



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-112

**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** [REDACTED]

### **Appearances:**

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Jesse Cutler, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for the respondent, Garrett L. Silveira, 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 Cherry Gulch School (Cherry Gulch) 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 received a diagnosis of an attention deficit hyperactivity disorder during the 2007-08 (first grade) school year (Dist. Ex. 5). After providing the student informal interventions during the 2012-13 (sixth grade) school year and fall 2013, the district developed an accommodation plan for the student in December 2013 pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) (Tr. pp. 79-89, 91-93, 123-24; Dist. Ex. 16; Parent Ex. D). The section 504 plan indicated the student exhibited increased

inattentive and off-task behaviors as school work became more challenging, did not record homework assignments, applied variable effort to assignments, had a difficult time accepting feedback, forgot materials, and exhibited general disorganization at school and home (Parent Ex. D at p. 10).<sup>1</sup> The December 2013 section 504 accommodation plan indicated that the student had received diagnoses of an attention deficit disorder (ADD), anxiety, and a mood disorder (id.). The district recommended daily supports in the form of preferential seating, organizational support, a home/school communication system including a behavior monitoring chart, long-term assignment help, and prompting, refocusing, and redirection (id. at pp. 10-11).

On June 24, 2014, a CSE convened for an initial eligibility determination (Dist. Ex. 3 at p. 1). The CSE determined that the student was eligible to receive special education and related services as a student with an other health-impairment and developed an IEP for the student for the 2014-15 school year (id. at pp. 1-2). The CSE recommended a daily 45-minute resource room program in a group of five along with seven annual goals to address the student's study skills and social/emotional needs, program modifications, and accommodations (id. at pp. 12-14).

By letter dated August 25, 2014, the parents rejected the June 2014 IEP on the basis that it would not meet the student's academic and emotional needs and informed the district that they were placing the student at Cherry Gulch (Dist. Ex. 24).<sup>2</sup> In response to a letter from the district assistant superintendent for student support services (assistant superintendent), by letter dated September 12, 2014 the parents asserted that the recommendation for a resource room program would not meet the student's social/emotional needs and was inadequate to address his behaviors (Dist. Ex. 26 at pp. 1-2; see Dist. Ex. 25). The parents restated their decision to place the student at Cherry Gulch and seek reimbursement (Dist. Ex. 26 at p. 2). By letter dated September 17, 2014, the assistant superintendent offered to discuss the parents' concerns and reconvene the CSE (Dist. Ex. 27).<sup>3</sup>

### **A. Due Process Complaint Notice**

By due process complaint notice dated January 5, 2015, the parents requested an impartial hearing, claimed that the district denied their son a free appropriate public education (FAPE) for the 2014-15 school year, and sought tuition reimbursement for the cost of the

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<sup>1</sup> With respect to citation to the record, the parents' exhibits are sequentially numbered as a whole and will be referred to by the exhibit number and the page number indicated on the exhibit. The district's exhibits are not consistently numbered throughout and citations in this decision will be to the total number of pages in each separate district exhibit, without regard to the consecutive pagination used for certain of the exhibits. The parties are encouraged to employ a consistent scheme for marking exhibits to assist them in referencing the record as required by State regulation (see 8 NYCRR 279.8[b]).

<sup>2</sup> The hearing record shows that Cherry Gulch is an out-of-State nonpublic therapeutic boarding school (Tr. p. 647; Dist. Ex. 26 at p. 2; Parent Ex. FFFF at p. 140). The Commissioner of Education has not approved Cherry Gulch as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

<sup>3</sup> The hearing record reflects that the parents met with the assistant superintendent to discuss their concerns in October 2014 (Tr. pp. 553-54; Dist. Ex. 27).

student's placement at Cherry Gulch (Dist. Ex. 1 at pp. 1-2, 5). The parents claimed that the district violated its child find obligations for failing to identify and evaluate the student during the 2012-13 and 2013-14 school years (*id.* at pp. 2-3). The parents next alleged that the June 2014 CSE denied the student a FAPE because it did not conduct a classroom observation (*id.* at p. 3). The parents also contended that the other health-impairment disability category did not sufficiently describe the student's needs, there was no documentation to support this classification, and the student should have been classified as a student with an emotional disturbance (*id.* at pp. 3-4). The parents alleged that the recommended program was insufficient and not reasonably calculated to enable the student to receive educational benefits (*id.* at p. 4). The parents also contended that despite the student's needs relating to his interfering behaviors, the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) prior to or during the June 2014 CSE meeting (*id.* at pp. 4-5). Finally, the parents asserted that their unilateral placement was appropriate and equitable considerations supported their request for relief (*id.* at p. 5).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on March 6, 2015 and concluded on August 10, 2015 after seven days of proceedings (*see* Tr. pp. 1-1110). In a decision dated October 19, 2015, the IHO found that the district did not violate its child find obligations and offered the student a FAPE for the 2014-15 school year (IHO Decision at pp. 17-19). With regard to the parents' child find claims, the IHO determined that the district appropriately monitored the student's behavior and performance and implemented "incremental strategies" to address the student's needs before intensifying supports (*id.* at p. 16-17). The IHO next determined that the June 2014 CSE had sufficient information to develop an IEP for the student and the lack of a classroom observation did not rise to the level of a denial of a FAPE because the omission did not impede the CSE process or the student's right to a FAPE (*id.* at p. 17). Regarding the student's disability classification, the IHO found that the record reflected that the student's primary needs—his attentional, behavioral, and executive functioning deficits—were related to his ADHD and therefore the other health-impairment category was appropriate (*id.* at p. 18). With respect to the district's failure to conduct an FBA or develop a BIP prior to the June 2014 CSE meeting, the IHO found that there was no requirement that the district conduct an FBA or develop a BIP prior to or simultaneously with the development of the IEP and it was reasonable for the district to recommend that an FBA be conducted and a BIP developed at the commencement of the 2014-15 school year (*id.* at p. 17). Because the district addressed the student's behavioral needs and recommended an FBA and BIP, the IHO found there was no denial of a FAPE as a result of their omission from the IEP (*id.* at pp. 17-18). The IHO further found that the recommendation for a resource room program, counseling, and classroom modifications was reasonably calculated to provide the student with educational benefit and the district offered the student a FAPE for the 2014-15 school year (*id.* at pp. 18-19).

