



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-006

**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:

Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for petitioner, Kenneth S. Ritzenberg, Esq., of counsel

Legal Services of Central New York, Inc., attorneys for respondents, Crystal M. Doody, Esq. and Susan M. Young, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which determined that it failed to offer respondents' (the parents') daughter an appropriate educational program and ordered it to reimburse the parents for their daughter's tuition costs at the Family Foundation School (Family Foundation) for the 2008-09 and 2009-10 school years. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending Family Foundation,¹ a private school which the Commissioner of Education has not approved as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; Tr. pp. 389, 532-33). According to the hearing record, the student received diagnoses of depression; a bipolar disorder; a mood disorder, not otherwise specified (NOS); an oppositional defiant disorder (ODD); and a probable reactive attachment disorder (Dist. Exs. 22 at pp. 2, 7; 26 at pp. 2, 11; 35 at pp. 4-5). The student's eligibility for special education programs and services as a

¹ It is unclear from the hearing record what grade levels the student attended during the 2008-09 and 2009-10 school years. (Tr. pp. 368, 475-76; Dist. Exs. 23 at p. 1; 37 at pp. 1, 6, 8-9; 39 at pp. 1, 6, 8-9; see Tr. pp. 331-32).

student with an emotional disturbance is in dispute in this appeal relative to part of the 2008-09 school year only (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The student attended a district elementary school beginning in 2001 (Dist. Ex. 18 at p. 2) and transitioned into a general education program in a district middle school (Parent Ex. B at p. 1). According to the student's mother, she secured private psychiatric services for the student during middle school due to concerns about her daughter's "emotional well being" (Tr. pp. 658-60). Despite these concerns, the student's mother indicated that her daughter did well in school and did not exhibit behavioral difficulties until the 2006-07 school year (Tr. pp. 476, 580).

The student began ninth grade during the 2006-07 school year at the district high school (Tr. p. 475). The student's mother revealed that at the commencement of the school year, the student appeared "sad" and "withdrawn," and by November 2006, she was passing only one academic course (Tr. pp. 477-78). The hearing record reflects that the student received general education academic intervention services (AIS)² in math and earth science, and "comp. ed." services (Tr. pp. 31, 157-58; Dist. Ex. 10 at p. 3).³ In November 2006, the parents consulted a private psychiatric nurse practitioner, who offered the student a "tentative" diagnosis of a bipolar disorder, and prescribed medications for "depression" and "mood stability" (Tr. pp. 478-80, 490). The hearing record also indicates that the student consulted with a child psychiatrist while she was in middle school, but stopped after one or two visits because "he couldn't really help us with any particular diagnosis or course of treatment" (Tr. pp. 580, 588, 658-59; see Parent Ex. F at p. 2). The student's mother, the student's guidance counselor, and assistant principal discussed the student's need to complete her schoolwork in order to pass her courses (Tr. pp. 478, 480).

In January 2007, the student was involved in a shoplifting incident, prompting the parents to place her in the "Persons in Need of Supervision" (PINS) diversion program, under which, in March 2007, the student was assigned a probation officer (Tr. pp. 483-84, 490, 587; Dist. Ex. 15). In April 2007, the student's mother requested that the district conduct a "non-CSE"⁴ evaluation of the student to determine what was "impeding [the student's] progress" (Tr. pp. 481-82; Parent Exs. B; C). In a May 10, 2007 e-mail to the student's mother, the school psychologist

² Pursuant to State regulations, AIS means "additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards as defined in subdivision (t) of this section and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance; provided that such services shall not include . . . special education services and programs as defined in Education Law section 4401(1) and (2). . . Academic intervention services shall be made available to students with disabilities on the same basis as nondisabled students, provided, however, that such services shall be provided to the extent consistent with the individualized education program developed for such student pursuant to section 4402 of the Education Law" (8 NYCRR 100.1[g]).

³ According to the hearing record, the district provides AIS to students requiring additional assistance in particular academic subject areas and "comp. ed." services are defined in the hearing record as "compulsatory education" services, which the district provides to students to address general areas of need, such as study skills and writing skills (Tr. pp. 157-58).

⁴ The district administrator identified the purpose of a "non-CSE" referral as "a way of providing some assessment services to students for whom a disabling condition isn't immediately suspected, but about whom we'd like to gather more information" (Tr. p. 75).

apprised that the student refused to complete the non-CSE evaluation, but assured the student's mother that the school psychologist would be available to conduct an evaluation in the future if the student changed her mind (Dist. Ex. 4). The student's mother explained that by late May 2007, it became apparent that the student would not pass any courses for the 2006-07 school year, and therefore, she removed the student from the district high school and sent her to stay with relatives outside of the State (Tr. p. 486). The student's mother stated that she received assignments from the district for the student to complete during the balance of the school year, and that her daughter achieved 1.5 credits during the 2006-07 school year (Tr. pp. 331, 485-86; Parent Ex. E). During the 2006-07 school year, the district documented 25 disciplinary referrals for the student for infractions such as "cutting mandatory detention," "accumulating 4 detentions," unexcused absences from school, "cutting a class," being late returning from lunch without an excuse, "cutting multiple classes," "disrupting a class," "perpetual tardiness to class," not being prepared for class, and leaving school without permission (Dist. Ex. 3 at pp. 1-5). During summer 2007, the parents procured weekly private psychotherapy services for the student and the family (Tr. pp. 487-88).

On July 5, 2007, at the request of the student's probation officer in the PINS program, the student was produced for a psychological evaluation "with a view toward better understanding her personality functioning and for appropriate treatment and placement recommendations" (Parent Ex. F at p. 1). In his report dated July 9, 2007, the evaluating psychologist indicated that the evaluation included parent and student interview components, during which he described the student as displaying an "angry affect" (*id.* at p. 2). The evaluating psychologist opined that the student was "angry and impulsive and [was] at hi[gh]-risk for committing provocative and reckless acts that could lead to self-injurious behavior," adding that the student's "anger and oppositionalism are likely signs of an underlying depression and/or mood disorder. Her irritability, anger and behavior problems may be characterized as depressive equivalents. There is a strong possibility she is suffering from bipolar disorder" (*id.* at p. 3). The evaluating psychologist emphasized the student's acute needs for counseling, "external structure and reinforcement," and "further diagnostic clarification" by a clinical psychiatrist (*id.* at p. 4).

The student enrolled in ninth grade classes while attending the district high school at the beginning of the 2007-08 school year (Tr. p. 489). On September 11 and 12, 2007 the student received disciplinary referrals for cutting a class and having an unexcused absence from school (Dist. Ex. 14 at p. 1). On September 14, 2007, the student was admitted to a private hospital to undergo an inpatient psychiatric evaluation (Tr. pp. 489, 492).⁵ The student's mother apprised that following an intake interview, the private hospital's psychiatrist altered the student's medications and "went with the tentative diagnosis of bipolar [disorder]" (Tr. p. 491).⁶ By correspondence dated September 25, 2007, the education coordinator of the private hospital informed the student's guidance counselor at the district high school of her admission and

⁵ According to the hearing record, this hospitalization was ordered by a judge in connection with the student's participation in the PINS program; the student's mother clarified that the judge ordered the evaluation subsequent to a "cumulative array of incidents" that occurred during summer 2007 (Tr. pp. 489-90, 591-92).

⁶ Although the student's mother confirmed that the private hospital conducted a psychiatric evaluation of the student, there is no report correlating to that evaluation contained in the hearing record (Tr. p. 592).

indicated the willingness of its treating staff to speak to district staff regarding discharge plans and the student's return to school (Dist. Ex. 7).

On September 26, 2007, the student was discharged from the private hospital after a two week stay (Dist. Ex. 8). In its discharge report, the private hospital staff advised that the student had participated in the hospital's academic program from September 17 through September 25, 2007 for two hours per day in a class of five students (id. at p. 1). She received instruction in math, global studies, science, English and physical education, and some course-related activities were provided by the district (id.). Private hospital staff commented that the student's "[a]cademic [a]pplication" of skills included "[c]onsistent application during classroom hours," that she was "[c]apable of working independently and asking questions when needed," and that she "[b]enefitted from individual help" (id. at pp. 1-2). Regarding social participation, private hospital staff observed that the student "[g]ot along well with others in the structure of the classroom," and that she "[w]orked well in this highly structured, small group setting" (id. at p. 2). They opined that "[w]ith improved health and continued application," the student "should have little difficulty reentering the academic program" and that she would "continue to benefit from the emotional and academic supports present in her academic program" (id.). The private hospital staff suggested that the district's guidance counselor schedule weekly meetings for the first three to four weeks after the student returned to school and subsequently evaluate the number of meetings that would benefit her (id.).

Following her discharge from the private hospital, the student returned to the district high school and met with the school's guidance counselor weekly in accordance with the private hospital's recommendations (Tr. pp. 298-300, 492, 592-93). The student's guidance counselor clarified that he met with the student to discuss her adjustment upon returning to school, developments in her course schedule, and her fulfillment of graduation requirements (Tr. p. 299; see Dist. Ex. 8 at p. 2). He further stated that the student did not discuss with him any difficulties she was having at school, with peers, or at home (Tr. pp. 299-300). During this time, the student's mother characterized her daughter's moods as "extremely volatile" (Tr. p. 492). From October 3 through 10, 2007, the student received seven disciplinary referrals for such infractions as accumulating excessive detentions, cutting mandatory detention and multiple classes, and arriving late to school without an explanation (Dist. Ex. 14 at p. 2). On October 23, 2007, following a verbal altercation with her parents, the hearing record reflects that the student left home overnight without notifying her parents and upon returning home, engaged in a "self-injury and suicide attempt" (Tr. pp. 492-94; Dist. Ex. 9 at pp. 1-2). The student received treatment overnight at a local hospital for "superficial cuts" and consumption of over the counter pain relief medication, and on October 24, 2007, she was admitted to a psychiatric hospital outside of the State (Tr. pp. 494-95; Dist. Ex. 9 at p. 1).

On November 2, 2007, the student was discharged from the out-of-State hospital after a ten day stay (Dist. Ex. 9 at p. 1). The results of a personality assessment screening⁷ administered by an independent psychologist on the same date "suggest[ed] someone with impulsivity, acting out problems or potential, and some difficulties with authority figures and externally imposed

⁷ The student's mother stated that the personality assessment screening report was never provided to the district (Tr. pp. 594-95; see Parent Ex. G).

rules and standards" (Parent Ex. G at p. 2). The evaluating psychologist also recommended further outpatient assessment "to clarify the question of depression as she notes she suffers from this, yet her ... profile reflected relatively little in the way of depressive symptoms" (*id.*; *see* Dist. Ex. 9 at p. 3). The November 13, 2007 discharge report from the out-of-State hospital prepared by a staff physician documented an interview with student, during which she revealed she had run away from home on four occasions in the past, "overdosed" following a breakup with her boyfriend, and had engaged in three episodes of self-injury (cutting behavior) (Dist. Ex. 9 at p. 2). The student further reported "a history of arguing with her parents but not typically [with] school personnel," although she admitted that she skipped classes "on occasion" (*id.*). She admitted that she "used marijuana once and alcohol twice, but denie[d] any other drug use" (*id.*). The discharge report noted that "according to the chart, [the student] has a diagnosis of bipolar disorder," and that she had been prescribed various medications since January 2007 (*id.*). The discharge report documented the student's participation in group therapy, cognitive behavioral therapy, pharmacotherapy, and family therapy during her ten day stay (*id.* at p. 3).

According to the discharge report, the out-of-State hospital staff conducted serial interviews, staff observations, labs and physical examinations, and administration of the Beck Depression Inventories on three occasions; in addition to psychological testing consisting of administrations of assessments identified in the hearing record as the "MMPI,"⁸ the Draw a Person, and the Rotter Incomplete Sentences Blank (Dist. Ex. 9 at p. 3; *see* Parent Ex. G at p. 1). Administrations of the Beck Depression Inventory yielded scores of 13, 13 and 3, respectively and the discharge report commented that "[p]reliminary results of the MMPI reveal[ed] an adolescent with impulsivity and conduct issues" (Dist. Ex. 9 at p. 3).

Regarding depressive symptoms, the student informed the reporting physician that she slept well, her energy was good, her appetite had not changed, and she denied experiencing anhedonia,⁹ maintaining that she smiled easily, laughed, and experienced "enjoyment in terms of activities and spending time with her friends" (Dist. Ex. 9 at p. 2). The reporting physician commented in the discharge summary that the student's "mood appeared depressed, affect was blunted with limited to no reactivity," and that she was "not as social as one would expect for a person her age" (*id.* at pp. 3-4). Although she denied having suicidal thoughts upon discharge, the discharge summary noted that she had previously admitted to having them earlier that week and added that "following her overdose [the student] thought it was 'stupid'" (*id.* at p. 3). The reporting physician deemed the student's judgment to be "impaired" and her insight "quite limited" (*id.*). He advanced diagnoses of a mood disorder, NOS; an ODD; and a "[p]robable" reactive attachment disorder (*id.* at p. 4). He qualified the student's prognosis as "[g]uarded," due to "suspicion of an evolving axis I diagnosis such as bipolar disorder or schizoaffective disorder" (*id.*). The student received prescriptions for two medications, and the reporting physician listed follow-up appointment dates with the student's probation officer, private therapist,¹⁰ and

⁸ The "MMPI" is described by the district's school psychologist as "a multi-personality inventory" that "looks for a variety of different symptoms that would contribute to ... coming up with a diagnosis" (Tr. p. 235).

