DEPARTMENT OF EDUCATION, SPECIAL EDUCATION UNIT
STATE OF COLORADO

Case No. 2006: 112

FINDING OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

[STUDENT], by and through his parents, [PARENT] and [PARENT],
Petitioners.

v.

ST VRAIN VALLEY SCHOOL DISTRICT RE-1J,
Respondent.

THIS MATTER came before the Impartial Hearing Officer (IHO) for a due process hearing upon the Petitioner's Due Process Complaint Notice. The hearing was held on November 7-8, and 13-14, 2006. The date for entering a Findings of Fact, Conclusions of Law, and the Final Order was extended by stipulation of the parties to November 29, 2006.

Petitioner appeared by his mother, and Petitioners were represented by Louise Bouzari and Kate Gerland of The Law Office of Louise Bouzari. Respondent appeared by Adele L. Reester and Catherine A. Tallerico of Bernard, Lyons, Gaddis & Kahn, P.C.

ISSUES TO BE DETERMINED

1. Was a Free and Appropriate Public Education (FAPE) provided by the Respondent to the student at Frederick Elementary School for the 2005-2006 school year?

2. Was FAPE provided by an IEP to the Student for the 2006-2007 school year by the Respondent?

3. If not, is the placement of the Student at the Western Institute for Neurodevelopmental Studies and Interventions (WINSi) for the 2006-2007 school year an appropriate placement for his needs?

4. If the placement at WINSi is found to be appropriate, what should the monetary reimbursement be by the Respondent?

5. Is the Evaluation by Dr. Kirk an Independent Educational Evaluation as defined by the Individuals with Disabilities Education Ace (IDEA) and, therefore, the financial responsibility of the Respondent?

After receiving the testimony of thirteen witnesses and numerous documentary exhibits extending over a three and one-half day hearing, and after giving such evidence due consideration and such weight and

relevance as the undersigned IHO determined was proper, the undersigned IHO makes the following Findings of Fact, Conclusions of Law, and Final Order:

FINDINGS OF FACT

1. The Petitioners presented the Student to the Respondent in May 2005 for enrollment in the Respondent's District. The initial letter of introduction by Petition Mother was a letter dated May 9, 2005 which included 15 attachments. The attachments included a draft IEP from a school located in Hawaii that had expired in January 2005, information from the Student's doctors, information from the Student's prior placements in Hawaii including his academic progress while there, and additional information specific to the Student regarding his behavior and other unique information that was drafted by the Petitioners. Petitioner Mother wrote two additional letters to the Respondent dated May 25, 2005, and July 27, 2005, that included additional information regarding the Student. Additionally, Petitioner Mother met with staff from the Respondent on at least two occasions in May and June (Exhibit L).

2. Petitioner Mother signed the Permission for Initial Assessment on June 14, 2005 (Exhibit A). This permission was for assessments of the Student in the following areas: Cognitive; Social/Emotional; Physical; Communicative; and Educational.

3. Respondents performed assessments on the Student during the summer of 2005. These assessments included the following: Student observations; record review; parent interviews; and testing through he Woodcock Johnson III (WJ III), Goldman Fristoe 2, CEELF 4, SIB-R, Behavior Assessment System for Children 2 (BASC 2), Wechsler Intelligence Scales for Children – 4th Edition (WISC IV), and Developmental Test of Visual – Motor Integration and Sensory Profile. Summaries of the results from these assessments were verbal provided at the August 12, 2005 IEP team meeting and are also summarized in the August 12, 2005 IEP itself (Exhibit C).

4. Petitioners received a written Notice of Meeting dated July 27, 2005, for an IEP meeting scheduled for August 12, 2005 (Exhibit B).

5. An IEP team meeting was held on August 12, 2005. Participants at the meeting included the following: Petitioner Mother; Kathy McCall (Special Education Teacher and Special Education Director Designee); Joyce Spong (General Education Teacher); Kathy Horning (Building Principal); Faith McFarling (Speech/Language Pathologist); Kim Bertele (Occupational Therapist); Holly Danielson (School Psychologist); and Margaret Wilson (Behavioral Support Team representative).

6. At this IEP team meeting, the Student's eligibility for special education services was determined and the Student's Goals and Objectives were created based upon his disabilities and assessment results. The Student's baselines were established using his assessment results from which IEP goals, objectives, services and accommodations were determined. Additional input was received from Petitioner Mother, and the August 12, 2005 IEP was formulated. The Student's disability was determined to be "Other Physical Disability" due to the medical diagnosis of bipolar and Asperger's syndrome.

