational therapist. Although the July 2009 meeting did not include the Parents' attorney, it did additionally include a speech therapist, an additional occupational therapist, two school counselors, and the Student's fifth grade Special Education Teacher. The first CSE meeting in March 2009 was well attended by a normal complement of participants along with the middle school principal. (See, 8 NYCRR section 200.3) Thus, there were current and future educators, related service providers, building personnel and a district psychologist available to answer questions and discuss the materials that were available. Cerra v. Pawling Cent. School Dist., 427 F.3d 186 (2nd Cir. 2005) Further, I note from observing the Parent (mother) during her testimony that she is articulate and capable of advocating for her son. Moreover, the Parents' able attorney appeared at the August CSE meeting, resolving any doubt about the issue of adequate parental participation.

Did the District improperly base the placement and program recommendations on considerations other than the Student's needs?

The Parents argue that rather than developing an IEP and making a placement decision based upon the IEP, the decision to place the Student in the ICT classes was part of a decision to place all the students from the self-contained fifth grade class into a newly developed program at the middle school --- namely, the ICT social studies and science classes.

According to the Parents, the District's decision to create sixth grade ICT classes in social studies and science was an administrative decision, not a CSE decision (Tr. pp. 308 – 311 (The District started to consider ICT before annual reviews; framework and resources were designed and designated before March 2009)). The Parents contend that it was made without parental input and, in the Student's case, without regard to the results of his most recent evaluation. (Ex. 34; Tr. p. 256) They conclude that the District's recommendation for the Student's sixth grade program and placement was a function of resource allocation and not of the Student's individual learning requirements. (Tr. p. 322 - format and resources for ICT "in the works" by February, March, 2009)

I disagree and find that the 2009-2010 IEP did not result from impermissible predetermination. Although it is clear that the District did make arrangements to set up an ICT program at the middle school weeks, if not months, before the first CSE for the Student in March 2009, school officials are permitted to form opinions and plan prior to IEP meetings. "IDEA regulations allow school districts to engage in preparatory activities . . . to develop a proposal . . . that will be discussed at a later meeting." R.R. ex rel M.R. v. Scarsdale Union Free Sch. Dist., 615 F.Supp.2d 283, 294(S.D.N.Y), affirmed 2010 U.S. App. Lexis 3143 (2d Cir. N.Y. Feb. 18, 2010) Far from creating an immutable policy concerning the Student's programming and placement, I find the CSE's substantive discussion of placement was far reaching and open minded. A school district must determine a student's educational placement on the basis of the student's IEP. See, 34 C.F.R. § 300.116[b][2]. Here, the CSE met three times to discuss the placement and program of the Student. The hearing record also contains testimony that the CSE chair contacted other school districts in the county consortium of districts and that the Parent (mother) visited a BOCES-run 8:1:1 class. However, there were no appropriate self-contained sixth grade classes available. (Exs. 39 & 47; Tr. pp. 291 – 293, 302, 303) Additional evaluative materials were considered: specifically, the Sorman evaluation produced by the Parents (Ex. 34), and the

opposing programming positions of the CSE chair and the Parents. These alternative considerations of the CSE weigh against any finding that the CSE or the District impermissibly predetermined the content of the IEP. I now turn my attention to the substantive adequacy of the District's recommendation.

Was the District's proposed program designed to meet the Student's needs?

