



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 11-020

**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 Pine Bush Central School District**

**Appearances:**

Sussman & Watkins, attorneys for petitioners, Michael H. Sussman, Esq., of counsel

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

### DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request that respondent (the district of residence or the district) be directed to reimburse them for their son's tuition costs at the Ridge School (Ridge) for the 2010-11 school year. The appeal must be dismissed.

During the 2010-11 school year, the student was parentally placed at Ridge where he was also receiving one weekly 30-minute group session of counseling, one weekly 30-minute session of 1:1 counseling, one monthly 30-minute occupational therapy (OT) consultation, two 30-minute sessions of 1:1 speech-language therapy per week, and one 30-minute group session of speech-language therapy per week through the Hyde Park Central School District (district of location) (Tr. pp. 5, 145; Joint Exs. 9 at pp. 2, 5; 10 at p. 6). In addition, the student received the support of a 1:1 aide (Joint Ex. 9 at p. 2). Ridge has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. pp. 141, 478; see 8 NYCRR 200.1[d], 200.7). The student has a diagnosis of Asperger's syndrome and has exhibited deficits in reading, writing, and math (Tr. pp. 4-5; Joint Ex. 13 at p. 1). Reportedly, the student presents with a school phobia manifested by an extreme level of fear, panic, and escape-avoidance thoughts when recalling memories of his former schools (Joint Ex. 22 at p. 2). The student's eligibility for special education and related services as a student with autism is not in dispute in this appeal (Tr. pp. 4, 405; 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

## Background

The student was first deemed eligible for special education and related services when he was in preschool (Tr. p. 405). In kindergarten, he was identified by the district of residence as a student with a speech or language impairment and for third grade (2003-04), the Committee on Special Education (CSE) changed the student's classification to reflect that he met the eligibility criteria as a student with a learning disability (Tr. p. 405; Joint Ex. 1 at p. 3). For the 2004-05 school year (fourth grade), the student continued to be classified as a student with a learning disability (Joint Ex. 2). On November 18, 2004, a sub-CSE met for a review of the student's program at which time, they added one 30-minute session of counseling per week in a group of five (Joint Ex. 3 at pp. 1, 4). The resultant individualized education program (IEP) reflected that improvements had been seen in the student's behavior, but due to his increased frustration with academics, the sub-CSE recommended that the student receive additional time for testing as well as frequent breaks (id. at p. 4).

In fall 2005, when he was in fifth grade, the district issued three elementary referral forms regarding the student, which indicated that on three separate occasions the student reportedly engaged in rude, discourteous, uncooperative, and destructive behavior or was involved in fighting with staff and students (Parent Ex. C at pp. 1-4). On November 2, 2005, following an episode of uncooperative, rude, destructive and discourteous behavior, the student was sent home from school (id. at pp. 3-4). Subsequently, the student was admitted for six days to a psychiatric hospital where he was offered diagnoses of a "Pervasive Developmental D/O NOS" and "Impulse Control D/O NOS" (Tr. p. 406; Parent Ex. D at pp. 1, 3). According to the student's mother, the student returned to the district's elementary school with a recommendation that he attend a "small classroom" (Tr. p. 407).

In a December 14, 2005 elementary referral form, the student reportedly exhibited rude or discourteous behavior as well as a lack of cooperation (Parent Ex. H at p. 2). On January 26, 2006, the student was referred to district administrative staff for slapping his teacher's hand, tipping over and attempting to throw furniture, and breaking headphones (id. at p. 1). As a result of the student's conduct, he was suspended from school for three days (id.). In a February 2006 letter to the district's director of special programs, the parents requested a 1:1 aide for the student (Parent Ex. I; see Dist. Ex. 21). According to the parents, the student's anxiety, frustration, and impulsive behavior concerning his school work caused losses in his academics (Parent Ex. I). The parents opined that a 1:1 aide would provide their son with assistance in task redirection, offer instructional support, and help him with social training (id.). They further noted that the student had previously received 1:1 support and that he benefited as a result (id.). In March 2006, due to increased anxiety and frustration, the district provided the student with a 1:1 aide, placed the student on "two days of two-hour school," and eventually scheduled him to attend school for half-days (Tr. p. 408; Parent Ex. W at p. 3). On March 15, 2006, the student experienced what his mother characterized as "a major meltdown" that prompted a district call to emergency services intervention and the parents (Tr. p. 409).<sup>1</sup> Subsequently, the district placed the student on home instruction until the end of April 2006, when the district placed him in an intensive day treatment (IDT) program offered through the Board of Cooperative Educational Services' (BOCES) (Tr. p. 410; Parent Exs. K; L). According to the student's mother, the student spent one day in the IDT program; however,

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<sup>1</sup> According to the student's mother, in April 2006, per her request, the district classified the student as a student with autism (Tr. pp. 405, 460).

following what she described as "a major meltdown," the student's mother was called to pick him up and he was subsequently placed on home instruction for the remainder of the 2005-06 school year (Tr. p. 411; see Parent Ex. S at p. 1; Joint Ex. 13).

In September 2006, per district recommendation, the student enrolled in a nonpublic school program; however, on the second day, staff at the nonpublic school program advised the student's mother that the program was not appropriate for the student and he was subsequently placed on home instruction (Tr. pp. 412-14). On November 30, 2006, per parent request, the CSE met to review the student's program and updated evaluations, including a November 2006 reading evaluation, a September 2006 audiological and central auditory processing evaluation, and an August 2006 speech-language evaluation (Joint Ex. 4 at pp. 4-5). Committee meeting information notes revealed that the student's home tutor reported that the student was making steady academic progress, had improved his frustration tolerance, and was much more motivated in task completion (id. at p. 5). The November 2006 CSE recommended that the student undergo an OT evaluation, and receive two 30-minute sessions of 1:1 speech-language therapy per week, one 30-minute session of group speech-language therapy per week, and one 45-minute session of multisensory reading instruction on a trial basis as tolerated in the home setting (id.). The November 2006 CSE also provided the parents with a listing of State-approved day schools specializing in programs for students with autism (id.).

On January 3, 2007, the student underwent an OT evaluation, which revealed that the student exhibited many sensory processing deficits which affected his ability to perform some fine motor tasks (Parent Ex. W at p. 1; Joint Ex. 5 at p. 4). On March 6, 2007, the CSE convened to review the student's program (Parent Ex. W; Joint Ex. 5). The March 2007 CSE decided to continue the student's home instruction program and added a monthly OT consultation (id.).