7. The IEP team met again on September 9, 2005, in order to finalize a Behavior Support Plan (BSP) for inclusion into the IEP. Present at this IEP team meeting included all of those previously mentioned above, except that Erin Mallon attended as the Speech/Language Pathologist instead of Ms. McFarling, and Mary Beth Downing also attended as a School Psychologist as these service providers would support the IEP delivery.

8. Petitioner Mother signed the Parental Agreement for Initial Placement on August 12, 2005, based upon the Student's assessments and the consensus of the IEP team at the August 12, 2005, IEP team meeting, the student was placed at Frederick Elementary School with a combination of regular and special education classes for the 2005-2006 school year and special education supports. This placement was determined to be the Student's least restrictive environment (LRE).

9. Copies of the draft August 12, 2005, IEP, including the Behavior Support Plan (BSP), were provided by Ms. McCall to the Petitioners. The Petitioners reviewed the documents and returned them to the Respondent on October 11, 2005.

10. Petitioners agreed to and were satisfied with the August 12, 2005 IEP and the Student's placement at Frederick Elementary School. This was communicated to the Respondent on several occasions, including in the Communication Log (Exhibit BB) on October 3, 2005, and in a letter written by Petitioner Mother on December 13, 2005 (Exhibit 11).

11. On or about December 7, 2005, the Student hit his classroom teacher, Ms. Spong. Ms. Spong stepped in front of another student in a wheelchair to protect the child while the Student was attempting to flee the classroom for his safe place. This incident lead the District to perform a threat assessment regarding the Student (results of which were shared with the Petitioners). It also led to the parties' revision of the Behavioral Support Plan.

12. The next IEP team meeting was held on January 18, 2006, in order to amend the BSP and to review the IEP services. This meeting was requested by the Petitioners on December 12, 2005 (Exhibit M). The meeting was initially scheduled for January 6, 2006; however, Petitioner Mother had surgery and had to reschedule the meeting to a later date. Petitioners were provided written notice of the January 18 meeting on January 5, 2006 (Exhibit D). Petitioner Mother attended this meeting and fully participated as an IEP team member. Also present at this meeting were the following: Ms. McCall; Ms. Spong; Ms. Horning; Ms. Mallon; Ms. Bertele; and Ms. Downing (Exhibit E).

13. At this meeting, the IEP team reviewed the services that were being provided under the August 12, 2005 IEP and agreed that no changes were necessary. Additional, the team discussed and amended the BSP for the Student. The amended BSP was implemented for the Student following this IEP team meeting. Petitioners objected to the language in Number 8 of the amended BSP, but did not object to any other aspects of the Student's IEP, including the .5 hour/month indirect mental health services as listed in the IEP. This disagreement with the Petitioners was addressed at the building level by Ms. Horning and on the Respondent's level by Ms. Ladd. The Petitioners ultimately filed a Federal Complaint on this specific issue. That disagreement was not at issue in this due process hearing.

14. On February 16, 2006, Ms. McCall and Ms. Downing met with the Petitioners in order to discuss the Student's behavior at school and to request that the Petitioner's consent to the reevaluation of the Student for social/emotional disabilities. Petitioner Mother signed the Notice/Permission – Reevaluation form on February 16, 2006 (Exhibit F).

15. Petitioners received a written notice on February 28, 2006, for an IEP team meeting on March 23, 2006 (Exhibit G). An IEP team meeting was held on March 23, 2006, for the reevaluation. Present at this meeting were the following: Petitioner Mother; Ms. McCall; Ms. Spong; Ms. Horning; Ms. Mallon; Ms. Bertele; and Ms. Downing.

16. The Student "was referred for a neuropsychological evaluation by Dr. Theodore Henderson, M.D., PhD, at Brain Matters, after receiving a brain spectroscopy scan which revealed findings suggestive of a traumatic brain injury." (Exhibit 1, pg. 1). The Student had the brain scan at Brain Matters sometime in February. The Petitioners retained Dr. Kirk to perform the recommended comprehensive neuropsychological evaluation. This evaluation was commenced by the Petitioners sometime prior to March 22, 2006. The Petitioners communicated to the Respondent on March 22, 1006, in the daily Communication Log that "[the Student] was undergoing a comprehensive neuropsychological evaluation." (Exhibit BB, pg. 236). This was prior to the March 23, 2006, meeting at which the Petitioners were verbally provided the results of the Respondent's assessments for the reevaluation meeting.

