



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-136

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Karyn R. Thompson, Esq., of counsel

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

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Cross Creek Academy (Cross Creek) for portions of the 2007-08 and 2008-09 school years. The appeal must be sustained.

At the commencement of the impartial hearing, the student had graduated from Cross Creek with a regular high school diploma (Parent Ex. BB). The Commissioner of Education has not approved Cross Creek, a private out-of-State school, as a school with which school districts may contract to instruct students with disabilities (Parent Ex. O at p. 1; see 8 NYCRR 200.1[d], 200.7]). The student's eligibility for special education services as a student with an emotional disturbance is in dispute in this proceeding (Parent Exs. A at pp. 3-4; B at p. 1; see 34 C.F.R. § 300.8 [c][4]; 8 NYCRR 200.1[zz][4]).

The student attended the district's public schools through junior high school (Dist. Ex. 8 at p. 3). The parents reported that their son performed "reasonably well" academically through junior high school, despite exhibiting "fidgety," "restless," and talkative" behaviors in school, and the fact that he "did not always conform to school rules" (id.). The student transferred to a private parochial school for high school due to his parents' hope that smaller classes and more structure would prove beneficial (id.). The student's mother indicated that her son did not exhibit emotional difficulties during ninth grade (2005-06) or tenth grade (2006-07) until spring 2007, at which time

his teachers contacted her about his behavior (Tr. p. 465). The student's mother indicated that the student's teachers expressed concerns that he appeared to be "withdrawn" and "depressed," exhibiting anger and not completing school work (Tr. pp. 465-66). According to the parents, the student's personality "seemed to suddenly and completely change" in that he worked just hard enough to be able to continue to play on a sports team, wanted to leave the building during school hours, and was suspended "a few times" for exhibiting disruptive behavior (Dist. Ex. 8 at p. 4). By the end of the 2006-07 school year, the parents reported that the student was no longer interested in playing the sport, he had failed three academic subjects, and had "failed 10th grade" (id.). The parents reported that the student was expelled from the private parochial school and attended the district's summer school program (Tr. pp. 466-67; Dist. Ex. 8 at p. 4).

The parents reported that the student enrolled in a district high school at the commencement of the 2007-08 school year (Dist. Ex. 8 at p. 5). According to the student's mother, the student "cooperated" during the first few weeks at school, but subsequently "gave up" after a change in his class schedule (Tr. pp. 469-70).¹ In October 2007, the student went under the care of a psychiatrist who prescribed medication for him (Parent Exs. R; S).² Also in October 2007, the parents obtained psychological therapy services for the student provided by a private school psychologist (private therapist), who offered the student a diagnosis of an oppositional defiant disorder "due to his pattern of erratic and dangerous behaviors" (Tr. pp. 429-30; Dist. Ex. 8 at p. 4; Parent Ex. P at p. 1).³ By November 2007, the student had dropped out of high school (Tr. pp. 489-92; Dist. Ex. 8 at p. 5). During this time, the parents indicated that their son "isolated himself" from his family and his appetite diminished; he also spent time alone in his room on the computer and slept "all the time" (Dist. Ex. 8 at p. 5). According to the parents, the student discussed the "futility of life," stopped leaving the house, and was verbally abusive to his family (id.). They reported that while attending a party, the student had engaged in a physical altercation and was charged with two counts of assault (id.). The parents further reported that their son "self-medicated" with marijuana and "seemed not to care about himself or anyone else" (id.).

During winter 2007 into 2008, with the help of agencies entitled "Help Your Teen" and "Family In Crisis" and the services of an advocate, the parents investigated alternative placements for their son, including Cross Creek (Tr. pp. 496-97, 500-03).

On March 19, 2008, the private therapist conducted a psychological evaluation of the student consisting of the Personality Assessment Inventory, Sentence Completion Test, a clinical interview, and review of records "to be used for placement purposes" (Parent Ex. AA). According to the resultant report, the student admitted to "multiple arrests, assaults, [and] felonies," dropping out of school, being unemployed, and that he was "involved in drug usage on a part time basis" (id. at p. 1). The private therapist reported that responses obtained during the evaluation indicated that the student was "an adolescent who [was] experiencing a great deal of difficulty complying

¹ The student's mother indicated that she contacted district staff in efforts to return the student to his original schedule, but was unsuccessful (Tr. pp. 470-72).

² The student's mother stated that the student independently discontinued taking his medication approximately one month prior to his attendance at Cross Creek (Tr. pp. 495-96).

³ The student's mother indicated that the private therapist also offered the student a diagnosis of a "major depressive disorder" (Tr. p. 492).

with the everyday demands of life," and that he tended to be "negative and oppositional with regard to authority figures, and intrusive, manipulative and assaultive with regard to peers" (id. at p. 2). The evaluation report further stated that the student lacked adequate impulse control, was frequently careless and indifferent with regard to the consequences of his actions, tended to project the blame onto others, and sought attention in a negative fashion (id.). The private therapist reported that the student exhibited "many serious emotional problems," explaining that his "self-concept [was] regressed, infantile, dependent, passive and ineffectual, with underlying impulsive and aggressive elements" (id.). The private therapist concluded that the student could "clearly be a threat to himself and others because of the amount of inner conflict, bizarre thought processes and poor impulse control" (id.). He offered the student a diagnosis of an oppositional defiant disorder based on behaviors that "typically cause[d] clinical[ly] significant impairment in [the student's] social, academic and occupational functioning" (id. at p. 3).

According to the parents, in consultation with the student's private therapist and psychiatrist, it was decided that the student required a residential placement (Dist. Ex. 8 at p. 6). The parents selected Cross Creek for their son, described in the hearing record as a "residential treatment center" with a "therapeutic component" (Tr. p. 395; Dist. Ex. 8 at p. 6; Parent Exs. E at p. 3; Y).

By letter dated March 20, 2008 to a Committee on Special Education (CSE) chairperson, the parents advised that their son had been, but was no longer attending a district high school (Dist. Ex. 1). The parents further stated their belief that the student required special education services and requested that the district provide him with a free appropriate public education (FAPE) (id.). Also by letter dated March 20, 2008, the parents informed the student's guidance counselor that their son needed "special education with residential placement, for his disability" and that they were placing him at Cross Creek until the district found him an appropriate placement (Dist. Ex. 16 at p. 1; Parent Ex. F at p. 1). In a letter dated March 28, 2008, the district informed the parents that it had received their son's referral to the CSE and provided the parents with information about the evaluation process (Parent Ex. G).

