FINDINGS OF FACT AND DECISION

Student's Name:	Henry Stutman
Date of Birth:	December 10, 1996
District:	East Ramapo Central School District
Hearing Requested By:	Parent
Hearing Officer:	William J. Wall, Esq.

Case: H.S. C v. East Ramapo Central School District

PRELIMINARY MATTERS

This matter took two days to hear during June, 2011. There were delays in the rendering the decision in this matter that were unavoidable. All hearing dates were mutually agreed upon by counsel for the parties and the Hearing Officer. The delay arose due to serious health problems encountered by the hearing officer. The nature of the illness incapacitated me for several months. Counsel for both parties were consulted and agreed that I would publish this decision as soon as I was able to do so with confidence that I was able to to evaluate the testimony and evidence without debilitating fatigue and write the decision in a way that met the required standards under the law and regulations. Unfortunately that delay was longer than anticipated, not due to the illness, but due to the side effects of some medication. Those problems have been resolved. I just wish to apologize for any inconvenience the parties have experienced because of these delays and assure them that the decision has been carefully considered before this publication.

The dates of the hearing were the following: 6/16/11 and 6/17/11. All Exhibits accepted into evidence are listed at the end of this decision.

THE DISTRICT'S POSITION

This case involves a request by the parent for tuition reimbursement for unilaterally placing the student in a non-approved, non-public school for the academic year 2010/2011. In addition, the parent is requesting reimbursement for transportation, additional costs and expenses and attorney fees. While I am authorized to consider and decide on costs associated with the student's educational needs, I do not have the authority to determine the awarding and/or payment of attorney

fees. Therefore attorney fees are excluded for the subject matter of this hearing and no such determination will be made in this decision.

The District's position is straight forward. The District CSE met on October 7, 2010, Classified the student as Other Health Impaired and recommended a residential placement. The team recommended a student teacher ratio of 8:1:1 with a variety of related services. The CSE referred the student to The Green Chimneys Residential School. The student was required to appear for a personal interview before being granted acceptance to the facility but the parent, after visiting the facility, rejected the placement as inadequate to meet the educational and emotional needs of the student. She therefore did not bring the student for an interview and as a result no offer of placement was made by Green Chimneys. As a result of the recommended placement, (Green Chimneys was entered into the IEP at some subsequent date) and the willingness of the District to provide tuition and other costs related to the student's enrollment, the District believes it has met it burden under FAPE and seeks to have the parent's request for tuition and costs associated with the unilateral placement of the student at Waterfall Canyon Academy in Ogden, Utah denied.

THE PARENT'S POSITION

The parent contends that the student has a number of learning disabilities, and psychiatric illnesses. The parent contends that the student presents with very complicated challenges that require very specific circumstances to facilitate meaningful progress in both academic and emotional areas. During the past year the student's psychiatric illnesses have intensified, requiring individualized care not only to allow

progress but to ensure that there will not be any significant regression in either his academic or emotional levels of performance. The parent did visit Green Chimneys and some other residential facilities but found them inadequate to meet her son's needs. She therefore rejected the placement and unilaterally placed her son int Waterfall Canyon Academy. She believed this institution was uniquely suited to meet her son's physical, psychological and educational needs. She placed the student in the facility and seeks reimbursement of tuition, costs and fees paid to Waterfall Canyon and related costs and expenses including travel for her and her son for the academic year 2010/2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The fact pattern in this matter is straight forward. The student was identified as a student with a disability early in his educational career. By the second grade it was clear that he required special education. For the 2004/2005 school year, he was a resident in the Katonah-Lewisboro School District but enrolled in the Eagle Hill School. in 2005/2006 he remained in the Katonah-Lewisboro School district but continued to attend Eagle Hill. The District had recommended a collaborative program but the parent rejected it.

During the 200/5/2006 school year the family moved int the East Ramapo CSD and the CSE met twice to develop and IEP for the student. The CSE recommended general education and related services. The parent did not challenge the placement but the student remained at Eagle Hill. Thereafter the student was placed at the Otto Spect School. That school operated as a homeschooling support program within a service community setting [T-10].

During both the 2009/2010 and 2010/2011 school years, the student was hospitalized for various psychiatric problems. Responding to a request for an expedited placement, the CSE met on October 7, 2010 and did recommend a residential placement. The district then sent out packages of information on the student to various residential facilities for possible placement. Two facilities replied, including Green Chimneys and the Andrus Children's Center. The parent had visited Green Chimneys during the month of September 2010, prior to the 10/7/11 CSE meeting. The parent advised Aura Signorini on November 1, 2010 by email that she felt Green Chimneys was a good facility but she did not believe it was suitable for her son. On or about November 1, 2010 she placed him at the Waterfall Canyon Academy in Utah. [T-11] It is that placement for the 2010/2011 academic year that is the subject of this decision.