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

The parents appeal the IHO's determination, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2014-15 school year and denying their request for tuition reimbursement. The parents contend that the district violated its child find obligations by

not evaluating the student and identifying him as a student with a disability prior to the 2014-15 school year because his behavioral and emotional decline was clear and there were obvious signs of his need for special education services. The parents assert that the district failed to conduct a classroom observation as part of the June 2014 IEP. The parents allege that the student was inappropriately classified as a student with an other health-impairment and the CSE failed to address the student's behavioral and emotional needs. The parents argue that the recommended educational placement was not appropriate for the student as it did not include a recommendation for counseling services in order to address his social/emotional needs. The parents contend that the IHO erred in failing to address the lack of a counseling recommendation in the June 2014 IEP and the hearing record was not clear as to what the CSE discussed regarding counseling. In addition, the parents argue that the recommended resource room program was insufficient to address the student's social/emotional and behavioral needs. The parents assert that the student had interfering behaviors and an FBA and BIP were required in the development of an IEP such that it was insufficient for the CSE to recommend they be done at a future time. The parents assert that the unilateral placement was a therapeutic school which met the student's needs and where he made progress. Further, the parents claim they cooperated with the district during the CSE process and therefore equitable considerations favor reimbursement.

The district denies the parents' material allegations in its answer and asserts that the IHO made appropriate determinations regarding the provision of a FAPE to the student. The district contends that the parents are precluded from raising the omission of counseling on the IEP because it was not raised in the due process complaint notice. The district also argues that the unilateral placement was not appropriate because it did not provide education that was specifically designed to meet the student's needs and there is no evidence he made progress. The district also contends that equitable considerations do not favor reimbursement because the parents never intended to cooperate with the CSE, withheld information from the district, and predetermined to send the student to a private school placement.

## **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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. 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]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see 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 (LRE) (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).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A];

8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. 2012-13 and 2013-14 School Years—Child Find**

Turning first to the parents' assertion that the district failed to meet its child find obligation to the student for the 2012-13 and 2013-14 school years, as explained more fully below, the evidence in the hearing record does not support the parents' contention, and thus, there is no reason to disturb the IHO's conclusion.<sup>4</sup>

The "child find" provision of 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; 20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; 8 NYCRR 200.2[a]; see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 659-60 [S.D.N.Y. 2011]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 224-25 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; 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 CFR 300.111[c][1]; 8

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<sup>4</sup> The parents' due process complaint notice and petition sought tuition reimbursement for the alleged denial of a FAPE during the 2014-15 school year and did not seek any relief in relation to the claims of child find violations for the 2012-13 or 2013-14 school years (Dist. Ex. 1 at pp. 1-2, 5).

NYCRR 200.2[a][7]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S., 826 F. Supp. 2d at 660 [S.D.N.Y. 2011]). 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]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [ finding that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]). 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" (J.S., 826 F. Supp. 2d at 660, quoting New Paltz, 307 F. Supp. 2d at 400 n.13). 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]). To support a finding that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent in failing to order testing,' or there must have been 'no rational justification for not deciding to evaluate' (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; A.P., 572 F. Supp. 2d at 225).

In this instance, the evidence in the hearing record demonstrates that the district attempted several academic interventions prior to considering the student's eligibility for special education, which did not contravene the district's obligations under the IDEA. A district guidance counselor explained that the district employed gradually more intensive interventions prior to a CSE referral, starting with response to intervention services, then instructional support team meetings, then a section 504 accommodation plan, and then a referral to the CSE (Tr. pp. 93-94). As the student entered sixth grade during the 2012-13 school year, the guidance counselor testified that the student excelled in academics but had difficulties with executive functioning and organizational issues (Tr. p 76). After a meeting with teachers, staff, and the parents in October 2012, the district commenced informal interventions including having a special education teacher meet with the student three times per week and helping him organize before the end of the school day (Tr. pp. 79-80). During the 2012-13 school year, the student also received response to intervention services, which entailed teachers offering extra help and extra credit assignments (Tr. pp. 84-85). In April 2013, the district convened an instructional support team meeting regarding concerns about the student's executive functioning and organizational issues and subsequently recommended organizational strategies (Tr. pp. 87-88). The guidance counselor testified he felt that these interventions were successful during the student's sixth grade year as he achieved report card grades in the "A" and "B" ranges (Tr. p. 89; see Dist. Ex. 28 at p. 1).

With respect to seventh grade (2013-14), the hearing record reflects that the student was provided with informal interventions such as preferential seating, extra help schedules, scaffolding of assignments, organizational support, and ensuring he was aware of homework assignments and expectations regarding long-term assignments (Tr. pp. 92-93, 352-53). Later in the fall, a home/school communication system was put in place to provide the parents with daily

communication about the student's functioning in the classroom and alert them as to homework assignments (Tr. pp. 113-14, 355-56; see Dist. Ex. 16). Academically, the student did well in social studies and English but struggled in science, French, and accelerated math (Tr. pp. 97, 100; Dist. Ex. 28 at p. 3). In December 2013, the district developed a section 504 plan due to the parents' concerns about the student's organizational needs and his progress in math (Tr. pp. 358-59). The section 504 plan formalized the interventions that were already being used with success (Tr. p. 360). As the year progressed, the parents continued to express concerns regarding the student and, after consulting with the student's private psychologist, a district school psychologist referred the student to the CSE in April 2014 (Tr. pp. 366-67; Dist. Ex. 17 at pp. 1-4). By prior written notice dated May 7, 2014, the CSE requested parental consent to evaluate the student (Dist. Ex. 20 at p. 1). By consent for initial evaluations dated May 13, 2014, the parents provided consent to the CSE to evaluate the student and the district conducted initial psychological, psychiatric, social and developmental, and educational evaluations in June 2014 (see Dist. Exs. 11; 12; 14; 15).