On April 3, 2008, the parents had the student "forcibly taken" to Cross Creek (Tr. pp. 475-77; Dist. Ex. 8 at p. 6; Parent Ex. Y). While attending Cross Creek, the student was enrolled in an academic program consisting of teacher-led instruction and computer-based learning, receiving credits applicable toward a high school diploma (Tr. pp. 362, 373-81; Parent Exs. X; Y). The student also received five hours per week of group therapy provided by a licensed marriage and family therapist, and one session per week of individual or family counseling (Tr. pp. 292-93). Upon entering Cross Creek, his therapist described the student as "angry," "clinically depressed," and exhibiting "irritability" (Tr. pp. 296-97). The therapist further indicated that initially, the student was not motivated to participate in school and exhibited poor self esteem related to school performance (Tr. pp. 299-300).

In an April 26, 2008 psychiatric note, the Cross Creek psychiatrist reported that the student presented as a "calm," "friendly and cooperative young man with good eye contact," who exhibited a "positive attitude" (Parent Ex. T at pp. 2-3). The psychiatric note indicated that the student was being treated pharmacologically and had previously received a diagnosis of depression (id. at p. 2). He further noted that the student had been charged with "3 assaults and [would] be on probation for the next 18 months" (id.; see Tr. pp. 511-12). According to the Cross Creek psychiatrist, the

student reported that he was "getting into fights, using drugs, and drinking" (Parent Ex. T at p. 2).⁴ From a history provided by the student and his mother, the Cross Creek psychiatrist reported that the student had done well in school until approximately the end of the 2006-07 school year, at which time he developed a conflict with his sports coach and quit the sport, resulting in depressed, isolative, and irritable behaviors (*id.* at pp. 2-3). Despite these difficulties, the student reportedly was able to attend school and maintain relationships with a girlfriend and his friends (*id.* at p. 2). Subsequent to the alleged assaults, the student became "very anxious and irritable about his legal charges" and "quit going to school," although he indicated to the psychiatrist that he was planning to graduate from school (*id.*). As of April 26, 2008, the student indicated to the Cross Creek psychiatrist that he had "calmed down" and was feeling "much better" after attending Cross Creek (*id.* at p. 3). The Cross Creek psychiatrist offered the student diagnoses of "Major Depressive Disorder, mild, single episode and currently in full remission. Anxiety Disorder, NOS, Conduct Disorder Adolescent Onset" (*id.*). The Cross Creek psychiatrist modified the student's medication regimen and indicated that the student would receive follow up every three months and work with his therapist (*id.*).

The hearing record reflects that between April 7 and May 29, 2008, district staff and the parents attempted to contact each other to discuss the status of the student's evaluation and a CSE meeting (Dist. Ex. 16; Parent Exs. H; I).⁵ According to the district's contact information, by April 10, 2008, the district knew that the student had been privately evaluated and was attending a private school (Dist. Ex. 16 at p. 1).

By facsimile dated May 16, 2008 and received by the district on May 20, 2008, the student's mother sent the private therapist's March 19, 2008 evaluation report to the CSE chairperson, and the student's case was subsequently "reopened" (Tr. pp. 66-68; Dist. Ex. 2). By letter dated May 20, 2008, the district informed the parents of a June 10, 2008 appointment for the completion of a social history, and psychological and educational evaluations of the student (Dist. Ex. 4).

By letter dated June 2, 2008, the parents informed the CSE chairperson that they were willing to provide a social history regarding their son; however, "we cannot bring [the student] in because he is [out-of-State], attending Cross Creek Academy, he is also a flight risk" (Dist. Ex. 3; *see* Dist. Ex. 4). The letter further advised that the student's psychologist and psychiatrist informed the parents that bringing the student in to the district for a social history would "interfere and disrupt" his program and schooling at Cross Creek, and would also be "detrimental" to him (Dist. Ex. 3). The parents indicated that they had the private therapist's March 2008 evaluation report, which the CSE chairperson was aware of, and requested that she "get back to [them] regarding this matter" (*id.*).

The parents did not appear on June 10, 2008 for the scheduled social history appointment, nor did the student attend the scheduled psychological and educational evaluation appointments

⁴ According to the psychiatrist's note, the student reported that he "ha[d] been using pot daily for the last two years and also getting drunk on the weekends drinking more than 6 beers" (Parent Ex. T at p. 2).

⁵ The district's social worker testified that at a time not specified by the hearing record, the student's CSE case was "closed" because the student was no longer attending a district school and had been placed out-of-State (Tr. pp. 58, 74).

(Tr. pp. 68-69; Dist. Ex. 4). By letter dated July 8, 2008, the district informed the parents of a July 15, 2008 appointment to complete the student's social history (Dist. Ex. 5).

The district obtained the parents' consent to evaluate the student and a district social worker completed a social history on July 15, 2008 (Dist. Exs. 6; 8). The social worker interviewed the parents, who provided the social worker with information about the student's educational performance during elementary and junior high school, his difficulty during high school, and his subsequent placement at Cross Creek (Dist. Ex. 8 at pp. 3-6). At the time of the social history, the parents reported that they were allowed to communicate with their son every other week for 30 minutes, were participating in "family therapy seminars" and were scheduled to visit the student in October 2008 (*id.* at p. 6). According to the parents, the student had begun to accept the program and actively participate in his treatment (*id.*). Additionally, they reported that he attended school in a class of eight students (*id.*). The parents indicated to the social worker that they believed their son needed to "continue in a residential program that offer[ed] psychiatric treatment and academic support" (*id.* at p. 7).

The district social worker determined that the March 2008 private therapist's evaluation report was "incomplete" in that it did not include cognitive or academic achievement testing results, and provided the parents with an "Assessment Authorization" form allowing them to obtain an independent evaluation of the student at district expense (Tr. pp. 87-88, 91, 182-83, 504-05; Parent Ex. M). On July 22, 2008, the parents and a private out-of-State psychologist discussed evaluating the student (Tr. pp. 410-11).

