



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-067

Application of the BOARD OF EDUCATION OF THE LAKELAND CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Garrett L. Silveira, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which determined that it failed to offer an appropriate educational program to the student and ordered it to reimburse respondents (the parents) for their daughter's tuition and costs at Wellspring Foundation for the 2007-08 school year. The appeal must be sustained in part.

At the time of the Committee on Special Education (CSE) meeting on March 28, 2008, the student was attending Wellspring Foundation, an out-of-State residential treatment facility and therapeutic school (Tr. pp. 420-21; Dist. Ex. 12 at p. 4). The Commissioner of Education has not approved Wellspring Foundation as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). On March 28, 2008, the CSE initially determined that the student was eligible for special education and related services as a student with an emotional disability (Dist. Ex. 12 at p. 1). The student's eligibility for special education services as a student with an emotional disability is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

The student's intellectual ability is described as average with "significant variability" in cognitive functioning (Dist Ex. 13 at p. 10). The variability is reportedly due to weakness in the ability to organize and integrate visual/spatial material, as well as impairment in executive functions involving cognitively flexibility, effective problem solving, planning, and attention (id.). During the 2007-08 school year, the student was scheduled to attend twelfth grade at one of the district's high schools (Dist. Ex. 12 at pp. 1, 4). The student's history includes several psychiatric hospitalizations which intermittently occurred between April 2007 and August 2007 before

attending Wellspring Foundation (Dist. Exs. 1 at p. 3, 3; Parent Ex. G at p. 4). The student was admitted to Wellspring Foundation on August 20, 2007 and her comprehensive treatment plan identified "[m]oderate to severe depression and anxiety leading to suicidal ideation, and social and academic impairment" as needs to be addressed (Parent Ex. M at p. 3). At Wellspring Foundation, the student received psychiatric care, individual psychotherapy three times per week, group therapy, and a high school educational program (Tr. pp. 419-20; Dist. Ex. 14 at p. 4).

A January 29, 2008 district social history report reflected that before the events that led up to the student's admission to Wellspring Foundation, the student was a "hard working, high achieving student, taking challenging courses" and participating in extracurricular activities (Dist. Ex. 14 at p. 5). Between fall 2005 and spring 2006 of the student's sophomore year in a district high school, the student saw a private psychotherapist for six months (Tr. pp. 366-67; Dist. Ex. 14 at p. 3). In September 2006 when the student was a junior in high school, the student reentered psychotherapy with a psychiatrist who determined that the student met the criteria for diagnoses of major depression and anxiety (Dist. Ex. 14 at p. 3). By December 2006, the student received individual therapy one time per week and took medication (id.). She also began seeing a neurologist for biofeedback training (id.).

The January 29, 2008 social history report, completed by the district, also indicated that in spring 2007, the student began expressing severe anxiety regarding preparation for advanced placement (AP) examinations (Dist. Ex. 14 at p. 3). The social history report reflected that in March 2007 the student had a "meltdown" and expressed suicidal thoughts (id.). The social history report indicated that the student was hospitalized at a psychiatric hospital in April 2007, where she remained as an inpatient for three weeks (id.). For two weeks after that, the student remained in the hospital's adolescent day treatment program (id.). Following her May 7, 2007 discharge from the hospital, the student returned to the district's high school for five days, but was unable to manage emotionally in the high school environment as she exhibited "uncontrollable anxiety" (Dist. Exs. 14 at p. 3; 16 at pp. 1-4). Within a period of one week, the student visited the emergency rooms of local hospitals for symptoms of severe stress related to her reported feelings about upcoming academic examinations (Dist. Ex. 14 at pp. 3-4). The district subsequently provided the student with home instruction (id. at p. 4).

In July 2007, the student exhibited symptoms of being at serious risk for suicide and was hospitalized for two weeks at a different psychiatric hospital (Dist. Ex. 14 at p. 4). Subsequent to the inpatient stay, she attended the hospital's outpatient day program for three days (id.). Within a short period of time, the student's suicidal impulses returned and she reentered inpatient care at the same psychiatric hospital (id.). The student's pharmacological treatment again changed and her clinical team recommended that she receive treatment in a long-term care facility (id.).

In an August 15, 2007 e-mail to the student's high school guidance counselor, the parents advised that the student would begin a treatment program at Wellspring Foundation and would not be starting the school year (2007-08) at the district high school (Tr. pp. 384-85; Parent Ex. G at p. 4).¹ The e-mail provided a synopsis of the student's hospitalizations and indicated that she needed

¹ The impartial hearing officer's decision indicates that Parent Exs. A-G were duplicative of some of the district's evidence and were not admitted to the hearing record by mutual consent of the parties' counsel (IHO Decision at p. 16). I note; however, regarding Parent Ex. G, that it is not entirely duplicative and accordingly will be cited where relevant as it was provided as part of the record on appeal.

a therapeutic environment to "help her improve enough so that she can get on with her life, academically and otherwise" (Parent Ex. G at p. 4). The e-mail also noted that the student would take classes at Wellspring Foundation's school and that it was the parents' understanding that the student would still be a district high school student; that Wellspring would work with her district to ensure that the student took the courses she needed to graduate in spring 2008; and that the student's high school diploma would come from the district (*id.*). Furthermore, the e-mail indicated that although the parents did not know if it was possible, they hoped the student's placement at Wellspring Foundation would be short-lived so that the student would be able to return to the district during the 2007-08 school year (*id.*). The parents indicated that Wellspring Foundation would contact the district regarding paperwork and/or meetings to implement the program that the parents had described, and asked that they be notified of anything the district needed them to do in the interim (*id.*). The parents also notified the guidance counselor that the student would not be taking State Regents examinations and they requested that the guidance counselor "alert whoever need[ed] to know this" (*id.*).

