



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-097

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

#### **Appearances:**

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

Law Offices of Neal Howard Rosenberg, attorneys for respondent, Neal Howard Rosenberg, Esq., of counsel

### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the West End Day School (West End) for the 2007-08 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was enrolled in the third grade at West End, a private school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with an emotional disturbance (ED) is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]). The student previously received diagnoses of an anxiety disorder, not otherwise specified (NOS); a mixed developmental disorder (learning disability); and a phonological disorder, mild (Dist. Ex. 3 at p. 5). The student's cognitive abilities are in the high average range (Dist. Ex. 8 at pp. 2, 4), although his overall reading level is estimated at the "K.2" level, his overall math level is estimated at the "K.8" level, and his overall spelling level is estimated at the "K.2" level (id. at pp. 5, 6).

On March 9, 2005, at the recommendation of the student's "pre-first grade" school, the student underwent a private psychiatric evaluation (Dist. Ex. 9 at p. 1). At the time, the student experienced difficulty with transitions and changes in routines, and the parent and the school

sought data to assist them in determining an appropriate school-age placement for the student (id.). During an interview, the parent reported that the student had become anxious at approximately two years of age, after several major upheavals in his family life (id.). The student "tended to withdraw, began to eat less, and stopped using the bathroom in school" (id.). These behaviors resulted in an initial evaluation of the student at 4 years of age, which yielded a diagnosis of "anxiety" and noted a "strong willed personality;" subsequently, the student began 18 months of private psychotherapy (id.). When the student was 5.9 years of age, his pre-first grade teacher reported that although the student was generally a happy, curious, helpful child who was enthusiastic about academics, he needed improvement in "personal space, transitions[,] being open to changes, and using words when frustrated" (id.). The parent identified her chief concerns as her son's "difficulty following directions, and his difficulty with transitions" (id. at p. 2). She also reported that he could be "oppositional," "often loses his temper," "will cry in frustration," "often argues with adults," "will deliberately annoy people for negative attention," often says that he is "scared," "has bouts of nightmares which will last for about a week," is "very sensitive," (exemplified by his tendency to run and hide while watching a cartoon), "is anxious about new activities," "wets the bed about three times a month," and exhibits a "tic" like behavior of "spitting into the sleeve of his shirt" when anxious (id.). The parent explained that her son was anxious about visitations with his father because his father "does not keep appointments," "visits are 'irregular,'" and "there is little interaction on [his] father's part during these visits" (id.).

The evaluator observed that the student exhibited "some symptoms of obsessiveness" and "becomes anxious or uncomfortable when routines are altered," "absorbs details," and "tends to be rigid and stubborn" (Dist. Ex. 9 at p. 5). He opined that in addition to elevated anxiety, the student's behaviors may indicate an "Oppositional Defiant Disorder," an "Obsessive-Compulsive Personality Disorder," a "Tic Disorder," an "Attachment Disorder" or a "Dissociative Disorder" (id.). The student received an Axis I diagnosis of an anxiety disorder NOS, an Axis IV diagnosis of problems with primary support group, and received a score of 50 on the Axis V Global Assessment Scale for Children (id.). The evaluator recommended that the student resume psychotherapy, but did not suggest pharmacotherapy at the time of his report (id. at p. 6).<sup>1</sup>

On September 8, 2005, a district social worker obtained a social history from the parent as part of the student's initial referral to the Committee on Special Education (CSE) (Dist. Ex. 3). The social history report referenced the student's comprehensive private evaluation in spring 2005, which included a pediatric neurodevelopmental evaluation, psychological evaluation, psychiatric evaluation, speech-language evaluation, audiogram, a team conference, and a subsequent neurological evaluation that ruled out a seizure disorder as the cause of "staring episodes" experienced by the student (id. at pp. 1-2).<sup>2</sup> The evaluation team recommended that the student be evaluated by the CSE to determine the most appropriate educational placement (id. at p. 1).

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<sup>1</sup> The hearing record references a "team conference" that was conducted on or about June 16, 2005 to address the possibility of implementing pharmacotherapy, and which generated a written report giving the student diagnoses of "Anxiety Disorder, Mixed Developmental Disorder (Learning Disability) and Phonological Disorder, mild" (Dist. Ex. 3 at p. 5). However, the parties did not include this report in the hearing record.

<sup>2</sup> The hearing record does not include these evaluations.

According to the social history report, the student attended full-time day care from the age of six months through approximately four to five years, in a class of fifteen children with three to five adults (Dist. Ex. 3 at p. 2). During her separation and subsequent divorce from the student's father, the parent observed that her son "went from being a talkative and friendly child to quiet and withdrawn" (*id.*). During the following two years at day care, the student was observed to be easily distracted, have daily staring episodes, experience difficulty with transitions, manifest oppositional behavior, and refuse to use the bathroom at day care (*id.*). The student next attended a private kindergarten in a class of eight children, where his oppositional behavior and difficulties transitioning continued (*id.*). In September 2005, the student attended first grade at West End, "a non-public special education school for children with learning disabilities," to address emotional, academic, and learning difficulties noted by his kindergarten teacher in the spring 2005 (*id.* at p. 3).

The parent described the student in the social history report as a "very healthy boy," with "no known allergies, no history of asthma or seizures," advised he was not taking any medications, and described his vision and hearing as normal (Dist. Ex. 3 at p. 4). She revealed that he stopped receiving psychotherapy in February 2005 after 18 months, because the therapist "thought he had made improvements" and had gone as far as he could with the therapist (*id.*). However, the student had been receiving "art therapy" since February 2005, initially two times per week, later decreased to once per week, which the parent reported "had been very helpful" for the student (*id.*). The report noted that the student lived with his mother and visited with his father once per week (*id.*). The student's recreational interests included playing with "Legos," soccer, playing the guitar, swimming, and using the computer; she also advised that he had "several good friends that he plays with during and after school" (*id.*). The report also referenced previously received diagnoses of an anxiety disorder, a mixed developmental disorder (learning disability), and a phonological disorder, mild (*id.* at p. 5).

On September 13, 2005, when the student was six years of age and in first grade at West End, the district conducted a psychoeducational evaluation of the student as part of his initial evaluation by the CSE (Dist. Ex. 8 at p. 1). Administration of the Wechsler Preschool and Primary Scale of Intelligence-III (WPPSI-III) placed the student's overall cognitive functioning in the high average range, and reflected a full scale IQ score of 111 (high average), a verbal IQ score of 112 (high average), a performance IQ score of 112 (high average) and a processing speed quotient of 102 (average range) (*id.* at pp. 2, 4).<sup>3</sup>

The Wechsler Individual Achievement Test, Second Edition (WIAT-II) was administered to examine the student's academic abilities and revealed a significant discrepancy between predicted and actual WIAT-II scores (Dist. Ex. 8 at pp. 7, 10-11). Five scores proved significantly lower than expected given the student's high average intellectual ability, a result which the evaluator opined "clearly indicates that [the student] does have a broad-based Learning Disability" (*id.*). The student achieved a standard score of 87 on the word reading subtest (low average), and

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<sup>3</sup> The district's evaluator indicated that the WPPSI-III scores discussed in the report were attained when the test was administered by "an outside psychologist" on May 25, 2005, and that "[t]he scores are reported here for the purpose of [an] ability-achievement discrepancy analysis," which indicated that the student had a broad based learning disability (Dist Ex. 8 at pp. 2, 7). There is no report or any other information contained in the hearing record relative to the May 25, 2005 administration of the WPPSI-III.

was able to identify most lower case letters, perform some beginning rhyming, identify some beginning and ending sounds, and demonstrate some simple phonics knowledge; however, he was unable to read any of the basic sight words presented (*id.* at p. 5). The evaluator described the student as a "non-reader," noting that the student failed all items on grade one of the reading comprehension subtest, achieving a standard score of 61 (extremely low or deficient) (*id.*). On the pseudoword decoding subtest, the student was unable to pronounce any three letter combinations using basic phonics rules, achieving a standard score of 88, the lowest possible score on this subtest (*id.*). The student's math skills reflected higher abilities, as demonstrated by standard scores of 95 in numerical operations and 94 in math reasoning (both falling in the lower end of the average range) (*id.* at p. 6). The evaluator observed that the student achieved number-symbol correspondence, was able to write some numbers, and was able to perform one basic written computation problem ( $3+3=6$ ) (*id.*). The student achieved a standard score of 80 (low average) in spelling, and successfully identified letters associated with sounds and printed them, but was unable to spell any whole words (*id.*). The evaluator commented that the student demonstrated relative strengths in listening comprehension, as evidenced by his standard score of 118 (high average) and his understanding and retention of verbally presented information (*id.*).

