



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-132

Application of a STUDENT SUSPECTED OF HAVING A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Mattituck-Cutchogue Union Free School District

Appearances:

Cordova & Associates, P.C., attorneys for petitioners, Doreen Cordova, Esq., of counsel

Ingerman Smith, L.L.P., attorneys for respondent, Susan E. Fine, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which determined that the student was ineligible for special education programs and services and denied their request to be reimbursed for their daughter's tuition costs at the Bromley Brook School (Bromley Brook) for the 2007-08 school year, denied tuition reimbursement for the Dublin School (Dublin) for the 2008-09 school year, denied the parents' request for direct funding at Dublin for the 2009-10 school year, and denied reimbursement for travel expenses. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled at Dublin, a private residential high school (Tr. pp. 405, 434-35). Dublin is an out-of-State school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). At the time of the impartial hearing, the student had been found ineligible for special education services by the district (Parent Ex. N at p. 1). The student's eligibility for special education services as a student with an emotional disturbance and/or as a student with an other health impairment is in dispute in this appeal (see 34 C.F.R. § 300.8[c][4], [c][9]; 8 NYCRR 200.1[zz][4], [zz][10]).

The hearing record reflects that the student attended the district's general education program for elementary and junior high school (Parent Ex. D at p. 19). The student demonstrated strong academic ability during seventh and eighth grades, earning a fourth quarter average of 90.889 at the end of seventh grade (2005-06), which placed her on the honor roll, and a fourth quarter average of 89.556 at the end of eighth grade (2006-07) (Dist. Exs. 15 at p. 1; 16 at p. 1).

The parents reported that the student had historically been both socially and athletically successful and that she had always been able to make friends easily (Parent Ex. D at p. 19).

Despite the student's success in the district's general education program, the parents reported that during eighth grade (2006-07), the student began to exhibit some "behavioral problems" (Parent Ex. D at p. 19). According to the parents, reportedly after some incidents of verbal harassment by other students, the parents noted a decline in the student's self esteem (Parent Ex. DD at p. 1). The parents reported that in March 2007, the student began a relationship with an older boy (*id.*). The parents further reported that the student exhibited an escalation of fighting with her parents, chronic lying, petty theft, and that the student demonstrated signs of anxiety and depression (Parent Ex. D at p. 19). The student subsequently saw a private clinical social worker for counseling from April 2006 to September 2007 although according to the parents, it was not helpful because the student "refused to tell the truth or be open about her life situation" (*id.*). The parents described the student as having become overly concerned with approval from others and reported that during the summer before ninth grade, she had become "violent" and uncontrollable when limits were set for her (*id.*).

On September 12, 2007, the parents met with the student's high school guidance counselor to discuss concerns they had regarding their daughter and some of the students with whom she was socializing (Tr. p. 493; Parent Ex. DD at p. 1). The parents also reported that they expressed their concerns to the guidance counselor at the meeting regarding the student's anxiety and violent outbursts (*id.*). According to the parents, the guidance counselor assured them that he knew the students, that things would be fine, and that he would "keep an eye on things" (*id.*). The hearing record reflects that the guidance counselor advised the parents to contact the student's teachers (Tr. p. 494). The hearing record further reflects that on September 20 and 21, 2007, the parents emailed the student's Spanish teacher and soccer coach requesting feedback on her class performance and her attendance at soccer practice (Parent Exs. K; L).¹

On September 23, 2007, after discovering the nature of the student's relationship with the older boy and alerting the police, the parents contacted the student's private therapist for guidance in helping their daughter (Parent Ex. DD at p. 2). The private therapist recommended that the student be immediately removed from the community and placed in an all girl residential treatment facility to ensure her safety and to begin intensive treatment (*id.*). The following day, the parents contacted the student's guidance counselor at the district to advise him of the situation and to ask for assistance in placing their daughter (*id.* at p. 3). The hearing record reflects that although the guidance counselor provided them with names of potential placements for the student that he had obtained from the district social worker, the parents ultimately located a private therapeutic residential school with the help of their private therapists (Tr. p. 499; Parent Ex. DD at p. 3).

On September 24, 2007, the student was involved in an "altercation" at home that resulted in police involvement (Parent Ex. F at pp. 1-2). The parents reported that the police were able to calm the student and convince her to acquiesce to a treatment plan (Parent Ex. DD at p. 3). The following day, the parents contacted the district's superintendent to request an emergency meeting and explained their daughter's situation to him (*id.*). According to the parents, after consulting with the district's attorneys, the superintendent contacted the parents and informed them that since

¹ Testimony by the student's soccer coach indicates that the parents had used an incorrect e-mail address and the soccer coach never received the parents' e-mail (Tr. p. 480).

the student was not classified as a student with a disability, the district could offer no further assistance (*id.*).

On September 26, 2007, the parents unilaterally placed the student at Bromley Brook, an out-of-State private therapeutic boarding school (Parent Exs. V at p. 1; DD at p. 3).

On October 5, 2007, in a letter addressed "To Whom It May Concern," the student's private therapist indicated that, at that time, it was in the student's best interest that she be placed in an "all-girl's" residential school and that she could not return to the district school (Parent Ex. Z at p. 1).

In a letter to the district's director of special education dated November 7, 2007, the parents notified the district that they were referring their daughter for "evaluation and special education placement" (Parent Ex. G at p. 1).