The CSE recommendation to place the Student in the ICT program in his science and social studies classes for sixth grade (Ex. 12, 13 & 14) presents the dispositive issue in this case. I find that this placement decision was contrary to the mandates of IDEA to provide a FAPE in the LRE. The District rationale that the ICT class offered "the next step" for the Student's education is not supported in the record. I cannot find that such a placement would offer an educational benefit to the Student. To the contrary, after reviewing the record in this matter, I conclude that the ICT program could have actually hurt the Student. Previously, for third through fifth grades, the Student was placed in a full time self-contained class. (Exs. 4 – 11) The most recent evaluations provided no support for the change to a less restrictive environment. I recognize, as did the District, that the ICT would present a challenge for the Student ("You have to go outside of your comfort zone. . ." (Tr. p. 199 - school psychologist) And I note that the District offered the additional support of an aide for the Student. Unlike the District however, I view the Student's learning profile and past academic history to indicate that the larger class size prescribed by the ICT class would likely breed frustration, anxiety, impulsivity and the inability to learn. Historically, the Student has demonstrated sensitivity to noise (Ex. 6, p. 4; Ex. 7, p. 4; Ex. 8, p. 4; tr. p. 16; Ex. 12, p. 5; Ex. 14, p. 6), aggression (Ex. 6, p. 4; Ex. 7, p. 4; Ex. 8, p. 4; Ex. 9, p. 5; Exs. 10 – 14, p. 5), impulsivity (Ex. 4 – 7, p. 4; Ex. 8 – 14, p. 5), being easily overwhelmed by the environment (Ex. 8 – 14, p. 5), and that he performs better in small groups or one-on-one (Ex. 33, p. 9; Ex. 38). Aside from the persistent Parental concerns delivered to the CSE (Tr. pp. 767-768), I also point to the rather explicit recommendation of Dr. Sorman (Ex. 34 p. 6) whose opinion I weigh heavily based upon his background, demeanor while testifying, and his ongoing evaluative relationship with the Student. Along with his written opinion that was available to the CSE there was also his opinion that the larger school size of the District's middle school would present a problem for the Student. While the District may complain that this specific opinion was not in writing and brought to the CSE meetings, I am not persuaded that this is a valid argument. Actually, I find the building size issue to be implicit in Dr. Sorman's written recommendation. Moreover, the District's representative (CSE chair) was very familiar with the Private School (Tr.p.245) and did know or, should have known, that the statistical size of the

relative schools was a major factor in Dr. Sorman's report (Ex. 34). I also cannot ignore the pervasive testimony from the Student's educators who consistently recognized the propriety of a self-contained class. See above testimony of SE teacher, (Tr. p. 54) school counselor in the elementary school, (Tr. pp. 162-163 & 181, 184 & 793) and CSE chair (Tr. p.245) for examples. "Parents who believe that the state has failed to provide such an education may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state." A.C., M.C. v. Bd., Chappaqua Central Sch., 553 F.3d 165 @ 171 (2nd Cir. 2009)

Are the ICT classes the LRE for the Student?

The ICT classes are not the LRE for the Student. In addition to the free appropriate education requirement, IDEA provides that States must establish procedures to assure that, to the maximum extent appropriate, children with disabilities ". . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . ." 20 U.S.C. § 1412(5)(B). As numerous courts have recognized, this provision sets forth a "strong congressional preference" for integrating children with disabilities in regular classrooms. Oberti v. Board of Education, 995 F.2d 1204 (3rd Cir. 1993) The test for determining LRE is ". . . whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child, and, if not, then whether the school has mainstreamed the child to the maximum extent appropriate." P. v. Newington Bd., 546 F.3d 111 (2nd Cir. 2008) As stated above it is my opinion that education in the regular classroom cannot be provided to the Student. I find the efforts of the District to mainstream the Student miss the mark, laudable as they may be. ". . . [S]chools must attempt to achieve that goal [of LRE] in light of the equally important objective of providing an education appropriately tailored to each student's particular needs. See, Bd. of Educ. of Murphysboro v. III. Bd. of Educ., 41 F.3d 1162, 1168 (7th Cir. 1994) (stating that least-restrictive-environment requirement 'was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements')." P. v. Newington Bd. at 122 In the case before me there is a recognition that the Private School does not provide opportunities for integration with non-disabled peers. But I rely on the opinion of Dr. Sorman that, although the Student would benefit from modeling non-disabled peers, such modeling should take place in a non-academic setting. "[The Student] would be a fish out of water . . ." in a setting designed for learning. (Tr. pp. 62- 21

663) To this I add the testimony of the counselor from the private School: “. . . [I]t seemed to me that [the Student] took more pride in his work in a smaller classroom. . . Now [in] the smaller classroom he doesn’t say, ‘I can’t do it. I don’t know how.’ He will self advocate. . . He has flowered as an individual but also as a student.” (Tr. pp. 405-406) When confronted with the record herein, I cannot simply rely on the District’s hope that the ICT is the “next good step” for the Student. “[T]he presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students.” Schreiber v. East Ramapo Central School District, Case No. 06-cv-5004 (S.D.N.Y. 3-30-2010)

Accordingly, I find that a FAPE was denied in this case.