The evaluator utilized the Bender Gestalt Test to analyze the student's perceptual-motor development (Dist. Ex. 8 at p. 7). The student achieved a standard score of 94 (lower part of average range), but the evaluator characterized the student as "somewhat haphazardly and impulsively" performing his work, the result of which reflected "a variety of types of errors including one rotation, difficulty with angles, integration, and perseveration" (*id.*).

The student's social/emotional functioning was examined by reviewing figure drawings he produced, which the evaluator described as "somewhat immature for his age" and which indicated a mental age of 5.9 under the "Goodenough scoring system"<sup>4</sup> (low average) (Dist. Ex. 8 at pp. 7-8). Considering the student's chronological age was 6.5 at the time, this result prompted the evaluator to opine that the student's "social-emotional development seems far behind his intellectual development" (*id.* at p. 8). The evaluator further concluded that the student manifested pronounced "control issues," as she found it difficult to persuade the student to comply with any requests, or even to look at the examiner or acknowledge her presence (*id.* at p. 3). The student was observed whispering and conversing with his mother, began the testing while sitting on his mother's lap, and "became distracted and fidgety" when tasks became difficult for him (*id.* at pp. 3-4, 9).

On November 30, 2006, the district conducted a 2 ½ hour classroom observation of the student at West End and generated a report that summarized the student's participation in his classroom activities during reading, writing workshop, and gym (Dist. Ex. 4). The student was observed participating in a group of four children, and the evaluator characterized him as "energetic," "constantly talk[ing] and call[ing] out answers," "easily distracted," off task (drawing pictures instead of doing the assigned task), and "ma[king] noises while other students read aloud" (*id.*). The observer noted: "The teacher constantly reminded him to be quiet and follow the reading," and prompted the student to put his hands on his desk and "to get started right now" (*id.*). However, when asked questions about the lesson, the student responded correctly (*id.*). The

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<sup>4</sup> The hearing record does not include any further information describing this scoring system.

observer reported that during work time, the student "began to do his work slowly, continued talking and getting up" (id.). He was observed leaving the classroom several times to go to the bathroom and stayed out of the classroom for five minutes each time (id.). In gym class, the observer noted that after the teacher had reminded the student of the rules, the observer reported that the student "followed them without hesitation" (id.).

On March 13, 2007, the student's special education teacher at West End prepared a report summarizing the student's current functional level in academic areas, peer and adult relations, social/emotional concerns, and study skills/motivation (Dist. Ex. 5 at pp. 1-2). The report cautioned that the student continued to need a 12-month therapeutic special education setting (id. at p. 2). The student's teacher estimated his reading level at grade 1.3, with support and structure, and his math skills level at grade 2.0, with support and structure (id. at p. 1). The student's reading strengths included identifying all letters of the alphabet, recognizing beginning and ending sounds in words, identifying rhymes, increasing sight word repertoire, enjoying listening to stories, identifying main characters and settings, and recollecting of the stories' sequences of events (id.). His reading weaknesses included inconsistent identification of middle vowel sounds in words, inability to sound out unfamiliar words without assistance, guessing pronunciation using only the initial letter of a word, rushing through work, and making careless mistakes (id.).

Regarding math, the student's strengths included a strong knowledge of ordinal numbers, the ability to apply "greater than" (">"), "less than" ("<"), and "equal to" ("=") concepts when comparing numbers, understanding and using graphs, identifying coins and their values, and the ability to add and subtract two-digit numbers with and without using manipulatives (Dist. Ex. 5 at p. 1). The student's math weaknesses included writing numbers without reversals, applying math knowledge to problems and equations, requiring a starting point when counting in math problems, remaining task focused, rushing, and making careless errors (id.).

In writing, the teacher noted that the student possessed the abilities to copy a sentence, generate ideas on his own, and create vivid and elaborate sentences (Dist. Ex. 5 at p. 1). However, the teacher reported that the student also experienced difficulties applying phonics rules to spelling, using proper spacing between words, including appropriate punctuation, and writing letters in a controlled manner, and often becoming frustrated when he needed to correct mistakes (id.).

In the area of adult relations, his teacher opined that the student was "eager for adult approval and often looked for reassurance from the teachers," and added that "he can now listen to his teachers much of the time. As a result, usually he is able to be redirected when needed" (Dist. Ex. 5 at p. 2). With regard to peer relations, she believed that the student had some ability to initiate conversations, although "his exchanges [were] scattered and not always on target" (id.). The student's teacher related that he could "engage in cooperative play," was "empathetic and sensitive to others and [was] willing to lend a helping hand to his teachers or classmates;" however, she also pointed out that he demonstrated "difficulty with turn-taking and sharing and often require[d] teacher assistance to arrive at a solution and resolve conflicts in an appropriate manner" (id.). She added that "[h]is impulsiveness require[d] teacher re-direction" (id.).

With respect to the student's social/emotional development, the student's teacher described him as "an anxious child. He needs to feel safe and secure in his environment with clear

expectations and frequent reassurances given to ensure [his] participation" (Dist. Ex. 5 at p. 2). She further noted that the student "sometimes ha[d] difficulty maintaining focus" and was often "distracted by external stimuli in the room or his own thoughts," and "often ha[d] difficulty maintaining a working position ... requir[ing] frequent reminders to raise his hand before answering a question instead of calling out" (id.).

When commenting on his study skills and motivation, the student's teacher advised that although the student completed all in-class and homework assignments, "[a]t times, he rushes through his work. This results in careless errors and affects the overall presentation of his work" (Dist. Ex. 5 at p. 2). However, she added that the student was "an active participant in class" and that he "responds well to positive reinforcement" (id.).

On March 14, 2007, the student's speech-language therapist at West End prepared a report summarizing the student's developmental status and describing annual goals and short-term objectives for the remainder of the 2006-07 school year (Dist. Ex. 6). The therapist confirmed that at the time of the report, the student was receiving speech-language services two times per week on a push-in basis for 30 minutes per session in a "friendship group" setting and once per week for 30 minutes per session in a "language group" setting, as well as one 30-minute push-in writer's workshop session per week (id. at p. 1).<sup>5</sup> The report identified five annual speech goals with related short-term objectives for the 2006-07 school year, including improving attention and focus, improving pragmatic language skills, improving receptive language skills, improving expressive language skills, and improving phonological awareness skills (id.). At the time of the report, the student's receptive language ability level included the ability to follow one and two-step directions when given maximum visual supports and teacher/peer models, but he had difficulty responding to open and close-ended questions (id.). The student's responses tended to include unrelated and inappropriate topics on which he perseverated and which required redirection that was occasionally successful (id.). The speech-language therapist also observed the student's "demonstrate[d] preoccupations with internal stimuli that also distract[ed] him from participating appropriately in some classroom activities" (id.). In the realm of expressive language, the therapist described the student as having "difficulty organizing his thoughts and generating ideas, especially with his writing," and opined that "[h]e continues to need visual and verbal cues to generate complete thoughts and sentences" (id.). The therapist identified the student's needs to continue to work to identify middle sounds in words, to blend and segment sounds into words, and to address decoding and encoding skills (id.). In regard to pragmatic language, according to the therapist, the student had "established positive relationships with peers, "although "he demonstrate[d] difficulties staying on topic, turn-taking with his communication partner, and reading social cues of others," deficits which she stated were addressed in the school's push-in group sessions (id.). She recommended that the student continue to receive push-in speech-language therapy four times per week (id. at p. 2).