The hearing record includes a signed contract dated August 20, 2007, indicating in part that the student was voluntarily seeking treatment at Wellspring Foundation and that the parents were the financially responsible parties for the student's placement there, as well as diagnostic/intake information, and a comprehensive assessment initial treatment plan conducted at Wellspring Foundation, also dated August 20, 2007 (Parent Exs. K; L; M; S at pp. 1-12; T). An August 21, 2007 psychiatric evaluation conducted at Wellspring indicated that the student had a history that included suicidal gestures and ideation (Parent Ex. I at p. 2). The evaluating psychiatrist offered Axis I diagnoses of "Generalized Anxiety Disorder R/O PTSD" and "Major Depressive Disorder, Moderate, non-psychotic R/O Cycling Disorder" as well as an Axis III diagnosis of mild cerebral palsy and "H/O Dystonic Reaction to second generation antipsychotic," and an Axis IV diagnosis of "Academic pressure" (*id.*).² Recommendations included admitting the student to Wellspring Foundation for a full range of services as she was "in need of this level of care," as well as suggestions regarding medications (*id.* at p. 3).

The hearing record reflects that in response to the above referenced e-mail from the parents, the guidance counselor called the parents on August 27, 2007 and informed them that they needed to call the district supervisor of special education (Tr. pp. 384-85). The hearing record indicates that the parents called the district and left a message for the supervisor of special education at the student's district high school on August 27, 2007, the same day that they wrote a letter to the supervisor requesting a special education evaluation for the student on the grounds that the student was "emotionally incapable" of attending public school at that time (Tr. p. 386; Dist. Ex. 3). The August 27, 2007 letter indicated that the student was scheduled to attend a district high school, but was attending Wellspring Foundation and that the student suffered severe emotional problems that "greatly hindered" her ability to perform in school and caused her to attempt suicide twice, resulting in three psychiatric hospital stays for treatment of severe depression (Dist. Ex. 3).

An initial discharge plan dated September 3, 2007 was completed at Wellspring Foundation following completion of the comprehensive initial treatment plan discussed above (Parent Ex. N at p. 1). The discharge plan indicated that it was anticipated that upon discharge the student would return to her parents' home (*id.*). It was also anticipated that the student would need some sort of

² Although not defined in the hearing record, it is presumed that "R/O" means "rule out."

intensive outpatient therapy, the level of which would be determined closer to discharge (id.). The discharge plan further noted that it was not determined which school the student would attend upon discharge (id.).

The hearing record reflects that the parents met with the district's director of pupil personnel services and the director of special education services on or about September 17, 2007 (Tr. pp. 387-88). The hearing record further reflects that the parents were told at the meeting that, as a result of the student's attendance at a facility outside of the State, the district no longer had responsibility for the student; that the parents should contact the district of location of Wellspring Foundation to be evaluated for eligibility for special education; and that the district would help the parents contact the out-of-State district so that it could "take over [the student's] educational needs" (Tr. pp. 49-50, 110-112, 387-88).

A September 20, 2007 treatment plan "Review No. 1" conducted at Wellspring Foundation indicated that having had time to adjust, the student had begun to explore the "dynamics that have lead to the recent diagnoses of Major Depression and Generalized Anxiety" (Parent Ex. O at p. 1). The treatment plan indicated that the student seemed unable to accept the physical limitations of her cerebral palsy and suffered with frequent bouts of severe depression and anxiety that lead to isolation from others, avoidance of certain responsibilities, forgetfulness and disorientation, and suicidal ideation with no intent or plan (id.). The student's ability to function at an age-appropriate level during these episodes was described as "very much impaired" (id.). The treatment plan also noted that the student's excessive fears of failure and sense of inadequacy hindered her academic performance and participation in extra-curricular activities (id.).

In an October 5, 2007 letter to the district director of pupil personnel services, the parents again requested that the district proceed with a special education evaluation of the student on the grounds that she was "emotionally incapable" of attending public school (Dist. Ex. 4 at pp. 1-2). The letter reflected that the parents disagreed with the interpretation by the director of pupil personnel services as to whether the student's district of residence was legally responsible for the student's special education evaluation (id. at p. 1). The parents further indicated in the letter that the student was not a "parentally-placed private school student," but rather had been "unilaterally placed" pursuant to "34 C.F.R. § 300.148" (id.). The October 5, 2007 letter is the first written notice in the hearing record establishing that the student's parental private placement was a result of a free appropriate public education (FAPE) being at issue and was a "unilateral placement."

In an October 11, 2007 written response to the parents' October 5, 2007 letter, the director of pupil personnel services indicated that, although the law provided that the district of location had "responsibility for child find activities," the district was prepared to evaluate the student's eligibility for special education services if the student was made available within the district, but the district was not prepared to travel out-of-State to perform evaluations (Dist. Ex. 5 at pp. 1-2).³ The letter invited the parents to contact the director's office to make arrangements for such evaluation of the student and to have the necessary consent form sent to them (id. at p. 2).

³ The United States Department of Education's Office of Special Education Programs (USDOE) has opined that under child find duties, a district that is responsible for offering a student a FAPE must not decline a parent's request to conduct an eligibility evaluation of the student even if the student is attending a private school located in another district (Letter to Eig, 52 IDELR 136 [OSEP 2009]).

An October 20, 2007 treatment plan "Review No. 2" was conducted at Wellspring Foundation (Parent Ex. O at p. 2). The treatment plan indicated that since the last review there had been a decrease in the student's depressive affect, but that her constant state of anxiety was quite severe (id.). The treatment plan indicated that the student was often inundated with self-imposed, paranoiac-like ideations that interfered with her ability to maintain healthy relationships (id.). The treatment plan described the student as tending to obsess about minute details of interactions with others, a tendency that led to "debilitating anxiety" and interfered with her academic functioning, engagement in social activities, and overall routine (id.).

In an October 26, 2007 letter to the district, the parents submitted three discharge notes regarding psychiatric hospitalizations, two emergency room reports, and a statement from the student's psychiatrist who treated her until she began attending Wellspring Foundation in August 2007 (Dist. Ex. 6 at p. 1). The parents also indicated in the letter that they had arranged for a psychiatrist to conduct a psychoeducational evaluation of the student and they would forward the evaluation report to the district upon completion (id.). In addition, the letter stated that the parents understood from their "advisers and lawyers" that the student was not required to come to a designated school within the district for evaluations, and that the documents the parents submitted to the district should provide the district with sufficient information to determine the student's eligibility for special education services (id. at pp. 1-2). Furthermore, the letter noted that the district was "more than welcome" to see the student at Wellspring Foundation, as the parents reported they were advised by Wellspring Foundation that removing the student for an evaluation at that point in time would not be in the student's best interests (id. at p. 2). The parents indicated in the letter that the student needed "round-the-clock therapy for severe depression and anxiety" (id.). They also noted that the credits the student earned at the "school attached to Wellspring" would allow the student to obtain a diploma from the district high school that she had previously attended (id.).

