The University of the State of New York

The State Education Department
State Review Officer
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No. 09-083

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Scarsdale Union Free School District

Appearances:
Law Office of Skyer, Castro, Cutler & Gersten, attorneys for petitioners, Jesse Cole Cutler, Esq. of counsel

Keane & Beane, P.C., attorneys for respondent, Stephanie Roebuck, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at Montana Academy for the period of April 4, 2008 through June 30, 2009. Respondent (the district) cross-appeals to the extent that the impartial hearing officer did not make a determination that it was not obligated to classify the student during spring 2008, as well as from her determination that it failed to demonstrate that it had offered an appropriate educational program to the student for the 2008-09 school year and that Montana Academy was an appropriate placement for the student. The appeal must be dismissed. The cross-appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in Montana Academy (Tr. pp. 483-84). The Commissioner of Education has not approved Montana Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). Reportedly, the student has difficulty with anxiety, mood swings and depression in addition to perfectionist behaviors (Tr. pp. 485, 496, 648, 676, 755). Although the hearing record describes the student as "bright," it further indicates that she can be easily overwhelmed, and that she also exhibits difficulty with self-esteem (Tr. pp. 669, 677, 679, 698). The student's overall cognitive skills are in the superior range, although it is reported that her "capacity to utilize her superb abilities toward academic achievement are considerably impaired by relative cognitive weaknesses and significant psychological difficulties" (Dist. Ex. 11 at pp. 11-12). She exhibits difficulty with self-regulation, and the ability to shift attention, start tasks, and approach tasks in

an organized and systematic way (id. at p. 11). The student has been offered diagnoses of a dysthymic disorder; a major depressive disorder, severe; an anxiety disorder; and an attention deficit disorder, primarily inattentive type (id. at p. 11; Dist. Ex. 13). The student's eligibility for special education services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 C.F.R. § 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

The student attended the district's schools in general education programs from kindergarten through January 2008, which was approximately the middle of her eleventh grade year (Tr. p. 697; see Tr. p. 727). The hearing record reflects that the student did not exhibit academic difficulties during elementary or middle school and that her academic level of functioning was "above grade expectation" (Dist. Ex. 11 at p. 2; see Tr. pp. 698-700). The student's father stated that he obtained short-term private counseling services for his daughter during the 2004-05 school year after she threw out or hid a progress report (Tr. pp. 723-24).

While in ninth grade during the 2005-06 school year, the student attended the district's high school (Tr. p. 701). In addition to her other courses, the student's father stated that the student requested to take an honors math class, Spanish classes, and a Latin class (Tr. pp. 701-03). He described how the student was "overwhelmed" and could not "handle the work" of the advanced courses and the hearing record further reflects that the student "dropped" her honors Spanish class (Tr. pp. 703-05; Dist. Ex. 16). The student's father added that "there were ups and downs, but [the student] was holding her own" (Tr. p. 705). In spring 2006, after learning that she was not selected for one of the district's sports teams, the student expressed to her parents that she wanted to kill herself (id.). According to the student's father, the next day, the student stated that she was "just overreacting" (id.). The student's final grades during the 2005-06 school year were in the "A" to "B-" range and she earned eight credits (Dist. Exs. 16; 32).

For tenth grade during the 2006-07 school year, the student voluntarily applied for and by lottery system was accepted to the district's alternative high school, described in the hearing record as a school within the district's high school that functions as a "separate, … smaller community designed for teachers to better know the students" and familiarize themselves with their students' needs (Tr. pp. 24, 272-77). The hearing record reflects that the alternative high school focuses on character, leadership and a hands-on approach to education (Tr. p. 272). Students at the alternative high school participate in a month-long internship program and weekly in-school "community" meetings (Tr. pp. 273-76). The alternative high school offers general education courses and is not considered to be or designed as a special education program (Tr. p. 25).

The student's tenth grade English teacher/advisor stated that at the commencement of the 2006-07 school year, the student was considered to be "one of the strongest academic students in terms of her performance" (Tr. pp. 278-79). In mid-October 2006, the student consumed an excessive amount of an over-the-counter medication and according to the hearing record, subsequently slept for an unusual amount of time and did not report the incident to her parents until a few days after it had occurred (Tr. pp. 714-17, 722; Dist. Ex. 11 at p. 3). The parents obtained the services of a private psychiatrist who initiated psychopharmacological treatment with the student, and also obtained private individual and group therapy services (Tr. pp. 718-21; Dist. Ex. 11 at p. 3). The hearing record also reflects that during this time, the student's school work was less "focused" and was handed in less consistently (Tr. p. 280).

During the first half of the 2007-08 school year, the parents notified the district regarding concerns about their daughter, and district staff and the parents discussed strategies to use to assist the student (Tr. pp. 301-07; Dist. Ex. 8 at p. 2). The hearing record reflects that for the remainder of the 2006-07 school year, the student's academic performance was described as "up and down" and "erratic," but that by the third quarter, she had exhibited academic improvement, and by the end of the school year, she had achieved grades in the "B" range and also received all 6.5 credits (Tr. pp. 283-84, 306-07, 725-26; Dist. Exs. 16; 23 at p. 4; 31 at pp. 7-10; 32). The student's father and tenth grade English teacher/advisor indicated that during the periods of time the student struggled, she exhibited difficulty with completing assignments, keeping up with school work, getting to school on time, and exhibiting confidence about her academic performance (Tr. pp. 283-87, 725-27).

According to the student's alternative high school advisor, who had been her English teacher and advisor during the previous year, the student began eleventh grade during the 2007-08 school year "very strong" academically and emotionally (Tr. pp. 307-08). The hearing record reflects that beginning in mid-October 2007, the student's teachers and her parents "noticed a precipitous drop in [the student's] functioning," including her ability to complete school work and attend class (Dist. Exs. 8 at p. 2; 15; 23 at p. 4; 33-35; 37; 39; Parent Exs. H; J). Despite the student's discontinuation of an honors Latin course, her ability to complete school work did not improve (Dist. Ex. 8 at p. 2). During this time, the parents and the student's advisor communicated frequently about the student (Tr. pp. 271, 313-27, 732-38; Dist. Exs. 8 at p. 2; 34-35; Parent Ex. G). The decline in the student's performance continued through December 2007 (Dist. Ex. 23 at p. 4).

