



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-103

**Application of the BOARD OF EDUCATION OF THE
[REDACTED] SCHOOL DISTRICT
for review of a determination of a hearing officer relating to
the provision of educational services to a student with a
disability**

Appearances:

Keane & Beane, P.C., attorneys for petitioner, Stephanie L. Burns, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Neal H. Rosenberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Silverado Boys Ranch (Silverado) for the 2008-09 school year. The appeal must be sustained.

At the time of the impartial hearing, the student had graduated from Silverado, a private school located in Utah, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1 [d], 200.7). The hearing record reflects that Silverado is a residential program that serves boys ages 13 through 18 in an accredited academic program that is combined with a therapeutic and behavioral component for students with emotional and behavioral difficulties (Tr. p. 386). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this proceeding (Dist. Ex. 21 at p. 1; see 34 C.F.R. § 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

In December 2007, due to concerns regarding their son's behavior, the parents withdrew him from the district's high school and unilaterally placed him in a private "wilderness program" in Utah (Tr. pp. 517-19). At the time the student was withdrawn from the district, he was in eleventh grade and was maintaining passing to average grades (Dist. Exs. 10; 11; 12). The student's behavior log from the district's school for the 2007-08 school year, described incidents

including cutting class, insubordination, lateness, and inappropriate language with adults; however, at that time, the district's principal and director of staff and pupil personnel services (director) did not consider the incidents in the behavior log to be indicative of a student with an emotional disturbance (Tr. pp. 21, 47-48, 138, 164; Dist. Ex. 13 at pp. 1, 5).

On January 8, 2008, the student underwent a private psychological assessment at the private wilderness program by a clinical psychologist employed by the program (Dist. Ex. 4 at p. 1). In an assessment report dated January 15, 2008, the clinical psychologist indicated that the student had been referred for a psychological evaluation by his parents and an educational consultant who was working with the student's family (id.). The purpose of the evaluation was to assess the student's intellectual, academic and social/emotional functioning and in particular, to evaluate psychological concerns related to maladaptive behavior patterns including substance abuse, oppositional and defiant attitudes and behaviors, and recent arrests (id. at pp. 1-2). An additional purpose of the evaluation was to assist with planning an appropriate aftercare placement for the student (id. at p. 1). The evaluation included a clinical interview with the student, a review of the student's private wilderness program application, an adolescent history completed by the parents, intelligence and academic achievement testing, and administration of a battery of instruments to assess the student's social/emotional functioning and personality dynamics (id.).

The psychological assessment report reflected that according to the student's interview and history, he experienced anxiety regarding how he was perceived by others, he had poor coping skills, was easily overwhelmed, was unable to manage the stress and anxiety in his life, and he lacked insight into the basis for his feelings (Dist. Ex. 4 at p. 20). The report indicated that the student's overall anxiety warranted a diagnosis of an anxiety disorder - not otherwise specified (NOS) (id.). The report further reflected that the student presented with mild depressive features, such as diminished self esteem and self-confidence related to his difficulty finding a sense of identity within his family, and that the student had experienced periods of sadness, a lack of motivation, and lacked the insight and self awareness necessary to look at himself clearly (id.). The clinical psychologist noted that these features indicated a diagnosis of a depressive disorder - NOS (id.). The clinical psychologist also found that the student was less willing than others his age to process emotional situations and that he struggled to identify, understand and express his emotions (id.). He noted that the student was less mature than others his age, avoided focusing on himself, and that he had developed a series of behaviors that allowed him to disconnect from the world (id.). With regard to behavioral concerns, the clinical psychologist indicated that the student's behavior met the criteria for an oppositional defiant disorder (ODD) (id.). The clinical psychologist opined in the report that the student appeared to feel that rules did not apply to him, and reported that testing and interview material reflected that the student was frequently rebellious and defiant, lacked respect for his parents, and had difficulty with authority figures (id.). He further reported that the student lied and manipulated his parents, had difficulty controlling his anger, was often impulsive, made poor choices, was frequently irritable and struggled to see the consequences of his actions (id.).

The psychological assessment report indicated that the student's testing reflected an addictive personality and a chemical dependency consistent with his substance abuse history (Dist. Ex. 4 at p. 21). The clinical psychologist reported that the student's substance abuse was connected to efforts to self-medicate, difficulties related to anxiety and depression, and that the student remained at "high risk" to relapse without additional intervention (id.). As such, the psychologist indicated that diagnoses of marijuana dependence and alcohol abuse were

appropriate (id.). With regard to family relationships, the report indicated that the student had demonstrated significant conflicts with his parents including oppositional and defiant behavior, and that the conflicts had intensified over the last several years causing clinically significant impairment in family functioning, which warranted a diagnosis of a parent-child relational problem (id.).

The student's cognitive ability was assessed by administration of the Weschler Intelligence Scale for Children-Fourth Edition (WISC-IV), which yielded scores within the average range (Dist. Ex. 4 at p. 21). Administration of the Weschler Individual Achievement Test-Second Edition (WIAT-II) revealed that the student's academic functioning ranged from twelfth grade to college level and indicated an age equivalency of "adult" (id.). As such, the report indicated the student had no significant academic disabilities or concerns (id.). However, the report reflected an Axis IV diagnosis of "[a]rrested academic career, resistance to previous treatment efforts, placement in a wilderness program" (id. at p. 22).

The private clinical psychologist indicated in the report that due to the student's difficulties with anxiety, depression, oppositional attitudes and behaviors, and his high risk for future substance abuse, the student was in need of continued residential therapeutic intervention following his discharge from the private wilderness program (Dist. Ex. 4 at p. 21). The psychologist opined that as the student improved in these areas, he anticipated the student would develop the coping skills necessary for adaptive functioning and transition to a less restrictive setting (id.).