⁹ The hearing record defines "anhedonia" as "a loss of pleasure, not finding pleasure in daily life or activities" (Tr. p. 237).

psychiatric nurse practitioner (Tr. pp. 478, 487; Dist. Ex. 9 at p. 4). He further recommended that the family engage in family therapy, that the student continue to "follow stipulations of the PINS," and that she and her family "meet with school staff to develop a plan for reentry and catching up with school work" (Dist. Ex. 9 at p. 4).

The student's mother revealed that following the student's November 2, 2007 discharge, the PINS probation agency placed the student under "house arrest," including requiring the student to wear an electronically monitored ankle bracelet, due to her repeated incidents of running away (Tr. pp. 499-500). Upon the student's return to the district, the parents requested that she attend the district's alternative high school¹¹ rather than the high school she had previously attended (high school) (Tr. pp. 500-01). In mid-November 2007, the student began attending the district's alternative high school, receiving three hours per day of tutoring in math, English, and earth science (Tr. pp. 339, 341; Dist. Exs. 14 at p. 4; 22 at p. 2; Parent Ex. J). The guidance counselor added that in addition to tutoring at the alternative high school, the district also offered the student opportunities at the high school including after-school tutoring, an earth science lab, a global studies class with a preferred teacher, and participation in after-school activities (Tr. pp. 300-02).

On November 13, 2007, the student's mother completed a written referral to the Committee on Special Education (CSE) for her daughter (Dist. Ex. 10). The student's mother requested that the student be classified as having an emotional disturbance and apprised the CSE that she had missed school due to hospitalizations (*id.* at p. 1). The student's mother recalled that her daughter "used to enjoy sports, music, and art," but observed that "since [the student] became depressed, she has lost interest in activities except for computers and TV" (*id.*; Parent Ex. H at p. 1). The referral described the student's difficulties and lack of progress in "English/language arts" and math, and stated that despite receiving AIS and comp. ed. services, she did not pass her academic courses (Dist. Ex. 10 at pp. 2-4). The student's mother characterized her daughter as "sad," and exhibiting a short attention span and impulsive, uncooperative, withdrawn, anxious and moody behaviors (*id.* at p. 4). The student's mother also reported that the student appeared to be "socially immature for her age" and that she experienced "difficulty finding [and] keeping friends who ha[d] healthy interests," confirmed that her daughter had "been diagnosed with a [d]epressive mood disorder," and expressed a belief that the student had an educational disability (*id.* at p. 5).

¹⁰ The student's mother advised that she secured the services of a private family therapist during summer 2007, and that this individual worked with the student individually, and with the family as well, on a weekly or biweekly basis (Tr. pp. 487-88, 598). It is unclear from the hearing record whether or not these services extended beyond November 2007.

¹¹ The hearing record describes the district's alternative high school as an "off-campus school where students from the high school who have been suspended or have some reason to require tutoring" receive individual and small group tutoring services (Tr. p. 500). The student's mother explained that she requested that her daughter attend the alternative high school following her discharge from the out-of-State hospital because it was "clear to [her] that [the student] could not function in school" and because the student had missed so many days of school due to her hospitalizations (*id.*). According to the hearing record, the parents received approval from the student's physician, provided it to the student's guidance counselor, and the district approved the change in the student's program (Tr. pp. 163, 501).

At the end of the first quarter of the 2007-08 school year, the student received the following grades: English, 62; global studies, 28; earth science, 60;¹² and algebra, 78 (Dist. Ex. 14 at p. 2). By correspondence dated December 7, 2007, the district's director of special education (director) acknowledged the parents' request for a CSE evaluation of the student, and represented that an educational assessment, a physical examination, a social history, and a psychological evaluation would be conducted (Dist. Ex. 12). The letter purported to enclose a "[p]arent [h]andbook," a request for consent, and a test description, and the director further apprised the parents that a "description of [their] legal rights" was attached and urged them to "read it carefully," offering to provide additional information upon request (*id.*). The hearing record evidences that the parents received these enclosures (*see* Tr. pp. 602-03), and on December 14, 2007, the student's mother signed a consent form allowing the CSE to evaluate the student (Dist. Ex. 13).

In a January 3, 2008 e-mail to the school psychologist, the student's mother synopsised the student's educational history, assessing that she had "achieved academically at a reasonable to good level through eighth grade, then last year stopped working, got on PINS in March (we filed after she was caught shoplifting) and left school before the end of June" (Dist. Ex. 15). The student's mother further informed the school psychologist that the student had been hospitalized twice during fall 2007 "for depression" and advised that she would send to the district the out-of-State hospital's discharge summary report, which she believed was the "most comprehensive psychological report we have at this point" (*id.*). She also characterized the student's "work" at the alternative high school as "going well-[the student] is passing two out of three classes, and she will probably pass [m]ath once she gets caught up" (*id.*).

On January 8, 2008, the student's mother completed a social history (Dist. Ex. 18). She recounted how the student had "resisted rules and authority from age five, especially at home," described her daughter as a "strong willed child [and] very demanding," and noted that the student had "trouble getting along with people and generally with feelings [and] emotions (*id.* at pp. 1-2). The social history confirmed that the student had been "hospitalized twice th[at] fall for depression," identified the student's school-related problem as "trouble with relationships and work," and surmised that "[d]epression is a cause, but there may be others" (*id.* at p. 3). The student's mother cited the student's weekly sessions with a "family therapist" and science tutoring, and requested that the district provide the student with psychological counseling and "support from the [r]esource [r]oom" (*id.*).

On January 16, 2008, a "student assistant team counselor" advised the high school principal via e-mail that she had spoken "at length" with the student's private therapist, her science teacher, the school psychologist, and the director of special education (Tr. pp. 26, 147, 176-77, 670; Dist. Ex. 20). Based on those discussions, the student assistant team counselor recommended that for the second semester of the 2007-08 school year, the student return to the high school to receive instruction in her "regular 4 main classes and lab/pe"¹³ during the morning

¹² The student's transcript does not reflect a grade for her participation in the earth science lab (Dist. Ex. 14 at p. 2).

¹³ Although not defined in the hearing record, "pe" presumably refers to physical education.

hours and attend the alternative high school in the afternoon to "work on her homework" (Dist. Ex. 20). The student's mother explained that behaviorally, the student did "okay" at the alternative high school, insofar as she attended regularly and "did what she was asked to do" (Tr. p. 502). At the end of the second quarter, the student had achieved grades of 92 in algebra, 90 in English, 78 in earth science lab, and 72 in earth science (Dist. Ex. 14 at p. 3).¹⁴

On January 31, 2008, the district's school psychologist generated a psychoeducational evaluation report of the student, which synthesized data collected over three previous days of assessment (Dist. Ex. 22; see Tr. pp. 170-91; Dist. Ex. 16). The school psychologist apprised that she reviewed the student's records, conducted a parent interview, consulted with district staff, conducted observations, and administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) and the Woodcock Johnson Tests of Achievement-Third Edition (WJ-III ACH) to the student in performing the evaluation (Dist. Ex. 22 at p. 1). Academically, the psychoeducational evaluation reflected that the student achieved at a "reasonable to good level" until eighth grade, achieving a final seventh grade average of 89.9 and a final eighth grade average of 84.6 (id.).

Two of the student's middle school teachers and her guidance counselor concluded that the student was a good role model for others, was "well behaved and well mannered" despite requiring redirection in class for excessive talking, and characterized her as a "good girl" (Dist. Ex. 22 at p. 1). The psychoeducational evaluation report described the student as "outgoing with friends" (id.; see Parent Ex. B at p. 1). The student's English teacher during the 2006-07 school year added that the student completed homework approximately half of the time, very often appeared to "blank out" or draw a blank, and seemed to have difficulty listening for information because she would "drift" (Dist. Ex. 22 at p. 2; Parent Ex. B at p. 2). The English teacher further discerned that the student became "terrifically nervous" when answering questions out loud, "was almost never prepared for class," and appeared to be "totally disorganized" (id.). The student's math teacher during the 2006-07 school year reported that the student appeared to do "okay" when engaged, but "frequently chose not to do her work and her grades suffered" (Dist. Ex. 22 at p. 2; Parent Ex. B at p. 3). The student's 2006-07 teachers reported that "her motivation seemed to decline throughout the year" and that "her effort was inconsistent" (Dist. Ex. 22 at p. 2; Parent Ex. B at pp. 2, 5).

The psychoeducational evaluation report confirmed that during the 2006-07 school year, the student received AIS and comp. ed. support with the student's comp. ed. teacher, informing that the student "did her work in the classroom but lacked follow through with her assignments" (Dist. Ex. 22 at p. 2). Behaviorally, the psychoeducational evaluation report indicated that in April 2007, the student was described as "possibly withdrawn," and commented that she appeared to be "very immature socially" (id.; Parent Ex. B at p. 4). The school psychologist related that the student informed her that "schoolwork was not too hard for her and that she could get help if she needed it," and that her grades were "bad because she would 'get lazy' and not do her work" (Dist. Ex. 22 at p. 2; see Dist. Ex. 4). The psychoeducational evaluation report denoted that the parents withdrew the student from the district on May 22, 2007 "for home schooling" and at that time, she carried grades ranging from 37 in earth science to 75 in physical

¹⁴ The student's grade for global studies is not reflected in the hearing record (see Dist. Ex. 14 at p. 3).

education, and further identified 25 disciplinary instances during the 2006-07 school year for transgressions including cutting class, unexcused absences, and disrupting class (Dist. Ex. 22 at p. 2; see Tr. pp. 486-87).

The psychoeducational evaluation report addressed the student's return to the district for the 2007-08 school year and her receipt of multiple detentions for cutting classes and refusing to attend detention (Dist. Ex. 22 at p. 2). The high school vice principal, who was familiar with the student, "never saw the student as a real hard worker" and surmised that she often appeared to be "preoccupied" (id. at p. 3). However, he further indicated that although the student was periodically sent to his office while in the high school, she was "always respectful to him and seem [ed] to have developed a trusting relationship with him" (id.). The vice principal also observed "two sides" to the student noting that: "[a]t times, the student [was] distant and d[id] [not] appear to care about anything, including her poor choices," while "[o]n other occasions, she seem[ed] to want help and appear[ed] to be sorry or somewhat remorseful for her behaviors and poor choices" (id. at pp. 3-4). He expressed concern for the student and "believe[d] that counseling [was] necessary" (id. at p. 4). The student's French teacher, who provided instruction to the student during eighth and ninth grade, reported that she had observed the student change over the past two years; in that at the beginning of eighth grade the student "was a pleasure to have in class and her behavior seemed 'typical,'" but as the year progressed, the student "seemed to lose interest and often looked as if she was 'zoning out'" (id.). The French teacher opined that the student "need[ed] structure and predictability in her lessons," qualifying that even with 1:1 assistance, the student appeared unable to focus in class (id.). She further remarked that in ninth grade, the student "seemed to be unhappy and always looked depressed in class;" however, when the French teacher observed the student in the hallways or after school, she "would always be laughing and chatting happily with her friends," further relating that when she approached the student at these times, the student put on her "sad face" (id.).

The school psychologist acknowledged the student's two hospitalizations in fall 2007 and in her report, summarized the November 13, 2007 out-of-State hospital's discharge report, the January 8, 2008 social history, and notes culled from interviews conducted with the student and the student's mother (Dist. Ex. 22 at pp. 2-3; see Dist. Exs. 9; 16; 17; 18). The student's mother opined that "outside tutoring" was the best option for her daughter for the 2008-09 school year, but conceded that she was willing to allow the student to return to the high school for a portion of the day on a trial basis (Dist. Ex. 22 at p. 3; see Dist. Ex. 17). The student related that she had joined an extracurricular club and was beginning to form friendships (Dist. Ex. 22 at p. 3; see Dist. Ex. 16). According to the student's tutor in the alternative high school, the student had not been absent since the commencement of tutoring (Dist. Ex. 22 at p. 3). Her tutor described the student as "cooperative," observing that she typically stayed on task, completed her homework assignments, had worked very hard to catch up in math, and was "good" in English (id.). The tutor conceded that the student exhibited "goofy" behavior "here and there" but was easily redirected, and he did not view such behavior as defiant (id.). Her tutor expressed that "he ha[d] seen [the student's] emotional side and believe[d] that [the student] may not yet be ready to return to [the high] school on a full time basis" (id.). The tutor reported that the student was performing at a ninth grade level in reading and an eighth grade level in math, and he denied viewing the student as exhibiting academic deficits (id.).

