The University of the State of New York

The State Education Department
State Review Officer
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No. 15-086

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [redacted]

Appearances:
Law Offices of Neal H. Rosenberg, attorneys for petitioners, Lakshmi Singh Mergeche, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Lisa S. Rusk, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the John Dewey Academy (JDA) for the 2014-15 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student reportedly received a diagnosis of an attention deficit disorder (ADHD) during fifth grade (Dist. Ex. 30 at p. 2).[1] According to the student's mother, his performance began to decline academically while he was in eighth grade (Tr. pp. 366-67; see Dist. Ex. 22 at p.

[1] The parent testified that the student received a diagnosis of an attention deficit disorder (ADD) in the fifth grade (compare Dist. Ex. 30 at p. 2, with Tr. pp. 365-67).

1). The student exhibited difficulty with organization, homework completion, and classroom attention (Tr. pp. 366-67). At the start of the 2012-13 school year, when the student was in ninth grade, the student's mother testified that he exhibited significant anxiety related to finding his classes in the larger school environment, was frequently late to class, did not complete his homework, and began to exhibit anger (Tr. pp. 370-72). The parents referred the student to the district's CSE, and a CSE convened on April 17, 2013 (Tr. pp. 50-51, 374-75; Parent Ex. B at p. 3; Dist. Exs. 2 at p. 1; 3 at p. 1). By prior written notice dated May 4, 2013, the district notified the parents that the student was found not eligible for special education services (Tr. pp. 50-51, 376; Parent Ex. B at pp. 1, 3).

Following the April 2013 CSE's ineligibility determination, the parents obtained a private tutor to assist the student with organization (Tr. p. 378). The parent testified that the student began the 2013-14 (tenth grade) school year "relatively strong," but "took a nosedive" during the third quarter (Tr. p. 380; Dist. Ex. 25). The parent also testified that the student had legal difficulties related to his possession of illicit substances, and the student disclosed to the parents that he had been meeting with the school's drug counselor and that he had been using drugs in an attempt to deal with his anxiety and depression (Tr. pp. 380, 385-87). The parents sought additional assistance from a private social worker and an adolescent psychiatrist (Tr. pp. 388, 390). The adolescent psychiatrist indicated the student was experiencing severe anxiety and depression (Tr. pp. 390-91; Dist. Ex. 21 at pp. 2, 3).

Also during the 2013-14 school year, the student's mother testified that the student frequently skipped classes, became increasingly more oppositional, and used drugs in the home (Tr. pp. 395-97). According to the student's mother, the student's noncompliant behavior at home and at school continued to escalate, culminating in a behavioral incident at school in April 2014 (Tr. pp. 383-85, 397-99, 401-03). The student's mother testified that the student's anger over the next week was such that the parents could not "handle his behaviors" in the home (Tr. pp. 403-04). On May 8, 2014, in response to a physical altercation with his father, the student was admitted to a psychiatric hospital (Tr. pp. 405-08; Dist. Ex. 20). According to the testimony of the CSE chairperson, the parents notified the student's guidance counselor that the student had been hospitalized on May 9, 2014 (Tr. p. 46; Dist. Ex. 5 at p. 1). While at the psychiatric hospital, the student was diagnosed as having a mood disorder, not otherwise specified (NOS), and was discharged on May 19, 2014 (Dist. Ex. 20). Also while the student was at the psychiatric hospital, the parents obtained the services of an education consultant (Tr. p. 470). On the recommendations of a therapist at the psychiatric hospital and the education consultant, the student was enrolled in an out-of-state wilderness program immediately following his discharge from the hospital (Tr. pp. 409-10, 471; Dist. Exs. 3 at p. 2; 5 at p.1).

By electronic mail dated May 23, 2014, the district's CSE chairperson suggested to the parents that the student be referred to the CSE upon his return to the district, when he was available to participate in evaluations (Dist. Ex. 3 at p. 2). The CSE chairperson also reiterated the substance of a telephone call with the parents that day, acknowledging that the parents reported that the student's "anxiety, depression, frustration, and anger that he expressed at home revealed to you the significance that the impact of the work load and the demands of [the high school] had on his emotional status" (id.). By electronic mail dated June 2, 2014, the parents advised the CSE chairperson that they did not want to withdraw the student from the district and

wanted the student to be referred to the CSE immediately (Dist. Ex. 4 at pp. 2-3). With regard to evaluation, the parents advised the CSE chairperson that they intended to obtain a private evaluation that they would share with the CSE upon completion (id. at p. 3). The parents also wrote that they believed the private evaluation would be "more than adequate" for the CSE to assess the student (id.). The CSE chairperson replied the same day, writing that in order for the student to be considered by the CSE, the committee required updated testing and an observation (id. at p. 2). The CSE chairperson again suggested the parents wait to refer the student until he returned home (id.).