On March 14, 2007, the student's social worker at West End also generated a report documenting the student's progress and current levels of functioning with regard to his counseling sessions (Dist. Ex. 7). The report addressed the student's progress toward annual goals for the 2006-07 academic year, namely, to reduce the student's anxiety and "center" him more in the

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<sup>5</sup> The hearing record does not describe what characterizes "friendship group" and "language group" settings.

classroom, and toward short-term objectives, specifically, to develop his ability to listen to teacher prompts, to improve attention during lessons, and to increase his ability to pay attention to the questions posed by his teacher instead of the behaviors and activities of peers (*id.* at p. 1). The social worker reflected that although the student was able to learn and contribute to class discussions and activities when he was settled and calm, "he becomes easily preoccupied with his worries as well as external stimuli" (*id.*). She commented as to his sensitivity to "changes in his routine," and observed that he "become[s] anxious with decreased frustration tolerance as a result of large [or] small changes" and that "it is very difficult for him to put things aside" (*id.*). She observed that the student "is often preoccupied with his own thoughts/worries" and that he "[be]comes distracted and will also engage in conversation[s] which are unrelated" (*id.*). She revealed that the student "has experienced death [for] the first time in his life in the past several months. On a few occasions he became tearful when he though[t] of his losses and had to leave class," and the social worker commented that "[a]dditional therapeutic support was necessary in order for him to feel comforted and calm enough to return to classroom activities" (*id.*). The social worker also noted that the student tended "to become involved in, and discuss, the affairs of his peers at inappropriate times," and "then calls out impulsively ... requir[ing] redirection from the adults and then is able to regain his focus and attention" (*id.* at pp. 1-2). She added that the student "has a tendency to challenge authority" and that "his difficulties with reading, writing and language result in vulnerabilities regarding his self-esteem and self-confidence," but that he also "has a sense of humor and is liked by his peers" (*id.*). The social worker recommended that the student continue in a therapeutic, 12-month special education program, believing that he was "vulnerable to retreating to his preoccupations without class structure" (*id.* at p. 2).

On March 15, 2007, one month prior to the scheduled April 12, 2007 CSE meeting, the parent signed a contract enrolling him at West End for the 2007-08 school year (Dist. Ex. 16). The contract required a non-refundable deposit of \$10,500.00 due on March 2, 2007 as a precondition to enrolling the student, and stated that the total annual tuition for the year was \$36,500.00, payable in two installments of \$13,000 each, due on September 18, 2007 and December 5, 2007, respectively (*id.*).<sup>6</sup> According to the contract, tuition included speech-language services, push-in occupational therapy (OT) services, and counseling services (*id.*).

On April 3, 2007, the student's psychotherapist generated a report detailing the student's progress in connection with his ongoing individual "art and sandplay therapy" (Dist. Ex. 11). The student's therapist informed the district of the student's participation in weekly sessions addressing the life changes affecting his work at school (*id.*). The therapist explained that she was using the sessions to work through the student's anxieties and inner conflicts, "to foster his sense of self and esteem and to help him cope with the inevitable changes in [his] family constellation" (*id.*). The therapist suggested continued therapy would be beneficial to the student, "as he has his own consistent place where he can express and therefore work through his difficulties" (*id.*).

On April 12, 2007, a district clinician completed a functional behavioral assessment (FBA) (Dist. Ex. 10). The FBA was based on information developed by the classroom observation conducted on November 30, 2006 (*see* Dist. Ex. 4), an administrator interview, teacher interview,

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<sup>6</sup> The hearing record confirms that the parent paid the non-refundable deposit of \$10,500.00 by check on February 25, 2007; the first installment of \$13,000.00 by check on September 17, 2007; and the second installment of \$13,000.00 by check on January 3, 2008 (Dist. Ex. 17; Parent Ex. E).

parent interview, and review of the student's CSE file, which included prior evaluations and an interview with the student's social worker at West End (Dist. Ex. 10). The district gleaned additional information for the FBA from reports from the student's special education teacher and speech-language provider at West End, dated March 13, 2007 and March 14, 2007, respectively (Dist. Exs. 5; 6), a counseling report from the student's social worker dated March 14, 2007 (Dist. Ex. 7), and a physical examination report dated November 20, 2006 (see Dist. Ex. 10).<sup>7</sup> The FBA identified "unstructured times in the classroom and gym" and "academic instruction times in the classroom," as precipitating conditions of the behavior at issue, which it described as "preoccupation with a thought or concern to the exclusion of the task at hand or academic activity, i.e., [the student] will not engage in the assigned activity or classroom activity while preoccupied with a thought or with a conversation about a concern despite the attempts to engage him in the activity" (id.). The student "was said to be 'stuck in his own thoughts.'" The behavior can last 5 minutes to 6 hours (or the entire school day). He may become physical[ly] upset" (id.). The FBA identified "teacher attention" and "removal from class" as consequences typically following such behavior, and hypothesized that the functions of the behavior are "escape/avoidance," "gaining attention/security," and "frustration" (id.).

On April 12, 2007, the CSE convened to develop the student's individualized education program (IEP) for the 2007-08 school year (Dist. Ex. 12). Participating at the meeting were the parent, a school psychologist (also functioning as the district representative), a social worker and a special education teacher (id. at p. 2). Additionally, participating by telephone from West End, were the student's teacher, speech-language therapist, social worker and director of admissions (id.). The CSE team considered three reports from West End in developing the student's April 12, 2007 IEP, including the special education teacher's report dated March 13, 2007 (Dist. Ex. 5), the speech-language therapy report dated March 14, 2007 (Dist. Ex. 6), and the counseling report dated March 14, 2007 (Dist. Ex. 7); together with two district reports, the classroom observation conducted on November 30, 2006 (Dist. Ex. 4), and the April 12, 2007 FBA (Dist. Ex. 10).

The resultant IEP continued the student's ED classification, and recommended a 10- month 12:1+1 special class, with related services consisting of counseling, once per week for 30 minutes per session in a 3:1 setting at a separate location, and once per week for 30 minutes per session in a 1:1 setting at a separate location; OT, once per week for 30 minutes per session in a 1:1 setting at a separate location; and speech-language therapy, once per week for 30 minutes per session in a 3:1 setting at a separate location, and once per week for 30 minutes per session in a 1:1 setting at a separate location (id. at p. 13). The IEP identified "[p]referential seating to allow for teacher support and redirection," "[g]raphic organizers to improve written expression," and "[m]ath manipulatives to enhance new math concepts" as the student's academic management needs (id. at p. 3). The student's testing accommodations included a separate location, time extension to 1½ time with 5 minute breaks after 30 minutes of testing, directions read and reread aloud, and questions read aloud, except on tests of reading comprehension (id. at p. 13). The IEP indicated that the student "is able to benefit from school activities with his nondisabled peers" (id.).

With regard to the student's academic performance and learning characteristics, the IEP indicated that in reading and writing, the student "knows the letters of the alphabet and recognizes

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<sup>7</sup> The physical examination report referenced in the FBA is not included in the hearing record.

beginning and ending sounds of words," possesses the ability to sequence events and identify characters and setting, and "enjoys listening to stories," but "needs to improve in identifying middle vowel sounds" (Dist. Ex. 12 at p. 3). The IEP noted the student's present levels of performance as grade 1.3 in decoding and grade 2.2 in reading comprehension (id.). In math, the IEP confirmed that the student "can add and subtract [two] digit numbers without regrouping (with manipulatives and without)...makes reversals when writing numbers and often needs redirection to remain on task" (id.). The IEP noted that the student was performing at a grade 2.0 level in computation, but did not reference his problem solving skills (id.).