On October 8, 2008, the private out-of-State psychologist evaluated the student at Cross Creek (Parent Exs. Z at p. 1; EE).⁶ The resultant psychological evaluation report⁷ indicated that the student was referred to Cross Creek "by his mother and father and the courts" and that specific concerns reported by the student at his time of admission to Cross Creek were "drug use, dropping out of school, disrespect, and getting into trouble with the law" (Parent Ex. Z at p. 1). At the time of the psychological evaluation, the student indicated that his "main problems" were "anger and control" (*id.* at p. 5). The student reported to the private psychologist that he achieved "mostly B grades" in elementary school and "C+" grades in sixth, seventh, and eighth grades (*id.* at p. 3). He further reported that in eighth grade he "never had any big problems," although there were many fights at school, some involving him (*id.* at pp. 3-4). According to the private psychologist's report, in ninth grade the student "hated" the private school he attended and achieved "C" grades, and in tenth grade he "started hating school the most" and his average was a "D" (*id.* at p. 4). During tenth grade, the student admitted he started cutting classes and failed four classes during the second semester (*id.*). The evaluation report indicated that the student attended public school at the beginning of eleventh grade and began skipping school after the third week (*id.*). Regarding the

⁶ The private psychologist stated that he is employed by Cross Creek as a "consultant" and that he contracts with parents to conduct psychological evaluations (Tr. p. 409). In testimony, the private psychologist explained that he usually has a four to six week waiting list for assessments and students are placed on the waiting list after a retainer is received (Tr. pp. 411-12). He testified that he received the retainer from the parents at the beginning of August 2008, after which time the student was placed on the waiting list (Tr. p. 412).

⁷ The hearing record uses the terms "psycho-educational" and "psychological" interchangeably to describe the October 2008 evaluation (Tr. pp. 69, 72, 138-39; Parent Ex. Z at p. 1). For consistency in this decision, I will refer to the October 2008 evaluation as a "psychological" evaluation report.

use of drugs and alcohol, the student reported to the private psychologist that he smoked marijuana in ninth grade and prior to treatment, "his abuse pattern" was "10 times a day" (id.). He further reported that "heavy drinking" had begun during eighth grade, during high school he went to bars, and prior to treatment he drank approximately 30 beers per week with "occasional hard liquor" (id.).

The private psychologist conducted a clinical interview with and administered multiple assessments to the student, including the Wechsler Adult Intelligence Scale-III (WASI-III), Wechsler Individual Achievement Test-II (WIAT-II), Minnesota Multiphasic Personality Inventory-A (MMPI-A), Millon Adolescent Personality Inventory (MAPI), Substance Abuse Subtle Screening Inventory-Adolescent (SASSI-A), and a variety of projective tests and behavioral inventory scales (Parent Ex. Z at p. 1). The private psychologist reported that the student was "cooperative" during the evaluation and opined that the test results were a "good representation of his current functioning" (id. at p. 2). He further reported that assessment results suggested the student's intellectual functioning was in the average range, with areas of weakness in long-term memory, short-term verbal memory and knowledge of vocabulary words (id. at p. 13). The student also demonstrated "poor planning ability" and "lack of understanding of the sequences and patterns of social interactions" (id.). According to the psychologist's evaluation report, academically the student had "more significant difficulty with working on mathematics skills in a classroom setting" and achieved reading ability scores in the borderline range (id.). The psychologist indicated that although the student's difficulties were "not at the level of a learning disorder," they were more likely "to contribute to more difficulty in school and frustration in the learning process" (id.). The psychologist's report further stated that the student's "attitude about school appear[ed] to be a primary detractor to him being able to perform at expected levels in school because he 'hate[d]' school, and [did not] feel he d[id] well, even though he [saw] himself as an average to above average student" (id.). According to the psychologist, although many of the student's difficulties at school may have been a result of his struggles with academic material, "[the student] [was] capable of average levels of work if he provide[d] a concerted and concentrated effort in school;" and "his academic difficulties [were] compounded by his behavioral difficulties" (id.). The evaluation report indicated that the student's oppositional difficulties would interfere with his level of motivation, and an environment consisting of "behavior structure," which reportedly helped the student at the time of the evaluation, would be "necessary" until the student could work through other behavioral difficulties and take more personal responsibility for himself and schoolwork (id. at pp. 13-14).

The private psychologist reported that the student's test results indicated that "his difficulties [were] focused on behavioral acting out and oppositional attitudes and chemical abuse, with some developing personality traits," noting that depressive difficulties were not seen as "prevalent" in current testing (Parent Ex. Z at p. 14). Then current assessments indicated that the student's main difficulties were "a disregard for social standards and problems in acting-out and impulsivity" and that he was "more likely to have difficulties with defiance, disobedience and truancy, and [was] likely to have a history of legal violations and court actions" (id.). The psychologist's report described the student's behaviors prior to admission to Cross Creek, stating that his difficulties met the "criteria for a [c]onduct [d]isorder," requiring "a restrictive behavioral environment to challenge his ideals and beliefs about his behaviors" (id.). In his report, the psychologist described characteristics of the student's personality expressed during the evaluation, and indicated that those "symptoms" suggested the development of "Narcissistic Personality traits,

which [were] likely to further [the student's] oppositional ideals and acceptance of his acting out behaviors" (id. at p. 15). Finally, the psychologist indicated that the student's other difficulty was his reported use and abuse of chemicals, stating "[t]esting suggested that he may not [have] realize[d] how entrenched he [was] in his use of these chemicals and [would] require a more restrictive environment to make changes" (id.). The psychologist's diagnostic impressions included "[c]onduct [d]isorder, [c]hildhood [o]nset, [m]oderate;" "[c]annabis [d]ependence;" "[a]lcohol [a]buse;" and "[n]arcissistic [p]ersonality traits" (id. at p. 17). Recommendations included continued residential treatment with behavioral interventions and positive social environment; individual, family and group therapy; and a "significant regime of substance abuse interventions and attendance at 12-step meetings for his addiction" (id. at pp. 16-17). According to the psychologist, he provided the student's evaluation report to the parents on October 29, 2008 (Tr. p. 423).

In an October 22, 2008 psychiatric note, the Cross Creek psychiatrist reported that the student indicated that he was doing "very well" and requested to discontinue his medication (Parent Ex. T at p. 1). According to the psychiatric note, the student exhibited a "[s]table mood," was sleeping and eating well, and had not engaged in any "conduct behavior" (id.). Additionally, the student's Cross Creek therapist reported that he was making good progress in Cross Creek's program (id.). The Cross Creek psychiatrist recommended that the student gradually discontinue medications "if tolerated" (id.).

On November 3, 2008, a clerical staff member from the district contacted the parent indicating that the district had not received a report from the private evaluation of the student (Tr. p. 70). The student's father informed the district that the student's psychological evaluation had been conducted, but that the report would take seven weeks to complete (id.; Dist. Ex. 12 at p. 6).