During the psychoeducational assessment, the school psychologist characterized the student as "cooperative" and "polite," although "difficult to engage in conversation" (Dist. Ex. 22 at p. 4). Three of the student's WISC-IV composite scores were in the average range: verbal comprehension, 99; perceptual reasoning, 94; and processing speed, 94; she attained a working memory composite score of 116, in the high average range; and a full scale IQ score of 101, indicating that her overall cognitive abilities were in the average range (*id.*). The school psychologist noted that none of the student's WISC-IV subtest scores fell below the 25th percentile (*id.*). The student achieved WJ-III ACH subtest scores in the average to high average range, with the exception of the calculation subtest, on which her standard score of 89 (24th percentile) was in the low average range (*id.* at p. 5). The school psychologist acknowledged that these results accurately represented the student's abilities (*id.* at p. 4).

The school psychologist related that the student informed her that she wanted to return to the high school, and was willing to work while there (Dist. Ex. 22 at p. 4; *see* Dist. Ex. 16). The psychoeducational evaluation report noted that although the student received tutoring at the alternative high school, she was "often found" at the high school, and hypothesized that she may have been seeking out socialization with familiar people (Dist. Ex. 22 at p. 7).

The school psychologist stated in her report that that student "possesse[d] the academic and cognitive abilities necessary to be educationally successful; however, outside mental health factors appear[ed] to be causing a significant disruption in her life within school and, even more so, at home" (Dist. Ex. 22 at p. 7). In acknowledging that "opportunities for socialization and the development of healthy connections with others [were] crucial components to [the student's] therapy and future success," she concluded that there appeared to be "sufficient reason to consider the option of returning [the student] to the high school setting with appropriate supports put in place" (*id.*). The school psychologist opined that the results of the psychoeducational evaluation "suggest[ed] that [the student's] cognitive and academic abilities [were] appropriate and conducive to learning" and added that the data provided in the student's academic records coupled with the input from her teachers "concur[red] that [the student] d[id] not appear to meet the necessary criteria to qualify as a student with a specific learning disability" (*id.* at p. 8). She recommended that the student return to the high school on a part-time basis, and suggested that "[c]ommunication and collaboration among home, school, and outside agencies and counseling providers will be a critical component of any plan for [the student]" (*id.*). Other recommendations included a behavioral contract, weekly sessions with the guidance counselor to assist the student with overcoming "social and academic barriers," and provision of "an outlet within the school setting" where she could go if she felt "overwhelmed, depressed, or otherwise unable to cope with expectations" (*id.*).

On January 31, 2008, the CSE convened for the student's initial review (Dist. Exs. 21; 23; Parent Exs. M; N). Attendees included the director who also acted as district representative, a district nurse practitioner, the school psychologist, the guidance counselor, a special education teacher, a regular education teacher, the parents, and the student (Dist. Ex. 23 at p. 8; Parent Ex. N). Minutes from the CSE meeting indicated that the student's mother explained the reason for the referral as her daughter's inability to successfully begin the school year due to "emotional reasons" (Dist. Ex. 21 at p. 1). The student's guidance counselor reviewed the student's grades and the school psychologist reviewed her psychoeducational evaluation report and

recommendations (id.). The student's regular education teacher discussed his observations of the student's class performance and the student's father discussed his concerns regarding his daughter's organizational skills (id. at pp. 1-2). According to the CSE minutes, the director posited that the student did not appear to be "far behind" and, with assistance, should have been able to catch up (id. at p. 2). He reviewed the criteria for eligibility as a student with a learning disability, which he determined to be "not evident or supported" (id.).

The minutes of the January 31, 2008 CSE meeting further evidence that the CSE reasoned that "classification due to mental health factors does not seem to be the first choice – it is recommended that [the student] return to school on a part-time basis to determine how the general education environment can accommodate her without classification" (Dist. Ex. 21 at p. 2). The guidance counselor advised that the proposed general education program would consist of the student attending the high school in the morning for "four core classes," a lab, and physical education (id.). The meeting minutes further indicated that the student would also attend the alternative high school in the afternoon to receive tutoring services (Tr. pp. 307-08; Parent Ex. M). The January 31, 2008 CSE afforded the student options in the event she encountered any problems, including approaching any of her teachers, the guidance counselor, or the vice principal (Dist. Ex. 21 at p. 2). The January 31, 2008 CSE determined that the student was not eligible at that time for special education services, and declined to classify her; the hearing record evidences that the parents "went along" with the determination at that time (id. at p. 1; see Tr. p. 610).

Following the January 31, 2008 CSE meeting, the hearing record reflects that the student attended the general education program at the district high school and the alternative high school for approximately three days (Tr. pp. 610-11). In a February 11, 2008 e-mail to the school psychologist, the student's guidance counselor reported that the student had an argument with her boyfriend and her father requested that she only attend the alternative high school (Tr. pp. 308-09; Dist. Ex. 24; see Parent Ex. O). The hearing record reflects that in March 2008, the student's mother and district staff, including the high school principal and the student's guidance counselor, were in contact regarding the student's educational program at the alternative high school (Tr. pp. 292, 671; Parent Exs. P; Q; R; S).

In a March 20, 2008 e-mail to the student's earth science teacher, guidance counselor and high school principal, the student's mother apprised that she tried to get the student "up and out for school, but [the student] [wa]s collapsing into depression," and that the parents were "now trying to get [the student] a place in a hospital or other therapeutic environment" (Tr. p. 670; Parent Ex. T). On March 28, 2008, the parents attended an interview at Family Foundation and received information detailing enrollment and tuition expenses (Tr. p. 615).

In an April 21, 2008 e-mail to the student's guidance counselor, the student's mother informed that she was "working on enrolling" the student at Family Foundation and believed that the school had a program that could help her daughter (Parent Ex. U). Family Foundation's admissions director described the school as "a private therapeutic college-prep boarding school" (Tr. pp. 359-60; see Parent Exs. FF; GG). The April 21, 2008 e-mail also stated that the student

had expressed to her mother that she would like to attend a "BOCES"¹⁵ program, and the student's mother inquired as to the number of credits the student needed in order to attend such a program (Parent Ex. U). The hearing record reflects that the guidance counselor responded that the student had not earned enough credits to attend the BOCES program (Tr. p. 525). By e-mail dated April 28, 2008, the student's mother requested that the guidance counselor send the student's transcript to Family Foundation, and indicated that she hoped to enroll the student at Family Foundation that week (Parent Ex. V).

On May 2, 2008, the student enrolled at Family Foundation and later the same day, Family Foundation informed the parents that the student could no longer attend due to the positive result of a pregnancy test (Tr. pp. 372, 397-98, 526-27). On May 8, 2008, the student's mother apprised the guidance counselor that her daughter was no longer attending Family Foundation and was again attending the alternative high school (Parent Ex. X).

On May 22, 2008, pursuant to a judge's order relative to the student's PINS program, the student was again admitted to the out-of-State hospital for "evaluation of her mental status" (Tr. p. 617; Parent Ex. Y).¹⁶ She was discharged on May 30, 2008, after a nine day stay (Parent Ex. Y at p. 1). The out-of-State hospital discharge report characterized the student as "generally oppositional" and "somewhat difficult to engage" during her stay, offered Axis I diagnoses of an ODD and "a [m]ajor [d]epressive [d]isorder, recurrent, severe, without psychotic features, largely in remission," and a "guarded" prognosis (*id.* at p. 2). The student returned to the alternative high school and, according to the hearing record, completed her math and global studies courses and acquired two academic credits (Tr. p. 528; Parent Ex. LL). From late June 2008 through mid-July 2008, the student resided in an out-of-State "therapeutic residence" during which time she experienced a miscarriage (Tr. p. 528; Parent Ex. Z). She subsequently returned home with her parents, who reenrolled her in Family Foundation on July 21, 2008 (Tr. p. 530; Parent Ex. AA).

On August 27, 2008, the student was produced for her initial evaluation at Family Foundation (Dist. Ex. 35). Intake interviews of both the student and the parents were conducted (*id.* at pp. 2-3). In her interview, the student posited that "[p]rior to the age of [14], [she] felt she had no problems," but acknowledged "overdosing in apparent suicide attempts on four separate occasions," four extended hospitalizations, "a long history of cutting herself," her status as an adopted child,¹⁷ and frequent anger and conflicts with her parents and her younger sister (*id.*). The parents corroborated the student's history of cutting on her arms and piercing her face, and reported that she "had done practically no school work for the past two years," "ha[d] never accepted her adoptive family," "ha[d] never respected authority in her adoptive household," and "ha[d] always been depressed and unhappy" (*id.* at p. 3). The parents represented that they "were aware of some alcohol use, but were unaware of drug use" (*id.*). The evaluating psychologist observed that "[w]hile there is a history of [m]ood [d]isorder, [the student] did not appear

¹⁵ Although not defined in the hearing record, "BOCES" presumably refers to the Board of Cooperative Educational Services.

¹⁶ The student's mother maintained that she could not remember the event that precipitated the judge's ordering of the evaluation (Tr. pp. 617-18).

¹⁷ The hearing record reflects that the student was adopted by her parents at birth (see, e.g., Dist. Ex. 18 at p. 1).

depressed or anxious during this evaluation. There was no indication of a major mental disorder" (id. at p. 4).

The evaluating psychologist offered Axis I diagnoses of a depressive disorder, NOS; an ODD; and "rule out" a reactive attachment disorder; no Axis II diagnosis; an Axis III diagnosis of hay fever; and Axis IV diagnoses of adoption, extreme mood volatility with suicide attempts, academic problems, legal problems, and recent termination of pregnancy (Dist. Ex. 35 at pp. 4-5). He also cautioned that "[a]t this time, [the student] is relating in a direct fashion and indicates an understanding of her need for treatment. Her history, however, has been extremely erratic and chaotic" and "[g]iven her mood volatility, it is entirely possible that cooperation on one day will be followed by extreme negativity the day after" (id. at p. 5).

Additionally, in August 2008, the student's father and district staff including the director, engaged in two telephone conversations during which the parents requested that the district provide them with "tuition assistance" for the student's enrollment at Family Foundation (Tr. pp. 42-43, 531). The district stated that it could not provide tuition assistance because the student was not classified as a student with a disability and because Family Foundation was not a State-approved school (Tr. p. 532). The parents subsequently met with the same district representatives and reiterated their request for tuition assistance, at which time the district maintained its denial for the reasons previously cited, prompting the parents to seek the advice of counsel (Tr. pp. 533-34, 657).¹⁸

On October 8, 2008, upon advice of counsel, the parents referred their daughter to the CSE of the school district in which Family Foundation is located (district of location) (Tr. pp. 535, 622-23; Parent Exs. BB; CC; DD; EE).¹⁹ On January 18, 2009, the district of location's school psychologist generated a psychoeducational report of the student, memorializing the findings of an evaluation conducted on December 16, 2008 (Dist. Ex. 26). During the interview component of the evaluation, the student advised that at the age of 14, she began a relationship with a boyfriend who introduced her to "partying and alcohol/marijuana use" and skipping school (id. at p. 3). She revealed the frequent fights that occurred in the relationship, which she noted lead to bouts of depression and ultimately a suicide attempt in January 2006, in which she cut herself and took an overdose (id.). She cited frequent fights at home with her parents, and confirmed continued marijuana use on a daily basis after she moved in with a friend for an unspecified time period (id.). The evaluating school psychologist reported that the student "indicated that she is not feeling depressed anymore and no longer takes medication for her depression. She stated that she has been feeling better since July when she returned to [Family Foundation]" (id.).

With regard to academic performance, the evaluating school psychologist obtained comments from five of the student's teachers at Family Foundation, all of whom indicated that

¹⁸ The student's mother stated that in August 2008, the family resided outside of the district (Tr. pp. 567-69).

¹⁹ The student's mother advised that she did not inform the district that she had referred the student to the CSE in the district of location (Tr. p. 623).

the student "complete[d] her homework on time and d[id] a good job with it" and none of whom reported any "significant concerns in the classroom" (Dist. Ex. 26 at pp. 10-12). Her class participation ranged from "poor – doesn't participate" to "good," depending on the particular subject (id. at p. 11). Her test performance was adjudged as "mixed," ranging from poor in global studies to upper 80s – low 90s in English; the three remaining teachers commented that the student's grades were "improving" (id.). Her interactions with adults and peers were described as "generally positive," "courteous and polite," appropriate," and it was reported that she was "an excellent example to others in class," with one teacher observing that she "ke[pt] to herself" (id.). With respect to classroom behavior, the student's Family Foundation teachers opined that the student was "quiet, respectful," "pa[id] attention and always t[ook] good notes," and was "working at grade level, but need[ed] to put more of an effort into her work" (id.).

