



# The University of the State of New York

The State Education Department  
State Review Officer  
[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 11-153

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

## **Appearances:**

Ingerman Smith, LLP, attorneys for petitioner, Edward H. McCarthy, Esq., of counsel

Law Offices of Wayne J. Schaefer, LLC, attorneys for respondents, Wayne J. Schaefer, Esq., of counsel

## **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it violated the child find provisions of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and awarded full tuition reimbursement to the respondents (the parents) for their son's tuition costs at a nonpublic high school (NPS) for the 2010-11 school year. The appeal must be sustained in part.

According to the hearing record, the student experienced a "paranoid episode" and received diagnoses of a depressive disorder, anxiety, and behavioral problems secondary to reported peer bullying dating back to the 2007-08 school year (Dist Exs. A at pp. 2-5, 7-8; C at pp. 1, 5; D at pp. 1-2; E at pp. 3, 14-18, 47, 49-53, 55-59, 63, 66, 68). The NPS has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an emotional disturbance is in dispute in this appeal (see 34 C.F.R. § 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

## **Background**

The student's educational history was recently discussed in Application of a Student Suspected of Having a Disability, Appeal No. 11-023 and Application of the Bd. of Educ., Appeal No. 10-129, and will not be repeated here in detail. In the former proceeding, the parents

filed a due process complaint notice dated November 15, 2010 (which is also the subject of the instant appeal) requesting an impartial hearing to adjudicate their claims and sought relief including, among other things, reimbursement for the cost of their son's tuition at the NPS for the 2010-11 school year (Application of a Student Suspected of Having a Disability, Appeal No. 11-023; see also Dist. Ex. A). The impartial hearing officer in that proceeding dismissed the parents' November 15, 2010 due process complaint notice, finding that it was barred by the doctrine of res judicata (Application of a Student Suspected of Having a Disability, Appeal No. 11-023; see Application of the Bd. of Educ., Appeal No. 10-129; Dist. Ex. I at p. 22). The parents appealed the dismissal and I determined that the doctrine of res judicata was inapplicable with respect to the parents' tuition reimbursement claim for their son's 2010-11 school year at the NPS, reinstated their tuition reimbursement claim for the 2010-11 school year, and remanded the case for an impartial hearing to consider the merits of the parents' 2010-11 tuition reimbursement claim (Application of a Student Suspected of Having a Disability, Appeal No. 11-023). This claim is the subject of the appeal at bar.

### **Due Process Complaint Notice**

The November 15, 2010 due process complaint notice (Dist. Ex. A) and the district's response (Dist. Ex. B) were recently described in Application of a Student Suspected of Having a Disability, Appeal No. 11-023, and need not be discussed in their entirety. Allegations contained in the due process complaint notice germane to the appeal at bar included that the district had reason to suspect that the student had an emotional disturbance as defined in State and federal regulations, yet the district failed to refer him to the Committee on Special Education (CSE) for an initial evaluation, and that the NPS was an appropriate placement for the student for the 2010-11 school year (Dist. Ex. A at pp. 2-8). The parents sought tuition reimbursement for the student's 2010-11 school year at the NPS or, alternatively, an order from an impartial hearing officer directing the district to refer the student to the CSE for evaluation of his eligibility to receive special education and related services as a student with a disability (id. at pp. 5, 8).

As it pertains to this appeal, the district's November 23, 2010 response to the due process complaint notice asserted that the district did not have an obligation to offer the student a free appropriate public education (FAPE) because the student attended a nonpublic school located outside the district, the student did not have a specific physical or mental condition which adversely impacted upon his educational performance to the extent that he required special education programs and/or related services, the NPS was not an appropriate placement for the student, and equitable considerations favored the district (Dist. Ex. B at pp. 3-5).

### **Impartial Hearing Officer Decision**

Consonant with my order in Application of a Student Suspected of Having a Disability, Appeal No. 11-023, an impartial hearing on the issue of the parents' claim for tuition reimbursement for the student's 2010-11 school year at the NPS reconvened on May 11, 2011, and concluded on September 2, 2011, after five additional days of proceedings.<sup>1</sup> On October 18,

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<sup>1</sup> The hearing record reflects that during the impartial hearing giving rise to the instant appeal, the impartial hearing officer admitted into evidence the entire documentary record (consisting of 72 pages) and the entire hearing transcript (consisting of 839 pages) from the underlying impartial hearing in Application of a Student Suspected of Having a Disability, Appeal No. 10-129 as District Exhibits "E" and "F," respectively (see Tr. pp. 111-12).

