The University of the State of New York

The State Education Department
State Review Officer

No. 07-133

Application of a CHILD WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Cornwall Central School District

Appearances:
Girvin & Ferlazzo, P.C., attorney for respondent, Tara L. Moffett, Esq., of counsel

DECISION

Petitioner appeals from a decision of an impartial hearing officer to the extent that it failed to address her request for the reimbursement of private evaluations and impartial hearing costs related to the unilateral placement of her daughter at the Bromley Brook School (Bromley Brook) for the 2006-07 and 2007-08 school years. Respondent cross-appeals the impartial hearing officer's decision which found that it failed to offer an appropriate educational program to the student and ordered respondent to reimburse petitioner for tuition costs for the 2006-07 and 2007-08 school years, including the summers of 2007 and 2008. The appeal must be sustained in part. The cross-appeal must be sustained in part.

When the impartial hearing commenced on August 27, 2007, petitioner's daughter was attending tenth grade at Bromley Brook, a therapeutic boarding school for girls who have social-emotional needs (Tr. pp. 253-54; Parent Exs. 25; 29; Joint Exs. 5 at p. 9; 26). Bromley Brook has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's educational history includes deteriorating grades and multiple disciplinary referrals (Joint Exs. 23; 56-88). She has deficits in the area of social-emotional skills (Joint Exs. 1 at pp. 7-8; 2) and diagnoses which include a conduct disorder, a depressive disorder, an attention deficit hyperactivity disorder (ADHD), and cannabis abuse (Joint Ex. 2 at p. 2). The student's eligibility for special education services and classification as a student with an emotional disturbance (Joint Exs. 32; 104A; see 34 C.F.R § 300.8[c][4]; 8 NYCRR 200.1[zz][4]) are not in dispute in this appeal.

As a preliminary matter, I will address the procedural issues raised by respondent in its answer to the petition. As affirmative defenses, respondent alleges that: 1) the petition does not comply with 8 NYCRR 275.10 of the Regulations of the Commissioner because the statements in

the petition are unduly vague and ambiguous and limit the ability to effectively formulate an answer, 2) the petition fails to clearly indicate the reasons for challenging the impartial hearing officer's decision in violation of 8 NYCRR 279.4(a) of the State regulations, and 3) petitioner's memorandum of law fails to properly identify petitioner and fails to include a table of contents in violation of State regulations.

State regulations provide that all pleadings and papers must be endorsed with the name, post office address and telephone number of the party submitting the same (8 NYCRR 275.4). A memorandum of law shall contain a table of contents (8 NYCRR 279.8[a][6]). Documents that fail to comply with these requirements may be rejected in the discretion of a State Review Officer (8 NYCRR 279.8[a]). Petitioner's memorandum of law did not include the above referenced information and, therefore, was not consistent with sections 275.4 and 279.8(a)(6) of the State regulations. I note, however, that although petitioner was represented by legal counsel prior to the impartial hearing, in this appeal petitioner is proceeding without an attorney. In the exercise of my discretion, I decline respondent's request to reject petitioner's memorandum of law (see Application of a Child with a Disability, Appeal No. 06-113). Petitioner is, however, cautioned to comply with these regulations in any future appeal.

State regulations also require the petition for review to clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and to briefly indicate what relief should be granted by a State Review Officer to petitioner (8 NYCRR 279.4[a]; see Application of the Bd. of Educ., Appeal No. 07-097). The petition shall contain a clear and concise statement of petitioner's claim showing that petitioner is entitled to relief, and shall further contain a demand for relief. Such statement must be sufficiently clear to advise respondent of the nature of petitioner's claim and of the specific act or acts complained of (8 NYCRR 275.10;). A review of the petition shows that the allegations asserted by petitioner are not so ambiguous that respondent was precluded from effectively formulating a responsive answer (see Application of a Child with a Disability, Appeal No. 06-138; Application of a Child with a Disability, Appeal No. 06-097; Application of a Child with a Disability, Appeal No. 06-096). I will therefore address the petition on the merits (see Application of the Bd. of Educ., Appeal No. 07-097; Application of the Dep't of Educ., Appeal No. 05-074).

In her answer to the cross-appeal, petitioner asserts that respondent's answer is unresponsive to petitioner's appeal and that respondent's cross-appeal is untimely. State regulations provide that respondent shall, within 10 days after the date of service of a copy of the petition, answer the same, either by concurring in a statement of facts with petitioner or by service of an answer, with any written argument, memorandum of law, and additional documentary evidence (8 NYCRR 279.5). A cross-appeal shall be deemed timely if it is included in an answer that is served within the time permitted by section 279.5 of the state regulations (8 NYCRR 279.4[b]). I have reviewed respondent's pleadings and affirmation of service and I find that its answer is consistent with the provisions of section 279.5 and that its cross-appeal is timely (see Application of a Child with a Disability, Appeal No. 00-040; 8 NYCRR 279.5).

The hearing record contains information relevant to the academic and social difficulties that the student experienced as a younger child (Joint Exs. 1 at pp. 1-3; 2; 21). The student attended a parochial school for sixth grade (Joint Ex. 1 at p. 2). She attended respondent's middle school

for seventh grade, where she had "great difficulty" and was required to attend summer school (id.). In 2004, during her eighth grade year, the student was seen by private psychiatrists who reviewed the medications she received to treat depression and irritability (Tr. pp. 97-98; Joint Ex. 2 at p. 2). Also that year petitioner referred her daughter to respondent's Committee on Special Education (CSE), but her daughter was found not to be eligible for special education services (Joint Exs. 1 at p. 10; 2 at p. 1). In April 2004, the student began to receive private outpatient social work services (Tr. pp. 4-5). The student failed eighth grade and for the 2004-05 school year, she returned to the parochial school where she received special education services and successfully repeated eighth grade (Tr. p. 948; Joint Exs. 1 at p. 2; 2 at p. 1). For a portion of the 2005-06 school year, the student attended a parochial high school and in March 2006, she was expelled for stealing (Joint Ex. 1 at pp. 2-3).

The student attended respondent's high school for the remainder of the 2005-06 school year (Joint Ex. 1 at p. 3). Between April 12, 2006 and May 30, 2006, the student was referred for disciplinary action on at least six occasions for stealing, "cutting" class, being in an unauthorized location, being late to class, and skipping detention (Joint Exs. 38; 39; 42; 44-46). As a result, the student attended respondent's full-day Alternative Placement Center (APC) at least three times in that timeframe (Joint Exs. 40; 41; 43).[1] In spring 2006, the student met with a "student assistance counselor" (Tr. p. 147).