On June 12, 2014, the parents replied, stating that they did not agree with delaying a referral to the CSE and reiterating their request that the student be referred to the CSE (Dist. Ex. 4 at p. 1). The CSE chairperson replied the same day and advised the parents that the student would be referred to the CSE (Dist. Ex. 4 at p. 1). The CSE chairperson further indicated that it would be necessary for the district to evaluate the student in order to make a recommendation (id.). Also on June 12, 2014, the CSE chairperson referred the student for an initial evaluation (Dist. Ex. 5 at pp. 1-2). The district provided the parents with prior written notice of the referral, a consent to evaluate form, and a copy of the procedural safeguards (Dist. Ex. 6 at pp. 1-4). On June 25, 2014, the parents returned a signed consent form (Dist. Ex. 7 at p. 2). By electronic mail dated July 15, 2014, the parents returned a completed Behavior Assessment System for Children, Second Edition (BASC-2) to the CSE chairperson (Dist. Ex. 10 at p. 2; Parent Ex. A). The parents had the student privately evaluated while he attended the wilderness program, and the resulting July 2014 psychological assessment report offered the student diagnoses of a generalized anxiety disorder, an unspecified depressive disorder, an oppositional defiant disorder, a moderate to severe substance use disorder, and an attention deficit hyperactivity disorder (ADHD)–inattentive type (Dist. Ex. 18 at p. 16).

The parents and CSE chairperson continued to correspond through July and August 2014, during which time period attempts were made to schedule an informal meeting and a CSE initial review, and to allow district personnel access to the student (Dist. Exs. 9 at pp. 1-2, 10 at p. 1; 12 at pp. 1-4; 14 at 1-2). The student was discharged from the wilderness program on August 4, 2014, and on August 6, 2014 was enrolled at JDA, which was recommended to the parents by the student's counselor at the wilderness program, (Tr. p. 563; Parent Ex. D at pp. 1-3, 7; Dist. Exs. 11 at pp. 1-2; 13 at p. 1). The parents notified the district of the student's placement at JDA on August 7, 2014 (Dist. Ex. 13 at p. 1).[2] The informal meeting between the parents and district personnel was rescheduled a number of times and the CSE meeting was rescheduled once before the CSE convened on August 27, 2014 (Dist. Exs. 14 at p. 1; 15 at p. 1; 16).

During the August 2014 CSE meeting, the committee considered a May 19, 2014 discharge summary from the psychiatric hospital; a July 15, 2014 BASC-2; the July 17, 2014 private psychological assessment report; a July 28, 2014 treatment summary from the wilderness program; an August 22, 2014 district psychological evaluation, which was based on interviews with the student, the student's father, the private evaluator, and the student's counselor at the

[2] JDA has not been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

wilderness program; and information presented by district staff and the parents (Dist. Ex. 30 at pp. 1-2; see Dist. Exs. 17; 18; 19; 20; Parent Ex. A).

Relying on the student's documented decline in grades, inattention, deficiencies in executive functioning, psychological diagnoses, anxiety, depression, and overall lack of coping skills, the August 2014 CSE found the student eligible for special education and related services as a student with an emotional disturbance (Dist. Ex. 30 at pp. 1-2; see Dist. Exs. 18 at pp. 10-11, 14-16; 22 at p. 1; 23 at p. 1; 24 at pp. 2-3; 25).[3] Following the eligibility determination, the CSE determined that the student required more support than was available in the district schools and the meeting was adjourned without finalizing a recommendation; the CSE reconvened on September 5, 2014, to develop the student's IEP (Dist. Ex. 30 at p. 2; see Tr. pp. 75-76, 78-79). The September 2014 CSE determined to send application packets to local therapeutic day programs and a representative from the county department of mental health described community-based services available to support the student at home to avoid the need for a residential placement (Dist. Ex. 30 at p. 2). The parents stated that they were willing to consider all options but remained concerned about removing the student from his current residential setting, and the CSE adjourned with the intention to "reconvene to make final recommendations for placement once the intake process ha[d] been completed for each appropriate program" (id. at pp. 2-3).

By electronic mail dated September 16, 2014, the CSE chairperson advised the parents that she had sent information packets to a number of prospective therapeutic day programs (Dist. Ex. 31). Three of the programs indicated that they could potentially accept the student, subject to intake interviews, and by letter dated October 9, 2014, the parents stated that they had visited all three and found them to be inappropriate (Dist. Ex. 34; see Dist. Exs. 31-33).[4] In several correspondences to the parents, the CSE chairperson addressed the parents' concerns regarding the potential therapeutic day programs and indicated that it was necessary for the student to be interviewed by the programs in order for the programs to determine whether they were appropriate for the student and for the district to be able to make and implement appropriate recommendations (Dist. Exs. 35; 37; 39). The parents replied, indicating they would not permit the student to participate in intake interviews because the potential programs did not comport with the recommendations of the student's therapists that the student be placed in a residential program, and requested that the CSE recommend a residential program (Dist. Exs. 36; 38). By letter dated November 7, 2014, the parents reiterated their concerns regarding the potential day treatment programs, noted that they had not received an IEP or prior written notice memorializing a recommendation by the CSE, and notified the district that the student would remain at JDA and that they would seek reimbursement from the district for the costs of the student's attendance at JDA for the 2014-15 school year (Dist. Ex. 40 at pp. 1-2).

[3] The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this proceeding (Tr. p. 445; see 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

[4] The hearing record reflects that four additional programs to which the CSE sent referral packets indicated that they could not meet the student's needs (Parent Ex. C).