2011, the impartial hearing officer issued a decision finding, among other things, that the district had failed to meet its child find obligation and denied the student a FAPE for the 2010-11 school year, that the NPS was an appropriate placement for the student for the 2010-11 school year, and that the parents were entitled to tuition reimbursement for the student's 2010-11 school year at the NPS (IHO Decision at pp. 1-3).

Specifically, the impartial hearing officer found that "[s]ince it ha[d] already been found that the failure to refer the student to the [d]istrict's CSE in the prior year [2009-10] constitute[d] a failure to provide [a] FAPE, the continuation of the failure to refer the student to the CSE continue[d] the lack of [a] FAPE in the 2010-11 school year" (IHO Decision at p. 1). In finding the NPS an appropriate placement for the student for the 2010-11 school year, the impartial hearing officer concluded that the NPS provided the student with "a general education without being subjected to the peer bullying that occurred in the district's high school," and that "the student had a successful school year in his NPS placement" (*id.* at pp. 2-3). He further noted that there was no evidence that the student required any special education services "except to be removed from the stressor of peer bullying" that had occurred at the district's high school (*id.* at p. 2). The impartial hearing officer did not address whether equitable considerations supported the parents' claim for tuition reimbursement for the student's 2010-11 school year at the NPS (*see id.* at pp. 1-3; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 12, 15-16 [1993]; *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-70 [1985]).

### **Appeal for State-Level Review**

The district appeals from the impartial hearing officer's decision, alleging, among other things, that the impartial hearing officer erred in finding the district responsible for evaluating and identifying the student for classification purposes for the 2010-11 school year, and that even if the district were found responsible for identifying and evaluating the student, there was no basis for the district to reasonably suspect that the student had a disability that rendered him eligible to receive special education and related services. The district alleges that the impartial hearing officer erred because he did not address whether the student had met the criteria for emotional disturbance and by reason thereof was in need of special education services for the 2010-11 school year, and the district argues that the student was not eligible for special education services as a student with an emotional disturbance. The district further contends that the impartial hearing officer improperly found, *sua sponte*, that the parents raised the issue of a denial of a FAPE for the 2010-11 school year in the due process complaint notice, and that this finding was not supported by the evidence contained in the hearing record. The district also alleges that the parents did not meet their burden of proving that the NPS provided a program specially designed to meet the student's unique needs. According to the district, equitable considerations favored the district and the impartial hearing officer erred by failing to address equitable considerations in the decision before awarding the parents tuition reimbursement. The district seeks reversal of the impartial hearing officer's decision in its entirety.

The parents answer,<sup>2</sup> countering, among other things, that the impartial hearing officer correctly determined that the district was responsible for evaluating and identifying the student for classification purposes for the 2010-11 school year; that the parents properly alleged a denial of a FAPE for the student's 2010-11 school year in the due process complaint notice; and that the parents satisfied their burden of proving that the NPS was an appropriate placement for the student for the 2010-11 school year. The parents seek dismissal of the district's petition and for the impartial hearing officer's October 18, 2011 decision to be upheld.

## **Applicable Standards**

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]).

In 2007, New York State amended Education Law § 3602-c to comply with the reauthorization of 20 U.S.C. § 1412(a)(10) ("Children in Private Schools") and its implementing regulations, 34 C.F.R. §§ 300.130-300.147 (see Educ. Law § 3602-c as amended by Ch. 378 of the Laws of 2007; Dist. Ex. G). In September 2007, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum—"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"—to "inform school districts of their responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents" (Dist. Ex. G at p. 1).<sup>3, 4</sup> Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or

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<sup>2</sup> The parents' memorandum of law, which was served together with their answer, exceeds 20 pages in length. State regulations provide that a petition, answer, or memorandum of law shall not exceed 20 pages in length and that a State Review Officer may reject a pleading or memorandum of law that does not comply with the regulations governing practice before the Office of State Review (8 NYCRR 279.8[a][5]). While I will exercise my discretion and consider the parents' memorandum of law in this appeal, I remind parents' counsel to ensure compliance with these regulations in future appeals before the Office of State Review.

<sup>3</sup> Available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>. United States Education Department guidance can be found in the Federal Register at: Child Find for Parentally-Placed Private School Children with Disabilities (§ 300.131) 71 Fed. Reg. 46593 (August 14, 2006): "If a determination is made by the LEA [local educational agency] where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private [school] located in another LEA, the LEA where the child resides need not make FAPE available to the child" (See Maine School Administrative District #40, 108 LRP 40513 [ME SEA, Oct. 23, 2007] [interpreting and applying the federal guidance and concluding that a district of location was not required to create an IEP for a student given the parent's intention to keep a student in a private boarding school]).