In a letter to the parents dated December 18, 2007, the special education director confirmed that she had spoken to the student's father regarding the Committee on Special Education (CSE) process and had informed him that because Bromley Brook was located out-of-State, the district of location would be responsible for conducting the initial referral and all necessary evaluations for the student (Parent Ex. H at p. 1). In her letter, the director of special education indicated that she was in the process of determining how the state where Bromley Brook was located and the school itself addressed this type of referral and that she was enclosing consent to evaluate forms to expedite the evaluation process, as well as a procedural safeguards notice (*id.*).

On December 19, 2007, the parents' educational coordinator requested the student's "education document[s]" from the district (Parent Ex. U at p. 1). On December 20, 2007, the student's previous district guidance counselor provided the educational coordinator with "all pertinent data" regarding the student, which included the student's 2007-08 class schedule, seventh and eighth grade report cards, attendance summary for the period of September 6, 2007 through December 20, 2007, cumulative health record, and the student's scores from the 2007 New York State Testing Program (NYSTP) for English language arts (ELA) and mathematics (*id.* at pp. 2-15). The guidance counselor further indicated to the educational coordinator that there were no special education records, individualized education programs (IEPs) or disciplinary records regarding the student (*id.* at p. 2).

In a letter dated January 7, 2008, the director of special education updated the parents regarding her contacts with Bromley Brook and the district of location and informed the parents that she was including another consent to evaluate form as the parents had not responded to her request made the previous month (Dist. Ex. 3 at pp. 1-4). She further informed the parents that the district wanted to avoid any delays in having the student evaluated; therefore, the district was seeking written consent to evaluate from the parents (*id.* at p. 1). The district indicated that when the written consent was received, the evaluations would be conducted at a "mutually convenient time" and asked the parents to call with any questions or concerns (*id.*).

On January 15, 2008, the student's mother completed a parent referral to the CSE (Parent Ex. J at pp. 1-2). As part of the initial CSE referral process, the student's mother also completed a CSE social and developmental history dated January 20, 2008 (*id.* at pp. 3-9).

In another letter dated January 7, 2008,² the director of special education informed the parents that she had received their signed consent to evaluate form, their "completed Referral," and their "typed narrative" in which they explained why they were referring the student (Parent Ex. H at p. 4).³ The director of special education indicated that, based on the parents' narrative, she believed a psychiatric evaluation by an outside provider at district expense would be "prudent" and she enclosed a consent form for a psychiatric evaluation (*id.*). The director of special education further informed the parents that if the psychiatric evaluation was not able to be completed within the required 60 day timeline, a CSE meeting would still be held and the CSE would reconvene when the psychiatric evaluation was completed (*id.*). Additionally, the director of special education requested that the parents either provide the district with the psychological evaluation completed at Bromley Brook or provide the district's school psychologist with consent to speak with the evaluating psychologist in order to avoid administering the same assessments or subtests (*id.*). The student's mother signed the consent for the psychiatric evaluation on January 31, 2008 and hand delivered it to the director of special education's office on February 4, 2008 (*id.* at p. 5).

A private psychological evaluation of the student was conducted on December 20, 2007 at Bromley Brook (Parent Ex. D at p. 17). The resulting report dated January 21, 2008, indicated that the student was referred for psychological testing "as part of an initial comprehensive [s]pecial [e]ducation evaluation to determine if she [met] the criteria as a student with a [s]pecific [l]earning [d]isability, [e]motional [d]isturbance and/or an [a]ttention [d]eficit/[h]yperactivity [d]isorder" and reflected information provided by the parents in a developmental questionnaire (*id.* at pp. 1-16, 17-20). The private evaluators noted that during the evaluation, the student was generally cooperative and motivated to do well, was somewhat impulsive at times, tended to react with anxiety to failure or difficult test items, that she displayed average verbal abilities, and that her articulation abilities and her fund of knowledge were typical for her age (*id.* at p. 20). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ of 98 (45th percentile), which the evaluators determined was in the average range of intellectual functioning (*id.* at pp. 21, 28). The evaluation report indicated that the student's performance on the Bender Gestalt Visual Motor Test was "generally adequate" (*id.* at p. 22). The student's academic ability was assessed by administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) and revealed that the student's achievement levels were consistently within the average range, ranging from the 34th percentile to the 77th percentile (*id.* at pp. 22, 30). The report further reflected that no significant discrepancy was found between the student's academic achievement and her cognitive functioning and therefore, according to the private evaluators, the student "[did] not meet the criteria for a diagnosis of any specific learning disability as described by the Diagnostic and Statistical Manual of Mental Health Disorders, 4[th] Edition (DSM-IV)" (*id.* at p. 29). The psychological evaluation report also indicated that the student did not appear to have a chronic health impairment that would be consistent with a diagnosis of an "[a]ttention-[d]eficit/[h]yperactivity [d]isorder" and that although the student episodically exhibited problems with attention, concentration and agitation; the evaluators determined that these problems appeared to be a result of the student's "mood state and concurrent anxiety" (*id.* at p. 30).

² The date on this letter is apparently an error as the letter makes reference to events which occurred on January 22 and 25, 2008 (Parent Ex. H at p. 4).

³ The parents' "typed narrative" was attached to the district referral and social history forms and provided more detailed responses to several questions on these forms (see Parent Ex. J at pp. 1, 2, 4, 9).