Given that the student responded to the pre-referral strategies offered during sixth grade and the district provided additional gradually more intensive strategies in response to the student's academic struggles during seventh grade, the hearing record does not support the conclusion that the district overlooked clear signs of the student's disability or were negligent in failing to evaluate the student prior to June 2014. To the contrary, the district was diligent during the 2012-13 and 2013-14 school years in attempting to address the student's needs with gradually more intensive strategies prior to commencing a CSE referral. Based on a review of the record, the district did not violate its child find obligations.

### **B. June 2014 CSE Process—Sufficiency of Evaluative Information**

Next, I address the parents' assertions that the June 2014 CSE failed to conduct a classroom observation of the student. Although the CSE did not conduct a formal classroom observation as part of the June 2014 CSE, the hearing record demonstrates that this did not result in a denial of a FAPE as the June 2014 CSE had ample information at the time of the meeting regarding the student's classroom behaviors.

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the

student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). In addition, State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation of a student (34 CFR 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]).

In this case, the June 2014 IEP indicates that the CSE considered the following evaluative information in the development of the June 2014 IEP: the student's June 2014 report card, a June 2014 classroom teacher report, a June 2014 social and developmental history, a June 2014 educational evaluation report, a June 2014 psychological evaluation report, a March 2014 private neuropsychological evaluation report, a psychiatric evaluation report, and reports from the student's classroom teachers (Dist. Ex. 3 at pp. 1-2; see Dist. Exs. 7-15).

The school psychologist explained that the purpose of a classroom observation was to provide the CSE with a snapshot of the student's behavior in the classroom (Tr. p. 377). The school psychologist testified that scheduling issues prevented her from completing a classroom observation; however, she decided that there was ample information about the student's classroom behavior to go forward with a CSE meeting (Tr. pp. 376-78). With respect to his classroom behavior, the June 2014 CSE reviewed a number of reports prepared by the student's classroom teachers, and his guidance counselor and regular education science teacher participated in the meeting (Dist. Exs. 3 at p. 1; 8; 9; 10; 13). An April 2014 report from the student's science teacher indicated that the student had high energy, readiness to participate, impulsivity, and inconsistency in completing assignments (Dist. Ex 8). During the second and third quarters, the student's mood was described as "unhappy" and "indifferent," and the report indicated he would not take notes and put his head on his desk (id.). When the student asked for help on lab work or homework, he would interrupt the teacher's explanation with "I don't get it" or "I don't understand" (id.). The teacher noted that the student completed his homework on a fairly regular basis once the school/home communication system was implemented (id.). In the weeks recent to the report, the science teacher noted that the student was a positive participant in class and during discussions, was more focused, and his classroom conduct was more appropriate (id.). A May 2014 report from the student's social studies teacher indicated that the student was hard working, thrived in a group setting, and acted things out in front of the class (Dist. Ex. 9 at p. 1). He could get distracted by others, but was respectful when asked to refocus (id.). A May 2014 report from the student's math teacher indicated that since he transferred to a grade level math class from an accelerated class, the student had more success (Dist. Ex. 10). However, the math teacher noted that if the student struggled to understand a concept he would try, but then gave up—sometimes for the entire class period—depending on his mood (id.). He would also put his head down and exhibited distracting behaviors (id.). There were also days where he gave up at the first sign of difficulty (id.).

With respect to the parents' contention that a classroom observation was not completed, the hearing record reflects that the CSE had sufficient information regarding the student's classroom behaviors from the teacher reports and the participation of several staff members familiar with the student's classroom performance. Therefore, I find that the absence of a

classroom observation of the student did not result in a failure to offer the student a FAPE for the 2014-15 school year.

### **C. June 2014 IEP**

#### **1. Disability Classification**

The parents contend that the district erred in finding the student eligible for special education and related services as a student with an other health-impairment, "despite the fact that his emotional issues and behavioral concerns were the primary reason he was referred to the CSE." The parents assert that the student should have been found eligible as a student with an emotional disturbance.

The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*9 [S.D.N.Y., Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). In other words and as noted above, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Accordingly, even if a classification of emotional disturbance was appropriate for the student, as the parents suggest, this alone would not result in a finding that the district failed to offer the student a FAPE absent some evidence that the recommended program was developed based on the student's disability classification, rather than his needs (see M.R., 2011 WL 6307563, at \*9).

Under State regulations, an "other health-impairment" is defined as:

having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to . . . [an] attention deficit hyperactivity disorder . . . , which adversely affects a student's educational performance.

(8 NYCRR 200.1[zz][10]; see 34 CFR 300.8[c][9]).

While the parents assert that that the student would have been more appropriately deemed eligible for special education as a student with an emotional disturbance, they do not argue that the student did not meet the eligibility requirements for the category of other health-impairment as set forth above (compare 34 CFR 300.8[c][4] and 8 NYCRR 200.1[zz][4], with 34 CFR 300.8[c][9] and 8 NYCRR 200.1[zz][10]). Testimony by the district school psychologist and assistant superintendent reflect that other health-impairment was an appropriate classification for the student (Tr. pp. 387, 537). The student's IEP noted that the student's received a diagnosis of an ADHD, which affected his ability to carry out executive functioning skills pertaining to organization (Dist. Ex. 3 at p. 11). The IEP further indicated the student's attentional needs, combined with his social/emotional presentation, affected his ability to perform to his true potential and his motivation to independently initiate and complete assignments, both in class and at home (id.). The March 2014 private neuropsychological evaluation and the June 2014 district psychiatric evaluation reports also provided the student with an ADHD diagnosis, which supports classification as a student with an other health-impairment (Dist. Exs. 7 at p. 12; 15 at p. 4). In light of the evidence in the hearing record, there is no basis to disturb the IHO's finding on this issue.