By letter dated January 29, 2008, the principal of the district high school requested permission from the parents to contact the private wilderness program (Dist. Ex. 38). The principal indicated in the letter that he wanted to determine if the student should be removed from the district's attendance roster and requested that the parents provide him with authorization to speak with a representative from the private wilderness program, as well as provide the necessary contact information (id.).

By letter dated February 2, 2008, the student's mother informed the district's director that she had placed the student at the private wilderness program in December 2007, that she anticipated his completion of the program within the next "few weeks," and that she wanted the help of the Committee on Special Education (CSE) in planning for the student's academic and emotional needs when he returned to the district (Dist. Ex. 3). She indicated that she had enclosed a psychological and academic evaluation which was completed by the private wilderness program (id.).

Also by letter on February 2, 2008, the student's mother responded to the principal's request, and provided him with contact information and permission to speak to the staff at the private wilderness program (Dist. Ex. 39). Additionally, the student's mother explained that the private wilderness program was a highly intensive therapeutic program that was focusing on the student's emotional needs and that the student was not receiving educational instruction there (id.). The student's mother also indicated that she had requested a CSE meeting to plan for the student's emotional, behavioral, and academic needs when he returned to the district in a "few weeks" (id.).

The student's academic history at the district's high school was reflected in a transcript from the district dated February 4, 2008 (Dist. Ex. 9 at p. 9). The transcript indicated that the

student had received passing grades throughout his high school career and that the majority of his grades fell in the 80s range (Dist. Ex. 9). The transcript also indicated that the student's performance on five Regents tests he had taken in June 2005, 2006 and 2007, reflected scores that ranged from 79 to 94 (id.).

In a letter dated February 24, 2008, the clinical psychologist who had been providing therapy to the student while he was at the private wilderness program informed the district's director that although the student had made "tremendous progress," the student would continue to need the structure and support of a therapeutic boarding school after his discharge from the private wilderness program (Dist. Ex. 8). The clinical psychologist also indicated that the student's substance abuse problems were secondary to his emotional concerns (id.).

On February 26, 2007, the student was discharged from the private wilderness program (Parent Ex. A). The student's clinical psychologist from the private wilderness program prepared a discharge summary of the student that reflected Axis I diagnoses of an anxiety disorder - NOS, a depressive disorder - NOS, an ODD, marijuana dependence, alcohol abuse, and a parent-child relational problem (id. at p. 1).¹ The discharge summary indicated legal concerns and school difficulties on Axis IV, an intake "GAF" score of 49, and an exit GAF score of 58 (Parent Ex. A).² The discharge summary indicated that the student had worked on treatment areas related to substance abuse, emotional growth, accountability and relationships and although he was often defiant, he was open to the therapeutic process and had made significant progress (id. at p. 1). The discharge summary reflected the student's need for continued support in a structured setting that included individual therapy, group therapy and family therapy, in addition to academic support and recommended that the student attend Silverado (id. at p. 2).

The parents placed the student at Silverado and signed a contract with Silverado for the student's placement there on February 26, 2008 (Parent Ex. E at pp. 1, 4). The contract indicated that it would be renewed on a monthly basis and that there was a monthly rate of \$6,500 for room and board, academic instruction, therapy and treatment; and a one-time enrollment fee of \$1,800 for uniforms, staffing for quarterly family workshops, and a psychiatric evaluation (id. at p. 1). An initial payment of \$15,400, which included the first and last month of enrollment and a student activity fee, was to be paid upon admission (id. at p. 2).

In preparation for a scheduled CSE meeting, the student's math, Spanish, and history teachers prepared individual reports for the district's "guidance center" regarding the student's performance prior to his withdrawal from the district (Dist. Exs. 10; 11; 12). The student's math teacher indicated that prior to his withdrawal, the student had been passing with below average class work and that although he did well when he was engaged, his weakness was "indifference" (Dist. Ex. 10). She also noted that the student displayed below average attention span, attitude, and conduct, and that putting too much pressure on him was not a successful strategy (id.). The student's Spanish teacher indicated that the student exhibited excellent conduct, average attitude

¹ The date of the discharge summary reflected that the student was discharged from the private wilderness program on February 26, 2007, which is apparently a typographical error as the date of admission was December 17, 2007. Thus, it appears that the actual date of discharge was February 26, 2008.

² Testimony by the clinical psychologist at the private wilderness program indicated that "GAF" stands for "global assessment of functioning" and that the student's score of 49 signified his inability to function at home and his need for residential treatment (Tr. p. 355). The clinical psychologist at the private wilderness program also testified that the student's exit GAF score of 58 indicated that he had "made some improvements" (id.).

and class work, and below average attention span (Dist. Ex. 11). The Spanish teacher further noted that the student was very nice in class, although he didn't speak much, and that he did his work most of the time (*id.*). The student's history teacher indicated that the student exhibited average attention, attitude, conduct and class work; that he had "notable ability," especially as an auditory learner; and that he did well without studying (Dist. Ex. 12). The history teacher's report indicated that the student had scored a 93 on his last test and that he had come to most of his classes during the first quarter (Dist. Ex. 12). The history teacher further indicated that the student paid attention to lectures and class discussions, but did not respond well to group work or independent work outside of the class (*id.*).

On February 28, 2008, at the request of the district's director of staff and pupil personnel services, the student's mother completed a "Parent Referral to the CSE" form regarding her son (Tr. p. 26; Dist. Ex. 5). The student's mother indicated her reason for referral as "[the student] has had a significant history of emotional/behavioral difficulties which have impacted his functioning at school" (Dist. Ex. 5).

