



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-073

### **Application of a STUDENT 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 Hyde Park Central School District**

#### **Appearances:**

Family Advocates, Inc., attorneys for petitioners, RosaLee Charpentier, Esq., of counsel

Donoghue, Thomas, Auslander & Drohan, LLP, attorneys for respondent, Daniel Petigrow, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their son's tuition costs at the Ridge School (Ridge) for the 2006-07 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending Ridge, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Joint Ex. 2 at pp. 1-2). The student's eligibility for special education services as a student with an other health impairment (OHI) is not in dispute (see 34 C.F.R. § 300.8[c][9];<sup>1</sup> 8 NYCRR 200.1[zz][10]). The student has been found to have numerous disabilities, including Asperger's syndrome, an anxiety disorder, an attention deficit hyperactivity disorder (ADHD) and learning disabilities (Joint Exs. 4 at p. 1; 8 at p. 17). The student's performance on intelligence testing reflects difficulties with attention, organization, language and visuospatial organization (Joint Ex. 18 at p. 5). Achievement testing conducted in February 2005 revealed deficits in reading decoding and comprehension, numerical operations and math reasoning, and written expression and spelling (id. at pp. 7-9). Socially, the

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<sup>1</sup> The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. While some of the relevant events in the instant case took place prior to the effective date of the 2006 amendments, unless otherwise noted, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

student exhibits "immature and inappropriate" behavior at times that occasionally interferes with classroom instruction (Joint Ex. 4 at p. 4; see also Tr. pp. 272-74). His tutor testified that the student is not always socially appropriate outside of school with non-peers or in public settings, as he is prone to anger and uses foul language (Tr. pp. 272-73). A December 2004 speech evaluation revealed deficits in expressive vocabulary, auditory/listening skills, memory, oral narrative and written narrative skills (Joint Ex. 6 at p. 2).

The student was first classified as a preschool child with a disability in pre-kindergarten during the 1998-99 school year (Tr. pp. 686-87; Parent Ex. D at p. 2). He received speech-language services and special education services "address[ing] poor learning behaviors and inappropriate social behaviors with both peers and adults" until the end of the school year, at which time he was declassified (Parent Ex. D at p. 2). The results of an occupational therapy (OT) evaluation conducted at the end of the 1998-99 school year revealed "mild delays in fine motor skills that should be monitored by his teacher" (id.).

On March 21, 2000, the district conducted a psychoeducational evaluation of the student (Parent Ex. D). The evaluating psychologist opined that the student exhibited average cognitive function, with strengths in verbal fluency and word knowledge, and weaknesses in mental control, the ability to work without distraction, sequential process reasoning, social comprehension, and graphomotor skills (id. at pp. 2-4, 6). Academically, the psychologist indicated that the student's functioning in reading, spelling, and mathematics "is well below expected levels, given his cognitive ability" (id. at pp. 4-6). Behaviorally, the psychologist noted that the student's teacher reported observing hyperactivity, learning problems, atypicality (immaturity), aggression, conduct problems, and attention problems while the student was in school (id. at pp. 5-6). The psychologist characterized the student as "demonstrating considerable externalizing and school problem behaviors at significantly high levels of maladjustment," and opined that "[t]hese behaviors certainly interfere with his ability to make academic progress and benefit from instruction in the classroom" (id. at p. 6).

For the 2000-01 school year, the student was found eligible for special education services as a student with an OHI, and was placed in a general education first grade class with direct consultant teacher services in a 5:1 setting for 7½ hours weekly, and program modifications (preferential seating, refocusing and redirection, and a positive reinforcement plan) (Parent Ex. C; Tr. pp. 79-84). On June 6, 2001, the student underwent a neurological consultation (Parent Ex. A). The examining neurologist noted "some abnormalities" in the student's language and social interactions, as well as difficulty with transitioning, and concluded that "although he may not meet all criteria . . . he is likely within the Asperger's spectrum. Many of his behaviors appear to be extremely disruptive" (id. at p. 3). The student continued in his public elementary school placement during the 2001-02 school year, during which he experienced difficulty socializing and received several disciplinary referrals for inappropriate playground behavior (Tr. pp. 93-94). In May and June 2002, the parents secured a private psychoeducational assessment of the student (Tr. pp. 91-92; Parent Ex. E), which characterized the student as "a complex mix of anxiety, ADHD, and Asperger's Syn[d]rome" (Parent Ex. E at p. 8). The student continued to experience difficulty making friends and "had a number of issues in the district that were becoming volatile" to the point where the parents "felt that emotionally he was not safe" in the second grade placement (Tr. pp. 95-96).

He spent his third grade (2002-03) and fourth grade (2003-04) school years in a self-contained special class in a public elementary school (Tr. pp. 95-98; Parent Ex. F).<sup>2</sup> His fourth grade special education program included a special class in a 15:1+1 setting for 6½ hours; a shared aide with one other student daily for 5½ hours; group counseling services in a 5:1 setting and individual counseling services, each on a six day cycle, for 30 minutes per session; OT in a 3:1 setting, on a six day cycle, for 30 minutes per session; program modifications (positive reinforcement plan, preferential seating, refocusing and redirection); and testing accommodations (extended time, special location, directions read and explained and administered individually) (Parent Ex. F at p. 1). The hearing record indicates that during fourth grade, the student received six bus discipline referrals and three school disciplinary referrals (Parent Ex. G), which led the parents to remove him from busing and to drive him themselves (Tr. pp. 97, 100-04; Parent Ex. G. at p. 10).