With regard to the student's emotional functioning, the private evaluators administered several objective and projective measures including behavioral checklists, personality surveys, interviews, drawings, sentence completions, and story telling tasks (Parent Ex. D at pp. 24-27). The evaluators determined that the student met Axis I criteria for an anxiety disorder not otherwise specified (NOS), a depressive disorder NOS, alcohol abuse, a parent-child relational problem, and a "R/O" dysthymic disorder (*id.* at p. 28).⁴ Despite the evaluators' determination that the student's academic achievement scores were within the average range, they also determined that the student met the criteria for an Axis IV diagnosis of academic problems (*id.* at pp. 28, 29). Recommendations included in the psychological evaluation report indicated that the student should continue to attend Bromley Brook in order to "stabilize and maintain her affective functioning, maximize her academic strengths and continue to achieve academically to her potential," and should continue participation in individual and group psychotherapy (*id.* at p. 30). The private evaluators also strongly encouraged the parents to participate in family counseling and alcohol support groups and to model positive coping methods and appropriate responses to situations (*id.* at p. 31).

By letter dated February 4, 2008, the district's director of special education informed the parents that she had received their signed consent for the district funded psychiatric evaluation of the student and requested that they complete and return the enclosed parent questionnaire for use in the upcoming psychiatric evaluation (Dist. Ex. 7). The letter also indicated that a "teacher information packet" had been forwarded to Bromley Brook that would also be used for the psychiatric evaluation (*id.*). The parents responded by letter dated February 28, 2008, stating that they had enclosed the completed parent questionnaire and the student's recently completed January 21, 2008 private psychological evaluation (Dist. Ex. 10). In their letter, the parents also requested that the evaluation be conducted by a female psychiatrist (*id.*).

On February 13, 2008, Bromley Brook provided the district with information regarding the student's academics, work habits, socialization, and management needs (Dist. Ex. 11). In the area of reading, the student reportedly did not "comprehend what s/he reads" and exhibited "difficulty retaining learned words/sight words" (*id.* at p. 2). With regard to socialization, the student reportedly related well to other students and responded well to adult feedback (*id.* at pp. 4-5). With regard to work habits, the student was reported to demonstrate weakness in working to finish assignments, failed to complete assignments well, and sometimes needed considerable teacher intervention to complete missing assignments (*id.*). In the area of management, the student was reported to be cooperative, well behaved, and easily redirected (*id.*). The student's grades from October 2007 to February 2008 were primarily in the 80s or "B" range; however, at times the quality of her work and her effort were described as "inconsistent" (*id.* at pp. 9-16).

By letter dated March 3, 2008, the district's director of special education contacted a local Board of Cooperative Educational Services (BOCES) requesting a psychiatric evaluation of the student by a female evaluator and enclosed a copy of the January 21, 2008 private psychological evaluation report and teacher information packets completed by the student's then current teacher at Bromley Brook and by a previous district teacher of the student (Dist. Ex. 12 at p. 1).⁵

⁴ It is presumed that "R/O" means "rule out."

⁵ The teacher information packet from the district was referred to in the letter, but was not attached to the copy of the letter contained in the hearing record (Dist. Ex. 12).

In a memorandum to the district's director of special education dated March 7, 2008, the district's school psychologist indicated that following her review of the student's private psychological evaluation and consultation with the district's educational evaluator, she had determined that no further cognitive or academic evaluations of the student were necessary (Dist. Ex. 13 at p. 2). The school psychologist opined in the memorandum that because the private evaluators had determined that the student did not meet the criteria for any specific learning disability and that the student was proficient in all areas of academics, it was unnecessary to reevaluate the student in these areas (*id.*).

By letter dated March 7, 2008, the district notified the parents that a CSE meeting was scheduled for March 18, 2008 (Parent Ex. M at p. 1). However, in a letter dated March 13, 2008, the parents responded that they were unable to attend on that day and the CSE meeting was ultimately rescheduled for April 4, 2008, with the parents' approval (*id.* at pp. 2-5).

On April 4, 2008, the CSE met for an initial eligibility determination meeting regarding the student (Parent Ex. N at p. 1). The meeting was attended by the district's director of special education who also functioned as the CSE chairperson, the school psychologist, a district high school teacher, a district special education teacher, the guidance counselor, an additional parent member, the parents, and an educational coordinator who functioned as a consultant/advocate to the parents (*id.*). The comments noted on the resultant April 4, 2008 CSE "Ineligibility Document" reflected that the CSE meeting was held as a result of an initial referral made by the parents to determine if the student had an educational disability and if special education services were needed and that although the parents were informed of the responsibilities of the district of location and the district's director of special education had contacted the district of location, the parents elected to have the referral process completed by the district of residence (*id.*). The comments also reflected that the parents reported that the student had developed "extreme mood swings," "often screamed and cursed at them," had several "episodes" between July and August 2007, had run away several times and stayed at a neighbor's house for briefs periods, and had engaged in a physical altercation with the parents that required assistance from the police in September 2007 (*id.*). The comments indicated that the parents elected to place the student at Bromley Brook on September 26, 2007 "due to concerns regarding [the] relations she was engaging in with a boy," which the parents reported had started in March 2007 (*id.*). The comments further reflected that the student's school records showed passing grades, success in all subject areas, daily attendance in school, no noted behavioral problems that had resulted in any in or out of school suspensions and that the student's teachers reported that the student presented as "a happy girl who participated in class" (*id.*). Additionally, the comments reflected that although the parents' advocate had requested "test results and/or grades" for the first three weeks of the 2007-08 school year, no grades or assessments were completed as school was in session for only twelve days prior to the parents' placement of the student at Bromley Brook (*id.* at pp. 1-2). The CSE ineligibility document indicated that based on the January 22, 2008 social history and the January 21, 2008 private psychological evaluation, the CSE deemed the student ineligible for special education services (*id.* at p. 2). The comments also reflected that in light of the information reported by the parents, the district had coordinated the scheduling of a psychiatric evaluation (*id.* at p. 1).