By letter dated December 10, 2008 entitled "To Whom It May Concern," the student's mother stated that she "ha[d] all the pertinent evaluations and would like to move forward with a CSE review for [the student]," and provided her contact information (Tr. pp. 31, 70; Dist. Ex 9).⁸

By e-mail dated December 18, 2008, the student's Cross Creek therapist provided the parents' advocate with updated information about the student (Parent Ex. U). The e-mail indicated that the student was "currently doing well in school and thriving in this educational environment," noting that the student had also received 20 hours of group therapy per month and one session per week of individual or family therapy sessions (id.). The Cross Creek therapist indicated that the student's "case" was reviewed on a regular basis by the psychiatrist and his medications were monitored/adjusted as needed (id.). Additionally, the student was "on level five" of Cross Creek's six level privilege system and he had completed three parent-child seminars (id.). The Cross Creek therapist described the student's next steps, including development of a "home contract" and home visits (id.).

By letter dated January 28, 2009 to a CSE chairperson, the parents expressed concern that they were still awaiting notification that a CSE meeting had been arranged for their son (Parent

⁸ The student's mother indicated that she had provided a copy of the October 2008 psychological evaluation report to the parents' advocate (Tr. pp. 506-07). The hearing record does not identify the date when the district received a copy of the October 2008 psychological evaluation report (see Tr. pp. 70-72, 90).

Ex. K at p. 1). The parents indicated that they referred their son to the CSE in March 2008 and followed up with a letter in May 2008 regarding the status of a CSE meeting (id.). The parents informed the district that until the CSE determined the student's eligibility for special education services, he would remain at Cross Creek where he was "reportedly making very good progress" (id.). The parents further informed the district that their advocate would file a due process complaint notice within seven business days unless they received a CSE meeting notice (id.).

According to contact information maintained by the district, on January 29, 2009, the district's "team" contacted Cross Creek's academic director, who indicated that while Cross Creek employed a special education teacher, the student "ha[d] not yet been identified as a special ed[ucation] student;" therefore, he was not receiving special education services (Tr. p. 337; Dist. Ex. 12 at p. 5). The academic director further provided information to the district indicating that the student only required three more credits in order to graduate (Dist. Ex. 12 at p. 5). By letter dated January 30, 2009, the district informed the student's mother that a CSE meeting regarding the student was scheduled for February 10, 2009 (Parent Ex. L at p. 1). By letter dated February 4, 2009, the parents informed the district that no one from Cross Creek would be able to participate at the scheduled time of the CSE meeting due to the three hour time difference (Dist. Ex. 10). In response, the district rescheduled the time of the CSE meeting (Tr. p. 71).

On February 10, 2009, the CSE convened a meeting for an initial review of the student (Parent Ex. C at pp. 1-2). Attendees included a bilingual school psychologist who also participated as a district representative, a district social worker, a district special education teacher, an additional parent member, the parents, the parents' advocate; and by telephone, Cross Creek's academic director, the student's Cross Creek therapist, and a teacher from Cross Creek who participated as a regular education teacher of the student (id. at p. 2). Following a review of the student's records and discussion with CSE participants, the February 2009 CSE determined that the student was not eligible for special education programs and services and recommended placement in a general education program (id. at p. 1).

Also on February 10, 2009, by letter to the CSE chairperson, the parents expressed that they were "in total disagreement with the finding of the CSE" and that their son required a residential placement and should have been classified under the Individuals with Disabilities Education Act (IDEA) (Dist. Ex. 13; see Dist. Ex. 5). The letter further informed the district that the student would remain at Cross Creek and that the parents planned to seek tuition reimbursement for the student's placement (Dist. Ex. 13).

By due process complaint notice dated February 26, 2009, the parents, through their advocate, alleged that the district denied the student a FAPE for the 2008-09 school year due to numerous procedural and substantive violations (Parent Ex. A). The parents alleged that the CSE should have found the student eligible for special education programs and services as a student with an emotional disturbance (id. at pp. 3-4). The parents further asserted that the CSE's recommendation of general education was not reasonably calculated to confer educational benefits upon the student and that the CSE failed to consider a more restrictive residential placement for the student (id.). The parents also alleged, among other things, that the district failed to timely recommend an appropriate program for the student (id.). As a remedy, the parents requested reimbursement for the student's tuition costs at Cross Creek (id. at p. 5).

In an answer dated March 12, 2009, the district responded to the parents' due process complaint notice and denied the parents' allegations (Parent Ex. B).

In a letter dated March 18, 2009 entitled "To Whom It May Concern," the student's private therapist indicated that the student's behaviors led to "a significant impairment of his social, academic and occupational functioning" (Parent Ex. P at p. 1). The letter stated that the student met the IDEA's definition of a student with an emotional disturbance in that he exhibited three characteristics "over a long period of time and to a marked degree which had adversely affected his educational performance" (*id.*).⁹ The private therapist indicated that he had suggested to the parents that they place the student in a "24/7 structured, supportive and therapeutic residential school" and that although he had made "nice progress," the student continued to require residential placement (*id.*).

On April 24, 2009, the student graduated with a regular high school diploma from Cross Creek (Parent Ex. BB).

An impartial hearing began on May 27, 2009 and concluded on July 7, 2009, after three days of proceedings (IHO Decision at p. 1). By decision dated October 27, 2009, the impartial hearing officer found that: (1) the district failed to provide the student with a FAPE; (2) the district failed to provide an adequate explanation for being nonresponsive to the parents' initial referral; (3) the student had depression affecting his educational performance; (4) the student's evaluators were not present at the CSE meeting; (5) the program at Cross Creek was appropriate for the student; (6) the student made meaningful progress at Cross Creek; (7) the Cross Creek program was reasonably calculated to provide educational benefits to the student; (8) the parents cooperated with the district; and (9) equitable considerations offered no basis to rule against the parents (*id.* at pp. 8-11). The impartial hearing officer ordered the district to reimburse the parents for the student's tuition costs at Cross Creek from April 3, 2008 through April 20, 2009, upon submission of proof of payment (*id.* at p. 11). The impartial hearing officer also ordered the district to reimburse the parents for the private psychological evaluation, upon submission of proof of payment (*id.*).