For the student's fifth grade school year (2004-05), the district's Committee on Special Education (CSE) met on June 15, 2004 and recommended a similar program to the student's fourth grade year, with the modification of a 4¾-hour duration for the special class instead of 6½ hours, individual access to an aide rather than in a 2:1 setting, the additional provision of an aide/monitor on the bus, and the addition of a modified curriculum and reteaching of materials to its program modifications (compare Parent Ex. F at p. 1, and Parent Ex. H at pp. 1-2). The parents disagreed with the recommended program, stating that they believed that the student "was unsafe in that environment. He did not get along with the other kids in the class. He didn't get along with the busing situation" (Tr. pp. 108-10). At the recommendation of the student's therapist, the parents home schooled the student for the 2004-05 school year (Tr. pp. 542-43, 789-90; Parent Ex. QQ). After the June 15, 2004 CSE meeting, the hearing record indicates the parents requested an impartial hearing (Tr. p. 791),<sup>3</sup> which produced an agreement between the parents and the district whereby the district agreed to provide 12½ hours of home tutoring services per week during summer 2005 as make-up services, rather than pendency services, and the district would send referral packets to Board of Cooperative Educational Services (BOCES) and other out-of-district programs (Tr. pp. 791-99; Dist. Ex. 13). Additionally, the district agreed to conduct

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<sup>2</sup> The student's individualized education programs (IEPs) for the 2001-02 and 2002-03 school years are not included in the hearing record.

<sup>3</sup> The due process complaint notice requesting an impartial hearing is not included in the hearing record.

neuropsychological,<sup>4</sup> speech-language,<sup>5</sup> and OT-assistive technology<sup>6</sup> evaluations of the student in advance of a scheduled CSE meeting on June 13, 2005 (Tr. pp. 791-94).

On June 13, 2005, the CSE convened to develop the student's program for the 2005-06 school year and recommended the student's placement in a 6:1+1 BOCES special class; group counseling in a 5:1 setting and individual counseling, both once per week for 30 minutes per session; and group speech-language therapy in a 5:1 setting and individual speech-language therapy, both once per week for 30 minutes per session (Joint Ex. 13 at p. 1). The CSE also recommended an aide/monitor on the bus, the same program modifications and testing accommodations as contained in the June 15, 2004 IEP, together with assistive technology devices in the form of a word processor and learning software (compare Parent Ex. H at pp. 1-2, with Joint Ex. 13 at p. 2). The CSE also recommended extended school year (ESY) services for the student, in the form of home instruction for 2½ hours per day in order to prevent the student's regression during the summer, and specifically characterized these services as compensatory in nature (Joint Ex. 13 at p. 1). The parents rejected the proposed BOCES placement,<sup>7</sup> and instead, elected to unilaterally place the student in Ridge for the 2005-06 school year, a facility that the parents owned and operated themselves (Tr. pp. 109-12).

On June 22, 2006, the CSE convened to develop the student's program for the 2006-07 school year (Joint Ex. 4). The CSE meeting was attended by the CSE chairperson, a regular education teacher, a special education teacher, a school psychologist, an occupational therapist, the student's special education tutor, both parents, an additional parent member, a special education advocate, and the district's director of special education (id. at p. 10). The June 22, 2006 CSE recommended a special education program identical to that recommended by the CSE during the 2005-06 school year, with the addition of individual OT once per week for 45 minutes per session (compare Joint Ex. 4 at pp. 1-3, with Joint Exs. 11 at pp. 1-3; 12 at pp. 1-2; 13 at pp. 1-2).

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<sup>4</sup> The neuropsychological evaluation of the student was completed on March 22, 2005 (Joint Ex. 8 at p. 1). The neuropsychologist identified the student as performing age-appropriately on some abstract intellectual tasks in both verbal and visual contexts, possessing an average lexicon, and at least average memory (id. at p. 23). The neuropsychologist identified the student as having deficits in attention, information processing, and working memory, as well as difficulties with language, nonverbal information and acquisition of fundamental skills of reading, spelling, composition, mathematics, and calculation (id.). The neuropsychologist cautioned that the student could be at risk to develop a mood disorder and recommended a "coherent individualized educational program in order to learn to work, make friends, and master the '3 R's,' in an environment that provides discipline, structure, an understanding of [autistic spectrum disorder], and the means to remediate processing difficulties and the resultant academic and interpersonal difficulties" (id.).

<sup>5</sup> The speech-language evaluation of the student was completed on December 27, 2004, and noted that the student's "weaknesses in direction and following memory may interfere with comprehension of academic information" and that his "[d]eficits in written and oral narrative skills, vocabulary, and organization may negatively impact on his ability [to] effectively communicate and to demonstrate understanding during academic activities" (Joint Ex. 6 at p. 3). The evaluator recommended individual speech-language therapy one to two times per week for 12 months (id.).

<sup>6</sup> The assistive technology evaluation of the student was conducted on February 25, 2005, and recommended that learning software be made available to the student (Joint Ex. 7 at p. 4).

<sup>7</sup> The hearing record indicates that the parents visited the proposed placement, but rejected it because of the large size of the school building, the "mass confusion" of the environment, the alleged inappropriateness of the class profile, and transportation concerns about the student riding a bus (Tr. pp. 550-56).

By letter dated August 20, 2006, the parents rejected the "IEP for 2005/06,"<sup>8</sup> advised the district that they would be placing the student at Ridge for the 2006-07 school year, and that they intended to seek tuition reimbursement (Parent Ex. OO). The parents alleged that the proposed IEP was inappropriate for the student because the district did not offer an appropriate class size, the student could not sustain extended bus rides, the class profiles of the suggested placements were inappropriate, and the proposed placements either failed to contact the parents or refused to allow them visitation access (id.). The parents indicated that they may request an impartial hearing (id.).

