DOCKET NO. 293-SE-0505

Student BNF Parent Petitioner	§ § §	BEFORE A SPECIAL EDUCATION
VS.	§ §	HEARING OFFICER FOR
TOMBALL INDEPENDENT SCHOOL DISTRICT, Respondent	§ § §	THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

ATTORNEY FOR PETITIONER

Pro Se

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Statement of the Case

Petitioner, Student, by her next friends, Parent brought this action against Tomball Independent School District (hereafter "Tomball ISD") pursuant to the Individuals with Disabilities Education Act (hereafter IDEA), as amended by the IDEA Amendments of 1997, 20 U.S.C. §1400 *et seq.*, seeking tuition reimbursement for Student's private school placement for the 2004-2005 school year. To support the claim for reimbursement, Petitioner alleges that Tomball ISD failed to timely comply with the child find requirements of the IDEA by failing to identify Student as a child with a disability in May, 2004; failed to offer appropriate special education and related services to Student for the 2004-2005 school year; and improperly changed Student's educational placement without review in September, 2004.

Procedural History

Petitioner filed this request for a due process hearing on May 6, 2005. A telephone prehearing conference with the parties was held on May 18, 2005, wherein the issues for hearing were identified. The parties jointly requested a continuance of the May 25, 2005 hearing date due to scheduling conflicts and to obtain additional time to prepare for the hearing. This request was granted and the hearing was rescheduled and held on June 21, 2005. The parties also agreed to extend the decision due date to July 17, 2005. Petitioner was not represented by legal counsel. Tomball ISD was represented by its legal counsel, Mr. Jeffrey Rogers, with the law firm of Feldman & Rogers, L.L.P..

Based upon the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:[1]

Findings of Fact

1. Student. is a ***-year-old student with Down syndrome and speech delays who resides with her parents within the jurisdictional boundaries of Tomball ISD. [Respondent's Exhibit # 11, hereafter R. Exh. # ___; Hearing Transcript, pages 14-16, hereafter, T. ___].

2. Tomball ISD is a political subdivision of the State of Texas and a duly incorporated independent school district located in Harris County, Texas.

[1] Findings of fact and conclusions of law are also contained in the Discussion section of this decision.

3. During the 2003-2004 school year, Student was home-schooled and attended *** part-time at Graceview Baptist School. Academically, socially and behaviorally, Student. performed well in those settings. She received passing grades from Graceview Baptist School. [R. Exh. #11, T. 32].

4. In April 2004, Student's mother contacted the vice-principal of their local elementary school to discuss her daughter's disabilities and possible enrollment in Tomball ISD for the 2004-2005 school year. During this conversation, Student's mother informed the vice-principal that she did not want any I.Q. testing of Student and wanted her placed into a regular education class with the understanding that Student. would need assistance in that class. The vice-principal indicated that she would have the school's educational diagnostician contact her since the diagnostician was familiar with the types of assessment instruments available. [T. 15, 104-105].

5. Tomball ISD's educational diagnostician contacted Student's mother on April 26, 2004. They discussed the need to perform a full and individual assessment, including an I.Q. test, in order for Student. to receive special education services. Student's mother responded that she did not want Student labeled and hoped to avoid her placement in special education classes. She specifically objected to any standard I.Q. testing. Moreover, she indicated that she wanted Student. placed in regular education classes with assistance, not special education classes. [T. 27-29].

6. Based on their conversations with Student's mother, the vice-principal and educational diagnostician correctly surmised that she had refused consent for evaluating Student. to determine her eligibility for special education services. [T. 105-106, 151-152; R. Exh. # 11].

7. The parent's concern about I.Q. testing was based on her belief that because Student. was virtually non-verbal, a standardized I.Q. would not accurately reflect her intellectual abilities. [T. 15].

8. Academically, M. R. can recognize numbers 0-8, can arrange numbers in order to 6, can use one-to-one correspondence to count objects to 8, can rote count numbers to 14, can identify a circle, triangle, and diamond, and 8 of 11 colors. In language arts, she can recite the alphabet and recognize most uppercase letters of the alphabet, identify 10 of the 30 kindergarten level sight words, can write her name, and is learning to read phonetically. [R. Exh. #1, 11].

9. On May 27, 2004, M. R.'s mother sent the following e-mail to the vice-principal believing it notified the district she had changed her mind and would now consent to a full and individual assessment during the summer:

> "You & I had met and also talked with each other on the phone regarding my daughter's enrollment into Tomball Elementary. My husband asked that I pick up an enrollment package to see what all I needed to provide – this I did today. He also mentioned that if there was something we could do before August, he'd like it done. I know I spoke to you about my concerns with an IQ test; reason being that I was hoping to have Student[ ] taught to her strengths/weaknesses and not her IQ or disability. To refresh the details:Student[ ] is *** years old

with Down syndrome; has been going part time to an accredited *** and home schooled the other days. Also, I'd forgotten if it was you or the diagnostician who mentioned that I could place a request for a *** grade teacher who is better equipped with having a special needs child in her class. I look forward to hearing from you. And thank you for your time in reading this."

[R. Exh. #14].

10. The vice-principal, still believing that the mother was refusing to consent for testing, responded as follows:

"Unfortunately, there is not anything that we can do over the summer. Once Student] is enrolled, we will place her in a class. If she is having difficulty, we will meet as the Student Assistance Team (the team is comprised of parents, teachers, counselor and assistant principal). We can request special education testing at that time, if it is necessary. We definitely want to teach her, not her disability. We always strive to accelerate children to meet their full potential. Let me know if you have any further questions, & I'm looking forward to meeting Student[ ] in the fall."

[R. Exh. #14; T. 105-106].

11. The May 27, 2004 e-mail sent by Student's mother to the vice-principal was ambiguous and did not place the school district on notice that she had changed her mind and would consent to evaluating Student for special education services.

12. Tomball ISD did not violate any "child find" requirement of the IDEA[2] when it failed to initiate a full and individual evaluation of Student within a reasonable period of time after receiving the May 27, 2004 e-mail from Student's mother. Tomball ISD had already identified Student in April 2004, as possibly needing special education services, but her mother had declined to consent to a full and individual evaluation.

13. On or about August 10, 2004, Student enrolled in Tomball ISD and was placed in a regular education *** grade class. Because Student's mother had not consented to Tomball ISD conducting an evaluation to determine Student's eligibility for special education services, she did not receive and was not entitled to receive such services from Tomball ISD. Consequently, Student was placed in a regular education class with approximately 15 to 18 students, with only 1 teacher, no aide and without any special education supplementary aids or services.