The district appeals and asserts that the parents have failed to state a claim for which relief can be granted because they are seeking funding for a for-profit school, which does not qualify as a school under the IDEA. The district also argues that it timely convened a CSE meeting, appropriately found that the student is not eligible for special education programs and services, and recommended a general education program. The district argues that the parents were responsible for delays in the evaluation process since they sent the student out-of-State shortly after sending their initial referral letter to the district. The district argues that it authorized the parents to obtain an evaluation and that it did not receive the evaluation report from the parents until December 2008. The district contends that it then scheduled the CSE meeting for February 2009. The district asserts that it properly determined that the student was not eligible for special education programs and services as a student with an emotional disturbance. The district alleges that the student had a single episode of depression, was not suffering from depression at the time

⁹ The three characteristics were: (1) an inability to learn that could not be explained by intellectual, sensory or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; and (3) inappropriate types of behavior or feelings under normal circumstances (Parent Ex. P at p. 1).

of the CSE meeting in February 2009, and was not experiencing any academic difficulties at the time of the CSE meeting. The district contends that it reviewed the student's evaluation reports and determined that his diagnoses did not significantly affect his education. The district further argues that even if the CSE had met at the time of the referral, in March 2008, the student still would not have met the criteria for an emotional disturbance because there was no evidence of his meeting any of the five criteria over a long period of time and to a marked degree that adversely affected his educational performance.

The district further argues that the parents failed to demonstrate that Cross Creek was an appropriate placement for the student because they failed to demonstrate that Cross Creek was specially designed to meet the student's unique needs, Cross Creek did not provide the student with any special education services, and Cross Creek is a residential program, which was an overly restrictive program for the student. Additionally, the district alleges that in April 2008, the student's Cross Creek psychiatrist reported that the student was in full remission from his single episode of a major depressive disorder. The district also asserts that equitable considerations do not support an award of tuition reimbursement. The district alleges that the parents impeded the district's ability to evaluate the student and make appropriate program recommendations because they sent the student out-of-State ten days after the district received their referral and before the district had an opportunity to evaluate him. The district also argues that the parents did not cooperate with the district and their claim should be denied. The district does not appeal from the award to reimburse the parents for the private psychological evaluation.

In their answer, the parents assert that the student was denied a FAPE. The parents assert that, among other things, the district failed to convene a CSE meeting in a timely manner and classify the student as a student with an emotional disturbance. The parents also assert that they are not subject to the same mainstreaming requirements as the district. The parents allege that the hearing record does not show that the parents' frustrated the placement by the district; thus, equitable factors do not apply. The parents contend that they are entitled to tuition reimbursement because the district failed to provide the student with a FAPE, the unilateral placement was appropriate, and equitable considerations favored tuition reimbursement.

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 individualized education program (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). Also, a FAPE must be made available to an eligible student who needs special education and related services even though the student is advancing from grade to grade (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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).

First, I will consider the district's assertion that the impartial hearing officer erred by determining that it did not respond to the parents' initial request for evaluation. The hearing record reflects that the parents referred the student to the CSE by letters dated March 20, 2008 (Dist. Exs. 1; 16 at p. 1; Parent Ex. F at p. 1). In a letter dated March 28, 2008, the district informed the parent that it had received the student's referral to the CSE and provided the parents with information about the evaluation process (Parent Ex. G). The March 28, 2008 letter explained that the parents would need to provide written consent so that the district could conduct the evaluations and that such consent would be obtained during the social history appointment, which would be completed by a district social worker (*id.*). The letter provided contact information for a district staff person and indicated that the "Notice of Parental Rights" and a "Request for Physical Examination Form" were attached (*id.*).

On April 3, 2008, the student was unilaterally placed at Cross Creek by the parents (Tr. pp. 475-77; Dist. Ex. 8 at p. 6; Parent Ex. Y). The hearing record reflects that between April 7, and May 29, 2008, district staff and the parents attempted to contact each other to discuss the student's evaluation and CSE status (Dist. Ex. 16; Parent Exs. H; I). According to the district's contact information log, by April 10, 2008, the district knew that the student had been privately evaluated and was attending a private school (Dist. Ex. 16 at p. 1).

By facsimile dated May 16, 2008 and received by the district on May 20, 2008, the parent sent the CSE chairperson the private therapist's March 19, 2008 evaluation report (Dist. Ex. 2). By appointment letter dated May 20, 2008, the district informed the parents of a June 10, 2008 appointment for the completion of the social history, and psychological and educational evaluations of the student (Dist. Ex. 4). The May 20, 2008 letter requested that if the parents were unable to keep the appointment, or if they had any questions, they contact the district at a phone number listed in the letter (*id.*). By letter dated June 2, 2008, the parents informed the CSE

chairperson that they were willing to provide a social history regarding their son; however, they would not bring their son to the district because he was out-of-State attending Cross Creek and it would be detrimental for him to leave the program (Dist. Ex. 3; see Dist. Ex. 4). The parents reiterated in their letter that they had obtained a private evaluation, which they alleged the district was aware of and had been discussed during a phone conversation (id.).

The parents did not appear on June 10, 2008 for the scheduled social history appointment, nor did the student attend the scheduled psychological and educational evaluation appointments (Tr. pp. 68-69; Dist. Ex. 4).¹⁰ By appointment letter dated July 8, 2008, the district informed the parents of a July 15, 2008 appointment to complete the student's social history and again requested that if the parents could not attend the appointment, they contact the district (Dist. Ex. 5).

The district obtained the parents' consent to evaluate the student and a district social worker completed a social history on July 15, 2008 (Dist. Exs. 6; 8). The district social worker also determined that the March 2008 private therapist's evaluation report was "incomplete" in that it did not include cognitive or academic achievement testing results and; therefore, the district provided the parents with an "Assessment Authorization" form that allowed them to obtain an independent psychological evaluation of the student at district expense (Tr. pp. 87-88, 91, 182-83, 504-05; Parent Ex. M). On July 22, 2008, the parents and a private out-of-State psychologist discussed evaluating the student (Tr. pp. 410-11). The private out-of-State psychologist testified that he received a retainer from the parents at the beginning of August 2008, after which time the student was placed on his waiting list (Tr. p. 412). On October 8, 2008, the private out-of-State psychologist evaluated the student at Cross Creek (Parent Exs. Z at p. 1; EE).

On November 3, 2008, a clerical staff member from the district contacted the parents, indicating that the district had not received a report of the student's evaluation (Tr. p. 70). The parents informed the district that the student's psychological evaluation had been conducted, but that the report would take seven weeks to complete (Tr. p. 70; Dist. Ex. 12 at p. 6).

By letter dated December 10, 2008 entitled "To Whom It May Concern," the student's mother stated that she "ha[d] all the pertinent evaluations and would like to move forward with a CSE review for [the student]," and provided her contact information (Tr. pp. 31, 70; Dist. Ex 9).