Over three dates in November and one date in December 2007, a psychologist conducted a private neuropsychological evaluation of the student (Dist. Ex. 11). The resultant report indicated that the purpose of the evaluation was to "establish [the student's] current level of cognitive and psychosocial functioning, gain an understanding of what may be causing the continuance of her depressed mood, and make appropriate recommendations," due to the student's failure to respond to the medication and cognitive-behavioral interventions she had received (id. at p. 1). Numerous assessment instruments were administered to evaluate the student's cognitive, achievement, memory, visuoperceptual and visuomotor, attention/executive functions, and personality (id. at pp. 1-10; Dist. Exs. 30; 38). The private psychologist reported that the student's "overall level of intellectual functioning is in the superior range, with a significant discrepancy between her truly outstanding verbal skills and her more average visual spatial capacities" (Dist. Ex. 11 at p. 11). In the area of executive functions, the private psychologist indicated that the student exhibited "global difficulties with self-regulation, including the fundamental ability to inhibit impulses, modulate emotions, and flexibly problem-solve," and "[the student's] problems shifting attention, getting started on tasks, approaching tasks in an organized and systematic fashion, and self-monitoring [a]ffect her academic work as well as her interactions" (id.). The private psychologist reported that the student's "present feelings of emptiness, weak self-concept, irritable behavior, interpersonal withdrawal, and sad mood have clearly disrupted her day-to-day functioning," and her "deep-seated worries, self-demeaning tendencies, hypersensitivity, and depressed mood [were] clearly indicative of a Dysthymic Disorder[1] which is exemplified by her

[1] The hearing record described a dysthymic disorder as "a chronic condition characterized by irritability and

overeating, low energy, poor self-esteem, difficulty making decisions and feelings of hopelessness" (id.). Additionally, the private psychologist reported that the student exhibited "some very anxious tendencies, particularly within the social and performance domains" (id.). Academically, the private psychologist reported that the student demonstrated the potential to "perform amazingly well," but that "problems with visual-organizational skills, inflexible problem solving and the slow processing of information clearly hinder her" (id. at p. 12). The private psychologist concluded that the student's capacity to use her "superb" abilities toward academic achievement was "considerably impaired" by relative cognitive weaknesses and significant psychological difficulties (id.). The private psychologist recommended that the student continue to receive psychopharmacological intervention, and that her parents meet with an educational consultant, "to discuss the possibility of an immediate program change," while suggesting "exploring the range of possible therapeutic placements," such as local school and residential programs (id. at p. 13). Other suggestions included developing the student's relationships with her teachers, considering an assessment of her visual processing skills, adding academic support for her organizational skills and providing social skill intervention (id. at pp. 13-14).

By letter dated January 11, 2008, a staff member of an out-of-State wilderness program[2] informed the district that the student would attend its program beginning January 13, 2008, with a six to eight week average length of stay (Dist. Ex. 14).[3]

By letter dated January 16, 2008, the student's private psychiatrist indicated that on January 14, 2008, upon the recommendations of the private psychiatrist, the parents, and the student's therapist, the student entered the wilderness program "emergently as a result of an acute deterioration in her psychiatric condition" (Dist. Ex. 13).[4] The private psychiatrist reported that the student's functioning had declined "precipitously" in the preceding two weeks, evidenced by her inability to attend school and remaining either at home or in bed (id.). The student reported to the private psychiatrist that her mood was depressed and her "anxiety level high;" symptoms, which, according to the private psychiatrist, had worsened despite intensive treatment (id.). The private psychiatrist offered the student diagnoses of a major depressive disorder, severe; an anxiety disorder; and an attention deficit disorder, primarily inattentive subtype (id.).

By letter dated January 25, 2008, to the Committee on Special Education (CSE) chairperson, the parents requested that the CSE evaluate the student (Dist. Ex. 1). By letter dated January 29, 2008, the CSE responded to the parents by informing them about the initial evaluation process and providing them with the procedural safeguards notice and evaluation consent forms

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depressive symptoms that occurs for most of the day, more days than not, for over a year" (Dist. Ex. 11 at p. 11).

[2] The hearing record refers to this program as both a "wilderness" and an "outward bound" program (Dist. Exs. 13; 23 at p. 4). For the purpose of consistency, in this decision I will refer to the student's January 14 to April 2, 2008 parentally obtained out-of-State placement as the "wilderness program" (Dist. Ex. 13; Parent Ex. E).

[3] Although the letter from the wilderness program stated that student was enrolled in the program beginning January 13, 2008, this appears to be an error (Dist. Ex. 14). According to the hearing record, the correct date that she enrolled in the program was January 14, 2008 (Tr. pp. 10, 760; Dist. Ex. 13).

[4] The January 16, 2008 letter is addressed "to whom it may concern" (Dist. Ex. 13).

(Dist. Ex. 2). On February 5, 2008, the district received the parents' consent to evaluate the student (Tr. pp. 36-37; Dist. Ex. 3).

On February 16 and 17, 2008, the parents completed an application for admission of the student to Montana Academy (Parent Ex. C). By e-mail dated February 25, 2008, the student's mother transmitted the December 2007 private neuropsychological evaluation report to the district for the CSE's consideration (Dist. Ex. 10).