On August 29, 2006, the district telephoned the parents and scheduled an intake interview with a potential BOCES placement (Tr. pp. 1196-98; Parent Exs. EE; FF). On August 30, 2006, the intake interview occurred, but the student did not personally appear for the interview as was mandated by BOCES (Tr. pp. 513-14, 771-72, 830-31, 1003-08, 1198).<sup>9</sup> Ultimately, the student was not accepted by this program because the intake interview was deemed incomplete by virtue of the student's absence (Tr. pp. 1081-84).<sup>10</sup> By letter dated September 27, 2006, the parents requested that the district contact their attorney to schedule an impartial hearing (Parent Ex. HH).

On September 29, 2006, the parents forwarded an "invoice" to the school district seeking payment for the student's attendance at Ridge for the last two weeks of September 2006 (Parent Ex. RR at p. 2). The district denied the parents' payment request on October 23, 2006, citing the lack of a contract between the parties (id. at p. 1).

The student was enrolled at Ridge during the 2006-07 school year (Tr. pp. 248-51, 761, 834-35), during which the district funded OT, speech-language therapy, and counseling services for the student on the premises of Ridge (Tr. pp. 312-14). On December 8, 2006, the CSE again convened to discuss the student's special education program and placement for the 2006-07 school year (Joint Ex. 10). In attendance were the CSE chairperson, a regular education teacher, a special education teacher, a school psychologist, an OT therapist, the student's special education tutor, both parents, an additional parent member, a special education advocate, the district's director of special education, and the BOCES in-district coordinator (id. at p. 13). The recommended program was identical to that recommended in the previous June 22, 2006 IEP, except that the latter provided for access to an extra aide in a 6:1+2 setting (compare Joint Ex. 4 at pp. 1-3, with Joint Ex. 10 at pp. 1-2).

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<sup>8</sup> It is unclear from the hearing record whether the parents intended this letter to refer to the June 22, 2006 IEP or any of the three IEPs contained in the hearing record relative to the 2005-06 school year (see Joint Exs. 11; 12; 13).

<sup>9</sup> The hearing record contains conflicting testimony with respect to the production of the student for the August 30, 2006 intake interview. The student's parent testified that although she was never informed by the district to bring the student with them, she did so anyway, but "he refused to get out of the car" (Tr. pp. 771-72). She maintained that she had to excuse herself on at least three occasions from the interview to go outside of the building to "check on him" (Tr. pp. 829-31). District witnesses testified that the student's other parent informed personnel at the intake interview that "we are not bringing him for the intake until we know what the school is like, or what's going on here" (Tr. pp. 1199-1200), and that they did not observe either parent leave the intake at any point during the interview (Tr. pp. 1209-10).

<sup>10</sup> The hearing record indicates that the district recommended additional potential BOCES placements to the parents for the 2006-07 school year, which, for various reasons not germane to this appeal, the parents rejected (Tr. pp. 424-26, 449-51, 498-99).

By letter dated March 21, 2007, the parents rejected the June 22, 2006<sup>11</sup> IEP for the 2006-07 school year alleging that it was "inappropriate" and did not meet the student's needs (Joint. Ex. 1 at p. 1). The parents also reiterated their intention to unilaterally place the student at Ridge for the 2006-07 school year and seek "full tuition reimbursement and related costs" (id.). The hearing record indicates that on May 14, 2007, the district received two additional pieces of correspondence from the parents: a letter dated January 19, 2007 and a letter dated May 14, 2007 (id. at pp. 2-4). In their January 19, 2007 letter to the district, the parents rejected two BOCES placements on various grounds (id. at p. 3). The parents agreed to accept special services for the student from the district, including, but not limited to, physical therapy (PT), OT, individual and group speech-language therapy, and individual and group counseling (id.). They also requested an explanation as to "why since September there has been no home instruction since [the student] is not enrolled in [Ridge] legally with no tuition being paid,"<sup>12</sup> and why "to date no one has contacted my attorney to set up and appoint a hearing officer" (id.). In their May 14, 2007 letter to the district, the parents again rejected a BOCES placement on various grounds, indicated their acceptance of special services from the district, and questioned why the district had not yet contacted their attorney to schedule an impartial hearing (id. at p. 2). On May 25, 2007, the district, through its attorneys, sent a formal response to the parents rejecting their request for reimbursement, on the grounds that the placements set forth in the June 22, 2006 and December 8, 2006 IEPs were appropriate to meet the student's special education needs; that the parents' unilateral placement of the student at Ridge was not appropriate; and that Ridge was not a State-approved school (Joint Ex. 2).

An impartial hearing was convened on July 24, 2007 and concluded on February 28, 2008, after eight days of testimony. In her 88-page decision dated June 12, 2008, the impartial hearing officer determined that: (1) the district failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year because the recommended placements contained in its June 22, 2006 and December 8, 2006 IEPs were premature, insofar as the student had not yet been accepted by the BOCES programs recommended by the CSE (IHO Decision at p. 77); (2) the parents failed to meet their burden of persuasion that their unilateral placement of the student at Ridge was appropriate for the 2006-07 school year (id. at p. 87); (3) the parents were not entitled to reimbursement for tuition or "costs and related service fees" for the 2006-07 school year (id.); and (4) the parents were not entitled to reimbursement for compensatory home instruction during the 2006-07 school year because the hearing record lacked any evidence indicating either that the district failed to provide such services in the amounts and frequencies recommended in the governing IEPs, or substantiating that the parents ever procured such services privately and at their own expense (id. at pp. 84-85, 87).

The impartial hearing officer based her determination that the parents did not sustain their burden to show that Ridge was appropriate to meet the student's special education needs on the

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<sup>11</sup> The parents' March 21, 2007 and May 14, 2007 correspondence contained in the hearing record refers to the "IEP Review meeting at BOCES on August 22, 2006" (Joint Ex. 1 at pp. 1-2). The hearing record reflects that a CSE meeting was held on June 22, 2006 (Joint Ex. 4) and that the parents participated in an intake interview at BOCES on August 30, 2006 (see Tr. pp. 513-14, 830-31, 1003-08, 1198; Parent Ex. PP).