In April and May 2006, a private psychologist conducted a psychological evaluation of the student (Joint Ex. 1). Completion of the Connors' Parent Rating Scale-Revised (L) by the student's parents resulted in significantly high ratings on the oppositional, cognitive problems, hyperactivity and social problems scales (id. at p. 4). As rated by her parents, the student's behavior on the attention deficit hyperactivity index and the restless-hyperactive and emotional lability global indexes fell within the "significant" range (id.). The private psychologist concluded that the student exhibited emotional immaturity, significant difficulty sustaining interpersonal relationships, immature problem solving skills, and was in a chronic state of stimulus overload (id. at p. 7). The student's behavior and emotional profile suggested to the private psychologist that her psychological disturbance was complex and developing in a manner that would likely result in "personality liabilities" (id.). She determined the student met the criteria for a diagnosis of a conduct disorder, a dysthymic disorder and related concerns with "educational, peer and problems with primary support group" (id. at p. 8). The private psychologist recommended residential placement due to the student's need for intense therapeutic support and a stable, consistent living environment (id. at p. 7).

In June 2006, respondent notified petitioner that the student failed math and English for the school year (Joint Exs. 47-49). The student's final 2005-06 report card indicated that she earned credits (final average) in art (75), biology (69), global studies (74) and physical education (83) (Joint Ex. 50). In summer 2006, the student successfully attended respondent's summer school English program; however, petitioner stated that in summer 2006 her daughter also had episodes

[1] Students are assigned to the APC as a disciplinary action (Joint Ex. 40).. Homework, class work, and supervision are provided by school personnel (id.) Students assigned to the APC are prohibited from participating in or being a spectator at any school sponsored activity during or after school hours on the day(s) assigned (id.).

of throwing items, slamming doors, and one instance of a physical altercation (Tr. pp. 955-56, 993-95).

During the 2006-07 school year while in tenth grade, the student attended respondent's high school in a regular education program that included Spanish, math, global studies, math achievement center, physical education, earth science and English (Joint Ex. 23). In late September 2006, petitioner requested that the CSE evaluate her daughter (Joint Ex. 27). On October 16, 2006, respondent received consent to evaluate the student, completed her social history report and obtained a copy of her May 2006 private psychoeducational evaluation report (Tr. p. 136; Joint Exs. 21; 28). On November 9, 2006 the student's health record was compiled by the school nurse (Joint Ex. 22).

Teacher comments on the student's fall 2006 report card indicated that the student's achievement was hampered by poor attendance, that she could improve with greater effort, and that she performed inconsistently (Joint Ex. 51). By November 9, 2006, the student was failing math and physical education, passing global studies and English with grades of 67 and 65 respectively, and was absent/tardy a total of ten times (Tr. p. 150; Joint Ex. 52). By December 15, 2006, the student was failing math, global studies, physical education, earth science and English for that marking period (Joint Ex. 53).

On December 15, 2006, respondent's school psychologist conducted a psychoeducational evaluation of the student (Joint Ex. 24). The evaluation report noted the student's history of depression and involvement with a psychotherapist and the court system (id. at p. 2). It also reported the student's grades from the 2005-06 and 2006-07 school years, noting that on multiple occasions her teachers commented that her achievement was hampered by poor attendance (id.). A classroom observation of the student and discussion with her teachers revealed that she was moderately impulsive, distractible at times, and that her teachers were concerned about her high rate of absenteeism (id. at p. 4). The school psychologist's report included the private psychologist's diagnoses of the student and the private psychologist's statement that the student required "intense support" to address her emotional, social and educational needs (id. at p. 3).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension index composite score of 91 (average), a perceptual reasoning index composite score of 96 (average), a working memory index composite score of 99 (average), a processing speed index composite score of 85 (low average) and a full scale IQ score of 90 (average) (Joint Ex. 24 at p. 1). The student's performance on formal achievement tests revealed average skills in reading (standard score 98), spelling (53rd percentile), and applied problems (standard score 96) (id. at pp. 5-6). The student exhibited low average skills in written language (standard score 84) and broad math (standard score 84), with a particular weakness in mathematic calculations (standard score 78, borderline) (id. at p. 5). The school psychologist concluded that the student's overall intelligence and broad academic skills were in the average range, but that she would benefit from math practice, consistent attendance and classroom seating away from distractions and closer to the teacher (id. at p. 6). The school psychologist recommended that the CSE review the evaluation report to determine eligibility for special education services (id.).

From the beginning of the 2006-07 school year through January 10, 2007, the student received at least 21 disciplinary referrals for behaviors that included tardiness, cutting class,

smoking, insubordination, skipping detention, stealing, truancy, disrespect to others and use of unacceptable language (Joint Exs. 56-59; 61-65; 68-70; 72-74; 77; 79-81; 84; 87). These referrals resulted in a total of nine days of placement in the APC and two days of out-of-school suspension (Joint Exs. 60; 66; 67; 71; 75; 76; 78; 82; 83; 85; 86). On December 21, 2006, an assistant principal's intervention meeting was held to discuss the student's progress in school, her patterns of unacceptable behavior, and the excessive number of in and out-of-school suspensions and detentions (Joint Ex. 89). As a result of that meeting, the student was disciplined for all infractions pursuant to respondent's code of conduct and she was required to meet with the student assistance counselor one time per week while the CSE continued its evaluation (id. at p. 2).

The CSE scheduled a meeting on January 17, 2007; however, the CSE meeting was cancelled by petitioner because a student assistance counselor was unable to attend on that date (Joint Exs. 29; 30). In a letter she provided to petitioner dated January 22, 2007, the student's private social worker stated that she had treated the student since April 2004 and that she had previously referred her for both psychological and psychiatric evaluations (Parent Ex. 1). She opined that the student needed "more comprehensive help than outpatient psychiatric or therapy treatment can provide," and that a "therapeutic community with firm behavior modification" and "psych supports" appeared to be the appropriate setting to address the student's educational needs (id.). By the end of the second quarter on January 30, 2007 the student had passed one out of five academic classes with a grade of 65 (Joint Ex. 23).