In a November 14, 2007 letter to the director of pupil personnel services, the parents informed the district that the student's psychoeducational evaluation that they had previously indicated they would send to the district for consideration, had been delayed twice because the student's depression had "worsened dramatically in recent weeks," and she had been on a "suicide watch" at Wellspring Foundation for approximately two weeks (Dist. Ex. 7). The parents indicated that the student's therapists at Wellspring Foundation felt that the student was unable to handle the stress of a lengthy evaluation at that time (id.). The parents indicated that they would forward the evaluation report upon completion and provided the name of the student's primary therapist, should the district require verification of the information provided (id.). The parents also indicated their belief that the district had enough information to determine the student's eligibility for special education services without the psychoeducational evaluation and they urged the district to move forward in the process without the evaluation (id.).

A November 20, 2007 treatment plan "Review No. 3" was conducted at Wellspring Foundation (Parent Ex. O at p. 3). The treatment plan indicated that since the last review the student had experienced a moderate to severe depressive episode with suicidal ideation and intent, and was placed on "Constant Observation," whereby weekend passes were suspended until her condition was stabilized (id.). The treatment plan noted that it was determined that the student needed continual use of medication to help mediate suicidal thoughts and feelings of hopelessness (id.). It was reported that after a medication change occurred there was considerable improvement in the student's mood (id.).

In a December 3, 2007 letter from the district written in response to the parents' recent correspondence, the director of pupil personnel services indicated that the district retained the "legal right and responsibility" to complete its own evaluations as appropriate (Dist. Ex. 8 at p. 1). The letter also noted; however, that there had been instances where the district accepted evaluations provided by parents and considered those evaluations appropriate for the CSE to make informed decisions and appropriate recommendations for students referred to it (id.). The letter informed the parents that it would be necessary for one or both parents to meet with a district social worker at its high school to complete a social history (id.). A consent to evaluate form for the parents to sign was enclosed with the letter which indicated that upon the district's receipt of the signed consent form, a meeting would be scheduled with the district's social worker to conduct the mandated social history component of the initial evaluation (id.). In the letter, the district also advised the parent that a copy of the student's most recent physical examination was needed (id.). In response, a December 12, 2007 letter from the parents to the director of pupil personnel services indicated that the student's psychoeducational testing was nearly completed and the evaluation report was anticipated to be available mid-January 2008 (Dist. Ex. 9). The parents agreed to complete a social history and indicated that they would send the district a copy of the student's most recent physical examination report.

A December 20, 2007 treatment plan "Review No. 5" was conducted at Wellspring Foundation (Parent Ex. O at p. 4). The treatment plan indicated that since the last review there was considerable progress in the student's mood, level of motivation, and engagement with others (id.). The student's affect was described as less volatile and severe regarding suicidal ideation, and she presented as less despairing and hopeless regarding her present and future potential (id.). Although the student displayed consistency in constructing weekly agendas that were previously avoided due to fear of failure and self-doubt, and she was more engaged with peers in clinical treatment groups, she continued to struggle with remaining related to and invested in others, and frequently questioned her own self-worth (id.). The treatment plan indicated that the student appeared to benefit from the consistency and built-in structure offered by the Wellspring Foundation residential program (id.).

On January 2, 2008 the parents signed a consent form for the student to receive a multidisciplinary evaluation "to gather information for [the student] to progress in school" (Dist. Ex. 10). The signed consent form indicated that the parents would provide psychological, educational, and physical evaluations to the district and that the district would conduct a social history, observation of the student, and if necessary, speech-language and occupational/physical therapy evaluations (id.).

A January 20, 2008 treatment plan "Review No. 5" was conducted at Wellspring Foundation (Parent Ex. O at p. 5). The treatment plan indicated that since the last review the student's affect and mood continued to fluctuate, and that her depression could be "quite extreme" in impairing daily functioning and adaptive abilities (id.).

A January 29, 2008 social history report indicated that the district's social worker completed a social history with the parents acting as informants (Dist. Ex. 14 at p. 1). The social history report indicated that the reason for referral to the CSE was that the parents were "concerned about the impact of [the student's] depression and anxiety on her learning" (id.). The social history included information about the student's previous interventions, family information,

developmental history, developmental milestones, early personality and temperament, significant health history, family health history, school history, and social development (id. at pp. 1-6).

An undated psychiatric update report written by the director of psychiatric services at Wellspring Foundation subsequent to the aforementioned August 21, 2007 psychiatric evaluation indicated that in addition to previously diagnosed conditions, the student's psychiatric diagnoses had been updated to include a borderline personality disorder (Parent Ex. J at p. 1). The psychiatric update report indicated that such a diagnosis was consistent with the student's age, a well-developed pattern of unstable/intense interpersonal relationships, poorly developed identity, and rapid mood fluctuations in response to perceived abandonment (id.). The report described the student as a "people pleaser" who was very anxious about pleasing others, about performing well, and "about most everything" (id.). The report indicated that the student's need to form an independent identity whereby she was capable of asserting her needs was a long-term challenge for her continued psychological growth (id.).

A letter dated February 1, 2008 to the director of pupil personnel services indicated that the parents provided the district with a psychoeducational evaluation and the student's last physical exam (Dist. Ex. 11). The parents also indicated that they completed the social history on January 25, 2008 with the district social worker (id.). They requested that the district let them know if anything else was needed (id.).

A private psychoeducational evaluation report indicated that the student was evaluated over a period of three days in December 2007 (Dist. Ex. 13).⁴ The report indicated that the administration of a battery of tests occurred (id. at p. 1). Administration of the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) yielded a verbal IQ score of 100, a performance IQ score of 92, and a full scale IQ score of 97 (id. at p. 3). Overall, the student was described as functioning in the average range across verbal and nonverbal tasks, processing auditory and visual material with equal facility in the average range (id. at pp. 3, 10). However, the evaluation report indicated that the student demonstrated difficulty in her ability to organize and integrate visual/spatial material (id. at p. 10). Weakness and impairment was noted in selected executive functions, particularly in the student's ability to remain cognitively flexible and to problem solve effectively (id.). Difficulty was noted with planning and attention (id.). The evaluator described the student's abilities and skills as "solid," but indicated that advanced placement classes may be beyond her capacities and may be too demanding for her (id. at p. 11). The evaluator indicated that the student's profile was consistent with a diagnosis of a learning disability, not otherwise specified (NOS) (id. at p. 10). Additional evaluative findings were consistent with diagnoses of a post-traumatic stress disorder and a major depressive disorder (id.).