This case is a Burlington/Carter case. Sch. Comm of the Town of Burlington v. Dep't of Educ. 471 U.S.359, 105 S. Ct. 1996, 85 L. Ed.2d 385 (1985); Florence County Sch. Dist IV v. Carter, 510 U.S. 7, 114 S. Ct. 361126 L. Ed. 2d. 284 (1993). A board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (Application of a Child Suspected of Having a Disability, Appeal No. 93-9; Application of a Child with a Handicapping Condition, Appeal No. 92-7; Application of a Handicapped Child, 22 Ed Dept Rep 487 [1983]). To meet its burden, a board of education must show that its recommended program is reasonably calculated to confer educational benefits (Bd. of Educ. v. Rowley, 458 U.S. 176 [1982]). The recommended program must also be provided in the least restrictive environment (34 C.F.R. § 300.550[b]; 8 NYCRR 200.6[a][1]). Application of a Child with a Disability. 02-055.

The beginning of a FAPE is the IEP that is procedurally and substantively correct.

Certain flaws or failures on the part of the District will not invalidate the IEP provided those defects do not interfere with the substantive rights of the parents or the education of the student. The pertinent regulation is 8 NYCRR 200.5. (j)(ii);

> (ii) Procedural issues. In matters alleging a procedural violation, an impartial hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies impeded the student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent's child, or caused a deprivation of educational benefits. Nothing in this paragraph shall be construed to preclude an impartial hearing officer from ordering a school district to comply with procedural requirements under this Part and Part 201 of this Title.

The IEP (Ex. 11) was developed at a CSE meeting held on October 7, 2010. The IEP (Ex. 11) contains a recommendation for a 8-1+1 special class. (p.1 of Ex. 11). The IEP specified Green Chimneys as the recommended placement. However, it is clear from the transcript that Green Chimneys never did offer the student a placement because he did not complete the application process which required a personal interview. The interview was not conducted because the mother (a certified Special Education teacher) had concluded that Green Chimneys was not an appropriate placement for her son despite the fact that she did recognize that it was a fine facility appropriate for other children. The nature and extent of her own son's disabilities precluded her from accepting the placement because she believed after viewing the facility and speaking with the staff that the facility could not provide the individual care and instruction her son required to make academic an emotional progress.

The fact the the student's mother visited the facility before it was recommend by the CSE in no way makes her decision unreasonable or inappropriate. This case involves a severely disabled student with a mother who is trying to find a placement for her son which would accommodate his needs and provided him with academic and emotional support. The fact that she was proactive in that search does not indicate a failure to cooperate with the CSE in the placement process, especially in light of Ex. 14, Dr. Jeanette E. Cueva's letter of 11/24/10, supporting the parent's decision not to accept Green Chimneys as a placement for her son.

> At the CSE meeting on October 7, 2010 H. was classified as OHI and both Green Chimneys and Andrus were recommended. While they are both therapeutic residential settings and are both strong programs, it is my professional and medical opinion that neither of these programs is suitable for H.

Dr. Cueva goes on to articulate her reasoning for that statement. I conclude that the IEP identified the educational needs of the student but did not recognize the extent and severity of his disabilities. Rather than quote extensively from the record which supports that conclusion, I refer the parties to the following exhibits; Parents Ex. 3, Parents Ex. 7, Ex. 12 and Ex. 14. Therefore I conclude that the IEP developed by the CSE on October 7, 2010, failed to confer a FAPE on the student for the 2010/2011 academic year.

The second prong of Burlington focuses on the appropriateness of the placement chosen by the parent for the student. "In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials

to develop and implement at public expense an IEP placing the child in a private school." (Burlington)

The Carter case refined the court's thinking and it determined that strict compliance with the requirements of the state's education agency were not necessary for a unilateral private placement to be "appropriate".

Nor do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards. Trident's deficiencies, according to the school district, were that it employed at least two faculty members who were not state-certified, and that it did not develop IEPs. As we have noted, however, the 1401(a)(18) requirements - including the requirement that the school meet the standards of the state educational agency, 1401(a)(18)(B) - do not apply to private parental placements. Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." 950 F.2d, at 164. Accordingly, we disagree with the Second Circuit's theory that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private" schools. Tucker, 873 F.2d, at 568 (internal quotation marks omitted). Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement. (Carter)

The burden to establish The Waterfall Canyon Academy as an appropriate placement rests with the parent. The standard by which a private placement is determined to be appropriate is found in Frank G. v. Board of Educ. Of Hyde Park, 459 F. 3d 356 (2nd Cir. 2006). In an extensive discussion of the requirements necessary to establish the appropriateness of the private placement the court stated.

Parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate. M.S., 231 F.3d at 104. Nevertheless, parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public

education. See 20 U.S.C. § 1401(9). An appropriate private placement need not meet state education standards or requirements. Carter, 510 U.S. at 14, 114 S.Ct. 361. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student. Id. In addition, parents "may not be subject to the same mainstreaming requirements as a school board." M.S.,231 F.3d at 105 (citing Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (holding that "the test for the parents' private placement is that it is appropriate, and not that it is perfect")).

Subject to the foregoing exceptions, the same considerations and criteria that apply in determining whether the School District's placement is appropriate should be considered in determining the appropriateness of the parents' placement. Ultimately, the issue turns on whether a placement — public or private — is "reasonably calculated to enable the child to receive educational benefits." Bd. of Educ. v. Rowley, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); Muller ex rel. Muller v. Comm. on Special Educ., 145 F.3d 95, 105 (2d Cir. 1998). While the IDEA does not require states to "maximize the potential of handicapped children," Rowley, 458 U.S. at 213, 102 S.Ct. 3034, it must provide such children with "meaningful access" to education, Walczak,142 F.3d at 133. With these goals in mind, we have held that for an IEP to be reasonably calculated to enable a child to receive an educational benefit, it must be "likely to produce progress, not regression." Id. At 130 (quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,118 F.3d 245, 248 (5th Cir. 1997)). Courts must, therefore, "examine the record for any `objective evidence' indicating whether the child was likely to make progress or regress under the proposed plan." Id. (quoting Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997).

Thus, "in the regular classrooms of a public school system, the achievement of passing marks and regular advancement from grade to grade will be one important factor in determining educational benefit." Rowley, 458 U.S. at 207 n. 28, 102 S.Ct. 3034; see also Sherman v. Mamaroneck Union Free Sch. Dist., 340 F.3d 87, 93 (2d Cir. 2003) (noting that "[p]assing grades are . . . often indicative of educational benefit"). Although it is more difficult to assess the significance of grades and regular advancement outside the context of regular public classrooms, these factors can still be helpful in determining the appropriateness of an alternative educational placement. See Walczak, 142 F.3d at 130.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207, 102 S.Ct. 3034. 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. See Page 365
Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001) (holding that a unilateral private placement was appropriate where, inter alia, class sizes were small, the student made significant educational progress, and his grades and behavior improved significantly). 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. See M.S., 231 F.3d at 105
("The test for parents' private placement is not perfection.") (internal quotation marks omitted). 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." Rowley, 458 U.S. at 188-89, 102 S.Ct. 3034 (internal quotation marks omitted).
Frank G. v. Board of Educ. Of Hyde Park, 459 F. 3d 356,364,365 (2nd Cir. 2006)

With this relatively recent articulation of the law we can now turn to the facts of the placement of the student to determine if the placement for the student was appropriate.

The District's argument against the appropriateness of the placement rest on the fact that the student was hospitalized on two occasions during the 2010/2011 for psychiatric reasons. They also contend the the student did not make any real academic or emotional progress. The fact that the student was hospitalized is not a significant determinative factor in the appropriateness of this child's placement. He was hospitalized rather early in his stay at Waterfall Canyon and his record of an inability to cope with change is clearly documented. The fact that he returned to Waterfall Canyon after the hospitalizations and showed improvement in social behaviors and some progress academically outweighs the the mere fact of his being hospitalized. A Director of the facility, Karen Nickel, testified that the school " serves adolescents and

young adults ages 13 to 26 in a residential and community-based setting that are struggling with academics in their hometowns due to complexities and intellectual problems, educational issues, learning disorders and pervasive developmental disorder, autism I guess are on the spectrum and very complex kids with dual diagnosis". (T. p.218) She continue to describe the physical facility and the educational philosophy. She identified it as "moral reconation therapy" (T. p.225). The program is a recognized therapeutic model used throughout the country. The residential facility and the school are licensed by the State of Utah. The student's program was reviewed in detail. It is a very structured program with both therapeutic and academic supports. The program is structured to deal with significantly disabled students.There were 45 students enrolled at the time of Ms. Nickel's testimony. (T p.219)

With respect to this student, the program meets the criteria articulated above in Frank G. v. Board of Educ. Of Hyde Park, 459 F. 3d 356,364,365 (2nd Cir. 2006).

The residential aspect of the program is highly structured and the student has very close monitoring by the residential staff with only about 45 minutes of free time during a school day. There are adequate staff to supervise the student and make sure he is safe from himself and not a danger to others. He participates twice a day in a social skills group (T. p. 221). There are also daily living skills presented daily. They are also knowledgeable and experienced so that should the student deteriorate to a level where he needed hospitalization, they are in a position to obtain such help with minimal delay.

The academic portion of the facility is described as 9,000 sq. feet building broken into 6 class rooms with class sizes of four to seven students with a teacher. In addition to the teacher in the classroom the

school has two support staff that are there for behavioral and emotional management. There is also a program coordinator , school counselor and an administrator.