17. At the March 23, 2006 IEP team meeting, the Respondent's assessment results were presented. Theses results were summarized in a draft IEP document that was discussed at the meeting but not finalized (Exhibit H). The assessments included: File reviews; Informal assessments; Classroom observations; BASC 2; and a Parent interview. The consensus of the IEP team was to change the Student's primary disability from Other Physical Disability to Significantly Identified Emotional Disability (SIED). The Respondent was ready to begin modifying the IEP, including the Goals and Objectives at this meeting; however, Petitioner Mother requested that the meeting be continued until after the results of a comprehensive neuropsychological evaluation was completed and could be reviewed by the team. The IEP team agreed to comply with Petitioner's request.

18. The Respondent's assessment results were provided to the Petitioners verbally at the March 23, 2006 meeting and in written form by ms. McCall (Exhibit H; hearing transcript, v. 1, pp. 187-188).

19. Unfortunately, while the parties were waiting for the results of Dr. Kirk's neuropsychological testing, the Student engaged in two additional incidents of hitting. One incident occurred April 25, 2006, and the other May 11, 2006.

20. On May 11, 2006, immediately following the last hitting incident, Petitioners requested that the Student be placed on Homebound status. The District approved the request and offered to provide the Student with services in his home. Petitioners rejected the District's offer to provide services (Hearing Transcript, V. lll, p. 716, line 6-13).

21. The Respondent received the results of the comprehensive neuropsychological evaluation performed by Dr. Kirk on May 15, 2006 (Exhibits 1 and R). The next IEP team meeting was held on May 23, 2006. This meeting was originally scheduled for May 25, 2006; however, it was rescheduled at the Petitioners' request (Exhibit I). Petitioners were provided written notice of the rescheduled May 23, 2006, IEP team meeting on May 16, 2006 (Exhibit J).

22. An IEP team meeting was held on May 23, 2006. Present at that meeting included the following: Petitioner Mother; Ms. Sires; Ms. McCall; Ms. Spong, Ms. Horning; Ms. Mallon; Ms. Bertele; Ms. Downing; Marla Ladd; and the attorneys for both parties, Ms. Bouzari and Richard N. Lyons, II. A draft IEP document was prepared for discussion at the meeting, but the IEP was not finalized (Exhibit K). At this meeting, the IEP team's consensus was that the student could not return to Frederick Elementary School for the following school year because the Student needed more therapeutic services due to elevated social/emotional needs.

23. At the May 23, 206, IEP team meeting, which was the last IEP team meeting held before Petitioners provided their 10-day notice, the Petitioners did not state their intent to privately place the Student at public expense or that they were rejecting the agreed upon increase of therapeutic services for the Student.

24. Immediately following this May 23, 2006, IEP team meeting, the parties and their attorneys met to discuss the placement for the implementation of the IEP and the delivery of services for the Student. Although more therapeutic services had been agreed to by the team, the Student's actual placement in a specific program was not determined. The Respondent provided five options (four that were ultimately available for the Student based on his age) for this placement and allowed the Petitioners to investigate these placements and provide their input. The four available places that were provided by the District included: Cleo Wallace; Flatiron Academy; the Littler Center; and Burlington Elementary. Only Burlington Elementary was a District school; however, the remaining three programs were available as placements by contract with the Respondent. Ms. Sires testified at the hearing that all were appropriate placements for the Student pursuant to the May 23, 2006 IEP (Hearing Transcript, V.III, p. 688, lines 2-13).

25. The draft May 23, 2006 IEP was not finalized because the Petitioners would not agree to place the Student at any of the District's available placements. After the Petitioners declined to enroll the Student in one of the placements for the 2006-2007 school year and demanded that the Respondent place the Student at WINSi, on September 18, 2006, the Petitioners provided the Respondent with their 10-day notice that they would be placing the Student in a private placement.

26. The school year for the Respondent's student body began on August 23, 2006, less than ten business days after the notice was provided.

27. Throughout the 2005-2006 school year there were three behavior incidents by the Student at school. For each of these incidents the Respondent followed either the BSP or the amended BSP, whichever was in effect at the time of the incident (Exhibits Y, Z, AA). Petitioner agreed with the appropriateness of the discipline for the December 7, 2005, and April 25, 2006, incidents (Exhibits Y and Z). The discipline for these incidents totaled less than four days (two days of out-of-school suspension and two half-days of in school suspension).