The evaluator also indicated that the student was in an emotionally fragile state and that test findings revealed her to be "unable to free herself of depressive preoccupation, except within the confines of a more structured environment, and even then she is prone to lapse into depressive and suicidal thinking" (Dist. Ex. 13 at p. 10). The evaluation report indicated that an outpatient approach was "untenable" for the student (id.). The evaluation report further noted that "distinct cognitive impairments" exacerbated the student's ability to problem solve effectively (id. at p. 11).

⁴The psychoeducational evaluation report indicated that the evaluation occurred in December 2008 (Dist. Ex. 13 at p. 1). The hearing record reflects that 2008 was a typographical error and the correct year was 2007 (Tr. p. 8).

The evaluation report indicated that it was essential for the student to remain in a structured therapeutic environment which required the student to make fewer independent decisions while providing guidance and support, as well as external structures "to supplant what is lacking neurologically" (id.).

The evaluator recommended a highly structured classroom environment which provided organization and guidance through the learning process, and specifically addressed the student's greatest area of weakness by providing her with a plan for completing a task and/or assistance in developing such a plan herself (Dist. Ex. 13 at pp. 11-12). He recommended that the classroom environment should foster a sense of community that valued the student's learning needs over the completion of class content (id. at p. 12). Additional recommendations were for a learning specialist to assist the student in the development of study skills, a teacher assistant to guide the student toward the completion of work and problem solving, and an active and experiential approach to learning (id.).

A February 20, 2008 comprehensive individual treatment plan (CITP) "No. 6" from Wellspring Foundation indicated that since the last review the student reported improved mood, increased motivation, less anxiety, and feelings of hopefulness about the future (Parent Ex. P at p. 1). The CITP indicated that the student still focused on management of volatile affect and overwhelming feeling states (id.). It was further noted that despite her progress, the student struggled with self-deprecating thoughts and impulsivity (id.). The CITP reported that the student needed to address her tendency to inflict self-harm when feeling overwhelmed, emotionally reactive, and out of control (id.). To address her needs, the student participated in ten therapeutic sessions per week that included individual, family, and interactive sessions, expressive group, women's group, resident empowerment, and a weekly community meeting (id. at pp. 2-4). The CITP included information regarding an anticipated discharge date of June 20, 2008, and indicated that the student would require "intensive" outpatient therapy when discharged and that she would graduate from high school in June 2008 (id. at p. 5).

By letter dated March 3, 2008 to the district's director of pupil personnel services, the parents indicated that more than a month had passed since providing the district with documentation of the student's psychoeducational evaluation and physical examination, and that the parents had met with the district social worker (Parent Ex. G at p. 12). The parents noted that they had not received any communication from the director of pupil personnel services and they requested information as to when the CSE would meet regarding the student (id.).

By letter dated March 4, 2008, the district notified and invited the parents to attend a CSE meeting scheduled for March 28, 2008 regarding the student, for the purpose of an initial eligibility determination (Dist. Ex. 18). The letter included the names of expected participants, as well as procedural information for the parents (id.).

By letter dated March 12, 2008, the parents notified the district that they did not want an additional parent member or a physician to attend the upcoming CSE meeting (Dist. Ex. 19).

On March 28, 2008, the CSE convened for an initial eligibility determination meeting (Dist. Ex. 12 at p. 1). Attendees included the parents, the district director of special education, a school psychologist, a special education teacher, a regular education teacher, the student's guidance counselor from the district, the student's special education advocate, and by telephone from

Wellspring Foundation, the assistant director of education, a social worker, a special education teacher, and a science teacher (Dist. Exs. 12 at p. 4; 20). The CSE determined that the student was eligible for special education programs and services as a student with an emotional disability due to her significant emotional needs (Dist. Ex. 12 at pp. 1, 4). The resultant individualized education program (IEP) indicated that the CSE based its recommendations upon the January 2008 social history, the December 2007 psychoeducational assessment, the August 2007 physical examination, and the May 2007 discharge summary (*id.* at p. 4; *see* Dist. Exs. 13; 14; 16; 17).⁵ The comments section of the IEP described the student's presenting problem as "suicidal ideation with the need for 24 hour a day supervision" (Dist. Ex. 12 at p. 4). The CSE recommended that upon discharge from Wellspring, the student attend the district's day program at its high school that the student had previously attended (*id.*).⁶ The CSE also recommended that the student attend special education 12:1+1 classes five times per week for 44 minutes each in English, math, science, social studies, and skills (*id.* at p. 1). Recommendations for related services were for group counseling (5:1) one time per week in the special education setting for 30 minutes, and individual counseling also in the special education setting for 30 minutes (*id.*). Recommended program modifications were to break tasks down into discrete parts and sequence and prioritize long-term assignments (*id.* at pp. 1-2). Recommended testing accommodations were breaks during testing, check for understanding, and location with minimal distractions (*id.* at p. 2). In addition, the CSE recommended that the student participate in general education physical education and that she not be exempt from the language other than English requirement (*id.*).

In a letter dated May 1, 2008 to the director of pupil personnel services, the parents indicated that they visited the day program recommended by the CSE and they were rejecting it (Parent Ex. G at p. 15). The parents noted that the recommended program was not appropriate for the student because she had suicidal ideations and she needed "round-the-clock therapeutic care, 24/7," per recommendations made by her psychiatrists and therapists (*id.*). The parents stated that the program recommended by the CSE did not provide the round-the-clock care that the student needed (*id.*).

A May 20, 2008 CITP "No. 7" from Wellspring Foundation indicated that despite several bouts of severe depression, the student continued to work toward various treatment goals, and it was "critical" that she learn to detect early warning signs of depression (Parent Ex. Q at p. 1). The CITP also indicated that the student was expected to manage her moods and use effective strategies (i.e. regular exercise, proper nutrition, journaling, formation of a social/support network, hobbies) to decrease the intensity of her depression (*id.*). The CITP indicated that the student would graduate from high school in June 2008, but it was unknown at the time which school the student would attend upon discharge from Wellspring Foundation (*id.* at p. 6).

