



The University of the State of New York

The State Education Department State Review Officer

No. 07-137

Application of the BOARD OF EDUCATION OF THE EAST RAMAPO CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Greenberg Wanderman and Fromson, attorney for petitioner, Carl L. Wanderman, Esq., of counsel

DECISION

Petitioner appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to the student and ordered it to reimburse respondents for the portion of the student's tuition costs that related to secular special educational instruction at the Yeshiva of North Jersey School (YNJ) during the 2006-07 school year. Respondents cross-appeal from that portion of the decision of the impartial hearing officer that denied them reimbursement for the student's non-special education classes at YNJ and additionally request reimbursement for the portion of the student's 2006-07 YNJ tuition expense that was applied to YNJ's building fund. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the commencement of the impartial hearing, the student was attending YNJ where respondents had unilaterally placed him at the beginning of the 2004-05 school year (Dist. Ex. 1 at p. 1; Parent Ex. C at p. 37; IHO Ex. I at p. 1). YNJ has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). Educational evaluation reports indicate that the student exhibits deficits in reading decoding, reading comprehension, spelling, vocabulary and word usage (Parent Ex. H at pp. 1-2; Joint Ex. a at pp. 10-11). The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this appeal (see 8 NYCRR 200.1[zz][6]).

The student's educational history is discussed in Application of a Child with a Disability, Appeal No. 06-013 and Application of a Child with a Disability, Appeal No. 06-100 and will not be repeated here in detail. Briefly, petitioner's Committee on Special Education (CSE) convened in November 2004 and found the student eligible for special education programs and services as a student with a learning disability (Application of a Child with a Disability, Appeal No. 06-013). The individualized education program (IEP) developed at this November 2004 CSE meeting included goals and objectives in the areas of study skills, reading, writing and math (id.). The student's mother visited the recommended resource room program and met with its teacher; however, respondents did not subsequently consent to the recommended IEP (id.). In March 2005, the CSE reconvened (id.). The CSE recommended the same classification, program and placement previously recommended at the November 2004 CSE meeting (id.). Again respondents did not subsequently provide consent to implement the recommended IEP (id.). The student attended YNJ for both the 2004-05 and 2005-06 school years (id.; Tr. pp. 152-53).

On March 27, 2006, petitioner's school psychologist/service coordinator (school psychologist) sent a letter to respondents along with petitioner's "Consent for Evaluation" form and requested that respondents complete the enclosed form and consent to have the student reevaluated (Dist. Ex. 2). The letter indicated that the reevaluation was requested so that petitioner could "make appropriate recommendations for the coming school year" (id.). The letter further indicated, "[w]e need an updated academic assessment to ensure that we can offer [a] FAPE in the least restrictive appropriate placement..."(id.).

On May 4, 2006, respondents signed petitioner's "Consent for Evaluation" form and provided consent for petitioner to reevaluate the student, exchange all pertinent information with YNJ, observe the student at YNJ, and obtain YNJ's teacher progress reports (Parent Ex. I).¹ In the margin at the bottom of the form, respondents requested that petitioner clarify what kind of evaluation it was considering (id.). By letter dated May 31, 2006, respondents referred to the consent form they executed on May 4, 2006 and requested that the student be evaluated "as you do other special education students with their follow-up evaluations" (Dist. Ex. 3).

On June 9, 2006, petitioner conducted an educational evaluation of the student (Parent Ex. H). Administration of the WIAT-II-Abbreviated yielded standard (and percentile) scores of 78 (7) for word reading, 95 (37) for numerical operations, 85 (16) for spelling and a standard composite score of 83 (id. at pp. 1-2). The evaluator reported that the student was able to read familiar sight words (id. at p. 2). The evaluator also reported that although the student tried to use syllabication to break up complex words into structural components, the student had difficulty sounding out many multi-syllabic words (id.). The evaluator opined that the student's errors on the spelling subtest reflected poor knowledge of spelling rules and homophones (id.). She noted that the student exhibited difficulty with fractions, decimals, and simple algebraic equations (id.). The evaluator administered the Test of Written Language (TOWL) which yielded scores in the 16th percentile for vocabulary, the 50th percentile for thematic maturity, the 9th percentile for word usage, and the 25th percentile for style (id.). The student achieved a