Following the CSE's review of the private neuropsychological evaluation report, by letter dated March 4, 2008, the CSE chairperson requested that the student "meet with the district psychiatrist" due to the parents' belief that their daughter may require a residential placement (Dist. Exs. 4; 23 at p. 4). By e-mail dated March 11, 2008, the student's mother advised the CSE chairperson that the student was "not likely to be in [the district] at any time in the near future; all of the people treating [the student] or advising us in any fashion strongly recommend against bringing her home before any future placement in a residential setting; and the district is fully authorized to conduct its evaluation of [the student] in [the wilderness program]" (Dist. Ex. 5; see Dist. Ex. 6 at p. 1). The student's mother further advised that arrangements could be made if the district wanted to confer with the student's treating psychiatrist (Dist. Ex. 5). Lastly, the student's mother requested that the district reschedule a CSE meeting arranged for April 4, 2008, because the parents were unavailable on that date (Dist. Ex. 5; see Dist. Ex. 6 at p. 1).

By letter dated March 19, 2008, the student's mother informed the CSE chairperson that the student would be completing the wilderness program on April 2, 2008 and enrolling in Montana Academy on April 4, 2008 (Tr. p. 775; Parent Ex. E). She further advised the district that the student would not be returning home, but that the district remained "fully authorized to conduct its evaluation of [the student] in the [wilderness program] or in Montana" (Parent Ex. E).

On March 30, 2008, the parents completed a social history at the district indicating that the student had exhibited "normal" social and academic development until she became "depressed;" at which time she ceased socializing with friends and going to school, isolated herself, and was unable to "snap out of her mood" (Dist. Ex. 12).

On April 4, 2008, the student enrolled in Montana Academy and according to her clinical supervisor, exhibited "issues of depression, low self-esteem, avoidance and academic struggles" (Dist. Ex. 26 at p. 1). The hearing record describes Montana Academy as a "ranch school" consisting of approximately 70 students in grades nine through twelve, which operates "24/7, 12 months a year" (Tr. pp. 467-69).[5] One of Montana Academy's psychiatrists stated that students who attend Montana Academy "tended to be kids who were failing globally . . .at school, at home, among their peers and all by themselves" (Tr. pp. 461, 473).

On April 10, 2008, a district special education teacher prepared a "Summary of Academic Achievement" of the student based upon the results of the December 2007 private neuropsychological evaluation (Dist. Ex. 9). An April 13, 2008 "Educational History" summary prepared by the parents, provided information regarding the series of events subsequent to the

[5] References in the hearing record to Montana Academy refer to the "ranch school," the portion of Montana Academy that the student attended (Tr. pp. 466-71).

student's October 2006 suicidal gesture through her removal from the district's alternative high school in January 2008 (Dist. Ex. 8; see Dist. Ex. 11 at p. 1).

On April 17, 2008, the CSE convened for the student's initial review (Dist. Exs. 7; 23). Attendees at the meeting included the district's director of special education, the CSE chairperson, a school psychologist, a regular education teacher, the dean of the "A" school,[6] a special education teacher, the parents, the psychologist who conducted the December 2007 private neuropsychological evaluation, and an additional parent member (Dist. Ex. 23 at p. 4). Comments developed by the April 2008 CSE and contained in the resultant individualized education program (IEP) stated that the parents referred the student to the CSE because by December 2007 they noted that the student spent much time in bed and her school attendance had declined "dramatically" since the beginning of the school year (id.). The April 2008 CSE noted that efforts made by the school counselor and the parents as well as "dropping" Latin from the student's schedule had not proved to be beneficial (id.). The April 2008 CSE reviewed the December 2007 private neuropsychological evaluation report, noting that it received the report subsequent to the student's referral to the April 2008 CSE and placement in the wilderness program (id.).

The April 2008 CSE determined that the student was eligible for special education services as a student with an emotional disturbance and although the parents were uncertain when the student would return to the district, it proceeded "as if [the student] were returning now" (Dist. Ex. 23 at p. 5). Annual goals and short-term objectives were developed for the student in the areas of study skills and social/emotional/behavioral skills (id. at pp. 5-7). The April 2008 CSE recommended that the student receive twice weekly individual counseling and one session per week of group counseling services, and recommended placement of the student in a 12:1+1 special class in a special school (id. at p. 1). The April 2008 CSE identified three potential out-of-district "day treatment placements," to which it subsequently sent information packets regarding the student (Dist. Exs. 17; 19, 21; 23 at p. 5).

In a progress report dated June 25, 2008, the student's clinical supervisor at Montana Academy indicated that although the student responded well to the structure and staff availability, "[l]ack of motivation and personal apathy remain[ed] a daily risk for [the student] thus requiring the 24 hour support and supervision evident within the Montana Academy environment" (Dist. Ex. 26 at p. 1). The clinical supervisor advised that "[p]roviding an environment of lesser structure, supervision or staff support would create significant interference with the progress [the student] [wa]s clearly capable of achieving within an environment offering a continuous program indicative of Montana Academy" (id. at p. 2).

The CSE reconvened on June 25, 2008 to make a placement determination and consider the June 25, 2008 Montana Academy progress report (Dist. Ex. 24 at p. 5). Attendees at the meeting included the district's director of special education, the CSE chairperson, a school psychologist, a district dean, a special education teacher, a regular education/math teacher, the student's mother, and an additional parent member (id. at p. 4). Comments contained in the resultant IEP revealed that the student's father visited the day programs proposed by the April 2008 CSE and that the programs expressed interest in the student (id.). According to the June 2008

[6] The hearing record often refers to the district's alternative high school as the "A" school.

CSE, the day programs could not formally accept the student without an interview, for which the student was unavailable due to her placement in Montana, and because a discharge date was uncertain (id.). At the June 2008 CSE meeting, the student's mother expressed that the student was progressing, but "unable to move up a level in the structure of the program" and that the full-time supervision offered by Montana Academy was "vital" (id.). In light of the parents' concerns and the information contained in the Montana Academy progress report, the June 2008 CSE changed its April 2008 recommendation and offered the student a 12-month residential placement (id. at pp. 2, 5).[7] The June 2008 CSE discussed that one of the State-approved nonpublic placements proposed in April 2008, Summit School (Summit), had both a day and a residential component, and the June 2008 CSE agreed to recommend Summit for the student "pending the completion of the interview process" (id. at p. 6). The June 2008 CSE further offered to contact a second State-approved nonpublic program, in the event the student was not accepted at Summit (id.).[8]

By e-mail dated July 17, 2008, a social worker from Summit informed the CSE chairperson that she believed the student could be an appropriate candidate for its residential program; however, she was unable to make a formal decision until an intake interview with the student took place (Dist. Ex. 27; see Parent Ex. A at p. 1). The social worker further indicated that the student's father had visited for "an informal interview," but that he did not have dates or an estimate of when the student would return from Montana (Dist. Ex. 27).