A. Due Process Complaint Notice

By due process complaint notice dated December 17, 2014, the parents requested an impartial hearing (Dist. Ex. 1). The parents' due process complaint notice alleged that the district failed to identify the student as eligible for services under the IDEA through the 2013-14 school year, and failed to offer the student a FAPE for the 2014-15 school year (id. at pp. 1, 3-4, 7, 9). Specifically, the parents alleged that after finding the student eligible for special education services at the September 2014 CSE meeting, the CSE failed to develop an IEP for the student or make any program recommendations (id. at p. 7). The parents also alleged a number of claims regarding the conduct of the September 2014 CSE meeting (id. at pp. 7-8).

The parents asserted that the student required a residential placement and that JDA was an appropriate program for the student (Dist. Ex. 1 at pp. 6-8). The parents also contended that they fully cooperated with the district and that equitable considerations favored district funding of the costs of the student's attendance at JDA for the 2014-15 school year (id. at pp. 8-9).

B. Impartial Hearing Officer Decision

After a prehearing conference was held on January 28, 2015, an impartial hearing proceeded on the merits on April 16, 2015 for four hearing dates before concluding on May 20, 2015 (Tr. pp. 1-640; IHO Ex. I).[5] In a decision dated July 2, 2015, the IHO denied the parents' request for tuition reimbursement (IHO Decision at pp. 27-34). Initially, the IHO noted that the district did not dispute that it failed to offer the student a placement for the 2014-15 school year, but argued both that JDA was not appropriate and that equitable considerations did not support the parents' request for relief (id. at p. 28). The IHO then considered the appropriateness of the parents' unilateral placement of the student at JDA and determined that it was not an appropriate program for the student (id. at pp. 28-31). In particular, the IHO found that JDA did not provide the student with a nurturing, structured environment with sufficient therapeutic support and supervision (id. at pp. 29-31). The IHO also determined that equitable considerations did not favor an award of tuition reimbursement (id. at pp. 31-33). Specifically, the IHO found that the parents failed to make the student available for intake interviews, inappropriately attempted to exert veto control over the options proposed by the district and prevented the district from offering the student a placement (id. at pp. 31-32).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in not finding that the district violated its child find obligations and failed to offer the student a FAPE for the 2013-14 and 2014-15 school years, in finding that JDA was not an appropriate unilateral placement, and in finding that equitable considerations did not favor their request for relief. The parents further allege that the

[5] Although the IHO properly documented her response to each request for an extension in writing, the hearing record is unclear why the hearing did not convene for over two months after the prehearing conference was held other than "due to the extensive testimony/issues" (IHO Ex. I; see IHO Exs. II; V; VI). The IHO is reminded that convenience of the parties or their counsel is not an appropriate basis for granting an extension "[a]bsent a compelling reason or a specific showing of substantial hardship," and that she may not grant more than one extension at a time (8 NYCRR 200.5[j][5][i], [iii]).

IHO failed to address issues of law and fact and to consider all of the evidence.[6] The parents assert that the district violated the child find provisions of the IDEA; that the district failed to provide a FAPE to the student for the 2013-14 and 2014-15 school years; that their unilateral placement of the student at JDA was appropriate; and that equitable considerations favor their request for relief.

In an answer, the district responds to the parents' allegations with admissions and denials, and argues that the IHO correctly determined that JDA was not an appropriate program for the student and that equitable considerations do not favor the parents' request for relief.[7] The district contends that the September 2014 CSE recommended a therapeutic day placement, but concedes that an IEP was not prepared and no formal program recommendation was made for the student. With regard to the parents' unilateral placement, the district argues that the student did not require a residential placement to receive educational benefit and that a day program represented the student's least restrictive environment, and that JDA did not provide the student with special education to meet his unique needs. The district further contends that equitable considerations do not favor an award of tuition reimbursement because the parents unreasonably withheld the student from intake interviews at prospective placements, thereby thwarting the district's attempts to finalize a recommendation for the 2014-15 school year, and the parents failed to provide timely notice to the district of their intention to unilaterally place the student and seek tuition reimbursement.

V. 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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v.

[6] The parents also raise various challenges in their memorandum of law to the IEP entered into evidence at the impartial hearing; it is unnecessary to address these claims (which were not raised in the parents' due process complaint notice or petition) based on the resolution of this matter.

[7] The district argues that the petition should be dismissed because it was served on the district without an affidavit of verification, in derogation of the practice regulation that all pleadings be verified (8 NYCRR 279.7). As noted by the parents in a reply, the petition received by the Office of State Review was properly verified and it appears that the district has now been served with the verification received by this office. In any event, even if the parents failed to properly verify their petition in this instance, I would decline to dismiss the appeal on this ground, given that the district was able to respond to the allegations raised in the petition in an answer and there is no indication that it suffered any prejudice as a result.

Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; 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 v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir. 2003]). 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 T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). 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 (20 U.S.C. § 1412[a][5][A]; 34 CFR 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).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. CSE Process

1. Child Find

The parents argue that the IHO erred by failing to find that the district violated the "child find" provisions of the IDEA, and allege that the district's child find obligation was triggered in February 2013, when the parents initially referred the student to the CSE.

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" (Forest Grove, 557 U.S. at 245). The "child find" requirements apply to "[c]hildren 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 CFR 300.111[c][1]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1]).