¹ Although the "Consent for Evaluation" form was dated May 4, 2006, the hearing record is unclear as to when respondents actually sent this form back to petitioner. Petitioner however does not dispute the receipt of this completed "Consent for Evaluation" form.

written language quotient of 85 (low average) (id.). The evaluator also administered a test identified in the hearing record as the "Gates-MacGinitie Reading Test (Level 7/9)" (id. at pp. 1, 2). The student achieved grade equivalent (and percentile) scores of 5.5 (23) for vocabulary, 4.3 (11) for comprehension, and 4.8 (13) for total reading (id. at p. 1). The evaluator determined that the student's spelling, vocabulary, and critical reading skills were below grade expectation and that the student exhibited "weakness" in specific written expressive language skills including punctuation, capitalization and grammar (id. at p. 2). The evaluator recommended that the student participate in small group instruction to address the academic deficits denoted in the evaluation (id.).

On July 19, 2006, petitioner's school psychologist sent a letter to respondents indicating that they had "the right to refer" the student to the CSE to determine the student's eligibility for special education services for the 2006-07 school year (Dist. Ex. 4 at p. 1). The letter requested that respondents complete and return the enclosed form entitled "Referral to the Committee on Special Education" (id. at pp. 1-2). Also included with the letter was a copy of the Procedural Safeguards Notice (id. at p. 1). Respondents never returned the "Referral to the Committee on Special Education" form to petitioner (Tr. p. 169).

By letter dated August 21, 2006, respondents advised petitioner that they would be placing the student at YNJ for the 2006-07 school year because petitioner failed to develop an IEP for the student (Dist. Ex. 5). The letter also advised petitioner that respondents would be seeking full tuition reimbursement for the student's placement at YNJ (id.).

By letter dated August 22, 2006 to petitioner's school psychologist, respondents acknowledged receipt of the school psychologist's prior July 19, 2006 letter (Dist. Ex. 6). Respondents' letter also contained a list of questions inquiring about respondents' right to a meeting to review the student's special education needs, about the parties' prior appeal concerning the 2004-05 school year, and about multiple aspects of the CSE meeting process (id.).

On August 24, 2006, petitioner's director of special student services responded to respondents' two August letters (Dist. Ex. 7). The letter stated that petitioner had sought respondents' cooperation in order to conduct a CSE review for the 2006-07 school year, but that respondents' lack of cooperation had prevented such a review (id.). Petitioner's letter explained that it would schedule a CSE meeting if respondents provided consent and copies of all current evaluations and reports (id.). Petitioner requested that respondents "reconsider your refusal to have a CSE review for the 2006-07 school year, and sign and return the enclosed consent" (id.).²

On September 7, 2006, petitioner's director of special student services sent another letter to respondents (Dist. Ex. 8). The letter provided details about several aspects of the CSE process and indicated that the CSE needed respondents' written consent in order "to hold a CSE meeting and to obtain all records" (id. at pp. 1-2). The September 7, 2006 letter further indicated that

² At the impartial hearing, the exhibit was introduced without "the enclosed consent" referred to by the director of special student services (Dist. Ex. 7).

respondents "finally provided written consent on May 31, 2006" (id. at p. 2).³ The letter then provided "[o]n July 19, 2006, after not hearing from you, a letter was sent reminding you that you have the right to refer [the student] to the CSE..." (id.). In the next paragraph the letter provides "[t]o date written consent to access [the student's] school records has not been provided" (id.). The final sentence in the letter indicates, "[a]s you requested, [Petitioner] will certainly convene a CSE... however, we must first receive your consent, and access all the information necessary...." (id. at p. 3).⁴

By letter dated September 28, 2006, respondents replied to petitioner's September 7, 2006 letter (Dist. Ex. 9). Respondents indicated that petitioner's letter was "very confusing" (id. at p. 1). Respondents indicated that they had already supplied petitioner with all the evaluations pertaining to the student (id. at pp. 1-2). Respondents inquired as to whether petitioner considered another CSE meeting necessary, the proposed program petitioner had in mind for the student, and the purpose of any intended CSE meeting (id.). Respondents also indicated that they consented to petitioner's review of YNJ records (id. at p. 2).