## **2. Program Recommendation**

I now turn to the parents' contention that the recommended program did not meet the student's needs and the June 2014 IEP did not include the counseling services that the student required. The district contends that the recommended educational placement met the student's needs and that the parents should be precluded from raising any objection to the frequency and duration of counseling services because it was not raised in the due process complaint notice. For the reason set forth below, the June 2014 IEP was not reasonably calculated to enable the student to receive educational benefits.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (20 U.S.C. § 1415[b][6], [7]; 34 CFR 300.507; 300.508; 8 NYCRR 200.5[i], [j]). In general, that party may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 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 IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). This statutory provision prevents the party requesting an impartial hearing from bringing up claims during the hearing without providing "fair notice" to the opposing party (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014]; R.E., 694 F.3d at 187 n.4). However, if the respondent at an impartial hearing raises issues that are outside of the scope of a due process complaint notice in support of its position, the Second Circuit has held that this may "open the door" to such issues being appropriately considered (M.H., 685 F.3d at 250-51; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]). Such has been deemed to be the case, for example, when a respondent raises an issue at the impartial hearing in its opening statement, and then later elicits direct testimony from witnesses regarding the issue (see M.H., 685 F.3d at 250; A.M. v. New York City Dep't of

Educ., 964 F. Supp. 2d 270, 283 [S.D.N.Y. 2013]; P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 515 [S.D.N.Y. 2013]).

The parents' due process complaint notice does not raise the issue of the omission of counseling as a basis for a denial of FAPE; rather, the parents alleged that the CSE "recommended a program of Resource Room in a group of five, for 45 minutes per day, as well as counselling support and classroom modifications" (see Dist. Ex. 1 at p. 4). Generally, this would preclude the parents from raising this issue at the impartial hearing or in their petition. However, based on a review of the hearing record, the district "opened the door" to the parents' counseling claim raised in the petition.<sup>5</sup> Indeed, the district directly addressed the issue in its opening statement, asserting that the CSE provided a counseling recommendation to support the student's social/emotional and behavioral needs (Tr. p. 52). When counsel for the parents rebutted that assertion, counsel for the district objected to an expansion of the issues to be addressed in the impartial hearing beyond those raised in the due process complaint notice (Tr. pp. 57-58). However, the district further elicited testimony from the school psychologist that the CSE discussed recommending psychological support services, but they were omitted from the IEP due to a clerical error (Tr. pp. 394-96).<sup>6</sup> The district then went on to elicit testimony from the school psychologist as to how this service would have addressed the student's needs (Tr. p. 397). The school psychologist testified that she would have provided consultant services to the student's teachers regarding the student's behaviors and provided them with alternative methods of interacting with the student (Tr. pp. 397-98). The district further elicited testimony regarding how the counseling support recommendation would have been implemented during the 2014-15 school year had the student attended the public school, and that this recommendation was appropriate for the student (Tr. pp. 399-400). The district also elicited testimony from the assistant superintendent that counseling was recommended for the student but mistakenly omitted from the IEP (Tr. p. 544). In this case, the district raised an issue, not preserved in the due process complaint notice, in order to defend the IEP. Under these circumstances, where the district raised the issue for a strategic advantage, the parents are not barred from arguing in their petition that the IEP omitted counseling services that were necessary to address the student's needs (M.H., 685 F.3d at 250; P.G., 959 F. Supp. 2d at 515).

The determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). However, the Second Circuit

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<sup>5</sup> It is unclear whether the parents raised this issue in their closing argument to the IHO; although the hearing record reflects that the parties submitted closing briefs (IHO Decision at p. 1), and despite State regulations providing that the record of an impartial hearing includes all briefs submitted to the IHO (8 NYCRR 200.5[j][5][vi][b]), the parties' briefs were not included in the hearing record submitted to the Office of State Review. Counsel for the district is reminded of the district's obligation to ensure that the record submitted is a true and complete copy of the hearing record before the IHO (8 NYCRR 279.9[a]).

<sup>6</sup> As noted by the parents, while the district school psychologist testified that the purported clerical error "was recently corrected," the district did not introduce a corrected IEP into evidence (Tr. pp. 394-95).

has rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 186-87; J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at \*18 n.23 [S.D.N.Y. Nov. 17, 2015] [noting that "[i]t is appropriate to rely on evidence explaining how specific IEP requirements would operate in practice to achieve the IEP's required academic needs, even if it is not appropriate to rely on evidence claiming that a student would receive services above and beyond what the IEP requires on its face"] [emphasis in original]).

In this case, the June 2014 IEP indicated the student exhibited social/emotional and behavioral needs that the district acknowledged would be addressed with counseling services (Tr. pp. 394-401, 543-44). Testing revealed, and the IEP reflected, that the student had feelings of sadness, anger, frustration, a sense of ineffectiveness, and sensitivity to humiliation (Dist. Ex. 3 at p. 11). The CSE noted that the student presented with a social/emotional profile that left him vulnerable and he became overwhelmed and anxious when academic demands met with his cognitive weaknesses (id.). The IEP further stated that the student's social/emotional functioning needed "consistent monitoring" and indicated that his social/emotional presentation was a factor in his academic performance (id.). The CSE also developed two social/emotional/behavioral goals for the student on the June 2014 IEP related to his need to identify and comply with teacher directives/classroom expectations, and identify and appropriately use coping skills when expressing negative emotions (id. at p. 13).