On February 1, 2007, a private psychiatrist evaluated the student to assess the appropriateness of a residential placement (Joint Ex. 2). The private psychiatrist reviewed the May 2006 private psychologist's report and based on her own assessment of the student, concluded that the student's history of family, social and academic difficulties contributed to her "sense of sadness, loss and anger which fuel her impulsive, oppositional and acting out behavior" (id. at p. 2). The report indicated that, psychiatrically, the student has diagnoses of a conduct disorder, a depressive disorder, ADHD combined subtype, and cannabis abuse (id.). The private psychiatrist opined that the early development and severity of the student's antisocial and impulsive behaviors was a poor prognostic indicator and she reported the need for extreme treatment measures, noting that outpatient treatment and court involvement had not made a decisive change in the student's behavior (id.). The private psychiatrist stated that a day school could not provide the contained, structured behavioral modification that the student's "severe emotional pathology" warranted, and recommended placement in a therapeutic school with firm behavioral plans, intensive psychiatric treatment and academic supports (id.). The student attended an interview at Bromley Brook in mid to late January 2007 (Tr. p. 977).

On February 5, 2007, respondent's CSE convened for an initial eligibility determination meeting (Joint Exs. 3; 4). Committee meeting notes reported that the student's testing, levels of performance and observations were reviewed and indicated that her overall ability was in the average range, with the exception of processing skills that were in the low average range (Joint Ex. 4 at p. 5). The CSE discussed and selected annual goals, curriculum modifications, and testing accommodations for the student and determined that she was eligible to receive special education services as a student with an emotional disturbance (id. at pp. 2, 5). It recommended that the student receive a 15:1 special class program and two 45-minute group counseling sessions per week (id. at p. 2). Petitioner provided consent to the CSE to send referral packets to the Orange-

Ulster and the Putnam-North Westchester Board of Cooperative Educational Services (BOCES) in an effort to locate a "more therapeutic setting" (Joint Exs. 4 at p. 5; 90).

After the February 5, 2007 CSE meeting petitioner decided to enroll her daughter at Bromley Brook (Tr. pp. 974-78; Parent Ex. 25). By letter dated February 12, 2007, petitioner informed respondent that although the student was going to be residentially placed, she was willing to consider placements respondent brought to her attention (Joint Ex. 32). Petitioner also stated that she would visit a BOCES program when it became available (id.). By letter dated February 12, 2007, the Orange-Ulster BOCES (OU BOCES) notified respondent's CSE Chairperson that it had forwarded the student's referral packet to a specific BOCES high school for consideration (Joint Ex. 33). The student began attending Bromley Brook on February 16, 2007 (Tr. p. 255).

On or about March 15, 2007, petitioner informed respondent's director of pupil services that she had been in contact with an OU BOCES social worker who, after review of the student's private psychological and psychiatric evaluation reports, reportedly indicated that a BOCES day program would not meet the student's emotional needs (Joint Ex. 34). Petitioner indicated that, for transition purposes, they agreed to set up an appointment to visit the OU BOCES program upon the student's completion of the Bromley Brook program (id.). Petitioner also indicated that a representative from the Putnam-North Westchester BOCES stated that its day program was not in the student's best interests at that time (id.).

In a due process complaint notice dated March 26, 2007, petitioner's then current counsel requested an impartial hearing to obtain reimbursement for petitioner's tuition costs for the unilateral placement of the student at Bromley Brook for the 2006-07 school year (Joint Ex. 6). Petitioner alleged that respondent's CSE failed to evaluate the student, develop an individualized education program (IEP), and offer an appropriate placement in a timely manner, and, thereby, denied the student a free appropriate public education (FAPE) (id.).[2] Petitioner further alleged that additional goals mailed to petitioner to supplement the February 5, 2007 IEP were invalid, and that no goals and objectives addressed the student's areas of weakness in math, English, science, and social studies (id.). By letter dated March 28, 2007, petitioner's counsel withdrew the due process complaint notice without prejudice (Joint Ex. 7). By letter dated May 18, 2007, petitioner's counsel reasserted petitioner's original claims and requested an impartial hearing to reimburse petitioner for tuition and residential costs incurred by her daughter's unilateral placement at Bromley Brook for the 2006-07 school year (Joint Ex. 8).

[2] The term "free appropriate public education" means special education and related services that—

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

(20 U.S.C. § 1401[9])

By letter dated June 4, 2007, respondent acknowledged that the student's eligibility determination and placement offer were not timely, but alleged that the delays were due to untimely parental consent, student unavailability for evaluation dates, and parental cancellation of scheduled meetings (Joint Ex. 9 at p. 1). Respondent asserted that its initial placement recommendation was for an in-district self-contained program, but with parental consent, agreed to pursue day treatment programs at two BOCES sites (id. at pp. 2-3).

On June 11, 2007, the CSE subcommittee convened for the student's annual review for the 2007-08 school year (Joint Ex. 5 at p. 4). Participants included respondent's director of pupil services, a guidance counselor, a special education teacher, a regular education teacher, the school psychologist, petitioner, the OU BOCES social worker and Bromley Brook staff (Tr. pp. 844-45; Joint Ex. 5 at p. 9). The CSE subcommittee meeting information indicated that it received, reviewed, and discussed reports from Bromley Brook regarding the student's performance (Joint Ex. 5 at p. 9).

Present levels of performance included in the resultant June 11, 2007 draft IEP indicated that the student demonstrated average intelligence and average verbal reasoning and working memory ability (Joint Ex. 5 at pp. 1, 6). Her processing speed was reportedly low average, which affected her visual memory, visual-motor coordination and recall of facts (id. at p. 6). Academically, the draft IEP indicated that the student's reading and spelling ability was average (id.). She had difficulty organizing and expressing herself through written language and had difficulty with basic mathematic calculations (id.). The student reportedly was prone to impulsive behavior and distractibility, and exhibited low frustration tolerance (id.). Her class performance and homework production were adversely affected by poor attendance and tardiness (id.). Socially, the June 11, 2007 draft IEP described the student as well-spoken and outgoing, but somewhat detached from others (id. at p. 7). The draft IEP noted that the student became anxious and depressed when presented with the demands of everyday life and relationships (id.). She had difficulty taking responsibility for her actions, was inflexible in her thinking, engaged in self-advocacy at inappropriate times, and exhibited a heightened sensitivity to criticism (id.). The draft IEP also indicated that the student had diagnoses of a conduct disorder, a depressive disorder, ADHD and had a history of drug use and stealing (id.).

The June 11, 2007 draft IEP recommended that the student receive program modifications which included flexible scheduling, the use of a calculator and an extra set of text/workbooks (Joint Ex. 5 at pp. 4-5). The student would participate in state and local assessments administered to regular education students, but would complete them in a location with minimal distractions (id. at p. 5). The draft IEP included a transition plan and annual goals in the areas of study skills, writing, mathematics, and social-emotional/behavioral skills (id. at pp. 8, 10-13).