On May 2, 2007, the CSE met for an annual review and to develop the student's program for the 2007-08 school year (seventh grade) (Joint Ex. 6 at p. 5).<sup>2</sup> Committee meeting information revealed that the CSE chairperson explained to the parents that it was imperative that the CSE begin to prepare the student for a transition back into a "regular special education program" for the upcoming 2007-08 school year (id.). Recommendations included a change in the student's service designation to allow for an extended day program in order to provide the student with transition opportunities over the summer and to better prepare him for reentry into a structured school program (id.). Further recommendations were for continued home instruction pending placement in either the Asperger Program for Independent Education (APIE) at BOCES (or a similar program for students with autism),<sup>3</sup> one OT consultation per month, one group session of speech-language therapy per week, one weekly session of 1:1 speech-language therapy per week, one session of 1:1 counseling per week, and multisensory reading instruction within the school program (id.). The May 2007 CSE meeting information further indicated that the CSE provided the parents with information regarding the BOCES APIE program, and that it was explained to the parents that the program was designed for high functioning autistic students with Asperger's syndrome (id.). The

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<sup>2</sup> The IEP generated as a result of the May 2007 CSE meeting is not included as part of the hearing record and the hearing record does not include a list of attendees at the May 2007 CSE meeting (Joint Ex. 6 at p. 5).

<sup>3</sup> According to the hearing record, the APIE program specialized in students with high functioning autism and students who had a diagnosis of Asperger's syndrome (Tr. p. 26).

CSE chairperson indicated that he would contact the student's outside counselor to ascertain how his therapy related to the goals and objectives on the IEP (id.).<sup>4</sup>

In late spring 2007, the parents visited the BOCES APIE program; however, they decided that the program would not meet the student's needs (Tr. pp. 32, 416). On September 6, 2007, the CSE reconvened per the parents' request (Joint Ex. 6 at p. 5). For the 2007-08 school year, the student continued to receive a home instruction program combined with "speech-language supports, and occupational therapy consults as well as counseling" (Tr. p. 419; Joint Ex. 6 at p. 5). According to committee meeting information gleaned at the September 2007 meeting, the CSE recommended that supported gradual attempts be made to increase the student's toleration to a school environment and to include his participation in some small group activities for added growth in social skills (Joint Ex. 6 at p. 5). The September 2007 CSE recommended that a follow-up meeting take place six to ten weeks after the CSE meeting to monitor the success of the student's program (id.).

In December 2007, the student's mother visited Ridge with her son (Tr. p. 424). In February 2008, the student's mother requested that the district send a referral packet to Ridge regarding the student (Tr. p. 422). By letter dated March 13, 2008 to the district's CSE chairperson, the student's mother requested that the CSE convene to discuss placement of the student at Ridge (Joint Ex. 22 at p. 2).

For the 2008-09 school year, the district recommended the BOCES APIE program for the student (Tr. p. 426).

By letter dated August 13, 2008 to the CSE chairperson, the student's mother advised that the parents decided to place the student in Ridge for the 2008-09 school year (Joint Ex. 23 at p. 2). The student's mother requested that the district pay for the student's tuition at Ridge and provide transportation (id.). On August 22, 2008, the parents submitted an application to Ridge for the student for the 2008-09 school year (Joint Ex. 49).

In an August 28, 2008 progress report from the student's private psychologist, it was reported that the student had shown significant improvement in his ability to develop trust and accept positive assurances from trusted individuals (Joint Ex. 12 at p. 2).<sup>5</sup> According to the psychologist, given the student's history in educational settings where the student expressed that he had been previously mistreated, trust was an area of great difficulty for him (id.). The psychologist further noted that the student had improved in his ability to accept change and that the student had also made some adaptations when he had attended school programs as a guest during the past school year (id.). Although the student had indicated to the psychologist that he was fearful of his previous school setting, he had also stated that he wanted to go to school and "be with the other kids" (id.). The psychologist added that the student's "[s]pecific [p]hobia regarding school" interfered with his daily functioning; however, she opined that with intervention, the student's "[s]pecific [p]hobia" might be resolved over time (id.). The psychologist explained

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<sup>4</sup> The CSE chairperson of the May 2007 CSE meeting was the district's interim head of special programs at that time (Tr. p. 465).

<sup>5</sup> The psychologist who prepared the August 28, 2008 report provided the student with 1:1 counseling during the 2007-08 school year (Tr. p. 420). Pursuant to a request from the student's mother, the district funded the student's counseling sessions with the private psychologist during that school year (id.).

that the student would most likely benefit from an educational program that accommodated the specific needs of a student with Asperger's syndrome as well as the student's specific needs (*id.*). She further suggested that the student needed the opportunity to gradually develop the needed skills and emotional competence to adjust, accept, and function successfully so that the student could progress academically (*id.*). The psychologist added that the student would need adult support, supervision, and instruction that would provide him with a feeling of trust and security in all aspects of his learning environment (*id.*). She also noted that the student needed to develop an increasing level of comfort with receiving directions and requests as well as social interactions and instruction (*id.* at pp. 2-3). Lastly, the psychologist indicated that the student needed to be given an opportunity to express and resolve his fears (*id.*).

On December 16, 2008, the parents and the district entered into a stipulation of settlement with respect to claims asserted in an impartial hearing related to the 2008-09 school year (Dist. Ex. 1).

On June 19, 2009, while the student was enrolled at Ridge, a sub-CSE of the district of location convened to develop an individualized education service program (IESP) for the student for the 2009-10 school year (Joint Ex. 7 at pp. 1, 5).<sup>6</sup> According to the resultant June 2009 IESP, for the 2009-10 school year, the student had been enrolled by the parents at Ridge and sought special education services through dual enrollment at the district of location (*id.* at p. 1). The student was deemed eligible for extended school year (ESY) services (*id.*). For the 2009-10 school year, the sub-CSE of the district of location recommended the provision of consultant teacher services one hour per week in a group of five and three hours of resource room services per week (*id.* at pp. 1-2). Related services recommendations consisted of a full-time 1:1 aide, one weekly 30-minute session of group counseling, two 30-minute sessions of 1:1 counseling per week, one monthly OT consultation, one weekly 30-minute session of 1:1 speech-language therapy, and two 30-minute sessions of group speech-language therapy per week (*id.* at p. 2). According to the June 2009 IESP, the 1:1 aide would support the student in any area of school that required reading or writing (*id.*). For summer 2009, the sub-CSE of the district of location recommended that the student receive 1:1 home tutoring two hours per day on a daily basis (*id.*). Related services recommendations for summer 2009 also included one weekly 30-minute session of 1:1 counseling, one weekly 30-minute session of group counseling, one monthly OT consultation, one weekly 30-minute session of 1:1 speech-language therapy, and one weekly 30-minute session of group speech-language therapy (*id.*). Program modifications for the student listed on the June 2009 IESP were also comprised of access to support staff, a 1:1 teaching assistant, use of multisensory instructional strategies, refocusing and redirection, a positive reinforcement plan, modification of written work, a copy of class notes, checks for understanding, and additional time to complete