⁵ The impartial hearing officer indicated in his decision that although the March 2008 IEP did not list multiple psychiatric hospital discharge reports, emergency room reports and a statement from the student's psychiatrist, the parents had submitted these documents to the district as an attachment to the November 26, 2007 letter (IHO Decision at p. 8; *see* Dist. Ex. 6 at p. 1).

⁶ The hearing record reflects that the program at the district's high school is a day program (Tr. pp. 172, 537). Testimony by the district's director of special education indicated that the day program was recommended for whenever the student returned to the district and that the program was "ready to go "the minute the [student] walked in the door" (Tr. p. 539).

By letter dated May 21, 2008, the director of pupil personnel services notified the parents that the district's Board of Education had met on May 20, 2008 and supported the recommendations of the March 28, 2008 CSE regarding the student (Parent Ex. G at p. 16). The letter indicated that the parents had already received those recommendations (id.).

The hearing record reflects that sometime before her discharge from Wellspring Foundation on June 17, 2008, the student graduated from high school and received a State Regents diploma as a result of completing her work when she had attended school in the district, taking Regents examinations, and completing her work at Wellspring Foundation (Tr. p. 413; Parent Ex. R at p. 1). A June 18, 2008 academic progress report indicated that the student received eight credits and the following final grades at Wellspring Foundation: English (94), pre-calculus (80), civics (94), physics (84), contemporary issues (93), expressive art (94), and physical education (91) (Parent Ex. H). The student received a "P" (passing) in study skills, substance abuse education, and character development (id.). Depending on the course, teacher comments included "takes responsibility for learning," "difficulty focusing/concentrating," "shows interest and effort," "inconsistent effort," "improved progress," "improved effort," "works well independently," "takes pride in work," and "displays appropriate behavior" (id.).

By due process complaint notice dated June 26, 2008, the parents requested an impartial hearing (Dist. Ex. 1). The parents challenged the student's March 2008 IEP and alleged that the CSE failed to hold a timely review meeting to develop an IEP for the student; that the program recommended by the CSE was inappropriate for the student; that the CSE failed to offer extended school year (ESY) services for the student; that the CSE failed to properly develop the IEP at the March 28, 2008 meeting; that the goals were not developed or discussed with the parents; that the regular education CSE member was not familiar with the student and would not have been responsible for implementing the IEP; that there was no participant from the recommended program to determine if it was appropriate for the student; that the student required a 12-month residential placement in order to benefit from instruction; that the program chosen by the parents was appropriate for the student; that the parents had cooperated with the CSE; and that the parents were entitled to tuition reimbursement for their placement of the student at Wellspring for the days that she attended the program from July 1, 2007 through June 30, 2008 (id. at p. 3).

An impartial hearing convened on October 6, 2008. The hearing record reflects that the district made a motion to disallow issues in the impartial hearing which were not raised in the parents' due process complaint notice (see IHO Interim Order at p. 1). In an interim order dated December 22, 2008, the impartial hearing officer excluded from the impartial hearing any argument or evidence specifically related to "Child Find" violations (id.)⁷. The impartial hearing officer, however, declined to exclude from the impartial hearing argument or evidence related to the appropriateness of the IEP goals (id. at pp. 1-2). The impartial hearing officer found that the parents' due process complaint notice referenced the IEP goals by stating that they were not developed or discussed with the parents, that the issue was raised in conjunction with the assertion that the CSE failed to develop a proper IEP at the March 28, 2008 CSE meeting, and that such reference was "sufficient to call into question" the appropriateness of the goals to the district (id.).

⁷ See 20 USC § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; 8 NYCRR 200.2[a][7].

The impartial hearing concluded on February 9, 2009, after five days of testimony (Tr. p. 634). In a decision dated May 11, 2009, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2007-08 school year; that the parents' placement at Wellspring Foundation was appropriate; and that the equities favored the parents (IHO Decision at pp. 13-14). The impartial hearing officer noted that that "there were significant delays before the CSE convened on March 28, 2008 from the time of the August 27, 2007 request for evaluation," that the "delays were attributable to both parties" but that the district improperly failed to issue an IEP recommendation for a placement within 60 school days after the consent to evaluate the student was "signed on January 2, 2008 and received by the District on January 3, 2008" (*id.* at p. 6). He further noted that this delay did not automatically result in a denial of a FAPE but was indicative of the district's "failure to timely respond to a very seriously disabled child" (*id.*).

In addition, the impartial hearing officer found that the hearing record did not indicate that arrangements were made regarding CSE attendance in accordance with 8 NYCRR 200.4 (d)(4)(b) (IHO Decision at p. 6).⁸ The impartial hearing officer found that no reasonable educator could preclude the possibility of a residential placement as a result of the evaluations that were provided to the CSE and were the basis for the IEP (*id.*). The impartial hearing officer noted that in the "Other Options Considered" section of the IEP, there was no mention of a residential treatment program even though there was clear recommendation of such a program from all of the health professionals (*id.* at p. 8). The impartial hearing officer found that the district's failure to even consider such a program, along with the other deficiencies in the IEP, lead him to conclude that there was a failure to develop an IEP that contained a recommended program reasonably calculated to confer education benefits to the student (*id.* at pp. 8-9).

The impartial hearing officer further found that none of the goals in the IEP provided any support for the student's presenting problem identified in the IEP as "suicidal ideation with the need for 24 hour a day supervision" and that the goals did not address the identified severity of the student's depression and anxiety (IHO Decision at p. 8). The impartial hearing officer further found that, based on the testimony of various professionals who had evaluated the student, information contained in the IEP regarding the student's levels/abilities was wrong and that the testimony was clear that many of the student's major issues were directly related to school and school expectations (*id.*). In addition, the impartial hearing officer found that the student made meaningful academic progress at Wellspring Foundation and that under the equities analysis, the parents cooperated in every phase of the evaluation and CSE review and a delay in returning the consent to evaluate form did not reflect lack of cooperation by the parent (*id.* at pp. 12, 13). The impartial hearing officer also found that the notice provision of 20 U.S. C. § 1412(a)(10)(C)(iii) did not apply because there was no prior IEP or special education services offered to the student

⁸ I note that the impartial hearing officer cited this section of the State regulations as "200.4(b)" (IHO Decision at p. 6). The correct citation is 8 NYCRR 200.4(d)(4)(b), which requires, in part, that, where a student is at risk for a residential school placement, the committee must, with consent of the parent, request in writing that a designee of the appropriate county or State agency participate in any committee proceedings to make recommendations concerning the appropriateness of a residential placement, other programs and placement alternatives.

prior to the student's placement (id. at p. 5).⁹ Accordingly, the impartial hearing officer ordered that the district reimburse the parents for tuition and fees for the student's placement at Wellspring Foundation for the 2007-08 school year (id. at p. 14).

