The University of the State of New York

The State Education Department
State Review Officer

No. 04-046

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Nyack Union Free School District

Appearances:
George Zelma, attorney for petitioners

Ingerman Smith, LLP, attorney for respondent, Ralph C. DeMarco, Esq., of counsel

DECISION

Petitioners appeal from an impartial hearing officer's decision which denied their request to be reimbursed for the cost of their son's tuition at Community School of Bergen County (Community School) for the 2003-04 school year. The appeal must be sustained.

During kindergarten and first grade, petitioners' son was enrolled in respondent's Upper Nyack Elementary School, receiving Educationally Related Support Services (ERSS) (Tr. pp. 149, 864). In addition, the record suggests that during this time the child received accommodation services of occupational therapy and resource room services pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 701-*796*[*l*][1998]) (section 504) (Dist. Ex. 11; see Tr. pp. 149, 864, 867-70). At the end of his first grade year, in spring 2001, concerned about his slow progress, petitioners first referred their son to respondent's Committee on Special Education (CSE) for evaluation (Tr. pp. 860, 862). The CSE did not classify the child at the time, but recommended that he repeat first grade (Tr. p. 863). Petitioners agreed to have the child repeat first grade, and the child was enrolled in Liberty Elementary School (Liberty) for the 2001-02 school year, in a collaborative team first grade classroom, which consisted of a special education teacher, a regular education teacher and two aides (Tr. pp. 863-64, 903, 908, 910). The collaborative class consisted of both regular and special education students (see Tr. pp. 548-550, 787-88, 909-10, 389). The child continued to receive resource room and occupational therapy services under his section 504 plan (Tr. pp. 868-69).

The following year, the child began attending the collaborative second grade class at Liberty, but in November 2002, dissatisfied with their son's progress, petitioners withdrew their son and unilaterally enrolled him in Community School, a private school approved by the New York State Education Department as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 871-75, 827-828). Community School admits only special education students with at least average cognitive potential and either a learning disability and/or attention deficit disorder, but not an emotional disability (Tr. pp. 822, 828). The class petitioners' son was enrolled in consisted of ten students and two teachers (Tr. pp. 823-24, 838). Community School developed their own individual instruction plan for the child with specific goals and objectives for him in reading/writing, math, social studies, visual/motor skills, music, drama, computer skills, art, physical education, and health (Parent Ex. C). In addition, the child received speech-language services (Parent Ex. C). In January 2003, petitioners again referred their son to respondent's CSE, providing the CSE with two independent evaluations of their son which described him as having a language impairment and recommended speech therapy (Parent Exs. I, J; Tr. pp. 738-39, 749, 754; see Dist. Exs. 5, 6; Tr. p. 1037). The CSE evaluated the child, and in April 2003 classified him as learning disabled, and recommended he be placed back at the collaborative second grade classroom at Liberty (Dist. Ex. 3). Petitioners objected to the recommended program and requested an impartial hearing seeking tuition reimbursement for the 2002-03 school year (Tr. pp. 885).

While the hearing for the 2002-03 school year was pending, on June 25, 2003 the CSE met to develop a program for petitioners' son for the upcoming 2003-04 school year (Dist. Ex. 2). The CSE continued to classify the child as learning disabled and recommended that he be placed in a collaborative 20:2+2 third grade classroom in respondent's Upper Nyack Elementary School. The recommended class consisted of a maximum of 20 regular and special education students,[1] one special education teacher, one regular education teacher, and two aides (Tr. pp. 548-50). Group counseling was recommended once per week for 30 minutes to assist the child with occasional anxiety. The individualized education program (IEP) stated that, although the child's overall cognitive functioning fell within the average range, memory deficits and decoding weaknesses impacted on the child in all academic areas. Reading and word retrieval tasks were specifically indicated as impacted by his memory deficit. The CSE determined that his needs lay in improving his decoding, fluency, and memory skills, with decoding and spelling identified on the IEP as particular areas of weakness. The CSE indicated on the IEP that the child needed a "meaningful multisensory approach to reading with a lot of repetition" (Dist. Ex. 2 p. 2). The IEP listed the following testing accommodations: directions read, special location for tests, spelling waived in content area tests, and "explicit writing strategies" (Dist. Ex. 2 p. 1). Program modifications specified pre- and reteaching of materials, access to a computer with reading programs, directions and word problems read, word box for spelling, and modified tests. No assistive technology devices were listed on the IEP. The IEP included two objectives in study skills, three objectives in reading, two objectives in writing, and one objective in social/behavioral needs.

Petitioner's mother expressed her disagreement with the 2003-04 program at the June meeting (Tr. pp. 775-76, 225), claiming, among other things, that her son had a language impairment and needed speech-language services and more individual multisensory instruction in a smaller class setting (Tr. pp. 884-85, 941, 225), consistent with the recommendations in the independent evaluations provided by the parents (Dist. Exs. 5, 6). The CSE Chair believed at the end of the meeting that the parent wanted to continue sending the child to Community School for the 2003-04 school year (Tr. p. 718). There was some indication that the CSE discussed at the meeting the possibility of additional testing by the school district on the issue of language impairment (Tr. pp. 156, 226), but no such testing was done over the summer (Tr. p. 886).