By letter dated January 28, 2009 to a CSE chairperson, the parents expressed concern that they were still awaiting notification that a CSE meeting for their son had been arranged and stated that they had "instructed" their advocate to file a due process complaint notice unless they received a CSE meeting notice within seven business days (Parent Ex. K at p. 1). By letter dated January 30, 2009, the district informed the student's mother of a CSE meeting regarding the student scheduled for February 10, 2009 (Parent Ex. L at p. 1). On February 10, 2009, the CSE convened a meeting for an initial review of the student (Parent Ex. C at pp. 1-2).

State regulations require school districts to make reasonable efforts to obtain written informed parental consent to evaluate a student suspected of having a disability within 30 calendar days of the district's receipt of referral and to maintain a detailed record of its efforts to obtain such

¹⁰ The May 20, 2008 appointment letter that was made part of the hearing record includes a handwritten notation that says "no show" (id.).

consent (see 8 NYCRR 200.1[n], 200.4[a][8], 200.5[b][1]). The hearing record reveals that the district did not obtain the parents' consent to evaluate the student within 30 days of March 28, 2008, the date it received their referral; and, although it maintained a record of its contact with the parents, it did not attempt to obtain such consent until it scheduled a social history appointment for June 10, 2008 (Dist. Exs. 1; 4; 16; Parent Exs. G; H; I). I note that the parents did not appear on June 10, 2008 for the scheduled social history appointment, and the district rescheduled the social history appointment for July 15, 2008, at which time the district obtained the parents' consent to evaluate the student (Tr. pp. 68-69; Dist. Exs. 4; 5; 6). Thus, the district did not timely obtain the parents' consent to evaluate the student (see 8 NYCRR 200.4[a][8]); however, the hearing record reveals that the parents contributed to the further delay in obtaining consent (Tr. pp. 68-69; Dist. Exs. 4; 5). In addition, State regulations require school districts to complete the individual evaluation of a student within 60 calendar days from the date of receipt of parental consent to evaluate the student (8 NYCRR 200.4[b][1]; see 20 U.S.C. § 1414[a][1][C][i][I]; 34 C.F.R. § 300.301[c][1][i]). However, if a parent "refuses to produce" the student for the initial evaluation, the 60-day timeframe does not apply (8 NYCRR 200.4[b][7][ii]; see 20 U.S.C. § 1414[a][1][C][ii][II]; 34 C.F.R. § 300.301[d][1]). As detailed above, the hearing record reveals that the parents unilaterally placed the student out-of-State at Cross Creek shortly after referring the student to the CSE, refused to produce the student for the district's initial evaluation, and in the alternative, agreed to privately obtain the student's psychological evaluation out-of-State at district expense (Tr. pp. 87-88, 91, 182-83, 410-11, 475-77, 504-05; Dist. Exs. 1; 3; 4; 8 at p. 6; 16 at p. 1; Parent Exs. F at p. 1; M; Y). The hearing record also reveals that, although the parents arranged for the private psychological evaluation in July 2008, the private out-of-State psychologist selected by the parents did not evaluate the student until October 2008 (Tr. pp. 410-11; Dist. Ex. Z; Parent Ex. EE). Also, the hearing record reflects that the parents informed the district in December 2008 that they had received the evaluation report and were ready to proceed with the CSE process (Tr. pp. 31, 70, 412; Dist. Exs. 9; 12 at p. 6). Thus, I find that the parents contributed to the delay in obtaining the student's psychological evaluation. Further, a procedural violation does not, standing alone, require a finding that a FAPE was denied (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Matrejek, 471 F. Supp. 2d at 419). Here, the hearing record does not show that 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. Moreover, here a procedural violation does not qualify the otherwise ineligible student for IDEA relief (R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 [9th Cir. 2007]; J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 69-70 [2d Cir. 2000]).

Next, the parents assert generally in their answer that the district failed to comply with the procedural requirements of the IDEA. 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]). After the district initiated this appeal, the parents did not interpose a cross-appeal challenging the impartial hearing officer's decision, which did not adequately address or properly analyze the parents' procedural claims that were raised in their due process complaint notice (IHO Decision at pp. 8-9; Parent Ex. A; see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).¹¹ Therefore, I decline to address the merits of the parents' procedural

¹¹ To the extent that the impartial hearing officer addressed the parents' procedural arguments, they were not properly analyzed because the impartial hearing officer failed to apply the proper legal standard as required by

claims that were raised in their due process complaint notice and not addressed by the impartial hearing officer because those arguments have been waived (see Application of a Student with a Disability, Appeal No. 09-068; Application of the Dep't of Educ., Appeal No. 09-046; Application of the Dep't of Educ., Appeal No. 09-033; Application of the Dep't of Educ., Appeal No. 09-027; Application of a Student with a Disability, Appeal No. 08-021; Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; 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).

I turn next to the district's argument that the impartial hearing officer erred by awarding the parents the cost of the student's tuition at Cross Creek. Tuition reimbursement is among the remedies available when a school district fails to offer a student a FAPE (see Burlington, 471 U.S. 359; Carter, 510 U.S. 7). However, FAPE extends only to students who meet the criteria for identification as children with disabilities under the IDEA (20 USC § 1400 et seq.) and Article 89 of the New York Education Law (see Application of a Child Suspected of Having a Disability, Appeal No. 07-003; Application of a Child Suspected of Having a Disability, Appeal No.03-063; Application of a Child Suspected of Having a Disability, Appeal No.01-107; Application of the Bd. of Educ., Appeal No. 01-058). Unless the student is eligible for classification as a student with a disability, the parents cannot prevail in their claim for tuition reimbursement.

When a student suspected of having a disability is referred to a CSE, the CSE, upon receipt of consent, must ensure that an individual evaluation of the referred student is performed (see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063; Application of a Child Suspected of Having a Disability, Appeal No. 04-059). A "full and individual initial evaluation" must be conducted (20 U.S.C. § 1414[a][1][A]; see 34 C.F.R. § 300.301[a]) and must include at least a physical examination, an individual psychological evaluation (unless a school psychologist assesses the student and determines that such an evaluation is unnecessary), a social history, an observation of the student in the current educational placement, and other appropriate assessments or evaluations as necessary to ascertain the physical, mental, behavioral, and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][i-v]; Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-128; Application of a Child Suspected of Having a Disability, Appeal No. 05-047; Application of a Child Suspected of Having a Disability, Appeal No. 04-063). The student must be assessed in all areas of suspected disability (20 U.S.C. § 1414[b][3][B]), including, "if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). The evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified" (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Moreover, as part of an initial evaluation, the CSE must, as appropriate, "review existing evaluation data on the child" including "evaluations and information provided by the

federal and State regulations (see 20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

parents of the child" (20 U.S.C. § 1414[c][1][A][i]; 34 C.F.R. § 300.305[a][1][i]; 8 NYCRR 200.4[b][5][i]).