The hearing record reflects that the district timely convened a CSE in response to the parents' initial referral (Dist. Exs. 3 at p. 1; 5 at p. 2; 30 at pp. 1-2). The IHO determined that the CSE correctly found the student ineligible for special education, but provided additional general education support services for the student during the 2012-13 and 2013-14 school years (IHO Decision at p. 33). The hearing record also reflects that the parents were in agreement with the CSE's determination (Tr. p. 51; Dist. Ex. 3 at p. 1; Parent Ex. B at p. 3).[8]

The hearing record also indicates that the parents did not claim that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years; rather, the child find allegation was raised as evidence of the district's past conduct for the IHO to review within the context of equitable considerations (Tr. pp. 37-38). A review of the hearing record supports the IHO's determination that the CSE correctly found the student ineligible for special education and services prior to the 2014-15 school year as the student's "condition did not previously adversely impact his performance to the extent that he required special services and programs" (IHO Decision at p. 33).

2. Failure to Develop a Final IEP

The district contends that the September 2014 CSE was unable to finalize the student's IEP at the meeting because the potential programs required intake interviews with the student. While the district argues that the September 2014 CSE recommended a therapeutic day placement, the hearing record reflects that the CSE did not make a final program

[8] The student's mother testified that the parents were not in agreement with the district's CSE's determination that the student was ineligible for special education and related services; nevertheless, the parents did not seek review of the CSE's determination (Tr. pp. 376, 479-81).

recommendation and did not provide the parent with a finalized IEP for the student (see Dist. Ex. 30).

Pursuant to State regulation, the district must arrange for appropriate special education programs and services to be provided within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability (8 NYCRR 200.4[d], [e][1]). As the parents provided consent to evaluate on June 25, 2014, although the hearing record does not indicate the days on which the district public schools were in session, the 60 school day period in which the district was required to implement an educational program for the student did not expire prior to the date of the September CSE meeting.[9] However, subsequent to the September CSE meeting, the district failed to develop a finalized IEP for the student. Under the facts of this case, the district's failure to provide the student with a final IEP constituted a procedural error that impeded the student's right to a FAPE and the district failed to offer the student a FAPE for the 2014-15 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Eschenasy v. New York City Dep't. of Educ., 604 F. Supp. 2d 639, 650 [S.D.N.Y. 2009] [holding that because the district did not develop an IEP for the student, it had not made an appropriate recommendation]; Application of a Student with a Disability, Appeal No. 15-047).

B. Unilateral Placement

The parents contend that the student required a residential placement and that the IHO erred by finding that JDA was not an appropriate program. The district argues that the IHO correctly determined that JDA was not appropriate and alleges that the parents' unilateral placement was a stressful, demanding, and anxiety-producing environment, and that the parents failed to demonstrate how such a program addressed the student's unique needs.

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 must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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 develop its own IEP for the student (Carter, 510 U.S. at 13-14). 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, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). 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

[9] A school day is defined by State regulation as "any day, including a partial day, that students are in attendance at school for instructional purposes . . . except that, during the months of July and August, school day means every day except Saturday, Sunday and legal holidays" (8 NYCRR 200.1[n][1]).

"reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; 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 appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 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).

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, quoting Frank G., 459 F.3d at 364-65).

While the student's performance on measures of intellectual and academic abilities indicated his overall functioning was generally within the average to very superior range, the student's performance in the areas of executive functioning, emotional control, and attention, as well as his tendencies toward opposition and defiance, anxiety, and mild depression demonstrated needs relative to the student's social/emotional and behavioral functioning (see generally Dist. Ex. 18). According to the psychologist who evaluated the student privately, psychological and emotional assessments revealed clinically significant problems in the areas of inattention and distractibility, as well as difficulty with anxiety, oppositional attitude and behavior, mild depressive symptoms, and substance abuse (id. at pp. 14-16). The psychologist described the student as emotionally immature, sensitive, somewhat fragile, and susceptible to depression, anxiety, and anger (id. at p. 15). He further described the student as an adolescent "who lacks almost any healthy coping skills," whose anxiety was masked by anger, and who felt overwhelmed even when faced with age-appropriate levels of stress (id.). The psychologist also indicated that the student had a history of increasingly oppositional behavior, appeared "quite entitled," and dealt with his anxiety, anger, and depression by abusing drugs (id.).

The private psychologist recommended that the student attend a highly structured residential school with "24/7 therapeutic support," strict inclusion and exclusion criteria, and a consistent, nurturing environment, where the student would understand expectations and receive direct feedback when he was feeling overwhelmed (Dist. Ex. 18 at p. 16). The psychologist also determined that the school should provide substance abuse treatment and, most importantly, include a strong positive peer culture that emphasized peer group interventions (id.).

According to the July 2014 treatment summary prepared by the student's primary therapist at the wilderness program, at the time of his enrollment in the program the student required an intensive intervention to address his emotional and mood issues (Dist. Ex. 19 at p. 1). The wilderness therapist's treatment summary indicated that the student had made improvements but still required residential and therapeutic support to address his emotional, relational, and behavioral issues, without which he would "regress and slip back to a place of emotional regression and continue to use his anger and negative behavioral expression as a way to cope" (id. at pp. 1-2).

Consistent with the wilderness therapist's and the private psychologist's description of the student, the head of school at JDA indicated that upon arrival the student was arrogant, self-centered, entitled, anxious, and quick to point out other people's faults, although not able to acknowledge his own need to make changes (Tr. pp. 290-91). Also consistent with reports by the student's private providers, the head of the school testified that the student's anxiety was caused by extreme insecurity, that the student exhibited a "real fear of failure," had an "avoidant personality," and that his anxiety "led [the student] to a lot of denial, escapist behavior" (Tr. p. 291).