14. After approximately 5 days in that class, Student's teacher indicated that Student could not keep up with her class work. Consequently, the parties agreed to convene a Student

[2] The child find requirements of the IDEA require school districts to ensure that all children with disabilities residing in the State, including those in private schools, who are in need of special education and related services, are identified, located and evaluated. 20 U.S.C. §1412 (a)(3)(A) and (B); 34 C.F.R. §300.125. Since the parent was offered an evaluation and declined, and Student was performing adequately in her private school regular education *** class, Tomball ISD was not put on notice that Student needed special education and related services and therefore was not obligated at that time to request a due process hearing to override the lack of parental consent for an evaluation. 34 C.F.R. §300.505.

Assessment Team. [T. 16]. The Student Assessment Team meeting was held on August 17, 2004, at which time Student's mother signed consent for Tomball ISD to conduct a full and individual evaluation of Student. Additionally, it was agreed to move Student into a regular education *** class. [T. 16, 43-45; R. Exh. #4].

15. Written notice of the IDEA's procedural safeguards was given and explained to the parents on August 17, 2004, along with notice of the full and individual evaluation. [R. Exh. #2, 4].

16. Student had behavioral problems in her regular education *** class, which involved hitting, kicking and choking other students, hugging other students too hard, and not staying seated in the teaching centers. [T. 17 -18; 88-89]. Also, *** had difficulty learning because there were so many distractions in the class, including the other students. Instead of paying attention and doing her work, she would turn and touch other students, or kick or hit them. [T. 88-89]. Parents requested that a behavior plan be implemented but were told it could not be done because Student was not a special education student. However, on or about August 27, 2004, her teacher implemented a behavior system that rewarded Student with a sticker for keeping her hands and feet to herself. [T. 17, 95-96; R. Exh. 17].

17. On August 24, 2004, Student kicked and hit other students and failed to follow directions. On August 26, 2004, Student hit 3 students and they were sent to the nurse and she pushed down another student. On August 27, 2004, Student pulled a student's hair and hit and kicked other students. Student's teacher contacted her mother and advised her of these incidents. [R. Exh. #17, 18].

18. On August 31, 2004, Student hit a student on the side of her face and made her cry. Later that day, she pushed a student in the chest and when told to stop, she turned and grabbed the student by the neck, shook him and hit him in the right eye. She was placed in in-school suspension for this behavior. [R. Exh. #13, 17].

19. On September 1 and 2, 2004, Student's mother observed her in the classroom and provided the teacher with assistance and support. Student's mother assisted Student in keeping her hands to herself so she could not hurt others. [R. Exh. #17].

20. On September 3, 2004, the Friday before the Labor Day holiday, Student was suspended from school for kicking another student. Student's mother was not notified by school officials that the suspension period was only for the remainder of the school day. [T. 19; R. Exh. #13].

21. On Tuesday, September 7, 2004, Student's mother met with the school principal wherein she requested that an ARD Committee meeting be held and an IEP and behavior plan be developed and implemented for Student. She was informed that the school district could not do these things until Student's evaluation had been completed. The school principal proposed that Student be temporarily placed in the special education developmental class, indicating to the parent that Student could not stay in her regular *** class. [P. Exh. #1, page 22; T. 46].

22. Student's mother toured the developmental class but determined that it was not appropriate and kept Student home, believing that Student would be removed from her

*** class and placed into the special education developmental class if she returned to school [T. 21-22; 49-51].

23. The developmental class was a separate special education class for developmentally delayed children. [T. 68].

24. Student imitates other children and her mother was concerned that she would imitate inappropriate behavior if placed in the developmental class. She was also concerned that much older students could be placed in that class. [T. 68].

25. Student's mother wrote to the school district on September 13, 2004, requesting that the district convene an ARD Committee meeting, allow Student to return to her regular *** class, develop and implement a behavior plan for her and provide her with one-on-one assistance. [P. Exh. #5].

26. Student's mother contacted the Tomball ISD Special Education Director on September 14, 2004, and learned that Student's suspension had been for only one day. This was confirmed in a letter received by Student's mother on September 15, 2004. [T. 23; Petitioner's Exh. #6, hereafter P. Exh. ___]. Additionally, she informed the Director that she had placed Student in a private school.

27. Tomball ISD conditioned Student's return to school on her parents' consenting to the interim program suggested by the school principal, that being a temporary placement in its special education developmental class with some inclusion. [P. Exh. #4, 6;].

28. As indicated in the September 14, 2004, letter from the Principal of *** School to Student's mother, Tomball ISD predetermined that Student's interim educational placement would include its special education developmental class prior to completing Student's full and individual evaluation, prior to convening an ARD Committee meeting and prior to receiving consent for the provision of special education services for Student from her parents. [P. Exh. #6].

29. Student's parents did not return her to school after the September 3, 2004 suspension because they were not notified until September 14, 2004 as to the length of her suspension and because they objected to the school district's intention to educationally place her in the special education developmental classroom upon her return to school. [T. 51].

30. Instead of returning Student. to Tomball ISD, she was placed by her parents on September 8, 2004, into the regular education *** class at the Graceview Baptist School. [T. 59, 70].

31. At the time of this unilateral private school placement, Tomball ISD had not notified Student's parents of the length of her suspension.

32. Student's parents made her available to Tomball ISD for purposes of completing her evaluation, even after Tomball ISD suspended her from school.

33. Student did well at Graceview Baptist School. It had a small student-to-teacher ratio. Student mastered most of the indicators of progress in the various areas of development, including social-communicative activities, self-help activities, and gross motor and fine

motor activities. Additionally, she mastered most of the indicators of progress in the categories of general knowledge and comprehension, including attention and memory, recognition of attributes, and number concepts. Academically, she had a modified curriculum but met the minimum standards required of *** students and was promoted to the *** grade. [P. Exh. #16; T. 75].

34. The private school tuition paid by Student's parents to Graceview Baptist School during the 2004-2005 school year was $2,600.00. [T. 71].

35. Prior to Student's parent-initiated private school placement at the Graceview Baptist School on September 8, 2004, she had not previously received special education and related services under the authority of a public agency.

36. Tomball ISD timely completed Student's evaluation on September 17, 2004. The evaluation found that Student was a child with Down syndrome and that she qualified for special education and related services as a student with mental retardation and speech impairments. [R. Exh. #5].

37. On September 27, 2004, an ARD Committee meeting was held which confirmed Student's eligibility for special education services. The ARD Committee designed an individual educational program that addressed her unique educational needs. However, the ARD Committee, over the objection of Student's mother, determined that Student had not been successful in the general education classroom and proposed as her educational placement, 12.5 hours per week in the special education resource class for language arts and math, 3.75 hours per week in the developmental class for functional living skills, and 12.5 hours per week in the general education classroom for language arts, social studies, science and specials. Student's mother objected to this proposed placement seeking instead full inclusion of Student in the general education setting with the support services, including an aide. [R. Exh. #1].