The June 11, 2007 CSE subcommittee recommended that the student receive special education services in a small structured setting with a high staff to student ratio, in order to provide flexibility and support to address her emotional needs and academic skill development (Joint Ex. 5 at p. 8). It decided to pursue day treatment program options due to the student's identified areas of need and her current level of functioning (id. at p. 9). Although petitioner did not agree with the day treatment recommendation, she agreed to allow the student's referral packets to be sent to various programs (id.). The meeting was adjourned and notes indicated that after the referral process was complete, the CSE subcommittee would reconvene to make a recommendation (id.).

The CSE subcommittee also recommended that the student undergo a functional behavioral assessment (FBA) upon her return to respondent's school (id.).

In correspondence dated June 21, 2007, petitioner informed respondent that there was "no appropriate IEP available" and that she wanted to proceed with the due process hearing (Joint Ex. 97). By letter dated June 22, 2007, petitioner's counsel advised respondent that he no longer represented petitioner (Joint Ex. 10).

On July 16, 2007 petitioner provided consent to send referrals to the OU BOCES and Putnam-North Westchester BOCES (Joint Ex. 36). By letters dated July 18, 2007, respondent sent the June 11, 2007 draft IEP, the December 2006 psychoeducational evaluation report, the October 2006 social history, the November 2006 physical report, the 2006-07 report card, the February 2007 private psychiatric evaluation report, the May 2006 private psychological evaluation report and the 2006-07 Bromley Brook reports to the BOCES programs (Joint Exs. 99 at pp. 1-2; 100 at pp. 1-2). On July 23, 2007, petitioner provided the BOCES programs with a January 2007 letter from the student's private social worker and indicated that the BOCES programs could contact Bromley Brook directly (Tr. pp. 3-4; Joint Exs. 99 at p. 3; 100 at p. 3).

In a due process complaint notice dated July 20, 2007, petitioner requested among other things, tuition reimbursement at Bromley Brook for summer 2007, the 2007-08 school year, and summer 2008 if necessary, as well as reimbursement for private evaluations, and hearing costs (Joint Ex. 11).

By correspondence dated August 1, 2007, respondent provided petitioner's advocate with prior notice that explained what the June 11, 2007 CSE subcommittee considered when making its recommendations, the options it considered and rejected, reasons why and a statement of the recommendation made (Joint Ex. 12). The notice stated that the CSE would schedule another meeting prior to the start of the school year to finalize the IEP and recommend a specific placement for the 2007-08 school year, and that petitioner was not entitled to any of the relief that she had sought (id. at pp. 2-3). Also on that date, respondent requested that the impartial hearing officer consolidate petitioner's May and July 2007 impartial hearing requests (Joint Ex. 18).

By letter dated August 6, 2007 the principal of an OU BOCES high school program (BOCES principal) notified respondent that following a review of the student's materials, he believed petitioner's daughter would be an appropriate candidate for his program (Dist. Ex. 1). He stated that the student would be conditionally accepted, pending a personal interview with the student and her parent (id.).

On August 10, 2007, the impartial hearing officer agreed to consolidate the 2006-07 and the 2007-08 impartial hearing requests (Joint Ex. 20).[3] By letter dated August 27, 2007, the Putnam-North Westchester BOCES supervisor of special education notified respondent that at that

[3] In July 2007, an impartial hearing officer was appointed to hear claims regarding the 2007-08 school year (Joint Ex. 98; IHO Ex. 1). This impartial hearing officer subsequently withdrew from the case when the due process requests for the 2006-07 and 2007-08 school years were consolidated by the impartial hearing officer who ultimately rendered the decision in the instant matter (IHO Exs. 1; 2).

time, it did not have an appropriate program for the student (Joint Ex. 105). Also on August 27, 2007, the impartial hearing commenced and continued over five days of testimony.

On August 29, 2007, the CSE subcommittee reconvened to determine the student's placement for the upcoming school year (Joint Ex. 104A). Participants included respondent's director of pupil services, school nurse, regular education teacher, school psychologist, school attorney, petitioner, petitioner's advocate, as well as representatives from the OU BOCES high school program who participated by telephone (id. at p. 6). The CSE subcommittee reviewed the student's June 2007 draft IEP, March-August 2007 Bromley Brook progress notes and report card, the May 2006 private psychological and February 2007 private psychiatric evaluation reports and the January 2007 letter from the student's private social worker (Dist. Ex. 2 at p. 3; Joint Ex. 104A at p. 6). The CSE subcommittee noted that the June 11, 2007 draft IEP was reviewed "section by section" and additional information was added regarding the student's medication and program modifications (compare Joint Ex. 5 at pp. 4-5, 8, with 104A at pp. 2, 5-6).

At the August 2007 CSE subcommittee meeting, the BOCES principal discussed a 6:1+1 program, including the supports, services and therapeutic component (Joint Ex. 104A at p. 6). The CSE subcommittee discussed the student's counseling needs and subsequently recommended that the student receive individual counseling two times per week for 30-minute sessions and group counseling one time per week for a 30-minute session (id. at pp. 1, 6). Petitioner requested that the CSE subcommittee consider residential placement, but after a discussion regarding least restrictive environment (LRE), the CSE subcommittee recommended the 6:1+1 OU BOCES program with counseling for the upcoming 2007-08 school year (id. at p. 1). The CSE subcommittee decided to defer a decision regarding the student's eligibility for extended school year services until later in the year (id. at p. 6). The August 29, 2007 IEP stated that petitioner was not in agreement with the CSE subcommittee's recommendation (id.).

On August 30, 2007 the BOCES principal spoke to petitioner and although he did not schedule an intake interview for the student, he offered that petitioner and the student visit the program the next time the student was home (Tr. pp. 767, 778-79).

The impartial hearing ended on September 20, 2007. During the impartial hearing, respondent conceded that it did not offer the student a FAPE for the 2006-07 school year (Tr. p. 176). By decision dated November 9, 2007, the impartial hearing officer found that: 1) respondent failed to meet its burden to offer the student a FAPE for the 2006-07 school year (IHO Decision at pp. 3, 4); 2) a residential placement was necessary for the student to make educational progress during the 2006-07 school year (id. at pp. 7-8); 3) Bromley Brook offered the therapeutic environment recommended (id. at pp. 9-11); 4) respondent's equities argument was without merit (id. at pp. 11-12); 5) the student's summer 2007 placement at Bromley Brook was a necessary part of the student's educational program (id. at p. 13); and 6) the student's removal from Bromley Brook and placement at BOCES was not a placement calculated to permit the student to make reasonable educational progress in the LRE during the 2007-08 school year (id. at p. 27). In addition to ordering respondent to reimburse petitioner for tuition costs and reasonable transportation to and from Bromley Brook for the 2006-07 school year, including summer 2007, and for those costs already incurred for the 2007-08 school year, the impartial hearing officer directed respondent to pay tuition costs for Bromley Brook for the remainder of the 2007-08 school year, including summer 2008 (id. at p. 28).