By e-mail and letter dated July 28, 2008 to the CSE chairperson, the student's mother advised that based upon her husband's July 15, 2008 visit to Summit, they believed it would not "suffice for [the student's] needs at this time" (Parent Ex. A at p. 1).[9] In particular, the student's mother expressed concern about the "mixed population" of students, and that the student would be grouped with the more "higher-functioning students," who participated in a seven-period school day and followed the New York State Regents curriculum (id.). According to the student's mother, the student had previously and continued to exhibit difficulty "managing a full day program and handling a full course load," recalling that the student dropped a course during both her ninth and tenth grade years, which did not improve her performance in other classes (id.). The student's mother opined that if her daughter were able to maintain a full high school course load, Summit might be an appropriate placement for her; however, she indicated that the student was "simply not at that stage at this time" (id. at p. 1). In addition, the student's mother noted that if her daughter could not keep up with the curriculum for the more high functioning students at Summit, Summit had little to offer her, given that the student had little in common with balance of Summit's student population (id. at p. 2). Lastly, the student's mother expressed concern that the level of group and individual therapy at Summit was insufficient to meet the student's needs, and further noted that

[7] The June 2008 CSE retained the student's counseling services recommendations (compare Dist. Ex. 23 at p. 1, with Dist. Ex. 24 at p. 2).

[8] The hearing record reflects that in summer 2008, the second State-approved nonpublic school contacted the parents (Tr. pp. 809-10; Dist. Ex. 28 at p. 3). The student's father testified that he spoke with that school's staff who stated "there would be no reason to come for a visit unless I had [the student] with me" (Tr. p. 810). The parents assert that due to the concerns of their daughter's therapeutic team, they elected not to remove the student from Montana Academy for an interview (Dist. Ex. 28 at p. 3).

[9] This exhibit was also entered into the hearing record as Parent Ex. F (compare Parent Ex. A, with Parent Ex. F).

the student's revised IEP dated June 2008 recommended more services than what she and the student's father understood could be offered at Summit (id.).

By letter dated August 18, 2008, the parents informed the CSE chairperson of the student's placement at Montana Academy for the 2008-09 school year and their intention to seek tuition reimbursement from the district (Dist. Ex. 25). The parents further advised the district that they rejected the June 2008 IEP and placement recommendation (id.).

By due process complaint notice dated October 22, 2008, the parents, through their attorney, commenced an impartial hearing in which they sought tuition reimbursement for Montana Academy for the period of April 4, 2008 through June 30, 2009 (Dist. Ex. 28 at p. 3). The parents alleged, among other things, that the district failed to meet its affirmative obligation under the Individuals with Disabilities Education Act's (IDEA) child find provisions (id. at p. 2). Moreover, the parents claimed that from spring 2008, the district had failed to offer the student a free appropriate public education (FAPE) (id. at p. 3). Specific to their claim that the student was denied a FAPE, the parents maintained that the district's recommended placement at Summit was inappropriate for the student, such that the school could not meet the student's educational needs, nor could Summit provide her with sufficient therapeutic support as prescribed by her IEP (id.). The parents contended that despite communicating their concerns regarding Summit to the district in writing, the district was unresponsive (id.). Additionally, the parents asserted that by failing to secure an acceptance for the student at Summit, the district's reliance on the placement was premature, and in turn, denied the student of a FAPE (id.).

By letter dated October 30, 2008, the district's director of special education submitted a response to the parents' due process complaint notice (Dist. Ex. 29). The director of special education noted that at the time that the parents referred their daughter to the CSE, she had already been withdrawn from the district (id. at p. 1). In addition, while the director of special education indicated that the parents provided consent to have the student evaluated by the district, he further stated that the parents would only allow the student to be seen out-of-State, a stipulation the district deemed "unreasonable" (id.). He further indicated that in April 2008, the CSE recommended a day treatment program, having previously successfully placed students whose needs were similar to those of the student in the instant case in that program; however, the student could not be placed without an intake interview (id. at p. 2). According to the director of special education, in June 2008, although the parents did not know when the student would be returning from Montana Academy, the district recommended Summit, subject to the completion of an intake interview, in addition to a second State-approved nonpublic school as a "backup" recommendation (id.). He added that both schools offered therapeutic components that the June 2008 CSE thought could meet the student's needs; however, neither school could determine if the student was an appropriate candidate for admission without an intake interview (id.). The director of special education contended that the CSE made a "good faith effort to offer [the student] an appropriate program based on the information it had" (id.).

An impartial hearing convened on December 10, 2008, and after four days of testimony concluded on April 24, 2009 (IHO Decision at pp. 1-3; Tr. pp. 1, 627). By decision dated June 6, 2009, the impartial hearing officer denied the parents' request for tuition reimbursement at Montana Academy for the 2008-09 school year (IHO Decision at p. 19). As an initial matter, the

impartial hearing officer found that the district met its obligations under child find (id. at pp. 15-16).

Turning to the parents' request for reimbursement, notwithstanding her ultimate conclusion, the impartial hearing officer first found that although the district's recommendation of a residential placement combined with counseling was reasonably calculated to meet the student's needs, the district failed to establish how Summit's program would meet the student's needs, and IEP goals and objectives (id. at p. 17). Accordingly, the impartial hearing officer determined that the district failed to demonstrate that the student was offered a FAPE during the 2008-09 school year (id. at p. 17). Next, the impartial hearing officer found that the parents had secured a unilateral placement for their daughter that provided the student with a clinical facility designed to first cater to her emotional development, and that provided an educational component secondary to its therapeutic objectives (id. at p. 18). However, the impartial hearing officer went on to describe Montana Academy as "a very restrictive setting and remote from the student's home location" (id.). Although she noted that the student could be educated in a less restrictive setting and also obtain a "substantial" educational benefit, under the circumstances, the impartial hearing officer concluded that Montana Academy was appropriate and the hearing record clearly established that the student had exhibited meaningful academic growth while in attendance there (id.).