According to the dean of academics at JDA, at the beginning of the 2014-15 school year approximately 25 students were enrolled at the school, and in May 2015, 19 students attended JDA (Tr. pp. 575, 587). Literature about the school described JDA as a "therapeutic setting," and according to JDA's head of school and dean of academics, the therapeutic model utilized at JDA is eclectic and combines a variety of therapies such as reality therapy, choice therapy, cognitive behavior training, positive psychology, and mindfulness (Tr. pp. 271-72, 594; Dist. Ex. 45 at p. 4). The head of school also testified that JDA emphasizes a positive peer culture, including a lot of group work and peer responsibility (Tr. pp. 271-72; see Dist. Ex. 45 at p. 4). He further testified that JDA utilizes a non-mental health approach and is known for taking students off of psychotropic medication and "push[ing] [students] on cognitive abilities and peer responsibility" (Tr. p. 272). The head of school indicated that JDA tries to "re-instill hope and belief," "convince [students] that the efforts needed are worth their time and worth their effort," and "convince them that they are capable" (Tr. p. 276). Testimony by the dean of academics at JDA similarly indicated that the therapeutic approach at JDA is an integrated approach of traditional clinical therapy, such as cognitive behavioral therapy and confrontation net theory, which is administered by the primary clinicians at the school, as well as a rigorous academic environment, and the student peer culture (Tr. pp. 584-85).

According to the JDA parent handbook, the therapeutic community is "an essential and integral" part of the school wherein students "learn the foundation on which all else is built: how

to be honest with themselves and others," how to "confront others," and how "to become moral leaders" (Dist. Ex. 45 at p. 8). A central tenet of the therapeutic community is the concept of "caring confrontation" which is described as "honest, direct feedback" that should be "done in a constructive, caring, explanatory way" and is a technique that is used constantly at JDA (Tr. p. 304; Dist. Ex. 45 at pp. 8, 21). The hearing record indicates that JDA utilizes a therapeutic level system wherein privileges and responsibilities increase with each level of advancement (Tr. p. 285; Dist. Ex. 45 at pp. 6-8). The peer community determines by vote whether a student may advance to the next level or requires more time to achieve the promotion (Tr. p. 285).

The JDA parent handbook reflects that JDA utilizes various types of counseling opportunities for students including full school group, smaller primary groups, and individual therapy (Dist. Ex. 45 at pp. 8-9). The head of school testified that each student selects a primary therapist for individual therapy; however, the primary modality at the school is group work (Tr. pp. 272-73).[10] According to the head of school the entire school met as a group for an hour and a half on Mondays and Fridays; on Wednesdays, group therapy alternated between a whole school group and primary groups, with each of JDA's primary clinicians meeting with their students as a smaller group (Tr. pp. 273, 290, 353).[11] Students also attend a weekly one hour gender-based group (Tr. pp. 273, 353-54). In addition, the students participate in a self-help peer group without staff present for one hour nightly (Tr. pp. 273, 327).

According to the hearing record, the student selected the head of school as his primary clinician at the time of his enrollment in August 2014 (Tr. p. 289; see Dist. Ex. 29 at p. 1). The head of school testified that he interacted with the student on an almost daily basis for short exchanges, and that he talked with the student for an extended period approximately once every two or three weeks (Tr. pp. 289-90). Testimony by the dean of academics indicated that the student participated in a group of four students in an eight week behavioral therapy anxiety group that she facilitated, beginning in September 2014 (Tr. pp. 594-95).

The hearing record reflects that JDA also offers additional group therapy sessions for various family constellations during parent weekends, which are held seven times a year (Tr. p. 307; see Dist. Ex. 45 at pp. 5, 18). In particular, testimony by the head of school indicated that a sibling group was important for the student in this case, as he had always cared about his brother (Tr. p. 308). Knowing that his behavior influenced his brother and talking with him about how his past behavior was problematic was helpful to the student (id.).

The parent handbook reflects that JDA "does not wish to provide" constant adult supervision and further notes that students are expected to behave maturely and responsibly with or without the presence of adults, noting that in general, students meet if not surpass this expectation (Dist. Ex. 45 at p. 14). In addition, the hearing record reflects that by signing the

[10] With regard to the credentials of the three primary clinicians at JDA, the head of school testified that he held an MSW; the dean of academics held an MSW and an LCSW; and the dean of students held an MA in counseling psychology (Tr. pp. 271, 278).

[11] At the time of the head of school's testimony, the student's primary group included five students (Tr. p. 290).

JDA Enrollment and Financial Agreement, parents acknowledged the level of adult supervision at the school was as described in the parent handbook (see Parent Ex. D at p. 6).

Testimony by the head of school indicates that house parents are on duty during the hours that day staff is not present, although the job of house parent does not require visible presence (Tr. pp. 339, 350). Furthermore, house parents have no assigned duties, functioning primarily on an as-needed basis to provide transportation for recreational purposes (Tr. pp. 279-80). Testimony by the dean of academics indicates that JDA does not provide 24 hour supervision "by design" because JDA employs the mental health concepts of internal and external locus of control or internal and external motivation (Tr. p. 634; Dist. Ex. 45 at p. 11). She indicated that JDA attempted to balance the external controls associated with its strict, non-negotiable schedule that is extremely demanding and full of academic, personal, and emotional responsibilities, with opportunities to make independent decisions using an internal compass, noting that this was a skill that, prior to attending JDA, students handled very poorly (Tr. pp. 634-35). She further indicated that "in order to do that [they] need to be able to have some ability to give [students] the freedom to make decisions and to have them review those decisions" (Tr. p. 635).