The evaluating school psychologist administered the Behavior Assessment System for Children – Second Edition (BASC-2), and concluded from the results of the teacher report scale that she was in the "at risk" range in the areas of "anxiety, atypicality, withdrawal, adaptability, study skills, functional communication, anger control, bullying, developmental social disorders, emotional self control, executive functioning, negative emotionality, and resiliency;" he also noted that "[s]cores in the clinically significant range were found on the conduct problems, depression, and somatization scales" (Dist. Ex. 26 at pp. 2, 4-7, 11). The student's scores on the BASC-2's self-report scale placed her in the "at risk" range on the "sensation seeking scale, self-reliance scale, and ego strength scale with a clinically significant score on the self-esteem scale" (id. at pp. 2, 7-11). The student's scores on the Reynolds Adolescent Depression Scale – 2nd Edition (RADS-2) placed her within the "normal" range (id. at pp. 2, 10-11). The report deferred to the district of location's CSE to determine if she was eligible for classification as a student with a disability (id. at p. 12).

On January 23, 2009, the district of location's CSE subcommittee convened for an initial review of the student (Dist. Ex. 27). Attendees included the parents, the CSE subcommittee chairperson/school psychologist, a special education teacher, and a parent advocate; two of the student's Family Foundation counselors and a Family Foundation regular education teacher participated telephonically (id. at p. 9). Following a review of the district of location's January 18, 2009 psychoeducational evaluation report, the August 27, 2008 Family Foundation initial evaluation report conducted by a psychologist, the parents' referral, and input from Family Foundation staff, the district of location's CSE subcommittee determined that the student was eligible for special education services as a student with an emotional disturbance (id. at pp. 1, 10; see Dist. Ex. 35 at pp. 2-5). The resultant Individualized Education Services Plan (IESP)²⁰

²⁰ Pursuant to Education Law § 3602-c, boards of education of all school districts of the State shall furnish services to students who are residents of this State and who attend nonpublic schools located in such school districts upon the timely written request of the parent or person in parental relation of any such student. For the purpose of obtaining education for students with disabilities, such request shall be reviewed by the CSE of the school district of location, which shall develop an IESP for the student based on the student's individual needs. (Educ. Law §§ 3602-c[2][a], [2][b][1] as amended by L.2007, c. 378, § 27, subd. d; L.2005, c. 352, § 22). The CSE is also required to assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).

indicated that the "[p]arent ha[d] parentally placed student at the [Family Foundation] due to the structure and accommodations built into the curriculum" and offered the related services of twice weekly group counseling and consultation with the psychologist, psychiatrist, and social worker on an as needed basis at Family Foundation (Dist. Ex. 27 at pp. 3, 10-11).²¹

On February 26, 2009, the parents, through counsel, filed a due process complaint notice applicable to the student's 2008-09 school year, alleging that the January 31, 2008 CSE denied the student a free appropriate public education (FAPE)²² for the 2008-09 school year by declining to classify her as a student with an emotional disturbance, despite possessing a current psychological evaluation and information detailing the student's anxiety, academic difficulties, disciplinary concerns, behavioral concerns, self-injurious and suicidal behavior, multiple hospitalizations, and diagnoses of depression, a bipolar disorder, a mood disorder, NOS, an ODD, and a probable reactive attachment disorder (Dist. Ex. 1 at p. 4). The parents further alleged that the January 31, 2008 CSE's decision not to classify the student as a student with an emotional disturbance constituted a failure to appropriately place and provide services to the student, and ultimately resulted in her enrollment at Family Foundation by her parents (*id.* at p. 5). The parents sought an order from an impartial hearing officer: (1) directing the district to develop an appropriate individualized education program (IEP) for the student, including an appropriate classification for placement and services for the 2008-09 school year; and (2) reimbursing the parents for all costs incurred incidental to the student's placement and education at Family Foundation for the 2008-09 school year (*id.*).

On March 13, 2009, the district, through counsel, responded to the parents' due process complaint notice countering that the January 31, 2008 CSE met "with all mandated members

²¹ According to an interpretive guidance memorandum published by the New York State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) and titled "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," (VESID guidance memorandum) dated September 2007, with respect to child find requirements and the provision of special education programs and services to students parentally placed in private schools within the district of location, the VESID guidance memorandum notes, in pertinent part, the following:

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

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

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

(VESID guidance memorandum at pp. 4-5).

²² The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).[09-124]

present and thoroughly reviewed each and every one of [the student's] special education needs. At that meeting it was determined that [the student] not be classified" (Dist. Ex. 2 at p. 3). However, the district contended that thereafter, "the parents never requested that the ... CSE reconvene nor did the [p]arents provide the [d]istrict with additional evaluative information or any reports from [the student's] alleged hospitalizations" (*id.*). The district maintained that "[b]oth procedurally and substantively the [d]istrict has met all of its legal obligations to [the student] and her [p]arents and offered [her] FAPE in the least restrictive environment ('LRE')" (*id.*). The district added that it did not believe that Family Foundation had provided the student "with a program from which she will benefit" and had not provided the student "with appropriate special education and/or appropriate therapeutic services" (*id.* at pp. 3-4). Finally, the district asserted that the parents "did not provide appropriate notice to the [d]istrict that they would be unilaterally placing their daughter in private school and that they would be seeking reimbursement" (*id.* at p. 4).

Following a March 23, 2009 resolution session, the parents referred the student to the district's CSE (Tr. pp. 50, 627; Dist. Exs. 29; 30; 33; see C.F.R. § 300.510[a][2]; see also 8 NYCRR 200.5[j][2]). On April 7, 2009, the student's father completed a social history for the district, in which he asserted that the student's emotional difficulties, including "[a d]epressive [m]ood [d]isorder [and an] ODD," prevented her from being educated in a "normal school environment" (Dist. Ex. 31 at p. 3). The student's father contended that the student needed daily therapy to function in school, and that a residential, therapeutic placement was the only program that had "helped" his daughter (*id.* at pp. 2-3). He requested that the district "help" the student remain at Family Foundation for the 2008-09 school year (*id.* at p. 3).

On April 8, 2009, both the district's school psychologist and director visited the student at Family Foundation (Tr. pp. 53-63, 205-13; Dist. Ex. 32). The director's notes reflected that district staff spoke with both a Family Foundation guidance counselor and the student's counselor about the "therapeutic" services offered to the student, the school's academic program, its student body composition, and the specific needs of the student that the counselor had identified (Dist. Ex. 32). By letter dated April 13, 2009 to the director, the student's father provided the district with the August 27, 2008 initial Family Foundation evaluation report, a report of the results of a September 16, 2008 administration of the Millon Adolescent Clinical Inventory (MACI),²³ and the January 23, 2009 IESP developed by the district of location (Dist. Exs. 34; 35).

On April 22, 2009, the district's CSE convened for the student's review (Dist. Exs. 36; 37). Attendees included the director who also acted as the CSE chairperson, the district's nurse practitioner, the school psychologist, the guidance counselor, a district regular education teacher, a district special education teacher, two BOCES supervisors, the parents, and the student (Dist. Ex. 37 at p. 11).²⁴ CSE meeting minutes reflected that the student's father provided information regarding the student's hospitalizations, PINS involvement, and placement at Family Foundation,

²³ The hearing record indicates neither who administered nor who interpreted the results of this administration of the MACI.

²⁴ The hearing record indicates that the parents agreed to continue the April 22, 2009 CSE meeting without an additional parent member present (see Dist. Ex. 36 at p. 1).

and that the school psychologist reviewed the student's cognitive, academic and social/emotional assessment results (id. at pp. 1-2; Parent Ex. KK). In addition to the April 7, 2009 social history and January 23, 2009 IESP, information before the April 2009 CSE included the August 27, 2008 initial Family Foundation evaluation report and September 16, 2008 MACI results, which proffered diagnoses of a dysthymic disorder; a depressive disorder, NOS; an ODD; and "[r]ule out reactive attachment disorder" (Dist. Exs. 34 at p. 7; 35 at p. 4). The April 22, 2009 CSE recommended that the student be classified as having an emotional disturbance and recommended that the student attend a 10-month "outside general ed[ucation]," "day treatment program, which includes a school component with certified teachers and a [R]egents curriculum" with "a very intensive wraparound therapeutic component, including social workers, psychologists and psychiatrists that are connected with the program and who the students establish a relationship with and see fairly regularly" (see Tr. p. 67), and receive counseling services, with effective dates of May 1, 2009 to June 25, 2009 (Dist. Ex. 37 at pp. 1, 6, 8-9).²⁵

According to the minutes from the April 22, 2009 CSE meeting, the CSE reiterated to the parents that Family Foundation was not a State-approved private school (Dist. Ex. 36 at pp. 2-3). The minutes also reflected that the BOCES supervisors described their respective 8:1+1 and 8:1+2 programs at the CSE meeting, and the CSE also discussed placement of the student in an adolescent day treatment (ADT) program, described as a "classroom environment located in a hospital or residential environment" (id. at p. 4). The hearing record evidences that the CSE discussed the student's need for a day treatment or residential placement and the services offered at Family Foundation (id. at p. 4-6). The April 22, 2009 CSE ultimately recommended placement of the student at a specific ADT program outside of the district, which the parents agreed to contact in order to gain additional information (Tr. pp. 66-68; Dist. Exs. 36 at pp. 5-6; 37 at p. 8).

In a May 4, 2009 e-mail to the director, the student's father indicated that the parents visited the recommended ADT program, and although they were "highly impressed," they did not believe that the program met their daughter's needs at that time (Parent Ex. NN). He requested that the director advise him of the next "action in this matter" (id.). The director responded via letter dated May 12, 2009, in which he sent the parents a list of State-approved residential programs that were "technically appropriate" for the student, insofar as they were designed for students with an emotional disturbance and accepted female students of a certain age and geographic location (Tr. pp. 71-73; Dist. Ex. 40). The list included the names, addresses, and phone numbers of residential schools, and the director invited the parents to contact him if they had any questions about the list or the "process" (Dist. Ex. 40).

²⁵ The hearing record indicates that the April 22, 2009 IEP also recommended the identical program and counseling services for the student's 2009-10 school year, with program dates extending from September 8, 2009 to June 24, 2010 (see Dist. Ex. 37 at p. 8). However, this IEP was ultimately superseded by the recommendations of the June 4, 2009 and August 5, 2009 CSEs (see Parent Ex. OO; Dist. Ex. 39 at pp. 1, 6, 8-9).

On June 4, 2009, the district's CSE convened at the parents' request (Parent Ex. OO).^{26, 27} According to CSE minutes, the parents discussed their reasons for rejecting the ADT program recommended in the April 22, 2009 IEP and two additional residential programs recommended in the director's May 12, 2009 list and visited by the parents (Tr. p. 543; Parent Ex. OO).²⁸ The director maintained that at that time, the CSE was willing to continue to investigate residential placements for the student (Tr. p. 74). On June 19, 2009, the director forwarded e-mail correspondence to the student's mother apprising her of additional residential placements to consider as potentially appropriate for her daughter (Dist. Ex. 41). The e-mail concluded with the director's request that the parents "[I]et me know if I can help facilitate any communication or visits" (id.).²⁹

On August 5, 2009 the CSE convened for a program review to continue discussion regarding the student's 2009-10 special education placement (Dist. Exs. 38; 39; see Tr. pp. 126-27).³⁰ Attendees included the successor director, the CSE chairperson, the district's nurse practitioner, the school psychologist, the guidance counselor, a district regular education teacher, a district special education teacher, and the parents (Dist. Ex. 39 at p. 11).³¹ The parents indicated that they had contacted "some" of the residential schools from the lists provided by the district, and expressed their belief that those schools "weren't aligned with [the student's] needs" (Tr. pp. 126-27, 546-48; Dist. Ex. 38). The CSE meeting minutes reflect that the parents requested that the CSE consider placement of their daughter at Family Foundation, and that the CSE reiterated that Family Foundation was not a State-approved private school (Dist. Ex. 38).

The August 5, 2009 CSE continued the student's classification as a student with an emotional disturbance and recommended a 10-month special program in a "[n]on-specified" residential placement at an approved in-State private school and continued counseling services, with program effective dates of September 8, 2009 to June 24, 2010 (Dist. Ex. 39 at pp. 1, 6, 8-9; see Tr. pp. 128-29). According to the successor director, he and the CSE chairperson "were planning on doing some visits" to some of the residential programs previously recommended by the district after the successor director returned from a planned one week vacation (Tr. p. 127). The successor director advised that those visits did not transpire on account of a conversation with the parents subsequent to the CSE meeting, whereby it was "mutually agreed" that the visits were unnecessary in light of the parents' belief that Family Foundation was the "only alternative" for the student (Tr. p. 128). The parents maintained the student's placement at Family Foundation at the start of the 2009-10 school year (Parent Ex. QQ).