Despite these needs, a counseling recommendation does not appear on the IEP (see Dist. Ex. 3). The district cites to a clerical error as the reason for the omission (Tr. pp. 394-95, 544). In certain circumstances, this type of unintentional omission may be cured with other evidence in the record (see M.H. v. New York City Dep't Educ., 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011]). However, in this case there is insufficient evidence in the record as to what the CSE's specific counseling recommendation was. There is a reference on the student information summary page attached to the June 2014 IEP that the CSE recommended "counseling support," but the portions of the IEP specifying related services and supports for school personnel do not include this recommendation (Dist. Ex. 3 at pp. 1, 13-14). Furthermore, this reference does not provide additional information regarding the exact nature of the CSE's recommendation. Additionally, there are no CSE meeting minutes, no prior written notice, or any other documentary or testimonial evidence in the hearing record contemporaneous with the June 2014 CSE meeting indicating the exact service being offered to the student and the district's witnesses were not clear about what specific services were recommended, such that the district failed to comply with State and federal regulations requiring that an IEP specify the frequency, duration, and location of the services provided to a student with a disability (34 CFR 300.320[a][4], [7]; 8 NYCRR 200.4[d][2][v][a], [b][7]). The school psychologist testified that psychological consult services were offered to the support staff to assist in their interactions with the student, which should have been indicated on the IEP as "supports for school personnel" (Tr. pp. 394-95). The assistant superintendent testified he believed the recommendation was for one weekly 30-minute counseling session to "support" the student "in terms of talking through some issues and concerns," but that he could not recall the specific recommendation (Tr. pp. 543-44). Without any contemporaneous evidence identifying the CSE's specific counseling recommendation, I cannot solely rely on the retrospective testimony offered by the district regarding what

counseling services would have been offered to the student had he attended the public school placement where those services are not listed on the IEP (R.E., 694 F.3d at 185-89).

Accordingly, based on the foregoing, as the IEP does not adequately address the student's social/emotional needs, the district denied the student a FAPE for the 2013-14 school year.<sup>7</sup>

#### **D. Unilateral Placement**

Having determined that the district failed to offer the student a FAPE for the 2014-15 school year, the next issue to determine is whether Cherry Gulch was an appropriate unilateral placement. The district argues that the hearing record does not contain evidence that Cherry Gulch provided the student with instruction specially designed to meet his needs; and further, that Cherry Gulch "simply avoided addressing the student's fundamental deficits in organization of school work and completion of homework." A review of the evidence in the hearing record refutes the district's allegation, supporting a finding that Cherry Gulch was an appropriate unilateral placement for the 2014-15 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or 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 at 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 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; 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 instruction specially designed to meet the unique

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<sup>7</sup> With respect to the parents' claims that the failure to conduct an FBA and develop a BIP prior to the implementation of the June 2014 IEP constituted independent bases on which to premise a finding of a denial of a FAPE, the IEP stated that a BIP would be developed in the fall based on the outcome of an FBA (Dist. Ex. 3 at p. 12). Considering that the IEP was developed at the end of the school year and the student was recommended to receive additional services during the 2014-15 school year, it was not unreasonable for the CSE to wait to conduct an FBA and develop the recommended BIP at the start of the new school year, to determine his behavioral needs while receiving the recommended services (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x. 519, 522 [2d Cir. Oct. 22 2006]).

needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; 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).

### **1. The Student's Needs**

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the student's unilateral placement at Cherry Gulch was appropriate for the 2014-15 school year.

The March 2014 private neuropsychological evaluation report indicated that for the most part, the student was pleasant and cooperative throughout each of the four test sessions; however, in general, the student's mood and affect appeared to be sad throughout the testing process (see Dist. Ex. 7 at pp. 1, 4-5).<sup>8</sup> The report indicated that generally, the student answered all test questions rapidly and without forethought; and when it was suggested he take more time to think about a question, the student refused (id. at p. 4). It was reported that the student's "approach to the work of the testing varied from strong effort and persistence on the one hand, to weak effort and dismissive on the other" (id. at p. 10).

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<sup>8</sup> The March 2014 neuropsychological report was used in the development of both the June 2014 IEP, as well as an October 2014 Individual Academic Plan at Cherry Gulch (see Dist. Exs. 3; 7; 31).

An administration of cognitive testing to the student yielded a full scale IQ of 100, in the average range of general cognitive ability (Dist. Ex. 7 at p. 5). The report indicated that the student's performance reflected a "significant degree of discrepancy between [the student's] strong functional/mechanical skills and weaker language and conceptual abilities" (id.). Specifically, the student demonstrated strengths in areas of speeded processing, and relative weaknesses in abstract thinking and reasoning with both nonverbal and verbal material (id. at p. 12). Additionally, the evaluator reported that the student's verbal memory, retrieval and word finding skills were "very weak," and that his performance was also negatively affected by difficulties with executive functions, attention, impulsive responding, lack of forethought and planning, and memory (id.).

With respect to academic functioning, administration of academic achievement assessments to the student revealed that he performed "best" in the area of math and weaker in the areas of reading comprehension and narrative writing (Dist. Ex. 7 at p. 8). In reading, despite average phonetic decoding and word recognition skills, the evaluation report indicated that the student showed poor visual attention, resulting in weak reading fluency skills, which negatively contributed to reading comprehension scores that were in the lower end of the average range (id. at pp. 8-9). The evaluation report indicated that the student exhibited good basic writing skills, but when asked to write paragraphs and integrate ideas, failed to develop his writing and demonstrated numerous mechanical writing weaknesses (id. at pp. 9, 12).

In order to assess the student's social/emotional functioning, the evaluators used projective testing that revealed the student's feelings of anger, frustration, sense of ineffectiveness, and "sensitivity to feelings of sadness and humiliation" that were evident in several responses (Dist. Ex. 7 at pp. 10, 12). The evaluators noted that as "demonstrated in his work on the tests of this evaluation, the emotional issues involved in [the student's] efforts with schoolwork are complicated by his poor impulse control, sensitivity, anxiety, and reactive anger, and in the end, result in his defensive avoidance" (id.). With respect to projective psychological testing, the student created few original stories, but those that he did create had characters that "tended to be suffering in some way," some of the student's "responses suggested a feeling of fragility," while some "reflected impulsivity," emotional sensitivity, and an oppositional stance (id. at pp. 10-12). According to both parent and teacher rating scales, the student demonstrated very elevated scores, indicating "many more concerns than are typically reported," with regard to inattention, hyperactivity/impulsivity, executive functioning, defiance/aggression, peer relations, and symptoms of an oppositional defiant disorder (id. at pp. 8, 18). The report indicated that the student was "unsure about his true abilities," and "shuts down and avoids many difficult tasks because when his weaknesses are revealed he feels terrible" (id. at p. 11). Further, the report noted that "at school when task demands meet with [the student's] cognitive weaknesses he rapidly becomes emotionally reactive, which exacerbates his difficulties thinking things through" (id.).