With respect to the student's social/emotional performance, the IEP identified the student as "an anxious child," although "empathetic and sensitive to the needs of others" (Dist. Ex. 12 at p. 4). Although observed as capable of engaging in cooperative play, "he ha[d] difficulty with turn-taking and sharing," which often required teacher assistance (id.). The IEP stated that the student "is reportedly sensitive to changes in his routines and becomes anxious with decreased [sic] frustration tolerance," "is often preoccupied by his thoughts/worries and becomes distracted" (id.).

The CSE included a behavior intervention plan (BIP) in the IEP which addressed the student's "preoccupation with [a] thought or concern curtail[ing] his participation in the task at hand or academic activity and consequently interfering negatively with his learning," prompting him to "become physical[ly] upset" (Dist. Ex. 12 at p. 15). The BIP recommended employing a token reward system, based on the student's preferences for specific objects or activities, to assist in developing alternative behaviors, opined that "counseling sessions can also help [the student] to cope with changes in his life that [affect] his academic functioning, and enhance his sense of security," and suggested "orchestrated play activities" as a means toward "labeling his feelings and exploring his emotionally laden thoughts," thereby "facilitat[ing] the development of self-regulation and reduc[ing] his sense of confusion about his feelings" (id.). The IEP indicated that the student's teachers would collaborate with nonacademic staff to implement the BIP (id.).

The IEP included annual goals and short-term objectives addressing the student's needs in word decoding, spelling, reading comprehension, addition and subtraction with regrouping, pragmatic speech skills, expressive language skills related to academic success, writing print and script, improving hand-eye and fine motor coordination, decreasing his anxiety level, and increasing his ability to focus and ignore internal distractions (Dist. Ex. 12 at pp. 6-10). The IEP revealed that the CSE considered and rejected a 12:1 program because, in the CSE's opinion, the student "not only require[d] a small special education class with a fully modified curriculum but he [was] also a very anxious child who needs significant adult support in order to make appropriate progress" (id. at p. 12).

The district generated a Final Notice of Recommendation (FNR) on June 24, 2007 recommending a specific 12:1+1 special class placement at a community school and instructing the parent to contact a named individual if she wished to discuss the recommendation further (Dist.

Ex. 14; Parent Ex. D at p. 2).<sup>8</sup> The FNR stated that if the district did not hear from the parent by July 6, 2007, the district would effectuate the recommended placement (id.).

On June 29, 2007, the parent forwarded correspondence to the district via facsimile in which she acknowledged receipt of the June 24, 2007 FNR, noting that "I did not receive this placement offer until schools were closing for the summer so that I cannot visit the school or obtain any information about the program being offered" (Parent Ex. D at pp. 1, 3). She requested that the district forward to her further information regarding the recommended placement and its class profile, without which she was "unable to determine the appropriateness of the [recommended] program and accept the offer at this time" (id. at p. 1).

On October 17, 2007, the parent forwarded supplemental correspondence, dated October 15, 2007, to the district via facsimile indicating that she had not received any response to her telephone calls made directly to the recommended placement to arrange for a personal visit (Parent Ex. B). She reiterated that without the opportunity to visit the recommended placement personally, "I am unable to assess whether the program is appropriate. I cannot send [the student] to a school that may not be appropriate to meet his academic needs. Therefore, [the student] will continue to attend West End Day for the 2007-08 academic year" (id. at p. 1).

On November 9, 2007, the parent forwarded another letter, dated November 6, 2007, via facsimile to the district (Parent Ex. A). In this letter, the parent advised the district that she still had not received any contact from the recommended placement scheduling a personal visit, and that without such a visit, "I am unable to assess whether the program is appropriate" (id. at p. 1). She also reiterated her intention to send the student to West End for the 2007-08 academic year (id.).

On January 15, 2008, the parent, through her attorney, filed a due process complaint notice in which the parent enumerated several alleged deficiencies in the April 12, 2007 IEP that she contended deprived the student of a free appropriate public education (FAPE), including: (1) the IEP recommended a 12:1+1 setting; however, the student required a smaller classroom setting in order to address his emotional and attending deficits; (2) the IEP failed to provide for special education support during unstructured social times (lunch, recess), despite the fact that the FBA, prepared by the district, acknowledged this need; (3) the IEP's recommended program included a significant amount of pull-out services, requiring multiple transitions on the part of the student during the school day, rather than push-in services; this recommendation was inappropriate in light of the student's anxiety and difficulty with transitions; and (4) the goals listed on the IEP failed to sufficiently address the student's academic needs, particularly in reading comprehension, for which the IEP failed to enumerate any goals at all (Dist. Ex. 1). The parent also alleged that she never received any responses from the CSE to her numerous contacts requesting an opportunity to visit the recommended placement prior to the start of the 2007-08 school year, and therefore, she had no alternative but to continue the student's unilateral placement at West End (id.). The parent's

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<sup>8</sup> The educational program described in the June 24, 2007 FNR recommended two 30-minute individual OT sessions per week, whereas the April 12, 2007 IEP recommended only one 30-minute individual OT session per week (compare Dist. Ex. 14, with Dist. Ex. 12 at p. 13).

due process complaint notice also requested tuition reimbursement and the provision of transportation and related services for the student's 2007-08 school year at West End (id.).<sup>9</sup>

An impartial hearing convened on March 27, 2008, and concluded on June 17, 2008 after four days of testimony. In her decision dated July 31, 2008, the impartial hearing officer awarded the parent tuition reimbursement for the 2007-08 school year at West End (IHO Decision at p. 13). The impartial hearing officer first determined that the district did not sustain its burden of proving that it offered the student a FAPE for the 2007-08 school year, insofar as the program it recommended was not "reasonably calculated" to allow the student to receive educational benefit (id. at pp. 11-12). She determined that: (1) the April 12, 2007 CSE insufficiently addressed the student's anxiety, distractibility, and inability to cope with transitions; (2) the CSE did not address student's documented learning disabilities and failed to include writing goals on his April 12, 2007 IEP; and (3) the CSE failed to adequately consider the student's needs when it recommended a special class in a 12:1+1 setting (id.). The impartial hearing officer commented that that the uncontroverted testimony of all hearing witnesses who personally knew the student established that he would be unable to function in such a community school setting, and the impartial hearing officer determined that the student would be able to learn only in a small class in a small school, in a quiet setting where distractions were minimized and his therapeutic needs were addressed in a coordinated manner by school personnel (id.).

The impartial hearing officer further determined that the uncontroverted testimony of witnesses from West End and from the parent established that West End addressed the student's special education needs (IHO Decision at pp. 12-13). She reasoned that: (1) West End provided a small, structured, and supportive environment where the student's anxiety was lessened, where he could receive teacher supervision to remain on-task, and where his therapeutic needs could be addressed; (2) the student made specific gains in the areas of reading and writing, and the student's anxiety level decreased in West End's small setting as a result of the student working with school social workers in both group and individual settings, as well as on a "crisis management" basis; and (3) the student's need for frequent redirection in the classroom was addressed by West End in its small class setting and small group instruction (id.).

Lastly, the impartial hearing officer concluded that equitable considerations supported the parent's reimbursement claim, insofar as the hearing record demonstrated that the parent attended and participated in the April 12, 2007 CSE meeting, provided requested information to the CSE, worked cooperatively with district staff, expressed her concerns to the CSE, and communicated with the CSE and other district personnel about the recommended placement (IHO Decision at p. 13). Accordingly, the impartial hearing officer awarded the parent full tuition reimbursement for the student's 2007-08 school year at West End (id.).<sup>10</sup>

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<sup>9</sup> The hearing record contains the district's December 10, 2007 answer to the parent's due process complaint notice which erroneously states that the parent's due process complaint notice was dated November 19, 2007 (Dist. Ex. 2).