²⁶ The student's mother stated that on June 4, 2009, the family resided outside of the district (Tr. pp. 569-70).

²⁷ It is unclear from the hearing record whether or not the June 4, 2009 CSE generated an IEP. The hearing record neither references a resultant IEP, nor contains a copy of same.

²⁸ The hearing record does not contain a list of participants at the June 4, 2009 CSE meeting.

²⁹ The district's director retired on July 1, 2009 (Tr. p. 24). To avoid confusion, I refer to the individual who succeeded him in this position subsequent to July 1, 2009 as the "successor director" (see Tr. pp. 111-12).

³⁰ The parent stated that on August 5, 2009, the family resided outside of the district (Tr. pp. 570-71).

³¹ The hearing record indicates that the parents agreed to continue the August 5, 2009 CSE meeting without an additional parent member present (see Dist. Ex. 38).

On September 1, 2009, an impartial hearing convened. On September 3, 2009, the parents, through counsel, filed a second due process complaint notice,³² regarding the 2009-10 school year and the three CSE meetings occurring on April 22, 2009, June 4, 2009, and August 5, 2009 (Parent Ex. g at p. 3). Although acknowledging that at the August 5, 2009 CSE meeting the parents were provided with a list of potential residential placements, they alleged that the resultant IEP developed at this meeting recommended only a residential program at an unspecified location from the list of approved in-State private schools; further, the parents contended that the August 5, 2009 IEP failed to identify a specific appropriate program and placement for the student (id.; see Dist. Ex. 39 at p. 8). The parents also contended that Family Foundation was an appropriate placement for the student during the 2009-10 school year, and that "the equities are in the [p]arent[s]' favor" (Parent Ex. g at p. 3). The parents sought an order from an impartial hearing officer directing the CSE to: (1) develop an IEP for the 2009-10 school year recommending Family Foundation as the student's placement; (2) reimburse the parents for all costs incurred relative to the student's placement at Family Foundation prior to the 2009-10 school year; and (3) award direct funding for the student's 2009-10 school year at Family Foundation (id. at p. 4).

On September 11, 2009, the district, through counsel, responded to the parents' second due process complaint notice, countering that the program and placement proposed in the April 22, 2009 IEP provided the student with a FAPE for the 2009-10 school year, but that after the parents rejected that program, the district held additional CSE meetings on June 4, 2009 and August 5, 2009 at which it "appropriately proposed residential treatment facilities for [the student]" (Parent Ex. h at p. 3). The district maintained that it "d[id] not believe that [Family Foundation] has provided [the student] with a program from which she will benefit" and "has not provided [the student] with appropriate special education and/or appropriate therapeutic services" (id.). Finally, the district asserted that the parents "did not provide appropriate notice to the [d]istrict that FAPE was at issue, that they would be unilaterally placing their daughter in a private school and that they would be seeking reimbursement" (id.).

On September 15, 2009 the impartial hearing concluded after four days of testimony. In a decision dated December 13, 2009, the impartial hearing officer determined that the parents were entitled to tuition reimbursement at Family Foundation for the 2008-09 and 2009-10 school years (IHO Decision at pp. 23, 26-27). With regard to the 2008-09 school year, the impartial hearing officer found that the January 31, 2008 CSE deprived the student of a FAPE because: (1) the CSE failed to classify the student as a student with an emotional disturbance despite possessing sufficient information at the time of the CSE meeting to support said classification; (2) despite possessing evidence indicating the existence of serious mental health issues, the district's school psychologist failed to pursue further evaluation of the student and instead "prescribed an altered academic schedule designed to offer supports;" and (3) the CSE failed to develop sufficient

³² The September 3, 2009 due process complaint notice and the district's answer thereto, dated September 11, 2009, were admitted into evidence as Parent Exs. "g" and "h," respectively, and were submitted at the direction of the impartial hearing officer after the parties orally argued the district's objection to the previously submitted due process complaint notice dated February 26, 2009 (see Dist. Ex. 1), which the district contended was limited only to allegations pertaining to the 2008-09 school year (see Tr. pp. 5-9, 357-58).

information relative to the student's educational history in advance of the January 31, 2008 CSE meeting (*id.* at pp. 17-18).

The impartial hearing officer also concluded that the parents satisfied their burden of proving that Family Foundation was an appropriate placement for the student for the 2008-09 school year in that: (1) witness testimony established that the student had "stabilized emotionally, [wa]s far less depressed, less anxious, and much more capable of managing the struggles and difficulties of life;" (2) evidence contained in the hearing record from district staff who visited Family Foundation indicated that various aspects of Family Foundation's program were appropriate for the student; (3) counseling at Family Foundation focused primarily on emotional and behavioral issues, specifically, reactive attachment disorder; and (4) literature from Family Foundation contained in the hearing record further supported hearing testimony that the school offered a program that was appropriate for the student (IHO Decision at pp. 19-20).

In considering the equities of the parents' reimbursement claim for the 2008-09 school year, although determining that the parents failed to afford the district adequate notice of their intention to unilaterally enroll the student at Family Foundation and seek tuition reimbursement as required in the Individuals with Disabilities Education Act (IDEA), the impartial hearing officer "invoke[d] the exception found in 20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb), which allows the [i]mpartial [h]earing [o]fficer discretion if compliance with the notice provisions of 20 U.S.C. § 1412(a)(10)(C)(iii) 'would likely result in serious emotional harm to the child'" (IHO Decision at pp. 20-23). Having excused the parents' failure to properly notify the district of their intention to unilaterally place the student at Family Foundation for the 2008-09 school year and seek tuition reimbursement from the district due to the "grave danger" confronting their daughter in her "emergency" situation, the impartial hearing officer awarded the parents full tuition reimbursement for the 2008-09 school year (*id.* at pp. 23, 27).³³

Turning to the 2009-10 school year, the impartial hearing officer surmised that the district deprived the student of a FAPE because: (1) the proposal for a residential placement was never effectuated by the district, as the district did not take any affirmative steps to place the student in a particular residential placement, notwithstanding the CSE's promises to do so made at the June 4, 2009 and August 5, 2009 CSE meetings; (2) instead of actively making referrals, the CSE simply provided the parents with a list of State-approved residential placements and the CSE's failure to make a specific placement recommendation left the student without a recommended program for the 2009-10 school year; and (3) the CSE neither provided information to the parents as to the types of services that the recommended "unnamed school" would offer to the student, particularly with respect to counseling services, nor did it provide them with any class profiles to enable them to assess whether or not the student would fit in to a particular class (IHO Decision at pp. 23-25).

In determining that the parents had met their burden of proving that Family Foundation was an appropriate placement for the student for the 2009-10 school year, the impartial hearing

³³ The impartial hearing officer excluded the month of June 2009 from the reimbursement award pursuant to the parents' request as set forth in their post-hearing memorandum of law, a copy of which is not included in the hearing record (*see* IHO Decision at p. 27).

officer relied on the same analysis he performed relative to the 2008-09 school year, stating that he "f[ound] the [p]rivate [s]chool to be appropriate for the 2009-10 school year. See analysis above" (IHO Decision at p. 25).

In considering the equities of the parents' reimbursement claim for the 2009-10 school year, the impartial hearing officer again acknowledged that the parents failed to provide formal notice to the district, commenting that "the intention of the [p]arents was to continue placement at [Family Foundation] if the [d]istrict was unable to designate a place where they believed [the student] would be safe" (IHO Decision at pp. 25-26). However, notwithstanding these determinations, the impartial hearing officer opined that "while the [p]arents failed to give formal notice, it seems to me an untenable position that the [d]istrict did not understand that there was a finite period of time and that the [student] would stay where she was if an agreed upon placement was not found" (*id.* at p. 26). He concluded that "[o]n balance, I find the equities do support reimbursement for tuition paid to [Family Foundation] until January 31, 2010 only and deny reimbursement for the balance of the 2009-10 school year" (*id.* at pp. 26-27). The impartial hearing officer also remanded the case to the CSE "with the direction to make an appropriate placement recommendation for the balance of the 2009-2010 school year" (*id.* at p. 27).³⁴

The district, through counsel, appeals seeking annulment of the impartial hearing officer's decision with respect to both the 2008-09 and 2009-10 school years. In the petition, the district advances four general arguments: (1) the impartial hearing officer's finding that the district's decision not to classify the student during the beginning of the 2008-09 school year deprived the student of a FAPE during the 2008-09 school year was "factually and legally wrong;" (2) the impartial hearing officer's findings that the 2008-09 and 2009-10 IEPs were inappropriate and deprived the student of a FAPE during both school years were "factually and legally wrong;" (3) the impartial hearing officer's findings that the parents met their burden of proving that Family Foundation was appropriate for the student for the 2008-09 and 2009-10 school years were "factually and legally wrong," and the student did not receive counseling or any special education services at Family Foundation; and (4) the impartial hearing officer's findings that the parents are not precluded from tuition reimbursement for the 2008-09 and 2009-10 school years based upon considerations of the equities were "factually and legally wrong."³⁵

The parents, through counsel, answer, countering that: (1) the impartial hearing officer correctly found that the district failed to meet its burden of proof that it offered the student a FAPE for the 2008-09 and 2009-10 school years; (2) the impartial hearing officer correctly found that the parents met their burden of proof that Family Foundation was an appropriate placement for the student for the 2008-09 and 2009-10 school years; and (3) the impartial hearing officer

³⁴ Although the district seeks an order from a State Review Officer overturning the impartial hearing officer's decision in its entirety, it does not specifically appeal this aspect of the impartial hearing officer's decision in the petition.

³⁵ The petition contains recitations of the student's educational history and procedural history of the case, but no specific arguments. The petition for review is required to "clearly indicate the reasons for challenging the impartial hearing officer's decision" (8 NYCRR 279.4[a]). The district's petition contains general allegations that each of the enumerated impartial hearing officer's findings is "factually and legally wrong" without arguing the specific grounds for these assertions.

correctly found that the parents' claims for tuition reimbursement for the 2008-09 and 2009-10 school years were supported by equitable considerations.

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34

C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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).

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 (see Application of the Bd. of Educ., Appeal No. 08-016).

Initially I will address the allegations applicable to the 2008-09 school year.

The district appeals the impartial hearing officer's finding that its decision not to classify the student at the January 31, 2008 CSE meeting deprived the student of a FAPE during the 2008-09 school year. In order to be eligible for special education services as a student with an emotional disturbance, the student must meet one or more of the following five characteristics:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless

it is determined that they otherwise meet the criteria above (id.; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B., 496 F.3d at 944; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of the Dep't of Ed., Appeal No. 09-136; Application of a Student Suspected of Having a Disability, Appeal No. 09-117; Application of the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-128; Application of the Dep't of Ed., Appeal No. 08-112; Application of the Dep't of Ed., Appeal No. 08-099; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz, 307 F. Supp. 2d at 399; see also M.H. v. Monroe-Woodbury Cent. Sch. Dist., 2008 WL 4507592 [2d Cir. Oct. 7, 2008]). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176; but see A.J. v. Bd. of Educ., 2010 WL 126034, at *9 [E.D.N.Y. Jan. 8, 2010]), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546).

With regard to the first criterion, the director testified that the January 31, 2008 CSE's discussion regarding whether or not the student exhibited an inability to learn was "fairly short, because the evaluation made it pretty clear that [the student] was learning effectively and that her academic skills were generally clustered around the middle of the average range, which is what we expected given generally average IQ" (Tr. p. 36). The school psychologist who conducted the student's January 2008 evaluation and attended the January 31, 2008 CSE meeting testified that the student's January 2008 WISC-IV index scores fell in the average and high average range, and that she was particularly encouraged by the student's performance on subtests measuring working memory and processing speed, because occasionally "weak fluency" and lower processing speed scores manifest themselves in students with diagnoses of a mood disorder/depression (Tr. pp. 183-85, 187; see Dist. Ex. 22). She added that she administered the WJ-III ACH knowing that the student had "not done well in 9th grade," and missed "a lot" of school during the first semester of the 2007-08 school year, in order to "see if [the student] had fallen behind her peers

academically" (Tr. pp. 183, 186). She further testified that results of the WJ-III ACH evidenced that the student was "predominantly in the average range straight across the board for all of the different areas," and was "still keeping up to her peers" (Tr. pp. 186-87).

Turning to the second criterion, the director confirmed that the January 31, 2008 CSE discussed the parents' concern that their daughter exhibited an inability to build or maintain satisfactory interpersonal relationships with peers and teachers (Tr. p. 36). Although he acknowledged that the CSE had "little to go on" because the student had not attended the high school in the preceding six to seven months (Tr. pp. 36-37), the hearing record reflects that the student frequently went to the high school to see peers, and that the director, the student's guidance counselor, and the student's alternative high school tutor all observed that she was socializing appropriately with peers and teachers (Tr. pp. 37, 306, 338-39, 343, 345; Dist. Ex. 22 at p. 7; see Tr. pp. 164, 244). The hearing record further indicates that the student developed what the high school's vice principal characterized as a "trusting" relationship with him (Dist. Ex. 22 at p. 3). The student informed the school psychologist in January 2008 that she joined an extracurricular club and was beginning to form friendships with others in the group (Tr. p. 190; Dist. Exs. 16; 22 at p. 3).