On Monday, August 25, 2003, at approximately 4:15 pm, the child's mother hand-delivered a letter to the assistant superintendent of respondent's special education department reiterating her disagreement with the recommended program for the 2003-04 school year, and informing respondent that she would again be enrolling her son at Community School for the 2003-04 school year (Tr. pp. 91, 156, 887; Dist. Ex. 16). Because the new school year was starting the following week, the assistant superintendent informed the parent that she wished to immediately arrange to have the child evaluated by the school psychologist and to set up a CSE meeting to address petitioners' concerns (Tr. pp. 177-78, 887). The parties apparently discussed both Thursday and Friday of that week as possible CSE meeting dates (Tr. pp. 178, 887; Dist. Ex. 22). After the parent left, the assistant superintendent sent a letter to petitioners via express mail, which she believed would be delivered to petitioners the next day, informing them that a CSE meeting had been scheduled for Friday, August 29, 2003 at 1:45 pm (Tr. pp. 179-180, 331; Dist. Ex. 21). The assistant superintendent immediately notified all CSE members of the meeting and informed the school psychologist that he was to complete an immediate evaluation of the child to determine whether the child had a language impairment as identified in the independent evaluations, and to bring the results to the CSE meeting (Tr. pp. 179, 187, 224-25). Petitioners brought their son in to be evaluated by the school psychologist on Wednesday and Friday mornings of that week, and the psychologist administered a battery of tests (Tr. pp. 888, 345; see Dist. Ex. 4). Petitioners claim they did not receive the letter notifying them of the date of the August 29th CSE meeting prior to the meeting (Tr. pp. 920), but instead found out about the meeting on Friday morning, a few hours before it was to take place, from the school psychologist when they brought their son in for his final day of testing (Tr. pp. 890, 926-27, 227; Parent Ex. E). The child's mother immediately notified the district by hand-delivered letter that she would not be able to attend the meeting that afternoon on such short notice, and suggested the following Wednesday, September 3, as an alternative date (Tr. pp. 890-91, 922-23, 180-82; Parent Ex. E). The assistant superintendent received the letter, but decided to proceed with the meeting without the parent present (Tr. pp. 180-82, 228).

At the August 29, 2003 CSE meeting the school psychologist presented the preliminary results of his evaluation of petitioners' son completed that morning, and his conclusion that the child was not language-impaired (Tr. pp. 386-87, 183, 373; see Dist. Ex. 4). The assistant superintendent chaired the meeting (Tr. p. 184). After a two-and-a-

half-hour discussion, the CSE developed an IEP for the 2003-04 school year that was identical to the program recommended in the earlier June 2003 IEP (Tr. pp. 188-89; Dist. Ex. 1; see Dist. Ex. 2). The only difference in the two IEPs was the addition of the standardized test results obtained by the school psychologist, and a short update to the comment section indicating that the CSE had reviewed all test data and found no indication of a language impairment as indicated in the independent evaluations, while recognizing the child had difficulties in the reading/fluency area (Dist. Ex. 1 p. 2); the recommended program remained the same as in the June 2003 IEP. The assistant superintendent had a copy of the August 29 IEP hand-delivered to petitioners' home later that day (Tr. pp. 190-91).

By letter dated September 8, 2003, petitioners, through their attorney, rejected the CSE's program for their son for the 2003-04 school year, and informed respondent that their son would be re-enrolled in Community School, and requested an impartial hearing for the purpose of obtaining an award of tuition reimbursement for the 2003-04 school year (Parent Ex. A). Meanwhile, at about the same time, in late August/early September 2003, petitioners reached a settlement agreement with respondent on their claim for tuition reimbursement for the prior 2002-03 school year, whereby respondent agreed to reimburse petitioners for some of the costs of the child's education at Community School for the 2002-03 school year in exchange for petitioners' agreement to withdraw their request for a hearing for that year (Dist. Ex. 23).

The impartial hearing on the 2003-04 IEP commenced on November 7, 2003 and concluded on April 5, 2004. In a decision dated June 1, 2004 the hearing officer found that respondent had offered petitioners' son an appropriate educational program for the 2003-04 school year; that the parents had acted unreasonably in both not attending the August CSE meeting and in not giving respondent sufficient notice of their intent to enroll their son in a private school; and that, regardless, the parents were not entitled to tuition reimbursement because the private school was too restrictive a setting for the child. Petitioners appeal, arguing that the hearing officer was guilty of bias and misconduct during the hearing and that he erred in his conclusions of law. They argue that they fully cooperated with the district, that the 2003-04 IEP was both procedurally and substantively defective, and that Community School's program met the child's needs. They ask that the hearing officer's decision be annulled and reimbursement of tuition expenses be ordered for their son's educational program at Community School for the 2003-04 school year.

I will address petitioners' claim of hearing officer bias first. Petitioners cite to numerous instances in the record of alleged misconduct, bias, and incompetence in the hearing officer's behavior, rulings, and decision and ask that I annul the decision on that basis. A hearing officer who is appointed to preside at an impartial hearing must provide all parties with an opportunity to present evidence and testimony (34 C.F.R. § 300.509[a][2]; 8 NYCRR 200.5[i][3][xii]). An impartial hearing officer must conduct a hearing consistent with the requirements of due process (Application of a Child with a Disability, Appeal No. 04-018; see 34 C.F.R. § 300.510[b][2][ii]). A hearing "may not be conducted …by any person having a personal…interest that would conflict with his or

her objectivity in the hearing" (34 C.F.R. § 300.508[a][2]; see 8 NYCRR 200.1[x][3]). The U.S. Department of Education has suggested that the regulation concerning the impartiality of hearing officers be read in conjunction with State ethics requirements for attorneys and judges (Impartial Hearing Officer, 64 Fed. Reg. 12613 [Mar. 12, 1999]). In New York State, a hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Child with a Disability, Appeal No. 04-010; Application of a Child with a Disability, Appeal No. 03-071; Application of a Child with a Disability, Appeal No. 01-046; see also 22 NYCRR 100.1; 22 NYCRR 100.2[A]; 22 NYCRR 100.3[B] [N.Y. Code of Judicial Conduct, Canons 1-3, McKinney's Consol. Laws, Book 29 App.]), and must render a decision based on the record (see Application of a Child with a Disability, Appeal No. 00-063; Application of a Child Suspected of Having a Disability, Appeal No. 00-036; Application of a Child with a Disability, Appeal No. 98-55). The test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired" (N.Y. Code of Judicial Conduct, Canon 2.2, McKinney's Consol. Laws, Book 29 App.). A hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others whom the judge deals in an official capacity and perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child Suspected of Having a Disability, Appeal No. 01-021; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see 22 NYCRR 100.3[B]; see also New York State Unified Court System Standards of Civility, 22 NYCRR Part 1200, Appendix A [1997]). Inappropriate remarks by a hearing officer may afford a basis for finding that a hearing officer was biased (see generally Application of a Child with a Disability, Appeal No. 98-55). A hearing officer may not abuse his power or demonstrate bias in any evidentiary rulings (see Application of a Child with a Disability, Appeal No. 01-002; Application of a Child Suspected of Having a Disability, Appeal No. 00-036). A finding of actual bias can afford a basis for annulling a hearing officer's decision (see, e.g., Application of a Child with a Handicapping Condition, Appeal No. 91-10; see generally Application of a Child with a Disability, Appeal No. 03-015; Application of a Child with a Disability, Appeal No. 02-073; Application of a Child with a Disability, Appeal No. 01-037).

