The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 10-009

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 Northport-East Northport Union Free School District

Appearances:
Cordova Law Associates, P.C., attorneys for petitioners, Doreen Cordova, Esq., of counsel

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

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the Family Foundation School (Family Foundation) for the 2007-08 and 2008-09 school years. The appeal must be dismissed.

At the time of the impartial hearing, the student was enrolled in a "non-public school other than Family Foundation" (Pet. ¶ 4). During the 2007-08 and 2008-09 school years, the student attended Family Foundation, a residential 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 (Tr. pp. 35-36, 46, 270-271, 360; 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 is in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The hearing record reflects that the student attended the district's general education program for elementary school (Dist. Ex. I at pp. 2-3). The hearing record further reflects that the student attended a district middle school and achieved average to above averages grades in sixth grade with no behavioral or emotional issues reported (id.). During seventh grade, the student continued to progress academically and achieved average to above average grades, although some of her teachers noted missing or late assignments and declining or inconsistent performance (id. at

p. 3). During eighth grade, the student again achieved average to above average grades with some of her teachers noting that she needed to improve her work habits or was missing assignments, while others reported "good achievement" and that the student was a pleasure to have in class (Parent Ex. 25).

According to evaluations conducted by the district and by Family Foundation between 2007 and 2009, the student reported that she began to interact with a different social group during middle school and that by seventh grade, she was using marijuana and alcohol and was acting out at home (Dist. Exs. A at pp. 19-21; I at p. 3). The student further reported that she gravitated toward older peers who were also engaged in drug use and eventually began to use marijuana several times per day (Tr. p. 393; Dist. Exs. A at p. 19; I at p. 3). Reportedly, the student's drug use later became more frequent and included "more dangerous illicit drugs" (Tr. p. 401; Dist. Exs. A at pp. 19-20; I at p. 3). She also reported that she was adept at hiding her drug use and would often use drugs alone (Dist. Ex. A at 19-20). The student's father testified that the parents were unaware of the extent of the student's drug use until after the student attended Family Foundation (Tr. p. 363). In late 2005, during the student's eighth grade school year (2005-06), the student began to see a counselor that was recommended to the parents by a local drug and alcohol center (Tr. pp. 417-18).

The student entered ninth grade at a district high school for the 2006-07 school year (Parent Ex. 50). The student reported that during that school year, her drinking and drug use increased, she rarely slept or spent time with her family, and she often stayed out all night (Dist. Ex. I at p. 3). The student's father testified that also during that time period, the student's behavior at home declined wherein the student would react out of proportion to normal parental controls and on at least two occasions, the police were called when the student could not be located (Tr. pp. 346-47, 350; Dist. Ex. A at pp. 14, 21; Parent Ex. 34). During the 2006-07 school year, the student "cut" a large number of classes, received an in-school suspension, and was recommended for "Academic Place" in two subjects (Tr. p. 317; Parent Exs. 10-12; 15-23).[1]

In May of 2007, the student was hospitalized after an incident that began in the home wherein the student threatened suicide with a knife (Parent Exs. 33; 42; 43). The student was escorted to the hospital by police where she remained for eight days (id.). While in the hospital and after the student was discharged in early June 2007, the parents and the district's guidance counselor arranged for the student to receive home instruction that continued for the remainder of the 2006-07 academic year (Tr. pp. 56, 246; Dist. Ex J at p. 2; Parent Ex. 39).

The student received the following "end of the year" grades for ninth grade (2006-07): English (61), Spanish 2 "RE" (75), algebra 1 (88), earth science "R" (72), global history 1 (75), studio media "Y" (91), intro/dance "S 9th" (94), physical education "F 9th grade" (90), and fashion

[1] According to the student's guidance counselor at the district high school, "Academic Place" is a service provided by the district wherein students have access to teachers in each of the five main subject areas after school to provide additional academic support (Tr. p. 58).

marketing "Y" (73) (Parent Ex. 50).[2] The student passed and received credit for every class except English (id.).[3]

After the student was discharged from the hospital in June 2007, she began seeing a private psychiatrist and a private licensed clinical social worker and continued therapy with both individuals throughout summer 2007 (Tr. pp. 355-56, 380-84; Parent Ex. 42). The student reported that during summer 2007, she continued to use drugs and went on a three week "cocaine binge" (Dist. Exs. A at p. 19; I at p. 4). On August 31, 2007, the parents unilaterally placed the student at Family Foundation (Dist. Ex. A at p. 19; Parent Ex. 7 at p. 1).