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<sup>6</sup> Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts, upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs (Educ. Law §§ 3602-c[2][a], [2][b][1]). A school district of location recovers from the school district of residence the evaluation costs, CSE administrative costs, and special education services costs incurred (8 NYCRR 177.2; see also "Guidance on Reimbursement Claims for the Cost of Providing Special Education Services to Parentally-Placed Nonresident Students Pursuant to Education Law Section 3602-c" located at <http://www.p12.nysed.gov/specialed/publications/policy/reimbursement608.htm>).

tasks (id.). Annual goals were developed with respect to reading, writing, speech and language, and in the area of social, emotional, and behavioral development (id. at pp. 6-8).

According to committee meeting information, the June 2009 sub-CSE of the district of location noted that the student had a successful year at Ridge, and had made remarkable academic and social improvements (id. at p. 5). However, the sub-CSE noted that the student continued to struggle with reading and writing tasks, and that he would continue to require the support of a 1:1 aide (id.). The June 2009 sub-CSE of the district of location recommended that the student's reevaluations be administered by staff who worked with him regularly at Ridge (id.). The sub-CSE of the district of location determined that contingent upon an agreement with the district of residence, consultants would be contracted with for the psychological, speech-language, and OT evaluations (id.).

On July 9, 2009, the CSE of the district of residence also convened at the parents' request to conduct an annual review for the student (Joint Ex. 8). Meeting notes from the July 9, 2009 CSE meeting of the district of residence indicated that the parents had met on June 19, 2009 for an annual review with the district of location and that the student was attending Ridge (id. at p. 5). According to meeting notes, the student had a very successful year at Ridge, and despite a difficult transition at the start, the student had become very social in the classroom (id.). The program director from Ridge reported that the student had made friends, had good attendance, and that he had also had made steady progress with academics (id.). The student's counselor advised that the student should be placed in a nurturing and supportive environment that would provide stability as well as the opportunity to socialize within the classroom setting (id.). The parents requested tutoring at the Konsul Remedial Center during the period of July 2009 through August 2009, a request that was denied by the CSE (id.).<sup>7</sup> The July 9, 2009 CSE proposed that the student attend the BOCES APIE program; however, the parents advised that they planned to continue with their son's placement at Ridge and that they intended to seek payment from the district for that placement (id.). The July 9, 2009 CSE further noted that it would convene as early as possible to review the results of the triennial evaluations, and further recommended continuation of the student's related services (id.). The July 9, 2009 CSE did not recommend a 12-month program because significant regression was not evidenced by the student's grades (id.). The July 9, 2009 CSE meeting was adjourned without changes to the student's IEP, pursuant to the advice of counsel for the parents and the district of residence (id.). According to the meeting minutes, additional information and clarification would be sought from the district of location's CSE and the meeting would be rescheduled as soon as possible (id.).

On July 16, 2009, the CSE of the district of residence reconvened to develop the student's program for the 2009-10 school year (ninth grade) (Joint Ex. 8). The resultant July 16, 2009 IEP indicated that the student was parentally placed at Ridge (id. at p. 1). For the 2009-10 school year, the July 16, 2009 CSE of the district of residence proposed placement in an 8:1+1 special class offered through the BOCES, in conjunction with related services comprised of one weekly 30-minute session of counseling, one monthly 30-minute OT consultation, one weekly 30-minute session of 1:1 speech-language therapy, and one weekly 30-minute session of group speech-language therapy (id. at pp. 1-2). The July 16, 2009 CSE found the student ineligible for ESY

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<sup>7</sup> The hearing record also refers to Konsul as the "Konsul School of Developmental Learning" (Tr. p. 536). The hearing record describes Konsul as a private remedial learning center founded by the executive director of Ridge before he founded Ridge (Tr. pp. 536-37).

services (*id.* at p. 1). Program modifications built into the July 16, 2009 IEP included access to support staff, additional time to complete tasks, checks for understanding, a copy of class notes, modification of the student's written work, a positive reinforcement plan, preferential seating, and refocusing and redirection (*id.* at p. 2). That same day, the CSE chairperson sent a referral packet to BOCES for admission of the student into the APIE program (Joint Ex. 17).

By e-mail dated July 21, 2009, the student's mother notified the director of special education from the district of location that the parents were placing the student at Ridge for the 2009-10 school year (Dist. Ex. 3). The student's mother further requested that the district of location provide the student with services (*id.*). The parents thereafter advised the district of residence on August 27, 2009 that they planned to continue the student's private placement at Ridge and that they would seek direct payment from the district of residence (Joint Ex. 24). The parents notified the district of residence that they had continued the student's ESY services at Konsul and requested that the district fund the ESY services (*id.*). In addition, they requested funding of the student's tuition at Ridge for the 2009-10 school year (*id.*).

By letter dated September 9, 2009, the director of special and alternative education from BOCES notified the CSE chairperson from the district of residence that they would not proceed with the student's referral because the parents were not interested in placing their son there (Joint Ex. 18). For the 2009-10 school year, the student attended Ridge (Tr. p. 433).

Over six dates between November 16, 2009 and January 11, 2010, a private licensed psychologist conducted a psychological evaluation of the student as part of his "three year assessment" (Joint Ex. 13 at p. 1).<sup>8</sup> The evaluator administered tests identified in the record as the "Woodcock-Johnson Psycho-Educational Battery-III Tests of Cognitive Ability (WJ-III COG)," and the "Woodcock-Johnson Psycho-Educational Battery-III Tests of Achievement (WJ-III ACH)," as well as administered the Behavior Assessment System for Children, Second Edition (BASC-2), the Beery-Buktenica Developmental Test of Visual Motor Integration-5th Edition (VMI) and the Wisconsin Card Sorting Test-64 Card Version (WCST-64); assessments which measured the student's cognitive skills; academic achievement; visual, spatial, perceptual and constructional skills; and executive and social/emotional functioning (Joint Ex. 13). The evaluator reported that while the student's behavior was "variable throughout the test sessions," and that at times the student exhibited "increasing anxiety which exacerbated his low frustration tolerance for some challenging tasks," test results "provided an accurate estimate of [the student's] current level of functioning in all areas assessed" (*id.* at p. 3).