In the instant case, the record belies a contentious relationship existed between the hearing officer and parent's counsel from the very beginning. On the start of the first day of the hearing, petitioner's attorney began by stating for the record that, within 10 to 30 seconds of entering the room, the hearing officer inexplicably ordered him to sit down, and ordered the parents' advocate to leave the room despite petitioners' attorney's request that she remain.[2] The following exchange then occurred:

> PETITIONERS' ATTORNEY: [T]he tone with which you have addressed me to this point is very disturbing, because I tried to act as professionally as possible. And you have raised your voice to me, as I say, practically every minute that we've been in the room together. I don't know why.
> HEARING OFFICER: Okay. Well, I think what you have to understand…is I'm

in charge. And if I don't want somebody present, I'll tell you that I don't want them present, okay, and you'll follow my direction as long as you're in this hearing. Do you understand that?

PETITIONERS' ATTORNEY: I don't understand why you are yelling at me, sir.

HEARING OFFICER: Do you understand that?

PETITIONERS' ATTORNEY: I don't want you to yell at me any more, please.

(Tr. pp. 3-4).

At the insistence of the hearing officer, petitioners' attorney then stated for the record that he had mentioned in a pretrial telephone conference a few days earlier that, due to his belief that the case included complex legal issues, he had expressed a preference that the hearing officer assigned to the case be an attorney (Tr. pp. 4-5). The hearing officer then remarked "evidently you looked into my background" and then raised his voice again and repeatedly demanded to know if petitioners' counsel had any objection to his age, during which petitioners' attorney several times asked the hearing officer why he was yelling at him, and told him he did not understand and had no "axe to grind" with the hearing officer (Tr. pp 5-7). Eventually, petitioners' attorney left the hearing room because of the impartial hearing officer's "demeanor" and "threatening gestures" toward him (Tr. p. 8). Petitioners' attorney stated that he was leaving the room because the impartial hearing officer was "shouting" at him and further stated "if you want to speak to me in a civilized manner, you let me know, sir" (id.). When petitioners' attorney returned, he explained he was only making an ordinary motion for recusal earlier, and that he did not understand the hearing officer's reaction, and that there was no animosity intended (Tr. pp. 10-12). Nevertheless, within a few moments the hearing officer again began demanding, "Do you have any objection to other things about me, my age, my sex, okay, my religious preferences?" (Tr. p. 13), after which petitioners' counsel stated he did not see how the hearing could continue, and asked the hearing officer, "with all due respect" if he would recuse himself based on the fact that his demeanor had demonstrated that a personal bias existed which would interfere with the parents' right to a fair impartial hearing (Tr. pp. 13-14, 17). The hearing officer responded, "If you don't want me to be in charge, okay, then you have a problem. But as long as I'm in charge, you know, I make the rules. Okay? All right?" (Tr. p. 16), and refused to recuse himself (Tr. p. 18). The school district's counsel then asked for a moment to confer with petitioners' attorney and his client regarding how they wanted to proceed, given the events of the morning (Tr. p. 18), after which both sides agreed to an adjournment (Tr. p. 19).

Several days later, both respondent's and petitioners' attorneys reached a mutual agreement, based on the events that had transpired on the first day, that respondent would allow the parents to withdraw their request for a hearing, without prejudice, provided that a new hearing was requested by March 31, 2004 (Tr. p. 26). This agreement was reduced to writing in letterform (Pet. Ex. B). When the attorneys advised the impartial hearing officer of this in a telephone conference, however, the hearing officer reportedly immediately informed them that if the parents withdrew their request, he would make sure that it would be with prejudice and that they would not be able to request a new hearing (Tr. p. 27), effectively losing their right to an impartial hearing. When the

hearing resumed, petitioners' attorney recounted these events and again asked the hearing officer to recuse himself, citing the parents' apprehension over the ability to receive a fair hearing from the hearing officer (Tr. p. 27). The hearing officer again declined to recuse himself (Tr. p. 28), and when asked why he would make sure any withdrawal by the parents would be with prejudice, he responded, "Basically, it was my determination. And my determination is determined, okay, in terms of your [petitioners' attorney's] conduct…And we'll proceed and there will be no further explanations at this time" (Tr. p. 28-9). When asked by petitioners' attorney what conduct he was referring to, the hearing officer replied only, "You'll find out later," and upon further questioning declared only that petitioners' attorney had "violated the law" by asking the hearing officer to recuse himself (Tr. p. 29).

Throughout the course of the six-day hearing, there were several heated verbal exchanges between the hearing officer and petitioners' attorney on rulings and interpretations of legal issues (see Tr. pp. 294-301, 533-37, 564-570, 732, 1014-16, 1019-24). In addition, petitioners' attorney and the parents' expert witness on several occasions had to ask the hearing officer to stop yelling at them (Tr. pp. 534, 536-37, 1007, 1010-1011, 1015). When the parent's advocate attempted to help by instructing the witness to let respondent's attorney finish the question, the hearing officer asked her if she wanted to take over and told her she was out of order and not to help again (Tr. pp. 569-770). By contrast, the record contains no instances of the hearing officer yelling at respondent's attorney or any of respondent's witnesses.

The hearing officer also made several misstatements of law at the hearing; for example, he stated that petitioners' attorney "violated the law" by asking for his recusal (Tr. p. 29), and also stated that "if [the parents' independent psychologist] doesn't have school credentials, this person has no business examining a child like this, because a school psychologist - okay? Okay?- is licensed to work in schools. Okay?" (Tr. p. 419). In addition, the hearing officer tried to insist pendency was an issue, both at the hearing and in his decision, even after an earlier stipulation was entered into evidence which stated that pendency was not established by the prior year's agreement, neither party had raised it, and both parties tried to tell the hearing officer that pendency was not an issue (Tr. pp. 729-31; IHO Decision p. 6).