On April 11, 2008, the CSE documented the results of the April 4, 2008 CSE meeting in a letter to the parents and indicated that the recommendation of the CSE, meeting information, and appropriate evaluation information would be provided to the student's building administrator for the purpose of determining what academic intervention services, educationally related support services or other services may be appropriate for the student (Parent Ex. N at p. 3).

In a letter to the parents dated April 15, 2008, the district's director of special education informed the parents that the student had been referred to the district's Section 504 Committee (Parent Ex. O at p. 1; see 29 U.S.C. §§ 701-796[*I*] [1998]). In the letter, the district asked the parents to provide any evaluative information they wanted the Section 504 Committee to consider and requested that they sign and return an enclosed consent to collect the evaluative information (Parent Ex. O at p. 1). The letter indicated that a copy of the "Section 504 Procedural Safeguards Notice" was also enclosed (*id.*). The hearing record reflects that the parents signed the consent form on April 30, 2008 (*id.* at p. 3). By letter dated June 16, 2008, the district notified the parents that a Section 504 Committee meeting was scheduled for June 25, 2008 (Parent Ex. P).

On May 23, 2008, while still in ninth grade at Bromley Brook, the student underwent a district funded psychiatric evaluation (Parent Ex. T at p. 1; see Parent Ex. N at p.1). The evaluating psychiatrist indicated that she interviewed the student and her parents, reviewed a narrative written by the parents, and reviewed the private psychological testing previously completed (Parent Ex. T at p. 1). The psychiatrist also reviewed the rating scales completed by the parents and two of the student's teachers (*id.*). In her report, the psychiatrist summarized the student's history of behavioral difficulties based on the information provided to her and indicated her impressions of the student (*id.* at pp. 1, 2, 4). The psychiatrist indicated that she was unable to "elicit a history of prior ADHD or learning disability from the parents" and that while there was not a "glaring history of early anxiety," there was indication of a tendency for the student to have problems regulating herself such as early sleep difficulty, fussiness, and temper tantrums (*id.* at p. 5). The psychiatric evaluation report indicated that the student reported feeling anxious and worried about acceptance as an elementary student and about bad things happening to her parents, although the psychiatrist stated in the evaluation report that "it did not sound like these interfered with [the student's] function[ing]" (*id.*). The psychiatrist opined that puberty, being bullied/harassed, and the student's response to the parents' "marital stress" may have added to the student's insecurities and anxiety (*id.*). She further opined that the student was willing to do things that her family disapproved of to gain the regard of her peers, but that she also needed the positive regard of her parents and concluded that conflict was what put her into a "tailspin" (*id.*). The psychiatrist added that children such as the student, whose parents have marital discord often "act out" as a way to unify the parents, and that the student was also struggling with separation (*id.*). The psychiatrist indicated in the evaluation report that she did not disagree with the diagnosis given to the student by other professionals of an anxiety disorder NOS, which she defined as "[the student] has a little bit of several different disorders but not enough of any one of them to 'meet the criteria'" (*id.* at p. 6). She also indicated that the student exhibited an adjustment disorder of adolescence with behavior and emotional symptoms (*id.*). The evaluating psychiatrist recommended that the question of classification be left to the CSE, and further recommended treatment that included removal of the student from the situation, individual and family therapy, a token economy, and group therapy (*id.*). The psychiatrist also noted that "[the student] really [didn't] have any educational problems per se," and that she "does not have a disorder that directly impacts her learning" (*id.*).

By letter dated June 11, 2008, the district's director of special education provided the parents with a copy of the May 23, 2008 district funded psychiatric evaluation report and indicated that a Section 504 Committee meeting would be scheduled to discuss the results of the evaluation (Parent Ex. S). The district's Section 504 Committee met on June 25, 2008 (Parent Ex. Q). The 504 Committee meeting comments revealed that the parents indicated to the 504 Committee that they wanted the student to receive counseling and their belief that the district should be responsible for the payment of those services (*id.*). According to the meeting comments, the 504 Committee noted that the student was capable of and competent at learning; that her school records indicated

passing grades, success in all subject areas, daily attendance in school, and no behavioral concerns that had resulted in any in or out of school suspensions; and that her teachers reported that the student presented as a happy girl who participated in class (*id.* at p. 1). Additionally, the 504 Committee meeting comments reflected that psychiatric findings indicated that the student did not have a disorder that directly affected her learning (*id.*). As such, the 504 Committee did not find that a disability existed and deemed the student ineligible for a 504 accommodation plan (*id.*).