<sup>12</sup> This contention by the parents is in direct conflict with testimony in the hearing record that the student was, in fact, enrolled at Ridge for the 2006-07 school year (Tr. pp. 248-51, 761, 834-35), was receiving related services from the district on-premises there (Tr. pp. 312-14), and that the parents were paying tuition (Tr. pp. 761, 834-35; see also Parent Ex. SS).

following observations: (1) despite having spent two years at Ridge, results of an October 30, 2007 Key Math Revised test showed that with the exception of geometry, the student scored significantly below average in 12 of 13 subtests (IHO Decision at p. 79; Tr. pp. 1242-45; Dist. Ex. 24); (2) despite Ridge's small class size (3:1 setting), the student continued to experience difficulty putting forth consistent effort and focusing on his work (IHO Decision at pp. 79-81; Tr. pp. 188-89, 251-54, 328-29; Parent Exs. T at pp. 2-3; U at p. 2); (3) the hearing record lacked evidence that the student's teacher at Ridge utilized a formal or informal behavior plan, nor did it contain any explanation of classroom strategies used by the school, if any, to address the student's attending and management difficulties (IHO Decision at pp. 81-82); (4) evidence submitted by the parents describing Ridge's philosophy, curriculum, and "scaffolding approach" were too general and uninformative regarding specific plans and strategies, if any, used in dealing with the student's attending, focusing, behavioral, and management issues in the classroom, as well as his deficient social skills with peers and adults (IHO Decision at p. 82; Tr. pp. 248-51; Parent Exs. K; M; P; VV); (5) after spending two years at Ridge, the student still was unable to independently read more than one page of material at the fifth grade level, and his academic functioning at the end of the 2006-07 school year was evaluated at a third to fourth grade level (IHO Decision at pp. 82-83; Tr. pp. 259-71, 328-29); (6) the hearing record contained no evidence about the instructional techniques, if any, Ridge used to address the student's social skills deficits (IHO Decision at p. 82; Tr. pp. 616-22, 638); (7) the hearing record contained no evidence about the methods used, if any, to address the student's anxiety, including limits, if any, set for the student, and options, if any, presented to the student per his psychologist's recommendations (IHO Decision at pp. 83-84; Tr. pp. 613-15, 625-27, 638, 652-57); (8) Ridge did not provide any of the OT, speech-language therapy, or counseling services to the student that the parents, tutor, psychologist, and the CSE believed were necessary for the student in order for him to receive educational benefit (IHO Decision at p. 84; Tr. pp. 188-89, 297, 312-14, 659-60, 672-73, 827-28; Joint Exs. 4; 10; Dist. Exs. 11; 12; Parent Exs. LL; TT); and (9) Ridge was an overly restrictive placement for the student and did not provide opportunities for mainstreaming (IHO Decision at p. 85; Tr. pp. 860-61; Parent Exs. K; T).

The parents appeal from the impartial hearing officer's decision, seeking a determination (1) affirming the impartial hearing officer's determination that the district failed to offer the student a FAPE; (2) finding that the parents' unilateral placement of the student at Ridge was appropriate; (3) finding that equitable considerations warrant relief for the parents; and (4) awarding the parents tuition reimbursement<sup>13</sup> for Ridge for the 2006-07 school year.

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<sup>13</sup> In their petition, the parents seek "tuition reimbursement;" in their memorandum of law, they seek "full reimbursement," covering tuition and "related costs, including related service fees incurred" which they failed to specify (compare Pet. ¶ 54, with Parent Mem. of Law at p. 3). A memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6). Accordingly, the relief sought in the parents' memorandum of law will not be considered to the extent that it seeks relief not enumerated in the petition.

The district answers, contending that the impartial hearing officer's determinations that the Ridge placement was inappropriate and that the parents are not entitled to tuition reimbursement for Ridge for the 2006-07 school year are correct and should be affirmed.

The district does not appeal the impartial hearing officer's decision determining that the district failed to offer the student a FAPE during the 2006-07 school year (IHO Decision at p. 77); therefore, that decision is final and binding on the parties (34 C.F.R. § 300.514; 8 NYCRR 200.5[k]; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100). To the extent that the parents request an order affirming the impartial hearing officer's determination that the district failed to offer the student a FAPE during the 2006-07 school year, I find that they are not aggrieved by the impartial hearing officer's decision on that issue (see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). Accordingly, I need not review the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2006-07 school year.

What remains at issue in this appeal is the appropriateness of the parents' unilateral placement at Ridge for the 2006-07 school year, and the equity considerations for tuition reimbursement.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE<sup>14</sup> that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (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 (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v.

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<sup>14</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]).



Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. 2008]). A parent's failure to select a program approved by the state in favor of an unapproved option is not by itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [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 112). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate (Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [citing Frank G., 459 F.3d at 365 [quoting Rowley, 458 U.S. at 188-89] [emphasis added]]; R.C. and M.B. v. Hyde Park Cent. Sch. Dist., 07-CV-2806 [S.D.N.Y. June 27, 2008]; M.D. and T.D. v. New York City Dep't of Educ., 07 Civ. 7967 [S.D.N.Y. June 27, 2008]).

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; see also A.D. and H.D. v. New York City Dep't of Educ., 06 Civ. 8306 [S.D.N.Y. April 21, 2008]).

Ridge is described in the hearing record as a non-denominational, non-sectarian, State-accredited private day school (Parent Exs. K; M; N; P). The school's focus is on delivering services to students with Asperger's syndrome, pervasive developmental disorder (PDD) and high functioning autism (Tr. pp. 203-05). The stated goals of Ridge include increasing students' attendance and engagement in class; increasing students' sense of self-value and belonging to a cooperative group; increasing students' social, academic and career related skills; and decreasing disciplinary referrals, student apathy and altercations, and student perception of the gap between school and "real life" (Parent Ex. P at p. 2).