Moving to the third criterion, the director advised that at the January 31, 2008 CSE meeting, the parents voiced specific concerns regarding their daughter's inappropriate types of behavior or feelings under normal circumstances (Tr. p. 37). However, he maintained that inappropriate types of behavior or feelings were "not something that we had seen when we saw [the student] at school, and . . . at that time we didn't have . . . a broad set of reports and information that indicated that to us at all" (Tr. p. 37). Although the hearing record reflects that the student engaged in activities that could be viewed as "inappropriate," such as cutting herself and consuming excessive amounts of over the counter pain relief medication, according to the information available to the January 31, 2008 CSE, these behaviors did not occur frequently or across a variety of settings and situations, such as at school (Dist. Exs. 9 at pp. 2-4; 18; 22). The student's ninth and tenth grade teachers commented that the student at times would "drift," "become terrifically nervous" when answering questions out loud, and "blank out," but also qualified that in some classes, she "seemed to do okay when engaged" and "did her work while in the classroom" (Tr. pp. 163-64; Dist. Ex. 22 at p. 2). Both the school psychologist and the student's guidance counselor testified that the student's failure to attend detentions, cutting of classes, and talking in class did not constitute severe behavior problems, and opined that the student's behavior outside of school was more significant than her in-school behavior (Tr. pp. 244-45, 293-95, 303). Although the student experienced occasional difficulty performing in the classroom, the hearing record does not indicate that her inappropriate behavior or feelings surfaced "to a marked degree."

Addressing the fourth criterion of emotional disturbance, a generally pervasive mood of unhappiness or depression, the hearing record demonstrates that the January 31, 2008 CSE was aware that the student had received a diagnosis of a mood disorder, NOS and that her parents were concerned about their daughter's depression (Dist. Exs. 9 at p. 4; 10). Teacher reports available to the January 31, 2008 CSE regarding the student's in-school behavior did not suggest the presence of a pervasive mood of unhappiness or depression (Dist. Exs. 8; 22 at pp. 2-4). The director recalled that "as we, the school, we the school faculty and staff around the table

experienced her, she was a fairly social young woman" (Tr. pp. 37-38). The school psychologist apprised that as of January 2008, she was "encouraged" by the student's improved grades, her participation in an extracurricular activity in which she had formed relationships, her interest in going to the high school to socialize after tutoring sessions, her follow through with tutoring, and her stated desire to attend the high school on a regular basis (Tr. p. 190). The student's alternative high school tutor posited that the student was "comfortable" at the alternative high school, and characterized her occasional manifestations of "withdrawn, quiet" and "pout[y]" behaviors as "typical teenage stuff" (Tr. pp. 342-43).

The impartial hearing officer opined that the district should have conducted additional assessments of the student to determine whether she exhibited problems relating to teachers and peers and to further investigate her symptoms of depression (IHO Decision at pp. 17-18). I also note, however, the hearing record reflects that the school psychologist gathered information about the student from two middle school teachers and one middle school guidance counselor, four of the student's ninth grade teachers, the school psychologist who met with the student in ninth grade, and the student's 2007-08 alternative high school tutor and high school vice principal (Dist. Ex. 22 at pp. 1-3). However, I also note that the school psychologist admitted that due to the student's limited high school attendance during the 2007-08 school year, she was unable to locate a teacher familiar enough with the student to complete standardized behavior assessments (Tr. pp. 233-34, 244). She further explained that she relied on the results of psychological testing conducted during the student's October-November 2007 hospitalization, which included self-assessments and projective tests (Tr. pp. 187-88, 233-36), and although she did not request the specific results of the assessments conducted during that hospitalization, she asserted that she "trusted that [the out-of-State hospital] had certified staff who w[ere] giving proper diagnoses" (Tr. p. 244). I further note that neither the private hospital's September 2007 school services discharge report nor the out-of-State hospital's November 2007 discharge report recommended referral of the student's case to the CSE to conduct additional psychological assessments of the student (see Dist. Exs. 8; 9). Additionally, the hearing record establishes that the district was not provided with copies of the July 9, 2007 psychological evaluation report (Parent Ex. F), the November 2, 2007 personality assessment report (Parent Ex. G), the June 13, 2008 discharge report from the out-of-State hospital (Parent Ex. Y), and the December 16, 2008 psychoeducational evaluation report from the district of location (Dist. Ex. 26) until the commencement of the impartial hearing (see Tr. pp. 45, 484, 590-91, 594-95, 618, 624).

The evidence contained in the hearing record suggests a correlation between the student's absenteeism and poor in-class performance, and her grades. The school psychologist remarked that despite her possessing cognitive and achievement assessment skills generally in the average to high average range, the student's grades were "lower than what I would have expected" (Tr. p. 248; Dist. Ex. 22 at p. 7). The hearing record reflects that the student accrued numerous absences and instances of tardiness and cut numerous classes during the 2006-07 school year (Dist. Ex. 3 at pp. 1-5; Parent Ex. A). The majority of comments contained on the student's May 2007 report card emphasized the necessity for the student to come to class prepared and use class time wisely, and reported that she did not do homework or participate in class, that her homework was inconsistently completed, and that she demonstrated inconsistent/minimal effort and was not working to potential (Parent Ex. E). The school psychologist confirmed that "homework plays a huge part" in determining student grades (Tr. pp. 250-51, 271-72).

The evidence contained in the hearing record illustrates that the student's inconsistent attendance and declining grades continued into the first quarter of the 2007-08 school year (Dist. Ex. 14 at pp. 1-3).³⁶ The director identified the student's "skipping school and cutting classes" as her "biggest difficulties" at the time of the January 31, 2008 CSE meeting (Tr. p. 87). However, the student's absenteeism at the high school³⁷ notwithstanding, the student's participation in instruction, and subsequently her grades, appeared to improve during the September 2007 hospitalization and while she attended the alternative high school (Dist. Exs. 8; 14; 22 at p. 3). The January 31, 2008 CSE reviewed information revealing that during her September 2007 hospitalization, the student exhibited "[c]onsistent application during classroom hours," was adjudged as "[c]apable of working independently and asking questions when needed," and that she "[b]enefitted from individual help" as a participant in the hospital's academic program (Dist. Ex. 8 at pp. 1-2). The student's alternative high school tutor revealed that the student had not accumulated any absences since tutoring began in November 2007, and characterized the student as cooperative, typically staying on task, completing her homework assignments, working hard to catch up in math, and easily redirected (Dist. Ex. 22 at p. 3).

Finally, considering the fifth criterion, the hearing record does not reflect that the student experienced "a tendency to develop physical symptoms or fears associated with personal or school problems" over a long period of time and to a marked degree. The parent represented in the November 13, 2007 CSE referral that the student had undergone "extensive tests" for her "physical complaints (headaches)," but stated that "no physical issues" had been found (Dist. Ex. 10 at p. 2). With the exception of this reference, the hearing record is bereft of additional examples of physical symptoms the student may have experienced, nor does it reflect that the student exhibited fears associated with personal or school problems.

In consideration of the evidence discussed above, I find that at the time of the January 31, 2008 CSE meeting, the student did not meet one or more of the criteria for eligibility as a student with an emotional disturbance. Furthermore, even if the student had met one of the criteria over a long period of time and to a marked degree, the evidence contained in the hearing record does not by itself establish that the adverse impact on the student's educational performance, namely her failing grades, was attributable to an emotional disturbance (see generally Nguyen v. Dist. of Columbia, 110 LRP 7603 (D.D.C. Feb. 1, 2010)).

Additionally, even if the student had met one of the criteria, the evidence contained in the hearing record does not establish that the student required special education services as a result. Under the State regulations, "[s]pecial education means specially designed individualized or group instruction or special services or programs, as defined in subdivision 2 of section 4401 of the Education Law, and special transportation, provided at no cost to the parent, to meet the unique needs of students with disabilities" (8 NYCRR 200.1[ww]). The State regulations define

³⁶ The hearing record does not reflect that the student received academic instruction during her October 24, 2007 to November 2, 2007 hospitalization (Dist. Ex. 9 at p. 1).

³⁷ I note that during this time period, the student was hospitalized twice from September 14, 2007 through September 26, 2007 and from October 24, 2007 through November 2, 2007 (see Dist. Exs. 8 at p. 1; 9 at p. 1).

"specially designed instruction" as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

The hearing record does not reflect that the student received any special education services during either her September 2007 hospitalization or during her tenure at the alternative high school that would account for her improvement in grades and her ability to meaningfully participate in instruction (Tr. pp. 338-50; Dist. Exs. 8; 14 at p. 3). While the hearing record demonstrates that the student benefited from the small class size and the 1:1 attention afforded her in the private hospital and the alternative high school settings, there is no evidence establishing that those settings offered the student "specially designed" instruction (Tr. pp. 304, 341, 344-45; Dist. Ex. 8 at p. 1). I note that neither the private hospital's September 2007 school services discharge report nor the out-of-State hospital's November 13, 2007 discharge report recommended referral of the student to the CSE, nor did either suggest that she required special education services (Tr. pp. 103-05; Dist. Exs. 8; 9). In addition, the school psychologist, while acknowledging that the student had been offered "diagnoses," posited "[t]here are students who have diagnoses, emotional problems who are accommodated very well in the general environment and are able to do well in that setting" (Tr. p. 191).

The impartial hearing officer based his finding that the district failed to offer the student a FAPE for the 2008-09 school year in part upon the fact that the CSE did not immediately reconvene after the student's February 2008 withdrawal from the high school or after receiving the parent's March 20, 2008 e-mail advising that the student was "collapsing into depression" (IHO Decision at p. 18). However, according to the hearing record, the student's guidance counselor testified that during the few days that the student attended the high school after the January 31, 2008 CSE meeting, he observed her with a group of peers and she appeared to be "fine" (Tr. pp. 308-09). He added that during her three day tenure at the high school, on three occasions he invited the student into his office to "see how she was doing;" on one occasion, she accepted his invitation and they briefly discussed her classes (Tr. p. 309). He characterized the student's departure from the high school as a removal by the parents, due to their daughter's emotional response to "problems with her boyfriend" (Tr. pp. 308-09; Dist. Ex. 24).³⁸ The guidance counselor discerned that the student "didn't seem particularly excited one way or another" about returning to the high school, but that "she was willing to come back" (Tr. p. 312). He indicated that the district would have "had [the student] back" at that time, but the parents did not return her to the high school (Tr. pp. 312, 518-19). He also recalled discussing with the student's mother the possibility of the student returning to the high school, but surmised that "there never really seemed to be a plan put together that was agreeable" to the parents (Tr. p. 312). I note that following the student's return to the district after her brief attendance at Family Foundation in early May 2008, the parents elected to return her to the alternative high school where she completed the 2007-08 school year (Tr. pp. 314-15, 527; Parent Ex. X).

³⁸ The student's mother advised during the impartial hearing that the student expressed that she "couldn't handle" being back at the high school, because she believed that "everybody knew that she had been at a [psychiatric] hospital" (Tr. pp. 516-17).

Finally, I note that the impartial hearing officer concluded that "there is no justification offered for the [CSE's] failure to perform a [f]unctional [b]ehavioral [a]ssessment [FBA]," and that he partially relied on this ground as a basis for finding a deprivation of FAPE for the student's 2008-09 school year (IHO Decision at p. 18). Under the State regulations, 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]). An FBA shall be conducted as part of an evaluation or reevaluation, in the consideration of "special factors" during the recommendation process to the board of education, or as part of disciplinary actions (see 8 NYCRR 200.4[b][1][v], [d][3][i], 200.22[a][1]).

However, in the case at bar, the specific student behavior that the impartial hearing officer determined warranted an FBA was neither identified in his decision nor raised in the due process complaint notice (see Dist. Ex. 1; IHO Decision at p. 18). Furthermore, the impartial hearing officer's assertion that the district did not offer justification for not conducting an FBA is not supported by the hearing record. During the impartial hearing, the school psychologist explained that an FBA of the student was not conducted because the student was not exhibiting extreme "problem behaviors" such as being defiant in school, disrespecting teachers, damaging property, throwing chairs, pushing or shoving, and becoming physically violent or verbally abusive, and added that the district did not typically conduct FBAs of students who achieve poor grades, or who manifest problematic behaviors outside of the school setting, such as failing to complete homework (Tr. pp. 282-84). Under the circumstances presented above, I find that at the time of the development of the January 31, 2008 IEP, the development of an FBA was not necessary in order to offer this student a FAPE. Even if an FBA was required by State regulation in this instance, the district's failure to develop one here did not, procedurally or substantively, rise to the level of a denial of a FAPE to the student (see A.C., 553 F.3d at 172-73).