According to the March 2014 neuropsychological report, the student met the criteria for the following diagnoses: an ADHD, combined presentation; an oppositional defiant disorder; an unspecified anxiety disorder; and an unspecified depressive disorder (Dist. Ex. 7 at p. 12).

Consistent with the March 2014 neuropsychological evaluation report, both the October 2014 Cherry Gulch individual academic plan and individual service plan reflected the student's needs which included: understanding and using math concepts; increasing reading stamina and task (school and homework) completion; improving reading comprehension following completion of a reading passage; executive functioning; self-regulation skills; and cognitive functioning as it related to anxiety, depression, and attention deficits (compare Dist. Ex. 7 at pp. 9, 11, 12, with Dist. Ex. 30, and Dist. Ex. 31 at pp. 8-10). Other needs identified in the individual academic plan were: poor emotional regulation, rigid thinking, emotional reactivity, and verbal aggression (Dist. Ex. 31 at p. 4). In addition, core and postural strength, as well as handwriting skills, were identified as areas of need in the October 2014 individual academic plan (id. at pp. 9-11). The student's primary therapist at Cherry Gulch testified that "within days to a week" of the student's arrival at Cherry Gulch, the student "expressed a lot of anxiety, feeling very overwhelmed, very incapable, and was beginning to avoid daily tasks such as the lessons or the assignments that he needed to complete as part of his Cherry Gulch program" (Tr. p. 676). Additionally, the primary therapist described the student's therapeutic needs as including lack of confidence, immense anxiety, avoidance, and shutting down in response to feeling overwhelmed (Tr. pp. 678, 778). The academic director of Cherry Gulch, who was also the student's English teacher, testified that the student struggled with reading stamina, attention, adjusting to behavior expectations, putting forth effort, rushing through assignments, becoming overwhelmed and shutting down (Tr. p. 806). Additionally, the academic director noted that the student had tantrums, struggled with accountability, and shifted blame (Tr. pp. 806-07). With respect to social/emotional functioning, the primary therapist noted that the student was "really, really concerned about what his peers think or how they perceive him" and that "he has had periods of difficulties with certain peers" (Tr. pp. 679, 754-55). Additionally, she commented that the student had sometimes made "negative or disrespectful comments towards peers or even towards staff members, name calling, kind of condescending remarks, teasing, in order to try to impress others" (Tr. pp. 780-81). According to the primary therapist, the student avoided accountability for his role in a strained peer relationship or misperceived social interactions (Tr. pp. 786-87).

## **2. Specially Designed Instruction**

According to the hearing record, Cherry Gulch is a therapeutic all-boys boarding school that employed therapists and teachers who were "certified educational specialists, certified teachers, as well as one special education certified instructor" (Tr. pp. 647-48; see Tr. pp. 794, 797-98). Additionally, Cherry Gulch employed floor staff who "interact[ed] with the boys on a daily basis . . . supervising and monitoring the boys as well as coaching the boys, prompting them, helping them complete hygiene tasks, organizational skills, getting backpacks ready for school" (Tr. p. 648). The hearing record shows that Cherry Gulch enrolled up to 47 students between the ages of 10 to 15 years old, whose typical length of stay was between 15 and 18 months (Tr. pp. 710-11, 897-98). The executive director and academic director testified that students were grouped in classes by academic level (Tr. pp. 801, 895-96). According to the student's primary therapist, the students at Cherry Gulch experienced emotional regulation difficulties that may manifest as anxiety, depression, anger management issues, and defiant behaviors, and that their underlying learning differences exacerbate their emotional behavior (Tr. p. 714). Services available at Cherry Gulch included: individual therapy; one session of family therapy per week (usually by video conferencing); ten hours of group therapy per week (two

hours per day, Monday through Friday); specialty group therapy (i.e., adoption group); school community and family meetings; occupational therapy; different methods of equine therapy; "neurotechnology"; interaction training; and a behavior management approach called "positive parenting with a plan" (Tr. pp. 649-57, 669; Dist. Ex. 30 at p. 3).

The primary therapist testified that the students' weekday schedule included six daily classes, meals, therapy, structured free-time activities, and organization for the next day (Tr. pp. 670-74). The academic director at Cherry Gulch described the academic program as comprised of five core classes including science, math, English, social studies, and character development, as well as physical education and special education (Tr. p. 796). The Cherry Gulch academic director further noted that upon enrollment, the special education director completed assessments to determine certain needs and areas for growth (Tr. p. 799). According to the academic director, the students were also assessed for benchmarking with regard to reading, writing, and math skills (Tr. pp. 803-04). The Cherry Gulch academic director noted that the academic curriculum aligned with the Idaho common core state standards; in addition, in the character development class, the students worked on emotional regulation, executive functioning, and conflict resolution skills (Tr. pp. 810, 820-21). The academic director explained that the teachers provide monthly academic reports on students, as well as progress reports, which are a "more formal representation of academic growth" (see Tr. pp. 813-15; Parent Exs. HHHH-PPPP). The student's school day consisted of a predictable daily routine and schedule, small class sizes, movement breaks, and use of a daily planner and backpack (Dist. Ex. 30 at p. 4).