The hearing record reflects that the student transferred from Bromley Brook to Dublin, a private out-of-State co-ed boarding school for students in ninth through twelfth grade, for the 2008-09 school year (tenth grade) and participated in the general education curriculum (Tr. pp. 434-35; Parent Ex. C at p. 2). While in tenth grade at Dublin, the student was referred by her parents for a private neuropsychological evaluation in order to determine how her emotional difficulties were interacting with her cognitive processing and to determine if her then current academic environment was appropriately meeting her needs (Parent Ex. C at pp. 1, 10). The neuropsychological evaluation summary noted the student's prior diagnoses, history of "risky behaviors" and family discord, average cognitive and achievement test scores, and her placement at Bromley Brook and later, at Dublin (*id.* at pp. 1-8). Despite the student's consistently average intellectual and achievement scores, the private psychologist indicated that the student's "relative weaknesses" in organization and visuomotor planning "parlay[ed] into taking messy notes, and struggling in math and sciences and engineering, where visual material is often dense and abstract," and that the student was likely to be disorganized and lose or misplace things at home and at school (*id.* at p. 10). The private psychologist opined in the evaluation report that for an otherwise intelligent student, these relative weaknesses could be quite frustrating and for a child who experienced vacillating emotions, it could sometimes feel "devastating" (*id.*). The psychologist reported that her assessment revealed that the student continued to experience anxiety and that she exhibited elements of a mood disorder (*id.*). Specifically, the evaluator reported that the student's low mood coupled with anxiety caused her to lose focus and concentration and to avoid tasks that she deemed "effortful" and that her anxiety made her feel overwhelmed (*id.*). The psychologist indicated that in combination these behaviors could result in conflicts at home and school, with peers and parents (*id.*). The psychologist determined that consistent with previous reports, the student did not have a learning disability or an attention deficit hyperactivity disorder (ADHD) (*id.*).

Recommendations in the report indicated that the student required a program that provided daily structure and teachers who were knowledgeable about her anxiety and mood disorder and who understood her weaker visuomotor planning and organization skills (Parent Ex. C at p. 11). The evaluator opined that the student's then current academic setting at Dublin was appropriate to help decrease her "vulnerability to high risk behaviors (drinking, drugs, smoking, stealing, sex, etc.)" (*id.*). The private psychologist also recommended that the student be provided with a designated person within the school, such as a school psychologist or guidance counselor, whom she could immediately contact, as well as a place to which she could "retreat and feel supported during moments of frustration" (*id.*). The psychologist also "strongly encouraged" the student to continue ongoing private outpatient counseling services at home with active participation of the parents in a family component to the therapy (*id.*). The neuropsychological evaluation report reflected recommendations for academic strategies including use of a word processor to complete assignments, guidance in staying organized and "caught up" with daily tasks, allowance for slow work habits, and strategies for remembering and retrieving new or lengthy information (*id.*). Lastly, the private psychologist recommended a follow up with the student's then current medical specialist regarding her medications (*id.* at p. 12).

On April 27, 2009 in a handwritten letter addressed "To Whom It May Concern," the student's private child and adolescent psychiatrist indicated that the student had been under his care since October 14, 2008, and that he had "diagnosed anxiety, depression and ADHD" and "prescribed [medication] for the ADHD" (Parent Ex. AA).

On May 5, 2009, the student underwent a private "Orthoptic Visual Perceptual Evaluation," reportedly to determine whether a program of visual therapy would improve the student's academic performance (Parent Ex. Y at p. 1). The resulting evaluation report indicated that the student's "poor academic performance" was in part due to diagnoses of "[p]oor [p]ursuits," "[p]oor [s]accades," "[c]onvergence [i]nsufficiency," "[a]ccommodate [i]nfacility," and "[p]oor [e]ye/[h]and [c]oordination" (*id.* at p. 3). The private evaluator recommended orthoptic visual therapy which he indicated "was not routine eye care or glasses," but a treatment for a specific neuromuscular anomaly that required "in-office treatment plus home supported activities" (*id.*).

The parents, through their attorney submitted a due process complaint notice dated May 21, 2009 (Parent Ex. A). In the due process complaint notice, the parents argued that the district's failure to classify the student had denied the student a free appropriate public education (FAPE)⁶ because the student was eligible as a student with a disability under the IDEA and State and federal regulations and should have been classified with an emotional disturbance or an other health impairment (*id.* at pp. 3-5). They argued that the district failed to respond in a timely fashion to the parents' concerns regarding the student's escalating behavior problems, including her relationship with an older boy, which forced the parents to remove the student from the district high school and place the student at Bromley Brook for the remainder of the 2007-08 school year (*id.* at pp. 2-4). During the 2008-09 school year, the parents stated that they placed the student at Dublin (*id.* at p. 2). The parents argued that both of these unilateral placements were appropriate for the student and that there were no equitable considerations barring a reimbursement award for both the 2007-08 and 2008-09 school years (*id.* at pp. 6-7). The parents also sought direct payment of tuition for the "2010 and 2011 school year...until [the student] graduates from [h]igh [s]chool" (*id.* at p. 7). Additionally, the parents sought payment of attorney's fees and reimbursement of travel expenses to and from Bromley Brook and Dublin (*id.*).

The hearing record includes the student's report card for the 2008-09 school year (tenth grade) at Dublin, dated June 8, 2009 (Parent Ex. CC). The report card reflected that the student earned final grades in academic subjects which ranged from "C-" to "C+" and earned grades of "B-" and "B+" in non academic areas (*id.* at p. 1). The student's effort was rated as "good" by five out of her six teachers and as "average" by one of her teachers (*id.* at pp. 4-9).

⁶ The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State educational agency;
 - (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
- (20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

The district submitted a response to the parents' due process complaint notice dated June 18, 2009, denying the allegations contained in the complaint (Parent Ex. B). Specifically, the district contended that the student did not meet the criteria for special education services and that "there was no educational impact to support a need for special education services;" therefore, the CSE appropriately found the student ineligible for such services (*id.*). Thereafter, an impartial hearing was convened on July 24, 2009 and concluded on September 16, 2009, after four hearing dates (Tr. pp. 1, 157, 352, 438). At the impartial hearing, the district called two witnesses and entered twenty-one exhibits into the hearing record (Tr. pp. 31, 94; Dist Exs. 1-21) and the parents called ten witnesses and entered thirty exhibits into the hearing record (Tr. pp. 164, 226, 267, 355, 394, 432, 475, 486, 516, 523; Parent Exs. A-DD).