By letter dated October 5, 2006, petitioner's director of special student services responded to respondents' September 28, 2006 letter (Dist. Ex. 10). The director's letter indicated that "[t]here is no current IEP for [the student] for the 2006-07 school year because, until we received your letter dated 9/28/06, we did not have your consent to access [the student's] school records or obtain the necessary teacher progress reports...." (id. at p. 1). The letter further provided that "[n]ow that consent has been received and it is clear that you want a meeting, we will gather the necessary information and schedule a meeting of the Committee on Special Education (CSE)" (id.). The letter requested that respondents send any reports or relevant information that they would like to have reviewed by the CSE, and the letter described some of the programs or placements that the CSE would consider and indicated that an IEP would be developed (id. at pp. 1-2).

On October 10, 2006, petitioner's school psychologist sent a letter to YNJ requesting the student's documents and records (Dist. Ex. 11). No YNJ records were received (Tr. p. 185). On November 21, 2006, the school psychologist sent a second letter to YNJ requesting the same records (Dist. Ex. 12). Again, no YNJ records were received (Tr. pp. 38, 77, 186).

On January 2, 2007, petitioner's school psychologist wrote a letter to respondents indicating that she and the evaluator who had conducted the student's June 9, 2006 reevaluation were planning to travel to YNJ on February 28, 2007 to conduct annual review testing for all of petitioner's classified students attending YNJ (Dist. Ex. 13 at p. 1). The school psychologist requested that respondents complete the enclosed consent form to authorize this YNJ reevaluation (id.). The enclosed form was the same "Consent for Evaluation" form that

³ It is unclear from this passage whether petitioner's director of special student services was acknowledging that respondents had provided consent for petitioner to hold a CSE meeting, consent for petitioner to access the student's records, or consent for petitioner to hold both a CSE meeting and access the student's records.

⁴ When these passages are read in conjunction with the previous indication in the September 7, 2006 letter that respondents had provided consent "on May 31, 2006," it becomes even less clear as to what consent petitioner's director of special student services had acknowledged in that passage and what consent the director of special student services was seeking in these passages.

respondents had previously executed on May 4, 2006 (id. at p. 2; Parent Ex. I). The letter also advised respondents that petitioner had not yet received the student's updated records from YNJ despite prior requests (Dist. Ex. 13 at p.1). The letter encouraged respondents to ask YNJ to forward the previously requested records (id.). The enclosed "Consent for Evaluation" form was never returned by respondents (Tr. p. 196).

On July 16, 2007, respondents filed a due process complaint notice requesting an impartial hearing (IHO Ex. I). Respondents alleged that the student was denied a free appropriate public education (FAPE) because petitioner failed to develop an IEP for the student for the 2006-07 school year, that their placement of the student at YNJ was appropriate, and that they were dissatisfied with petitioner's procedures (id. at p. 2). Respondents requested reimbursement for the costs of tuition for the secular portion of the student's education at YNJ during the 2006-07 school year (id. at p. 3).

The impartial hearing commenced on October 17, 2007 and concluded on the same day. During the impartial hearing, respondents asserted that petitioner did not offer the student a FAPE (Tr. pp. 9, 60; IHO Ex. I at p. 2). Respondents asserted that YNJ was an appropriate placement for the student and presented YNJ records from the 2004-05, 2005-06 and 2006-07 school years that respondents argued showed that the student had made educational progress during the last three school years (Tr. pp. 34, 117-19; see Parent Exs. C; D; E). Respondents also asserted that the student was mainstreamed more at YNJ during the 2006-07 school year than during the prior school years (Tr. p. 117; Parent Ex. G).

During the impartial hearing, petitioner conceded that no IEP was prepared for the 2006-07 school year (Tr. pp. 35, 38, 155, 156). However, petitioner argued that respondents' refusal to cooperate and failure to provide consent to refer the student to the CSE precluded petitioner from offering the student a FAPE (Tr. p. 184; Dist. Exs. 7; 8). Petitioner further argued that YNJ's failure to respond to petitioner's requests for the student's records also prevented petitioner from preparing an IEP (Tr. pp. 38, 154-57, 184-93; Dist. Exs. 11; 12; 13).