<sup>10</sup> The impartial hearing officer did not address the parent's request in her due process complaint notice for the provision of transportation and related services, and these issues have not been raised on appeal. Therefore, I will not address those issues.

The district appeals from the impartial hearing officer's decision, arguing that: (1) the district offered the student a FAPE for the 2007-08 school year; (2) the impartial hearing officer erroneously addressed and permitted the parent to argue purported violations of due process not raised in her due process complaint notice; (3) the parent did not carry her burden of proving that West End's program was specifically designed to meet the student's unique needs; and (4) equitable considerations preclude awarding reimbursement to the parent. The district seeks an order from a State Review Officer (1) annulling the impartial hearing officer's decision dated July 31, 2008 in its entirety; (2) determining that the district offered a FAPE to the student for the 2007-08 school year; (3) determining that the parent failed to meet her burden of proving that West End was an appropriate placement to meet the student's unique special education needs; and (4) determining that the equities do not favor the parent.

The parent, through her attorney, answers, countering (1) that there were several procedural and substantive deficiencies rendering the April 12, 2007 CSE meeting defective, and, consequently, invalidating the resultant IEP, including allegations that not all CSE members possessed the student's complete file at the time of the meeting; that the CSE members did not discuss the goals and short-term objectives contained in the IEP in sufficient detail; that the CSE failed to consider more restrictive programs than the 12:1+1 program contained in the IEP; and that the CSE failed to include any writing goals in the subject IEP; (2) that the district's witness who testified at the impartial hearing as to the appropriateness of the district's recommended program is not qualified to offer such testimony because he is neither a licensed occupational therapist nor speech-language therapist; and (3) that the district's argument that the parent alleged due process violations outside the scope of her due process complaint notice is without merit because the impartial hearing officer already determined during the course of the impartial hearing that the due process complaint notice adequately raised a challenge to the district's recommended placement, and, because even if the parent did fail to articulate such allegations in her due process complaint notice, the district waived any objection during the impartial hearing by presenting evidence as to the program's appropriateness for the student. The parent also raised four affirmative defenses: (1) that the district's petition failed to state a claim upon which relief may be granted; (2) that the impartial hearing officer's decision should be upheld in its entirety because it sets forth the factual basis and reasons for its determination that are supported by law; (3) that at all times relevant, the parent acted in good faith and cooperated fully with the CSE; and (4) that the district "failed to timely object and thus waived its right to raise issues on appeal." The parent's attorney also submitted a memorandum of law<sup>11</sup> 18 days after serving an answer, to which the district objects on the basis of timeliness.

Preliminarily, I will address the district's objection to parent's service of her memorandum of law as untimely. The district timely served the parent with its verified petition on September 4, 2008. The parent timely served an answer on October 20, 2008. The parent served a memorandum of law upon the district on November 7, 2008. By letter dated November 12, 2008, the district requested that a State Review Officer decline to consider the parent's memorandum of law on the ground that it was untimely submitted. The district argued that the memorandum of law should

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<sup>11</sup> The parent's attorney entitles his legal memorandum "Petitioner's Memorandum of Law," and identifies himself as "Attorneys for Petitioners," (Resp't Mem. of Law at pp. 1, 15) when in fact he represents respondent in this appeal.

have been submitted along with the answer, citing 8 NYCRR 279.5 (2004). The parent, through her attorney, submitted additional correspondence to the Office of State Review pertaining to this issue that was received on November 13, 2008. I find the district's argument persuasive that the State regulations required simultaneous filing of the answer and the memorandum of law. Accordingly, I decline to consider the parent's memorandum of law.

Next, I turn my attention to the district's argument that the impartial hearing officer erroneously addressed and permitted the parent to argue alleged violations of due process that the parent failed to raise in her due process complaint notice. The district first argues that the impartial hearing officer improperly stated in her decision that the April 12, 2007 CSE was improperly composed (see IHO Decision at p. 12 n. 4) because the parent failed to raise this issue in her due process complaint notice. In her July 31, 2008 decision, the impartial hearing officer includes the following footnote:

As a result of the finding on substantive grounds that the school district did not provide [the student] with a [FAPE], I need not address the procedural violations, such as the CSE's failures to include at the April 12, 2007 CSE meeting (a) a special education teacher (one who actually teaches special education in an elementary school) and (b) the absence of a general education teacher (since the recommended program was housed in a general education school and [the student] would be in the general education environment during lunch, recess, gym, and hallway time).

(IHO Decision at p. 12 n.4).

I note that the parent neither included an allegation of deficient CSE composition in her due process complaint notice, nor raised this issue during the impartial hearing (see Dist. Ex. 1). Accordingly, I find that in determining that the April 12, 2007 CSE team was improperly composed, the impartial hearing officer exceeded her jurisdiction by addressing an issue that she herself raised sua sponte in her decision. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Bd. of Educ., Appeal No. 08-085;<sup>12</sup> Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is impermissible for the impartial hearing officer to raise issues sua sponte that were not presented by the parties. Although it is clear from the plain language of the decision that the impartial hearing officer did not base her decision on this finding, she should have confined her determination to issues raised in the parent's due process complaint notice (see 20 U.S.C. § 1415[c][2][E], [f][3][B]; 34 C.F.R. §§ 300.508[d][3], 300.511[d]; 8 NYCRR 200.5 [i][7][i], [j][1][ii]; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 07-047; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with

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<sup>12</sup> The New York State Education Department's Office of State Review maintains a website at [www.sro.nysed.gov](http://www.sro.nysed.gov). The website explains in detail the appeals process and includes State Review Officer decisions since 1990.

a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-019; Application of a Child with a Disability, Appeal No. 03-095; Application of a Child with a Disability, Appeal No. 02-024; Application of a Child with a Disability, Appeal No. 01-024; Application of a Child with a Disability, Appeal No. 99-060). Therefore, I will not address this issue on appeal.

The district next argues that the parent failed to challenge the appropriateness of the recommended 12:1+1 program in her due process complaint notice. In her complaint, the parent contended that "the recommendation of a 12:1[+]1 class is inappropriate for this child who requires a smaller class setting in order to address emotional and attentional difficulties" (Dist. Ex. 1). She further alleged that "the child's difficulties are exacerbated in large settings and during unstructured social times so that he requires a school program that can provide significant special education support in a small group during unstructured times such as lunch and recess," adding that "the [April 12, 2007] IEP does not make specific provisions to address these times" (*id.*). The parent also contended that the district's recommended program was inappropriate given the fact that the student "is a child with significant anxiety and who has difficulty with transitions" because "the CSE's recommended program includes a significant number of transitions, offering only related services on a pull out basis and no push in services, so that [the student] would have multiple transitions in and out of the class setting" (*id.*). The parent also alleged that "the goals included in this IEP fail to sufficiently address [the student's] academic needs, including the failure to include appropriate goals for his reading comprehension skills" (*id.*). Based on the foregoing, I am not persuaded by the district's argument, and I concur with the previous finding of the impartial hearing officer that the parent's due process complaint notice included a legally sufficient challenge to the appropriateness of the district's recommended 12:1+1 program (Tr. pp. 200-02).

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132). An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Bd. of Educ., Appeal No. 08-085; Application of the Bd. of Educ., Appeal No. 08-070; 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).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or 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[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 119-20; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968 at 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116).

Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for the student by his or her parents if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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).

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 and therefore applies to the present case.