<sup>4</sup> The branch of VESID that formerly addressed programs for student's with disabilities under the IDEA is now located in the Office of Special Education (see <http://www.p12.nysed.gov/specialed/>).

before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). The district of location's CSE must review the request for services and develop an individualized education service program (IESP) based upon the student's individual needs and "in the same manner and with the same contents" as an IEP (id. § 3602-c[2][b][1]). In addition, the district of location's CSE "shall 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.).

## Discussion

### Sufficiency of the Due Process Complaint Notice

Preliminarily, I will address the district's argument that the parents failed to allege that the district denied the student a FAPE for the 2010-11 school year in their due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, at \*8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*8 [S.D.N.Y. Aug. 27, 2010]; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038; Application of a Student with a Disability, Appeal No. 11-008).

In this case, I find that while the specificity of the parents' due process complaint notice may not have comported with pleading requirements in a court of law, for purposes of an administrative hearing under the IDEA, the due process complaint notice provided the district with notice that the parents wanted an impartial hearing pursuant to State regulations regarding the evaluation and educational placement of the student, who they suspected of having a disability (Dist.Ex. A at p. 1; see Application of a Student Suspected of Having a Disability, Appeal No. 11-023). Additionally, the parents noted that they intended to seek tuition reimbursement for their unilateral placement of the student at the NPS for the 2010-11 school year (Dist. Ex. A at pp. 4, 8). Thus, I find that the due process complaint notice can be reasonably read as providing notice that the nature of the problem included that the district denied the student a FAPE for the 2010-11 school year and, consequently, the impartial hearing officer properly reached this issue.<sup>5</sup>

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<sup>5</sup> Conversely, merely alleging a denial of FAPE, without more, would not adequately describe the nature of the problem and would simply indicate the ultimate conclusion that the complaining party would prefer the fact finder to reach. If a district has not challenged a due process complaint notice within the statutory timeframes, a prehearing conference is the time to clarify concerns regarding the issues to be addressed in an impartial hearing (see Application of a Child with a Disability, Appeal No. 06-065).

## Child Find

Although the district acknowledges that it did not develop an IEP for the student for the 2010-11 school year or evaluate the student in relation to the development of an IEP for the 2010-11 school year, the district argues in its petition that the impartial hearing officer erred in finding the district, as the district of residence, responsible for evaluating the student, determining the student's eligibility to receive special education programs and related services, and developing an IEP for the 2010-11 school year. In particular, the district argues that it had none of these obligations to the student in this case because the parents' actions made it clear that they intended to continue the student's enrollment at the NPS, which was located outside the district, for the 2010-11 school year, and therefore, the evaluation, identification, and classification of the student was the responsibility of the district of location. However, for the reasons discussed below, I find that the district's argument is misplaced.

In this case, the district's director of special services (director) testified during the impartial hearing that the district discharged its child find responsibilities in accordance with written procedures (Tr. pp. 128-35; Dist. Ex. H). However, these procedures addressed only students attending nonpublic schools within the district's geographical boundaries, and did not contemplate the circumstances presented under the facts of this case, in which the NPS was located outside of the district's geographical boundaries (see Dist. Ex. H at p. 1). When asked during the impartial hearing if, as part of its child find responsibilities, the district ever reached out to private schools that enrolled district students located outside of the district's geographical boundaries, the director responded "[n]o. If we get notification from one of those schools that a parent has moved into one of those districts, and they request an IEP from us, then we send it" (Tr. p. 130).

The district relies principally upon the following three questions and answers provided in the September 2007 VESID guidance memorandum in support of its argument:

6. Which school district has the responsibility to conduct the evaluation to determine if a parentally placed nonpublic school student is eligible for special education?

The **district of location** is responsible to conduct the evaluation to determine a student's eligibility for special education. The district of location is also the district that must obtain the informed written consent of the parent to conduct the initial evaluation or reevaluation.

7. Which school district would convene a meeting of the CSE to determine the student's eligibility and develop the IESP?

If a student is parentally placed in a nonpublic school and is suspected of having a disability, the district of location is responsible to conduct the CSE meeting to determine a student's eligibility for special education and, if determined eligible for special education, to recommend the special education services the student will receive and document such recommendations on an IESP.