28. The Respondent provided the Petitioners with a copy of the Colorado Department of Education, Educational Rights of Parents booklet at the IEP team meetings held on August 12, 2005; September 9, 2005; January 18, 2006; March 23, 2006; and May 23, 2006.

29. Based upon the above, the Respondent met all procedural requirements of IDEA throughout the 2005-2006 school year.

30. The August 12, 2005, IEP was individualized for the Student based upon the assessments performed on him during the summer of 2005 and based upon his past performance as communicated by the Petitioners both verbally and in writing.

31. The Student was placed in his LRE at Frederick Elementary and received special education and related services in a combination of regular and special education class structure for the 2005-2006 school year.

32. The services required in the Student's August 12, 2005 IEP were provided in a coordinated and collaborative manner, with Ms. McCall acting as the Student's case manager. Ms. McCall oversaw the IEP team meetings and coordinated the delivery of services by the specialists throughout the entire school year.

33. The required services in the August 12, 2005 IEP (Special Education, Speech/Language, Occupational Therapy, and School Psychologist) were all provided to the Student. Additionally, the Respondent provided more than the required .5 hour/month indirect school psychologist services.

34. The Student's BSP and amended BSP were followed throughout the school year. Specifically, during the December 7, 2005, incident at school, Ms. Spong did not violate the BSP when she stepped in front of another student in a wheelchair to protect her while the Student was attempting to flee the classroom for his safe place. The BSP at that time did not require that the Student's exit from the classroom when going to a safe place not be blocked. Staff was permitted to use proactive strategies with the Student as provided in Paragraph 8 of the BSP (Exhibit C, pg. 42b). The language regarding not blocking the Student's exit from the classroom was incorporated into the amended BSP in January (Exhibit E).

35. The Student's amended BSP was followed after its implementation in January, 2006, during the Student's behavior incidents at school on April 25, 2006 and May 11, 2006.

36. The Student's sensory break requirements as described in the IEP 9Exhibit CC, pg. 43) were also not violated. The sensory breaks were to be given "on the hour and half hour or as needed." Ms. McCall had a telephone conversation with Petitioner Mother and reached an agreement regarding the provision of sensory breaks for approximately the first half of the school year. Based upon this agreement and the language in the IEP that the breaks were to be given "as needed" the sensory breaks were properly provided. Ms. McCall then physically wrote in the break times on the Student's daily schedule for him to see beginning sometime in mid-February, 2006 (Exhibit CC, pg. 99).

37. The following academic benefits as shown by the Student were established:

- The Student made progress on his Goals and Objectives from his August 12, 2005 IEP as shown in his progress reports for the three trimesters of school (Exhibit 24). Specifically, the Student mastered three of his objectives and was making progress on 14 other objectives.

- The Student made progress on his 4th grade curriculum as shown by his report card. For example, over the course of the school year the student became only "partially proficient" in several areas of mathematics (gaining ratings of "2's". He also became "proficient" in several areas of science (gaining ratings of "3's") (Exhibit 25).

- The Student made progress in reading as testified to by ms. McCall (an expert in reading), Ms. Spong (the Student's regular education reading instructor throughout the year), Petitioner Mother's observations throughout the year, and the Student's 4th grade reading checklist as completed by Ms. Spong (Exhibit 26).

38. Additionally, the Petitioner's own expert, Dr. Kirk, testified that the Student made minimal progress throughout the year.

39. The Student made only minimal academic progress despite a large number of absences (17 days) throughout the school year and a large number of days when he left school early (18) for a variety of reasons. (Hearing Transcript, V. 1, p. 200, l.9-p. 201, l.5)

40. The Student made only minimal academic progress even with at least three weeks of school homework that were excused by the Petitioners and one week in which the Petitioners substituted Cub Scout work for school homework.

41. The Student "was referred for a neuropsychological evaluation by Dr. Theodore Henderson, M.D., PhD, at Brain Matters, after receiving a brain spectroscopy scan which revealed findings suggestive of a traumatic brain injury." (Exhibit 1, pg. 1). The Student had the brain scan at Brain Matters sometime in February. The Petitioners retained Dr. Kirk to perform the recommended comprehensive neuropsychological evaluation.

42. This evaluation was commenced by the Petitioners sometime prior to March 22, 2006. The Petitioners communicated to the Respondent on March 22, 2006, in the daily Communication Log that "[the Student] was undergoing a comprehensive neuropsychological evaluation." (Exhibit BB, pg. 236). This was prior to the March 23, 2006, meeting at which the Petitioners were verbally provided the results of the Respondent's assessments for the reevaluation meeting.