The student's initial therapist at Silverado prepared a "Master Treatment Plan" for the student that included four goals with corresponding objectives in the areas of "work," "love," and "play" (Parent Ex. B at p. 1).³ The student's work goal and objectives focused on improving his management of emotions, including anger, anxiety, and depression through active involvement in his schoolwork, ranch and community work projects, cabin and lodge chores, by advancing through the levels system, and by staying on the "transition" level for an appropriate amount of time (*id.* at p. 2). The student's second goal and objectives focused on improving relationships in his life through the nurture, support and demonstration of love to those around him through the development of positive and healthy relationships with peers, authority figures, and family members (*id.*). The third goal and corresponding objectives focused on improving the student's ability to take care of himself through play by developing healthy leisure time activities, demonstrating a positive attitude and active involvement in on and off grounds leisure activities, honest dialogue with staff regarding his history of criminal activity and drug use, and an understanding of how negative leisure choices affected his life and the lives of his "victims" (*id.* at pp. 2-3). The student's fourth goal focused on the development of an effective discharge and aftercare plan with follow-up therapy care, academic plans and living arrangements, together with his parents (*id.* at p. 3).

On March 7, 2008, the CSE met to determine whether the student was eligible for special education programs and services as a student with a disability (Tr. p. 28). The meeting was attended by the parents, the CSE chairperson who was also the district's director of staff and pupil personnel services, a regular education teacher, a special education teacher, the student's guidance counselor, and the district school psychologist (Dist. Ex. 6). The hearing record reflects that the student's mother waived her right to participation by an additional parent member and signed an "Agreement to Excuse a Required CSE Member" form (Tr. p. 27).⁴ The

³ The hearing record reflects that the student's master treatment plan was prepared by his initial therapist who later left the employ of Silverado (Tr. p. 409). The hearing record further reflects that the student's therapy was thereafter provided by the founder and executive director of Silverado (Tr. p. 426).

⁴ The "Agreement to Excuse a Required CSE Member" form that the parent signed did not include the name or position of the excused CSE member; however, testimony by the director indicates that the student's mother knew before she signed the document that it was the additional parent member who was being excused (Tr. pp. 27-28).

hearing record reflects that the CSE reviewed the January 2008 psychological assessment report prepared by the private wilderness program, a letter from the student's therapist at the private wilderness program that recommended he be enrolled in a therapeutic boarding school, the student's transcripts from the district, three district teacher reports, and the student's district school behavior log (Tr. pp. 28-29, 40, 42, 43, 44, 45, 46). However, the hearing record reflects that an eligibility determination was not made at the March 2008 CSE meeting because the CSE determined that additional information regarding the student's emotional needs was required and recommended a psychiatric evaluation (Tr. pp. 28, 48, 523).

After the March 2008 CSE meeting, a series of correspondence between the parents and district took place regarding the recommended psychiatric evaluation. By letter dated March 19, 2008, the director contacted a private psychiatrist through the Board of Cooperative Educational Services (BOCES) regarding the CSE's recommended psychiatric evaluation of the student (Tr. p. 49; Dist. Ex. 14). However, the psychiatrist did not conduct an evaluation of the student because the student was residing in Utah (Tr. p. 50).

On May 2, 2008, the student's initial therapist at Silverado prepared a "Treatment Plan Review" of the student (Dist. Ex. 26 at p. 1). The student's progress was reviewed with regard to work projects, cabin chores, and school work (id. at pp. 1-2). The review reflected that the student had turned his "extremely negative attitude into a positive one that is a model for other students" and had demonstrated the ability and willingness to do all chores assigned to him (id. at p. 1). The review indicated that the student volunteered for extra work assignments and often helped new students learn what was expected of them (id.). With regard to school work, the review indicated that the student had a grade point average (GPA) of 4.0, worked hard, and was conscientious about finishing school work before using his "down time" for leisure activities (id. at p. 2). The student's behavior in school was described in the review as "very positive and . . . rarely need[ing] correction or discipline" (id.). The review also reflected that the student assisted other students with their studies (id.).

The student's progress at Silverado was also reviewed with regard to team relationships and family relationships (Dist. Ex. 26 at p. 2). The review indicated that the student was no longer following negative peers and had become a positive leader in his "cabin" (id.). The review further indicated that the student was able to stand behind his own personal values and standards and his positive attitude extended to the general student population (id.). It was reported that the student was still reactive to authority and was oppositional at times, but transitioned back to a positive position much faster than in the past (id.). The review indicated that the student had decreased his passive aggressive behavior toward authority (id.). With regard to family relationships, the review indicated that the student had made great changes in his relationships with his parents and that his previously "challenging, blaming, hostile and disrespectful attitude and behavior ha[d] given way to more respect, less blaming and more personal responsibility for his actions and behavior" (id.). The review reflected that the student continued to have a reactive nature at times that negatively affected communication, but that the student's overt manipulation of his mother had decreased and he was accepting more responsibility for his current situation (id.).

The review also indicated that the student's participation in both on and off campus activities was positive (Dist. Ex. 26 at p. 2). However, with regard to substance abuse, the review indicated that the student continued to struggle with the use of marijuana, tobacco, and alcohol (id. at p. 3). It was reported that the student was currently guided by external

consequences such as "arrest and jail time," but when asked if he would "use" if there were no consequences, he responded "yes" or "possibly yes" (id.). The review also indicated that, regarding his progression through the program's level system, he had only missed one level change due to his negative behavior very early in the program and that since then, he had moved up one level each time he had "applied" (id.).

By letter dated June 16, 2008, the student's mother informed the director that the student was expected to return to the district for his senior year of high school and requested a CSE meeting to develop an individualized education program (IEP) for the student for the 2008-09 school year (Dist. Ex. 20).