Ridge assesses all incoming students to its program (Tr. pp. 228-29).<sup>15</sup> Prior to the start of a student's program, Ridge staff evaluates students' mathematics skills (Parent Ex. P at p. 4). Students from fifth to eighth grade are placed at appropriate levels, where remediation will help bring them to a ninth grade level (*id.*). The school follows the State curriculum guide in mathematics so that students have a chance to achieve a high school Regents diploma (*id.*). The hearing record further indicates that Ridge uses a pragmatic approach to English language arts, and that staff follow the guidelines established by the State curriculum (*id.*). The Ridge program guide includes a description of the Orton Gillingham (OG) approach, but does not indicate that it is used to instruct students at the school (*id.* at p. 6).<sup>16</sup> The program guide also contains an outline detailing the school's "scaffolding approach" (*id.* at pp. 9-10). The scaffolding approach includes four phases focusing on identifying and developing student interests while building socialization and trust among group members (*id.*). The phases also include broad academic goals such as "advance[ing] each [student] into higher more academic and written work" (*id.*). Field trips, occurring nearly every Friday, are an integral part of the Ridge program (Tr. pp. 225, 320; Parent Ex. K).

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<sup>15</sup> Initial student assessments are conducted by one of the parents, who is a part-time employee of the school (Tr. pp. 229, 296, 1256).

<sup>16</sup> The student's teacher testified that during the 2006-07 school year the OG approach influenced his instruction, but was not used directly to teach the students (Tr. p. 209).

During the 2006-07 school year, there were approximately nine students enrolled at Ridge (Tr. p. 207).<sup>17</sup> The students ranged in age from 10 to 19 years old and exhibited deficits in social and communication skills (Tr. p. 222). The majority of the students were male (*id.*). The school was comprised of two classes, a middle grades class of three students and a high school class (Tr. pp. 207, 248). The middle and high school classes combined for field trips and were also regularly combined for project time and socializing (Tr. pp. 320-21). In addition, for instructional purposes, the classes combined for approximately three sessions, totaling 1½ hours per week (Tr. pp. 321-22, 351-53). According to the student's special education teacher at Ridge, the school day lasted 5½ hours and often began with a socialization period followed by an academic period (Tr. p. 324). The academic period included English language arts, mathematics, writing and reading (Tr. p. 325). Lunch time afforded additional opportunities for interaction and the development of social skills (Parent Ex. T at p. 1). Afternoon sessions featured project construction, research, art, science, and physical education activities (*id.*).

The special education teacher reported that in mathematics, the middle grades class had been working with geometry, perimeter and area, several forms of measurement, estimation, scale drawings, basic math operations, word problems and simple algebra (Parent Ex. T at p. 1). During English language arts, the class focused on parts of speech (word groups such as homonyms, synonyms, and homophones), following written directions, sentence formation, vocabulary, and connecting between languages from different academic disciplines, such as science and mathematics (*id.*). Writing exercises consisted of sentence and paragraph formation (*id.*). Additionally, the class practiced exercises involving listening or taking turns reading stories or books and answering written questions based on their content (*id.*). The Ridge curriculum included thematic studies in which different academic disciplines were integrated (Tr. pp. 208, 227). Students utilized laptop computers (Tr. p. 228) and embarked on approximately 40 field trips during the 2006-07 school year (Tr. p. 320).

Academically, the student's special education teacher provided only a global description of the student's functioning at the beginning of the 2006-07 school year and failed to identify any specific academic skills that the student needed to acquire, despite the teacher's familiarity with the student, having provided him with home instruction for two years (Tr. pp. 171-72, 185-86, 299-308). Although the teacher estimated that the student's academic skills at the beginning of the 2006-07 school year were "a grade year to two years behind in most 'stuff'" (Tr. p. 234), the teacher provided minimal details regarding instructional strategies employed at Ridge to address the student's specific deficits. In summary, the teacher indicated that the student received multisensory instruction; that the OG approach influenced his instruction, but was not used to directly teach the students; and that he worked with the student on writing, using outlining and mapping (Tr. pp. 290, 264; Parent Ex. U). Although he believed that the student may one day be able to read at grade level (Tr. p. 262), he testified that the student may never be able to write at grade level, even with the assistance of a word processor (Tr. pp. 263-66). The teacher did not otherwise describe how the Ridge educational program specifically addressed the student's deficits in reading and mathematics. The hearing record indicates that the student was provided with a scribe for writing and also had access to a computer (Tr. pp. 233, 266). However, the hearing record contains no

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<sup>17</sup> The hearing record indicates that Ridge employed three people during the 2006-07 school year (Tr. p. 297). Two of the employees were the student's parents, one of whom is the executive director of the school (Tr. pp. 199-201). The third employee was the student's special education teacher, who is also a Ridge trustee (Tr. p. 289).

indication that Ridge provided the student with basic keyboard training or computer software designed to assist him with reading and writing, as recommended in a February 2005 assistive technology evaluation and on the student's IEPs (Joint Exs. 7 at pp. 3-4; 4 at p. 3; 10 at p. 2). In fact, the hearing record suggests that the assistive technology provided by Ridge was not helpful to the student due to his focusing issues (Tr. pp. 266-70).