43. The Respondent did not perform a comprehensive neuropsychological evaluation on the Student.

44. The Petitioners did not inform the Respondent at the March 23, 2006 IEP team meeting that the comprehensive neuropsychological evaluation was going to be an independent educational evaluation at public expense and that the Petitioners were rejecting any of the Student's testing results. The Petitioners first informed the Respondents that they wanted reimbursement for this evaluation following the meeting I a letter dated March 28, 2006 (Exhibit 18).

45. The Petitioners provided the results of Dr. Kirk's comprehensive neuropsychological evaluation to the Respondent on May 15, 2006. The members of the Student's IEP team reviewed the results for the May 23, 2006, IEP team meeting and in general agreed with the results, including the determination that the Student needed more therapeutic services for the following school year and that could not be provided at Frederick Elementary.

46. At no time after the IEP meeting of May 23, 2006, was recessed and after the Respondent was informed by the parents that none of the four placements suggested by the Respondent was suitable, did the Respondent convene another IEP meting to discuss the placement further and, in fact, suggested the Petitioners file their 10-day notice for a Due Process hearing.

47. The testimony of the Mother that none of the placements suggested by the Respondent was suitable was undisputed by the Respondent.

48. Respondent contends that WINSi is not an appropriate placement because it "is not an educational program." This defense is based on an incorrect legal premise: that private placements must conform to the educational standards of the student's home state or that the instruction must be delivered in a traditional format or setting. The U.S. Supreme Court has made it clear that parents can be entitled to reimbursement for private placements even if the placement does not meet the regulatory standards of the student's home state. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993). Additionally 34

C.F.R. 300.403© states "A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." *See also Lamoine Sch. Dep't v. Maine State Educ. Agency,* 40 IDELR 148, 587, 592-93 (Maine Dept. of Educ., Oct. 6, 2003) (holding that wilderness program was an appropriate private placement, despite fact that it was "not a traditional academic environment" and not approved the state department of education; *Student v. Burbank Unified Sch. Dist.,* Case No. SN03-01451, slip op. at *15 (Cal. Special Educ. Hearing Office, Oct. 21, 2003) (rejecting argument that private placement was not appropriate because it did not meet the state standard for the minimum number of instructional days).

49. Respondent also contends that WINSi is inappropriate because it is not "on the Colorado Department of Education's approved eligible facilities list." A similar "list of approved private school" argument was attempted by the district in the *Florence County* case, and was rejected by the Court.

DISCUSSION

It is undisputed that the burden is on Petitioners to show, by a preponderance of the evidence, that the Respondent has not met its obligations under the IDEA. *Schaffer v. Weast,* 126 S. Ct. 528 (2005); *Urban v. Jefferson County Sch. Dist. R-1 870 F.Supp.* 1558, 1567 (D. Colo. 1994), *aff'd,* 89F.3d 720 (10th Cir. 1996).

The Supreme Court in *Board of Educ. of Hendrick Hudson Sch. Dist. V. Rowley*, 458 U.S. 176, 201 (1982), set forth a two prong test to determine if FAPE was provided. First, whether there has been compliance with the procedural requirements of the IDEA; and second, whether the IEP was reasonably calculated to enable the student to receive educational benefit.

The Procedural Requirements of the IDEA Were Met.

Based upon the findings of fact set forth herein, the IHO determines that there was compliance with the procedural requirements of the IDEA. While this issue was not conceded by Petitioners, no evidence was presented to controvert the evidence of such compliance. Exhibits A-K and X, along with the accompanying testimony relating to these exhibits, clearly demonstrate adherence to the procedural requirements of the IDEA.

An IEP is "reasonably calculated to enable the student to receive educational benefits" if it meets the four-part test set forth in *Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.,* 118 F.3d 245, 253 (5th Cir. 1997); *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692, 701 (10th Cir. 1998). The four relevant factors in this determination are that: (1) the program is individualized on the basis of assessment and performance; (2) the program is administered in the LRE; (3) the services are provided in a coordinated, collaborative manner; and (4) positive academic and non-academic benefits are demonstrated. *Cypress-Fairbanks Indep. Sch. Dist., supra.*

An examination of the August 12, 2005 IEP against each of these four factors indicates that the IEP was reasonably calculated to enable The Student to receive educational benefits.