I have thoroughly and carefully reviewed the entire record and I find that there was clear evidence of actual bias and/or prejudice against petitioners in this case, as evidenced by the hearing officer's treatment of petitioners' attorney, advocate, and witness, as well as by some of his rulings (compare Application of a Child with a Disability, Appeal No. 03-015). The record as a whole demonstrates a personal bias on the part of the hearing officer against petitioners' counsel from the first day, and a lack of judicial temperament in dealing with petitioners' attorney, advocate, and expert witness throughout the hearing. His refusal to permit the parents' advocate (Tr. p. 18) (and possibly the parents also) to be in the room on the first day of the hearing raises serious due process issues. The hearing officer's conduct of repeatedly shouting at persons appearing for petitioners (but not respondent) to the point where the hearing could not proceed at one point, and his attempt to bar the parents' advocate from the first day of the

hearing, indicate evidence of a clear animus against petitioners' representatives (compare Application of the Bd. of Educ., Appeal No. 01-043). I also find extremely troublesome the hearing officer's refusal to permit the parties to voluntarily agree to allow the parents to withdraw their hearing request without prejudice after the acrimonious events of the first day of the hearing, and his insistence that, despite the school district's agreement, any withdrawal of the parents' request would be *with* prejudice, and his admission that he made this determination in reaction to petitioners' counsel's request that he recuse himself based on his behavior. This ruling would have denied the child's parents their right to a due process hearing based solely upon the hearing officer's animus with their attorney; and it left the parents no choice but to continue with a hearing officer whose impartiality was, at the very least, questionable. After a careful review of the record, I find the hearing officer's actions in the present case rose to the level of actual bias. I further find that the hearing officer's repeatedly disparaging remarks to petitioners' attorney were unwarranted and inconsistent with the standard set forth in Canon 3 of the Code of Judicial Conduct, which provides that a judge shall be patient, dignified and courteous to litigants, their attorneys and others with whom the judge deals in an official capacity (see Application of a Child with a Handicapping Condition, Appeal No. 91-40; 22 NYCRR 100.3[B][3]). In conclusion, I find that the hearing officer's demeanor and bias inappropriately affected his decision and some of his rulings, and that therefore the hearing officer's bias impermissibly interfered with his objectivity at the hearing in contravention of state and federal regulations (34 C.F.R. § 300.508[a][2]; see 8 NYCRR 200.1[x][3]). Based on my finding of actual bias, I will annul the hearing officer's decision in this matter. However, I also note that, in spite of the hearing officer's bias, petitioners' attorney concedes (Pet. ¶ 33) and I agree that a complete record was developed over the course of the six-day hearing. Both sides had the opportunity to adequately question witnesses, enter exhibits, and present their case, albeit in a very contentious atmosphere. Hence, although I find the level of actual bias in this case compels me to annul the hearing officer's decision, I see no reason to remand the case to be heard before a new hearing officer, as I find that I have a sufficient record upon which to base a decision.[3]

Moreover, while I find it proper for the impartial hearing officer to refuse to recuse himself at petitioners' counsel's first request, which was based solely on the fact that the impartial hearing officer was not an attorney (Tr. pp. 4-5), I find that the impartial hearing officer erred in failing to recuse himself after the second motion for recusal was made by petitioners' attorney at the close of the first day of the hearing (Tr. pp. 17-18). Petitioners' attorney made the second recusal motion "because I believe that the demeanor that you exhibited is clearly indicative of an impossibility in terms of providing a fair and impartial hearing" (Tr. pp. 17-18), and later stated that the student's mother was "very shaken up by all these events" as he reported them to her (Tr. p. 18). In response to the concerns underlying the second motion, the impartial hearing officer did not attempt to assure the parties that he would be impartial, rather he asserted he was "in control" and "in charge" (Tr. p. 16). While parties to a due process proceeding should follow the reasonable directives of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 04-010), I find that the impartial hearing officer here was not issuing reasonable directives. Under those circumstances, the hearing officer

should have realized that his conduct, or the reasonable perception of it, had, at the very least, created in the mind of one of the parties that the hearing officer's ability to impartially carry out his responsibilities was impaired. I find that the impartial hearing officer committed reversible error by not recusing himself. The impartial hearing officer repeated this error by failing to recuse himself again at the start of the second day of the hearing for the same reason (Tr. pp. 27-29).

I turn now to the crux of petitioners' appeal, respondent's alleged failure to provide a free appropriate public education (FAPE) for their son.

The purpose behind the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 - 1487) is to ensure that students with disabilities have available to them a free appropriate public education (20 U.S.C. § 1400[d][1][A]). A FAPE consists of special education and related services designed to meet the student's unique needs, provided in conformity with a comprehensive written individualized education program (20 U.S.C. § 1401[8]; 34 C.F.R. § 300.13; see 20 U.S.C. § 1414[d]). A board of education may be required to pay for educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]). The parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Florence County Sch. Dist Four v. Carter, 510 U.S. 7 [1993]). The board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (M.S. v. Bd. of Educ., 231 F.3d 96, 102 [2d Cir. 2000], cert. denied, 532 U.S. 942 [2001]; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 [2d Cir. 1998]; Application of a Child with a Disability, Appeal No. 02-092).

To meet its burden of showing that it had offered to a provide a FAPE to a student, the board of education must show (a) that it complied with the procedural requirements set forth in the IDEA, and (b) that the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Bd. of Educ. v Rowley, 458 U.S. 176, 206, 207 [1982]). If a procedural violation has occurred, relief is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]), e.g., resulted in the loss of educational opportunity (Evans v. Bd. of Educ., 930 F. Supp.83, 93-94 [S.D.N.Y. 1996]), seriously infringed on the parents' opportunity to participate in the IEP formulation process (see W.A. v Pascarella, 153 F. Supp.2d 144, 153 [D. Conn. 2001]; Brier v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242, 1255 [D. Vt. 1996]), or compromised the development of an appropriate IEP in a way that deprived the student of educational benefits under that IEP (Arlington Cent. Sch. Dist. v. D.K., 2002 WL 31521158 [S.D.N.Y. Nov. 14, 2002]). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5]; 34 C.F.R. § 300.550[b]; 8 NYCRR 200.6[a][1]).