In a decision dated October 20, 2009, the impartial hearing office determined that the CSE's decision not to classify the student as a student with a disability was appropriate because based on the evidence, the student did not require special education services (IHO Decision at p. 13). He found that the parents' removal of the student from the public school and placement at Bromley Brook was not prompted by academic or program deficiencies at the public school, but by what the parents perceived as unacceptable behavior by the student unrelated to the student's education (*id.* at p. 14). The impartial hearing officer noted that according to the available evaluations and the testimony of witnesses presented by both parties, the student's cognitive abilities and achievement levels were in the average range, her behavior in class was acceptable, and that there were "no issues with the student" that might have triggered the district to seek to classify the student (*id.* at pp. 14-15). The impartial hearing officer found that the parents' notion of having the student classified was an "after thought" attempt to have the district fund the student's boarding school tuition "after the dust had settled" and denied the parents' tuition reimbursement requests for the 2007-08 and 2008-09 school years, as well as the direct funding request for the 2009-10 school year (*id.* at p. 15).

The parents appeal, and request that the impartial hearing officer's decision be annulled. They further request findings including that the district denied the student a FAPE and that their unilateral placements of the student at Bromley Brook and Dublin were appropriate. The parents also request attorneys' fees and argue that the impartial hearing officer erred in rendering his decision because he did not take into account the district's "child find" obligations. The parents contend that the impartial hearing officer also erred in ignoring case law which they contend "extended tuition reimbursement to students who were not previously identified and classified under the Act." The parents also argue that two district administrators were aware of the student's "rapidly increasing behavior" and failed to pass the information on to the CSE chairperson or the school psychologist, that the district failed to fulfill their "child find" obligations by failing to identify the student as a student needing special education services, and that the district failed to begin a response to intervention process. The parents also argue that the CSE failed to invite any representatives from Bromley Brook to the CSE meeting and made its classification determination despite the fact that it lacked a new psychiatric evaluation that was later produced at district expense. Thus, the parents argue that the CSE made a predetermined decision not to classify the student. The parents also contend that the student experienced physical manifestations of emotional issues and that emotional issues interfered with her ability to learn while at the public school. The parents argue that Bromley Brook and Dublin were both appropriate placements for the student and that the equities favor reimbursement for the parents because the parents were cooperative with the CSE and were forthcoming with information. Lastly, the parents claim that they were not provided with a procedural safeguards notice and because of this, they were unaware of the need to give the district prior notice that they were unilaterally placing the student in a

private school and seeking tuition reimbursement. The parents seek tuition reimbursement for the 2007-08 and 2008-09 school years and direct funding for the 2009-2010 school year.

In its answer, the district requests that the parents' petition be dismissed and argues that the CSE correctly determined that the student was ineligible for special education services because the student does not satisfy the criteria for classification as a student with an emotional disturbance in that she was a successful student who did not exhibit any of the required characteristics over a long period of time to a marked degree. The district further argues that it did not breach its "child find" obligations because nothing in the student's behavior caused, or should have caused, the district to suspect that the student had a disability. The district also argues that it has no financial responsibility to fund the student's private placements, even if it is found to have failed to offer the student a FAPE, because the parents' unilateral placements were not appropriate placements for the student. Lastly the district argues that the equities do not favor the parents because the parents failed to provide advanced written notice to the district of the private placement and did not consent to the evaluation process until the student had already been in the private placement for four months. Additionally, the district contends that the parents decided to place the student at Bromley Brook before the CSE met and would not have changed their placement decision regardless of the CSE's ultimate determination.

The district also raises two arguments pleaded as affirmative defenses. First, the district argues that the petition should be rejected for failure to include the notice with petition required by 8 NYCRR 279.3 and second, the district argues that the parents' contentions raised on appeal regarding the composition of the CSE should not be considered because these arguments were not raised in the due process complaint notice.

In their reply, the parents respond to the procedural defenses raised by the district. The parents argue that they served the notice with petition upon the district along with the petition. In the alternative, the parents argue that even if the notice with petition was defective, no prejudice was suffered by the district warranting dismissal of the petition. Also in their reply, the parents concede that the composition of the CSE was not raised in the due process complaint notice and they withdraw those arguments from their appeal.

Preliminarily, I will address a procedural issue. The district contends that the parents' petition must be dismissed for failure to include the notice with petition with the verified petition as required by 8 NYCRR 279.3 and the parents contend that they did serve the required notice. However, the copy of the petition filed with this office does not contain the required notice, nor does the copy of the petition attached to the parents' reply. To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). The district answered the parents' allegations in a timely manner. Under the circumstances, I decline to dismiss the petition for the alleged failure to serve the notice with petition (see Application of a Child with a Disability, Appeal No. 07-117); however, I remind the parents and their counsel to adhere to the State regulations in future appeals.

I will now turn to the substantive issues in this appeal.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare

them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; 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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), 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 consider the parents' arguments that the CSE should have classified the student as a student with an emotional disturbance or an other health impairment and that the district violated its "child find" obligations (see 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]).⁷ For the reasons set forth below, I find that the CSE appropriately found the student ineligible for special education services.