Ms. Nickel testified in her opinion the student was a very good fit for the program. The program employed by the facility is a step program so that each student may have some success and then proceed to the next step. The program is thus individualized for the student. Ms. Nickel indicated that the student had lost about 15 pounds and had more energy. He now participates in the entire daily schedule and has a good relationship with his therapist. With respect to his academic program the picture is not as upbeat. Ex. 15 lists both behavior and academic goals, along with progress reports. H. is not progressing in all of his academic goals and the ones where he is showing some progress, his highest percent of achievement is 40% with others more consistently at 20%. However, it is clear he is making academic progress. He has only been at the school for 8 months when these evaluations were written and I find that they are credible based on the testimony of M. Nickel and the student's mother. In addition, the documents vary extensively from academic area to academic area and each report provided a brief but detailed reason for the progress measurement. From both the testimony and the written evidence I find the placement meets the requirement of the second prong of Burlington.

Finally, the equities favor the parent in that she cooperated completely with the district throughout the process. The parent provided all relevant educational and psychological evaluations and participated at all CSE meetings. I note that the parent did not disclose her visit to Green Chimneys at the 10/7/10 CSE meeting. I find no mandatory ethical obligation to do as she clearly agreed that the program was a good one but probably not suitable for her son.In the interests of full disclosure of the student's situation she might have done so but it is understandable that she did not have a placement for her son at the time of the CSE meeting and did not want to jeopardize any placement she may have been required to accept if no other options were found. She admitted that she was aware at the CSE meeting that Green Chimneys was going to be a recommended placement but at that time had not committed to Waterfall Canyon or any other institution and was working with an educational consultant to find a an appropriate placement. She also pointed out that no one from the CSE asked if she had visited Green Chimneys. It is not until after the 10/7/10 CSE meeting that she determined that she would be sending her son to Waterfall Canyon. I find that her failure to communicate to the CSE about her visit to Green Chimneys did not significantly reduce the balance of equities in the mother's favor.

ORDER

In as much as I found that the School District did not provide a FAPE to the student for the 2010-2011school year, the Waterfall Canyon Academy is an appropriate placement for the student and the balance of equities favor the parent, I herby ORDER that the School District reimburse the parent for the tuition and fees incurred during the 2010/2011 school for the student's attendance at Waterfall Canyon. I further ORDER that reasonable transportation be reimbursed to the

parent for two trips to the school and any transportation costs incurred by the parent for mandatory participation in any of the school programs or meetings. Any fees for related services incurred in connection with the student's attendance at Waterfall Canyon shall also be reimbursed upon presentation of appropriate documentation.

The above ordered costs must be properly documented and presented to the district in order to obtain reimbursement. Reimbursement is not to be delayed once the costs have been documented and shall be made no later that 30 days from the date that properly documented receipts and invoices are presented to the District.

DATED: January 13, 2012

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William J. Wall. Esq.

Impartial Hearing Officer

PLEASE TAKE NOTICE

Within 35 days of the date of this decision, the parent and/or the School District has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act.

"The notice of intention to seek review shall be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period." (8NYCRR279.2[b]) Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and sample forms for filing an appeal are included with this decision. Directions and forms can also be found in the Office of State Review website: www.sro.nysed.gov/appeals.htm.

EVIDENCE RECEIVED

(PLease note that the evidence listed had been marked numerically even though all of the evidence received was from the parent.)

No.	Date	Description	# of pages
1.	10/12/05	IEP	7
2.	undated	Home Schooling Year End Narrative Report	2
3.	1/26/10	Letter and Discharge Summary from Four Winds Hospital	5
4.	2/5/10	Home Schooling Quarterly Report	2
5.	4/23/10	Home Schooling Quarterly Report	2
6.	6/28 10	Home Schooling Quarterly Report	2
7.	4/15/ - 6/24/10	NYU Child Study Center Confidential Neuropsychological and Educational Report	13
8.	9/29/10	Four Winds Discharge Summary and Labs	15
9.	9/24/10	Parent Letter to CSE	1
10.	9/28/10	Fax from Counsel requesting CSE meeting	3

11. 10/22/10 Transmittal letter of IEP
8
10/7/10 IEP
12. 10/28/10 Letter of Myrna Harris
2
13. undated Resume of Myrna K. Harris
3
14. 11/24/10 Letter of Jeanette E. Cueva, M.D.
2
15. 6/15/11 16 Annual Goal Reports
16
undated Midterm Grade Report 2nd Q. 2010-2011
1
5/6/11 Progress Report
1

Hearing Officer Evidence

I. 11/1/10 Parent Letter to CSE -10 day notice and Due 3
Process Request
II. 11/16/10 Response from District Counsel to Parent
2