Petitioners allege that the 2003-04 IEP developed by respondent's CSE was procedurally flawed in that, inter alia, the August CSE meeting which developed the IEP failed to include the parent, the parent did not receive the required notice of the meeting, no current classroom observation was performed, and the CSE team failed to consider the results of the parents' independent evaluations.[4]

It is undisputed that the parent was not present at the August 29, 2003 meeting which established the child's final IEP for the 2003-04 school year (Dist. Ex. 1; Tr. pp. 184-85, 189, 886). The importance Congress attached to the parent's presence at the CSE meeting cannot be minimized. Procedural violations that interfere with parental participation in the IEP formulation process have been found to "undermine the very essence of the IDEA" (Application of a Child with a Disability, Appeal No. 02-015, *quoting* Amanda J. v. Clark Co. Sch. Dist., 267 F.3d 877, 892 [9th Cir. 2001]; see also Application of a Child with a Disability, Appeal No. 01-001). As the Second Circuit explained, "The IEP process reflects a novel approach to the guarantee of rights to a minority: Congress, in lieu of uniform substantive standards, sought to protect the interests of the child by providing for parental participation in the process of charting an appropriate education for their child" (Heldman v. Sobol, 962 F.2d 148, 151 [2d Cir. 1992]; see also Honig v. Doe, 484 U.S. 305, 310-12 [1988]; Bd. of Educ. v. Rowley, 458 U.S. 176, 205-06, 208-09 [1982]).

One of Congress' goals in drafting the 1997 amendments to the IDEA was to strengthen the role of parents by expanding their participation in the identification, evaluation, and educational placement of their children (see 34 C.F.R. Part 300, Notice of Interpretation, Appendix A, Section II, Questions 4, 5). The resulting IDEA and implementing state and federal regulations require that parents must be part of the team that determines the educational placement of the child (20 U.S.C. § 1414[d][1][B][i]; 34 C.F.R. § 300.344[a][1]; 34 C.F.R. § 300.501[c], [a][2]; 34 C.F.R. § 300.552[a][1]; see N.Y. Educ. Law § 4402[1][b][1][a][i]; 8 NYCRR 200.3[a][1][i]). It is the school district's responsibility to ensure that parents are present at CSE meetings and are provided the opportunity to participate in decisions (20 U.S.C. § 1414[f]; 34 C.F.R. § 300.501[c][1]; 34 C.F.R. § 300.345[a]). The parents also have the right to inspect all records at the meeting relating to the child's identification, evaluation, and educational placement (20 U.S.C. § 1415[b][1]; 34 C.F.R. 300.501[a][1]; 8 NYCRR 200.5[d][6]). A school district must take affirmative steps to ensure that one or both of the student's parents are present at each CSE meeting or are afforded the opportunity to participate, including notifying the parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place (34 C.F.R. § 300.345[a]; 34 C.F.R. § 300.501[c]; 8 NYCRR 200.5[d][1]). Unless the purpose of the meeting is a disciplinary review or the parent otherwise agrees, the parent must receive prior notification in writing of the meeting, which under New York State regulations must be provided at least five days prior to the actual date of the meeting (8 NYCRR 200.5[c][1]; see also 20 U.S. C. § 1415[b][3], [c]; 34 C.F.R. § 300.345[a], [b]; 34 C.F.R. § 300.503[a][1]; N.Y. Educ. Law § 4402[1][b][3][c]). If a parent is unable to be physically present at a meeting, the district must use other methods to ensure their participation, such as telephone or video conference calls (34 C.F.R. §

300.501[c][3]; 34 C.F.R. § 300.345[c]; 8 NYCRR 200.5[d][1][iii]). A school district may only conduct a meeting without a parent's participation if it is unable to convince the parent that they should attend; in which case the district must have a detailed record of its various attempts to arrange a mutually agreed upon time and place for the meeting (34 C.F.R. § 300.345[d]; 8 NYCRR 200.5[d][3], [4]). The U.S. Department of Education has interpreted these regulations as indicating that "The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their child. This is an active role in which the parents…provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child…[and] join with the other participants in deciding...what services the agency will provide to the child and in what setting" (34 C.F.R. Part 300, Notice of Interpretation, Appendix A, Question 5).

In the instant case I find that the school district, by its own admission, failed to give the parent the requisite written five-days' notice of the August 29 CSE meeting. The assistant superintendent testified that she sent the letter announcing the date of the meeting to petitioners after close of business on August 25 (Tr. pp. 177-180), and both the mailing receipt (Dist. Ex. 21) and the testimony of her secretary (Tr. pp. 323-24, 326) verify that the letter announcing the August 29th meeting went out on the 25th, indicating that even if petitioners had received the letter the next day, they still would not have had the requisite five-day notice as required under the regulations. In addition, I find the parent's actions reasonable in that when petitioner claims she found out for the first time from the school psychologist on Friday the 29th that the meeting was to be held later that afternoon (Tr. pp. 890, 227), she promptly notified the assistant superintendent that she had not received the notice and could not be present and suggested a reasonable alternative, i.e., rescheduling the meeting in five days, on September 3 (Dist. Ex. 14; Tr. pp. 890-91, 180, 182). The record reveals that the parent had a history of attending all CSE meetings (Tr. p. 892; Dist. Exs. 2, 3). I also find the district's actions unreasonable and in violation of state and federal regulations in that the assistant superintendent testified that she summarily rejected this idea, as she was at that point determined to hold the meeting that afternoon, "with or without" the parent, and had already begun writing a letter to the parent to that effect (Tr. pp. 181-82, see Tr. pp. 190, 228-29; Dist. Ex. 15). The importance of the parent's presence was particularly important at this meeting, given the fact that the parent and the district were in disagreement over whether or not the child had a language impairment and what his appropriate placement should be, and the results of the district's tests were to be disclosed for the first time at this meeting (Tr. pp. 241-42, 187-89, 177-78, 157-58). By not giving the required notice of the meeting and by not making reasonable efforts to reschedule the CSE meeting so as to include the parent, and by holding the meeting without the parent in spite of the parent's express desire to attend and her suggestion of a reasonable alternate date, I find that respondent acted in violation of the parental participation procedures of the IDEA, resulting in a serious infringement on the parents' opportunity for meaningful participation in the development of their son's IEP (see Pascarella, 153 F. Supp.2d at 153; Brier, 948 F. Supp. at 1255; Application of a Child with a Disability, Appeal No. 02-028; Application of a Child with a Disability, Appeal No. 01-001; compare Application of the Bd. of Educ., Appeal No. 02-047 [where district gave more than five days' proper notice, made numerous efforts during the year to

schedule meeting at a mutually agreeable time, and parents rejected all dates but proposed no alternative dates]). In reaching this conclusion, I note that while respondent's decision to convene a CSE meeting in response to petitioner's concerns about her son's 2003-04 IEP was appropriate, going forward with the CSE meeting without petitioners, who in this case demonstrated an interest and willingness to participate and who suggested a timely and reasonable alternate date, undermined the effort to correct mistakes or resolve the parents' concerns over the IEP.