On appeal, petitioner seeks reimbursement for evaluations and out-of-pocket expenses, witness fees, lost wages, supplies, and her advocate's transportation and meal expenditures.

Respondent does not appeal the impartial hearing officer's determination that it did not offer a FAPE for the 2006-07 school year. Rather, in its answer and cross-appeal, respondent appeals the impartial hearing officer's findings regarding the appropriateness of the student's placement at Bromley Brook and equitable considerations for the 2006-07 school year. In addition, pertaining to 2007-08, respondent appeals the impartial hearing officer's determination that the student was not offered a FAPE, that the private placement was appropriate and that equities did not preclude reimbursement.

In her answer to the cross-appeal, petitioner asserts that respondent provided OU BOCES "information" which was inaccurate and not raised at the impartial hearing, that respondent did not offer an OU BOCES placement to the student which would begin on September 5, 2007, and that the BOCES principal improperly alleged that "he can make a day treatment program a residential program without the 24/7 structured residential component." Petitioner requests that I find that the impartial hearing was a frivolous hearing caused by respondent, affirm the impartial hearing officer's decision, and direct petitioner to reimburse respondent for her expenditures related to the impartial hearing.

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of

educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d. at 132). The IDEA "expresses a strong preference for children with disabilities to be educated 'to the maximum extent appropriate,' together with their nondisabled peers" (Walczak, 142 F.3d at 122). In addition, federal and state regulations require that districts ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115[a]; see 8 NYCRR 200.6[a][1]).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a child 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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 child a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

As noted above, respondent conceded that it failed to offer the student a FAPE for the 2006-07 school year at the impartial hearing, thereby conceding the first criterion of the Burlington analysis (Tr. p. 176). I note that neither party has appealed the impartial hearing officer's finding that respondent did not offer the student a FAPE for the 2006-07 school year. An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; see Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 04-018; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). Consequently, respondent's concession that it failed to offer the student a FAPE for the 2006-07 school year, as incorporated into the impartial hearing officer's decision, is final and binding (Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

As respondent has conceded Prong 1 for the 2006-07 school year, I now turn to Prong 2 for that year. With respect to the second criterion for an award of reimbursement, petitioner must show that the services she obtained for her daughter were appropriate to meet her special education needs for the 2006-07 school year (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363). In order to meet that burden, the parents must show that the services provided were "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., that the private education services addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192). Parents are not held as strictly to the standard of placement in the LRE as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d at 105).

Petitioner asserts that the student required a residential placement for the 2006-07 school year based on the recommendations contained in two private evaluation reports and a letter from the student's private social worker (Parent Ex. 1; Joint Exs. 1 at p. 7; 2 at p. 2). The hearing record reveals that the February 2007 CSE reviewed and discussed the May 2006 private psychologist's and February 2007 private psychiatrist's evaluation reports (Joint Ex. 9 at p. 2). The private psychiatrist participated at the February 2007 CSE meeting by telephone where she again recommended that the student receive a residential program (Tr. pp. 541-42). According to these professionals, the student needed intense therapeutic support and a stable, consistent living environment, firm behavioral plans, psychiatric treatment, and academic supports to address her educational needs (Joint Exs. 1 at p. 7; 2 at p. 2). Respondent's school psychologist opined that the private psychiatrist's evaluation report did not contain enough evidence that, educationally, the student required a residential placement, because there were no measures of her academic or other needs (Tr. pp. 871, 899-900). Although the school psychologist opined that the private psychiatrist did not base the student's need for a residential placement on academic testing, the private psychiatrist's report states that the student's academic performance continued to be poor, and, at

the time of evaluation in February 2007, the student received failing grades (Tr. p. 901; Joint Exs. 2 at p. 2; 23). The school psychologist stated that she did not give the private psychiatrist's academic recommendations "a lot of weight" because the private psychiatrist received her information from the student and petitioner, who did not have firsthand knowledge of the student's day to day functioning in school (Tr. pp. 902, 905-06). I note that petitioner testified that she supplied the private psychiatrist with the student's cumulative school, court, and psychological evaluation records and that the private psychiatrist discussed the student with petitioner, the private social worker and the private psychologist (Tr. p. 971).

The hearing record also reveals that the February 2007 CSE considered the school psychologist's December 2006 psychoeducational evaluation report (Joint Ex. 4 at p. 5). The school psychologist testified that prior to completing her December 2006 evaluation of the student, she interviewed five of the student's teachers and her guidance counselor, reviewed the May 2006 private psychological evaluation report, the student's academic file, discipline and attendance records, and conducted a classroom observation (Tr. pp. 873-75, 920). Results of the school psychologist's academic evaluation of the student indicated that her skills were in the average to low average range (Tr. pp. 909-10). Based on teacher interview and direct observation, the school psychologist opined that the student's lack of attendance and lateness to class was what interfered with her ability to pass her classes (Tr. pp. 910-11). She acknowledged that her December 2006 psychoeducational evaluation report did not address the psychological and emotional problems that resulted in the student's poor attendance (Tr. pp. 936-37). The school psychologist did not conduct additional social-emotional testing of the student because "it had already been covered" and she had no reason to believe that the May 2006 results of the private psychologist were invalid (Tr. pp. 924-25). She further stated that she relied on the private psychologist, private psychiatrist and private social worker's assessments of the student's social-emotional status (Tr. pp. 934-35). Based on the above, I find that the February 2007 CSE did not have sufficient information to refute the description of the student's social-emotional status and needs or the recommendation for a residential placement contained in the private evaluation reports. As I have determined that in February 2007 a residential placement was appropriate for the student, I will now consider whether Bromley Brook met her special education needs.

Bromley Brook is a 12-month therapeutic boarding school program for girls in grades 9-12 who have social, emotional, and learning needs that require a small classroom learning environment (Tr. pp. 253, 307, 441). It offers out-of-class learning supports, individual therapy, group therapy, family therapy and psychiatric consultation services and a college "prep" curriculum (Tr. pp. 254, 347). Students often have a history of depression, cutting behavior, substance experimentation, low motivation, difficulty at home, and struggling in school (Tr. p. 441). Bromley Brook accepts students who have mild to moderate learning disabilities (id.). The Bromley Brook admissions director testified that Bromley Brook provides a structured, predictable 24-hour supervised therapeutic milieu (Tr. pp. 239, 253-54). As of August 2007, 54 students were enrolled at Bromley Brook (Tr. p. 318).