On June 25, 2008, the CSE convened for a review of the student's educational needs and to determine whether the student was eligible for special education programs and services as a student with a disability (Dist. Ex. 21 at p. 4). The attendees included the CSE chairperson/director of staff and pupil personnel services, a school psychologist, a district special education teacher, a district regular education teacher, the guidance counselor, and the parents (Dist. Exs. 21 at p. 4; 22). The hearing record reflects that the participation of an additional parent member was waived by the student's mother (Dist. Exs. 21 at p. 4; 23). The CSE determined that the student was eligible for special education programs and services as a student with an emotional disturbance (Dist. Ex. 21 at p. 1). The resultant IEP recommended indirect consultant teacher services once per week for one hour in a group, a 40-minute "learning lab" in a group of 8:1 for six sessions per eight day cycle, and one 30-minute individual counseling session per week (id.).

The June 2008 IEP reflected that the student's overall cognitive abilities, as measured by the January 2008 administration of the WISC-IV, were in the average range with strength noted in verbal reasoning skills (Dist. Ex. 21 at pp. 2-3). The IEP further indicated that his current academic status, as measured by the January 2008 administration of the WIAT-II, reflected overall above average ability in reading, math, written language, and oral language skills (id.). However, it was noted in the June 2008 IEP that, although the student typically excelled on assessments, he did the minimum amount of work necessary to pass a course and he needed to improve his ability to complete school work (id. at p. 3). With regard to the student's social development, the June 2008 IEP reflected that the student had a difficult year emotionally and behaviorally (id.). The June 2008 IEP indicated that the student had a history of gravitating toward peers who did not make good decisions, had trouble relating to adults and teachers, cut classes and became oppositional with teachers and administration when limits were set (id.). The June 2008 IEP reflected that the parents had placed him in an intensive therapeutic setting due to difficulties with substance abuse, behavior difficulties at home and trouble with the law, and that he was now reported to be doing well (id.). The June 2008 IEP reflected that the student needed to improve his decision-making skills, his class attendance, his ability to seek out staff during stressful situations, and his ability to relate to adults (id.).

The June 2008 IEP addressed the student's social/emotional/behavioral needs with seven annual goals that focused on improving the student's ability to interact appropriately with teachers and adults, comply with rules and teacher directives, complete class work and homework, accept responsibility and consequences for his actions appropriately, increase his ability to identify effective coping strategies, seek out appropriate assistance when under stress, and identify alternative actions for past decisions (Dist. Ex. 21 at pp. 6-7). The June 2008 IEP further indicated that, due to the parents' concern that the student would "relapse" in the home

setting, the CSE recommended that the student receive outside counseling to address issues outside of the school setting and that his "discharge plan" include outside support for substance abuse (id. at p. 5). The June 2008 IEP stated that the parents were in agreement with the CSE's recommendations and the hearing record reflects that the student's mother signed a consent form granting permission for the delivery of the services recommended by the CSE in the June 2008 IEP (id.; Dist. Ex. 43). The district Board of Education reviewed the recommendation and notified the parents, by letter dated July 17, 2008, that it supported the CSE's recommendation (Dist. Ex. 40). The letter also invited the parents to contact the district's superintendent's office if they had any questions regarding the notice (id.).

On June 25, 2008, the director e-mailed the student's mother and informed her that the private wilderness program had faxed the student's transcript, but indicated that the program required a parent's consent to release information regarding the student's social/emotional functioning (Dist. Ex. 25).⁵ The director also requested the discharge summary and any progress notes related to the student's clinical work in order to assist the district in making plans for the student's return to the district in September 2008 (id.).

On July 8, 2008, by e-mail, the student's mother informed the district that she had visited the student at Silverado and signed a release of information form allowing the district access to information regarding the student and provided the district with contact information for Silverado (Dist. Ex. 41). As a result of a series of e-mails between the director and staff at Silverado in July 2008, the student's transcripts were faxed from Silverado to the district (Dist. Exs. 29; 30; 31). The e-mails also reflected that the district requested a phone conference with the principal of Silverado (Dist. Exs. 31; 32). In an e-mail dated August 27, 2008, the student's mother informed the district that she had visited the student at Silverado, met with his teachers and therapist, and that the date of the student's return to the district was still undetermined, but her "best guess [was] the end of October" (Dist. Ex. 32). The student's mother also provided contact information for the student's therapist at Silverado (id.). On October 7, 2008, the director confirmed with the student's mother that staff in her office had contacted the student's therapist at Silverado, who indicated that the student's discharge had not been discussed at that time (id.). The director indicated to the student's mother that someone from her office would call the student's mother to discuss the conversation that had occurred with the student's therapist (id.).

On September 5, 2008, the student's Silverado therapist summarized the student's progress in a treatment plan review (Parent Ex. C at p. 1). The review reflected that the student had made continued progress in all areas (id. at pp. 1-3). The student continued to be a positive influence in his cabin and continued to demonstrate academic success with a final GPA of 3.76 for the term (id. at pp. 1-2). With regard to team relationships, the review indicated that the student had formed some very strong and positive relationships with peers, had gained the respect of his peers, and had provided both time and academic knowledge to many members of his "team" (id. at p. 2). With regard to family relationships, the review reflected that the student's struggle with parental authority had given him the opportunity to explore his sense of entitlement, his anger, and possible goals for his adult life (id.). The review indicated that the student continued to be very active and enthusiastic about on and off campus activities and that he had made some "very adult like decisions concerning drug use" (id.). The student understood that he could not use drugs and be a successful adult (id.). The review indicated that the student

⁵ The hearing record does not include a transcript from the private wilderness program; however, it does include a transcript from Silverado (Dist. Ex. 27).

was on the "transition" or highest level leading to returning home and that he had worked hard to obtain and maintain these levels (id. at p. 3). With regard to the student's aftercare planning, the review reflected that the student had completed successful home visits and had a visit scheduled for October 2008 (id.). The review reflected that the student was expected to remain in the program until he graduated from high school, although the student and his parents had not yet made that decision (id.). The review indicated that if the student elected not to stay in the program until graduation, he would return home to finish high school, and he had plans to continue his education after high school (id.).