Even had the aforementioned procedural violations of the parental participation regulations in and of themselves not amounted to a denial of FAPE, I must note that there are also several problems with the educational program developed by respondent's CSE at the August 2003 meeting, both procedurally and substantively, which cumulatively resulted in a denial of FAPE.

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services (Application of a Child with a Disability, Appeal No. 04-029; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, 01-109; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Federal regulations require that an IEP include a statement of the student's present levels of educational performance, including a description of how the student's disability affects his or her progress in the general curriculum (34 C.F.R. § 300.347[a][1]). School districts may use a variety of assessment techniques such as criterion-referenced tests, standard achievement tests, diagnostic tests, other tests, or any combination thereof to determine the student's present levels of performance and areas of need (34 C.F.R. Part 300, Appendix A, Section 1, Question 1).

The child's IEP for the 2003-04 school year fails to adequately describe the child's present levels of performance. Global statements such as "Memory deficits impact upon academic learning" and "Improve decoding. Improve fluency" (Dist. Ex. 1 p. 2), do not describe specific skills the child has mastered, nor provide a meaningful picture of the child's needs, nor suggest specific deficits that need to be addressed. For example, although the August 2003 IEP indicates that the child needs to improve his decoding skills, it does not indicate if he can decode consonant sounds, vowel sounds, blends, two-syllable words, etc. I also note that the record does not contain a classroom observation of the child in his current educational setting, i.e., Community School. A classroom observation in the child's then "current educational placement" is required in any initial classification (34 C.F.R. § 300.533[a][1][ii]; 8 NYCRR 200.4[b][1][iv]), and, when appropriate, in any subsequent annual evaluation (34 C.F.R. § 300.533[a][1][ii]; 8 NYCRR 200.4[b][5][i]). In contradiction of the regulations, the April 2003 IEP which originally classified petitioners' son relies on a classroom observation report from the prior school year (June 2002) when the student was in a past educational placement, i.e., respondent's schools, instead of his then current educational placement, Community School (Dist. Ex. 3). Neither the April 2003, the June 2003, nor the August 2003 IEPs contain a classroom observation of petitioners' son in his current educational setting (see

Dist. Exs. 1, 2, 3). While an observation of the child at Community School was only mandated for the April 2003 IEP, I find that, due to the fact that the child had been out of respondent's school system for over a year, together with the fact that no initial classroom observation in his current educational placement had been done prior to classification as required, an observation of petitioners' son in his current classroom placement at Community School would have been appropriate in this instance in aiding in the determination of the child's present levels of performance and in setting individual goals and objectives for the upcoming school year (see Application of a Child with a Disability, Appeal No. 01-007).[5] Moreover, there is no evidence in the record that any detailed discussion of the child's present levels of performance occurred at the August CSE meeting. Although a "teacher update" is listed on the August 2003 IEP as considered by the committee (see Dist. Ex. 1), the August CSE Chair stated that she was not able to contact anyone from Community School for their input prior to the August meeting (Tr. pp. 179, 222), and various members of the August CSE team testified that they could not remember if they reviewed any documents from Community School, such as teacher evaluations or report cards, at the August CSE meeting (see Tr. pp. 650, 495-98, 197) (compare Application of the Bd. of Educ., Appeal No. 02-025; O'Toole v Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 703-04 [10th Cir. 1998]). In addition, although the members of the CSE admitted that the main purpose of the August CSE meeting was to determine whether or not this child had a language impairment (Tr. pp. 223-26, 563-64, 188-89), the district failed to have a speech-language therapist evaluate the child. In short, the IEP contains no baseline from which to project goals and objectives. The present levels of performance and individual needs outlined on a student's IEP serve as the foundation on which the CSE builds to identify goals and services to address the student's individual needs (see Sample Individualized Education Program and Guidance Document, p. 40 [December 2002]; see also 34 C.F.R. Part 300, Appendix A, Section 1, Question 1). Without a detailed description of the child's present functioning it is unclear how the CSE could have determined appropriate goals and objectives or services for petitioners' son.

An IEP must also include measurable annual goals, including benchmarks or short-term objectives, related to meeting the student's needs arising from his or her disability to enable the student to be involved in and progress in the general curriculum, and meeting the student's other educational needs arising from the disability (34 C.F.R. § 300.347[a][2]). In addition, the IEP must include a statement of the special education and related services and supplementary aids and services to be provided to or on behalf of the student (34 C.F.R. § 300.347[a][3]). Such education, services and aids must be sufficient to allow the student to advance appropriately toward attaining his or her annual goals (34 C.F.R. § 300.347[a][3][i]).

The August 2003-04 IEP fails to adequately identify the child's speech-language needs and fails to provide appropriate services, goals and objectives to meet those needs. The independent speech evaluation conducted by the parents' expert in November 2002 constitutes an extensive evaluation of the student's speech and language abilities (Parent Ex. F). While the child performed statistically in the average range on many of the standardized tests, the evaluation captures areas in which the student's performance was

significantly below expectation. Weaknesses were noted in the child's ability to define words, to construct complex and sequentially correct sentences and to use language for abstract purposes (id.). The independent evaluator reported that the child processed language slowly and his expressive language was "characterized by poor organization and sequencing, poor word retrieval, and immature sentence structure" (id. at 8). She opined that it was difficult for the child "to use language for abstraction such as verbal reasoning and problem solving" (id. at 8). In addition, the speech therapist reported that the child's poor spelling was reflective of auditory discrimination and segmentation weaknesses and that his deficits in written expression mirrored his oral language deficits in terms of organization and form (id. at 7, 8). As noted previously, the district did not offer a speech therapist or someone who had conducted actual language testing of the child to rebut the findings of the independent speech therapist.