To address the student's academic needs, Cherry Gulch recommended an individualized, multimodality-based academic curriculum including brain-based learning strategies, experiential hands-on learning, multisensory learning approaches, breaking assignments into smaller chunks or shorter tasks, teaching concrete concepts before teaching abstract concepts, and using educational technology (Dist. Ex. 31 at pp. 4, 8).<sup>9</sup> The student's primary therapist described the academic program at Cherry Gulch as the "foundation that everything is built from," and that "the academics can be modified and customized and individualized" (Tr. pp. 668-69; see Dist. Exs. 30 at pp. 3-4; 31 at pp. 8-9). In order to address the student's need to manage his attention difficulties, Cherry Gulch recommended developing and implementing an organizational system to increase the student's on-task behaviors and completion of school assignments; and utilization of the "lessons binder" to organize and prioritize lesson work in an effective manner (Dist. Ex. 30 at p. 2). According to the Cherry Gulch individual academic plan, math, reading, executive functioning, fine motor skills, postural stability, and self-regulation were included under academic areas of concern; and goals and objectives were recommended for all of the areas except executive functioning (Tr. pp. 839-40; Dist. Ex. 31 at pp. 8-10). The academic director described how the character development curriculum/course addressed the student's needs with respect to homework completion, emotional regulation, executive functioning skills, and conflict resolution (Tr. pp. 810, 844-45).

Regarding the student's fine motor/sensory needs, the student received occupational therapy to address his handwriting speed and endurance skills, postural stability, and self-

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<sup>9</sup> The individual academic plan indicated that the student would benefit from classroom accommodations identified on the "Classroom Accommodations Checklist" as needed (Dist. Ex. 31 at pp. 9-13).

regulation needs (Dist. Ex. 31 at pp. 9-10). The following sensory strategies were suggested: introduce new foods slowly; use unscented cleaners and soaps; incorporate routine and repetition in movement activities; use natural lighting; minimize clutter/organize environment; establish comforting and supportive routines; find quiet places for alone time; and diminish background noise (*id.* at p. 7).

With respect to the student's social/emotional needs, the primary therapist indicated that during the development of the individual service plan the student had identified three areas of need on which he wanted to work: anxiety, "ADHD," and oppositional defiance (Tr. p. 663; Dist. Ex. 30). To address his anxiety, the student worked on articulating the relationship between cognition and emotion as it related to mood; developing relaxation and breathing techniques and implementing them over time; and making two feeling statements in individual therapy (Dist. Ex. 30 at pp. 1-2). Additionally, the therapist identified specific interventions which included: a medication consult with the student's physician, completion of a sensory profile with an occupational therapist, expansion of the student's ability to recognize feelings and express them in effective, non-self-defeating ways, the development and implementation of an organizational system, and completion of the "how to deal with feelings" interactive journal (Tr. pp. 663-64, 676-77, 679-82; Dist. Ex. 30 at p. 2). To address his ADHD, the student worked on: developing three new strategies that resulted in pro-social resolution; responding positively with verbal/non-verbal behavior when prompted for inattentiveness; and utilizing the "lessons binder" to organize and prioritize work (Dist. Ex. 30 at p. 2). To address his oppositional defiance, the student worked on: significantly reducing maladaptive social behavior while maintaining pro-social behavior, following basic safety rules, and "owning" mistakes or misbehaviors consistently (Dist. Ex. 30 at pp. 2-3). Additionally, the therapist worked on building a level of trust with the student, had the student explore his own perceptions of his oppositional pattern toward rules and authority, established clear rules and had the student demonstrate his understanding of them (Tr. pp. 664-66; Dist. Ex. 30 at p. 3). The student's social/emotional needs were also addressed by community and family meetings, equine assisted psychotherapy, individual, group and family therapy, group initiatives, psychology group and multi-family group therapy; and positive parenting with a plan behavior management system (Dist. Ex. 30 at pp. 3-4).

Given the student's above described needs, and the description provided in the hearing record of the instructional supports Cherry Gulch provided and the methodologies employed, the evidence in the hearing record supports a finding that Cherry Gulch provided the student with specially designed instruction to address his identified academic and social/emotional needs.

### **3. Progress**

With respect to the student's progress at Cherry Gulch during the 2014-15 school year, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed App'x 80, 82 [2d Cir. Dec. 26, 2012]; Frank G., 459 F.3d at 364). However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In this case, a comparison of the Cherry Gulch progress reports from October 2014 and February 2015, and the updated January and April 2015 individual service plan reports reflect that the student made gains in some areas measured (Dist. Exs. 30; 31; Parent Exs. HHHH-PPPP).<sup>10</sup> According to the January 2015 updated individual service plan, the student demonstrated 50 percent goal completion in his three therapy goals (Dist. Ex. 30 at pp. 9-10). The report indicated that the student demonstrated a significant decrease in depressive symptoms, as well as a smaller decrease in his symptoms of anxiety (*id.* at p. 9). The student demonstrated an improved ability to verbally identify and share regarding his emotional state, but still struggled with identifying internal influences (*id.*). The report indicated that the student was improving in his ability to manage symptoms related to his ADHD by successfully utilizing routines and systems for task completion; and had shown consistency in responding positively to staff prompts for inattentiveness (*id.* at p. 10). The report indicated that the student was generally respectful and compliant at Cherry Gulch, and, if upset, the student had shown an increased ability to recover quickly (*id.*). According to the April 2015 updated individual service plan, the student demonstrated 75 percent completion of his three therapy goals, indicating improvement from the January 2015 report (*id.* at pp. 6-7, 9-10). The report indicated that the student's mood was upbeat and positive overall, and the student demonstrated good awareness and insight into his mood and emotions (*id.* at p. 6). The student continued to respond well to prompts for inattentiveness, maintain his organization of lesson work, and manage his daily tasks and responsibilities (*id.* at p. 7). His therapist noted some improvement in the student's ability to own his mistakes (*id.*). Accordingly, an overall review of the evidence in the hearing record supports a finding that the student progressed in his areas of need, namely, social/emotional and executive functioning, and self-regulation and organization as it related to academics.

Based on the foregoing, a review of the evidence in the hearing record demonstrates that Cherry Gulch offered specially designed instruction to address his needs, the student demonstrated some progress, and therefore, it constituted an appropriate unilateral placement for the student for the 2014-15 school year.