8. Is it possible for a parent to request evaluations from the district where the nonpublic school is located as well as the district where the child resides?

Yes, but it is generally not advisable because subjecting a student to repeated testing by separate school districts in close proximity of time may not be the most effective or desirable way to ensure that the individual evaluations are meaningful measures of whether a student has a disability or of obtaining an appropriate assessment of the student's educational needs.

If the district of residence receives a request for an evaluation of a student suspected of having a disability who is parentally placed in a nonpublic school in another district, and the parent is not seeking to enroll the student in the public school, the district of residence should notify the parent or his/her right to request an evaluation from the district of location and the development of an IESP from the district of location. The district of residence, with parental consent to share information, should facilitate the referral to the district of location.

(Dist. Ex. G at pp. 11-12) (emphasis in original).

In addition, the September 2007 VESID guidance memorandum also provides:

11. Must the district of residence develop an IEP for a student who is parentally placed and conduct annual reviews of this IEP?

USED has provided guidance that states: "If a determination is made through the child find process by the LEA (local educational agency) where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child." Therefore, if the parents make clear their intention to keep the child enrolled in the nonpublic elementary or secondary school, the district of residence need not develop or annually review an IEP for the student.

(id. at p. 13).

In this case, although the hearing record indicates that the director did endeavor to facilitate the referral of the student to the district of location, when, during a telephone conversation, she provided the student's mother with the district of location's contact telephone number and advised her of the name of the district of location's director of special education (see Tr. pp. 163-64), the parents ultimately did not contact the district of location and attempt to initiate evaluation procedures, did not seek to obtain special education programs and services from the district of location, did not furnish consent to the district to share the student's information with the district of location, did not have the student evaluated by the district of location, and did not accept an IESP developed by the district of location or accept services provided by the district of location (Tr. pp. 127-28, 164-65, 202; Dist. Ex. J; cf. Application of the Bd. of Educ., Appeal No. 10-049; Application of a Student with a Disability, Appeal No. 09-133). Thus, there is no evidence here that the district of location had already determined

"through the child find process . . . that the child needs special education and related services," which is the necessary condition precedent to displacing the district's obligation to evaluate the student, determine the student's eligibility to receive special education programs and related services, and, if appropriate, develop an IEP for the student (Dist. Ex. G at p. 13; Application of a Student with a Disability, Appeal No. 11-011 [finding that the district of residence remained responsible for evaluating the student and determining eligibility because the district of location had not determined that the student required special education]).

Moreover, even if the parents had actively pursued an evaluation of the student with the district of location, they would not have been precluded from seeking an evaluation from the district as well, because, contrary to the district's assertion, the obligation of the district of residence to provide a FAPE does not terminate because a student has been privately educated elsewhere – rather, the IDEA's obligations may be shared with the district of location, and Education Law § 3602-c "does not imply that parents may not also seek a FAPE for a privately placed child from the district of the parents' residence" (J.S. v. Scarsdale Union Free Sch. Dist., 2011 WL 5925309, at \*27-\*29 [S.D.N.Y. Nov. 18, 2011] [emphasis in original]; see Dist. Ex. G at p.12). In addition, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that under child find duties, a district that is responsible for offering a student a FAPE must not decline a parent's request to conduct an eligibility evaluation of the student even if the student is attending a private school located in another district (Letter to Efg, 52 IDELR 136 [OSEP 2009]; see Moorestown Tp. Bd. of Educ. v. S.D., 2011 WL 4345433, \*9-\*10 [D.N.J. Sept. 15, 2011]; Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at \*10 [D.Conn. Aug. 7, 2009]; District of Columbia v. Abramson, 493 F. Supp.2d 80, 84-85 [D.D.C. 2007] [rejecting the proposition that a district of residence did not have a child find obligation due to the fact that the student was parentally placed in a private school in another district and finding that both public school districts retained child find obligations]; Application of a Student with a Disability, Appeal No. 11-011; Application of the Bd. of Educ., Appeal No. 09-067; see also Application of a Student with a Disability, Appeal No. 10-049). Accordingly, I find that under the facts and circumstances of this case, the fact that the student was being educated in a nonpublic school outside of the district did not extinguish the district's child find obligations under the IDEA and State and federal regulations, and that the district remained responsible for evaluating the student, determining the student's eligibility for special education programs and related services and, if appropriate, developing an IEP for the student for the 2010-11 school year.