The child's language weaknesses are mentioned in other documents as well. As a young child the student experienced speech and language delays (see Dist. Exs. 6, 10), and received early intervention speech-language services as a preschooler (Dist. Ex. 10 at p. 4). Psychological testing performed by the district in June 2002 "suggested weaker functioning in information related to days, weeks, months and seasons, in recall of a series of digits, [and] in oral arithmetic skills" (Dist. Ex. 11 at pp. 3-4). The parents' independent psychologist's evaluation in November 2002 reported that the child demonstrated difficulty with speech-sound discrimination when words were presented without a context (Dist. Ex. 6). The independent psychologist also reported that the child might appear distracted when he was overwhelmed by language demands (Dist. Ex. 6 at p. 8). In the most recent psychological evaluation conducted by the district in August 2003, the school psychologist indicated the child's response to test questions was concrete rather than reflective and he sometimes missed the central point of the question (Dist. Ex. 4 at p. 2). The school psychologist also reported that the child's short-term auditory processing fell within the lowest part of the average range (id. at 3). He also agreed with the independent psychologist that the child struggled with reading and his decoding was "laborious" (Tr. pp. 398, 449, 513-14; Dist. Ex. 4 at p. 3; compare Dist. Ex. 6 at pp. 4, 6, 7, 8). He noted that the child had fluency difficulties that were apparent not only with challenging materials, but with very easy materials as well (Tr. p. 353). From his testing, he found that the child "had disabilities interfering with his ability to read words, read them accurately, read them efficiently, and they had interfered with his ability to comprehend what he read" (Tr. p. 353). In his testimony, the school psychologist admitted that he was not familiar with some of the language tests administered by the independent speech-language therapist and the independent psychologist (Tr. pp. 407-08, 453). He agreed with the overall results from the independent psychoeducational evaluation and the independent speech-language evaluation which indicated a diagnosis of dyslexia, and admitted that while some of the subsets of the tests administered may show the child was "language-deficient," he repeatedly emphasized he would not classify the child as "language-impaired" (Tr. pp. 447, 450, 453, 457, 460-61 399, 409, see Tr. pp. 475-76, 453-54; see also Tr. pp. 203-05 [CSE Chair]); however, the child's classification was never at issue, only his individual speech-language needs. The type and amount of services included in a child's IEP is not determined by the category the child is classified in, but rather by the nature of the child's individual needs, and in this case all three

evaluators agreed that petitioners' son had a language deficiency which affected his ability to progress in the regular education curriculum (see Dist. Exs. 4, 5, 6; Tr. pp. 352-54, 398-99, 449-50). These observations, coupled with the language samples contained in the record and the testimony of the independent speech therapist suggest that the child's language weaknesses impacted his academic performance and needed to be addressed in a more direct manner. At the very least, some speech-language services should have been included in the IEP, as well as more individualized and specific speech goals and objectives to address his language needs.

In addition to the lack of individualized speech-language goals and objectives, I also note that the August 2003 IEP does not contain any math goals and objectives, despite the school psychologist's observation in his report that petitioners' son, at the time of the August 29th CSE meeting, was no longer able to do complex addition, subtraction, or multiplication of whole numbers, and his recommendation that the child's 2003-04 program "should review arithmetic calculation skills, which [the child] seems to have forgotten over the summer" (Tr. p. 247; Dist. Ex. 4 at p. 4). The CSE Chair also agreed math skills should have been included in the August IEP (Tr. p. 183).

In short, I find that there were procedural violations and substantive inadequacies in the district's recommended program for the child for the 2003-04 school year which not only seriously infringed on the parent's ability to participate in the process, but which produced an IEP that was not reasonably calculated to enable the child to receive educational benefits, and thus denied petitioners' son a FAPE (see Rowley, 458 U.S. at 206-07).

Having determined that respondent has not met its burden of proving that it had offered to provide a FAPE to the student for the 2003-04 school year, I must now consider whether petitioners have met their burden of proving that the services provided to the student by Community School during that school year were appropriate (Burlington, 471 U.S. 359; Application of the Bd. of Educ., Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 02-080). In order to meet that burden, the parent must show that the private school provided services that met the student's special education needs (Burlington, 471 U.S. 359, 370). 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 a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105).

The record shows that the three professionals who most recently evaluated the child, the independent psychologist, the school psychologist, and the independent speech-language therapist, were all in agreement that the child had various language deficiencies involving circumlocution and fluency, organization and sequencing, and word retrieval skills that impacted on his performance in the classroom (Dist. Exs. 4, 5, 6; Tr. pp. 352-54, 398-99, see also Tr. p. 152). The professionals who evaluated and would teach the child were also in agreement that he required a multisensory program in a class size that allows for some small group or individualized attention (Dist. Exs. 5, 6; Tr. pp. 123, 383-84, 448-49, 824, 576-77, 592-94).

Both testimony and documentary evidence confirm that Community School provided instruction and services aimed at addressing the child's needs. At Community School, the child received daily individualized instruction for reading and small class sizes of three to ten students for math, social studies, and science, using a multisensory approach to learning (Tr. pp. 823-24, 839-40; Dist. Ex. 20 at pp. 1-2). In addition to his academic subjects, petitioners' son received 5:1 speech-language therapy services twice per week for 40 minutes and 5:1 visual-motor therapy services twice per week for 40 minutes (Tr. pp. 839-40; Dist. Ex. 20).

The individual instruction plan developed for petitioners' son by Community School for the 2003-04 school year contained reading, language arts, and math goals with specific objectives and methods that targeted petitioners' son's identified needs (Dist. Ex. 20 at pp. 4-9). The instruction plan outlined a variety of strategies to be employed, including phonics instruction coupled with a whole word approach, decoding strategies, and reteaching of new vocabulary words. For instance, his reading objectives specified "reinforce such phonic skills as vowel diphthongs au/aw, ou/ow, oi/oy" (Dist. Ex. 20 at p. l4). Other objectives directly related to improving fluency and comprehension, such as identifying main ideas, and using cues to more easily identify words (id.). Language arts objectives addressed the child's spelling needs, story recall, oral and written expression, and rules of language mechanics (Dist. Ex. 20 at p. 6). Additional objectives targeted grammatical usage and paragraph and sentence structure (id.). Math objectives included improving the ability to solve word problems, as well as basic computational skills in addition, subtraction, and multiplication (Dist. Ex. 20 at p. 8-9).