The evaluation report described the "significant variability" among the student's cognitive skills, evidenced by scores in the "[w]ell [b]elow [a]verage" range through the "[h]igh [a]verage" range on the WJ-III COG (Joint Ex. 13 at pp. 3-8, 24).<sup>9</sup> The student exhibited a relative strength in the "[c]omprehension-[k]nowledge" domain (high average), which measured his ability to "verbally communicate his verbal knowledge and comprehension" (*id.* at pp. 8, 24). The student's

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<sup>8</sup> The psychological evaluation was conducted by the student's private counselor and paid for by the district of residence (Joint Ex. 8 at p. 5).

<sup>9</sup> The evaluator reported that the student's "General Intellectual Ability Extended Standard Scale" score of 87 (low average) was not an accurate representation of his overall intellectual ability due to the significant differences between and among his "[d]omain" abilities, which suggested uneven cognitive skill development (Joint Ex. 13 at p. 23).

"[t]hinking [a]bility" domain score, consisting of long-term retrieval (below average), visual-spatial thinking (low average), auditory processing (average), and fluid reasoning (average) scores, was in the "[a]verage" range (id. at pp. 23-24). The student exhibited significant weaknesses in processing speed (well below average) and short term memory (well below average), two abilities comprising the "[c]ognitive [e]fficiency" domain (id. at p. 24). The student's "[c]ognitive [f]luency" domain score, representing the speed in performing simple to complex cognitive tasks, fell at the "[u]pper [l]imit of the [b]elow [a]verage [r]ange" (id.). Visual, spatial, perceptual and constructional skills were in the "[l]ow [a]verage" range (id. at p. 26).

Academically as measured by the WJ-III ACH, the student's reading decoding, reading speed, and reading comprehension skills were in the "[w]ell [b]elow [a]verage" range, and the evaluator characterized the student's reading skills as "very limited" (Joint Ex. 13 at p. 24). The student's overall mathematics skills, including calculation and fluency, were in the "[w]ell [b]elow [a]verage" range, and his applied problem skills were in the "[b]elow [a]verage" range (id.). In written language, the student achieved "[b]elow [a]verage" scores on the writing samples subtest, and "[w]ell [b]elow [a]verage" scores on the spelling and writing fluency subtests (id.). The student's overall oral language skills, including listening skills, verbal comprehension, and linguistic competency were in the "[a]verage" range, with "[l]ow [a]verage" ability to follow oral directions reported (id. at p. 25). The student's science, social studies and cultural knowledge was in the "[a]verage" range, to which the evaluator commented that the student would find age-level science, history, geography, government, economics, art, music and literature tasks "manageable" (id.). The evaluator concluded that the student's reading, writing, and mathematics skills were "far below" those of his peers as well as below his cognitive ability (id. at p. 27).

Although the student achieved a score within the average to high average range on a measure of executive functions, the student's mother and teacher reported that he exhibited difficulty controlling and maintaining his behavior and mood (Joint Ex. 13 at p. 26). In the area of social/emotional functioning, the student reported that he experienced more anxiety, worry, and nervousness than his peers (id.). With the exception of anxiety, the student's self-report reflected that in general he was "comfortable with whom he is, believe[d] that he c[ould] control what happens to him, [wa]s self-confident, and ha[d] a positive relationship with his parents" (id.). Parent and teacher reports reflected that at times, the student showed signs of being depressed and withdrawn, lonely and negative, and that he had difficulty making friends and adapting to changing/difficult situations (id.). However, both the student's mother and teacher reported that the student possessed sufficient social skills and generally did not experience "debilitating or abnormal social difficulties" (id.).

The evaluator recommended that the student's classroom teacher, speech therapist, and occupational therapist work together using an integrated approach with the student; keeping in mind his poor academic skills (Joint Ex. 13 at p. 27). The evaluator's report provided specific classroom management strategies for the student designed to reduce his anxiety surrounding academic tasks and test performance, as well as a recommendation to continue the then-current IEP test accommodations and program modifications (id.).

On April 29, 2010, the student underwent a private assistive technology evaluation obtained by the parents (Tr. p. 523; Joint Ex. 15). The evaluator reported that despite the student's obvious intelligence, the student was unable to write because of cognitive impairments (Joint Ex. 15 at p. 1). Although the evaluator found that the student was verbal, he described the student's



speech as "somewhat slurred" and that the volume of the student's speech was low, and that he trailed off at the end of sentences (id.). According to the evaluator, the student was unable to spell, exhibited difficulty decoding and synthesizing words, and read at a third grade level (id.). Recommendations included a voice recognition interface to produce written communication, and further evaluation regarding reading and receptive communication (id.). Software and hardware recommendations were also made for the student (id.).

By letter dated May 10, 2010 to a special education coordinator at the district of location, the student's mother provided the district of location with a copy of the student's April 2010 assistive technology evaluation (Tr. p. 686; Dist. Ex. 5). The student's mother further requested that the district of location review it and provide the student with recommendations as documented in the evaluation (Dist. Ex. 5 at p. 1). The student's mother asked that the CSE of the district of location convene as soon possible to discuss the evaluation and make recommendations (id.).

In a May 19, 2010 letter to the director of secondary special programs (director) from the district of residence, the student's mother summarized the contents of their conversation that had taken place the day before (Joint Ex. 25; see Tr. p. 21). The student's mother advised the director that she was waiting for information on the BOCES APIE program and another BOCES program (BOCES II) and upon review of the information; the parents would arrange to visit the aforementioned programs (Joint Ex. 25). By letter to the director dated May 20, 2010, the student's mother requested additional information regarding BOCES II and the BOCES APIE program (Joint Ex. 26). Specific to the BOCES APIE program, the student's mother requested more information regarding the academic and social skills levels and verbal abilities of the students in that program (id.).

On May 24, 2010, the director sent a referral packet to BOCES for placement of the student in the BOCES APIE program for the 2010-11 school year (Joint Ex. 19). By e-mail dated May 26, 2010 to the director, the student's mother gave her consent to send referral packets to the two BOCES programs described above (Joint Ex. 27). The student's mother further advised the director that she planned to schedule appointments with the aforementioned programs (id.).