With regard to the student's social/emotional needs, it appears that the student's anxiety, attending and social skills deficits were addressed in large part by the psychologist who was hired by the school district to provide counseling services to the student (Tr. pp. 604-656; Parent Ex. LL). The special education teacher testified that the student's social skills were addressed through the student's participation in field trips and interaction with the older students in the school, but did not indicate how (Tr. pp. 225-26; 353-54). The teacher noted that he was working with the student to understand the words "appropriate" and "not appropriate" (Tr. pp. 272-73). The district psychologist identified specific social skills that were targeted in counseling and detailed some of the strategies he used to address the student's social-emotional deficits (Tr. pp. 611-24; Parent Ex. LL). The district psychologist testified that socially, the student "presents as a much younger child ...I would say probably a two-year delay, somewhere around there" (Tr. pp. 628-29). The district also provided the student with speech-language therapy and OT, as Ridge did not employ related service providers (Tr. pp. 313-14, 827-28).

On appeal, the parents assert that Ridge was an appropriate placement for the student during the 2006-07 school year because the student's teacher testified that the student progressed from an inability to complete fourth grade work independently to an ability to complete fifth grade work independently; that objective test data introduced at the impartial hearing indicated that the student made academic and social/emotional progress; and that in contrast to having no friends at the public school, the student was "very popular" at the Ridge school.

Regarding the parents' first argument that the student progressed from a fourth to a fifth grade level, a review of the hearing record indicates that when the student's teacher made this statement he was referring to the progress the student had made between the 2004-05 and 2006-07 school years and not during 2006-07 alone (Tr. pp. 249-258). To the extent that the parents assert that the student made academic progress at Ridge during the 2006-07 school year, the hearing record does not support the parents' contention.

It is difficult to ascertain the student's academic and social needs at the beginning of the 2006-07 school year. Although the hearing record contains a final report card from the 2005-06 school year and a letter from the student's special education teacher<sup>18</sup> at Ridge summarizing the student's progress through June 2006, neither of these documents provides insight into the student's specific needs (Parent Exs. W; AA).<sup>19</sup> The student's 2005-06 final report card indicated that in English language arts, the student had begun to write short paragraphs on his computer and was better able to express himself in class and on paper (Parent Ex. W). The final report card further noted that during the 2005-06 school year, the student had written several short essays on field

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<sup>18</sup> This individual also provided the student with home tutoring services beginning in November 2004 through the 2006-07 school year (see Tr. pp. 171-72, 185-86, 299-308).

<sup>19</sup> The student's tutor for the 2005-06 school year testified that he was not the author of the student's final report card for the 2005-06 school year; however, he conceded that the report card provided an accurate description of the skills that he worked on with the student (Tr. pp. 240-41).

trips he had taken with the school (*id.*). In thematic studies, the student successfully conducted internet research related to new cars and alternative fuel use as part of a unit on alternative fuels for automobiles and home heating (*id.*). In the area of social/emotional development, the 2005-06 final report card described the student as "happy" in school and "frightened" about going to any school other than Ridge (*id.*). The student's June 22, 2006 draft IEP, developed with the help of the student's special education teacher, cited achievement test scores from February 2005, but offered little additional information regarding the student's academic ability (Joint Ex. 4 at p. 9). Progress reports written earlier in the 2005-06 school year demonstrated that the student was working on writing sentences and short essays, prefixes and suffixes, comprehension, developing vocabulary skills, borrowing and carrying (including decimals), regrouping, reading graphs, word problems, multiplication, and group projects (Parent Exs. V; X).<sup>20</sup> Although the parent testified that the student was tested yearly (Tr. pp. 713, 723-24), there is no evidence contained in the hearing record indicating that the student's academic or social skills were formally assessed at the beginning of the 2006-07 school year. Consequently, the hearing record contains no baseline level of performance against which future assessments can gauge the student's progress, either academically or socially.

The student's special education teacher testified that at the beginning of the 2006-07 school year, the student was "very very active" and it was "difficult to sit still" for him (Tr. pp. 231, 250). According to the teacher, "it took a lot of redirection" to prompt the student to participate in "non-preferred" activities (Tr. p. 232). The teacher articulated a number of possible strategies for addressing the student's inattention, including putting a hand on the student's arm to quiet him down, verbally redirecting the student, working with the entire class to make the material more interesting (thereby increasing the student's focus), and having direct discussions about behavior (Tr. p. 250). The teacher commented that if he wanted the student to work independently, he would provide the student with materials at a fourth or fifth grade level, depending on the subject; if the teacher wanted the student to learn something new, he would present material at a fifth or sixth grade level (Tr. p. 233). The teacher estimated that the student was a grade or two behind in most "stuff," but occasionally seemed to be on grade level (Tr. p. 234).

The student's special education teacher testified that the three students in his class were functioning at very different levels, and that "[the student's] needs were very different from the other students" (Tr. p. 254). Although the student's teacher testified somewhat obliquely that the student made academic gains during the 2006-07 school year (Tr. pp. 253-56), the teacher's claims are non-specific and are not corroborated by the hearing record.

Progress notes generated during the 2006-07 school year, at times appear contradictory, and overall lack the level of detail necessary to gauge the student's academic progress (Parent Exs. T; U; Y). The student's final report card for the 2005-06 school year indicated that the student had begun to write short paragraphs on his computer, had become "more able" to express himself in class and on paper, and had written several short essays on field trips he had taken (Parent Ex. W). The student received a letter grade of "A" in English and creative writing (Parent Ex. W). In contrast, the student's December 2006 progress report indicated that writing "was a struggle for him, and an even a bigger struggle for the teacher to get him to write a sentence, or many times

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<sup>20</sup> The student's teacher testified that he neither prepared Parent Ex. X, nor knew who did (Tr. p. 309). With regard to Parent Exs. V and W, the tutor testified that he "prepared" these documents with the student's parents, but did not author the documents (Tr. pp. 316-17).

even a word" (Parent Ex. T at pp. 2-3). The teacher noted that the student used a scribe, as recommended in his IEP, and that he alternated between independently writing a response to a story read in class and having the teacher write the response (id. at p. 3). Three months later, the student's teacher indicated that the student completed a written report on an English author (Parent Ex. Y at p. 1). The teacher noted that the student had difficulty "[g]etting his ideas onto paper in an organized manner" (id.). However, he added that "[the student's] willingness to participate in writing assignments has improved" (id.). The teacher reported that the student preferred to complete written assignments on his laptop computer, but, even this was difficult for the student (Tr. p. 266; Parent Ex. Y at p. 1). The student's final progress report for the 2006-07 did not address the student's writing performance (Parent Ex. U).