On appeal, the district contends that the impartial hearing officer erred in addressing issues in his decision that were not raised in the parents' due process complaint notice. First, the district contends that the impartial hearing officer erred in allowing the parents to raise the issue of the appropriateness of the student's goals at the impartial hearing. In support of its argument, the district asserts that the parents' due process complaint notice only raised the procedural issue of whether the student's IEP goals were developed or discussed with the parents and did not assert any substantive claim regarding the appropriateness of the student's IEP goals. Second, the district contends that the issue as to whether the district's IEP properly identified the student's present levels/abilities or goals was not raised in the parents' due process complaint notice. Third, the district asserts that the impartial hearing officer improperly determined the district violated 8 NYCRR 200.4(d)(4)(b) and that such issue was not raised in the parent's due process complaint notice.

In addition, the district contends that the impartial hearing officer erred in determining that the district failed to conduct a CSE meeting within 60 school days from the parents' consent. In support of its argument, the district asserts that the regulatory time frame for the CSE to meet to determine the student's eligibility for special education services was rendered inapplicable once the parents refused to produce the student for the district's evaluation (see 34 CFR § 300.301[d][1]). The district further contends that the impartial hearing officer failed to hold the parents' responsible for the substantial delay in providing their private psychoeducational evaluation since the CSE could not render its determination of the student's eligibility for special education without such evaluation (see 8 NYCRR 200.4[b][1][ii]). The district further contends that the impartial hearing officer erred in determining that the district's IEP denied the student a FAPE because the student's IEP failed to provide a placement in a residential school and that the district's IEP properly afforded the student an appropriate placement in a therapeutic program consisting of small class sizes with the provision of counseling as a related service.

The district further alleges that the impartial hearing officer erred in determining that the parents' unilateral placement for the student in a residential school was appropriate. Specifically, the district asserts that there was no evidence in the hearing record, other than the student's mother's testimony, that the student required a residential placement to access her education. Lastly, the district asserts that the impartial hearing officer erred in finding that the equities favored the parents. In support of its position on the equities, the district asserts that the parents failed to cooperate with the district by placing the student in a residential placement prior to referring her to the district for evaluation and by refusing to have the district of location or the district of residence conduct the psychoeducational evaluation of the student. The district further asserts that the parents failed to provide the district with any notice that the parents were rejecting the district's IEP and were placing or retaining the student at a unilateral placement at public expense until the

⁹ Regarding the impartial hearing officer's finding that the notice provisions of 20 U.S. C. § 1412(a)(10)(C)(iii) do not apply to the facts of the instant case, I need not address this issue, but note that case law does not support his contention (see Forest Grove School District v. T.A., 129 S. Ct. 2484, 2496 (2009); see also S.W. v. New York City Dept. of Educ., 2009 WL 857549 (2009)).

parents filed their due process complaint notice. Alternatively, the district contends that the parents are entitled to an award of tuition reimbursement only from the date that the student was determined to be eligible for special education programs and services as a student with a disability at the March 28, 2008 CSE meeting.

In its answer, the parents raised two affirmative defenses: (1) that the district's petition was not properly verified by someone with direct knowledge of the facts, but rather by the district's counsel, and therefore all facts should be stricken; and (2) that the district's memorandum of law pled facts that were not numbered or verified and should be stricken. The parents further contend that the facts as pled gave the district notice that the appropriateness of the IEP goals was at issue; that the district did not meet its burden of proving that the IEP offered the student a FAPE; and that the facts as pled gave the district notice that the timing of the CSE meeting was at issue because the parents requested a CSE meeting on August 15, 2007 and one was not held until March 28, 2008. In addition, the parents assert that the CSE failed to consider a plan for the student until after she was discharged from Wellspring and failed to consider the student's educational needs at the time of the CSE meeting. The parents assert that Wellspring Foundation was appropriate for the student. With regard to the equities, the parents assert that any failure to provide notice to the district was excused by the exceptions to the notice requirement for "physical harm" and "serious emotional harm" (see 20 USC §§ 1412(a)(10)(C)(iv)(I)(cc), (II)(bb) and that they did not prevent the district from providing an appropriate residential placement to the student. The parents argue that the right to tuition reimbursement does not attach at the time the student is classified and that tuition reimbursement can be awarded for a time period prior to classification. Lastly, it is noted that the parents did not cross-appeal from the impartial hearing officer's exclusion of claims pertaining to alleged child find violations.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 USC §§ 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 USC § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 USC § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 USC § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 114 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 USC § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An individual evaluation of a student referred for special education services shall, absent certain exceptions, be completed and a CSE shall arrange for appropriate special education programs and services within 60 days of receipt of parental consent (8 NYCRR 200.4[b][1], 200.4[d]). An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

I find for the reasons set forth below that the March 28, 2008 IEP did not sufficiently address the student's educational needs and did not substantively offer the student a FAPE. I concur with the impartial hearing officer that both parties contributed to the delay up to the district's receipt of the parents signed consent to evaluate the student. I further find that because the hearing record supports a finding that the district's offered placement did not substantively offer the student a FAPE, I need not address whether the IEP present levels of performance and/or goals were adequate.