By facsimile dated May 26, 2010, to the director of special education at the district of location, the student's mother confirmed that the parents planned to attend the scheduled June 7, 2010 subcommittee on special education meeting, taking place at Ridge (Dist. Ex. 4 at pp. 1-2).

On May 27, 2010, the parents visited the BOCES APIE program (Tr. pp. 44-46; Joint Ex. 29 at p. 1).

By letter dated June 2, 2010 to the executive director of Ridge, the director requested attendance, scheduling, grades and transcript information regarding the student (Joint Ex. 28). Additionally, she notified him that the district of residence's CSE planned to arrange for a meeting to review the student's updated psychoeducational testing and make recommendations for the student for the upcoming school year (Joint Ex. 28).

On June 7, 2010, a sub-CSE of the district of location convened for the student's annual review and to make recommendations for the 2010-11 school year (Tr. pp. 670-71; Joint Ex. 9). Attendees included the parents, a school psychologist intern, a school psychologist, an occupational therapist, an OT assistant, the student's private psychologist, the executive director from Ridge, the student's teacher from Ridge, the student's speech-language therapist, and a

speech-language therapist from the district of location (Tr. pp. 673, 675; Joint Ex. 9 at p. 5).<sup>10</sup> According to the June 2010 IESP, the student was parentally placed in a nonpublic school and subject to dual enrollment in the district of location (Joint Ex. 9 at p. 1). For the 2010-11 school year, the June 2010 sub-CSE of the district of location noted in the IESP that the student would not receive the recommended special education program because he was parentally placed in a private school (id. at p. 2). Related services recommendations consisted of a full-time 1:1 aide to support the student with reading and writing, one weekly 30-minute session of group counseling, one 30-minute session of 1:1 counseling per week, one monthly OT consultation, two weekly 30-minute sessions of 1:1 speech-language therapy, and one 30-minute session of group speech-language therapy per week (id.). For summer 2010, the sub-CSE of the district of location proposed placement in a 6:1+1 special math class, five times per week and placement in a 6:1+1 special reading class, five times per week in conjunction with one 30-minute session of 1:1 speech-language therapy per week and one 30-minute session of group speech-language therapy per week (id.). Program modifications for the student listed on the June 2010 IESP were also comprised of access to support staff, a 1:1 teaching assistant, use of multisensory instructional strategies, refocusing and redirection, a positive reinforcement plan, modification of written work, a copy of class notes, checks for understanding, and additional time to complete tasks (id.). The student was also afforded the use of assistive technology (id.). Committee meeting information revealed that the student had a very successful year at Ridge and had made remarkable improvements socially and academically (id. at p. 5). The sub-CSE of the district of location noted that the student's reevaluation had not been completed, but would be administered by the district of location (id.). Meeting minutes further reflected that "consensus [had been] achieved" (id.).

On June 14, 2010, the parties entered into a stipulation of settlement settling claims with respect to the 2009-10 school year (Dist. Ex. 2).

On June 23, 2010, accompanied by the student, the parents visited the BOCES APIE program (Tr. pp. 43, 508, 511).

In an e-mail from the student's mother to the director dated June 29, 2010, the student's mother acknowledged receipt of the director's message that the district hoped to transition the student to "the BOCES program" for the summer and discuss the intake interviews (Joint Ex. 32). However, the student's mother raised concerns that the student did not have a transition plan at the time (id.).

In an undated counseling summary for the 2009-10 school year, the student's psychologist noted that the student had little trouble sharing his thoughts and contributing to discussions that took place during group counseling sessions (Joint Ex. 16). According to the psychologist, the student demonstrated insight as to what was taking place during the session, and as the year progressed, the student was able to wait his turn to share (id.). The psychologist further stated that the student effectively used his 1:1 and had achieved the IEP goals of seeking out appropriate people when under stress, and identifying strategies for fostering positive peer relationships (id.). The student was also making satisfactory progress toward achieving the goals of using effective coping strategies when faced with conflict situations and verbally expressing displeasure rather

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<sup>10</sup> The CSE chairperson from the district of location stated that during the 2009-10 school year, the district "contracted out" the student's speech-language therapy and counseling services; however, for the 2010-11 school year, those services were to be provided by district employees (Tr. pp. 673, 675).

than by withdrawing (id.). The psychologist recommended that the CSE consider reducing the student's 1:1 counseling to twice monthly and as needed, and continuing the student's group counseling at the frequency of once per week (id.).

The CSE of the district of residence convened on July 8, 2010 for the student's annual review and to make program recommendations for the 2010-11 school year (Joint Ex. 10). The following individuals attended the July 2010 CSE meeting: the parents; the director, who also acted as CSE chairperson; a district school psychologist; the high school special education department chairperson; and a regular education teacher (id. at p. 5). In addition, the following people participated in the meeting telephonically: the executive director of Ridge, the student's psychologist, and the principal of BOCES (id.). The July 2010 IEP revealed that the student had been parentally placed at Ridge; however, for the 2010-11 school year, the CSE of the district of residence recommended placement in an 8:1+1 classroom through the BOCES APIE program with related services consisting of one weekly 1:1 30-minute session of counseling and one weekly 30-minute session of group counseling, one monthly OT consultation, two weekly 1:1 30-minute sessions of speech-language therapy, and one weekly 30-minute session of group speech-language therapy (id. at pp. 1-2). The July 2010 IEP further noted that the proposed program would offer the following in a group setting: speech-language therapy with an emphasis on pragmatic ability; counseling with an emphasis on social and communication skills training; OT; assistive technology, as needed; life skills and vocational training; career and technical education training; and family counseling as a support to the student's family (id. at p. 2). The student was also afforded the following program modifications: access to support staff, a 1:1 teaching assistant, use of multisensory instructional strategies, refocusing and redirection, a positive reinforcement plan, preferential seating, modification of written work, a copy of class notes, checks for understanding, and additional time to complete tasks (id.). Testing accommodations provided to the student included administration of tests in a small group, tests read, directions repeated, extended time (2x), tests to be given in a location with minimal distractions, answers recorded or scribed for lengthy classroom essays or tests, and breaks to be given every 20 minutes during tests, or short breaks as needed during lengthy exams (id. at pp. 2-3). Annual goals were developed with respect to reading, writing, speech and language, as well as social, emotional and behavioral functioning (id. at pp. 6-9).