The impartial hearing officer issued a decision on November 20, 2007 (IHO Decision at p. 10). She found that petitioner did not offer the student a FAPE for the 2006-07 school year (id. at p. 5). She also found that respondents' evidence established that their unilateral placement of the student was appropriate (id. at p. 8). The impartial hearing officer awarded reimbursement to respondents for that portion of the student's tuition costs that related to the special education services provided to address the student's needs in English, social studies, written expression and science (id. at p. 9). She declined to order reimbursement for mathematics, computers, and physical education because the student's instruction for those subjects occurred in a regular education setting (id.). The impartial hearing officer also declined to order reimbursement for the student's Hebrew and/or religious studies (id. at p. 10). Lastly, because the impartial hearing officer had no information on the amount of tuition, reasonableness of tuition, or the percentage of the tuition that was used for secular special education services, she indicated that these issues may be raised at a future hearing if the parties cannot agree on the amount of tuition for the student's secular special education services (id.).

Petitioner appeals from the impartial hearing officer's decision, asserting that the impartial hearing officer ignored evidence that respondents obstructed petitioner's attempts to convene a CSE by refusing to consent to refer the matter to the CSE. Petitioner further argues that respondents' failure to consent to refer the matter to the CSE, coupled with petitioner's inability to obtain the student's education records from YNJ, precluded petitioner from developing an IEP for the student for the 2006-07 school year. Petitioner also contends that the impartial hearing officer did not have any substantive evidence from respondents to show that their placement of the student at YNJ was appropriate, and further that the impartial hearing officer improperly reserved jurisdiction on the issue of the amount of tuition reimbursement.

Respondents cross-appeal from that part of the impartial hearing officer's decision that denied them reimbursement for the student's secular educational instruction that occurred in a regular education setting. Respondents also seek reimbursement for that portion of the tuition that YNJ uses for a building fund, and further seek to impose punitive monetary damages on petitioner.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).⁵ A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

A 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

⁵ The term "free appropriate public education" means 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 school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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). An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (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).

Preliminarily, I will address respondents' request for punitive damages. Although a parent may be entitled to reimbursement of education expenses, it is well settled that punitive monetary damages are not available under the IDEA (Cortese v. New Fairfield Bd. of Educ., 2006 WL 3826628 at *2 [2d Cir. Dec. 26, 2006]; Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Application of a Child with a Disability, Appeal No. 06-027; Application of a Child with a Disability, Appeal No. 05-039).

Next, I turn to respondents' contention that the impartial hearing officer erred in placing the burden of proof upon respondents. On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. Respondents argue that the impartial hearing did not "commence" until October 17, 2007, after the effective date of the amendment, and therefore the burden was on petitioner to prove that it offered the student a FAPE. Petitioner argues that the impartial hearing "commenced" when respondents filed their due process complaint notice on July 16, 2007, which was before the effective date of the amendment. In this matter, I find that I need not decide when an impartial hearing "commences," as that term is used in the amended education law, because regardless of whether petitioner or respondents were deemed to have the burden of proof, I find for the reasons set forth below that the hearing record amply demonstrates that respondents have prevailed on the first Burlington criterion.

Federal and State regulations mandate that each child with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). The procedure for a reevaluation requires the CSE and other qualified professionals to conduct an initial review of the existing evaluation data including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Based on that review, and based on input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional information is needed, the school district must administer tests and obtain other evaluation materials to produce the needed information (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]). However, before administering tests or other evaluation materials to reevaluate a student with a disability, a school district must obtain informed parental consent (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]).⁶ Informed consent from the parent is also required before the initial provision of special education and related services (34 C.F.R. § 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]).

In this case, the impartial hearing officer held that it was unnecessary for petitioner to require respondents to consent to refer the student to the CSE (IHO Decision at p. 5). First, the impartial hearing officer found that an additional consent to refer the matter to the CSE would be unnecessary when the CSE was already aware of the student and had previously identified the student as having an educational disability in the preceding two school years (id.). Second, the

⁶ Consent is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[7]).

impartial hearing officer found the consent to refer the matter to the CSE unnecessary because the May 4, 2006 consent form signed by respondents gave permission to petitioner to reevaluate the student "so that appropriate services can be recommended" (*id.*).

I agree with the impartial hearing officer's analysis regarding consent. I also find no merit to petitioner's argument that respondents' failure to consent to refer this matter to the CSE contributed to petitioner's failure to offer the student a FAPE. In light of the reevaluation procedure described in the federal and State regulations cited above, petitioner's requirement that respondents provide consent to refer the matter to the CSE was an extra procedural step in the CSE process that is not mandated by the IDEA, State Education Law, or the corresponding regulations. Respondents' alleged failure to comply with this extra procedural step does not excuse petitioner from its obligation to offer the student a FAPE. In addition, because the student was already identified as eligible for services under the IDEA, petitioner was required to ensure that the CSE review the student's IEP periodically, but not less than annually (20 U.S.C. § 1414[d][4][A][i]; 34 C.F.R. § 300.324[b][1][i]; 8 NYCRR 200.4[f]). Written notice of the convening of a CSE meeting is required to be given to a parent, but written consent from the parent to convene an annual review or reevaluation meeting was not required.