Alternatively, the district argues that even if a tenable child find duty on its part existed under the IDEA and State and federal regulations, its failure to evaluate the student for the 2010-11 school year was excusable because the district lacked a reasonable basis to suspect that the student had a disability and was in need of special education programs and related services. After careful review, I do not find that the hearing record in this case supports the district's argument. Initially, I note that the hearing record indicates that the parents neither requested the district to evaluate the student for the 2010-11 school year nor provided consent for the district to do so (Tr. pp. 283, 295-97, 299-301, 329-30), and that the district did not request parental consent to evaluate the student (Tr. p. 280; Dist. Ex. J).

However, the purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as

a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008] aff'd, 2010 WL 1049297 [2d Cir. March 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; Forest Grove, 129 S. Ct. at 2495; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400, n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; see 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094; Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (New Paltz, 307 F. Supp. 2d at 400, n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]; see Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child Suspected of Having a Disability, Appeal No. 06-087; Application of a Child Suspected of Having a Disability, Appeal No. 05-127; Application of a Child Suspected of Having a Disability, Appeal No. 05-040; Application of a Child Suspected of Having a Disability, Appeal No. 04-087; Application of the Bd. of Educ., Appeal No. 04-037; Application of a Child with a Disability, Appeal No. 03-043; Application of a Child with a Disability, Appeal No. 02-092; Application of a Child Suspected of Having a Disability, Appeal No. 01-082). To determine that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D.Cal. 2008], referencing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]).

In this case, the director acknowledged that, in formulating her conclusion an evaluation of the student was unnecessary, she considered evidence presented during the prior impartial hearing relative to the 2009-10 school year, including testimony suggesting that the student "was improving, and was making progress at the [NPS]," "was putting out good effort and was maintaining good academic standing [at the NPS]," was forming positive relationships with teachers and peers at the NPS, had demonstrated an improvement in his moderate depression since leaving the district high school, and was not receiving counseling services at the NPS,<sup>6</sup> in addition to a discussion with the district of location's special education director, who shared with her a June 16, 2011 letter from district of location's school psychologist stating that "I have had the occasion to meet with [the student] on several occasions over the past two years. ... Based on conversations with [the student] last year, I did have anger management concerns for him that were expressed to administration. However, I did not see him as emotionally disabled," and added "[h]e definitely had some lingering anxiety from his experiences at [the district high school] and was keeping to himself at [the NPS] .... [He] continues to be quiet and keep to himself, but is no longer having apparent difficulties with other students" (Tr. pp. 135-36, 142-59, 167-68, 202-03; Dist. Ex. J; see Tr. pp. 111-12; Dist. Ex. F; Application of a Student Suspected of Having a Disability, Appeal No. 10-129).

However, the director also testified that "sometime in the school year of 2010-11," she received a telephone call from the student's mother, during which the student's mother "mentioned that the student was still having some ... concerns, he was still having some problems," and that the director "assumed that they had ... to do with emotional issues" (Tr. pp. 159-60). The director added that she advised the student's mother that "if he was a student here, we could talk about possibly a referral and we would have some evaluations done. But ... because he is no longer a student in [the district] ... the obligation actually falls on the district of location to do the evaluations and to have a CSE if she wants to go that route" (Tr. p. 160). This testimony strongly suggests that the district's decision not to refer the student for evaluation by the CSE stemmed not from a lack of reasonable suspicion that he may have had a disability and needed special education programs and related services, but rather from the district's belief that the responsibility to evaluate the student rested with the district of location. Furthermore, the hearing record reflects that the district possessed sufficient information, developed after the student's November 2008 hallway "confrontation" in the district high school and examined in detail during the prior impartial hearing relating to the parents' claims relative to the 2009-10 school year, which identified the student's social/behavioral concerns sufficiently to trigger the district's child find obligation to refer the student to the CSE for evaluation for the 2010-11 school year (see Dist. Exs. E; F; Application of a Student Suspected of Having a Disability, Appeal No. 10-129). In sum, for the reasons discussed above, I find that the evidence contained in the hearing record supports the impartial hearing officer's conclusion that the district violated its child find obligations relative to the student's 2010-11 school year, and therefore, I decline to disturb that aspect of the impartial hearing officer's decision.

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<sup>6</sup> The hearing record reflects that the student saw a private therapist at the beginning of the 2010-11 school year, but discontinued visits after late November 2010 (see Tr. pp. 382, 444-45). During the impartial hearing, the student's mother testified that the student stopped seeing his private therapist "[s]ometime in the beginning of the [2010-11] school year, in the first quarter or the beginning of the second quarter," because "it really wasn't necessary after he built a rapport with [his guidance counselor at the NPS]," and that the student did not see any "outside professionals" or require hospitalization during the 2010-11 school year (Tr. pp. 289, 348-49).