On November 8, 2008, by letter, the director provided information to the parents regarding an informational fair scheduled on November 15, 2008, which would address transition planning issues (Dist. Ex. 33).

On November 18, 2008, the district e-mailed the student's mother and requested assistance in contacting the student's new therapist at Silverado, as there had been no response to the CSE's previous attempts to contact him (Dist. Ex. 34). The e-mail reflected that the CSE sought information regarding the student's progress, including how his October 19, 2008 home visit had gone, and any information regarding a potential discharge date or another scheduled home visit (id.). The student's mother responded by e-mail on November 19, 2008, and indicated that she would be speaking to the new therapist that day and would remind him to call the CSE (id.). The student's mother also indicated that the student's home visit went "fairly well," that he was doing very well academically, but that he was "dropped a level" in the therapeutic program due to attitude problems (id.). The student's mother also indicated that she was not certain when the student would be ready to leave Silverado (id.).

By due process complaint notice dated November 18, 2008, the parents, through their attorney, alleged that the June 2008 IEP did not provide the student with a free appropriate public education (FAPE) because it did not provide a "sufficient level of integrated support for the student in a full-time therapeutic residential school" (Dist. Ex. 35 at p. 2). The parents asserted that the student required a residential placement in order to be able to access his education for the 2008-09 school year because he required intensive monitoring and treatment, and the student's emotional disability was "inextricably intertwined" with his academic success (id.). The parents further alleged that the June 2008 IEP did not provide an "appropriate transitional educational placement" for the student (id.). The parents alleged that the June 2008 CSE was not properly composed and it did not develop a functional behavioral assessment (FBA) for the student although his classification was "ED" (id.).⁶ The parents also asserted that the June 2008 IEP's goals did not address the student's educational needs (id.). The parents contended that the June 2008 IEP would not have conferred meaningful educational benefits to the student and would have caused him to regress (id.). The parents requested that an impartial hearing officer declare that the June 2008 IEP was inappropriate and did not provide the student with a FAPE, that the district be ordered to provide an appropriate IEP, and that the parents be reimbursed for tuition, room and board, and "other related educational expenses and services" for the 2008-09 school year (id. at pp. 2-3).

By letter dated November 25, 2008, the director confirmed receipt of the parents' due process complaint notice, stated that the district believed it had met the requirements under the

⁶ The parents' due process complaint notice did not specify how the June 2008 CSE was allegedly improperly composed (see Dist Ex. 35 at p. 2).

Individuals with Disabilities Education Act (IDEA) and State regulations, and that the program it had recommended for the student for the 2008-09 school year offered the student a FAPE (Dist. Ex. 36 at p. 1). The district noted the specific recommendations made by the June 2008 CSE, the evaluations that those recommendations were based on, and indicated that the district was willing to meet with the parents in a resolution session scheduled for December 2, 2008 (id. at pp. 1-2; see 34 C.F.R. § 300.510[a]; see also 8 NYCRR 200.5[j][2]).

An impartial hearing began on April 21, 2009 and concluded on June 29, 2009, after five days of testimony (IHO Decision at p. 1). By decision dated August 9, 2009, the impartial hearing officer found that the June 2008 IEP was not reasonably calculated to enable the student to receive educational benefits and did not offer the student a FAPE (id. at p. 36). Specifically, the impartial hearing officer found that: (1) the June 2008 IEP did not adequately address the student's "built up anger;" (2) the district did not offer the student the structured setting or appropriate therapy to address his needs; (3) the June 2008 IEP did not offer the student an appropriate level of support because the student required residential therapeutic intervention; (4) the June 2008 IEP did not appropriately address the student's behavior problems as demonstrated by his history of cutting class, absenteeism, and discipline problems; (5) the June 2008 IEP did not accurately reflect the results of the student's evaluations to identify the student's needs, establish annual goals related to those needs, or provide for the use of appropriate special education services; and (6) the June 2008 IEP would likely not produce progress, but would produce regression (id. at p. 35). Thus, the impartial hearing officer found that the district did not offer the student a FAPE (id. at p. 36).

The impartial hearing officer next found that the parents' unilateral placement at Silverado was appropriate to meet the student's needs because: (1) the student was in a "downward spiral" and the student required a restrictive setting; (2) under the circumstances of this case, the parents' unilateral placement did not violate the concept of the least restrictive environment (LRE); (3) the program at Silverado provided both educational and emotional support that was calculated to provide the student with educational and emotional benefits; (4) the student advanced through the therapeutic system by meeting his educational and therapeutic goals; (5) the student's grades were excellent, and although the student therapeutically regressed prior to his discharge, it was not unexpected; and (6) the student exhibited emotional improvement, therapeutic success, and continued academic success at Silverado (IHO Decision at pp. 36-37).