Having determined that based upon the evidence presented to the CSE at the time of the January 31, 2008 CSE meeting, the student was not eligible to receive special education programs and services as a student with an emotional disturbance, I now turn my attention to the appropriateness of the educational program recommended by the district in the April 22, 2009 IEP, applicable to the portion of the student's 2008-09 school year extending from May 1, 2009 to June 25, 2009.

As previously discussed herein, the April 22, 2009 CSE determined that the student was eligible for special education programs and services as a student with an emotional disturbance and developed an IEP recommending a 10-month private day treatment program "outside general ed[ucation]" including a school component with certified teachers, a Regents curriculum, and counseling services (Dist. Ex. 37 at pp. 1, 6, 8-9; see Tr. p. 67). The April 22, 2009 IEP reflected that the CSE reviewed the January 2008 WISC-IV results, and the corresponding present levels of performance indicated that the student demonstrated cognitive abilities in the average to high average range (Dist. Ex. 37 at pp. 2, 4). The April 22, 2009 IEP also reported the January 2008 WJ-III ACH results indicated that with the exception of calculation skills (low average), the student exhibited academic achievement skills in the average range (id. at pp. 2-4). The April 22, 2009 IEP stated that the student "benefit[ed] from assistance with homework compliance and follow through with assignments, possessed "the basic academic skills necessary to maintain

satisfactory progress," was "able to work independently on academic assignments in the classroom setting," and "need[ed] a safe, structured, positive environment in which to access and use her academic skills in the Regents curriculum" (id. at p. 4).

Her present levels of social development and management needs as described in the April 22, 2009 IEP revealed that the student "has a history of self-injury and suicide attempts," with current diagnoses including a "[d]epressive mood disorder" and an ODD (Dist. Ex. 37 at p. 4). The April 22, 2009 IEP identified the student's abilities and needs regarding her relationships with peers, concerns about her physical appearance, ability to "work through" emotional difficulties, and communication skills (id. at pp. 4-5). The April 22, 2009 CSE determined that the student needed therapeutic intervention that focused on recognizing distressing feelings and seeking help, developing positive peer relationships and the ability to respond to emotional distress with strategies, and communicating about her feelings; and ascertained that this need extended into the academic realm as well, concluding that the student required "a therapeutic learning environment which is responsive to her emotional needs and focused on long-term success with the Regents curriculum" (id. at p. 5). According to the April 22, 2009 IEP, at the time of the CSE meeting, the student was not "taking any medications to treat emotional/mental health concerns" (id.).

The April 22, 2009 CSE developed a transition plan, post secondary goals, and annual goals calculated for the student to improve her engagement in instruction/assessment, and social-emotional skills (Dist. Ex. 37 at pp. 6-7). For the balance of the 2008-09 school year, the CSE recommended placement of the student at a specific ADT program located outside the district which, according to the hearing record, featured "a very intensive wraparound therapeutic component," administered by social workers, psychologists, and psychiatrists connected with the program (id. at p. 8; Tr. p. 67).

However, the evidence contained in the hearing record does not establish that the student was accepted to or would have been appropriately placed at the specific ADT program recommended by the April 22, 2009 CSE. The director testified that he did not contact programs such as the recommended ADT program prior to the April 22, 2009 CSE meeting because he wanted to "start with something that [the parents] felt that they could get behind from the beginning," and that he did not think it was "efficient to start application to programs like the ADT program that would be rejected" by the parents (Tr. p. 106). When asked during the impartial hearing if the student had been formally accepted to the proposed ADT program at the time of the April 22, 2009 CSE meeting, the director responded that he did not know, but that he did not believe that the student had "appeared for the interviews" (Tr. p. 94). Although the hearing record is devoid of information detailing the recommended ADT program's referral and application process, it does not appear that the district contacted the ADT program prior to or after the April 22, 2009 CSE meeting in order to determine whether or not the student was appropriate for or could be accepted to that program.

Generally, a CSE cannot recommend a placement in a non-district facility prior to a decision by the facility to accept the student, and that any such recommendation by a CSE is by nature premature, and does not satisfy the district's obligation to offer a FAPE (Application of the Bd. of Educ., Appeal No. 07-097; Application of the Bd. of Educ., Appeal No. 06-084;

Application of the Bd. of Educ., Appeal No. 05-116; Application of a Child with a Disability, Appeal No. 05-075; Application of a Child with a Disability, Appeal No. 04-044; Application of a Child with a Disability, Appeal No. 03-025; Application of a Child with a Disability, Appeal No. 01-078; Application of a Child with a Disability, Appeal No. 00-020; Application of a Child with a Disability, Appeal No. 98-32; Application of a Child with a Disability, Appeal No. 96-73; Application of a Child with a Disability, Appeal No. 93-38; Application of a Child with a Disability, Appeal No. 93-15).

Based upon the foregoing, I conclude that the district failed to meet its burden of proving that it offered the student a FAPE for the balance of the student's 2008-09 school year, from May 1, 2009 to June 25, 2009, and, although for a different reason, I concur with the impartial hearing officer's ultimate conclusion that the district did not meet their burden of proving that they offered the student a FAPE. Next, I will consider whether the parents met their burden of proving that Family Foundation was an appropriate program for the student during the same time frame of the 2008-09 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The hearing record describes Family Foundation as "a private therapeutic college-prep boarding school" with a mission "to provide a rigorous middle school and high school academic curriculum ... as well as providing therapeutic support and intervention to help students overcome the difficulties that have interfered with their academic and daily living issues" (Tr. p. 360). The hearing record reflects that out of a total student population of approximately 200 students, half have alcohol or substance abuse "issues," and "the other half have a variety of behavioral issues" such as cutting, sexual acting out, and running away (Tr. pp. 53-55; Dist. Ex. 32 at p. 1). The minimum length of stay for students is 18 months, with the average stay lasting 23-24 months (Tr. p. 387). The school divides the student population into six "family units," each numbering approximately 30 students, with staff, including a "family counselor," integrated into those family units (Tr. pp. 359, 382, 387, 460-61). The qualifications of Family Foundation faculty range from high school degrees to Ph.D.-level instructors, and "some" teachers are certified (Tr. p. 380; Dist. Ex. 32 at p. 1). The hearing record also establishes that Family Foundation is not a State-approved private school, and its admissions director advised that it is "not a [s]pecial [education] school in the traditional sense" in that it does not address "learning disabled-kind-of issues" (Tr. pp. 380, 389, 399). He noted, however, that Family Foundation makes "accommodations" for students, including providing class sizes of 8-16 students, teacher tutoring, teacher remediation within the classroom, teacher availability outside of the classroom, and peer tutoring (Tr. pp. 381, 460-62).

The admissions director expressed familiarity with the student through her participation in a "grief and loss group" that he led at the school, through his personal observations of her in the "family" environment of the school, and through his access to her academic progress reports and report cards (Tr. pp. 369-70, 438-39, 445-46). He advised that the student's academic program included "typical core classes for her grade level" taught at Regents level, and added that she was also involved in the school's sports and music programs (Tr. p. 370). The hearing

record reflects that the student passed the majority of her classes during her tenure at Family Foundation with the exception of geometry, which she failed in spring 2009 (Tr. pp. 370, 403-05; Parent Exs. FF; GG; QQ; i). The admissions director denied knowledge of any supports provided for the student to help her improve her geometry grade, complete her homework, and study for tests (Tr. pp. 404-05). He testified that he neither observed the student in any subject class, nor did he discuss the student's performance in class with any of her teachers because that was the role of the student's family counselor (Tr. pp. 439-40).

The admissions director testified that most of the counseling provided at Family Foundation was in the form of group counseling, and the hearing record reflects that the school put "greater emphasis" on peer group counseling and use of the "12-step" program³⁹ rather than individual psychotherapy (Tr. pp. 59, 206, 209, 382, 429, 436-37). According to the district director's April 8, 2009 Family Foundation visit notes, the student's family counselor informed him that "counselors are just team members" and that Family Foundation staff steer students toward their "family" at the school because "that is where the answers lie" (Dist. Ex. 32 at p. 2; see Tr. pp. 58-59). According to the admissions director, the student's family counselor holds a "masters degree in education" and is also a "social worker" and a "certified school counselor" (Tr. pp. 383, 418). According to the admissions director, "a master level clinician" such as himself and the student's family counselor are able to provide "psychotherapy" services (Tr. p. 435). He commented that "in the past" the student had received "more traditional, formal psycho-therapeutic" individual counseling from her Family Foundation family counselor (Tr. pp. 385, 431).

The district director's notes from his visit to Family Foundation indicated that the student's family counselor advised him that the student's difficulties stemmed from "[s]exual issues," [b]ody image," "[c]o-dependen[cy]," and "[a]nger" (Dist. Ex. 32 at p. 1). The notes further established that the counselor worked with the student to find the "next right step" instead of reacting with "drama and emotional uproar," and that the main focus of counseling was on "emotional and behavioral issues," specifically those associated with a reactive attachment disorder and adoption (Dist. Ex. 32 at p. 2). The hearing record is devoid of testimonial or documentary evidence from the student's family counselor at Family Foundation detailing precisely how she addressed the student's difficulties with her sexual "issues," body image, co-dependency and anger during therapy, despite the family counselor's identification of these issues as the student's primary areas of need (Tr. pp. 415-16; Dist. Ex. 32). Nor does the hearing record disclose the frequency with which the family counselor had previously met with the student individually, and, with the exception of limited statements made to district staff during their April 8, 2009 visit to Family Foundation, the hearing record is silent as to the amount of progress, if any, the student exhibited in the above identified areas of need (Tr. pp. 431-33; Dist. Ex. 32).

The admissions director clarified that Family Foundation utilized the services of a "consulting psychiatrist;" however, the hearing record does not indicate how frequently he met

³⁹ According to the admissions director, "traditionally," the 12-step program was structured to address addiction problems; however, Family Foundation uses the 12-step program "like an A[lcoholics] A[nonymous] support group" in that "it really is set on dealing with excessive behaviors . . . that for particular people have had some negative impact in functioning" (Tr. pp. 411-13).

with the student (Tr. p. 422; Dist. Ex. 32 at p. 1).⁴⁰ Nor does the hearing record contain any information as to whether the student met with Family Foundation's staff psychologist after he conducted her initial psychological evaluation on August 27, 2008 (Tr. pp. 423-24, 433; Dist. Ex. 32 at p. 1). The district director testified that the student's family counselor reported to him during the district's April 8, 2009 visit that one of the student's main difficulties involved the "family dynamics" (Tr. pp. 57-58, 414). The director acknowledged that Family Foundation offered family therapy, which the parents engaged in, but denied knowledge of how frequently the parents participated (Tr. pp. 428-29). He added that the student's family counselor contacted the parents frequently, but the hearing record offers no specific information regarding the substance of those contacts (Tr. p. 440). The admissions director disclosed that the student had attended home visits and outings with her parents during her tenure at Family Foundation, but was unable to comment on the frequency or how the student did on those visits (Tr. pp. 466-67).⁴¹

The hearing record evidences that all students at Family Foundation are assigned to a "staff sponsor," described as a person who works with students individually in the 12-step program (Tr. p. 385). The admissions director explained that Family Foundation staff are required to have "personal experience with the 12-steps, overcoming difficulties that people use the 12-step program for," such as alcoholism, drug addiction, and sexual promiscuity, in order to be "credentialed" by the school to sponsor a student (Tr. pp. 419-21). He characterized the 12-step program as one of Family Foundation's "core therapeutic underpinnings" and defined the job of the sponsors as teaching their assigned students the 12 steps and the application of the 12-step program to their everyday living (Tr. p. 385). The admissions director was unable to identify the student's sponsor, but he noted that assigned sponsorships could change over time (*id.*). I note that the hearing record lacks any testimonial or documentary evidence from the student's 12-step sponsor at Family Foundation detailing specifically how the program was implemented in the student's particular case and the amount of progress, if any, observed while the student participated in the 12-step program.

The admissions director further testified that "following lunch and dinner each day we [did] a group, support-group-type-of counseling that occur[ed] within the family unit," called "table topic" (Tr. p. 382). During table topic, a student was identified as the "focus," and that student stood at the head of the table and discussed not only "what their difficulties or struggles [were]," but also their successes during the day (Tr. pp. 410-11). The admissions director revealed that table topic group sessions were not monitored by licensed therapists; rather, the sessions constituted "support group[s]" (Tr. p. 411).

According to the admissions director, Family Foundation afforded its students the opportunity to participate in "specialized groups" addressing various issues, such as anger

⁴⁰ The admissions director testified that the student was prescribed medications that were monitored by the consulting psychiatrist; however, he did not know how frequently the consulting psychiatrist met with the student for that purpose, and added that the consulting psychiatrist did not provide psychotherapy services to Family Foundation students (Tr. pp. 422-23).