### **E. Equitable Considerations**

Having determined that Cherry Gulch was an appropriate placement to address the student's needs during the 2014-15 school year, it is now necessary to consider whether equitable considerations warrant a reduction in tuition reimbursement. The district argues that reimbursement should be denied because the parents did not cooperate with the district, withheld from the district their plans to place the student at Cherry Gulch, and failed to provide sufficient notice of unilateral placement. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations, which are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning

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<sup>10</sup> The individual service plan reports are not consecutively paginated; as submitted to the Office of State Review, the exhibit begins with an October 2014 individual service plan (pages 1-5), an April 2015 updated individual service plan report was submitted out of order as pages 6-8, and a January 2015 updated individual service plan report concludes the exhibit with pages 9-11 (see Dist. Ex. 30 at pp. 1-11).

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"]; M.H., 685 F.3d at 254-55 n.12). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 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, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, and any fraud or collusion on the part of the parent or private school]; see Frank G., 459 F.3d at 363-64; Voluntown, 226 F.3d at 69 n.9).

The IDEA provides that reimbursement may be reduced or denied if the parents did not provide notice, either at the most recent CSE meeting prior to their removal of the student from public school, or in writing to the district ten business days before such removal, "that they were rejecting the placement proposed by the [district] 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]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

A review of the hearing record in this case reveals that the parents cooperated in the CSE process. The parents provided consent to the CSE to evaluate the student, provided the district with an authorization to speak with the student's private psychologist, and also provided the private neuropsychological evaluation report to the district (Tr. pp. 116, 129; Dist. Ex. 21). The parents also attended the CSE meeting (Dist. Ex. 3 at p. 1). On the other hand, the parents' notice of unilateral placement was dated seven business days prior to the student's removal from the public school, instead of the ten business days required by the IDEA, and although it notified the district of their unilateral placement of the student at Cherry Gulch, it did not include language regarding seeking reimbursement at public expense (Dist. Ex. 24).<sup>11</sup> However, there is no indication in the hearing record that the district would have acted differently had the notice been provided 10 business days prior to the removal of the student and I decline to exercise my discretion to reduce or deny reimbursement on this basis. The district did not reconvene the CSE or amend the IEP in fall 2014 to correct the omission of counseling services, which may have

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<sup>11</sup> As noted above, the parents responded to an inquiry by the assistant superintendent by letter dated September 12, 2014, which provided notice of their intention to seek reimbursement from the district for the costs of the unilateral placement (Dist. Ex. 26 at p. 2).

addressed some of the parents' concerns about meeting the student's emotional needs.<sup>12</sup> The fact that the parents engaged an educational consultant to investigate private placements is not a bar to reimbursement and the district cites no authority that the parents were obligated to disclose such information (C.L., 744 F.3d at 840 [holding that where parents cooperated with the district and did not obstruct its attempts to meet its obligations under the IDEA, "their pursuit of a private placement was not a basis for denying their tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

However, from an equitable standpoint, reimbursement should be reduced because there is nothing in the evaluative information available to the CSE that suggests the student required a residential placement (see Dist. Exs. 7-15). At most, the private neuropsychological evaluation report recommended that the student attend "a therapeutic program" in the event that he did not remain in the district public schools (Dist. Ex. 7 at pp. 12-13).<sup>13</sup> A parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits (Jennifer D. v New York City Dept. of Educ., 550 F. Supp. 2d 420, 436 [S.D.N.Y. 2008]). However, a reduction from full reimbursement is appropriate where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]). Additionally, a parent's failure to locate a placement closer to home—to obviate the need for a residential placement—may be considered as a factor in reducing tuition reimbursement (Scarsdale Union Free Sch. Dist., 2013 WL 563377, at \*10).

Here the parents engaged the services of an education consultant on January 17, 2014 in order to create a plan of action based on the student's needs and seek an educational placement (Dist. Ex. 45). The parent testified that the education consultant provided options for three out-of-State residential placements (Tr. p. 959). There is no evidence that the parent requested a recommendation for a day program from their educational consultant or sought out a day program for the student from the time they retained the consultant in January 2014 until the student's enrollment in Cherry Gulch in September 2014 (Parent Ex. FFFF at pp. 140-42).

Considering the above, the parents' failure to explore a local day program weighs in favor of reducing the relief requested by the cost of the residential component of the program. Accordingly, the parents' relief shall be limited to the non-residential portion of the student's tuition at Cherry Gulch; the district shall be responsible for the non-residential portion of the student's tuition upon submission by the parents of satisfactory proof of the cost thereof.<sup>14</sup>

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<sup>12</sup> To be clear, the CSE was not required under State regulations to reconvene simply because the parents provided 10-day notice identifying their concerns; however, when the parents have provided a 10-day notice window—which was envisioned as providing public schools with an opportunity to cure alleged defects in a student's program—and the district makes no attempt at all to address the parents' concerns, such inaction does nothing to enhance a district's position in the weighing of equitable factors.

<sup>13</sup> While the student's father testified that this recommendation was for a therapeutic boarding school (Tr. pp. 981-82), the alternate recommendation by the private evaluator was for the student to remain in the district and receive counseling and resource room services (Dist. Ex. 7 at p. 13; see Tr. pp. 567-68).

<sup>14</sup> The hearing record does not specify the costs of the residential portion of the student's tuition at Cherry Gulch for the 2014-15 school year, separate from the regular tuition costs (Parent Ex. FFFF at p. 141). The Cherry Gulch executive director testified that the cost of attendance covered room and board, education, therapeutic

## **VII. Conclusion**

The evidence in the hearing record supports a determination that the district failed to offer the student a FAPE for the 2014-15 school year and that the parents' placement of the student at Cherry Gulch was appropriate. However since equitable considerations weigh in favor of a reduction of the relief requested, the appeal must be sustained in part.

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

**IT IS ORDERED** that that the district shall reimburse the parents for the cost of the non-residential portion of the student's tuition at Cherry Gulch for the 2014-15 school year, upon submission of proof of the cost therefor.

**Dated:**           **Albany, New York**  
                          **January 4, 2016**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**

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and psychiatric care, and "outings" (Tr. p. 898). The district shall reimburse the parents for the costs of the student's education and therapeutic services, and the costs of psychiatric care relating to the student's educational needs.