The impartial hearing officer then found that equitable considerations favored a full award of tuition reimbursement because: (1) the parents have, "at all time[s]," cooperated with the district; (2) the parents justifiably removed the student from the district because the student posed a "significant risk of physical harm to himself and others"; (3) although the student was absent from the district for evaluations, this did not impede the CSE process because the CSE had enough information regarding the student to classify him as emotionally disturbed; and (4) the parents provided the district with timely notice of their intention to reject the IEP and keep the student at Silverado (IHO Decision at pp. 37-38). The impartial hearing officer ordered the district to reimburse the parents, upon proof of payment, the enrollment fee and per month tuition at Silverado from July 1, 2008 until December 1, 2009 (id. at p. 39).⁷

⁷ The impartial hearing officer sent the parties a corrected order page on August 9, 2009, correcting typographical errors in the dates contained in his order.

The district appeals, and asserts that it developed an appropriate program for the student for the 2008-09 school year and that the June 2008 IEP was reasonably calculated to provide the student with educational benefits in the LRE. The district further argues that the parents did not prove that Silverado was appropriate for the student because Silverado was an overly restrictive placement that did not provide instruction specially designed to meet the student's needs. The district contends that the student was placed at Silverado because of his behavior outside of school. The district further argues that the student did not achieve his treatment goals at Silverado and was discharged despite regression. Lastly, the district contends that equitable considerations do not permit tuition reimbursement because the student was removed from the district before being referred to the CSE, the student was not available for an evaluation by the district, and the parents failed to provide the district with timely notice of their intention to reject the IEP and keep the student at Silverado at the district's expense. The district requests that a State Review Officer find that: (1) the district was not obligated to identify, evaluate, or recommend a program or services for the student for the 2008-09 school year; or (2) the CSE offered a FAPE to the student for the 2008-09 school year; or (3) the parents are precluded from receiving tuition reimbursement because Silverado was not appropriate and the equities favor the district.

In their answer, the parents allege that the district's petition fails to state a claim upon which relief can be granted. The parents allege that June 2008 CSE erred by not considering a more restrictive setting for the student since a residential school was necessary for the student to make educational progress. The parents assert that the June 2008 CSE was improperly composed since no one from Silverado participated as a special education teacher of the student. The parents further assert that the June 2008 CSE erred by not conducting an FBA and developing a behavioral intervention plan (BIP). The parents also argue that the student should have been classified as emotionally disturbed at the March 2008 CSE meeting. The parents request that the decision of the impartial hearing officer be upheld in its entirety. The parents contend that they have acted in good faith and have cooperated with the CSE, the district did not offer the student a FAPE, Silverado was an appropriate placement, and equitable considerations support the award of tuition reimbursement.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-

making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at *6 [S.D.N.Y. Oct. 13, 2009]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Forest Grove, 129 S. Ct. at 2488; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R.

§ 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087). An IEP must be reviewed periodically, but not less than annually, to determine whether the annual goals are being achieved and to make appropriate revisions (34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the merits of the parents' appeal, the parents assert that the June 2008 CSE was not properly composed because no one from Silverado attended the meeting as a special education teacher of the student.⁸ Federal and State regulations provide that "not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student" attend a students' CSE meeting (8 NYCRR 200.3[a][1][iii]; see 34 C.F.R. § 300.321[a][3]). In this case, the district school psychologist who would have provided counseling services to the student pursuant to the June 2008 IEP attended and participated in the June 2008 CSE meeting, in addition to one of the district's twelfth grade special education teachers (Tr. pp. 123-24, 235-37, 273, 269-83; Dist. Exs. 21 at pp. 1, 4; 22). Therefore, I find that the June 2008 CSE meeting was properly composed (20 U.S.C. § 1414[d][1][B][iii]; 34 C.F.R. § 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]).

Next, the parents allege that the CSE should have determined when it first met in March 2008 that the student was eligible for special education and related services, rather than requesting an additional evaluation and waiting to determine the student's eligibility until June 2008. The hearing record reveals that the parents failed to raise this allegation in their due process complaint notice (see Dist. Ex. 35). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended at least five days prior to the impartial hearing with an impartial hearing officer's permission (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see Snyder v. Montgomery County Pub. Sch., 2009 WL 3246579, at *6-*7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL

⁸ Although the parents' due process complaint notice generally alleged that the June 2008 CSE was improperly composed, they did not specify which required CSE members were missing from the meeting (Dist. Ex. 35 at p. 2). The impartial hearing officer did not address the issue of CSE composition in his decision. However, the parents raised the issue at the impartial hearing and the district did not object. Therefore, I will review the parents' claim raised at the impartial hearing and on appeal that the June 2008 CSE lacked a special education teacher of the student.

1912442, at *6-*7 [D. Hawaii April 30, 2008]; see also A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 215-216 [D. Conn. 2006] aff'd, 2007 WL 3037346 [2d Cir. October 18, 2007]; A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-130; Application of a Student with a Disability, Appeal No. 08-102; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065). Thus, I find that the parents' argument regarding this issue has not been properly raised and I decline to address it.

The parents also contend that the student was denied a FAPE due to the June 2008 CSE's failure to conduct an FBA and develop a BIP. When a student's behavior impedes his or her learning or that of others, the CSE must consider positive behavioral interventions and supports, and other strategies, to address such behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120).⁹ In addition to the federal requirement, State regulations require that the CSE include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]; see Connor, 2009 WL 3335760, at *4). Additionally, under State regulations, when considering more restrictive programs or placements as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]).¹⁰

The hearing record reveals that, at the time of the June 2008 CSE meeting, the student did not demonstrate a need for the development of either an FBA or a BIP. The May 2008 treatment plan review from Silverado indicated that the student's "behavior in school is very positive and he rarely needs correction or discipline" (Dist. Ex. 26 at p. 2). Also, as discussed in detail below, the student's June 2008 IEP included annual goals that addressed the student's school behaviors (Dist. Ex. 21 at pp. 6-7). Moreover, an integral aspect of conducting an FBA is determining how a student's behavior relates to the environment in which it occurs. At the time of the development of the student's June 2008 IEP, the CSE did not yet know whether the student would engage in behavior that would impede his learning in the recommended district setting with the recommended supports. Under the circumstances, I find that an FBA would have been

⁹ In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.