38. Student's mother refused to sign consent for the provision of special education services to Student by Tomball ISD. [R. Exh. #1].

39. The September 27, 2004, ARD Committee did not properly consider less restrictive options for Student's educational placement, including the provision of an aide for Student in the general education setting and/or co-teaching by a special education teacher in the general education setting.

40. Student's educational placement in the developmental class was predetermined by the school principal as of September 7, 2004.

41. The behaviors displayed by Student in her regular education class at *** School were the result of the school district's inability to provide Student with special education and related services, including the provision of an aide, and were not the result of an inappropriate educational placement.

42. Student's behaviors were not so severe as to justify her removal from the general education setting and from being educated with children without disabilities.

43. Student's parents fully cooperated with Tomball ISD relating to the evaluation of Student, in attending and participating in the September 27, 2004 ARD Committee

meeting and in considering the school district's proposed educational program and placement.

44. Notice as contemplated by the IDEA of rejection of Tomball ISD's proposed placement and of enrollment of Student in a private school was provided to Tomball ISD by Student's parents. This notice was given at the September 27, 2004 ARD Committee meeting, which was the first opportunity the parents had to provide effective notice pursuant to the IDEA.

45. Although Student's parents had previously verbally informed Tomball ISD of Student's private school placement and rejection of her proposed interim placement in a special education developmental class, Student was not entitled to special education and related services prior to September 27, 2004, since she had not qualified for special education services prior to that date. Consequently, Student's parents are not entitled to reimbursement for costs incurred prior to September 27, 2004.

46. Equitable grounds for awarding tuition reimbursement exist in this case since Student's parents requested special education and related services while she was in the public school, fully cooperated with the school district concerning Student's evaluation, attended and participated in the September 27, 2004 ARD Committee meeting, and considered the school district's proposed educational program and placement. By doing so, they indicated their willingness to forego the private school placement and return Student to a school district placement if an appropriate educational program had been offered. Accordingly, they gave the school district an opportunity to assemble a team, evaluate their daughter, devise an appropriate individual educational plan, and determine whether a free appropriate public education would be provided in the public schools.

Discussion

This case involves a request for tuition reimbursement for a parent-initiated private school placement premised on the school district's failure to provide the student with a free appropriate public education. Respondent claims that Petitioner is barred as a matter of law from tuition reimbursement under the IDEA because Student did not previously receive special education and related services under the authority of a public agency.

Petitioner's Eligibility for Tuition Reimbursement

Prior to 1997, case law controlled this issue. In *School Committee of Burlington v. Department of Education,* the United States Supreme Court set forth the circumstances under which a parent who unilaterally enrolled a child in a private school could receive tuition reimbursement. 471 U.S. 359, 369-70, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985). The Court did not limit the remedy to parents of children who previously received special education services, but held that parents may be awarded tuition reimbursement for a private school placement if the school district failed to offer a student a free appropriate public education and the parents established that the private school placement was appropriate. Specifically, the Supreme Court held that the IDEA'S grant of equitable authority under 20 U.S.C. § 1415(e)(2) empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."

In 1997, Congress amended the IDEA setting forth a specific statutory framework relating to reimbursement claims. The amendments encompassed the basic holding in *Burlington* that a local educational agency is not required to pay for the cost of educating a student at a private school if the agency made a free appropriate public education available to the child and the parents elected to place the child in the private school. *See* 20 U.S.C. § 1412 (a)(10)(C)(i). However, conversely, Congress added the provision: "If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment" (emphasis added). 20 U.S.C. § 1412 (a)(10)(C)(ii). The legal issue presented in this matter is whether Congress, when it amended the IDEA, intended to limit parental claims for tuition reimbursement for private school placements only for those children who had previously received special education and related services under the authority of a public agency or whether courts and hearing officers may otherwise award tuition reimbursement as an equitable remedy. The interpretation of this provision of the IDEA appears to be an issue of first-impression in this Circuit.[3]

In 1999, the United States Department of Education, Office of Special Education Programs (OSEP) addressed this legal issue and concluded that parents' eligibility for reimbursement for private school expenses was not foreclosed by the IDEA if the student had not previously received from a school district special education and related services. OSEP opined:

> "We do not view § 612(a)(10)(C) as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of the public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. In such a case, a parent may wish to avail him or herself of due process and judicial action, so that a hearing officer or court can determine whether there has been a denial of FAPE, and, if so, whether and to what extent tuition reimbursement would be warranted."

Letter to Luger, 33 IDELR 126 (March 19, 1999).

Subsequently, several federal courts have addressed this issue. In *Justin G. v. Board of Education of Montgomery County*, 148 F. Supp. 2d 576, 35 IDELR 3, 101 LRP 125 (U.S.D.C. - Md. 2001) the student had been privately placed by his parents and had not previously received special education and related services from a public agency. His parents sought tuition reimbursement on the basis that requests to the school district to evaluate and develop his IEP were not responded to in a timely manner. The court determined that the school district had not timely offered the student a free appropriate public education and awarded the parents tuition reimbursement. In responding to the school district's claim that tuition reimbursement was precluded by the amendments to the IDEA because the student had not previously received special education and related services from a public agency, the court held:

> "As a final matter, MCPS argues that, under 20 U.S.C. 1412 (a) (10) (C) (ii), the parents are not entitled reimbursement because Justin was never enrolled in the public school

[3] The U. S. Fifth Circuit Court of Appeals decisions and rulings constitute legal precedent to be followed within the State of Texas.

> system. The Court finds that such a construction of the IDEA would produce the absurd result of barring children from receiving a FAPE because their disabilities were detected before they reached school age. MCPS's disturbing interpretation would also place parents of such children in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to reimbursement. The Supreme Court has expressly rejected saddling parents of disabled children with such a pyrrhic victory. *See Burlington,* 471 U.S. at 369-70, 105 S.Ct. at 2003. Therefore, the Court finds that the parents are not barred from seeking reimbursement because Justin has not attended public school."

Id. at 583.