I am also not persuaded by petitioner's argument that its inability to obtain education records from YNJ prevented petitioner from developing an IEP (Dist. Exs. 8 at p. 2; 11; 12; 13). It is undisputed that respondents provided written consent to petitioner to obtain the student's records from YNJ on May 4, 2006 and again on September 28, 2006 (Tr. pp. 234-46; Dist. Exs. 9 at p. 2; 10 at p. 1; Parent Ex I). Additionally, at the impartial hearing, petitioner's school psychologist testified about the "rapprochement" that existed between petitioner and YNJ (Tr. p. 226). The school psychologist also indicated that in years past, she had spoken to YNJ by telephone to ensure that YNJ would gather teacher reports for petitioner's classified students attending YNJ (*id.*). However, the school psychologist testified that petitioner decided not to call YNJ to specifically request the student's records (Tr. p. 228). The hearing record does show however, that petitioner did attempt to obtain the YNJ records by letter without success and did ask respondents to assist in accessing the records. Under the circumstances, if the YNJ records were unattainable, petitioner was free, upon written consent by respondent, to conduct its own evaluations of the student to determine present levels of performance and special educational needs.

It is undisputed that petitioner has not convened a CSE for the student since March 2005 and that the student was not offered an IEP for the 2006-07 school year. I find that petitioner's arguments as to why a CSE was not convened and why an IEP was not developed are not persuasive. I concur with the impartial hearing officer's determination that petitioner has failed to offer a FAPE to the student for the 2006-07 school year. I find that respondents have prevailed with respect to the first criterion of the Burlington analysis for tuition reimbursement.

Petitioner is reminded that it has an affirmative obligation to offer a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer, 546 U.S. at 51; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d at 371). In addition, I remind both parties that formulating an IEP is a collaborative effort (Schaffer, 546 U.S. at 53) and I encourage the parties to work cooperatively.

I now turn to whether respondents have met their burden to show that the placement selected for the student was appropriate to meet the student's special education needs for the 2006-07 school year (Burlington, 471 U.S. at 370; Frank G., 459 F.3d at 363, Schaffer, 546 U.S. at 59-62).⁷ In order to meet their burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that the private education services addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192). Parents are not held as strictly to the standard of placement in the least restrictive environment (LRE) as school districts are; however, restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. Of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

The hearing record reflects that for the 2006-07 school year the student attended eighth grade at YNJ (Parent Ex. C at p. 37). The student received instruction in both religious and secular subjects (id.). YNJ offers an alternate program, identified as "the T class," for students who are unable to succeed in the mainstream class (Tr. p. 220). The student attended the "T class" and received a "modified" program for English, social studies, and science (id.; Parent Exs. C at p. 37; G). The student was "mainstreamed" for the religious subjects of "prophets," Jewish law, and bible studies, as well as for math, computers, and physical education (Parent Exs. C at p. 37; G).

At the impartial hearing, respondents' asserted that YNJ offered the student a much larger number of mainstreaming activities during the 2006-07 school year than during prior school years (Tr. pp. 117-18, 119). To support this claim, respondents introduced a one-page document from YNJ listing the classes in which the student was "mainstreamed" during her 2004-05, 2005-06 and 2006-07 school years (Parent Ex. G). For each of these three years it appears that the student was mainstreamed in Hebrew classes, in a computer class, and in a gym/physical education class (Tr. pp. 196-97, 201; Parent Exs. C at p. 37; G). During the 2005-06 school year, the student was additionally mainstreamed in science (Parent Ex. G). During the 2006-07 school year, the student was mainstreamed for math, but not for science even though the student had been mainstreamed for science during the prior year (id.). According to the student's father, the student's science class during the 2005-06 school year was experimental and hands-on, but during the 2006-07 school year, the mainstream science class required more reading (Tr. p. 143). As a result the student "couldn't handle" the mainstream science class in 2006-07 (id. at pp. 143-44).