¹⁰ In New York, a BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

premature because the student had not attended the recommended program with the recommended special education and related services (see M.M. v. New York City Dep't. of Educ., 2008 WL 4656876, at *10 [S.D.N.Y. Oct. 21, 2008]; E.H., 2008 WL 3930028, at *11; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Child with a Disability, Appeal No. 07-012, Application of the Bd. of Educ., Appeal No. 05-023; Application of a Child with a Disability, Appeal No. 04-033).¹¹

Finally, I agree with the district's assertion that the impartial hearing officer erred by determining that the June 2008 IEP did not offer the student a FAPE. The hearing record reveals that the documentation reviewed at the March 2008 CSE meeting was reviewed again at the June 2008 CSE meeting and included a January 2008 psychological assessment report and social history completed by the private wilderness program; an October 2007 physical examination report; February 2008 district teacher reports from the student's math, Spanish and history classes; the student's district transcript dated February 4, 2008; the student's district high school behavior log; and a student transcript from the private wilderness program dated February 26, 2008 (Tr. pp. 28, 29, 42, 43, 44, 45, 46, 63, 64; Dist. Ex. 21 at p. 6). In addition, the hearing record reflects that the June 2008 CSE considered the May 2008 Silverado treatment plan review in determining the student's needs and designing an appropriate program for him (Tr. pp. 68, 276; compare Dist. Ex. 21 at pp. 4-5, with Dist. Ex. 26 at pp. 1-3). The June 2008 IEP comments included information that was reflected in the May 2008 Silverado treatment plan review and I find that the June 2008 IEP properly identified the student's needs as described in that treatment plan review (compare Dist. Ex. 21 at pp. 4-5, with Dist. Ex. 26 at pp. 1-3; see 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]).

The May 2008 Silverado treatment plan review indicated that the student had some areas of continued need in that he was "at times, still reactive to authority" and oppositional, although he transitioned back "to a positive position much faster than in the past" and that his reactive nature sometimes got in the way of effective communication (Dist. Ex. 26 at p. 2). The June 2008 CSE developed seven annual goals to address these needs, including difficulties reported by the parents that the CSE had noted in their discussions and that the CSE determined were necessary to address for the student's success in the district's recommended program (Tr. p. 279; Dist. Ex. 21 at pp. 6-7). The goals in the June 2008 IEP focused on the student communicating and interacting with teachers and adults in a socially acceptable manner, complying with classroom rules and teacher directives, completing assignments, accepting responsibility and consequences for his actions without making negative comments, identifying effective methods to cope with stress or difficult life situations, seeking out appropriate people to ask for help when under stress, and identifying alternative actions for past decisions (Dist. Ex. 21 at pp. 6-7). I find that the June 2008 IEP contained annual goals which were appropriate to address the student's needs (see 34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]).

Although the May 2008 Silverado treatment plan review indicated that the student was doing well both academically and social/emotionally, the June 2008 CSE determined that it was appropriate to recommend supports to assist the student in his transition from his residential setting back to the district (Tr. pp. 59, 271). The June 2008 CSE recommended that the student be classified as a student with an emotional disability and recommended indirect consultant teacher services for one hour per week (Tr. p. 59; Dist. Ex. 21 at p. 1). The director testified that

¹¹ In New York, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]).

the special education teacher that would have provided the indirect consultant teacher services would have informed all of the student's teachers of the student's unique needs and would have served as the student's "case manager" (Tr. p. 59). The June 2008 CSE also recommended a learning lab for six days of an eight day cycle, in order to provide a consistent special education teacher during the student's day and to provide time for the student to work on any concerns that arose in the classroom setting (Tr. pp. 59-60; Dist Ex. 21 at p. 1).¹² The district school psychologist testified that the learning lab would have assisted the student in getting organized and would help him complete assignments, which had been an area of difficulty for the student in the past (Tr. p. 273). The June 2008 CSE also recommended counseling services of one 30-minute individual session per week to be provided by the school psychologist (Tr. pp. 62-63; Dist. Ex. 21 at p. 1). Thus, in addition to appropriately identifying the student's needs and establishing appropriate annual goals, the June 2008 IEP offered appropriate individualized services to address the student's unique needs (see 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

The May 2008 Silverado treatment plan review also indicated that the student continued to struggle with substance abuse and that although the student was not using substances at the time of the report, he had stated that he would "possibly" use these substances if there were no consequences (Dist. Exs. 21 at p. 5; 26 at p. 3). The June 2008 IEP also reflected that the student's mother was concerned that the student might "relapse" in the home setting (Dist. Ex. 21 at p. 5). The district recommended that the student receive outside counseling to address issues outside of the school setting and outside support for the substance abuse (id.). The June 2008 IEP also reflected that the district had requested a copy of the student's discharge/transition plan from Silverado so that it could plan for the student's return (id.).

Notably, in addition, the district school psychologist testified that to assist the student with the transition back to the district's high school, the CSE had planned to meet prior to the start of the school year with the student, his family, and district staff members and that the CSE would get a discharge summary from Silverado with recommendations to utilize for the student's transition (Tr. p. 282). Moreover, the school psychologist testified that an IEP is a "changing document" and that if "things weren't working or something wasn't working, we would have come back to the committee and . . . tailored his IEP" (id.). Thus, the hearing record reflects that the district planned to revise the IEP as appropriate (see 34 C.F.R. § 300.324[b][1]; 8 NYCRR 200.4[f]) and continue to collaborate with the parents in formulating the student's IEP (see Schaffer, 546 U.S. at 53; Cerra, 427 F.3d at 192-94 [finding that the parents were "significantly involved" in the IEP process and noting, among other things, that the district scheduled another CSE meeting upon learning of the parents' concerns and their intent to unilaterally privately place the student]).