A student with an emotional disturbance must meet one or more of the following five characteristics

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (*id.*; see N.C. v Bedford Cent. Sch. Dist., 2008 WL 4874535 [2d Cir. Nov. 12, 2008]). While the term emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they

⁷ In their petition, the parents do not specify the disability classification under which they believe the CSE should have classified the student. However, in their due process complaint notice, the parents stated that they believed the student should have been classified as a student with an emotional disturbance or an other health impairment (Parent Ex. A at pp. 4-5).

otherwise meet the criteria above (34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

An other health impairment is defined as:

[H]aving limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(8 NYCRR 200.1[zz][10]).

The hearing record reflects that according to the parents, they met with the district's high school guidance counselor on September 12, 2007, discussed concerns regarding their daughter and the students that she was "hanging around with," and disclosed to the guidance counselor that the student was having anxiety and violent outbursts at home (Parent Ex. DD at p. 1). Although the parents claim that district administrators failed to pass information on to the CSE chairperson or the school psychologist regarding the student's "rapidly increasing behavior," the hearing record shows that prior to the student leaving the district, there was no information regarding the student that required addressing by the district. Testimony by the guidance counselor indicates that during the three weeks before the student was removed from the district by the parents, he "did not have to do anything because [the student] did not have an issue that [he] did not think was being dealt with" (Tr. p. 497). The guidance counselor testified that when he met with the parents at the beginning of the 2007-08 school year, although the parents indicated that they had concerns regarding the student's behavior, they did not indicate any "specifics" or "incidents" that they wanted the guidance counselor to review, but rather voiced "general sort of overtones about their concern for their daughter" (Tr. p. 510). The guidance counselor testified that the parents mentioned their concern regarding an older peer group that the student was "hanging out with" and that his response was that he would monitor the situation (Tr. p. 509). The guidance counselor testified that during the ten days that the student attended school in September 2007, no one at the school came to him with any concerns regarding the student including the student's teachers, the dean of students, or the district administrators (Tr. pp. 510-11). The hearing record also reflects that during the ten days that the student was attending the district high school in September 2007, the student had no record of disciplinary referrals (Parent Ex. U at p. 2).

When asked if he had convened a child study team (CST) meeting for the student, the guidance counselor testified that that he did not think that a CST meeting was necessary for the student and explained that the role of the CST is to discuss concerns for "students who are having difficulties in school, are acting out in school, having attendance issues, and so forth" (Tr. p. 504; see Tr. p. 508). The hearing record does not contain documentary or testimonial evidence that would support a finding that the student exhibited these types of difficulties in school at the start of the 2007-08 school year or in previous school years. I note also that subsequent evaluations conducted prior to the CSE and the Section 504 Committee meetings showed that after the student left the district, she continued to maintain academic achievement levels in the average range, was

"achieving very consistently and at expected levels in all academic areas," did "not meet criteria for a diagnosis of any specific learning disability," and did not have "a chronic health impairment that would be consistent with a diagnosis of [a]ttention-[d]eficit/[h]yperactivity [d]isorder" (Parent Ex. D at pp. 29, 30). Although the January 2008 private psychological evaluation indicated that the student met the criteria for an anxiety disorder that the evaluator opined "likely cause[d] significant difficulty in her ability to function in her academic, social and home environment," this is not supported by the academic achievement scores reflected in the evaluation or by her grades during the 2006-07 school year (Dist. Ex. 15 at p. 1). I further note that the January 2008 private psychological evaluation reflected that the student was "experiencing significant emotional distress that in part [was] influenced by the changes she ha[d] recently experienced in her home and school environments," and that "there is no indication that her emotional disturbance is inherently chronic or wholly debilitating" (*id.* at p. 30). The May 2008 psychiatric evaluation indicated that the student "really doesn't have any educational problems per se" and that "[c]hances are, had the parents not intervened, her behavior would have started to impact her grades. However, unlike children I see with, say, ADHD or learning disabilities who crash and burn in adolescence because their prior problems were inadequately treated, [the student] does not have a disorder that directly impacts her learning" (Parent Ex. T at p. 6).

Although the parents also contend that before the student was unilaterally removed from the district, the district was aware that the student's emotional disabilities were interfering with her ability to receive an education, that her behavior was not that of an ordinary 14 year old, that she had an inability to make and maintain friendships, and that she had developed physical symptoms and fears that were associated with school and personal problems; I find no documentary or testimonial evidence in the hearing record that supports these contentions. Testimony by the executive and academic director of Bromley Brook revealed that she had no documentation other than the parents' opinion that the student's social/emotional issues were affecting the student academically when she was in the school district (Tr. pp. 252, 255-56). Moreover, the student's soccer coach testified that the student was well liked by the team, that she was a skilled player who worked hard, and that the girls on the team were upset that the student had left the school (Tr. p. 481).

In light of the above, I find that the student is not disabled such that she should have been classified as a student with an emotional disturbance or an other health impairment under the IDEA.

With regard to the parents' contention that the district failed to initiate a response to intervention (see 8 NYCRR 100.1[ii], 200.2[b][7]) process for the student, the hearing record contains no documentary or testimonial evidence that the student exhibited any signs of academic or behavioral need during the first ten days of the 2007-08 school year before the parents unilaterally removed her from the district. Likewise, the parents' reliance on the "child find" provisions is misplaced because the purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate those students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 436 F.3d 52, 65 [2d Cir. 2006] [holding that the purpose behind the "child find" provisions is to locate children with disabilities who are eligible for special education services who

might otherwise go undetected]).⁸ In this matter, prior to being referred to the CSE for evaluation by the parents, there was no reason for the district to suspect that the student was a student in need of special education. Moreover, after the parents referred the student to the CSE for evaluation, the CSE evaluated the student and correctly determined that the student did not meet the criteria for either an emotional disturbance or an other health impairment and did not have a disability requiring special education. Under these circumstances I find that the district did not violate its "child find" duty.