At the impartial hearing, respondents introduced what YNJ called "individual educational plans" (Parent Exs. C; D; E). For the 2006-07 school year, these individual educational plans included goals in the areas of reading decoding, reading comprehension, writing, spelling, and classroom participation/organization (Parent Ex. C at pp. 9-14, 21-26, 31-35). The individual educational plans document the student's progress via a number scale: skills between numbers

⁷ The burden for this second criterion of the Burlington analysis remains unchanged after the October 2007 amendments to the Education Law (Educ. Law §4404[1][c]).

one to four are "in progress," and skills between numbers five to eight are varying degrees of "strong" (Parent Ex. C).

Comments contained in the student's November 2006 individual educational plan indicated that when the student read at a slow pace she read fairly accurately and often self-corrected her errors, that her reading had "improved tremendously," that her sight word vocabulary was expanding, that she answered both literal and inferential questions on selections read in class, that she organized simple paragraphs without using an outline, and that she used varied sentence structure and conjunctions to enhance her writing (Parent Ex. C at pp. 10-12). Comments also indicated that the student was capable of "higher quality work" (id. at pp. 11, 14).

The student's March 2007 individual educational plan indicated that the student wrote "beautiful" essays for her literary term paper, but that although she was capable, she did not always take responsibility to edit her writing (Parent Ex. C at p. 24). Comments on this March 2007 plan also indicated that over the past semester the student's behavior had "declined," the student did not consistently follow directions, the student needed reminders to stop talking and to focus in class, and that the student did not consistently put effort into class work and homework (id. at p. 26).

Comments contained in the student's June 2007 individual educational plan indicated that the student had successfully completed the Wilson reading program (Parent Ex. C at p. 32). Although the student read fluently and sounded out most words independently, the student still misread some common words (id.). The comments for this plan also indicated that the student continued to have difficulty "grasping" information when reading content material in social studies and science (id.). In the area of writing, the student reportedly expressed creative ideas and thoughts in a structured manner (id. at p. 34). The student reportedly had progressed "nicely" both academically and socially (id. at p. 35). At the end of the 2006-07 school year, the student received final grades of B+ in literature and composition, C+ in mathematics, A- in social studies, C+ in science, and S+ in physical education (id. at p. 37).

Although petitioner's school psychologist provided some limited general information about YNJ, aside from the individual educational plans described above, I find that there is no documentary or testimonial evidence that describes the student's program at YNJ or demonstrates how YNJ's programs met the student's special education needs. There is no information contained in the hearing record regarding the student's daily schedule, the size of the student's classes or instructional groups, or the profiles of the other students in this student's special education classes. There is also no information regarding the frequency and duration of the student's reading or other instruction, the methodologies used for instruction, or the strategies used to address the student's identified deficits. Further, there is no information on the assessment strategies or formal tests used to determine the student's needs or to measure the student's progress, the accommodations and modifications provided to the student in the mainstream or self-contained classes, or the supplementary aids and services that may be appropriate for the student. It is also unclear how the number scales contained in YNJ's "individualized educational plans" demonstrate progress. I find that respondents have not provided sufficient evidence to demonstrate that YNJ provided educational instruction specially

designed to meet the unique needs of the student, supported by such services as are necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363-65).

Additionally, I am not persuaded that the evidence shows that the student was mainstreamed more during 2006-07 than in the prior school years. In 2006-07, the only additional class in which the student was mainstreamed was math. Despite this, the student was taken out of the mainstream science class due to her reading deficits. This suggests that YNJ has not met the student's special education needs. Moreover, since the student has always been mainstreamed for the computer class, physical education and the Hebrew classes, I cannot find that this evidence shows that YNJ was meeting the student's special education needs in these subject areas.

Therefore, based on the hearing record, I disagree with the decision of the impartial hearing officer pertaining to the appropriateness of the private placement. The record does not support a determination that the student's program at YNJ during the 2006-07 school year was appropriate to meet the student's special education needs. I find that respondents have not provided enough evidence to meet their burden of proof under the second criterion of the Burlington/Carter analysis for tuition reimbursement. As such, the necessary inquiry is at an end (Mrs. C. V. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-039).

I have considered petitioner's and respondents' remaining contentions and find that they are not supported by the hearing record, are without merit, or that it is unnecessary to address them in light of my determination.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
February 6, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**