Classes at Bromley Brook are comprised of approximately a 1:5 teacher to student ratio, but classes can range from six to twelve students (Tr. pp. 317, 441-42). The academic school day is from 9:45 a.m. until 3:15 p.m., and students usually take four to six 45-minute classes per day (Tr. pp. 324-25). After school tutorial sessions are available to students who need additional assistance (Tr. p. 455).

Usually within six weeks of arrival at Bromley Brook, an individual learning plan (ILP) is developed for all students (Tr. p. 288). The ILP is an assessment of the student's strengths and weaknesses, learning styles and future goals (id.). The student's April 6, 2007 ILP included classroom behavior, study skill, and social-emotional goals (Joint Ex. 25). Bromley Brook provided monthly reports regarding the student's academic and social-emotional progress in addition to weekly communication with the student's family (Tr. p. 290; Joint Ex. 26).

Bromley Brook employs a clinical director and a clinical program manager who supervises five therapists (Tr. p. 442). Each clinical therapist at Bromley Brook has a caseload of 10 to 12 students (Tr. p. 317). In addition to the services of an on-call clinician and on-call administrator, there are psychiatric consultation services, learning support services and full-time tutorial support services (id.). Teachers, therapists and community coaches conduct team and advisory meetings about the students in the program (Tr. p. 442). Faculty members communicate on a daily basis with the students' therapists (Tr. p. 464).

The residential portion of the Bromley Brook program consists of one "community life counselor" to every eight students (Tr. p. 317). Community life counselors are the individuals that work with the students during the evenings, nights, and weekends (Tr. p. 412). Morning meetings and therapy occur before the academic portion of the school day, and after class students participate in structured activities, including supervised study halls (Tr. p. 325). Bromley Brook staff members keep a daily log of the student's behavior at night and on weekends, which the social worker reviews with staff on a weekly or monthly basis (Tr. p. 394). Students are eligible for a local visitation with family after their fifth week in the program, dependent on the consensus of the student's therapist and family members (Tr. pp. 325-29). Students must successfully complete two local visits before they earn the opportunity for a home visit (Tr. pp. 327-28). Prior to a home visit, the social worker, parent and student develop a contract that outlines acceptable behaviors and visit expectations (Tr. pp. 419-20).

Bromley Brook uses a positive reinforcement system in that students earn access to privileges by, for example, following school rules and participating in the program (Tr. p. 320). For infractions such as failing to complete and turn in assignments, students are assigned to an evening study hall (Tr. pp. 351-52). The admissions director testified that there are a myriad of "different interventions" that are used to encourage students to attend class (Tr. pp. 353-54). Bromley Brook utilizes a progressive three goal system of evaluating student behavior that corresponds to increasing levels of responsibility and independence within the program (Tr. pp. 413-17). The school also uses "Values Council" for students who engage in behaviors that violate its core values (Tr. pp. 319, 411). The Values Council, composed of the clinical director, the community life director and the student, reviews the alleged behavior, provides the student with an opportunity to respond and develops a consequence that is related to the behavior (Tr. pp. 319-20, 378).

Petitioner's daughter was assigned to a social worker who met with her one time per week individually and one time per week in a group of up to eight students (Tr. pp. 367-68, 386, 392-93). The social worker was also available to the student at unscheduled times, and testified that the student sought her out during "crisis" situations (Tr. pp. 386-88). The student also participated in family group with the social worker and a "recovery" group for students who require drug addiction counseling (Tr. pp. 421-22, 426).

The admissions director testified that initially the student "struggled" a bit with impulse control, following the school schedule, and being distracted in class, but by the end of August 2007 she did a "much better job" both in and out of class (Tr. pp. 330-31). The student's Bromley Brook social worker testified that early in the program the student was not brought to Values Council despite her many infractions due to her emotionally fragile state (Tr. p. 379). She further testified that many of the infractions were addressed by herself with the student (Tr. p. 379). The social worker met with the student, discussed the incident and identified what could have been done differently (Tr. pp. 379-80). Due to the student's behavior, her initial local visit was postponed at least twice and was subsequently held approximately 12 weeks after she began at Bromley Brook (Tr. p. 382). The student did not participate in a home visit until July 26, 2007, but by the end of August 2007 she had earned the privilege of her full trimester break (Tr. pp. 382-84, 429-30). At the end of August 2007, the social worker testified that the student demonstrated "far less" incidents of behavioral violations since May or June 2007 and that, therapeutically, the student had improved her ability to show empathy and accountability for her actions (Tr. pp. 397-98). The social worker also testified that the student's manipulative behaviors decreased during her time at the school (Tr. pp. 403-04).

Academically, by August 2007 the student had passed all her courses (Joint Ex. 26 at p. 11). The student's earth science teacher testified that although the student's academic performance was variable, her class work was consistently better and she currently skipped class fewer times than when she entered the program (Tr. pp. 452, 463). Monthly reports from the student's Bromley Brook math and English teachers indicate that the student participated in class and worked hard (Joint Ex. 26). The hearing record reflects that in the past petitioner's daughter had difficulties with math and English, but by August 2007 she passed these classes with grades of B- and B+, respectively (Joint Exs. 23; 26 at p. 11; 50).

Although the hearing record reflects that the student continued to have some behavioral difficulties at Bromley Brook during the 2006-07 school year and summer 2007, the student made behavioral and academic progress in the program during that time (Joint Ex. 26). I agree with the impartial hearing officer's determination that Bromley Brook addressed the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192), including the need for a residential, therapeutic environment in order to benefit from her educational program (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 05-081).

The final criterion for an award of tuition reimbursement is that the parents' claim is supported by equitable considerations (see 20 U.S.C. § 1412[a][10][C]; Frank G., 459 F.3d at 363-64; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 416 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. 2006]). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; Mrs. C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required"]). Such considerations "include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters" (Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001], citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 801-02 [1st Cir. 1984], aff'd, 471 U.S.

359 [1985]). Parents are required to demonstrate that the equities favor awarding them tuition reimbursement (Carmel, 373 F. Supp. 2d. at 417).

The IDEA allows that tuition reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see Mrs. C., 226 F.3d at n. 9). Regarding the former, tuition reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the child from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d]). 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 tuition reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]).

Respondent asserts that petitioner did not make her daughter available for intake interviews with BOCES day treatment programs for the 2006-07 school year. Equitable principles dictate that parents cannot deliberately withhold their child from an intake interview and impede a district's ability to offer a FAPE and also secure a future award of tuition reimbursement at a private school of their choosing (Bettinger v. New York City Bd. of Educ., 2007 WL 4208560 at *7, *9 [S.D.N.Y. Nov. 20, 2007]; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 06-025; Application of the Bd. of Educ., Appeal No. 05-116; Application of a Child with A Disability, Appeal No. 05-075; Application of the Bd. of Educ., Appeal No. 96-9).