## Eligibility

Next, I will consider the consequence of the district's child find violation. The district correctly contends in the petition that the impartial hearing officer, despite finding that it denied the student a FAPE for the 2010-11 school year, did not address the issue of the student's eligibility for special education and related services in the decision (see IHO Decision at pp. 1-3). The parents assert that the student met the criteria for a student with an emotional disturbance under State and federal regulations, and consequently, upon evaluation by the district, should have been found eligible to receive special education programs and related services for the 2010-11 school year (see Dist. Ex. A at pp. 6-7).

Initially, according to State and federal regulations, a student with an emotional disturbance 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.; see N.C. v Bedford Cent. Sch. Dist., 2008 WL 4874535 [2d Cir. 2008]; see also Maus v. Wappingers Cent. Sch. Dist., 688 F.Supp.2d 282 [S.D.N.Y. 2010]; A.J. v. Bd. of Educ., 679 F.Supp.2d 299 [E.D.N.Y. 2010]). While the term "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 (34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]; New Paltz, 307 F. Supp. 2d at 398).

However, after careful review, I find that the hearing record is insufficiently developed to determine whether the student met any of the five criteria set forth under the State and federal regulations to become eligible for special education programs and related services as a student with an emotional disturbance. Although I note that the hearing record does contain anecdotal evidence germane to some of the five regulatory criteria for an emotional disturbance (see Tr. pp. 135-39, 141-43, 145-59, 308-25, 347, 383-87, 414, 420-21, 432-33, 475-79; Dist. Exs. E-F; J; Parent Exs. 2-3; 5), considered as a whole, the hearing record is inadequate to reach a reasoned, conclusive finding on the issue of the student's eligibility for special education and related services. Assuming, for the sake of argument that he met at least one of the five criteria, the available evidence does not support the conclusion that it was over a long period of time to a marked degree.

According to the parents' November 15, 2010 due process complaint notice, the student was allegedly the victim of bullying incidents occurring during the 2007-08 and 2008-09 school years, and that on November 5, 2008, one such incident ultimately led to his "removal" from the district high school in mid-November 2008 (Dist. Ex. A at pp. 2-3). The student's private

therapist testified during the impartial hearing that in her opinion, the student could not have returned to the district high school for the 2010-11 school year because "he was involved in a cycle of violence ... with his peers and he was a target there ... and it was a toxic environment" and not an appropriate placement for him (Tr. pp. 388-90). She added that the district high school "didn't provide or couldn't provide what [the student] needed, the supports, the sense of security ... the direction ... the one to one contact that he needed" (Tr. p. 428). Additionally, in response to inquiry by the impartial hearing officer, the private therapist opined that the student "could have been sent to any other high school other than [the district high school] without the mental problems that occurred" (Tr. pp. 447-48).

However, the private therapist also acknowledged that she lacked personal knowledge of the services provided to the student at the district high school or how the student performed academically while enrolled in the district high school, and that her opinion "regarding the student's ability to succeed at [the district high school] versus his ability to succeed at [the NPS was] based upon what [the student's mother] told [her]" (Tr. p. 442).

The impartial hearing officer also found "[w]hen bullying reaches a level where a student is substantially restricted in learning opportunities, the student is deprived of a FAPE" (see IHO Decision at pp. 2-3), and, in reaching this conclusion, relied upon T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011). However, based upon the facts and circumstances of this case, which are distinguishable from those in T.K., I find that the impartial hearing officer's reliance upon T.K. was misplaced, given that in T.K., the student had already been evaluated by the CSE and found to be eligible for special education programs and related services as a student with a disability,<sup>7</sup> and the parents had rejected the district's recommended placement (see 779 F. Supp. 2d 289, 294-95 [E.D.N.Y. April 25, 2011]). In this case, however, the student was not evaluated for special education and related services, consequently, was not found eligible for special education programs and related services, and consequently, received neither an IEP nor a special education placement.