The student's fall 2005 progress report indicated that in the area of math, the student was "capable of borrowing and carrying including decimals" (Parent Ex. X). The student could reportedly "talk through" word problems and perform some multiplication (id.). The student's December 2006 progress note indicated that the student was able to add with carrying and subtract with borrowing, but his focus remained a problem (Parent Ex. T at p. 2). The teacher observed that the student "does not know multiplication tables" and was just "beginning to understand when he must use this operation when presented [with] word problems" (id.). The student's winter 2006 progress report indicated that the student "continued to work on addition and subtraction regrouping problems," and opined that he seemed to achieve success more readily "when given one or two problems at a time rather than an entire page of problems" (id.). The teacher reported that the student was "attempting to do multiplication families up through five," and was "making steady progress in all areas" (id.). The student's final report card for the 2006-07 school year did not address his performance in math (Parent Ex. U). Administration of the KeyMath Revised/Normative Update (KeyMath-R/NU) by the parents following the end of the 2006-07 school year revealed that the student demonstrated "weak" addition, subtraction, and multiplication skills (Dist. Ex. 24 at p. 5).

I also note that while the student's progress reports for the 2005-06 school year at Ridge contain grades, those reports for the 2006-07 school year do not (compare Parent Exs. X; W, with Parent Exs. T; U; V; Y). The student's special education teacher testified that although he assigned grades to the student during the 2005-06 school year, during the 2006-07 school year, "I wasn't using grades at this time and I didn't put grades on the others. We discussed grades but I didn't write those, that's why the grades were in there and not on these because I didn't write down grades for students" (Tr. p. 331). He offered no explanation as to why neither he nor the parents assigned grades to the student during the 2006-07 school year. He also conceded that the school administered no State tests in English, mathematics, social studies, or science to the student during the 2006-07 school year (Tr. p. 330), and, although he "had ways of testing [the student]" the student's special education teacher did not administer any midterm or final exams to the student either (id.). Other than mastering the "concept" of topic sentences, the student's progress reports did not identify any specific academic gains made by the student.

Based on the foregoing, the hearing record does not demonstrate that the student made academic progress at Ridge during the 2006-07 school year.

Addressing the parents' second argument, relating to objective test data introduced at the impartial hearing, I note that the parents administered the Woodcock Reading Mastery Tests-Revised-Normative Update (WRMT-R/NU) to the student on two occasions (Parent Exs. Q; R).

The first administration, on April 11, 2005, yielded the following cluster of standard scores: readiness, 93; basic skills, 80; reading comprehension, 90; and total reading, 83 (Parent Ex. R). Achievement testing conducted by a private psychologist around the same time suggested that the student was experiencing somewhat greater delays in reading (Joint Ex. 8 at pp. 7-9, 17). The second administration of the WRMT-R/NU occurred in June 2007, and yielded the following cluster standard scores: readiness, 91; basic skills, 92; reading comprehension, 95; and total reading, 92 (Parent Ex. Q). The student's parent reported that the student was reading at or near grade level; however her assessment was inconsistent with testimony from the student's teacher that the student could only be expected to read one page of non-fiction material at a fifth grade level (Tr. pp. 261, 713, 728). Based on the conflicting evidence in the hearing record, I cannot conclude that the testing performed by the parents demonstrated that the student made progress in reading during the 2006-07 school year.

With regard to the parents' third argument relating to the student's social-emotional progress, the hearing record indicates that during the 2006-07 school year, the student's time on task and work productivity increased, as did other executive functioning skills (Tr. pp. 637-38; Parent Ex. LL). In addition, improvement was noted in the student's basic social skills (Tr. pp. 271-73, 278-79, 638; Parent Ex. LL). However, as noted above this was due, at least in part, to the district's psychologist's work with the student and his special education teacher (Tr. p. 636). Although the student's special education teacher described the student as "very popular," he also noted that the student was "pretty immature most of the time," that the student did not read non-verbal cues and that it was "tough for him to get along socially" (Tr. p. 272).

Based on the totality of the evidence found in the hearing record, I find that the parents have not sufficiently demonstrated that Ridge met the student's special education needs or that the student made progress attributed to Ridge during the 2006-07 school year.

Additionally, the hearing record establishes that Ridge did not provide the student with special education services in the least restrictive environment (LRE), insofar as the school's exclusive focus is on delivering services to students with Asperger's syndrome, PDD and high functioning autism (Tr. pp. 203-05; Parent Ex. K). While parents are not held as strictly to the standard of placement in the LRE as school districts, 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, 26-27 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

In the instant matter, the hearing record does not sufficiently establish that the student could not have been successfully educated in a 6:1+1 special BOCES class as recommended by the district. The parents produced the school psychologist who was contracted by the district to provide counseling services to the student during the 2006-07 school year as a witness during the impartial hearing (Tr. p. 611). The school psychologist testified that the student "made gains" during his counseling during the 2006-07 school year (Tr. p. 636),<sup>21</sup> required such counseling,

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<sup>21</sup> The school psychologist noted that by the end of the 2006-07 school year, the student was less resistant to putting in effort to accomplish classwork (Tr. pp. 620-22); he was more engaged in school, particularly his "need to learn" (Tr. p. 622); he decreased his manifestations of "territoriality" in groups of other students, allowing others to have first choice of snack foods offered; in group discussions, he improved in his ability to stay on topic and give someone else a chance to express another opinion; and he increased his ability to stay focused on conversation topics (Tr. pp. 644-46).

speech-language, and OT related services as part of his 2006-07 special education program (Tr. pp. 638, 672-73), and acknowledged that the district, not Ridge, provided these services (Tr. p. 673). He opined that it was anxiety, not ADHD, that was the root cause of the student's attentional deficits, and that behaviorally, "he needs limits set for him on that" (Tr. pp. 613-15).