Here, the hearing record shows that in March 2007, the OU BOCES social worker contacted petitioner to schedule an intake interview, but was informed by petitioner that the student was unavailable because she had been placed in a residential facility (Tr. p. 848; Joint Ex. 34). Failure to make a student available for an evaluation may be a basis for denial of reimbursement (20 U.S.C. § 1412[a][10][C][iii]; Bettinger, 2007 WL 4208560). Here, however, petitioner and the OU BOCES social worker agreed to schedule an appointment to visit the OU BOCES program closer to the student's completion of the Bromley Brook program (Tr. p. 863; Joint Ex. 34). The hearing record does not show that the social worker subsequently contacted petitioner again to schedule an intake interview prior to the start of the 2007-08 school year. The OU BOCES social worker testified that at the time she contacted petitioner, OU BOCES "didn't have a placement because we had no room" (Tr. pp. 849-50). Therefore, if the OU BOCES program had been found to be appropriate for the student as the result of an intake evaluation, the student's placement there was not a viable option at the time of the initial contact.

With respect to the issue of petitioner's cooperation, respondent's director of pupil personnel services testified that petitioner had attended all of the CSE meetings (Tr. p. 1084; Joint Ex. 4 at p. 5). I also note that petitioner testified that after the June 2007 CSE subcommittee meeting she contacted the OU BOCES social worker to "…cover my bases," and to determine "[w]here am I supposed to be, what day, who am I supposed to say something to?" (Tr. pp. 844-45, 982).

Under the circumstances, I agree with the impartial hearing officer that petitioner should not be denied tuition reimbursement for the 2006-07 school year on the basis that she deliberately withheld her daughter from an intake interview and impeded respondent's ability to offer her daughter a FAPE (IHO Decision at pp. 11-12; see M.V. v. Shenendehowa Cent. Sch. Dist., 2008

Respondent further alleges that petitioner failed to give appropriate notice that she was unilaterally placing her daughter in Bromley Brook. Respondent alleges that petitioner notified it of the student's removal from public school on March 26, 2007. A review of the hearing record supports the conclusion that petitioner's March 26, 2007 notice to respondent's CSE of the student's unilateral placement did not occur prior to removal of the student from public school (Tr. pp. 255, 1013; Joint Exs. 6; 103); therefore, respondent was not given proper ten day notice of the removal. The record shows that respondent's director of pupil services testified that if she received timely notice of a unilateral placement at public expense she would have contacted petitioner convened another CSE meeting to allow everyone to review the program offered and attempt to come to a resolution, but that by the time she received notice the student was already privately placed (Tr. p. 1099). Accordingly, I find that equitable considerations do not weigh in favor of full reimbursement for petitioner. Given the circumstances of this case, I will reduce tuition reimbursement for a portion of what petitioner seeks. I will modify the impartial hearing officer's order to the extent that respondent will only be responsible to provide tuition reimbursement and reasonable transportation costs to and from Bromley Brook for the 2006-07 school year from March 26, 2007 until the end of the 2006-07 school year (see Application of the Dep't of Educ., Appeal No. 07-115).[4]

Turning to the 2007-08 school year, I will first address the appropriateness of respondent's August 29, 2007 IEP. Respondent's CSE subcommittee initially convened on June 11, 2007 for the student's annual review and reviewed the student's social history, medical report, report cards, psychoeducational evaluation report, private psychological evaluation report, private psychiatric evaluation report, and March through May reports from Bromley Brook (Tr. p. 679; Joint Exs. 5 at p. 9; 12 at p. 1). The CSE subcommittee reconvened on August 29, 2007 and in addition to the above, reviewed and discussed the student's June through August Bromley Brook progress reports and the January 2007 letter from the student's private social worker (Tr. p. 678; Dist. Ex. 2 at p. 3). The August 29, 2007 CSE subcommittee recommended that the student be placed in a ten month 6:1+1 OU BOCES special class high school program and receive individual counseling two times per week and group counseling one time per week (Tr. pp. 767-68; Joint Ex. 104A at p. 1).

[4] Bromley Brook uses a four-day academic week and a trimester system whereby students are required to complete 12 months of coursework to gain a full class credit (Tr. pp. 307, 313). Therefore, the focus of the trimester that includes summer is to provide the students with core material instruction rather than to prevent skill regression (Tr. p. 307). As such, the trimester that includes summer 2007 is included in tuition reimbursement for the 2006-07 school year.

The BOCES principal of the proposed program provided a description of his program to the August 2007 CSE subcommittee (Tr. pp. 755, 800-01).

The OU BOCES high school has 24 6:1+1 classes and approximately 161 students (Tr. p. 806). A staff of approximately 80 is comprised of teachers, teacher's aides, counselors, crisis counselors, related service providers and medical service providers; this results in a two student to one staff ratio (Tr. pp. 806-07). The program has a consulting psychiatrist on staff and a psychiatrist from the local pediatric psychiatric center that conducts medication reviews with students and parents (Tr. pp. 801-02). To meet the students' medical needs, there is a full-time nursing staff and nursing office that is available to students throughout the day (Tr. p. 807).

The recommended OU BOCES program has seven social workers who conduct 40-minute individual and group counseling sessions according to students' IEPs (Tr. pp. 808-09). The social workers keep contact logs regarding their students and represent students at CSE meetings or at community organizations to which students may be referred (Tr. pp. 814-15). The high school has two crisis rooms that are composed of a teacher, a social worker and "two pair of educators" to assist students in crisis and help them get "back on track" (Tr. p. 807). If a student requires more intensive intervention, the student's counselor becomes involved and ultimately the school administration, if necessary (Tr. p. 808). The OU BOCES principal testified that the student's social-emotional needs would be discussed in counseling and during crisis intervention (Tr. pp. 815, 825-26).

The OU BOCES school day consists of seven periods and attendance is taken every period (Tr. pp. 810, 813). The office and crisis rooms are notified when a student is missing from a class (Tr. p. 813). Staff members walk hallways and other areas until the student is located (Tr. pp. 813-14). The principal testified that it is the staff's responsibility to account for students from the time that they arrive at school until they leave at 2:30 pm (Tr. p. 814). Students attend homeroom twice per day and OU BOCES staff use morning homeroom in part to "get a feel for students for that particular day" (Tr. p. 810). Depending on the needs of the student, the student is referred for counseling or to medical staff (id.).