With respect to whether equitable considerations supported the parents' claim for relief, the impartial hearing officer concluded that the evidence showed that the parents "failed to cooperate in good faith" during the intake process for the recommended placement (id. at p. 19). She further found that there was no evidence in the hearing record indicating that the student could not leave the program she attended for an interview, and that the parents' refusal to make her available for an interview at Summit and other placements was unreasonable (id.). Under the circumstances, the impartial hearing officer determined that the district demonstrated that the parents had acted unreasonably such that reimbursement should be denied on equitable grounds (id.).

The parents appeal, requesting that the impartial hearing officer's decision be reversed to the extent that she determined that equitable considerations did not support their claim for reimbursement for the period of April 2008 through June 2009. The parents contend, among other things, that their conduct throughout the evaluation and placement process was appropriate and cooperative, and they did not engage in any actions that impeded the district from offering the student a FAPE. Specific to their claim that they acted reasonably, the parents maintain that they provided written consent to the district to evaluate their daughter in a timely fashion, furnished the district with a number of private evaluation reports, and took part in a social history. Although the parents admit that the student did not leave her private placement during the evaluation process, they further assert that the student's treating psychiatrist and staff from Montana Academy advised against the student's return to the district at that time. Additionally, the parents claim that they participated in the CSE meetings and visited the potential placements recommended by the district, including Summit. Lastly, the parents contend that the impartial hearing officer erred in making a decision with respect to the equities by failing to take into consideration the district's shortcomings, which included: 1) failing to secure the attendance of a representative from Summit at the June 2008 CSE meeting; 2) recommending placement at Summit without first securing an acceptance there; and 3) failing to respond to the parents' written concerns regarding Summit.

The district submitted an answer with affirmative defenses and a cross-appeal requesting that the petition be dismissed in its entirety. Initially, as affirmative defenses, the district makes the following assertions: 1) that the impartial hearing officer's ruling with respect to the equities should be upheld; and 2) that the petition should be rejected because it was not verified.

Regarding the district's cross-appeal, as an initial matter, although the district does not dispute the impartial hearing officer's ruling that it met its child find obligation pursuant to the IDEA, the district claims that the impartial hearing officer erred to the extent that she did not determine that it was not the district's responsibility to classify the student once she moved out of state. The district further submits that after January 13, 2008, when the student withdrew from the district, it was relieved of any obligation regarding her education. Next, the district argues that it established at the impartial hearing that it offered the student an appropriate program for the 2008-09 school year, and therefore, offered her a FAPE. In particular, the district claims that during the April 2008 CSE meeting, the CSE determined that the student was eligible for special education services and accordingly, recommended a therapeutic day placement for the student. Next, the district asserts that it met its obligation to offer the student a FAPE during the June 2008 CSE meeting, by recommending a 12-month residential program with a therapeutic component at Summit. The district further maintains that the evidence adduced at the impartial hearing demonstrated that Summit offered the student an appropriate program because the school provided a highly structured therapeutic program close in proximity to the district, where other district students whose needs were similar those of the student in the instant case had previously succeeded. Additionally, the district contends that its efforts to offer the student an appropriate program were hampered by the parents' actions. The district contends that Summit offers exactly the type of program recommended for the student by her private evaluating psychologist, as well as the clinicians at Montana Academy.

With respect to the appropriateness of Montana Academy, the district first argues that the parents failed to show that the unilateral placement met the student's unique needs. Specifically, the district claims that the student was not grouped with students whose needs were similar to hers, and unlike most of the student body enrolled in Montana Academy, the student did not have a history of substance abuse. Although the district indicates that there was extensive testimony regarding the educational and therapeutic programs at Montana Academy, it asserts that the hearing record fails to illustrate how the programs were tailored to meet the student's unique needs. The district further asserts that upon the student's transition to Montana Academy, the student initially exhibited academic difficulties similar to those she experienced while attending school in the district.

Lastly, although the district does not challenge the impartial hearing officer's finding with regard to equitable considerations, the district also makes the following contentions: 1) the parents did not refer the student to the CSE until after they had withdrawn her from the district; 2) the parents failed to make the student available to the district to conduct a psychiatric evaluation of the student; 3) the parents failed to make the student available for intake interviews; and 4) prior to the April 2008 CSE meeting, the parents entered into a written enrollment agreement with Montana Academy, wherein they agreed to enroll their daughter for 16-18 months, thereby indicating that they had no intention of placing the student in a district-recommended program.

The parents submitted a verified reply in which they maintained that the petition was properly verified, and should not be dismissed on this basis. In addition, they submitted an answer to the cross-appeal, denying and admitting in part the allegations raised by the district in its cross-appeal.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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 U.S.C. § 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 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R.

§§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[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 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).

Initially, I will address a procedural matter raised in the district's answer and cross-appeal. First, the district asserts that the petition for review was not properly verified in accordance with State regulations (8 NYCRR 279.7), and therefore should be dismissed. State regulations require that "[a]ll pleadings shall be verified. The petition shall be verified by the oath of at least one of the petitioners…" (id.). Notwithstanding the district's contention, I find that the petition for review received by the Office of State Review in this appeal was verified in accordance with State regulations. As such, I will not dismiss the petition on this ground (see Application of a Student with a Disability, Appeal No. 08-138; Application of the Bd. of Educ., Appeal No. 04-104; Application of a Child with a Disability, Appeal No. 04-099).