The hearing record reflects that the student struggled in the first few months at JDA to engage, work, and start being honest about his issues (Tr. p. 292). JDA employed loss of privileges when the student did not do his homework or complete his personal responsibilities and he was also confronted in group by his peers and in individual meetings with the head of school in order to get the student to "buy into" the program (Tr. pp. 294-95).[12] The student was confronted with questions such as "what did your life look like, what got you here, what are you going to gain by acting in this way" and with the reality that the program would not work if he continued his behavior (Tr. pp. 294-95).

Testimony by the head of school indicated that the student reached a turning point in September or October, when he began to buy into the JDA program (Tr. pp. 292-93; see Parent Ex. E at pp. 1-2). The head of school indicated that during a group session the group addressed that the student was not participating in the program, as he had been caught in "a lot of lies," was not "doing his homework," was "goofing off during [the] set study hall," and was not meeting his responsibilities (Tr. pp. 292-93). The student voluntarily put himself into "scrub," a therapeutic intervention that the head of school described as a form of confrontation that is "basically a timeout so that [he] can think, reflect and write" (Tr. pp. 292-93, 305).[13] The student was taken out of classes and set up in the atrium of the school outside the head of school's office (Tr. pp.

[12] The head of school testified that the student lost privileges such as listening to music, going into town, eating junk food or unhealthy snacks, and doing outside reading other than for course work (Tr. p. 294).

[13] The hearing record reflects that a student may voluntarily go to or be sent to "scrub" when the student is "stuck," either academically or emotionally (Tr. pp. 292-93, 305). During scrubbing, a student does not attend classes, sleeps in a public area of the school, and sits facing a mirror and writing reflectively in a journal (see Tr. pp. 293, 305; Dist. Ex. 45 at p. 25). Students engage in scrubbing as a way to decide if they want to change their behavior and stay at JDA or leave the school (Tr. p. 351). Students may also do modified scrubbing where they maintain their regular schedule but are assigned one or more hours of scrubbing a day for a period of time (Dist. Ex. 45 at p. 25). The head of school opined that the student put himself into scrub to avoid group therapy (Tr. p. 293).

293, 341). There the student wrote for two or three days about "where his life was at, what his goals in life were, . . . what would happen if he didn't make it at [JDA], and does it make sense for him to be in this program" (Tr. p. 293). Testimony by the head of school indicated that the result of the scrubbing was that the student realized he did not want to be expelled or leave the school and, accordingly, the student started to work harder and engage in the program (id.). The head of school testified that from that point, the student met with teachers and was more honest and open about his difficulties, insecurities, fears, and dreams (id.).

The record reflects that at the time of the hearing the student had attained the level of middle member (Tr. p. 306). The head of JDA testified that generally, to achieve the level of middle member, a student must decide to make a long term commitment to change for the better, take on more responsibilities, and submit a written request to the faculty, receive an affirmative vote of a majority of the teachers and clinical staff, and the approval of a majority of his peers (Tr. pp. 286-87; Dist. Ex. 45 at p. 7).

Turning to the academic program at JDA, the head of school testified that class size at JDA ranges from an average of four to five students per class to a maximum of 12 students per class (Tr. p. 284). In keeping with the community milieu of the school, senior students serve as academic advisors, monitoring the progress and helping to identify academic problems of younger students, providing tutoring services to students in instances where teachers suggest a student tutor, and encouraging students to make appointments with teachers for extra help (Tr. p. 289; Dist. Ex. 45 at p. 9). The school also provides a structured study hall for two hours each night and three hours on Saturday mornings (Tr. pp. 311-12).

During the fall semester of the 2014-15 school year, the student received instruction in United States history, physics, algebra II, honors Spanish, creative writing, crimes and punishment, music performance, physical education, and moral reasoning (Parent Ex. F at pp. 1, 3). During the spring semester his courses included United States history, physics, algebra II, honors Spanish, introduction to literature theory, Marx, music composition, physical education and moral reasoning (id. at p. 4).

With respect to academics, the student received individualized support for his deficits in focusing and attention (Tr. pp. 607-09). Testimony by the dean of academics indicated that she met with the student's teachers to brainstorm ways to address the issue, specific to how it appeared in each class (Tr. p. 608). Her testimony indicated that in one class the student was required to participate in a way that demanded his active engagement, such as going up to the board and demonstrating problems, and his math teacher incorporated the use of short quizzes on the material covered in that day's class, to inspire and motivate greater attentiveness (Tr. pp. 608-09). She further indicated that she addressed the relationship between the student's anxiety and lack of attention during the anxiety group that she leads (Tr. p. 609). She indicated that working on anxiety and becoming more aware of one's thoughts can be helpful to increase attention (id.). The dean of academics also testified that she met with teachers weekly and received regular reports on how the student was doing from his teachers (Tr. p. 594).