Additionally, I find that the impartial hearing officer erred by determining that, at the time of the June 2008 CSE meeting, the student's needs required placement in a residential program. A student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428; W.S., 454 F. Supp. 2d at 148). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent

¹² The director testified that a learning lab is similar to a resource room, but offers more flexibility for high school students because it does not have a State mandate for minutes (Tr. pp. 60, 62).

appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when 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][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22).¹³ Behavioral problems do not afford a basis for concluding that a student requires a residential placement absent evidence that the student was otherwise regressing

¹³ The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

educationally in a day program as a result of those problems (see Walczak, 142 F.3d at 131-132 [residential placement not appropriate where student made meaningful social and academic progress in a day program]; c.f. Mrs. B., 103 F.3d at 1121-22 [residential placement necessary where behavioral problems resulted in the student not advancing more than one grade level in any subject in three years while in a day special education program with a therapeutic component]).

The hearing record reveals that, at the time the student was withdrawn from the district, he was in eleventh grade and academically was maintaining passing to average class work (Dist. Exs. 10; 11; 12). The student's high school academic history was reflected in a student transcript dated February 4, 2008 (Dist. Ex. 9 at p. 9). The transcript indicated that the student had received passing grades throughout his high school career and that the majority of his grades were in the 80s range (Dist. Ex. 9). The transcript also indicated the student's performance on five Regents tests he had taken in June 2005, 2006 and 2007, which reflected scores that ranged from 79 to 94 (id.).

In contrast to the earlier recommendations by the clinical psychologist at the private wilderness program; the May 2008 treatment plan review from Silverado, the student's then current school, indicated that the student had made significant progress in all areas (Dist. Ex. 26 at pp. 1-3). As reported in the May 2008 Silverado treatment plan review and reflected in the June 2008 IEP, the student had a 4.0 GPA, was "conscientious about getting his school work done," had "changed his attitude toward his family" to be more respectful and less hostile and angry, was getting along with peers, had "taken on some leadership roles," and was offering encouragement to other students (Dist. Exs. 21 at pp. 4-5; 26 at pp. 1-2). The June 2008 IEP and the May 2008 Silverado treatment plan review also indicated that the student had only missed one level change at Silverado due to negative behavior very early in the program, and he had since been "voted up" each time he had applied (Dist. Exs. 21 at p. 5; 26 at p. 3). The student's mother indicated at the June 2008 CSE meeting that if the student continued to be successful for the next two months, he would likely return home (Dist. Ex. 21 at p. 5). The hearing record also reflects that when the student's mother requested the June 2008 CSE meeting, she anticipated that the student would be returning to the district's high school "for his senior year" (Dist. Ex. 20). In addition, the district school psychologist stated that the CSE did not consider a residential program because the student's mother expected that the student would soon be discharged from his residential setting (Tr. p. 281). Moreover, the hearing record reflects that the CSE considered a more restrictive BOCES setting because the parents were concerned about the student's transition from his residential setting; however, the CSE determined that the BOCES setting was not appropriate because the district's high school would better address the student's academic and social/emotional needs (Tr. pp. 128, 273-74). Based on the information available at the time of the June 2008 CSE meeting, I find that the June 2008 CSE appropriately determined that the student would no longer require a residential placement for the 2008-09 school year. Also, in light of the student's aforementioned progress in the district's high school, progress at Silverado, and the special education program and services offered by the district for the 2008-09 school year, the hearing record demonstrates that the program offered by the district in the June 2008 IEP was reasonably calculated to confer educational benefits to the student in the LRE (see Walczak, 142 F.3d at 131-32; Mrs. B., 103 F.3d at 1121-22; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *36 [N.D.N.Y. Sept. 29, 2009] [concluding that "the CSE was obligated to recommend the least restrictive environment in which [the student] could make meaningful progress"]).

Based on the above, I find that the June 2008 IEP accurately reflected the student's needs and that the district's recommended program was reasonably calculated to confer educational benefits to the student in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006], citing J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]). Therefore, I find that the impartial hearing officer erred by finding that the district failed to offer the student a FAPE for the 2008-09 school year.

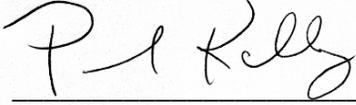
Having found that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issue of whether the parents' placement at Silverado was appropriate and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).¹⁴

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the impartial hearing officer dated August 9, 2009 is annulled.

Dated: Albany, New York
November 3, 2009



PAUL F. KELLY
STATE REVIEW OFFICER

¹⁴ Although I need not reach the issue of equitable considerations, I note that the hearing record reveals that the parents initially agreed with the June 2008 CSE's recommendation and that there were no objections raised at the June 2008 CSE meeting (Tr. pp. 63, 275; Dist. Ex. 21 at p. 5). In addition, the student's mother testified that she received a copy of the June 2008 IEP on or about July 17, 2008 and that she did not, at any time after receiving the June 2008 IEP and prior to filing the due process complaint notice in November 2008, contact the district to object to the recommended program or request another CSE meeting (Tr. p. 537). The hearing record reflects that the parents and the district continued to have contact in regard to planning for the student's return to the district after the June 2008 CSE meeting (Dist. Exs. 25; 28; 29; 30; 31; 32; 33; 34; 40; 41).