According to the school psychologist who was present at the February 2009 CSE meeting, the CSE reviewed the student's March 2008 psychological evaluation report, the July 2008 social history, the October 2008 private psychological evaluation report, Cross Creek "therapist notes," and the student's transcript from Cross Creek (Tr. pp. 133-34, 137-39, 149-50, 156-58, 162-63).¹² A careful review of the hearing record supports the district's assertion that the February 2009 CSE properly determined that the student was not eligible to receive special education programs and services. The school psychologist present at the CSE meeting testified that

[the CSE] had the psychoeducational evaluation that indicated that [the student] had average intellectual ability, and that if he applied himself he would present grade appropriate work. [The CSE] had the transcript that demonstrated that [the student] had A's and B's and that he was actually near completion of graduating high school. I think [the student] was . . . three credits short of graduating. The classroom teacher indicated that [the student] was doing well in school academically and socially.

(Tr. pp. 138-39).

The CSE discussed and considered the "emotional disturbance" and "learning disability" eligibility criteria, and after consultation with the parents and "school personnel," determined that the student was not eligible to receive special education programs and services, instead recommending placement in a general education program (Tr. pp. 137-38, 142; Dist. Exs. 11; 12 at pp. 1-2; 14).¹³

A learning disability is defined as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which manifests itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations (34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]). The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia (*id.*). The term does not include learning problems that are primarily the result of visual, hearing or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage (*id.*).

Regarding the student's eligibility for special education as a student with a learning disability, the school psychologist testified that although some academic weaknesses were noted in the October 2008 psychological evaluation report, those weaknesses "were not at a level of a learning disability" (Tr. pp. 142-43). The school psychologist further testified that the private psychologist "felt that if [the student] would apply himself, and was motivated, that he would

¹² The parents have not claimed on appeal that the student was insufficiently evaluated.

¹³ The school psychologist testified that the district's "Emotional Disability Justification Form" was discussed at the February 2009 CSE meeting, but was not completed because the student did not fit the criteria (Tr. pp. 169-70, 212-13; *see* Dist Ex. 14).

actually be able to produce grade appropriate work;" noting that the student's transcripts reflected "A" and "B" grades and his teacher "confirmed that he was doing pretty well academically in school" (Tr. p. 143). Thus, the evidence in the hearing record shows that the student did not have a learning disability as defined in State or federal regulations.

Turning next to the parties' contention that the student should have been classified by the CSE as a student with an emotional disturbance, in order to be eligible for special education services as student with an emotional disturbance, the student 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.*). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (*id.*; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

Whether a student's condition adversely affects his or her educational performance such that the student needs special education, within the meaning of the IDEA, is an issue that has been left for each state to resolve (J.D. v. Pawlett Sch. Dist., 224 F.3d 60, 66 [2d Cir. 2000]). Although some states elect to establish further, more explicit definitions for these terms, often through regulation or special education policy (see, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 11 [1st Cir. 2007]; J.D., 224 F.3d at 66-67; Johnson v. Metro Davidson County Sch. Sys., 108 F. Supp. 2d 906, 918 [M.D.Tenn. 2000]), others do not and instead resolve the issue on a "case-by-case" basis (R.B., 496 F.3d at 944; see, e.g., Yankton Sch. Dist. v. Schramm, 93 F.3d 1369, 1375-76 [8th Cir. 1996]; Greenland Sch. Dist. v. Amy N., 2003 WL 1343023, at *8 [D.N.H. Mar. 19, 2003]). Cases addressing this issue in New York appear to have followed the latter approach (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; Application of a Student Suspected of Having a Disability, Appeal No. 09-117; Application of the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-128; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Child

Suspected of Having a Disability, Appeal No. 07-086; see Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; N.C. v. Bedford Cent. Sch. Dist., 473 F. Supp. 2d 532, 543 [S.D.N.Y. 2007], aff'd 2008 WL 4874535 [2d Cir. Nov. 12, 2008]; New Paltz, 307 F. Supp. 2d at 399; see also M.H. v. Monroe-Woodbury Cent. Sch. Dist., 2008 WL 4507592 [2d Cir. Oct. 7, 2008]). While consideration of a student's eligibility for special education and related services should not be limited to a student's academic achievement (34 C.F.R. § 300.101[c]; 8 NYCRR 200.4[c][5]; see Corchado, 86 F. Supp. 2d at 176; but see A.J. v. Bd. of Educ., 2010 WL 126034, at *9 [E.D.N.Y. Jan. 8, 2010]), evidence of psychological difficulties, considered in isolation, will not itself establish a student's eligibility for classification as a student with an emotional disturbance (N.C., 473 F. Supp. 2d at 546).

In testimony, the school psychologist reviewed the five criteria for eligibility as a student with an emotional disturbance, and explained why the February 2009 CSE determined that the student did not exhibit any of them at that time (Tr. pp. 144-49). Specifically, the school psychologist testified that the student did not meet the first criteria because it had been reported that he demonstrated average intellectual potential, listened in class, followed class rules/routines, and his teacher reported "good academic performance" in conjunction with grades of "A" and "B," and near completion of the required credits to graduate from high school (Tr. pp. 144-45, 163-65).

The April 26, 2008 Cross Creek psychiatric note indicated that the student had "multiple friends" and experienced anxiety related "mostly to his girlfriend as he [was] away from her" (Parent Ex. T at p. 2). In October 2008, the private psychologist noted that the student's then current relationships with family members were good overall (Parent Ex. Z at p. 3). According to the school psychologist, the student did not meet the second criteria as reports indicated he was making progress socially, was involved in peer mentoring, and was part of a leadership team at Cross Creek (Tr. pp. 145-46, 195).

The school psychologist further testified that the February 2009 CSE "closely looked at" the student's feelings of depression and determined that the student did not meet the third criteria because despite "a past history of depression," at the time of the review the student had discontinued psychotropic medications and did not "fit the criteria for having depression, or a pervasive mood of unhappiness" (Tr. pp. 141, 146, 149). She testified that the Cross Creek therapist's notes indicated to the CSE that the student's "major depressive disorder was actually a single episode," characterized as "mild" and "in full remission" (Tr. pp. 147, 156-60). The therapist's notes further indicated that the student's mood had stabilized and he was considered to be "well behaved" (Tr. p. 147). Additionally, the October 2008 psychological evaluation report indicated that in October 2008, the student's level of depression was "non-clinical" and not prevalent at the time of the assessment (Tr. p. 146).