The district argues that the parent erroneously contends that her inability to personally visit the recommended placement prior to the start of the 2007-08 school year constituted a deficiency that denied her son a FAPE (see Tr. pp. 536-38; Dist. Ex. 1). The district asserts that once an IEP has been developed, the specific public placement is an administrative action, and a parent does not have an inherent right under the IDEA to visit and observe such schools. In general, the IDEA requires parental participation in determining the educational placement of a student (see 34 C.F.R. §§ 300.116, 300.327, 300.501[c]); however, the assignment of a particular school is an administrative decision, provided that it is made in conformance with the CSE's educational placement recommendation (White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049; Application of the Bd. of Educ., Appeal No. 99-90; Application of a Child with a Disability, Appeal No. 96-51; Application of a Child with a Disability, Appeal No. 93-5; but see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 [4th Cir. 2007]). The United States Department of Education (USDOE) recently noted that it "referred to 'placement' as points along the continuum of placement options available for a child with a

disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).<sup>13, 14</sup> This view is consistent with the opinion of the USDOE's Office of Special Education Programs (OSEP), which indicates that the assignment of a particular school that it is made in conformance with the CSE's educational placement recommendation is an administrative decision (Letter to Veasey, 37 IDELR 10 [OSEP 2001]; Application of a Student with a Disability, Appeal No. 08-103; Application of a Student with a Disability, Appeal No. 08-103; Application of a Child with a Disability, Appeal No. 07-049). While encouraging school districts to work with parents and offer opportunities to observe classroom and placement options, OSEP has opined that the IDEA does not entitle parents of children with disabilities to observe their children in any current classroom or proposed educational placement (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see Application of a Child with a Disability, Appeal No. 07-049; Application of a Child with a Disability, Appeal No. 07-013). Consequently, I find that the parent's unsuccessful attempts during summer 2007 to observe the particular classroom identified in the FNR do not rise to the level of a deprivation of a FAPE.

I will now consider whether the district offered the student a FAPE for the 2007-08 school year. Academically, at the time of the April 12, 2007 CSE, the hearing record indicates that the student was reading approximately two years below grade level (grade 1.3 with support and structure provided), that he identified middle vowel sounds of words inconsistently, required teacher assistance to sound out unfamiliar words, and needed reminders to slow down his work pace to prevent careless mistakes (Dist. Ex. 5 at p. 1). The West End teacher's report revealed that the student was functioning one year below grade level (grade 2.0 with support and structure) in math, and experienced difficulties with reversals in number formation and in applying his knowledge to problems and equations, maintaining his focus, and working slowly and carefully (*id.*). With regard to writing skills, a report from West End commented that although he was able to copy a sentence and generate ideas, the student experienced difficulty applying phonics rules to his spelling, including inserting correct punctuation and proper word spacing (*id.*). The student was also challenged "writing letters in a controlled manner," and became frustrated during writing tasks, especially when correcting mistakes (*id.*). With regard to the student's social/emotional performance, his special education teacher at West End described the student as "anxious," "overactive," "easily distressed," having "poor self-esteem," and "need[ing] a great deal of encouragement to feel safe and secure" (*id.*). She reported that the student needed clear expectations and frequent reassurances in order to participate in the classroom, and often was distracted either by external stimuli in the room or by his own thoughts (*id.* at p. 2). He also required prompts to raise his hand to prevent his calling out of answers (*id.*). The student's West End special education teacher testified that the student experienced considerable difficulty with

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<sup>13</sup> The federal and State continuums of alternative placement options are identified in 34 C.F.R. § 300.115 and 8 NYCRR 200.6, respectively.

<sup>14</sup> The USDOE previously discussed "location" regarding the 1997 amendments to the IDEA, which for the first time required an IEP to identify the "location" of services. In discussing this provision of the 1997 amendments, the USDOE noted that "[t]he 'location' of services in the context of an IEP generally refers to the type of environments that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or in a resource room?" (Content of IEP, 64 Fed. Reg. 12594 [March 12, 1999]). Current provisions requiring that the location of services be identified on an IEP are found at 20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); and 8 NYCRR 200.4(d)(2)(v)(b)(7).

reading in phonics, isolating sounds, and understanding blends, and that he required "repetition" and "a very structured program when it comes to reading based activities" (Tr. p. 424). She further posited that the student exhibited needs in reading fluency and comprehension that West End addressed with its Orton-Gillingham (OG) reading program and its highly structured phonetic program (Tr. p. 427). In math, according to the student's West End special education teacher, the student needed to "get ... comfortable" with word problems, he understood the basic concepts, but experienced difficulty navigating the language of word problems, he required "coaxing" to get started, he was "highly distractible," and he required intensive one-to-one attention (Tr. pp. 432-33). With respect to writing, the special education teacher testified that the student demonstrated difficulties in organizing his thoughts and ideas, required the use of a checklist and an outline to promote organization, and exhibited writing skills "below grade level" (Tr. p. 434).

In regard to the student's social/emotional functioning, the March 14, 2007 counseling report prepared by the student's social worker at West End noted the student's preoccupation with and distraction by his own thoughts, worries, and external stimuli; sensitivity to changes in routine, including anxiety and decreased frustration tolerance; and recurrence of tearful episodes regarding death and loss, requiring him to leave the classroom (Dist. Ex. 7 at p. 1). The social worker surmised that "additional therapeutic support was necessary in order for him to feel comforted and calm enough to return to classroom activities" (*id.*). The social worker also observed that the student tended to become involved in and discuss the affairs of his peers at inappropriate times, called out impulsively, and required repeated redirection to regain his focus (*id.* at p. 2). In her impartial hearing testimony, West End's clinical director maintained that:

His weaknesses are – and his problems are – that he does have an internal emotional life, which is usually about his anxiety. He is a vulnerable youngster. He has poor frustration tolerance, so if things do not go well, he does get upset. He has trouble in executive functioning where he doesn't think flexibly or can really change or transition easily. He can be very disorganized and needs a lot of interventions to really stay on track.

(Tr. pp. 320-21).

West End's clinical director further described the student as "highly anxious," identified his "major issues" as "his anxiety, but also his attention and disorganization," and commented: "He needs a lot of time to resolve a problem. He is one of those kids that you hear about that just – he gets stuck in an upset. And the teacher doesn't always have an easy time moving him out of it. He really needs one-to-one special attention" (Tr. pp. 322-23). She further assessed the student's needs as including a small classroom in order to feel safe, assistance with social disputes and staying on task, a high level of structure, break down of language into steps, frequent prompts, feedback, and one-to-one special attention and extra time to resolve problems when "he gets stuck in an upset" (Tr. p. 323).

With respect to the student's speech-language needs, his speech-language therapist at West End reported that the student's speech-language therapy addressed his attention and focus; receptive, expressive and pragmatic language skills; and phonological awareness skills (Dist. Ex. 6 at p. 1). She indicated that the student required maximum visual supports and teacher/peer

models to follow one and two-step directions, responded to open and close-ended questions with unrelated and inappropriate topics, and that he often perseverated on such topics (id.). "At times," she successfully redirected him (id.). The speech-language therapist concluded that the student was preoccupied with internal stimuli, which distracted him from participating appropriately in classroom activities (id.). She identified the student's difficulties organizing his thoughts and generating ideas (especially with his writing), and his continued need for visual and verbal cues to generate complete thoughts and sentences as his primary expressive language needs (id.). The speech-language therapist underscored the student's need to continue working on decoding and encoding skills, including identifying middle sounds in words, and blending and segmenting sounds into words (id.). His pragmatic language needs included staying on topic, turn-taking with a communication partner, and reading the social cues of others (id.).

The hearing record also identifies the student's needs with regard to learning environment. The district's school psychologist testified that during discussions he had with West End staff, they advised him that they believed that the "stressors" causing the student's inappropriate classroom behavior "were more or less internal thoughts and worries and concerns" (Tr. p. 145). When asked during cross-examination about what type of environment that the student should be in to minimize those stressors and their attendant behaviors, the district witness responded:

A structured, supportive ... type of emotionally, supportive type of environment that can provide him with a sense of security, and a level of him feeling comfortable and psychologically safe as far as his feelings are concerned, so that he can focus on academic concerns or academic activity, as opposed to worries and anxiety.

(Tr. pp. 145-46).