In *Greenland School District v. Katie C.,* 358 F.3d 150 (1st Cir. 2004), the United States First Circuit Court of Appeals was also presented with this issue. The Court provided the following detailed analysis of the historical grounds behind awarding private school tuition reimbursement as appropriate relief:

> "Until 1985, there was some uncertainty about whether the remedy of reimbursement for private school tuition was available when a school district had failed to provide appropriate services to a disabled child in the public school. IDEA itself only authorized the district court to "grant such relief as [it] determine[d] is appropriate." 20 U.S.C. § 1415(e)(2) (1984), recodified as amended 20 U.S.C. § 1415(i)(2)(B). In *Burlington v. Dep't of Educ.,* 471 U.S. 359 (1985), the Supreme Court held that this clause authorized the equitable remedy of tuition reimbursement. *See id.* at 369. It noted that the broad language of the statute vested courts with significant discretion to craft appropriate remedies and that, in cases where it would take a significant amount of time for the school to offer appropriate services, the Act's promise of a free appropriate public education could justify the remedy of reimbursement for private school tuition. *Id.* at 370. The Court also found that tuition reimbursement was available even in some instances when parents had unilaterally removed their child from public school. *Id.* at 372.
>
> Uncertainty about the circumstances under which tuition reimbursement was available remained even after *Burlington*. Before the 1997 IDEA amendments, several circuits had held that reimbursement for private school tuition depended on the parents cooperating with school authorities in determining the proper placement and educational plan for the child. *See Patricia P. v. Bd. of Educ.,* 203 F.3d 462, 468 (7th Cir. 2000) (listing cases interpreting pre-amendment IDEA). As one court noted, "parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement." *Id.* at 469. Although few courts precisely defined the level of cooperation necessary, most thought it clear that, at a minimum, the parents had to inform the school district of their concerns about their child's special needs and about the plan proposed before removing the child from public school. *See Berger v. Medina City Sch. Dist.,* 348 F.3d 513, 523 (6th Cir. 2003) ("Even before the IDEA was amended to explicitly require such notice, this court held that dissatisfied parents were required to complain to the public school to afford the school a chance to remedy the IEP before removing their disabled child from the school."); *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.,* 226 F.3d 60, 68 (2d Cir. 2000) ("[C]courts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP."); *Ash v. Lake Oswego Sch.*

Dist., No. 7J, 980 F.2d 585, 589 (9th Cir. 1992); *Evans v. District No. 17,* 841 F.2d 824, 829 (8th Cir. 1988).

The 1997 Amendments endorsed this line of cases and helped clarify the amount of parental cooperation required by adding a section to IDEA entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C); *see* H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90. *See generally Gary S.,* 241 F. Supp. 2d at 114-15. That section begins with a general statement of policy explaining that IDEA does not "require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i). This provision, taken by itself, might be considered ambiguous as applied to a situation where, as here, the local education agency was never informed while the child was in public school that the child might require special education services. But this seeming ambiguity disappears when considered in light of the section's affirmative requirement that "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency" can receive reimbursement for their unilateral placement of the child in private school only "if [a] court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." *Id.* § 1412(a)(10)(C)(ii).

These threshold requirements are key to this case: tuition reimbursement is only available for children who have previously received "special education and related services"[6] while in the public school system (or perhaps[7] those who at least timely requested such services while the child is in public school). . . .

Even for children who received special education services in the public schools before the private school placement, the 1997 Amendments implemented several additional limitations on reimbursement. . . . The statute provides that reimbursement may[8] be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school before they do so. *Id.* § 1412(a)(10)(C)(iii)(I); *see Rafferty v. Cranston Pub. Sch. Comm.,* 315 F.3d 21, 27 (1st Cir. 2002). That notice can be provided either "at the most recent IEP meeting that the parents attended prior to removal of the child from the public school" or by written notice ten business days prior to such removal. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The statute also creates exceptions to this notice requirement, such as when the parents are illiterate or the child will face physical or serious emotional harm by providing notice. *Id.* § 1412(a)(10)(C)(iv). . . .

These statutory provisions make clear Congress's intent that before parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools. *See Patricia P.,* 203 F.3d at 468; *Schoenfeld v. Parkway Sch. Dist.,* 138 F.3d 379, 381-82 (8th Cir. 1998); *cf. Burlington,* 471 U.S. at 373 (discussing the importance of reviewing a child's educational needs while the child is in the regular public school classroom). . . .

> The regulations promulgated under IDEA, to which we must give deference, *Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883, 892 & n.9 (1984), are consistent with our reading of the statute. For the most part, the regulations provide little additional guidance in interpreting the statute because they merely repeat the statute's language. *Compare, e.g.,* 20 U.S.C. § 1412(a)(10)(C), with 34 C.F.R. § 300.403. However, the regulations do provide one interpretive clue by organizing the statutory provisions dealing with reimbursement under the heading "Children with Disabilities enrolled by their parents in private school when FAPE is at issue." *See* 34 C.F.R. § 300.403 (emphasis omitted). This formulation indicates that the Department of Education views notice as critically important in the statutory scheme: it is difficult to imagine FAPE being "at issue" when neither the school nor the child's parents have ever raised the question of FAPE. Even more than the statute, the regulations suggest that a child . . . who is removed from her school without her parents or her school ever questioning the availability of FAPE is not within the category of children eligible for tuition reimbursement. . . .
>
> The purpose of the notice requirement is to give public school districts the opportunity to provide FAPE before a child leaves public school and enrolls in private school. *See Patricia P.,* 203 F.3d at 468 (emphasizing the importance of cooperation between parents and the school district before the child is removed from public school); *Schoenfeld,* 138 F.3d at 381-82 (same); *Town of Burlington v. Dep't of Educ.,* 736 F.2d 773, 799 (1st Cir. 1984) (noting the distinction "between a unilateral parental transfer made after consultation with the school system ... and transfers made truly unilaterally, bereft of any attempt to achieve negotiated compromise and agreement"), *aff'd,* 471 U.S. 359 (1985)….
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> As the Supreme Court warned almost twenty years ago, "parents who unilaterally change their child's placement ... without the consent of state or local school officials, do so at their own financial risk." *Burlington,* 471 U.S. at 373-74. This case demonstrates that the Court's admonition remains no less true today."

Greenland School District v. Katie C., 358 F.3d 150 (1st Cir. 2004).

In footnote 7 of its decision, the Court acknowledged: "Despite the language of the statute, some legislative history suggests that Congress meant to include children who had requested but not yet received special needs services during their period in the public schools. *See* H.R. Rep. 105-95, at 91-93, reprinted in 1997 U.S.C.C.A.N. 78, 89-90." *Id.* The Court however, did not resolve this issue since the parents had never requested special education services from the school district prior to the child's unilateral private school placement.

In *City School District of New York v. Tom F.,* 42 IDELR 171, 105 LRP 822 (S.D. – NY, Jan. 3, 2005), the district court addressed the situation where a privately placed student was evaluated by the local school district and offered services for the upcoming school year. The parents declined the placement proposed by the school district and sought tuition reimbursement claiming that the IEP team was not properly constituted and thus, the proposed placement was inappropriate. The district court, in interpreting *Greenland*, overturned an administrative decision awarding parents tuition reimbursement, holding:

> "Defendant advocates departure from the plain language of the statute on grounds that adhering to its literal interpretation would defeat the statute's very purpose. This contention is without merit. "Only the most extraordinary showing of a contrary intention

from the legislative history would justify interpretive departure from a statute's plain language." *O'Connell v. Hove,* 22 F.3d 463, 470 (2d Cir. 1994). Here, however, evidence of congressional intent from the legislative history is consistent with the plain meaning of the text. The relevant House Report from the Committee on Education and the Workforce states:

Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

House Report No. 105-95 (emphasis omitted).