Regarding the fourth and fifth criteria, the school psychologist testified that there was nothing in the student's "history or in his current functioning that indicated that he had inappropriate types of behaviors under normal circumstances," nor was there a "history of [the student] developing fears or currently having some type of fears or physical symptoms relating to school or personal problems at all" (Tr. pp. 148-49). Finally, the school psychologist stated that the student's Cross Creek therapist, teacher, and his parents participated at the February 2009 CSE meeting and agreed that the student was socially and academically doing "very well," which is consistent with testimony provided by the Cross Creek's therapist, psychiatrist, and academic

director at the impartial hearing (Tr. pp. 160-61, 264, 266-67, 281, 292-93, 300-01, 305-06, 337, 343-44). I note that the student's Cross Creek psychiatrist and his private therapist testified that the student met the criteria for eligibility as a student with an emotional disturbance; however, the hearing record reveals that their opinions were not based upon the student's performance at the time of the February 2009 CSE meeting (Tr. pp. 280-83, 437-39).

The school psychologist testified that the private psychologist indicated in his October 2008 report that the student's behavioral difficulties seemed to stem from his disregard for social standards and from his chemical abuse, and she testified at length regarding social maladjustment and its relationship to IDEA eligibility (Tr. pp. 139-40, 147, 153, 159, 166-67, 170, 176-80, 205, 226, 230-31, 249-50). Although the February 2009 CSE acknowledged the student's diagnoses of a conduct disorder, a major depressive disorder, and an oppositional defiant disorder, it determined that at the time of the initial review in February 2009, these diagnoses were not negatively affecting the student's educational performance based on the reports that he was performing well academically and socially (Tr. pp. 165-68, 175). The school psychologist testified that the February 2009 CSE was aware of the difficulties the student experienced in April 2008 including his history of substance abuse, truancy, behavior and social problems; but by the time of the initial review, he had demonstrated progress and the February 2009 CSE appropriately assessed the student's IDEA eligibility based upon his then current level of functioning (Tr. pp. 194-97, 204-07).¹⁴

Although the February 2009 CSE found the student ineligible for special education programs and services, it documented its discussion and review of the documents before it in an IEP (Parent Ex. C). The February 2009 IEP indicated that the student's present level of intellectual function was in the average range and his "verbal and nonverbal abilities [were] age appropriate" (*id.* at p. 3). Academically, the February 2009 IEP indicated that the student's math and written language skills were "adequate" and although his reading skills were delayed, his difficulty with reading did not rise to the level of a "learning disorder" (*id.*).¹⁵ The February 2009 IEP indicated that the student was capable of completing "average levels of work" when he provided a concerted and concentrated effort in school (*id.*). According to the February 2009 IEP, the Cross Creek teacher reported that the student exhibited good academic performance when he applied himself and at the time of the February 2009 CSE meeting, the student was achieving "A" and "B" grades (*id.*). It was reported that the student's transcript indicated that he had completed 21 out of 24 credits required for graduation, was working on completing the remaining three credits, and would be graduating from Cross Creek "soon" (Dist. Ex. 12 at p. 3; Parent Ex. C at p. 3).¹⁶ According to the hearing record, the student did not receive "any special education instruction" while at Cross Creek because "he was not identified as a special education student" (Dist. Ex. 12 at p. 3).

¹⁴ Although not before the February 2009 CSE, the hearing record reflects that the student's Cross Creek therapist reported in December 2008 that the student was "currently doing well in school" and was "thriving in this educational environment" (Parent Ex. U).

¹⁵ The student attained reading achievement subtest scores in the low average range (Parent Ex. C at p. 3).

¹⁶ I note that on April 24, 2009, the student graduated with a regular high school diploma from Cross Creek (Parent Ex. BB).

The February 2009 IEP indicated that the student's social/emotional functioning had "significantly improved" and that both his Cross Creek therapist and teacher reported that he exhibited good interpersonal skills with peers and adults (Dist. Ex. 12 at p. 3; Parent Ex. C at p. 4). The February 2009 IEP reflected that the student was able to listen and follow classroom routines and rules, as reported by the student's teacher (*id.*). The Cross Creek therapist reported to the February 2009 CSE that the student was at the "uppermost level" in Cross Creek's privilege system, and was part of a leadership team involving peer mentoring (Tr. pp. 355-56; Dist. Ex. 12 at pp. 2-3; Parent Exs. C at p. 4; D at p. 5). According to the February 2009 IEP, due to improvements in social/emotional functioning, the student had not been receiving psychotropic medications for approximately two months, during which time he demonstrated "good academic and emotional functioning" (Dist. Ex. 12 at p. 2; Parent Ex. C at p. 4). The February 2009 CSE determined that the student's behavior was "age appropriate" and it did not develop a behavioral intervention plan (Parent Ex. C at p. 4). The February 2009 IEP also noted that the student had "a history of substance abuse" (*id.* at p. 5). As explained above, the hearing record supports the February 2009 IEP descriptions of the student's then current levels of functioning and the February 2009 CSE's determination that he was ineligible to receive special education services.

In view of the evidence above, I find that, at the time of the February 2009 CSE meeting, the student did not meet one or more of the criteria for eligibility as a student with an emotional disturbance. Even if the student had met one of the criteria, I find that the hearing record does not indicate that the student required special education services as a result. Therefore, I find that the impartial hearing officer erred by determining that that the student was eligible for special education services as a student with an emotional disturbance (IHO Decision at pp. 8-9). Because I have found that the student is not eligible to receive special education programs and services as a student with a disability under the IDEA, the parents are not entitled to tuition reimbursement and I need not reach the issue of whether Cross Creek was an appropriate placement. The necessary inquiry is at an end (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142F. 3d at 134; Application of a Child with a Disability, Appeal No. 03-058; Application of a Child Suspected of Having a Disability, Appeal No. 03-058).

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 SUSTAINED.

IT IS ORDERED that the impartial hearing officer's order dated October 27, 2009 is annulled to the extent that it determined that the student was eligible for special education programs and services as a student with an emotional disturbance and ordered the district to reimburse the parents for the cost of the student's tuition at Cross Creek.

Dated: Albany, New York
January 21, 2010

PAUL F. KELLY
STATE REVIEW OFFICER