The April 12, 2007 IEP indicated that "school reports" were used to determine the student's academic present levels of performance, which reflected that with regard to reading, improvement was needed in his ability to identify middle vowel sounds; and in math, noted that that the student "makes reversals when writing numbers and often needs redirecting to remain on task" (Dist. Ex. 12 at p. 3). The IEP indicated teacher reported instructional levels of grade 1.3 in decoding, grade 2.2 in reading comprehension, and grade 2.0 in math computation (id.). Although not included in the IEP section addressing the student's present levels of academic performance, the "CSE review rationale" contained in the hearing record also reveals that the student demonstrated additional needs in reading and writing skills, including the need for prompting to sound out words, to encode and decode, and his need "to improve his reading fluency and his independent writing skills" (Dist. Ex. 13 at p. 2). The student's academic management needs as indicated on the April 12, 2007 IEP included preferential seating to allow for teacher support and re-directing, graphic organizers to improve written expression and math manipulatives to enhance new math concepts (Dist. Ex. 12 at p. 3).

With regard to academic goals, the April 12, 2007 IEP included two reading goals with corresponding short-term objectives addressing decoding, encoding and reading comprehension; however, the student's needs in writing skills, which were identified in the CSE rationale, were not addressed (compare Dist. Ex. 12 at pp. 3, 6, with Dist. Ex. 13 at p. 2). The IEP contained two math goals with corresponding short-term objectives addressing addition and subtraction computation

and word problems; however, the student's needs regarding number reversals and remaining on task were not addressed (Dist. Ex. 12 at pp. 3, 7). With regard to related services goals, the IEP contained two speech-language and two OT goals with corresponding short-term objectives addressing pragmatic and expressive language skills, handwriting, eye-hand, and fine motor coordination skills (id. at pp. 8-9). The IEP contained two counseling goals with corresponding short-term objectives addressing the student's anxiety and focusing needs; however, I find that these goals did not appropriately address the student's needs, as indicated by the student's present levels of performance delineated in the IEP and the documents that the CSE had available to it at the April 12, 2007 CSE meeting (id. at pp. 4, 10). Specifically, the IEP did not contain goals and short-term objectives addressing the student's deficits in conflict resolution (i.e., turn-taking and sharing) (id.). Furthermore, the present performance summary contained in the IEP did not address the student's needs that were noted on the classroom observation, including disruptiveness and off-task behavior (compare Dist. Ex. 4, with Dist. Ex. 12 at p. 4), or his needs noted in the March 14, 2007 counseling report from West End, including the student's impulsive behaviors and tearful episodes (compare Dist. Ex. 7, with Dist. Ex. 12 at p. 4). Consequently, I find that the two counseling goals included in the IEP did not adequately address the severity and intensity of the student's social/emotional needs as evidenced by the hearing record (compare Dist. Ex. 12 at pp. 10, 4, with Dist. Exs. 4; 5 at p. 2; 7 at pp. 1-2; 13 at pp. 1-3). Additionally, although the student's therapists and his special education teacher at West End all recommended push-in related services for the student to minimize his difficulties with frequent transitions, the IEP recommended that all of the student's related services take place on a pull-out basis at a separate location (compare Dist. Ex. 12 at p. 13, with Dist. Exs. 6 at p. 2; 7 at p. 1; Tr. pp. 439-40). Moreover, despite recommendations by the student's West End special education teacher and social worker that the student receive a 12-month program, the IEP recommended only a 10-month program (compare Dist. Ex. 5 at p. 2, and Dist. Ex. 7 at p. 2, with Dist. Ex. 12 at p. 1).

With regard to the student's social/emotional needs, the April 12, 2007 IEP also described the student's social/emotional present level of performance based upon the West End school reports previously discussed (compare Dist. Ex. 5, and Dist. Ex. 6, and Dist. Ex. 7, with Dist. Ex. 12 at p. 4). The April 12, 2007 IEP reflected that the student was "an anxious child who is nevertheless empathetic and sensitive to the needs of others," "has difficulty with turn-taking and sharing," which "would often require teacher assistance," was "sensitive to changes in his routines and becomes anxious with decreased [sic] frustration tolerance," and was "often preoccupied and distracted by his thought/worries and becomes distracted" (Dist. Ex. 12 at p. 4). Although the CSE review rationale contained in the hearing record demonstrated that the parent and West End staff expressed concern regarding the student's preoccupation, stating it was "so intense that it would not allow him to engage in the tasks at hand or classroom activity," and that the West End social worker reported an increased frequency of the student's preoccupation, this information was not included in the April 12, 2007 IEP (compare Dist. Ex. 13 at pp. 1-2, with Dist. Ex. 12 at p. 4). Despite the fact that the CSE developed a BIP, which was attached to the April 12, 2007 IEP (Dist. Ex. 12 at p. 15), the CSE concluded that the student's "[b]ehavior does not seriously interfere with instruction and can be addressed by the special education classroom teacher" (id. at p. 4). Moreover, with respect to the student's speech-language and fine motor needs, I note that the April 12, 2007 IEP did not reflect his needs in the speech-language or fine motor domains or include present levels of performance in these domains, yet the IEP recommended related services and goals in these areas (Dist. Ex. 12 at pp. 1, 5-6, 9, 13). The April 12, 2007 CSE recommended placing the student in a ten-month 12:1+1 special class to meet the student's needs

in the LRE (Dist. Ex. 12 at p. 1). The hearing record demonstrates that the CSE considered a less restrictive 12:1 special class, but ultimately rejected it, reasoning that the student "not only requires a small special education class with a fully modified curriculum but he is also a very anxious [student] who needs significant adult support in order to make appropriate progress" (*id.* at p. 12). The hearing record does not establish that the CSE considered any other more restrictive programs to address the student's special education needs, despite the fact that during the April 12, 2007 CSE meeting, both the parent and the West End staff "expressed concern [regarding how the student's emotional issues] influenced his school behavior and functioning, particularly [his] preoccupation with a thought or concern. This preoccupation was so intense that it would not allow him to engage in the tasks at hand or classroom activity" (Dist. Ex. 13 at pp. 1-2). Furthermore, the district's clinician who conducted the classroom observation of the student also noted the student's considerable difficulty in functioning appropriately without distraction when in a group of only four students during the November 30, 2006 classroom observation (Dist. Ex. 4). Therefore, the hearing record supports that in not considering a more restrictive placement, the CSE did not place the student in the LRE based on his specific special education needs.

Based upon the foregoing, I believe that the district's program recommended in the April 12, 2007 CSE would be an appropriate program for a student with less pronounced anxiety issues. However, based upon the documentary and testimonial evidence contained in the hearing record, I do not find that the district's program appropriately addressed this student's severe anxiety and transitional needs, and therefore, I find that the recommended program was not calculated to confer educational benefits to the student nor would he have achieved more than trivial progress in the recommended program. Accordingly, I must concur with the impartial hearing officer's determination that the April 12, 2007 IEP was not reasonably calculated to confer educational benefits upon the student, and I find that the district failed to offer the student a FAPE for the 2007-08 school year.

Having concurred with the determination of the impartial hearing officer that the district did not offer the student a FAPE for the 2007-08 school year, I now consider the appropriateness of the parent's placement of the student at West End, and the equity considerations for tuition reimbursement.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419, *aff'd*, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining

whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see also Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89][emphasis added]).