Meeting notes revealed that the BOCES principal described the APIE program during the July 2010 meeting and the CSE of the district of residence discussed concerns regarding the student's transition into the program (Tr. p. 52; Joint Ex. 10 at p. 5). According to the July 2010 committee meeting information, the BOCES APIE program had accepted the student and was confident that "they [could] meet his needs in the program" (Joint Ex. 10 at p. 5). At the CSE meeting, the parents asked questions regarding the revision of the student's IEP (Tr. p. 452; Joint Ex. 10 at p. 6). After reviewing the recommendations made by the CSE of the district of residence, the parents advised that they planned to parentally place the student at Ridge for the 2010-11 school year (Tr. p. 58; Joint Ex. 5 at p. 6).

### **10-day Notice/Request for an Impartial Hearing and District Response**

In a July 13, 2010 e-mail to the director, the parents confirmed that they notified her during the July 2010 CSE meeting that they would be placing the student at Ridge for the 2010-11 school year (Joint Ex. 35). According to the parents, Ridge had proven to be an appropriate placement for the student and it continued to be appropriate for the student (id.). The parents noted that the

student had tremendous difficulty with transitioning into new situations and with new people, and they were rejecting the district of residence's proposed placement in the BOCES APIE program (id.). The parents notified the district of residence that they were placing the student at Ridge and would be requesting that the district pay the costs of their son's tuition (id.).

On July 14, 2010, the student's mother requested the appointment of an impartial hearing officer and the commencement of due process proceedings (Joint Ex. 36). By letter dated July 26, 2010, the district of residence's attorney submitted a response to the parents' July 14, 2010 e-mail, which he referred to as a "due process complaint notice" (Joint Ex. 37). The district's response stated, among other things, that the student's recommended placement was appropriate and that the July 2010 IEP was reasonably calculated to provide the student with appropriate programming and educational benefits for the student in the least restrictive environment (LRE) (id. at pp. 1-2).

By letter dated July 16, 2010, the director was advised that a placement was available for the student in the BOCES APIE program for the 2010-11 school year (Joint Ex. 20 at p. 1). On July 26, 2010, the director requested that the parties arrange another meeting to discuss the student's transition plan and goals for the upcoming year (Joint Ex. 38 at p. 1). She further advised that the CSE of the district of residence had updated the student's present levels of performance (id. at p. 2). On July 28, 2010, the student's mother advised that she would be out of town during the period of July 30, 2010 through August 7, 2010 (Joint Ex. 39). The student's mother provided four dates in September 2010 that she would be available to schedule a CSE meeting (id.).

By letter dated July 29, 2010 to the parents, the director advised that she had scheduled a CSE meeting to take place on August 11, 2010 at the district of residence in order to finalize the student's IEP and update his goals and objectives (Joint Ex. 40). In addition, the director enclosed a draft copy of the proposed IEP for the parents' review and comment (id.). In an August 10, 2010 e-mail to the director, the student's mother requested that the August 11, 2010 CSE meeting be cancelled and further advised that she would not accept an IEP generated as a result of that meeting (Joint Ex. 41). Additionally, the student's mother indicated that she had previously advised the director that she was not available on that date, and further requested that the meeting be rescheduled for September 2010, during one of the dates for which she was available (id.).

On August 11, 2010, the CSE of the district of residence convened in the parents' absence to review and revise the student's transition plan and goals and objectives of the student's 2010-11 IEP based on updated testing and the IESP from the district of location (Joint Ex. 11 at p. 5). The director, who also acted as CSE chairperson; a district school psychologist; the high school special education department chairperson; a regular education teacher; and an additional parent member took part in the meeting (Tr. p. 70; Joint Ex. 11 at p. 5). Meeting minutes indicated that the goals and objectives were revised to more accurately reflect the student's needs and that a CSE meeting would be scheduled for September 2010 to further discuss and revise the student's transition and goals and objectives (Joint Ex. 11 at pp. 5-6).<sup>11</sup> In a letter also dated August 11, 2010, the director provided a copy of the August 2010 IEP to the parents, and further advised that pursuant to their

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<sup>11</sup> The following goals were added to the student's August 2010 IEP: (1) the student will use voice recognition software to submit a topic requested by the teacher, and (2) the student will attempt tasks independently before seeking adult assistance (Tr. pp. 64-65; compare Joint Ex. 8 at pp. 6-9, with Joint Ex. 11 at pp. 7-10). The August 2010 CSE also omitted a writing goal contained in the previous IEP (Tr. p. 65).

request, a CSE meeting would be scheduled on one of the dates that the parents had provided (Joint Ex. 42).

On August 12, 2010, the parents contracted with Ridge and agreed to pay the student's tuition for the 2010-11 school year (Joint Ex. 55).

By letter dated August 27, 2010 to the superintendent at the district of residence, the student's mother advised that on August 11, 2010, the director convened a CSE meeting in the parents' absence (Tr. p. 454; Joint Ex. 43 at p. 1). She noted that the staff who participated in August 11, 2010 meeting had never worked with her nor had they met the student, and as a result they were unfamiliar with him and not qualified to sit on his CSE (Joint Ex. 43 at p. 1). The student's mother stated that the parents were excluded from the development of the student's IEP, and that the parents would not accept the August 2010 IEP (*id.*). Although she acknowledged that on July 8, 2010, the CSE conducted the student's annual review; she contended that the IEP had not been completed because the director had advised the parents during the meeting that the director would only generate the IEP if the parents planned to send the student to BOCES (*id.*). According to the student's mother, the director also stated that the director would not write goals that were going to be changed (*id.*). The student's mother characterized the situation as "unacceptable" and a "total disregard" for the parents' and the student's rights (*id.*).

On September 23, 2010, the CSE from the district of residence convened (Tr. pp. 67, 454). Although the hearing record does not contain a copy of the IEP generated during the meeting, the student's mother reported that goals and objectives were agreed upon during that meeting (Tr. pp. 67-68, 454). The student's mother attended the meeting and noted that she agreed with the goals and objectives contained in the resultant IEP (Tr. pp. 527-28).