1. Individualized Program.

In preparing the August 12, 2005 IEP and resulting educational programs for the Student, the District followed the procedures outlined in the applicable IDEA regulations. Ms. Danielson (School Psychologist), Ms. McCall (Special Education Teacher and expert in field of Special Education and

Reading), and Ms. Horning (Principal of Frederick) all testified that the IEP was individualized for the Student based upon assessments conducted over the summer of 2005, review of records, student observation and information provided by Petitioner Mother. The District provided extensive opportunity for full and active participation by Petitioners in both the development and implementation of the IEP process. The Act creates a presumption in favor of the educational placement established by this IEP. *Tatro v. Texas*, 703, F.2d 823, 830 (5th Cir. 1983). The first prong of the *Cypress* test is thereby satisfied.

2. Least Restrictive Environment.

The Student received special education and related services at Frederick Elementary School in a combination of regular and special education class structures, which was the Student's LRE at that time Student was integrated into the regular educational program to the fullest extent possible under the requirements of his IEP. Petitioners do not dispute the Student's LRE for the 2005-2006 school year. The second prong of the *Cypress* test is therefore satisfied.

3. Coordinated, Collaborative Manner.

The services under the IEP were also provided in a coordinated, collaborative manner throughout the year by Ms. McCall as the case manager and the other specialists on the IEP team. No evidence disputing this issue was presented. The third prong of the *Cypress* test is thereby satisfied.[1]

4. Positive Academic and Non-academic Benefits

The crux of this case is whether positive academic and non-academic benefits were demonstrated. The IHO finds that the August 12, 2005 IEP did provide educational benefit to the Student. The academic progress is amply demonstrated by the progress reports (Exhibit EE), work samples (Exhibit DD), report card (Exhibit 25), reading worksheet (Exhibit 26) as well as the testimony of Ms. McCall and Ms. Spong. While attending Frederick Elementary under the IEP, the Student made progress on his IEP Goals and Objectives (Exhibit EE). At different times throughout the school year, the Petitioners agreed and admitted that such progress was being made. This progress is evidenced in the Student's work product and documented in the progress reports sent home to the Petitioners throughout the court of the school year, including a final progress report in May, 2006.

Significant non-academic benefits were also demonstrated through the testimony of Erin Mallon, Ms. McCall and Ms. Spong. The non-academic benefits included the Student making friends, being part of the classroom, improved handwriting and cutting skills, improvement in speech fluency (decreased stuttering), more appropriate peer interactions, improvement in social speech and turn-taking and other areas as further detailed in the Findings of Fact.

The IDEA was not designed to guarantee the academic success of a disabled child. The Act does not require the maximization of a child's potential. In fact, the Act implicitly recognizes the potential inability of an educational system to provide the resources necessary for a child to obtain the highest level of success. As such, an examination of a child's expected level of advancement over a given period, akin to maximization of his educational potential, and comparison of a child's progress through percentile

[1] The IHO notes that the Student's IEP need only be reviewed once a year. 34 C.F.R. Sec. 300.343(d). The IEP team visited the IEP on five occasions over a ten-month time frame, demonstrating the commitment to ensuring that the student was supported and that his needs were being met.

scores, as opposed to individual gains, are improper measures of academic progress. *Houston Indep. Sch. Dist. V. Bobby R,* 200 F.3d 3411,349 (5th Cir. 2000). Further, it is not necessary for the child to improve in every area to obtain an educational benefit from his IEP. Ld. The IDEA does not promise perfect solutions to the vexing problem posed by the existence of disabilities in children. The Act sets more modest goals: it emphasizes an appropriate, rather than ideal education, and it requires an adequate, rather than optimal, IEP.

However, as noted above in the Findings of Fact, it is impossible to totally reject the progress and achievements as documented and measured and testified to, by the classroom teacher, the speech/language therapist and the Special Education teacher. To conclude that this Student made absolutely no progress whatsoever as Petitioner's professional witnesses would have us believe controverts such evidence. Such a strained and illogical conclusion cannot be drawn from the facts. The educators at the District, who worked extensively with the Student on a daily basis, agree that he received an educational benefit from the program at Frederick Elementary and that the Student progressed towards the goals and objectives stated in his IEP. In determining whether an IEP is reasonably calculated to provide education benefit, the opinions of the educators who develop the IEP are entitled to great deference. *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991); *McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir 1985) ("due weight must be given to the expertise of school officials responsible for the child's education.")