Furthermore, as discussed above, there is no indication in the hearing record that the district requested parental consent to evaluate the student, nor that the parents requested that the district evaluate the student or furnished consent for the district to do so, or that they obtained an updated private evaluation of the student in support of their claim.<sup>8</sup> I also note that the impartial hearing officer did not request an independent educational evaluation (IEE) of the student as part of the impartial hearing, which, in consideration of the lack of recent evaluative data contained in the hearing record, may have aided in further developing the hearing record on this issue (see 20 U.S.C. § 1415[b][1]; 34 C.F.R. § 300.502[d]; 8 NYCRR 200.5[g][2]). However, remand of this case for further development of the hearing record on this issue at this juncture would serve little purpose, because the hearing record demonstrates that the student graduated from the NPS in

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<sup>7</sup> The student's eligibility in T.K. was not at issue because the student met the criteria for IDEA eligibility and the court was addressing the extent to which the student's special education and related services must be designed to remediate issues related to bullying. It appears that an appeal of this case to the Second Circuit is currently pending.

<sup>8</sup> The only psychiatric evaluations contained in the hearing record in support of the parents' claims that the student had an emotional disturbance and was therefore eligible for special education and related services for the 2010-11 school year were conducted on November 18, 2008 and November 26, 2008, respectively (see Dist. Ex. E at pp. 14-18), almost two years prior to the date of the parents' November 15, 2010 due process complaint notice and more than 30 months prior to the commencement of the impartial hearing in the instant appeal.

June 2011 and was scheduled to attend college in fall 2011 (see Tr. pp. 275, 292; Parent Exs. 2-3). As stated above, the evidence does not lead me to conclude that the student experienced one or more of the five criteria over a long period of time to a marked degree. I am also not convinced that the student required special education services as a result. However, assuming for the sake of argument that the student was denied a FAPE for the 2010-11 school year, I will next consider whether the parents satisfied their burden of proving that the NPS was an appropriate placement for the student for the 2010-11 school year.

### **Applicable Standards – Unilateral Placement**

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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 115 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; 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]). 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 specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 C.F.R. § 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

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).

### **Parents' Unilateral Placement – 2010-11 School Year**

Assuming, without deciding, that the CSE would have determined that the student was eligible for special education and related services, I find that with respect to the parents' tuition reimbursement claim, the hearing record contains a paucity of evidence describing the student's educational program at the NPS. The only additional documentary evidence from the NPS added to the hearing record developed during the prior impartial hearing conducted in Application of a Student Suspected of Having a Disability, Appeal No. 10-129 consisted of a tuition invoice for the 2010-11 school year, the student's 2010-11 report card, the student's academic transcript, a letter waiving the school's "world language" requirement for the student, the student's individual discipline report for the 2010-11 school year, and a parental release form dated December 14, 2009 (compare Dist. Ex. E, with Parent Exs. 1-6).

With respect to the student's social/emotional functioning, the student's mother testified during the impartial hearing that to address the student's socialization difficulties, NPS staff "encouraged him. They advised him. I don't know of anything else. I'm sure they did many things, but I wasn't there" (Tr. pp. 314-16). She explained that during the 2010-11 school year, her son saw a guidance counselor at the NPS "once or twice a week" and "anybody else [who] would speak with him at any given moment" (Tr. p. 288). She commented that the student "trusted" the guidance counselor, "could talk to him about anything," and that "he helped [the student] cope on a regular basis and he pretty much helped him graduate from therapy outside of school" (Tr. pp. 289, 348-49). The student's mother observed that the student "was becoming more and more social outside of school" and "[h]e started having his friends over again. He started being more social with a lot of people, going out more and [the guidance counselor] just did a very good job with the student" (Tr. pp. 289-90). The student's mother testified that during the 2010-11 school year, she had in excess of ten conversations with the guidance counselor, focusing on the student's difficulties socializing with other people (Tr. pp. 287, 290), and noted that, although at the beginning of the 2010-11 school year the guidance counselor "wanted to see him become more social in school and become part of a group," the student "was afraid that if anybody picked on him and he reacted, he would be thrown out ... [s]o after a little while, [the guidance counselor] agreed that it was best to help him focus on his academics and ... on his

relationships outside of school and we were successful with that" (Tr. pp. 290, 318; see Tr. pp. 319-20). Academically, the student's mother testified that the NPS guidance counselor advised the student regarding his academics, and she acknowledged that during the third quarter of the 2010-11 school year, her son was failing four of his eight courses (Tr. p. 308).<sup>9</sup>

The student's NPS guidance counselor, who was the only witness from the NPS to testify on behalf of the parents, testified that he initially met with the student at the beginning of the 2010-11 school year, focusing at first on academics, but then met with the student approximately ten times during the 2010-11 school year, during which he "encouraged [the student] to get involved and to socialize with other students;" however, he also testified that the student responded that "[h]e preferred not to" and that the student "made it perfectly clear that he preferred to be by himself in the school setting, so I accepted that" (Tr. pp. 472-73, 475-79). He also advised that he was unaware of any behavior incidents involving the student arising during the 2010-11 school year at the NPS (Tr. p. 474).