Turning to the merits of the instant case, I will first consider the district's cross-appeal. The district alleges that although the impartial hearing officer properly concluded that it did not violate its obligations to the student with respect to the child find provisions of the IDEA, the impartial hearing officer erred to the extent that she failed to rule that it was not the district's responsibility to classify the student while she was enrolled at the wilderness camp and at Montana Academy. "[T]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination" (Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001]). A party aggrieved by an impartial hearing officer's decision may appeal to a State Review Officer (see 34 C.F.R. § 300.514[b][1]; see 8 NYCRR 200.5[k][1]; Mackey v. Bd. of Educ., 386 F. 3d 158, 160 [2d Cir. 2004]; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of the Bd. of Educ., Appeal No. 04-016; Application of a Child with a Disability, Appeal No. 02-007; Application of a Child with a Disability, Appeal No. 99-029). "Generally, the

party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]). Further, a State Review Officer is not required to determine issues which are no longer in controversy or to review matters which would have no actual effect on the parties (Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 98-73; Application of a Child Suspected of Having a Disability, Appeal No. 95-60). In this case, the district was not aggrieved by the impartial hearing officer's determination on the issue of child find (Application of the Bd. of Educ., Appeal No. 07-092). Moreover, the district ultimately decided to classify the student as a student with an emotional disturbance; therefore, even if I were to make a determination with respect to the district's responsibility to classify the student, it would have no actual effect on the parties (Tr. pp. 53, 57). In view of the foregoing, the district's contention is without merit.

Next, the district argues that the impartial hearing officer erred in finding that the district did not offer the student a FAPE, because during the impartial hearing, the district failed to establish how Summit was appropriate to meet the student's educational needs. As set forth in greater detail below, the hearing record reflects that the impartial hearing officer properly determined that although the district's recommendation that a residential placement combined with counseling was appropriate and reasonably calculated to meet the student's educational needs, there is insufficient evidence in the hearing record to demonstrate how Summit would have met the student's needs and conferred educational benefits upon the student (see IHO Decision at p. 16).

The impartial hearing officer determined that the district presented evidence that substantiated the appropriateness of the June 2008 IEP, and which "clearly establishes that a residential program, and a small class setting, such as the 12:1[+]1 class setting recommended, with counseling/therapeutic services would be an appropriate setting for the student" (IHO Decision at p. 17). Neither party appeals this finding. 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[j][5][v]; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; 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). Inasmuch as neither party has appealed this determination, this portion of the decision is final and binding on the parties and I will not disturb the impartial hearing officer's finding.

The impartial hearing officer also determined that the district failed to provide evidence that described Summit's programs and resources (IHO Decision at p. 17). I agree that the hearing record affords little information about Summit, or how Summit would have addressed the student's special education needs and conferred educational benefits upon the student. The district's director of special education testified that Summit was "designed to address the needs of kids with emotional difficulties" and that support staff could have provided the counseling indicated on the student's IEP (Tr. pp. 19, 150). He further testified that Summit was a State-approved private

school that offered students the opportunity to receive a Regents diploma (Tr. pp. 150-51). The director of special education further testified that Summit "had room" for the student, offered small classes that would enable the student to "continue to earn her credits while her emotional condition was being addressed," and that there was "no reason to believe that [Summit] could not meet her needs" (Tr. p. 151).

However, the hearing record reflects that no one from Summit attended the June 2008 CSE meeting, and although the director of special education stated that the CSE discussed how other students similar "in emotional need" to the student attended Summit, he also testified "we needed the Summit School to interview [the student] and to see whether or not they had a group that would be appropriate" (see 34 C.F.R. § 300.325[a][2]; 8 NYCRR 200.4[d][4][i][a]; Tr. pp. 151-52; Dist. Ex. 24 at p. 5).[10] According to the director of special education, he did not "have access to their profiles of all their other children in that group and we rely on them to review the application to determine whether or not she would fit with the other kids there, and that's one of the reasons for making her available for the interview" (Tr. p. 152).

The district maintains that it met its obligation to offer a FAPE by its June 2008 IEP program recommendation, but that its efforts were "stymied in the identification of the actual school" by the parents' conduct (Answer ¶ 62). However, the district also asserts that it "did not demonstrate that the Summit School was appropriate as [the student] was not accepted into the program due to the [parents'] unwillingness to complete the intake process" (id.). Given the district's admission that it did not show the appropriateness of Summit, or how Summit could have implemented the student's IEP and addressed her special education needs, and that it did not formally offer the student a placement for the 2008-09 school year, the impartial hearing officer properly determined that the district did not offer the student a FAPE (see Tr. pp. 218-19; Dist. Ex. 27; see also Application of the Bd. of Educ., Appeal No. 08-051).

Having determined that the district did not offer the student a FAPE for the 2008-09 school year, I must now consider whether the parents have established the appropriateness of their unilateral placement at Montana Academy. The impartial hearing officer determined that Montana Academy was appropriate for the student (id.).[11] For the reasons explained further below, I agree with the impartial hearing officer and find that Montana Academy offered the student educational services that were specially designed to meet her unique needs, and accordingly, the parents have demonstrated the appropriateness of the unilateral placement (id.).

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;

[10] I note that in her December 2007 neuropsychological evaluation report, the psychologist stressed the importance of "a population of similar adolescents" when considering a change in the student's program (Dist. Ex. 11 at p. 13).

[11] The impartial hearing officer's decision noted as follows: "I find that although the parent's placement is not the least restrictive setting, the placement is appropriate under the circumstances of this matter, and the record clearly established that the student has obtained meaningful academic growth while in this placement" (IHO Decision at p. 18). The district does not cross-appeal from the impartial hearing officer's finding regarding the issue of LRE; therefore, it is final and binding upon the parties.

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).