A more logical conclusion can be drawn, and is one that is strongly suggested by the testimony, that the Student is extremely variable in his performance. The communications between the Respondent and Petitioner in the Communication Log (Exhibit BB) and the description of the Student's day in the daily schedules (Exhibit CC) clearly shows his variations. His test scores are "scattered" and he is fraught with anxiety and frustration when taking standardized tests. Witness after witness testified that there is no such thing as a "typical" day for the Student, and therefore, his emotions, physical well-being, fatigue, and course of medication likely affected his scores on the standardized tests.

Regardless of the extent or exact degree of progress made on any of the annual goals or on any of the multitude of educational objectives, the Respondent is not responsible under IDEA for a lack of progress, whether that lack of progress sis real or simply perceived. *Code of Federal Regulations*, 34 Sec. 300.350, make this clear as do applicable judicial decisions. An IEP is not a guarantor of educational success. *Urban*, 89 F.3d at 726. Even if an educational agency provides all the services listed in an IEP, a student may fail to achieve the plan's objectives. When a lack of progress occurs, a school district will not be held liable for the unfortunate results. *McDowell v. Fort Bent Indep. Sch. Dist.*, 737 F.Supp. 386-90 (S.D. Tex 1990) (holding school district not necessarily liable for student's failure to progress). An IEP must be developed in a manner that is reasonably calculated to provide an educational benefit. *Rowley*, 458 U.S. at 206-07. Because an IEP does not ensure educational progress, academic achievement alone cannot be considered the dispositive factor in determining whether an IEP was reasonably calculated to provide a meaningful educational benefit. *Houston Indep. Sch. Dist. V. Bobby R.*, 200 Ff.3d 341, 349 (5th Cir. 2000).

Petitioners also claim that Student's behavior worsened during the time he was placed at Frederick Elementary. The IHO finds that Petitioner failed to show that the worsening behavior demonstrates the Student was not receiving FAPE. The testimony showed that there are a variety of factors that could have caused the Student's behavior to worsen and not all of the factors are education based. The IHO is unable to conclude that the Student's gradually deteriorating behavior is conclusive evidence that he was not receiving FAPE. See *Gonzalez v. Puerto Rico Dept. of Ed.*, 969 F.Supp. 801 D.P.R. 1997).

Once the Student's behavior became a concern to the Respondent, the Respondent immediately took appropriate actions under the IDEA to address the same: it modified the Behavioral Support Plan; it called upon the Respondent's Behavioral Specialists for assistance; it requested to reevaluate the Student; and it held the March 23, 2006 IEP meeting to discuss reevaluation. The outcome of this meeting was delayed solely by Petitioner Mother who asked for the delay in order to wait for the results of Dr. Kirk's comprehensive neuropsychological report. Petitioner Mother did not provide Dr. Kirk's report until May 15, 2006. The IEP meeting was reconvened on May 23, 2006. At that meeting the IEP team agreed a more therapeutic program was required. The parties could not agree on the place where the more therapeutic program would be delivered. Based on this record the IHO does not find that Petitioners meet their burden of proof in demonstrating FAPE was denied on the basis of mental health deterioration. Accordingly, the fourth prong of the *Cypress* test is satisfied.

As explained in *Urban v. Jefferson County Sch. Dist.* 89 F.3d 720, 725 (10th Cir. 1996), the "appropriate education" required by the IDEA is not one which is "guaranteed to maximize the child's potential." Perhaps this legal doctrine is best expressed in the decision of *Doe v. Board of Ed. Of Tullahoma City Schs.*, 9 F.3d 455, 459 (6th Cir. 1993), wherein the court clearly stated that IDEA only requires schools to provide the educational equivalent of a serviceable Chevrolet, and a school district "is not required to provide a Cadillac." If the IEP is reasonably calculated to provide educational benefits to the Student, then it satisfies the requirements under IDEA. Because the preponderance of the evidence shows that the *Cypress* four-part test is satisfied, the Petitioners have failed to prove that the Respondent denied the Student FAPE at Frederick Elementary for the 2005-2006 school year.

A school district is not obligated to pay for the cost of private school for a child with a disability if the school district made FAPE available to the child and the parents elected to place the child in such private school. 20 U.S.C. §1412 (10)(c)(i). Reimbursement may be ordered only if it is determined that (1) that the IEP was inadequate to afford the child with an appropriate education (i.e., that the IEP was not reasonably calculated to provide FAPE); and, (2) if FAPE was denied, the parent's privately obtained educational services are appropriate to the child's needs. *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119 (2nd Cir. 1998).