In his daily reading class, the child received individualized instruction in phonemic awareness, as well as additional instruction on applying phonics skills to text (Tr. p. 831). His individual program at Community School for the 2003-04 school year included specific objectives related to developing expressive language skills, spelling skills, learning grammar rules, identifying sentence fragments, increasing sight word vocabulary, memory recall, identifying main ideas, improving fluency, focusing on visual and auditory word discrimination, as well as learning word clues, and phonic skills (Dist. Ex. 18). The child's reading instructor employed several reading methodologies including the Lindamood-Bell Phoneme Sequencing Program for word attack skills, and the Scott-Foresman Focus Reading Program for sight word vocabulary and contextual reading skills (see Dist. Ex. 20 at p. 2). His speech-language therapist worked with the child on his word retrieval, receptive language, vocabulary development, and sentence structure skills (Tr. p. 843). I note that the educational summary completed by the school administrator in Spring 2003 indicated that petitioner's son had made "substantial" progress after his first year in the program at Community School, mastering initial/final consonant sounds, consonant blends and digraphs, short/long vowels in cvc words, and his oral reading had become more fluent (Dist. Ex. 20 at p. 2). Based upon the information before me, I find that the parents have met their burden of establishing that Community School met the child’s special education needs. It provided an individualized program in mulitsensory instruction in reading, spelling and written language, while also addressing the child’s math deficits and providing additional assistance in speech-language therapy.

The district raises the issue that Community School was not the LRE for the child, and that he could be successfully educated in a regular education classroom with sufficient supports and services. Parents are not held as strictly to the standard of placement in the LRE as school districts are, however the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ, 231 F.3d at 105). It is true that Community School does not admit regular education students (Tr. p. 822) and therefore provides no opportunity for petitioners' son to interact with nondisabled students in the same way that a school that admitted regular education students would, and the record appears to indicate that this student is of average cognitive abilities and would not be harmed and could benefit from exposure to such nondisabled peers (see Tr. pp. 160, 389). However, I note that although Community School is a school exclusively for children with learning disabilities, its admission criteria specify that it only accepts students of average or greater cognitive potential, and it does not admit students who are emotionally disturbed (Tr. pp. 822, 829). Given the circumstances of this case, I decline to find that Community School was an inappropriate placement based on restrictiveness alone (see M.S. v. Bd. of Educ., 231 F.3d at 105, citing Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 [3d Cir.1999] ["(T)he test for the parents' private placement is that it is appropriate, and not that it is perfect"], and also citing Cleveland Heights-Univ. Heights City Sch. Dist. v. Boss, 144 F.3d 391, 399-400 [6th Cir.1998] [holding private placement's failure to meet IDEA's mainstreaming requirement does not bar parental reimbursement]; Application of a Child with a Disability, Appeal No. 04-015; Application of a Child with a Disability, Appeal No. 01-098).

The final criterion for an award of tuition reimbursement is that the parent's claim be supported by equitable considerations. Although the hearing officer found that the equities weighed against the parents because he found they placed their child in a private school without giving respondent sufficient notice, the record disputes this finding. The August IEP contains a statement by the CSE acknowledging that "Student is presently (parent placed) in Community School" (Dist Ex 1 p. 4), and the record reveals that the child had been at Community School for the entire prior school year, which the school district was well aware of as early as November 2002, since that placement had been the subject of an earlier impartial hearing resulting in a settlement agreement wherein respondent agreed to pay for some of the costs of the child's tuition at Community School for the 2002-03 school year (Dist. Ex. 23).

A review of the record reveals that the parent cooperated with respondent's CSE in its development of an appropriate program for their son for the 2003-04 school year by giving the district ample notice of their dissatisfaction with the district's proposed program as early as June 2003 (Tr. pp. 775-76, 225), by making their son available on very short notice so that the district could perform additional testing in August 2003, by attempting to set up a mutually agreeable meeting date within five days' notice, and in attending all prior CSE meetings (Tr. p. 892; see Dist. Exs. 2, 3). I find that the parents' claim for tuition reimbursement is supported by equitable considerations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the hearing officer's decision is hereby annulled; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioners for the cost of their son's tuition at Community School during the 2003-04 school year, upon petitioners' submission to respondent of proof of such payment.

Dated: Albany, New York
August 25, 2004

PAUL F. KELLY
STATE REVIEW OFFICER

[1] Although the IEPs describe the class as "22:2+2" (Dist. Exs. 1, 2), the CSE Chair testified that this was a computer error, and that the actual size of the class was limited to 20 students (Tr. pp. 201-02).

[2] Petitioners' attorney states in the Petition that at the same time the hearing officer ordered the parents' advocate to leave the room, he also ordered the parents to leave the room (Pet. ¶ 31), but the transcript is unclear on this point.

[3] Although not considered in any way in rendering the present decision, I note without comment that this same hearing officer's alleged conduct in two other unrelated hearings has been a subject of appeal in two different federal courts in the last several months, Starkey v. Somers Cent. Sch. Dist., 319 F.Supp.2d 410 (S.D.N.Y. Mar. 18, 2004), and Wasser v. New York State Office of Vocational and Educational Services, 2003 WL 22284576 (E.D.N.Y. Sept. 30, 2003). I also note that the regulations provide that the Commissioner of Education may suspend, revoke, or take such other appropriate action as he deems necessary with respect to the certification of an impartial hearing officer upon a finding of misconduct or incompetence (8 NYCRR 200.21[b][1][4]), and that any such complaints must be directed in writing to the Commissioner of Education for his investigation (8 NYCRR 200.21[b][1]).

[4] Initially, I note that respondent attempts to argue that the June 2003 and August 2003 IEPs should be viewed conjunctively. I find that only the final August 29, 2003 IEP is at issue herein. A CSE may revise a child's IEP from time to time; however, the relevant IEP for purposes of an award of tuition reimbursement is the IEP which the parents had at the time when they enrolled (or re-enrolled) their child in the private school (Application of the Bd. of Educ., Appeal No. 00-053; Application of a Child with a Disability, Appeal No. 98-14).

[5] I note that the CSE Chair and two teachers did visit Community School to observe the student after the August 2003 IEP was written, sometime during the 2003-04 school year while the hearing was already in progress (Tr. pp. 161, 629-30).