The parents next contend that the CSE predetermined its determination that the student was not eligible for special education services as a student with a disability because it met and made this determination without considering the results of a psychiatric evaluation that was later completed at district expense. However, the hearing record reflects that the CSE had before it sufficient information to determine that the student was ineligible for special education services. Specifically, the CSE based their determination on a January 2008 private psychological evaluation, which reflected that the student's intellectual and achievement functional levels were within the average range and that she did not meet the criteria for a diagnosis of either a learning disability or an ADHD (Tr. p. 53; Parent Ex. D at pp. 21, 22, 28, 30). Although the psychological evaluation reflected that the student met the criteria for emotional disorders that included an anxiety disorder NOS, a depressive disorder NOS, alcohol abuse, a parent-child relational problem and a dysthymic disorder, the report also reflected that the student was nonetheless achieving to her academic potential (Parent Ex. D at p. 30). Testimony by the CSE chairperson indicated that the CSE members, which included the parents and their advocate, discussed the student's "anxiety" indicated by the 2008 private psychological evaluation and determined that "based on all of the additional information, there were no indicators that it was having a negative impact on [the student's] ability to come to school, participate in class and complete her assignments and learn" (Tr. p. 68). Additionally, the evaluator suggested in the 2008 private psychological evaluation report that the student could "function as a tutor or mentor for another student" to improve her self esteem (Parent Ex. D at p. 31).

The hearing record reflects that the CSE also considered information provided by the student's mother on a January 20, 2008 district social history form that also included a narrative written by the parents regarding the student's history of behavioral difficulties outside of school (Parent Ex. N at p. 2).⁹ However, a review of the social history reveals that it contained no information indicating that the student's emotional and behavioral difficulties were affecting her school performance (see Parent Ex. J at pp. 3-9). Testimony by the CSE chairperson indicates that the CSE also considered information regarding the student's performance from October 2007 through February 2008 provided by the student's teachers at Bromley Brook (Tr. pp. 54-56). As

⁸ The IDEA places an affirmative duty on state and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the state (20 U.S.C. § 1412[a][3]; 34 C.F.R. § 300.111[a][1][i]; 8 NYCRR 200.2[a][7]; New Paltz, 307 F. Supp. 2d at 400, n.13). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. § 300.111[c][1]; 8 NYCRR 200.2[a][7]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (Application of a Child with a Disability, Appeal No. 07-062; Application of a Child Suspected of Having a Disability, Appeal No. 05-090; Application of a Child with a Disability, Appeal No. 04-054; Application of a Child Suspected of Having a Disability, Appeal No. 01-082; Application of a Child with a Disability, Appeal No. 93-41).

⁹ The April 4, 2008 CSE ineligibility document reflected the date of the student's social history as January 22, 2008; however, the social history was actually dated January 20, 2008 (Parent Ex. J at p. 3).

noted above, the Bromley Brook teachers reported that the student's grades were primarily in the 80s or "B" range; that the student related well to other students and responded well to adult feedback; and that she was cooperative, well behaved, and easily redirected (Dist. Ex. 11 at pp. 4-5, 9-16).

Testimony by the school psychologist who attended the April 2008 CSE meeting indicated that she agreed with the determination not to classify the student and relied on the information that the student had not exhibited difficulty while functioning at the district school; that the report cards from Bromley Brook also indicated that the student was achieving academically "within the expected range;" and that there was a lack of "indications of something that could interfere with her ability to learn" in the 2008 private psychological evaluation (Tr. p. 107). She further testified that as a school psychologist, she considered a classification of the student as a student with an emotional disturbance; however, she also testified that "[w]hile certainly there could be anxiety and depressive issues that were affecting her life, [the student] was functioning in school successfully" (Tr. p. 107). The school psychologist testified that she did not believe that the student met the requirements for an educational classification of emotional disturbance because although the January 2008 private psychological report reflected that the evaluators discussed the student's anxiety and social concerns, the report also reflected that they did not feel it was "atypical, or not within an expected range of things. . . that could happen," and therefore, did not affect the student's ability to be successful in school (Tr. pp. 108-09).

Additionally, a review of the May 2008 psychiatric evaluation reveals that, had the CSE been able to consider the May 2008 psychiatric evaluation at the April 2008 CSE meeting, its decision would have been supported by that evaluation. As noted above, the May 2008 psychiatric evaluation report was consistent with the findings of the January 2008 private psychological evaluation report and reflected that the student did not have either a diagnosis of a learning disability or an ADHD, but did meet the criteria for a diagnosis of an anxiety disorder- NOS (compare Parent Ex. D at pp. 29, 30, with Parent Ex. T at pp. 5, 6). However, the May 2008 psychiatric evaluation report also ultimately reflected that the student did not have a disorder that directly impacted her learning (Parent Ex. T at p. 6).

Based on the above, I find that the hearing record shows that the CSE had sufficient information before it to determine that the student was ineligible for classification as a student with a disability and did not predetermine the decision. Moreover, the hearing record supports the impartial hearing officer's conclusion that the district's CSE correctly concluded that the student was not eligible for classification.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 11, 2010

PAUL F. KELLY
STATE REVIEW OFFICER