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

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

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

The hearing record describes West End as "an independent special education school and a therapeutic program," totaling approximately 51 students, ages 5 to 13, grades kindergarten to 6, with a typical class size of 8 to 11 students, taught by a head teacher and an assistant teacher (Tr. pp. 318-19). The typical West End student has "good to above average intelligence," as well as "emotional and learning vulnerabilities, that need a great deal of support in the small setting" (Tr. p. 319). The student's special education teacher at West End described the student's class profile as including students ranging in age from 8 to 10 years with anxiety issues (Tr. p. 425). West End's clinical director added that its educational program is highly structured, and provides staff to meet the needs of each student on an individual level, including a team of social workers available in classrooms to deal with the student's conflicts as they occur (Tr. pp. 318-19). The clinical director testified that West End offered the student a small special education classroom of ten children, one licensed special education teacher, an assistant teacher licensed in general education and having had some "specialty training," a student teacher, and, to address the student's

related services needs, a speech-language therapist, occupational therapist, and social worker providing related services on a push-in basis (Tr. pp. 322, 337, 424). She explained that West End offers a small physical setting to address the student's anxiety issues, a small place to "separate from his mother," a small area to navigate the hallways, and a small classroom, in which he receives constant structure, break down of language, and feedback addressing the student's attention and organization needs (Tr. pp. 322-23). The clinical director also testified that West End is licensed by the State Office of Mental Health (OMH), and that every six months, the school provides OMH with a treatment plan developed by each student's social worker in conjunction with information provided by all staff who work with each student (Tr. pp. 332-33). She added that West End staff follows and discusses each student's treatment plan to coordinate the academic and therapeutic components of each plan (Tr. pp. 323-24).

In addressing the student's social/emotional needs, the student's special education teacher at West End testified that the school provided the student with an array of therapeutic supports, including daily contact with his social worker, daily collaboration between his social worker and his classroom teacher to assess the student's daily and ongoing needs and to assess his potential future needs, consistent one-to-one reassurance as needed, and a "games" group twice per week to develop social skills (Tr. pp. 440-42). The program also utilized a behavior reinforcement system, "stoplight," which features a visual representation of the student's progress and a daily log displaying the number of minutes of free time the student earned during each class period (Tr. 442-43). As explained by his special education teacher, the student kept track of his minutes in the log, and was asked to write a sentence describing the type of day the student experienced and reflecting upon his progress within the curriculum; his teacher then provided the student with feedback suggesting improvements with regard to specific subjects or situations presenting difficulties for the student (Tr. pp. 442-44). This behavior system also afforded the student the opportunity to start again after he experienced a setback (Tr. pp. 442-43). West End also provided push-in related services to address the student's difficulty with transitions (Tr. pp. 336-38, 477-78).

As demonstrated in the hearing record, the student's academic needs exhibited during the 2007-08 school year at West End included difficulties in applying phonics rules, spacing between words, and using correct punctuation, and in math number formation and application of math knowledge to problems and equations (Tr. pp. 424, 427; Dist Ex. 5 at p. 1). The student's West End special education teacher testified that the student's language and writing needs were addressed in a reading group of three students, which utilized the "Great Leaps"<sup>15</sup> program to increase fluency and reading comprehension, and "PAF," described in the hearing record as a highly structured phonetic OG-based method featuring repetition, to increase phonics skills (Tr. pp. 426-30). His math needs were addressed in a group of five students which utilized the "Harcourt" math program, described in the hearing record as a highly structured methodology that presents math concepts in small pieces, also stresses repetition, and builds upon previously developed skills (Tr. pp. 430-33). The special education teacher explained that both small group settings allowed for one-to-one attention, coaxing the student to get started, providing him with reassurance, and allaying his anxiety (Tr. p. 430). She added that the student's writing instruction was provided in a group of three students, which utilized checklists and outlines to help the student organize his thoughts and remember to include important details (Tr. pp. 434-35). The student's

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<sup>15</sup> The hearing record does not provide a description of the "Great Leaps" program.

writing group utilized the writing component "Just Right" reading program, which the special education teacher testified "is a very sequential program" that "breaks down the components of writing into very small manageable chunks, and it builds upon those chunks throughout the year," thereby allowing the student to work more independently (Tr. pp. 433-35).

The hearing record evidences the student's academic progress at West End. The student's special education teacher testified that the student increased his level of independence in writing and math (Tr. pp. 432, 434). I note further that the April 12, 2007 IEP indicated that the student's decoding skills were at a grade 1.3 level in April 2007, and his special education teacher advised that he was "very hesitant when it came to any kind of reading activity" (Tr. p. 428; Dist. Ex. 12 at p. 3). However, at the time of the impartial hearing, the special education teacher testified that the student had increased his decoding skills to a grade 2.2 level, and was voluntarily reading third grade scholastic news aloud in class (Tr. pp. 428-29; Dist. Ex. 12 at p. 3). In math, the IEP placed the student's computation skills at a 2.0 grade level, and noted that he could only add and subtract two-digit numbers without regrouping (Dist. Ex. 12 at p. 3). However, at the time of the impartial hearing, the special education teacher testified that the student's math group was functioning at a 2.3 grade level, that the student had completed three-digit addition and subtraction with regrouping, and had started an introduction to multiplication (Tr. p. 432).

In consideration of the foregoing, I find that the hearing record demonstrates that West End provided the student with educational instruction specially designed to meet his unique needs. Accordingly, I concur with the impartial hearing officer's determination that the parent met her burden of proving that West End's educational program was appropriate for the student during the 2007-08 school year.

The final criterion for a tuition reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required]). With respect to equitable considerations, the IDEA also provides that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181 at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [SDNY 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

In the instant appeal, the district argues that although the student began the 2007-08 school year at West End on September 10, 2007, the parent did not notify the district that she was rejecting the offered placement until October 15, 2007, more than one month later, contravening 20 U.S.C. § 1412(a)(10)(C)(iii), which mandates that the parent inform the district at the most recent meeting or give the district at least ten business days notice, prior to the removal, of their intent to enroll a

student in a private school at public expense. The IDEA allows that 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 student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Evidence in the hearing record supports the district's argument that the parent did not provide timely notice of her rejection of the public school placement and her intent to enroll the student in a private placement at public expense. It is unclear from the hearing record whether the parent informed the April 12, 2007 CSE that she considered the recommended 12:1+1 program to be inappropriate (see Tr. pp. 372-73, 394-95). However, the hearing record indicates that on March 2, 2007, the parent determined that she would re-enroll her son at West End for the coming school year (Tr. p. 398), and that on March 15, 2007, one month prior to the scheduled April 12, 2007 CSE meeting, the parent signed a contract enrolling him at West End for the 2007-08 school year (Dist. Ex. 16). She received the FNR recommending the 12:1+1 special class placement at the end of June 2007 (Tr. p. 374). On June 29, 2007, the parent forwarded correspondence to the district via facsimile in which she acknowledged receipt of the June 24, 2007 FNR, and requested that the district forward to her further information regarding the recommended placement and its class profile (Parent Ex. D at p. 1). On September 10, 2007, the student started classes at West End (Parent Ex. E). Not until October 17, 2007, when she forwarded supplemental correspondence dated October 15, 2007 to the district via facsimile, did the parent formally reject the recommended placement and inform the district that her son would continue to attend West End for the 2007-08 academic year (Parent Ex. B at pp. 1-2). However, the hearing record shows that the parent never informed the district that she would be seeking reimbursement for the costs of tuition at West End until she filed her due process complaint notice on January 15, 2008, approximately four months after she was required to do so by statute. She has not argued that any of the exceptions to the notice requirement apply (see 20 U.S.C. § 1412[a][10][C][iv]). While the impartial hearing officer concluded that the parent generally expressed her concerns and communicated with the district about the proposed placement, she neither determined nor indicated consideration of whether the parent provided notice pursuant to 20 U.S.C. § 1412(a)(10)(C)(iii). Under these circumstances, I find that the parent failed to provide the notice required by the IDEA and reimbursement would be inequitable. I therefore find that the impartial hearing officer erred by finding that the parent prevailed on her claim seeking the costs of tuition at West End for the 2007-08 school year.

I have examined the parties' remaining contentions and find that they are without merit.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated July 31, 2008 is annulled to the extent that it found that equitable considerations supported the parent's claims and granted the parent's request for tuition reimbursement for the West End Day School for the 2007-08 school year.

**Dated:**            **Albany, New York**  
                      **December 17, 2008**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**