As noted above, the student's educational history includes depression, anxiety, and suicidal ideation and suicidal gestures that prevented her from attending a district high school in April, May, and June 2007 (Dist. Exs. 3; 14 at pp. 3-4; 16 at pp. 1-2; Parent Exs. G at p. 4; I at p. 2; M). The student's emotional difficulties and suicidal tendencies resulted in multiple psychiatric hospitalizations and visits to hospital emergency rooms, and her subsequent admission to Wellspring Foundation (id.). The CSE recommended a program for the student to be effective after the student's discharge from Wellspring Foundation (Tr. pp. 128-130; Dist. Ex. 12 at p. 4). I note that the student's March 28, 2008 IEP indicated that "Upon discharge from Wellspring, the student is recommended for the [day] program" (Dist. Ex. 12 at p. 4), and that the IEP further indicated that the projected start date for the student's IEP was April 7, 2008 (id. at p. 1), but there is no evidence in the hearing record indicating that the student was expected to be discharged as of April 7, 2008. Moreover, I note that although all of the evaluations and reports that were before the March CSE recommended a residential treatment program, the "other options considered" section of the IEP did not indicate that a residential program was considered (Tr. pp. 250-51, 312-131, 344-45; Dist. Ex. 12 at p. 5). Accordingly, I find that based on the evaluative data that the CSE had before it, the CSE failed to recommend an educational program that is reasonably calculated to confer educational benefits. I also find that the district's denial of a FAPE occurred at the time that the March 28, 2008 IEP was formulated. In reaching this determination, I find that the hearing record supports the impartial hearing officer's conclusion that both parties contributed to delays in convening the CSE meeting to determine the student's eligibility. I also find that it was not unreasonable for the district to wait for the completion of and submission to the CSE of the parents' psycho-educational evaluation of the student, after the district had acquiesced to the parents' decision to have the evaluation conducted privately.

Next, addressing the appropriateness of the parents' private school placement, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419. A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool

[d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement..." (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

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

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

I must now consider whether the parents have met their burden of proving the appropriateness of the student's placement at Wellspring. For the reasons set forth below, I agree with the impartial hearing officer's determination that the parents established that the program at Wellspring Foundation was appropriate for the student (IHO Decision at pp. 28-31).

The parents assert that the student needs the residential program. Conversely, the district asserts that the evidence adduced at the impartial hearing does not support the parent's contention that the student requires the restrictive residential placement in order to receive educational benefits. Thus, the central issue in dispute is whether the student required a residential setting in order to receive educational benefits from her program and whether the residential placement provided educational instruction that was specifically designed to meet the student's unique special education needs. A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122;

Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Bd. of Educ., Appeal No. 08-016; Application of a Child with a Disability, Appeal No. 06-138; Application of the Bd. of Educ., Appeal No. 05-081; Application of a Child with a Disability, Appeal No. 03-066; Application of a Child with a Disability, Appeal No. 03-062; Application of a Child with a Disability, Appeal No. 03-051). Although parents are not held as strictly as school districts to the standard of placement in the LRE, 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, 26-27 [1st Cir. 2002]).

Based on the evidence in the hearing record, I find for the reasons discussed below that the residential placement of the student at Wellspring Foundation constituted an appropriate placement for the student and addressed her needs in an integrated and consistent manner in the LRE. The psychotherapist from Wellspring Foundation who met the student on the day that she was admitted to the program, indicated that Wellspring Foundation was an appropriate educational and therapeutic environment for the student (Tr. p. 313). The psychotherapist testified that upon admission to Wellspring Foundation, the student presented with a high degree of anxiety, and was moderately to severely depressed, with suicidal ideation and gestures, cutting behaviors, and self-harming, self-injurious behaviors (Tr. pp. 291, 299). Also, it was difficult for the student to be amongst her peers (Tr. p. 294). Additional testimony by the psychotherapist indicated that the student's self-idea, self-image, and identity were very poor (Tr. p. 306). The psychotherapist described the student as demonstrating extreme rapid mood fluctuations based upon how she was feeling on a particular day (*id.*). She also reported that even when the student was meeting her goals, any time a new goal was set or the challenge was increased, the student tended to doubt herself and have a setback (Tr. p. 310). The student was described as having difficulty with functioning and managing regular daily activities that would be easy for any adolescent to achieve (Tr. p. 343). The psychotherapist indicated that there was "absolutely not" a point during the 2007-08 school year that the student could have been discharged from Wellspring foundation and attend a public school (Tr. pp. 344-45). According to the psychotherapist, in the presence of the student's rapid mood fluctuations, her enormous social anxiety, and social performance anxiety, there was no clinical recommendation for the student to attend a regular high school (Tr. p. 345). She further testified that it was not recommended that the student receive outpatient treatment because when she had gone on home visits she had suicidal ideation and was thought to be unsafe at home (Tr. pp. 345-47).

The psychotherapist described the program offered at Wellspring Foundation as a "relational program" which stressed relationships and the repairing of relationships to both self and others (Tr. p. 295). She testified that every Wellspring Foundation staff member was part of the student's treatment, consistently providing feedback about the student's effect on others and in the relationships in which they participated (Tr. p. 296). The hearing record reflects that the student attended a therapeutic educational program for three-fourths of the day and participated in ten therapeutic sessions per week in a variety of situations (Tr. p. 289; Parent Exs. M at p. 4; P at pp. 2-4; Q at pp. 2-5). The psychotherapist testified that the student participated in two individual sessions per week, one family session per week, and up to seven groups per week (Tr. p. 294).

Testimony by the assistant director of education at Wellspring Foundation indicated that the educational program is approved by the state of location as a special education facility for students with severe emotional and mental health difficulties (Tr. p. 419). The seventh through

twelfth grade school is coeducational, consisting of 18 students residing at Wellspring Foundation and 20 students who attend as day school students (Tr. pp. 420-21). The director of education described the educational program as therapeutically based (Tr. p. 421). Students who resided at Wellspring Foundation received their therapy services at the residence (*id.*). Each student was assigned a "behavioral specialist" during the school day who provided support to the student in the classroom as needed (Tr. pp. 421-23). Instruction was delivered by six academic teachers; five were certified in a content area such as English, social studies, math, or science, and one teacher was a special education teacher (Tr. p. 422). The education program staff included three behavioral therapists and a clinical supervisor who was also a school social worker (Tr. pp. 422-23).

The assistant director of education opined that the student's "mental health and critical issues were very problematic and needed a small structured environment, therapeutic component" (Tr. p. 432). The director indicated that the smallness and the structure of the Wellspring Foundation educational program enabled the student to feel comfortable as she progressed clinically, and that a non-residential general education setting would not have been appropriate for the student during the 2007-08 school year "with the many mental health issues that she had" (Tr. pp. 432-33).