The hearing record demonstrates that the student made academic progress at JDA. Testimony by the dean of academics indicated that the student initially blamed any difficulty that

he had with a class on the teacher or the material and that it took "quite a while" for him to develop the work habits, patience, and the ability to persist that would enable him to get better grades and learn in the classroom (Tr. pp. 610-11). She indicated that the student continues to struggle with consistency in his effort amongst his classes; however, she indicated that he now had the mindset of a learner (Tr. pp. 606, 611).

With regard to social/emotional progress, the dean of academics testified that the student developed a sense of humility, was more able to hear criticism, and had more compassion for others and their struggles than when he arrived at the school (Tr. p. 606). The dean of academics further testified that the student was more willing to be an equal collaborator with his peers and had developed a social and emotional maturity, including the ability to persevere in the face of challenge and to place his long-term goals over short-term comfort (Tr. pp. 606-07). She indicated that the student had developed a sense of value for relationships and family and a greater sense of how his actions impact others (Tr. p. 607).

The head of school testified that the student had gained some leadership qualities and responsibilities in the JDA community (Tr. p. 306). Specifically, the student was a co-head of the kitchen, in which role he demonstrated organization; had done well academically; was participating in group therapy on a much more personal, connected level, showing empathy and connection to the students he confronted or helped; had formed relationships with some positive students; was dealing with his anxiety; and was more open about his fears and insecurities (Tr. pp. 306-07, 613).

The head of school also testified that the student attributed his success to the culture and milieu of the school, where academics were valued and the therapeutic structure supported his work (Tr. pp. 311-12).

Considering the totality of the student's needs, the hearing record demonstrates that JDA was an appropriate program for the student because it addressed the specific emotional and behavioral issues that interfered with his education, and provided a rigorous academic component (Application of a Child with a Disability, Appeal No. 15-047). In addition, the hearing record does not support a finding that JDA was not an appropriate placement based upon least restrictive environment considerations. Although the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the least restrictive environment as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; see Carter, 510 U.S. at 14-15) and "the totality of the circumstances" must be considered in determining the appropriateness of a unilateral placement (Frank G., 459 F.3d at 364).

The district maintains that the student did not require a residential setting, and that it was required to recommend a less restrictive setting for this student. However, because the district failed to complete an IEP for this student, in the absence of a recommendation from the CSE, the parents relied on the advice of their private providers, each of whom counseled against bringing the student home (Tr. pp. 57, 254-55, 419-22, 441, 566; Dist. Exs. 11 at pp. 1-2; 13 at p. 1; 17 at pp. 1-2; 18 at pp. 16; 19 at pp. 1-2). While the district may not have been required to

recommend a residential placement in order to offer the student a FAPE, I decline under the circumstances of this case to find JDA inappropriate based solely on concerns regarding its restrictiveness.

Based on the foregoing, the hearing record supports a finding that JDA provided the student with specially designed instruction to address his identified needs, and reflects the student's academic, social/emotional and behavioral progress, and therefore, I find that the parents' unilateral placement of the student at JDA for the 2014-15 school year was appropriate.

C. Equitable Considerations

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"]). 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]; 34 CFR 300.148[d]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified and whether the parent provided adequate notice]).

1. Parent Cooperation

The Supreme Court has stated that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06). The Second Circuit has held that where parents cooperate with a district in its attempts to develop an appropriate educational program for their child, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L., 744 F.3d at 840).

The district claims that the parents failed to cooperate with the CSE process by unreasonably refusing to make the student available for intake interviews at the three proposed day programs. The district contends that the parents' refusal precluded the CSE from finalizing the student's IEP and therefore the parents are not entitled to their requested relief. The parents argue that it was reasonable to withhold the student from the intake interviews because none of the recommended programs was a residential setting, as recommended by the student's private providers, and they were concerned that participating in these interviews would be detrimental to the student.

A review of the hearing record reveals that the parents' refusal to allow the student to participate in videoconference intake interviews was based on the opinions of the student's private providers that the student required a residential placement. The parents indicated during initial communication with the CSE chairperson, in advance of the CSE meeting, that they were being advised that the student should not return home (Dist. Exs. 11 at pp. 1-2; 19 at pp. 1-2).[14] The student's mother testified that she was unwilling to make the student available for intake interviews at the day programs because she was concerned about "subject[ing] him to the confusion" of whether he would return home, thereby "interrupting his progress" at JDA (Tr. pp. 459-61, 465, 504-05; see Dist. Exs. 36; 38). The student's therapist at the wilderness program testified that the student "would have regressed" and chosen "the easiest way through treatment" if he participated in multiple intake interviews (Tr. pp. 545-46). However, the hearing record contains no indication that the therapist relayed this concern to the parents at the time the district was attempting to schedule the intake interviews or that any of the student's private providers contemporaneously recommended that he not participate in intake interviews. Rather, the first time this issue arose, the parents contended that they did not want to make the student available for intake interviews "with programs that we believe are inadequate to meet his needs" (Dist. Ex. 34 at p. 3). It was obstructive of the cooperative process for the parents to arrogate to themselves the determination of whether the placements were appropriate, without permitting the CSE to complete the process of attempting to find a placement for the student. In any event, this concern is alleviated by the student's response to the district school psychologist asking if he wanted to return to the district in August 2014, prior to the time the district attempted to schedule intake interviews, that although he wanted to return home, he was concerned he "might not be ready and it would be too soon" (Dist. Ex. 17 at p. 2). Furthermore, the JDA head of school and dean of academics acknowledged that a student interview is an integral part of the intake process (Tr. pp. 338, 628-30).