### **Impartial Hearing Officer Decision**

On October 7, 2010, an impartial hearing convened and concluded on October 21, 2010, after four days of testimony (Tr. pp. 1-728). By decision dated January 18, 2011, the impartial hearing officer dismissed the parents' due process complaint notice with prejudice (IHO Decision at p. 21). Specifically, the impartial hearing officer found that the district, as the district of residence, was not required to offer the student a free appropriate public education (FAPE) during the 2010-11 school year because the parents "clearly indicated" their intent to place the student at Ridge (*id.*). As further explained below, the impartial hearing officer determined that the parents made it clear that the student would remain at Ridge, a private school located in the district of location, for the 2010-11 school year (*id.* at p. 19). In pertinent part, he took note of the June 2010 IESP that had been prepared by the district of location and developed one month prior to the initial July 2010 CSE meeting held by the district of residence (*id.* at pp. 19-20). Moreover, he found that despite having continuous contact with the district of residence, the parents failed to inform members of the CSE of the district of residence about their participation in the sub-CSE meeting that took place in the district of location (*id.* at p. 20). The impartial hearing officer also concluded that during the June 2010 sub-CSE meeting held at the district of location, the parents had advised the CSE chairperson from the district of location that the student would be attending Ridge during the 2010-11 school year (*id.*). Lastly, although the impartial hearing officer acknowledged that it was not particularly relevant to his analysis, he determined that the parents' representations to the district of residence that they were either "'unavailable'" or had a "'commitment'" with respect

to the dates offered by the CSE of the district of residence to convene a CSE meeting, were "disingenuous and deliberately designed to obstruct the CSE process" (*id.*).

### **Appeal for State-level Review**

The parents appeal and request a reversal of the impartial hearing officer's decision. As relief, the parents seek an award of tuition reimbursement, as well as an order that Ridge constitutes the student's pendency placement. First, the parents allege that the impartial hearing officer erred to the extent that he failed to address the merits of their claim; instead, erroneously dismissing it based on a finding that the district, as the district of residence, was not obligated to offer the student a FAPE because the parents had determined in advance that the student would attend Ridge for the 2010-11 school year. In short, the parents claim that the impartial hearing officer failed to conduct a Burlington/Carter analysis of their claim,<sup>12</sup> which was in error, because the parents maintain that the district failed to raise the argument during the impartial hearing that it did not have a responsibility offer the student a FAPE. Rather, the parents assert that the district contended throughout the impartial hearing that it had offered the student a FAPE for the 2010-11 school year. The parents further claim that in refashioning their case, the impartial hearing officer erroneously focused on the student's mother's credibility.

Regarding their request for tuition reimbursement, the parents first argue that the district failed to show during the impartial hearing that it offered the student a FAPE. In particular, the parents allege that the July 2010 IEP was insufficient because the CSE at the district of residence developed it without consideration of how the student progressed with regard to the goals and objectives contained in the previous year's IEP. Next, the parents argue that the July 2010 CSE developed the IEP without updated evaluative data regarding the student. The parents also argue that the majority of the goals contained in the challenged IEP were identical to those listed in the previous year's IEP. Lastly, the parents contend that the disputed IEP lacked a transition plan for the student. With regard to the proposed placement, the parents argue, in part, that the student would have been placed with much higher achieving students, which would have exacerbated his emotional fragility. Moreover, the parents assert that the size of the school building rendered the proposed placement inappropriate and that the student's sensory deficits would have further complicated any adjustment to a new placement.

Next, the parents contend that Ridge has proven to be a highly appropriate placement for the student, given the significant academic and social progress that the student has made there. Finally, the parents argue that the equities favor their claim for relief, because they fully cooperated with the district of residence by signing all requisite forms and visiting the proposed placements. Moreover, the parents allege that they provided appropriate notice to the district of residence of their decision to place the student at Ridge for the 2010-11 school year.

Conversely, the district argues in its answer that the parents' appeal be dismissed in all respects. The district preliminarily argues that the impartial hearing officer correctly determined that it was not required to offer the student a FAPE, pursuant to Education Law §3602-c because the student had been parentally placed in a private school. However, regardless of its obligation

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<sup>12</sup> Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993). These two cases are typically referred to together as the "Burlington/Carter" analysis for tuition reimbursement.

to offer the student a FAPE, the district submits that it did offer the student a FAPE for the 2010-11 school year. The district contends, among other things, that the July 2010 IEP was developed in accordance with the Individuals with Disabilities Education Act's (IDEA's) procedural mandates. Moreover, the district argues that the July 2010 IEP was reasonably calculated to enable the student to receive educational benefits in the LRE as it provided the student with an education in a small structured 8:1+1 setting, specifically designed for students on the autistic spectrum with other students of similar ages, needs, and abilities. The district also contends that the proposed program offered the student testing and program modifications designed to enable him to succeed in the BOCES APIE program, in conjunction with assistive technology and related services that the parents claim the student required in order for him to benefit from his program.

Next, the district argues that the parents did not demonstrate that Ridge was an appropriate placement for the student, in part, because the student continues to have "meltdowns" and Ridge staff cannot articulate what triggers those "meltdowns." Additionally, the district claims that Ridge was improperly staffed and unable to provide the student with the related services necessary to enable him to derive an educational benefit from his program, as the student's related services were furnished through the district of location. Finally, the district maintains that equitable considerations should preclude an award of relief to the parents because their actions evidenced a failure to cooperate with the CSE process of securing an appropriate placement for the student.

### **Applicable Standards**

Two purposes of the IDEA are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

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, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a



district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **Discussion**

### **Impartial Hearing — Scope**

Preliminarily, I must address a threshold matter. The parents contend that the impartial hearing officer erroneously dismissed the matter by determining that the district was not obligated to offer the student a FAPE, a claim that the parents assert the district did not raise during the impartial hearing. The parents maintain that instead the district vigorously argued that it had offered the student a FAPE. The party requesting an impartial hearing determines the issues to be addressed by the impartial hearing officer (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40). It is also essential that the impartial hearing officer disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). In the instant case, I note that it was the parents – not the district – who requested the impartial hearing and placed the district's obligation to offer a FAPE (or lack thereof) in issue. Additionally, despite the parents' contentions, the hearing record is replete with testimonial and documentary evidence regarding the parents' decision to privately place the student at Ridge for the 2010-11 school year, and the district of residence's responsibility to offer the student a FAPE in addition to the provision of related services through the district of location (see Tr. pp. 5-6, 53-54, 57-58, 61, 78-79, 84, 91, 95, 103, 139, 145, 452, 454, 479-80, 494, 671-672; Joint Exs. 7; 8; 10; 11). Moreover, the hearing record demonstrates that the parents had an opportunity to respond to the district's defense and a review of the hearing record reveals that the student's mother testified that upon her son's enrollment at Ridge, she requested that the district of location provide the student with related services (Tr. pp. 480-81). Under the circumstances, the impartial hearing officer's decision to dismiss the matter was based upon matters developed in the hearing record and neither party exceeded the scope of the due process complaint notice. Accordingly, the impartial hearing officer did not err in rendering a determination regarding whether the district was required to provide the student with a FAPE.