When asked what kind of setting the student would require in a public school environment, he responded "[the student] would need to be probably in a small structured class, I think the makeup of the class would have similar characteristics that he would have" (Tr. p. 626). He defined an appropriate class size for the student as "maybe a 1:6 class or 1:12:1 or 1:8:1 with a teaching assistant again with youngsters with similar characteristics too" (Tr. p. 630). He opined that the student would need a supportive curriculum and a "teacher breaking it down for him so he can understand the work in order to complete the work" (Tr. pp. 626-27), preferably someone "who's really sensitive or knows about Asperger's ...and some of the co-morbidities that go with that" (Tr. p. 630). He added that the student required "a safe, secure environment" (Tr. p. 626), one with students "that have some social skills deficits" but are not "acting out, per se" so "he would feel safe," not be "picked on" or be "bullied there in the classroom" (Tr. p. 630). Although he could not comment on the appropriateness of the district's recommended programs as set forth in the applicable IEPs without the benefit of a current classroom observation (Tr. pp. 674-76), at no point did the school psychologist testify that the student could not potentially derive educational benefit from a 6:1+1 special class in a public school setting, nor that Ridge's more restrictive setting was the only appropriate choice for the student.

The district produced a special education teacher from one of the BOCES programs recommended by its CSE as a witness during the impartial hearing (Tr. p. 898).<sup>22</sup> A licensed special education teacher in New York State for 21 years, the witness testified that she had worked exclusively with students on the autism spectrum since 2006 (Tr. pp. 899-900). She explained the specifics of the program's teaching methodology, "Treatment and Education of Autistic and Communicatively Handicapped children" (TEACH) (Tr. p. 901), noting that it is "specifically designed to meet the needs of [students] on the autism spectrum and it can meet the needs of diverse learners on that spectrum" (Tr. p. 903). Fundamental aspects of the methodology include: (1) presentation of information primarily through visual cues; (2) organization and arrangement of the classroom into individual physical spaces (student "offices"), providing each student with a place to sit, thereby minimizing distractions and reducing anxiety; (3) incorporation of each individual student's personal interests into each office space; (4) two daily sessions of 1:1 instruction, one session with the special education teacher and one session with her teaching assistant; (5) a visual daily schedule, listing specific tasks and events planned for each day, allowing the students to anticipate the program for the day, thereby reducing anxiety; (6) sensory integration therapy, allowing students to spend time in a "relaxation area" in order to reduce anxiety and improve learning; (7) addressing social skills development by taking the class to "real life places," such as restaurants; and (8) the use of learning software to develop students' abilities to discern facial expressions and recognize the emotions of others (Tr. pp. 903-06, 915-19, 951-53).

The BOCES special education teacher testified that during the 2006-07 school year, her class profile included one student in the sixth grade and the other students were in the seventh

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<sup>22</sup> The hearing record indicates that the program was entitled "Providing an Education for Autistic and Communication-impaired Children Effectively" (PEACCE) (Parent Ex. UU).



grade (Tr. pp. 953-54). She also confirmed that multiple students in her class received related services during the course of any given day, and that she would meet informally to discuss student progress with these providers as needed (Tr. pp. 946-49). Depending on the particular calendar quarter, she added that students were exposed to regular, mainstreamed art, computer, music, and technology classes with non-disabled students (Tr. pp. 911-12). At the beginning of the school year, students received a student handbook containing rules of behavior (Tr. p. 955). Protocol required each student to review this handbook with their parents, and to sign a written acknowledgement of same which the school placed on file (id.).

Based on the foregoing, the hearing record shows that the recommended BOCES program fulfilled several of the school psychologist's criteria as enumerated in his testimony, including a small class size, a supportive curriculum administered by a qualified teacher, and a safe, secure environment with defined limits on behavior and demarcation of personal space, so as to reduce anxiety and distraction, and thereby promote learning.<sup>23</sup> There is no evidence to suggest that the student's special education needs could not have been successfully addressed in a 6:1+1 BOCES program, and I therefore concur with the impartial hearing officer's determination that Ridge was an overly restrictive placement for the student in that it offered him no opportunities for exposure to non-disabled students in a mainstream educational setting (IHO Decision at p. 85; Tr. pp. 860-61; Parent Exs. K; T).

After carefully reviewing the hearing record, I concur with the impartial hearing officer's determination that Ridge's special education program was not appropriate to meet the student's needs and did not provide the student with special education services in the LRE. The parents' private school placement need not be perfect, but "a unilateral private placement is only appropriate if it provides 'educational instruction specifically designed to meet the unique needs of a handicapped child'" (see Gagliardo, 489 F.3d at 115; see also Matrejek, 2008 WL 3852180 at \*1). Therefore, the hearing record does not demonstrate that Ridge was an appropriate placement for the student during the 2006-07 school year.

Having already determined that the parents' unilateral placement of the student was inappropriate, I need not reach the issue of whether equitable considerations support the parents' claim for reimbursement, the third criterion of the Burlington analysis, and the necessary inquiry is at an end (Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119).

I have considered the parents' remaining contentions and I find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 10, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>23</sup> The district also produced the special education director of the proposed BOCES placement, who testified that in her opinion, the BOCES placement "might be appropriate" for the student (Tr. pp. 1103-04).