Thus, it is the opinion of the IHO that the Respondent and its highly qualified and dedicated staff of teachers and support efforts did provide FAPE during the 20044-2005 school year. However, FAPE was no longer provided after the IEP meeting of May 23, 2006, and subsequently on to the present. However, the events of the May 23, 2006, IEP meeting and events which transpired subsequent to that meeting show that FAPE has not been provided to the student for the 2006-2007 school year. It is clear that the Respondent knew of the parents' dissatisfaction with the suggested placements, but did nothing to provide any further alternatives and no further attempts to convene another IEP meeting were made. It is also clear to the IHO that the Respondent knew of the parents' intention to place the student at WINSi.

The Respondents offered no evidence to show that WINSi was not a proper placement except that it is not on a list of schools approved by the DOE and that it was not LRI. The IHO notes, however, the unrebutted testimony of their highly qualified expert witnesses that in this case the placement was proper and that both FAPE and LRI are being provided at this time. The "least-restrictive environment requirement does not bar reimbursement because the IDEA requires that disabled students be educated in the least restrictive *appropriate* educational environment." *Warren G. v. Cumberland County Sch. Dist.*, 190F.3d 80, 84 (3d Cir. 1999) (emphasis in original) (quotation omitted).

The last issue to be decided by the IHO concerns the Petitioners' request for reimbursement of the costs for the comprehensive neuropsychological evaluation performed by Dr. Kirk at their request after receiving a brain scan that was indicative of a traumatic brain injury. The record is clear that the evaluation was not performed to rebut an evaluation of a public agency as required by 34 C.F.R. § 300.502(b)(1), and Petitioners failed to request an independent educational evaluation at public expense, as required by 34 C.F.R. § 300.502(b)(2). Petitioners, instead had a parent-initiated evaluation conducted pursuant to 34 C.F.R. § 300.502(c), which the Respondent properly considered at the next IEP team meeting after it was received. Therefore Dr. Kirk's neuropsychological evaluation is not reimbursable.

CONCLUSIONS OF LAW

The IHO hereby concludes as follows:

1. The August 12, 2005 IEP, produced after the August 12 and September 9, 2005 IEP team meetings is a valid IEP which complies with the procedural requirements of the IDEA and with State regulations. Accordingly, the Respondent provided FAPE to the Student at Frederick Elementary School for the 2005-2006 school year.

2. The Respondents failed to provide FAPE after the May 23, 2006, IEP meeting and beyond.

3. The Student's present placement is proper under IDEA since at WINSi he is being provided with a proper individualized education plan under, for him, the least restrictive environment.

4. Dr. Kirk's comprehensive neuropsychological evaluation is a parent-initiated evaluation pursuant to 34 C.F.R. § 300.502(c).

ORDER

The IHO hereby orders as follows:

1. Petitioner's parents shall, within seven days of the date of this Order, document to the district all of their reimbursable costs incurred as of that date in connection with the Student's placement at WIMSi. Reimbursable costs include weekly program fees and $1,814.40 in transportation costs, but no documentation with respect to these costs need be provided to the district. Respondent shall, 10 days from being provided that statement of costs, reimburse Petitioner's parents the amount stated in the statement of costs.

2. Within 10 days of the date of this Order, Respondent shall enter into a contract with WINSi, committing itself to pay for the Student's (1) weekly program fees of $1,800.00 per week, up to a total of 36 weeks if necessary, and (2) follow-up care up to a total of $16,000.00 if necessary. Calculation of the 36-week period shall begin from the first week of the Student's enrollment at WINSi; however, Respondent shall have no contractual responsibility to pay for weekly program fees already paid by the Student's parents.

3. All of these weekly program fees and follow-up care fees to be terminated as soon as a new IEP is generated if the IEP finds them unnecessary.

4. An IEP meeting will be convened by the Respondents as soon as possible to attempt to find a more reasonable alternative to WINSi following the doctrine in *Doe v. Board of Ed. Of Tullhoma City Sch.*, 9F.3d 455,459 (6th Cir. 1993.

5. The Petitioners request for reimbursement for Dr. Kirk's parent initiated evaluation is DENIED.

Dated November 27th, 2006, at Denver, Colorado.

Richard G. Fisher
Impartial Hearing Officer

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of November, 2006, a true and correct copy of the foregoing **Findings of Fact, Conclusions of Law, and Final Order** was deposited in the United States Mail, first class postage prepaid, addressed to:

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