The hearing record also reflects three student visits to his private therapist during the 2010-11 school year, twice in September 2010 and once in November 2010, during which the student discussed his anxiety related to returning to the NPS and his "suspicious feelings" related to a female peer who approached him at the NPS (Tr. pp. 403-07, 444-45; Parent Ex. E at pp. 65-66). The private therapist confirmed that during the 2010-11 school year, she had no direct contact with the student after the student's November 2010 visit, that she spoke with the student's mother "[11] or 12 times" during the 2010-11 school year, and that she had no contact with NPS staff during the 2010-11 school year (Tr. pp. 410-12, 426, 444-45; see Tr. pp. 397-98).

The private therapist opined that the NPS was an appropriate placement for the student because at the NPS, he was not subject to the stressors to which he was exposed at the district high school, and the NPS provided a "level of security and safety for the student to continue to do well based on the trauma that he experienced, the social anxieties he struggled with, [and] the isolation," adding that the NPS "provided a lot of contact, a lot of support ... he saw a guidance counselor on a regular basis. I think at one point ... he had seen the pastor there" (Tr. pp. 388, 393, 394-95). She noted that the NPS seemed to "regulate any situation ... that he was confronted with [to which] he may have reacted in a negative way ... and I don't think that ... [the district high school] offered that for him" (Tr. p. 389; see Tr. pp. 391-92, 395), adding that the NPS had the "mechanisms ... to provide emotional support, social support, academic structure support and ... by having the counselors available, they recognized that ... the student did suffer ... clinical depression" (Tr. p. 395).

However, the private therapist also acknowledged that while she believed that the student's process of "reintegration" would have been less likely to be successful had it occurred at the district high school, she had no personal knowledge of the level of the student's isolation from his peers at the NPS during the 2010-11 school year, the nature of the services and supports provided to the student by the NPS during the 2010-11 school year, or the specific measures, if any, that the NPS employed to address the student's social relationships or academic

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<sup>9</sup> The student's mother attributed the student's academic difficulties during the third quarter of the 2010-11 school year to mononucleosis, which contributed to the student's "falling asleep in ... class" (Tr. pp. 308-09), but acknowledged during the impartial hearing that some of the student's grades could have been "adversely affected because of the socialization issues he was having" (Tr. p. 347).

performance during the 2010-11 school year, other than the information she received through conversations with the student's mother (Tr. pp. 434-36, 440-43).

The impartial hearing officer also found that "[t]here was no evidence in this proceeding that this student needed any further special education accommodation except to be removed from the stressor of peer bullying which occurred in the district's high school" (IHO Decision at p. 2), and there is, in fact, no indication in the hearing record that the student received special education services at the NPS during the 2010-11 school year (see Dist. Ex. F at p. 458). Although the removal of a student from a particular school building in which that student was exposed to peer bullying confers educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not, I find under the facts and circumstances of this case, that it did not satisfy the parents' burden to demonstrate how the program provided at the NPS was specially designed to meet the student's unique needs for the 2010-11 school year; thus, I also find that the parents were not entitled to tuition reimbursement (Gagliardo, 489 F.3d at 115). A unilateral 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 [quoting Frank G., 459 F.3d at 365]; see also Rowley, 458 U.S. at 188-89). Having determined that the parents did not meet the second criterion for an award of tuition reimbursement, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dept. of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]).

## **Conclusion**

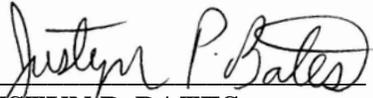
In sum, in consideration of the evidence contained in the hearing record, I disagree with the impartial hearing officer's determinations that the parents satisfied their burden of proving that the NPS was an appropriate placement for the student for the 2010-11 school year and that the parents were entitled to tuition reimbursement for the student's 2010-11 school year at the NPS and, therefore, I will annul those aspects of the impartial hearing officer's October 18, 2011 decision.

I have considered the parties' remaining contentions and find that I need not consider them in light of my determinations.

## **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portions of the impartial hearing officer's decision dated October 18, 2011 that determined that the parents satisfied their burden of proving that the NPS was an appropriate placement for the student for the 2010-11 school year and that the parents were entitled to reimbursement for their son's tuition and expenses at the NPS for the 2010-11 school year are annulled.

**Dated:** Albany, New York  
January 23, 2012

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**