Prong II

I must now consider whether the Parents met their burden of proving the appropriateness of the placement of the Student at the Private School. Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080. In order to meet that burden, respondent must show that the services provided were "proper under the Act" (Florence County Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 12 (1993); Burlington, 471 U.S. at 370), i.e., that the Private School offered an educational program which met the student's special education needs (Application of a Child with a Disability, Appeal No. 01-010). A private placement meeting this standard is one that is likely to produce progress, not regression. "Nevertheless, parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education," and "[a]n appropriate private placement need not meet state education standards or requirements." Frank G. v. Bd. of Educ., 459 F.3d 356, 364 (2d Cir. 2006) (citing Carter, 510 U.S. at 14). In this case many of the witnesses, from the District and the Private School testified about the benefits of small class size generally, and the teachers from the Private School specifically testified that they identified and addressed the Student’s specific needs. Although these same teachers testified about his difficulties (i.e., transition, the medical issue, lack of academic fundamentals), they were able to identify strategies for dealing with those issues. Further, the records kept by the Private School support the conclusion that the Student was benefiting from instruction particularly in the area of socialization and in the division of the class size on or about November 2009. "[T]he test for the parents’ private placement is that it is appropriate, and not that it is perfect." Cleveland Heights-University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400 (6th Cir. 1998). Applying this standard I find that the Parents have met their burden.

Prong III

Tuition 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 child 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][1]²; see 34 C.F.R. § 300.148[d]). 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]). In the instant case, the Parents have taken a candid proactive approach to working with the District, and I can find no basis to deny or reduce tuition reimbursement.

As a final note, I wish to address the Parents request that I order the Private School as the IEP placement and that I modify the IEP. Here, I decline to follow the Parents request. I believe the District and the Parents are able to work cooperatively to identify issues as the Student progresses throughout his education, and I leave these decisions to the CSE.

² 20 U.S.C. § 1412[a][10][C] states in pertinent part: (iii) Limitation on reimbursement.--The cost of reimbursement . . . may be reduced or denied--
(I)if-- (aa) at the most recent IEP meeting. . . ; or (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency . . .
(iv) Exception.--Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—
(I) shall not be reduced or denied for failure to provide such notice if-- . . . ; or (cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and
(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if-- . . (bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

Therefore, it is hereby **ORDERED**

That the District reimburse the Parents for the one-hundred percent of their cost of tuition at the Private School for the 2009-2010 school year upon presentation of a properly receipted bill for the cost of same.

Dated: March 31, 2010

Martin Kehoe, III
Impartial Hearing Officer

Exhibits considered - see Addendum

APPEAL RIGHTS

Appeal to a State Review Officer of the State Education Department

A review of the decision of a hearing officer rendered in accordance with New York State Rules and Regulations may be obtained by either the parent or the Board of Education by an appeal to a State Review Officer of the State Education Department. Such a review shall be initiated and conducted in accordance with the provisions of part 279 of Title 8 of The New York State Code of Rules and Regulations. The written decision of the State review Officer, a copy of which will be mailed to the parent and the Board of Education, shall be final, provided that either party may seek Judicial Review by means of a proceeding pursuant to Article 78 of the Civil Practice Law and Rules or 20 U.S.C. section 1415.

Title 8 NYCRR § 279.2 Notice of intention to seek review.

(a) The parent or person in parental relationship of a student with a disability who intends to seek review by a State Review Officer of the State Education Department of the decision of an impartial hearing officer shall serve upon the school district, in the manner prescribed for the service of a petition pursuant to section 275.8(a) of this Title, a notice of intention to seek review in the following form:

Notice:

The undersigned intends to seek review of the determination of the impartial hearing officer concerning the identification, evaluation, program or placement of (name of student with a disability). Upon receipt of this notice, you are required to have prepared a written transcript of the proceedings before the impartial hearing officer in this matter. A copy of the decision of the impartial hearing officer, a bound copy of the written transcript, including a word index for the written transcript, as well as an electronic transcript, and the original exhibits accepted into evidence at the hearing and an index to the exhibits must be filed by the Board of Education with the Office of State Review of the New York State Education Department within 10 days after service of this notice.

(b) The notice of intention to seek review shall be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period.

(c) A notice of intention to seek review shall not be required when the board of education initiates an appeal from an impartial hearing officer's decision. A copy of the board's notice of petition, petition, memorandum of law and any additional documentary evidence shall be served upon the parent within 35 days from the date of the impartial hearing officer's decision. If the decision has been served by mail upon the board, the date of mailing and the four days subsequent thereto shall be excluded in computing the 35-day period.