The OU BOCES principal testified that he based his decision that his program was appropriate for the student on the materials he received from respondent and that the student seemed to fit the profile of other students in his program (Tr. pp. 768-69). He testified that although he was not aware at the August 2007 CSE subcommittee meeting that Bromley Brook did not recommend that the student leave its program, he bases his decision to accept students primarily on the materials OU BOCES receives (Tr. pp. 829-31).

Respondent's school psychologist stated that based on the information presented at the August 2007 CSE subcommittee meeting the proposed OU BOCES placement adequately met the student's needs (Tr. pp. 907-08). However, the hearing record reflects that respondent's CSE subcommittee, with the exception of the June, July and August Bromley Brook progress reports, reviewed no new evaluative data at the time of the August 2007 CSE meeting and there is no indication that the student's needs had changed since her admission to Bromley Brook in February 2007 (Tr. p. 678; Dist. Ex. 2 at p. 3). I note also that the Bromley Brook progress reports indicated that the student's behavioral difficulties (stealing, dishonesty and manipulation) and tendency to make poor choices continued through August 2007 (Joint Ex. 26 at pp. 4, 9, 12). The Bromley

Brook admissions director stated that Bromley Brook met the student's needs outlined in the February 2007 private psychiatrist's report and the May 2006 private psychologist's report, including the need for medication monitoring, treatment, and structure that addressed her problematic behaviors (Tr. pp. 257-58). The admissions director opined that the student's needs were "in excess of what would reasonably be provided on an outpatient and day treatment basis" and stated that the student needed the level of support provided at Bromley Brook (Tr. pp. 259, 278-79). In addition, the student's Bromley Brook social worker stated that the student's behavior was consistent with the behavior described in the private social worker's January 2007 letter (Tr. pp. 402-03).

Based on the above, I agree with the impartial hearing officer's finding that the evaluative data, documentation and testimony did not support respondent's decision to recommend a day treatment program for the student for the 2007-08 school year (IHO Decision at pp. 24-25). Prior to the August 2007 CSE subcommittee meeting, respondent could have requested that the CSE conduct its own social-emotional assessment of the student, but instead chose to rely on the results of social-emotional evaluations conducted by the private psychologist and private psychologist (Tr. pp. 924-25, 934-35). Those results culminated in recommendations of a residential placement for the student, which was also recommended by the private social worker who had worked with the student and her family since 2004 (Tr. pp. 4-5; Parent Ex. 1). I also agree with the impartial hearing officer that respondent did not offer evaluative or documentary evidence to refute the residential placement recommendation made by these three private professionals and Bromley Brook staff (IHO Decision at p. 25). Moreover, testimony from the BOCES principal does not support respondent's claim that a seat was available for the student at the beginning of the school year (Tr. pp. 775, 781, 820-21, 839-41; Dist. Ex. 1).

With respect to the appropriateness of the student's unilateral placement at Bromley Brook for the 2007-08 school year, I agree with the impartial hearing officer and find that Bromley Brook remains an appropriate placement for the 2007-08 school year (IHO Decision at p. 14; see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B., 103 F.3d 1114 at 1121-22; Application of the Bd. of Educ., Appeal No. 05-081). [5]

Turning to Prong 3 for the 2007-08 school year, the record does not reflect that between respondent's August 9, 2007 notification of the student's conditional acceptance to the OU BOCES program (Dist. Ex. 1) and the August 29, 2007 CSE subcommittee meeting, that either respondent or the OU BOCES program attempted to schedule an intake interview with petitioner and the student. Additionally, after recommending the OU BOCES program at the August 29, 2007 CSE subcommittee meeting, there is no evidence in the record that respondent attempted to schedule an intake for the student prior to September 5, 2007, the start date of the 2007-08 IEP. In light of this, respondent could not officially offer the student the BOCES program, because her acceptance to the program was conditional (Tr. pp. 839-41; Dist. Ex. 1). Based upon the information before me, I do not find that petitioner did not cooperate with the CSE subcommittee or that she engaged in conduct that precluded the development of an appropriate IEP for the 2007-08 school year.

[5] As noted with respect to the 2006-07 award of tuition reimbursement, the trimester that includes summer 2008 is included in tuition reimbursement for the 2007-08 school year.

Therefore, I also do not disturb the impartial hearing officer's determination that petitioner cooperated with respondent's CSE in the evaluation process (IHO Decision at p. 14). I find that equitable considerations weigh in favor of petitioner and award for the 2007-08 school year (Application of a Child with a Disability, Appeal No. 07-075).

Regarding petitioner's request for reimbursement of private evaluations, I note that the impartial hearing officer did not rule on this request, nor was the hearing record sufficiently developed to make a determination on these claims. Therefore, I will remand the issue of reimbursement for private evaluations back to the impartial hearing for record development and issuance of a decision.

With respect to petitioner's request for reimbursement for out of pocket and other costs related to her impartial hearing (i.e. mileage and meals for her advocate, fees related to testimony by her witnesses, lost wages, and administrative supplies) I decline to award such costs. The IDEA does not provide for compensatory damages (see Polera v. Bd. of Educ., 288 F.3d 478 [2d Cir. 2002]).

The impartial hearing officer is reminded that, in the State of New York, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief for appeals commenced prior to October 14, 2007 (Schaffer, 546 U.S. at 59-62; Educ. Law § 4404 [1][c], as amended by Ch. 583 of the Laws of 2007).[6] Despite the impartial hearing officer's misallocation of the burden of proof, I find that it amounts to harmless error because the evidence in the record amply supports my determination herein.

I have considered the parties' remaining contentions and I find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it awarded full tuition reimbursement and reasonable transportation to and from the Bromley Brook School for costs incurred for the 2006-07 school year; and

IT IS FURTHER ORDERED that respondent shall reimburse petitioner for the cost of her daughter's tuition at the Bromley Brook School and reasonable transportation to and from Bromley Brook for that part of the 2006-07 school year which commences on March 26, 2007 and extends through the end of summer 2007, upon proper proof of payment by petitioner; and

[6] On August 15, 2007, New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404 [1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced before the effective date of the amendment.

IT IS FURTHER ORDERED that this matter shall be remanded to the impartial hearing officer, who shall, unless the parties otherwise agree, convene an impartial hearing and determine whether petitioner shall be reimbursed the cost of the private evaluations; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the decision dated November 9, 2007 is not available to conduct a hearing within the next 30 days, a new impartial hearing officer shall be appointed.

Dated: **Albany, New York**
February 4, 2008

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PAUL F. KELLY
STATE REVIEW OFFICER