### **District's Obligation to Offer the Student a FAPE during the 2010-11 School Year**

Having concluded that the district properly raised the issue of the extent of its obligation as the district of residence to provide the student with a FAPE for the 2010-11 school year, I will now consider the parents' argument that the impartial hearing officer incorrectly dismissed their claims pursuant to Education Law §3602-c. As a defense, the district argues that it did not have an obligation to offer the student a FAPE during the 2010-11 school year because the student was

parentally placed in a private school in the district of location; and furthermore, because the student had been evaluated and provided with an IESP by the district of location for that school year. For the reasons set forth below, I agree with the district that the impartial hearing officer correctly determined that the district was not obligated to provide the student a FAPE for the 2010-11 school year because, according to the facts of the case and consistent with the Office of Special Education guidance memorandum dated September 2007,<sup>13</sup> the district "need not make FAPE available" to a student who has been parentally placed in a private school in the district of location and who has been evaluated and provided with an IESP by the district of location.<sup>14</sup> For students who reside in New York, State law requires a school district of location to develop an IESP that is "based on the student's individual needs in the same manner and with the same contents as an [IEP]" and to "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (Educ. Law § 3602-c[b][1]). Parents are then provided the opportunity to challenge an IESP through the same due process procedures offered to students who are enrolled in a district of residence (*id.*) The following question and answer in the Office of Special Education guidance memorandum addresses the question as pleaded by the district:

12. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP?

U[nited] S[tates] E[ducation] D[epartment] has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private . . . school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear

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<sup>13</sup> The State policy guidance discussed in this decision was issued by the Office of Vocational and Educational Services for Individuals with Disabilities (VESID); however, in the intervening period VESID has been reorganized and renamed, and for purposes of this decision, will be referred to as the Office of Special Education.

<sup>14</sup> According to an interpretive guidance memorandum published by Office of Special Education and titled "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," (Office of Special Education guidance memorandum) dated September 2007, with respect to child find requirements and the provision of special education programs and services to students parentally placed in private schools within the district of location, the Office of Special Education guidance memorandum notes, in pertinent part, the following:

The district of location is responsible for child find for students who are parentally placed in nonpublic schools located in their geographic boundaries.

The CSE of the district of location must develop the IESP for students with disabilities who are NYS residents and who are enrolled by their parents in nonpublic . . . schools located in the geographic boundaries of the public school.

The IESP must be developed in the same manner and with the same contents as an IEP is developed.

(Office of Special Education guidance memorandum at pp. 4-5).

their intention to keep their child enrolled in the nonpublic . . . school, the district of residence need not develop or annually review an IEP for the student.

(Office of Special Education guidance memorandum dated September 2007 titled "Chapter 378 of the Laws of 2007 - Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State Education Law Section 3602-c").<sup>15</sup>

Here, the hearing record supports the impartial hearing officer's finding that the parents expressed their intent to privately place the student at Ridge for the 2010-11 school year, thus it appears that the parent first sought to parentally enroll the student under the State law dual enrollment statute to obtain public school services recommended by the CSE from one district – the district of location – without challenging the IESP as inappropriate and, thereafter, the parents again sought to obtain services again through the CSE of the other public school in this case – the district of residence.<sup>16</sup> The student's mother testified that she participated in the June 2010 CSE subcommittee meeting held in the district of location and that an IESP was developed as a result of that meeting (Tr. pp. 452, 454, 501-03; Joint Ex. 9; see Tr. pp. 670-71). During the July 2010 CSE meeting convened in the district of residence, the parents gave a copy of the student's June 2010 IESP to the CSE (Tr. pp. 53-54, 61, 91). Moreover, the student's mother testified that at the time of the June CSE subcommittee meeting held in the district of location, she indicated that the student would be attending Ridge for the upcoming school year and that she understood that the district of location would provide her son's related services upon his enrollment there (Tr. pp. 513-14, 516; see Joint Ex. 9 at pp. 1, 5), and the sub-CSE chairperson at the district of location confirmed that the parent had already decided to send the student to the district of location in June 2010 before the CSE in the district of residence even convened (Tr. p. 671).<sup>17</sup> The hearing record also demonstrates that the parents rejected the July 2010 IEP at the meeting and they advised the CSE of the district of residence that they had opted to place the student at Ridge (Tr. p. 58; Joint

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<sup>15</sup> Available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>. United States Education Department guidance can be found in the Federal Register at: Child Find for Parentally-Placed Private School Children with Disabilities (§ 300.131) 71 Fed. Reg. 46593 (August 14, 2006): "If a determination is made by the LEA [local educational agency] where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private [school] located in another LEA, the LEA where the child resides need not make FAPE available to the child" (See Maine School Administrative District #40, 108 LRP 40513 [ME SEA, Oct. 23, 2007] [interpreting and applying the federal guidance and concluding that a district of location was not required to create an IEP for a student given the parent's intention to keep a student in a private boarding school]).

<sup>16</sup> While neither the IDEA nor State law preclude a parent from meeting with CSEs from both a district of location and a district of residence to develop an IESP or IEP for their consideration, the IDEA and State law also do not require both public school districts to simultaneously provide services under both schemes. Additionally, parents are generally not advised to seek evaluations from two separate districts to avoid repeated testing in close proximity of time (Office of Special Education guidance memorandum at p. 11). In this case, the parent accepted the public school services recommended by the CSE and provided by the district of location under the student's IESP.

<sup>17</sup> Contrary to the student's mother testimony that she indicated to the CSE subcommittee that her son would attend Ridge for the 2010-11 school year, the student's mother later testified that the parents had not definitely decided whether the student would attend Ridge because they had to consider the programs offered by the district of residence (Tr. p. 516).

Ex. 10 at p. 6). Under the facts of this case and consistent with both the Office of Special Education guidance memorandum and federal guidance, the district—as the district of residence—was not required to make a FAPE available to the student and therefore, is not responsible for tuition reimbursement for the 2010-11 school year.

**Conclusion**

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 11, 2011**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**