As Plaintiff suggests, the provision ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate. Therefore, it cannot be said that adherence to the plain language would defeat the purpose of the IDEA to provide every child with a disability a free and appropriate public education. *See* 20 U.S.C. § 1400(d)(1)(A).

Finally, Defendant relies on an opinion given by the Office of Special Education Programs ("OSEP") in response to the question of whether the 1997 Amendments to the IDEA preclude private school tuition reimbursement for children who had not previously received special education from a public agency. OSEP concluded that it did "not appear that [this] question ... [was] answered by § 612(a)(10)(C) of IDEA '97." *Letter to Luger,* 33 I.D.E.L.R. 126 (March 19, 1999).

"Deference to an OSEP policy letter may be appropriate where statutory language is ambiguous." *St. Johnsbury Acad. v. D.H.,* 240 F.3d 163, 171 (2d Cir. 2001) *(quoting Honig v. Doe,* 484 U.S. 305, 325 n.8, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988). However, "if the intent of Congress is clear," a court reviewing an agency's construction of a statute that it administers "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Here, where there is no ambiguity in the statutory language, deference to the OSEP letter would be inappropriate. Therefore, this Court reaches the same conclusion as to the meaning of 20 U.S.C. § 1412 (a)(10)(C) that the First Circuit reached in *Amy N. See* 358 F.3d at 158-160."

City School District of New York v. Tom F., 42 IDELR 171, 105 LRP 822 (S.D. – NY, Jan. 3, 2005).

Most recently, the U.S. District Court in Oregon addressed this issue in *Forest Grove School District v. T. A.,* 105 LRP *25578* (U.S.D.C. – Oregon, May 11, 2005). In that case, the student had been evaluated in 2001 and found not eligible for special education services. In 2003, after becoming involved in illegal drugs and was residentially placed for educational reasons. His parents then sought tuition reimbursement. The court concluded that the requirements of 20 U.S.C. §1412(a)(10)(C)(ii), that the student "previously received special education and related services" prior to unilateral removal and private placement in order to receive tuition

reimbursement, were not met because "the parents agreed with an evaluation two years earlier that their son was not eligible; the parents had not requested any further evaluation or special services prior to removal from school; and the student was removed from school for reasons not related to special education services." The court determined that the student was not within the category of children eligible for tuition reimbursement under section 1412(a)(10)(C). Additionally, the court found that even if the student was eligible for tuition reimbursement, his parents had not provided any notice to the District prior to the student's unilateral private placement as required by the IDEA. However, in deference to the dicta in the *Greenland* decision that Congress may have intended to include as eligible for tuition reimbursement children who had requested but not yet received special needs services during their period in the public schools, the court proceeded with an analysis of the facts to determine if the parents might be eligible for tuition reimbursement under general principles of equity. In reviewing the facts of that case, the court concluded there were no equitable principles justifying an award of tuition reimbursement to the parents.[4]

Accordingly, based upon applicable case law described herein and in particular the *Greenland* decision - the only appellate court decision addressing this issue - I find that the IDEA, under appropriate circumstances, does not foreclose equitable reimbursement to parents for unilateral private school placements when they have timely requested special education and related services while the child is in public school. *In accord, Letter to Luger,* 33 IDELR 126 (March 19, 1999). Therefore, I find there is no legal impediment in the IDEA that precludes Student's parents from asserting their right to equitable reimbursement of private school tuition under the facts of this case and that hearing officers and courts have jurisdiction to entertain and award tuition reimbursement as an equitable remedy (as opposed to statutory) in those limited

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[4] Specifically, the court ruled as follows:

"In *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 16 (1993), the United States Supreme Court stated:

[W]e note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," *Burlington,* 471 U.S., at 374, 105 S.Ct, at 2005, and the court enjoys "broad discretion" in so doing, *id.,* at 369, 105 S.Ct., at 2002.

Florence and *Burlington* involved students who were receiving special education services. The parents dissatisfied with the adequacy of the services challenged the Individual Education Plan (IEP) and later withdrew their child from public school and enrolled the child in private school without the consent of the school authorities. In addressing the unilateral action of the parents, the Court noted that the course of administrative and judicial review leave the parents faced with the difficult choice: "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Florence,* 510 U.S. at 365 *(quoting Burlington,* 471 U.S. at 370).

Section 1412(a)(10)(C) was enacted subsequent to *Florence* and *Burlington* providing tuition reimbursement for a student who previously received special education services placed in private school without the consent of school authorities. Even assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities and the parents were uninformed or unable to request services, the facts in this case do not support such an exercise of equity. *See Greenland,* 358 F.3d at 160 n.8."

situations where parents timely requested special education and related services from a school district prior to unilaterally enrolling their child in a private school.

Factual Basis for Tuition Reimbursement Request

The facts of this case support an award of tuition reimbursement for equitable reasons, albeit, a reduced award because Petitioner was not determined eligible as a child with a disability until September 27, 2004, and did not provide Tomball ISD with notice of their claim as contemplated by the IDEA until that date.

Although Student had not previously been provided special education and related services by Tomball ISD, her mother timely sought an evaluation and special education services from the school district. Student began the school year in a regular education *** class without any special education supplemental services or support and on August 17, 2004, had been referred for evaluation to determine her eligibility for special education services. Tomball ISD was in the process of evaluating Student when, on September 3, 2004, it suspended her from school. On September 8, 2004, her mother unilaterally placed Student in a private school without prior notice to Tomball ISD. Student's private school placement was in response to Tomball ISD's suspension of Student from school on September 3, 2004, without proper notice to the parents as to the length of the suspension.[5] As a result, when her parents unilaterally placed Student in the private school, they had not been informed as to when she could return to school. It was not until September 14, 2004, eleven days after the suspension, and 6 days after the private school enrollment, that her parents were notified the suspension had only been for one day. Additionally, Student's private school placement was in response to the September 7, 2004 meeting between the parent and the school principal wherein the parent was led to believe that Student would not be allowed to return to her regular *** classroom upon her return to school but would be temporarily assigned to the special education developmental classroom pending completion of her evaluation and confirmation of that placement by the ARD Committee. The parent disagreed with this proposed placement, believing it to be inappropriate.