Admittedly, the record reflects that the parents cooperated with the district in all other respects. The parents completed a BASC-2 form, consented to evaluation, permitted the district school psychologist to interview the student, his primary therapists, and his evaluating psychologist, and shared the private psychologist's report with the CSE (Dist. Exs. 4 at p. 3; 8; 10 at p. 2; 11 at p. 1; 13 at p. 1; 17 at p. 2; 18; 19; Parent Ex. A). The parents also agreed to consider day programs despite the advice of the student's private providers, visited each of the prospective programs, and remained in open communication with the CSE chairperson until an impasse was reached in November 2014 (Dist. Exs. 30 at p. 2; 32 at pp. 1-2; 33 at p. 1; 34 at pp. 2-3; 36 at p. 1; 38 at pp. 1-2; 40 at 1-2). Accordingly, the hearing record does not support a conclusion that the parents did not participate in good faith with the district's attempts to develop an appropriate program for the student (see A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *9-*10 [S.D.N.Y. Sept. 23, 2013]).

In light of the above, I do not agree with the IHO that equitable considerations completely bar an award of reimbursement. Nevertheless, while the parents would have

[14] The hearing record reflects that the parents first advised the district that the student's providers recommended residential placement in July 2014, and continued to reiterate that position throughout the IEP development process until requesting tuition reimbursement in November 2014 (Dist. Exs. 11 at pp. 1, 2; 17 at pp. 1, 2; 18 at p. 16; 19 at pp. 1-2; 34 at p. 2; 36 at p. 1; 38 at pp. 1-2; 40 at p. 1).

preferred that the CSE recommend a residential program as the student's special education placement, the CSE was required to consider less restrictive alternatives such as therapeutic day programs. The CSE may have ultimately agreed with the parents that the student required residential placement, but it was unable to completely consider a day treatment placement when the parents failed to participate in the intake interview process. Given this lack of cooperation, where the parents attempted to exercise a veto over the district's proposals to provide the student with an appropriate school placement, equitable considerations do not favor full reimbursement (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *11-*12 [S.D.N.Y. Dec. 16, 2011]). Under circumstances similar to those presented in this instance, where the parents largely cooperated with the district but refused to make the student available for intake interviews, one court has held that an award of tuition reimbursement should be reduced by 75 percent (J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 675-76 [S.D.N.Y. 2011]). Accordingly, I direct the district to reimburse the parents for 25 percent of the costs of the student's attendance at JDA from September 5, 2014, through the end of the 2014-15 school year upon satisfactory proof of his continued attendance for that time period.[15]

2. Notice of Unilateral Placement

With regard to notice, the IDEA allows that reimbursement may be reduced or denied if parents do not provide notice 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 CFR 300.148[d][1]). 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 (Frank G., 459 F.3d at 376, citing Voluntown, 226 F.3d at 68).

The IHO determined that the district was not prejudiced by the parents' delay in providing notice of their intention to seek tuition reimbursement until November 7, 2014, noting that the "district did not change its course of action when it received the notification" (IHO Decision at p. 33). The hearing record supports the IHO's determination on this issue. The district was notified that the student had been removed from the district's schools for an indefinite period of time beginning on May 9, 2014 (Tr. p. 46; Dist. Ex. 5 at p. 1). Additionally, the parents informed the district that they were seeking a publicly-funded residential placement for the student by, at the latest, the September 2014 CSE meeting (Dist. Exs. 30 at pp. 2-3; 34; 36; 38). I agree with the IHO that the hearing record does not demonstrate that the district would have acted any differently if it had received timely notice, as there is no indication in the hearing record that the district took any steps after receiving the November 2014 letter informing it of the parents' intention to seek public funding for the costs of the student's enrollment at JDA.

[15] This award is limited to those costs allocated to "tuition," "therapy," "room and board," and "enrollment fees." I do not award reimbursement for those portions of the costs of the student's attendance allocated to "security deposit" or "student expense account," as there is no indication in the hearing record that they relate to costs for which the district would otherwise be responsible (Parent Ex. D at pp. 1, 3).

Accordingly, I find that the parents' failure to provide the district with timely notice does not weigh against their request for reimbursement for the period after the September 2014 CSE meeting.[16]

VII. Conclusion

In summary, the IHO erred in determining that the parents' unilateral placement was not appropriate. The IHO also erred in determining that the parents' lack of cooperation barred any award of tuition reimbursement. The evidence in the hearing record supports the IHO's determination that the parents' failure to provide the required statutory notice to the district of their intention to unilaterally enroll the student in JDA and seek tuition reimbursement does not weigh against an award of reimbursement.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 2, 2015, is modified, by reversing those portions of the decision which determined that the parents' unilateral placement of the student at JDA for the 2014-15 school was not appropriate, and that the parents' conduct barred an award of tuition reimbursement; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for 25 percent of the costs of the student's unilateral placement at JDA for the portion of the 2014-15 school year subsequent to the September 2014 CSE meeting, less any portions attributed to security deposit or student expense account.

Dated: **Albany, New York**
September 16, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

[16] As noted above, the district was not required to implement a program for the student prior to the September 2014 CSE meeting, as it was still within 60 school days from receipt of the parents' consent to evaluate the student.