In its cross-appeal, the district asserts that the parents failed to demonstrate that Montana Academy met the student's unique needs. Specifically, the district contends that the hearing record contained little information regarding the other students with whom the student was grouped, and that it showed that the student continued to have academic difficulty when she transitioned to Montana Academy. A review of the hearing record fails to substantiate the district's contentions. The co-CEO of Montana Academy, who is also a psychiatrist (psychiatrist), testified that Montana Academy consists in part of a "ranch school," where approximately 70 students live in dormitories (Tr. pp. 464-65, 468). The approximately 60 staff members consist of eight teachers, a director, seven Ph.D. level psychologists, two certified psychiatrists and "assorted activities staff and supervisory staff" (Tr. pp. 468-69). He described the school as a "settled community where staff and students live together and know each other very well" (Tr. p. 469). Students may graduate from Montana Academy's "emotional growth program" and return to their home district to graduate from high school, or graduate from high school and the Montana Academy program simultaneously (Tr. p. 472). The psychiatrist testified that the students at the school are organized based upon their clinical and academic needs into teams; and also into "clans," described as a "tangible way of describing the beginning, middle and end of [the students'] time at Montana Academy . . . that represents an emotional growth series of steps and progress" (Tr. pp. 471-72; see Tr. pp. 493-94). There are five clans defined by increasing levels of privilege and responsibility (Tr. pp. 500-01). The psychiatrist described the individual, family, and group therapy as "quite intensive," in that the psychologists are at the school full-time and see the students in a variety of contexts outside of therapy sessions (id.).

Teams are arranged by a mix of student ages and a "mix of diagnoses," to avoid having a team of students who all have diagnoses of the same disorders (Tr. pp. 512-13). The hearing record reflects that a goal of team composition is to allow students to "talk with each other without being just like each other" (Tr. p. 513). Adult staff on a team includes a Ph.D. or Masters level clinician/therapist, a teacher, a team leader, and a weekend team leader (Tr. pp. 478, 532, 578).[12] The teacher assigned to each team serves as the academic advisor for those students, and the team leaders perform a supervisory function (Tr. pp. 478-79). The students' therapist meets with them on a weekly basis for a one hour and fifteen minute session (Tr. p. 479). Depending on the student's treatment needs, the focus of the therapy sessions is more individual therapy or family therapy (id.). At the time of their enrollment, through "emotional growth plans," students are offered incentives, which provide more options and freedom as students demonstrate success with initial tasks (Tr. pp. 489, 529-30).

According to the psychiatrist, upon her arrival at Montana Academy in April 2008, the student presented a "fairly familiar clinical picture" in that she had "collapsed socially and academically" and was "so anxious and depressed that she could no longer function" (Tr. pp. 484-85; see Tr. pp. 495-98). He further stated that the student's profile was not an uncommon profile at Montana Academy (Tr. p. 486). The hearing record reflects that initial therapy, through the use of "de-escalation interventions" and through "processing" the "pathology" of her behaviors, focused on moving the student from socially awkward, self-conscious, perfectionistic, and critical tendencies, to looking at what she could change (Tr. pp. 495-98, 522-23). Therapy also addressed

[12] The student's team is supervised by the psychiatrist who testified at the impartial hearing, and the hearing record reveals that the student's therapist has a Masters degree in clinical counseling (Tr. pp. 465, 507).

family relationships and "issues of growing up" (Tr. pp. 496-500). The student's father also testified that he and the student's mother, the student, and her therapist participated in a weekly one to two hour telephone conference where they were "engaged in the therapeutic process" and working through the student's problems (Tr. pp. 788-89). As a result, the psychiatrist testified that the student became "more and more" successful socially, had reconciled with her family, and had demonstrated the ability to independently plan for her future, such as applying to colleges (Tr. pp. 499-500). I note that the hearing record reflects that the student's use of psychopharmacological mediations was discontinued while she was at Montana Academy (Tr. pp. 506-07).

In addition to individual and family counseling, students also attend "team groups" four days per week for 1 1/2 hour sessions, described as "conventional process psychotherapy groups," which are run by Ph.D. and Masters level clinicians or physicians (Tr. pp. 479, 492). During group sessions, students have the opportunity to discuss their feelings and struggles with each other and their parents (Tr. p. 479). The psychiatrist testified that evaluation of the student's clinical progress was ongoing, but that "she has been doing very well," despite an admitted "rocky start" (Tr. p. 498). He further testified that the student had become a leader on her team and helped other students with their "struggles" (Tr. p. 499). During one of the weekly sessions, the students' teachers join the group and discuss individual students' academic performance for that week, including how students "behaved and performed and improved" (Tr. pp. 492-93).

Additionally, the psychiatrist from Montana Academy testified that one therapy session per week is devoted to the "clan group;" where students who are grouped by whether they are at the beginning, middle, or end of their enrollment at the school, have the opportunity to discuss their "common problems" (Tr. p. 480). As of March 2009, the student was considered to be "fairly advanced" in group sessions and performing "very well … across the board" (Tr. p. 504).

The hearing record reflects that, academically, Montana Academy is organized based upon a three-month quarterly system, to accommodate students who enter the program at various points during the school year (Tr. p. 487). Students usually take two or three courses at the beginning of their enrollment, and are provided with a structured, supervised study hall to ensure that they are "engaged with their teachers and doing the work" (Tr. pp. 487-88, 561-62). Upon arrival, students' "credit history" is assessed and they are placed in courses according to what credits they need (Tr. pp. 562-63). The curriculum at Montana Academy is based upon California and Montana state standards and all of the teachers have Montana certification, including one certified special education teacher (Tr. pp. 557, 561). Classes are composed of four to twelve students and Montana Academy offers a "full curriculum" in math, science, English, social studies, as well as foreign language, music, physical education, and art classes (Tr. pp. 558-60).