Petitioner alleges that this proposed change in placement from the regular education *** class to the developmental class was improper and justifies an award of tuition reimbursement in this matter. Petitioner is partially correct in that this proposed change in placement, if made, would have been in contravention of federal law. Placement of a child in a special education class without parental consent violates 34 C.F.R. §300.505 (a)(1)(ii). This federal regulation requires that parental consent be obtained before the initial provision of special education and related services to a child with a disability. Additionally, the provision of special education and related services to Student prior to completion of her full and individual evaluation and development of an IEP by an appropriately constituted ARD Committee also would have violated federal regulations governing the provision of special education services.[6] Although Tomball

[5] At the time of Student's suspension, Tomball ISD was aware that she was a student with significant disabilities, including mental retardation, speech impairments and behavior problems, and because of the problems she was creating in the regular education setting (without support services), Tomball ISD was in the process of expediting the evaluation so that special education and related services could be provided to Student as swiftly as possible.

[6] 34 C.F.R. §300.552 requires that each public agency conduct a full and individual evaluation, in accordance with §§300.532 and 300.533, before the initial provision of special education and related services to a child with a disability under Part B of the Act. Although Respondent cites to 34 C.F.R. Part 300, App. A., Question 14 for support of its right to temporarily place Student in its special education

ISD claims this was just a recommendation to the parent, the totality of the evidence indicates otherwise, including the following statements contained in the letter dated September 14, 2004 from the principal to the parent:

> "To clarify, **at no point have we stated that Student[ ] could not return to school** from her one day suspension. Instead, we offered an interim program during our conference the day after the suspension, September 7th, to which you responded that you wanted to (sic) time to think and discuss our proposal. I would like to reiterate that Student[ ] continues to be welcomed at *** School with the services and supports outlined in my letter dated September 8, 2004.[7] To review, we want to provide Student[ ] with general education instruction combined with support from our developmental program. We feel this is the most appropriate and least restrictive placement until we have further data.
>
> As we discussed in our meeting September 7, we continue to offer the above placement as an *interim* placement while we complete the assessment and request an ARD **as soon as possible to put this into place.**"

This evidence confirms that the only option provided to Student's parents was to agree to the interim placement if she was to continue her education in Tomball ISD. However, despite the improper proposal and its consequence resulting in Student's private school placement, it is noted that throughout this time period, Student was not entitled to the full protections, safeguards and rights of the IDEA. It was not until September 27, 2004, that the ARD Committee determined her eligible for special education services. At that time, she gained the protections and rights encompassed within the IDEA, including the right to contest educational placement

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developmental class, a review of the response does not support this claim. The temporary placement referred to in the response applies to an eligible child with a disability and suggests that such a child can be temporarily placed into a special education program as part of the evaluation process – before an IEP is finalized – to assist in determining the appropriate placement of the child. That provision applies only to children who have already been determined eligible for special education services. The response contemplates that an ARD Committee has already been convened and made the eligibility determination and that the ARD Committee, before finalizing the IEP, desires to gather further evaluation information regarding placements by making a temporary placement to assist it in determining the appropriate placement for the child. Moreover, as indicated in the response, such a temporary placement would require parental consent. In the instant action, Student had not yet been determined to be an eligible child with a disability and the placement was not intended to be limited only for evaluation purposes or to be temporary before an IEP was finalized. Instead, the purpose of the proposed interim placement was to remove Student from her regular education program due to her behavior until an ARD Committee could be convened to confirm the interim placement. Even assuming, *arguendo*, that Tomball ISD had the legal right to make a temporary placement of Student as part of its evaluation process, then one must question why Tomball ISD did not first propose assigning an aide to Student in the regular classroom or utilizing a co-teaching model using a special education teacher in her class, along with the development and implementation of a behavior plan. Such a temporary placement and program would have provided Tomball ISD with valuable information as to Student's capabilities in the regular education environment when being provided with special education and the supplemental aids and services contemplated by the IDEA.

[7] The September 8, 2004 letter recommended: "temporary placement in the Developmental classroom with Mrs. *** for math, reading, social skills and independent living skills and two hours a day in Mrs. ***'s *** class for literacy with support. We also recommend, since Student[ ] has been successful in Music and Art, continuing that placement in the general setting. This temporary special education setting will provide opportunity for the staff to determine what Student[ ] is capable of achieving academically and behaviorally due to a smaller pupil teacher ratio." [P. Exh. #4].

decisions in due process hearings and seek statutory or equitable remedies for deprivation of her IDEA rights.

For purposes of tuition reimbursement, the IDEA requires parents to provide prior notice to school districts that they are rejecting the educational placement proposed by the school district and intend to enroll their child in a private school at public expense. 20 U.S.C. §1412 (a)(10)(C)(iii)(I). If they fail to do so, then hearing officers and courts may reduce or eliminate tuition reimbursement awards. However, under the facts of this case, taking into consideration that Student had not been determined eligible for special education services until September 27, 2004, I find that notice as contemplated by the IDEA was provided to Tomball ISD by Student's parents. This notice was given at the September 27, 2004 ARD Committee meeting, which was the first opportunity the parents had to provide effective notice pursuant to the IDEA. I find that Petitioner fully cooperated with Tomball ISD in the evaluation of Student, in attending and participating in the September 27, 2004 ARD Committee meeting and in considering the school district's proposed educational program and placement. By doing so, they indicated their willingness to forego the private school placement and return Student to Tomball ISD if an appropriate educational program had been offered. Accordingly, they gave Tomball ISD an opportunity to assemble a team, evaluate Student, devise an appropriate plan, and determine whether a free appropriate public education could have been provided in the public schools. *See Patricia P. v. Bd. of Educ.,* 203 F.3d 462, 468 (7th Cir. 2000); *Schoenfeld v. Parkway Sch. Dist.,* 138 F.3d 379, 381-82 (8th Cir. 1998); *cf. Burlington,* 471 U.S. at 373. Therefore, based on the foregoing, I find that Petitioner, is not entitled to reimbursement of tuition that accrued prior to September 27, 2004, because Student had not qualify for special education services prior to that date. However, Petitioner does qualify for tuition reimbursement effective September 27, 2004, since Student had qualified for special education services and her parents had provided notice to Tomball ISD that they rejected Student's proposed educational placement and of her enrollment in a private school.

To prevail and obtain tuition reimbursement for private school expenses, Petitioner had the burden of establishing by a preponderance of the evidence that the Tomball ISD's proposed educational program and placement for Student as developed at the September 27, 2004 ARD Committee meeting was inappropriate and that the private school placement was appropriate. I find that Petitioner met this burden. Petitioner claims that the proposed placement of 16.25 hours per week in the special education resource class and developmental class coupled with 12.75 hours per week of general education instruction is not the least restrictive environment for implementation of Student's IEP. Instead, Petitioner claims that Student could have been successfully educated in the general education *** class if provided with the necessary supplementary aids and services, including an aide to assist her in that educational setting.

The IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are nondisabled and that special classes, separate schooling or other removal of children with disabilities occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §1412 (a)(5); 34 C.F.R. §300.550. Moreover, it requires that in selecting the least restrictive environment, consideration be given to any potential harmful effect on the child or on the quality of services that he or she needs; and that a child with a disability not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. 34 C.F.R. §300.552.

In *Daniel R.R. v. State Bd. Of Educ.,* 874 F.2d. 1036 (5th Cir. 1989) the Court adopted a two-part test for determining the least restrictive environment for a child with disabilities, asking "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and if not, "whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* at 1048. To decide the first question, the trier of fact is to consider whether the district "has taken steps to accommodate the handicapped child in regular education, while bearing in mind that "the Act does not require regular education instructors to devote most or their time to one handicapped child or to modify the regular education program beyond recognition." *Id.*

Under the first inquiry, the Court recognized four factors to aid in the analysis. The first factor asks whether the district has taken steps to accommodate the child with disabilities in regular education. The second factor considers whether the child will receive educational benefit from regular education. The third factor considers the child's overall educational experiences in the mainstreamed environment. The fourth factor considers whether the child's presence in the regular classroom is detrimental to the regular classroom learning environment. *Id.*

Respondent contends that it offered Student an appropriate educational program and placement in the least restrictive environment when it proposed that Student spend over 40% of her time in general education settings. Respondent points to the testimony of Student's teacher in support of its position. She testified that to allow Student to remain in the regular classroom throughout the school day would probably require that her regular education curriculum be completely modified and indicated that Student's behavior problems had prevented her from receiving an educational benefit in the regular classroom. [T. 91-93]. I do not find this testimony to be persuasive. The circumstances under which Student was being educated by her teacher did not include the provision of special education and related services. There was no aide to assist the teacher, no co-teaching of Student. by a special education teacher in the regular classroom, no appropriate behavior modification plan and no modifications of the academic or instructional content. [T. 91-92]. In fact, the school district was precluded from providing these types of special education services to Student until such time as she had been determined eligible for special education services and consent for such services obtained from her parents. Accordingly, I find the evidence of how Student behaved in the regular classroom during the two week period when she was without the provision of any special education services is of minimal relevance to issue of whether her IEP was capable of being implemented in the general educational setting. Respondent further argues that in *Daniel R. R.*, the Court recognized that mainstreaming would be pointless if it forced instructors to modify the regular education curriculum to the extent that children with disabilities are not required to learn any of the skills normally taught in regular education, in that the only advantage to such an arrangement would be that the child is sitting next to a non-handicapped student. *Id.* at 1049. However, I note that since *Daniel R. R.,* Congress amended the IDEA to include a provision that prohibits a child with a disability from being removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. *See* 20 U.S.C. §1412 (a)(5); 34 C.F.R. §300.552 (e).

In reviewing the evidence presented, I find that the IEP proposed for Student could have been fully and successfully implemented in the general education setting with the provision of an aide and other necessary supplemental aids and services. For example, the objectives in the areas of functional living skills involved Student following two-step directions; help and share with others when asked on first request; participate attentively in activities for at least 5 minutes; read at least 5 common safety signs; and state own birthday and full name. Nothing in these objectives justified segregating Student from being educated with her nondisabled peers in the regular ***

class. These goals and objectives could have been adequately address in the regular classroom environment with the use of an aide and/or a special education co-teacher. Additionally, all of her academic goals and objectives could have been addressed and accomplished in the regular *** class and, in fact, were part of the normal *** curriculum. For example, her math objectives were: "MK.2 - sort objects by category: [] color []shape []size []use []ownership, etc.; MK.6 – discriminate same or different [] objects [] color []size [] shape [] set size; MK.17 – count sets of objects and/or symbols of objects (0-10); MK.19 – read numbers []0-5 [] 0-10 []10-20 pairing correct number of objects with each number read; MK.30 – compare and order numbers to 20; MK.71 – choose what comes next in a simple AB pattern of colors, shapes, or objects. [R. Exh. #1]. Although Student has mental retardation, she is capable of successfully completing at least a portion of the *** curriculum. As indicated in the ARD Committee report, her present level of performance in math included being able to recognize numbers 0-8, arrange numbers in order to 6, use one to one correspondence to count objects to 8, rote count numbers to 14, identify circle, triangle, and diamond, and 8 of 11 colors. In language arts, she could recite the alphabet and recognize most uppercase letters of the alphabet, and identify 10 of the 30 *** level sight words. Accordingly, Respondent's claim that the regular education curriculum would have to be completely modified by Student is without merit.

Respondent also points to the behavior problems displayed by Student, including the hitting and kicking of other students. Respondent claims that for safety reasons, Student could not be educated in the regular classroom, that the number of students and the distractions they caused overwhelmed her causing her to act out. I find, however, that these behavior problems were the result of Student not having access to the special education and related services she needed. The acting out could have been controlled by an aide being assigned to assist Student in the regular educational setting and through developing and implementing an appropriate behavior intervention plan. Also, in reviewing the evidence it confirms that none of the injuries Student inflicted upon other students from her hitting or kicking were serious (see nurse records R. Exh. # 18).

Respondent further claims that Student's behavior in the classroom was extremely disruptive of and detrimental to the learning environment. Respondent's argues that if Student requires so much of the teacher or aide's time that the rest of the class would suffer, then the balance will tip in favor of placing her in the special education classes. I find no evidence supporting the contention that an aide could not have adequately controlled Student's behaviors, especially if a behavior intervention plan was made a part of her program. The purpose of such a plan would have been to reduce the frequency of the inappropriate behaviors. I find that under the facts of this case, Respondent should have first attempted the program requested by the parent, being assignment of a full time aide and/or a special education co-teacher, coupled with implementation of a behavior intervention plan. Such a program would have fully complied with the IDEA's preference educating children with disabilities in the regular classroom. It was the least restrictive environment for implementation of Student's IEP as developed by the September 27, 2004 ARD Committee.

Moreover, I find that Petitioner established that Student's private school ***placement provided her with an educational benefit. She had access to the *** curriculum and achieved academic progress in that environment.

In summary, in applying the four factors recognized in Daniel R. R. I find that Tomball ISD did not take adequate steps to accommodate Student in regular education. That is, there was no offer or attempt to accommodate Student's unique educational needs in the regular classroom

made prior to or at the September 27, 2004 ARD Committee meeting. There was simply no justification, either academically or behaviorally, for removing Student from the regular education classroom for even part of the day. Full inclusion with the necessary support services should have been offered to determine if they worked before considering more restrictive educational settings. I also find that Student would have received educational benefits from being educated in regular education. She had the ability to model behavior and had the academic skills to perform portions of the *** curriculum even without modifications. I also find that Student presence in the regular classroom, if she had been provided with an appropriate educational program, including an aide or co-teacher and a behavior intervention plan, would not have resulted in a significant disruption to the regular classroom learning environment.