The assistant director of education also opined that the student received educational benefits from the educational program at Wellspring Foundation and testified that the student took classes in English, pre-calculus, civics (social studies), physics (science), contemporary issues (social studies), expressive art, physical education, study skills, substance abuse education, and character development (Tr. pp. 424, 433). The assistant director indicated that from September 2007 to the end of October 2007, the student's participation in the classroom appeared to be "guarded" but that after October 2007 the student's comfort level appeared to increase and she participated in class more actively (Tr. p. 425).

Regarding the assistant director's observations of the student when she was with peers, the assistant director's testimony reflected that in her classes when working on small projects within a group, the student frequently took a leadership role (Tr. p. 426). The assistant director described the student as having a great personality and the ability to make other students feel comfortable (*id.*). The student appeared comfortable with her peers and with teachers, although she required assistance to self-advocate and approach teachers when she felt anxious or overwhelmed (*id.*).

The assistant director described the level of cooperation and integration that occurred regularly between the educational and residential components of Wellspring Foundation (Tr. pp. 430-31, 437). Every morning, all teachers read residential notes from the previous night to ensure that they are aware of any situation that may have upset or concerned a student (Tr. pp. 430-31). A representative from the residential program attended the weekly educational staff meeting to review certain situations and a representative from the educational program attended weekly clinical update meetings at the residence (Tr. p. 431). Although the student did not initially share her school related anxiety with the education staff, communication between the educational and residential components revealed that the student talked to residential staff about the anxiety she experienced within school (Tr. p. 437). The assistant director indicated that as a result, when the student demonstrated difficulty concentrating or exhibited restlessness and anxiety about upcoming quizzes or tests, the teachers recognized the behaviors and would take her outside of the classroom and talk with her (Tr. p. 426). The assistant director reported that most of the time the

student responded quickly to this type of interaction, and as the student's comfort level increased, these types of episodes decreased (id.).

Regarding communication between the educational program and the parents, according to the psychotherapist, four formal report cards were mailed to the parents, there was a parent open house in October, a parent conference in February, and ongoing informal communication through e-mail or telephone (Tr. pp. 431-32).

The student's Wellspring Foundation psychotherapist reported that the student's needs were addressed using 1:1 interventions and because Wellspring Foundation offered a structured milieu environment, the residential and educational programs were "constantly in communication with one another" to monitor students' status (Tr. p. 300). The psychotherapist indicated that she constantly received feedback as to how the student was doing in the educational program and she communicated with the residence staff about how the student was doing in her individual work with the psychotherapist (id.). The psychotherapist indicated that Wellspring Foundation was able to provide the student with 1:1 interventions and monitor her progress, so that when she had severe bouts of depression that led to suicidal ideation and at times intent, the student was placed on constant observation, requiring a staff person to be with the student at all times, even during sleeping hours (Tr. pp. 300-301).

According to the psychotherapist, she met with the student's psychiatrist to review the student's medication and any side effects (Tr. p. 311). She also met with the student's social worker almost daily to discuss the student (id.).¹⁰ If the student was having a difficult time, the social worker or the psychotherapist would relay that to the student's teachers who would help provide structure for study time or provide 1:1 instruction to the student if she was particularly overwhelmed (Tr. pp. 311-12). Additionally, the student received feedback from her teachers, her parents, milieu staff and recreation leaders in order to move through the privilege system at Wellspring Foundation, a system that determines how much freedom a student might receive at any point in time, pending the student's ability to follow staff directions; to develop honest relationships with the primary treatment person; to learn about their family and personal relationships (Tr. pp. 318, 326). The hearing record includes monthly treatment plans that reflect the student's needs, interventions, and progress were reviewed on a regular basis (Parent Exs. I at pp. 1-3; K at pp. 1-4; M at pp. 1-6; N at pp. 1-6; O at pp. 1-5; P at pp. 1-5; Q at pp. 1-6; R at pp. 1-2).

The psychotherapist indicated that the student participated in every aspect of the program at Wellspring Foundation (Tr. p. 308). The student seemed brighter, more engaged, and began initiating topic agendas and talking in her therapeutic groups, and participated in all recreational programs (Tr. pp. 303-04). The psychotherapist testified that the student did very well in the educational program although some of the student's teachers reported to her that the student procrastinated and was disorganized (Tr. p. 308). The psychotherapist opined that this reflected the student's depression at the time as she had difficulty concentrating, and organizing her thoughts and her schoolwork (Tr. pp. 308-09). The psychotherapist noted that as the student began to engage in her clinical work she started to build strong relationships with Wellspring Foundation

¹⁰ The hearing record reflects that the social worker was the liaison between the psychotherapist, the educational program, and the parents (Tr. p. 307).

staff and peers and began to feel better (Tr. p. 309). However, when a new situation arose or when the student would have to achieve a new goal she tended to have set backs (Tr. pp. 309-10). According to the psychotherapist, the student tended to have increased anxiety at these times and she became hopeless and suicidal, which resulted in the student being placed on constant observation for 24 to 48 hours (Tr. pp. 310, 334).¹¹ The hearing record reflects that Wellspring Foundation addressed the student's fluctuating emotional needs during the 2007-08 school year, enabling the student to access and benefit from her educational program so that she was able to graduate from high school with a State Regents diploma in June 2008 (Tr. pp. 413-14). Therefore, I agree with the impartial hearing officer that Wellspring Foundation was an appropriate placement for the student consistent with LRE requirements given the student's needs.

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

Addressing the equities, I do not find that equities preclude reimbursement for the time period of March 28, 2007 to the end of the 2007-08 school year and the district shall reimburse the parents for tuition costs and fees at Wellspring Foundation for that time period upon submission by the parents of proper proof of payment.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that it ordered the district to reimburse the parents for the tuition costs and fees at Wellspring Foundation from the beginning of the 2007-08 school year through March 27, 2008; and

¹¹ The hearing record reflects that the student was placed on constant observation two times while at Wellspring (Tr. p. 334).

IT IS FURTHER ORDERED, that the district shall reimburse the parents for the tuition costs and fees at Wellspring Foundation for the time period from March 28, 2008 through the end of the 2007-08 school year.

Dated: **Albany, New York**
 August 7, 2009

PAUL F. KELLY
STATE REVIEW OFFICER