⁴¹ The hearing record indicates that as of April 2009, the student had been on one overnight visit with her parents since reenrolling at Family Foundation on July 21, 2008 (*see* Tr. pp. 57-58).

management, adoption, grief and loss, and social phobias (Tr. p. 382). He testified that the student in this case voluntarily participated in the weekly grief and loss group, which he led, and a bimonthly adoption group led by a "drug and alcohol counselor" who "has an associate's degree and [was] adopted himself" (Tr. pp. 384, 386, 418-19). Aside from one reference that the student was "working on bonding and connecting with her mother," the hearing record affords no other information explaining the interventions used during adoption group, or discussing the student's progress in this group, if any (Dist. Ex. 32 at p. 2). The admissions director asserted that the purpose behind the student's participation in the grief and loss group, which began in "late in the fall semester of 2008," was to address her feelings about her July 2008 miscarriage (Tr. pp. 394-95, 398, 528). He opined that by September 2009, the student, "through some exercises" had "very recently come to a point of almost closure" regarding that event (Tr. pp. 454-55). He also disclosed that the student met weekly with her family counselor in a group of five or six peers (Tr. pp. 382-83), but the hearing record is devoid of any information specifying the substance of what transpired during the grief and loss group sessions and the weekly group meetings led by the family counselor, or describing how these groups addressed the student's particular needs.

Although the admissions director testified that the student made social and emotional progress at Family Foundation, the hearing record does not contain evidence detailing the specifics of the student's therapeutic services and how those services addressed the student's unique special education needs (Tr. pp. 386, 441-422, 445-47, 464-66, 470).⁴² For the above reasons, I find that the hearing record lacks sufficient information regarding how Family Foundation provided educational instruction specially designed to meet the unique needs of the student. Based on this, I further find that the parents have not shown that Family Foundation was appropriate to meet the student's special education needs for the 2008-09 school year (Gagliardo, 489 F.3d at 112; see Matrejek, 2008 WL 3852180, at *2; Application of a Student with a Disability, Appeal No. 09-048; Application of the Dep't of Educ., Appeal No. 09-045; Application of a Student with a Disability, Appeal No. 08-151; Application of the Dep't of Educ., Appeal No. 08-092).

Having already determined that the parents' unilateral placement of the student was inappropriate, I need not reach the issue of whether equitable considerations support the parents' claim for reimbursement for the 2008-09 school year, 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 the Dep't of Educ., Appeal No. 09-127; Application of a Student with a Disability, Appeal No. 09-073; Application of the Bd. of Educ., Appeal No. 08-029; Application of a Child with a Disability, Appeal No. 06-055; Application of a Child with a Disability, Appeal No. 05-119; Application of a Child with a Disability, Appeal No. 03-058). However, in the exercise of my discretion, I have reviewed the hearing record and even if I concluded that the parents' unilateral placement of the student at Family Foundation was appropriate, based upon the circumstances in

⁴² The impartial hearing officer commented in the decision that "marketing literature" from Family Foundation contained in the hearing record further supported testimony that the school offered a program appropriate for the student (IHO Decision at pp. 19-20; see Parent Exs. VV; WW; XX; YY; c). Although these exhibits provide general descriptions of Family Foundation, its philosophy and educational mission, and a general overview of its student body, programs, staff qualifications, and available services; these exhibits yield no information detailing how Family Foundation provided educational instruction specially designed to meet the unique needs of this student during either the 2008-09 or 2009-10 school years.

this case, I conclude that equitable considerations do not support their claim for tuition reimbursement for the 2008-09 school year.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "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 [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

I note that the parties herein do not dispute that the parents did not provide the requisite written notice to the district of their intention to unilaterally place the student at Family Foundation at public expense prior to removing the student from the district program for the 2008-09 school year (see Tr. pp. 48, 530-31, 616; see also IHO Decision at p. 22). The parents acknowledge that they received an explanation of their due process rights from the district for the 2008-09 school year (Tr. pp. 602-03, 649-50). The district argues that the parents' failure to give

statutorily required notice to the district of their intention to unilaterally place the student at public expense prior to removing the student from the district program should have resulted in a denial of tuition reimbursement (see 20 U.S.C. § 1412[a][10][C][iii]). The impartial hearing officer determined that a reimbursement award need not be denied or reduced if compliance with the notice requirement "would likely result in serious emotional harm to the [student]" (see 20 U.S.C. § 1412[a][10][C][iv][II][bb]) and found that in the present case, due to the parents' concerns that their daughter was in "grave danger" because of her allegedly increasing depression and that the placement situation was an "emergency," complying with the notice requirement would likely have resulted in serious emotional harm to the student (IHO Decision at pp. 22-23; see Tr. pp. 264-65, 531, 633-34; Dist. Ex. 38 at p. 4).

However, the hearing record demonstrates that the parents did not enroll the student at Family Foundation until May 2, 2008, almost six weeks after the parent's March 20, 2008 e-mail correspondence to the CSE stating their belief that the student was "collapsing into depression" (Tr. pp. 671-72). I find no evidence contained in the hearing record suggesting that the parents were prevented from furnishing the district with the requisite written notice of their intentions during the six weeks between the March 20, 2008 e-mail correspondence and their placement of the student at Family Foundation. Hence, I disagree with the impartial hearing officer's decision to apply the statutory exception in this case (see Application of the Bd. of Educ., Appeal No. 08-152 [in situation where parent removed student from public school due to mental breakdown and four days later, notified district in writing of the removal and her intention to seek reimbursement, failure to comply with notice requirement was deemed to fit within the statutory exception]. Accordingly, I will annul that portion of the decision determining that a consideration of the equities did not require a denial of the parents' claim for tuition reimbursement for the 2008-09 school year.

I will now consider the allegations applicable to the 2009-10 school year.

The district appeals the impartial hearing officer's determination that it failed to offer the student a FAPE for the 2009-10 school year because the CSE's proposal for a residential placement was never effectuated by the district (IHO Decision at p. 25). The April 22, 2009 IEP recommended placement of the student in a 10-month program at a specific ADT outside of the district, and counseling services, with effective dates of September 8, 2009 to June 24, 2010 (Dist. Ex. 37 at p. 8). However, the hearing record contains no evidence suggesting that the district contacted the specific recommended ADT program after the April 22, 2009 CSE meeting either to determine whether the student was an appropriate candidate for that program, or to confirm that the specific ADT program had accepted the student and reserved a seat for her for the 2009-10 school year.

The hearing record reflects that after the April 22, 2009 CSE meeting, the parents visited the recommended ADT placement and subsequently expressed their wish for a "therapeutic residential placement" for their daughter to district personnel, including the director and successor director (Tr. pp. 71, 124-25).⁴³ After this discussion, the director and successor

director compiled lists of potentially appropriate State-approved residential placements and forwarded them to the parents (Tr. pp. 71-73, 125; Dist. Exs. 40; 41). On June 4, 2009, the CSE convened at the parents' request and discussed residential placement options for the student (Parents Ex. OO; see Tr. pp. 73-75). The June 4, 2009 CSE decided to "[t]able the meeting [and] investigate new residential placements" (id.). On August 5, 2009, the CSE convened with "[t]he goal of that meeting ... to look at alternative placements" (Tr. pp. 126-27), and ultimately recommended a 10-month special program in a "[n]on-specified" residential placement at an approved in-State private school and continued counseling services, with program effective dates of September 8, 2009 to June 24, 2010 (Dist. Ex. 39 at pp. 1, 6, 8-9; see Tr. pp. 128-29).

Although I find that the district's willingness to research and suggest potentially appropriate therapeutic residential placement alternatives for the parents' consideration and investigation was commendable,⁴⁴ the evidence contained in the hearing record supports the impartial hearing officer's conclusion that the district did not have a seat in a recommended appropriate residential placement available for the student prior to the beginning of the 2009-10 school year (see Tr. pp. 94-95). To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each student in its jurisdiction with a disability (34 C.F.R. § 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"]; Application of a Student with a Disability, Appeal No. 08-157; Application of a Student with a Disability, Appeal No. 08-088).

Next, I will address whether the parents met their burden of proving that Family Foundation is an appropriate program for the student during the 2009-10 school year. The evidence contained in the hearing record does not differentiate the educational programs and services used by Family Foundation to educate the student between the 2008-09 and 2009-10 school years. Consequently, based upon an independent review of the hearing record and the same reasoning employed above in my analysis of the appropriateness of Family Foundation during the 2008-09 school year, I find that the parents did not meet their burden of proving that Family Foundation is an appropriate placement for their daughter during the 2009-10 school year. Consequently, I will annul that portion of the impartial hearing officer's decision finding that the parents met the second criterion of the Burlington/Carter analysis.

As in the case of the 2008-09 school year discussed above, having already determined that the parents' unilateral placement of the student was inappropriate, I need not reach the issue of whether equitable considerations support the parents' claim for reimbursement for the 2009-10 school year, and the necessary inquiry is at an end (Voluntown, 226 F.3d 60, 66 [2d Cir. 2000];

⁴³ The successor director testified that when he considered the daily travel burden that the recommended ADT placement would have placed upon the student, he came to the conclusion that "I don't feel that that's necessarily a good scenario for her" (Tr. pp. 122-24; see also Tr. p. 127).

⁴⁴ The student's mother acknowledged that at the August 5, 2009 CSE meeting, the CSE represented that "it would be willing to send [the student] to any [S]tate-approved residential placement" and explained that "they had to exhaust New York State placements, but subsequently they could even go to [an] outside New York State placement" (Tr. pp. 638-39).

Walczak, 142 F.3d at 134). However, in the exercise of my discretion, I have reviewed the hearing record and even if I were to conclude that the parents' unilateral placement of the student at Family Foundation was appropriate, based upon the circumstances in this case, I conclude that equitable considerations do not support their claim for tuition reimbursement for the 2009-10 school year.

The fact that the parents failed to provide timely written notice to the district of their intention to unilaterally place the student at Family Foundation at public expense prior to removing the student from the district program for the 2009-10 school year in contravention of 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) is not disputed by the parties to this appeal (see Tr. pp. 633, 639-40; IHO Decision at pp. 25-26). Nor does the hearing record contain an allegation from the parents that the district failed to apprise them of their due process rights. The impartial hearing officer concluded that comments made by the parents during the August 5, 2009 CSE meeting "which indicate[d] their strong preference to keep their daughter at [Family Foundation]" sufficiently communicated their intention to "continue the placement at [Family Foundation] if the [d]istrict was unable to designate a place where they believed [the student] would be safe" to support an award of partial reimbursement for tuition at Family Foundation for the 2009-10 school year through January 31, 2010 (IHO Decision at p. 26; see Dist. Ex. 38).

However, the hearing record demonstrates that the student's mother denied advising the CSE during the August 5, 2009 meeting that she would reject any residential placements the CSE proposed, that she would continue student's placement at Family Foundation, and that she would seek tuition reimbursement from district (Tr. p. 639). This testimony does not support the impartial hearing officer's finding that the parents communicated their intent at the CSE meeting to place the student at Family Foundation in compliance with the notice provision in 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). Based upon the foregoing, I find that the parents did not furnish the district with adequate notice of their intention to unilaterally place the student at Family Foundation at public expense for the 2009-10 school year. Consequently, I will annul that portion of the impartial hearing officer's decision.

Because the district has not offered the student a FAPE for the 2009-10 school year and that school year has not yet concluded, consistent with the impartial hearing officer's decision, I will uphold his order to remand this case to the CSE with the direction to make an appropriate placement recommendation for the balance of the 2009-10 school year within 15 days of the date of this decision.

I have examined the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that with regard to the 2008-09 school year, he determined: that the student was eligible at the time of the January 31, 2008 CSE meeting to receive special education programs and services as a student with an emotional disturbance; that Family Foundation was appropriate to meet the student's special education needs; that the parents' failure to afford the district adequate notice of their intention to unilaterally enroll the student at Family Foundation and seek tuition

reimbursement was excused under 20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); and that the parents are entitled to full tuition reimbursement at Family Foundation for the 2008-09 school year; and

IT IS FURTHER ORDERED, that the impartial hearing officer's decision is annulled to the extent that with regard to the 2009-10 school year, he determined: that Family Foundation was appropriate to meet the student's special education needs; that the parents provided adequate notice of their intention to unilaterally enroll the student at Family Foundation and seek tuition reimbursement under 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa); and that the parents are entitled to partial tuition reimbursement at Family Foundation for the 2009-10 school year through January 31, 2010; and

IT IS FURTHER ORDERED, that in accordance with the impartial hearing officer's decision, this case is remanded to the CSE with the direction to make an appropriate placement recommendation for the balance of the 2009-10 school year within 15 days of the date of this decision.

Dated: Albany, New York
February 22, 2010



ROBERT G. BENTLEY
STATE REVIEW OFFICER