Accordingly, under the facts of this case, the first-prong of *Daniel R. R.* is met in that Student could have been educated satisfactorily in the regular *** classroom, with the use of supplemental aids and services. Therefore, an analysis of the second-prong is unnecessary.

I find that Respondent denied Petitioner a free appropriate public education from September 27, 2004 through the end of the 2004-2005 school year by failing to provide Student with a educational program in the least restrictive environment. Petitioner is entitled to equitable relief in the form of tuition reimbursement for the tuition costs they incurred in Student's private school placement at the Graceview Baptist School from September 27, 2004 through the end of the 2004-2005 regular school year.

Conclusion of Law

After due consideration to matters of record, matters of official notice, and the foregoing findings of fact, in my capacity as a Special Education Hearing Officer for the State of Texas, I make the following conclusions of law:

1. Congress did not intend to foreclose a parent's right to tuition reimbursement as equitable relief in situations in which the student had not previously received special education and related services from a public agency when it passed the 1997 amendments to the IDEA. Equitable reimbursement to parents for unilateral private school placements may be awarded in appropriate circumstances by the courts and hearing officers when parents have timely requested special education and related services while their child is in public school. *Greenland School District v. Katie C.,* 358 F.3d 150 (1st Cir. 2004); *In accord, Letter to Luger,* 33 IDELR. 126 (March 19, 1999).

2. Equitable grounds for awarding tuition reimbursement exist in this case since the parents requested special education and related services while the child was in the public school, fully cooperated with the school district concerning their daughter's evaluation, attended and participated in the September 27, 2004 ARD Committee meeting, and considered the school district's proposed educational program and placement. By doing so, they indicated their willingness to forego the private school placement and return their daughter to a school district placement if an appropriate educational placement had been offered. Accordingly, they gave the school district an opportunity to assemble a team, evaluate their daughter, devise an appropriate individual educational plan, and determine whether a free appropriate public education would be provided in the public schools. *See Patricia P. v. Bd. of Educ.,* 203 F.3d 462, 468 (7th Cir. 2000); *Schoenfeld v. Parkway Sch. Dist.,* 138 F.3d 379, 381-82 (8th Cir. 1998); *cf. Burlington,* 471 U.S. at 373.

3. Respondent denied Petitioner a free appropriate public education from September 27, 2004 through the end of the 2004-2005 school year by failing to provide Petitioner with a educational program in the least restrictive environment at the September 27, 2004 ARD Committee meeting. 20 U.S.C. §1401 (8); 34 C.F.R. §§300.550 – 300.552; *Board of Educ. v. Rowley,* 458 U.S. 176 (1982); *Daniel R.R. v. State Bd. Of Educ.,* 874 F.2d. 1036 (5th Cir. 1989).

4. Petitioner is entitled to tuition reimbursement from September 27, 2004 through the end of the 2004-2005 school year. *Greenland School District v. Katie C.,* 358 F.3d 150 (1st Cir. 2004); *In accord, Letter to Luger,* 33 IDELR. 126 (March 19, 1999).

ORDER

After due consideration of the record and the foregoing findings of fact and conclusions of law, I ORDER that Tomball ISD, within 30 days of receiving from Petitioner receipts for Student's private school tuition costs at Graceview Baptist School during the 2004 -2005 school year, reimburse Petitioner for those tuition costs incurred from September 27, 2004 through the end of Graceview Baptist School's regular 2004-2005 school year.

Finding that the public welfare requires the immediate effect of this Final Decision and ORDER, I hereby make it effective immediately.

Tomball ISD shall timely implement this decision within 10 school days in accordance with 19 Tex. Admin. Code §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency and copied to Petitioner within 15 school days from the date of the decision: 1. documentation demonstrating that the decision has been implemented; or 2. if the timeline set by the hearing officer for implementing certain aspects of the decision is longer than 10 school days, then the school district's plan for implementing the decision within the prescribed timeline, and a signed assurance from the director that the decision will be implemented.

SIGNED this 17th day of July, 2005.

/s/ James W. Holtz

James W. Holtz
Special Education Hearing Officer

DOCKET NO. 293-SE-0505

Student BNF Parent Petitioner	§ §	BEFORE A SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER FOR
	§	
TOMBALL INDEPENDENT SCHOOL DISTRICT, Respondent	§ § §	THE STATE OF TEXAS

SYNOPSIS

Issue: Whether *** student with mental retardation, speech impairments and aggressive behaviors who had not previously been provided special education and related services by a public agency had a right to equitable tuition reimbursement for a private school placement?

Held: For Parent. Congress did not intend to foreclose a parent's right to tuition reimbursement as equitable relief in situations in which the student had not previously received special education and related services from a public agency when it passed the 1997 amendments to the IDEA. Equitable reimbursement to parents for unilateral private school placements may be awarded in appropriate circumstances by the courts and hearing officers when parents have timely requested special education and related services while their child is in public school.

Cite: *Greenland School District v. Katie C.,* 358 F.3d 150 (1st Cir. 2004); *In accord, Letter to Luger,* 33 IDELR. 126 (March 19, 1999).

Issue: Whether parents were entitled to tuition reimbursement for their child's private school placement under the facts of this case?

Held: Equitable grounds for awarding tuition reimbursement exist in this case since the parents requested special education and related services while the child was in the public school, fully cooperated with the school district concerning their daughter's evaluation, attended and participated in the September 27, 2004 ARD Committee meeting, and considered the school district's proposed educational program and placement. By doing so, they indicated their willingness to forego the private school placement and return their daughter to a school district placement if an appropriate educational program had been offered. Accordingly, they gave the school district an opportunity to assemble a team, evaluate their daughter, devise an appropriate individual educational plan, and determine whether a free appropriate public education would be provided in the public schools. Respondent denied Petitioner a free appropriate public education from September 27, 2004 through the end of the 2004-2005 school year by failing to provide Petitioner with a educational program in the least restrictive environment. Petitioner's IEP was capable of being implemented in a regular education *** class with the assistance of an aide and/or co-teacher and with an appropriately developed behavior intervention plan. The student's behaviors were not so severe to have significantly disrupted the regular classroom learning environment.

Cite: *See Patricia P. v. Bd. of Educ.,* 203 F.3d 462, 468 (7th Cir. 2000); *Schoenfeld v. Parkway Sch. Dist.,* 138 F.3d 379, 381-82 (8th Cir. 1998); *cf. Burlington,* 471 U.S. at 373. 20 U.S.C. §1401 (8); 34 C.F.R. §§300.550 – 300.552; *Board of Educ. v. Rowley,* 458 U.S. 176 (1982); *Daniel R.R. v. State Bd. Of Educ.,* 874 F.2d. 1036 (5th Cir. 1989)