Students attend classes from 8:30 a.m. through 12:45 p.m. Monday through Friday and typically have three courses and a study hall during that time (Tr. pp. 489-90). Students eat lunch with their team and then participate in group counseling from 1:30 p.m. until 2:45 p.m. (Tr. p. 490). From 2:45 p.m. through 4:00 p.m., students have study hall or the opportunity for individualized instruction and "experientials," described as activities involving psychological lessons (Tr. pp. 490, 494-95, 564-66). The hearing record reveals that a significant amount of communication occurs between students' clinical and academic staff (Tr. pp. 478-79, 488-89, 502, 578-80). Specifically, the team teacher meets weekly with students' therapists and team leaders to discuss all students (Tr. p. 579). If a student is exhibiting difficulty in therapy and school, an

ongoing treatment plan is developed for the student based on the weekly conversations between the academic and therapeutic staff (id.). Commensurate with the student's academic program, the psychiatrist testified that Montana Academy devoted "the same sort of attention to [the student's] clinical problems," and that it was a "comprehensive approach which is intensive and… around the clock" (Tr. p. 488).

As stated above, students are apprised weekly of their academic performance and provided with "constant feedback" about whether their homework is up to date, how they are participating in class, and if they are misbehaving (Tr. p. 500). The hearing record reflects that the student continued to receive grades in the "A" to "B-" range during her enrollment at Montana Academy (Tr. pp. 573-77; Parent Ex. B). Although initially the student exhibited "some trouble getting in homework," the director of the educational program at Montana Academy testified that by March 2009, the student had "been doing quite well for the last few months" (Tr. pp. 555, 577-78). She further reported that the student's teachers indicated at weekly team meetings that the student had "been achieving well in every area" (Tr. p. 578). Additionally, the student applied for and was accepted to college (Tr. p. 499).

In light of the foregoing, a review of the hearing record reflects that the parents have met their burden to show that Montana Academy addressed the student's special education needs and further reflects that the student made progress in her educational and therapeutic programs.

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 U.S.C. § 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).

The IDEA allows that 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 student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory

provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger 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]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In the instant matter, the parents maintain in their petition that at no time did they engage in any actions that impeded the CSE from carrying out its obligation to offer the student a FAPE. The parents further submit that throughout the evaluation and placement process, they acted in a fair and equitable manner. Conversely, the district argues that in addition to their failure to make the student available for intake interviews, the parents engaged in other actions which weigh against an award for tuition reimbursement. For the reasons more fully described herein, I am constrained to uphold the impartial hearing officer's determination that equitable considerations bar the parents' request for relief.

Here, a review of the hearing record shows that although the student's father visited Summit, as well as two other potential day placements, the parents did not make the student available for an intake interview at Summit, a necessary step in the admissions process (Tr. pp. 140, 782-83; Dist. Ex. 27). Additionally, while a balancing of the equities does not prohibit parents from entering into an admissions contract with a unilateral placement prior to the date of the relevant CSE meeting, in the instant case, as detailed herein, I am not persuaded that the parents were willing to accept a district recommended placement and remove the student from Montana Academy for the 2008-09 school year (see Bettinger, 2007 WL 4208560, at *9 [S.D.N.Y. Nov. 20, 2007]).

On February 17, 2008, two months prior to the first CSE meeting, the parents entered into a written agreement with Montana Academy, wherein they agreed that the student would remain in the program for 16-18 months (Tr. p. 797; see Dist. Ex. 23; Parent Ex. C). Contrary to the student's father's testimony that at the time the parents signed the enrollment contract with Montana Academy he did not think they were "committed," testimony from Montana Academy's psychiatrist reflected that parents who submit an application to the school "really know what they're getting into, and they know what we expect and agree that they will participate" (Tr. pp. 483, 797).[13] The psychiatrist testified that he met with the parents in the instant case (Tr. pp. 518-19). The psychiatrist described the admissions process as "selective and thoughtful," while noting that staff meets with parents prior to accepting a student (Tr. pp. 482-83). According to the psychiatrist, parents are required to visit the school to discuss their children and their problems, meet other students and spend time in the classrooms (Tr. pp. 483, 519). Given the above set of circumstances, the parents' actions reveal that as of February 2008, the parents understood that

[13] The enrollment contract provided that the "parents understand that they are committing to enroll their child for the duration necessary to complete the program that is approximately 16-18 months but may be longer in some cases" (Parent Ex. C at p. 29).

they were committed to enrolling their daughter in Montana Academy for 16-18 months and it does not appear that they had any intention of removing her from the program to place her in a district recommended program (see Carmel, 373 F. Supp. 2d. at 415-16).

Moreover, a review of the hearing record reflects that the parents failed to afford adequate written notice of their intent to remove the student to Montana Academy and seek tuition reimbursement in accordance with 20 U.S.C. § 1412[a][10][C][iii]. Although the hearing record shows that by March 19, 2008, the student's mother had advised the CSE of the parents' intention to place the student at Montana Academy, there is no indication in the March 19, 2008 correspondence that the parents planned to seek tuition reimbursement for their unilateral placement (Tr. p. 775; Parent Ex. E). Similarly, while the hearing record illustrates that the CSE knew that the student was attending Montana Academy at the time of the April 2008 and June 2008 CSE meetings, it does not indicate that at the time of either meeting the parents advised the CSE of their intent to seek tuition reimbursement (Tr. pp. 127, 210; Dist. Exs. 23 at p. 4; 24 at p. 4). On August 18, 2008, through their attorney, the parents formally advised the district of their intention to place the student at Montana Academy for the 2008-09 school year, and their intention to request tuition reimbursement (Tr. p. 130; Dist. Ex. 25). According to the district's director of special education, although he had previously received a report from Montana Academy that the student was being educated there, the district's director of special education testified that he had not received a letter from the parents informing him of their intention to place her there (Tr. p. 130). Based on the foregoing, the hearing record does not establish that the parents afforded the district adequate written notice of their intent to unilaterally place the student at Montana Academy in April 2008 and seek tuition reimbursement in accordance with the IDEA for the time period of April 2008 through June 2009.

Under the circumstances detailed above, equitable considerations under 20 U.S.C. §§ 1412(a)(10)(C)(iii) and 1415(i)(2)(C)(iii) preclude an award of tuition reimbursement, given the constellation of the parents' actions that reflect a failure to cooperate with the district in developing the student's program.

In light of my determinations, I need not consider the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 19, 2009

PAUL F. KELLY
STATE REVIEW OFFICER