In July and August 2007, leading up to the student's admission to Family Foundation, the parents completed or provided information for a new student enrollment form, a "student alert," an initial interview sheet, an admissions screening form, an admissions phone contact, and an application for admission to Family Foundation (Dist. Ex. A at pp. 3-18). These documents described the student's medical and educational history and provided information for Family Foundation specific to the parents' concerns regarding the student (id.). The "student alert" noted that the student reportedly had a diagnosis of a "mood disorder" (id. at p. 7). On the application for admission, in response to a question asking what prompted the parents to consider Family Foundation, the parents responded that the student had potential but had become defiant and oppositional; gravitated to older peers, which "alarmed" the parents; and seemed unhappy and angry most of the time (id. at p. 13). In response to other questions, the parents stated that the student was adopted from another country and that the adoption issue had recently "resurfaced," that the student was defiant of curfews and resistant to "normal parental controls," that she abused alcohol, and that she engaged in "binge drinking that [led] to dangerous behaviors" (id. at pp. 13-14). In response to a question asking if the student had ever threatened or attempted suicide, the parents stated that the student was hospitalized for a suicide attempt and that at the hospital she had claimed that she "did it for attention," although the parents believed there were underlying concerns (id. at p. 15). The parents also reported on the application that the student had received a diagnosis of a "mood disorder-NOS" while at the psychiatric hospital (id.).[4] The Family Foundation admissions screening form, dated August 23, 2007, indicated that the student met the school's "consideration criteria" of "[a]ge," "IQ," "[p]re-existing diagnosis," "[d]rug/[a]lcohol [u]se," "[o]ppositional behavior toward parent," "[d]isrespectful toward parents/authority figures," and "[l]ow self esteem;" but did not indicate that she met the criteria of "[u]nderachieving academically" (id. at p. 9).

A psychologist at Family Foundation conducted an "Initial Evaluation" dated December 12, 2007, after the student had been at the school for approximately 3 1/2 months (Dist. Ex. A at pp. 19, 22). The evaluation report stated that the purpose of the evaluation was to help provide structure to the student's program at Family Foundation (id. at p. 19). The evaluating psychologist described the student's history in two parts, first as "history according to [the student]" and then as "history according to the parents" (id. at pp. 19-21). In the first part of the history, the evaluating

[2] The terms "RE," "R," "Y," "S," and "F" are not defined in the hearing record (see Parent Ex. 50).

[3] The student attended summer school for English and passed the class with a grade of 94 (Parent Ex. 50).

[4] Although not defined, it is presumed that "NOS" stands for "not otherwise specified."

psychologist noted that the student's explanation for her placement at Family Foundation was that she "drank alcohol and took drugs" (id. at p. 19). The psychologist also noted that the student had maintained her grades at "good levels" and that she had maintained her employment (id. at p. 20). In the second part of the history, the evaluating psychologist noted that the parents were not certain why the student's behavior had "so dramatically changed," and that the student had become preoccupied with "adoption issues," and the parents believed they had "lost their ability to reach [the student] and influence her direction" (id. at p. 21). In describing the student's "mental status," the evaluating psychologist noted that the student's range of emotions was "restricted," she appeared to be of normal intelligence without apparent cognitive defects, there seemed to be an "underlying mood of depression," she experienced anxiety, her judgment was impaired, and there were no indications of psychosis (id.). The evaluating psychologist offered Axis I diagnoses of an oppositional defiant disorder, a polysubstance related disorder, and a depressive disorder-NOS (id.). The evaluating psychologist offered Axis IV diagnoses of adoption, family difficulties, and separation anxiety (id. at p. 22). In describing the student's treatment considerations, the evaluating psychologist noted that "adoptive issues" had become paramount in the student's life, that she gave the impression of compliance but was maintaining a "secretive" interest in returning to drug use, and that she was a good candidate for the adoption and social phobia groups at Family Foundation (id.).

The hearing record reflects that on March 29, 2008, the student was administered the Millon Adolescent Clinical Inventory (MACI) by staff at Family Foundation (Tr. p. 467; Dist. Ex. A at p. 50).[5] The following diagnoses were offered in the MACI profile's interpretive report: other (or unknown) substance abuse, a dysthymic disorder (also consider depressive disorder-NOS or an adjustment disorder with depressed mood), and a conduct disorder (also consider an oppositional defiant disorder or childhood or adolescent antisocial behavior) (id. at p. 56). The MACI report further stated that the possibility of an acute alcohol or drug abuse problem should be carefully considered for the student and if this possibility was verified, "appropriate behavioral management or group therapeutic programs should be implemented" (id.). The report also noted that "family treatment methods" may be the most useful techniques with this student (id. at p. 57).

The hearing record also contains a letter dated February 5, 2009, from the director of counseling services at Family Foundation (director) entitled "To Whom It May Concern" (Parent Ex. 7). The director, who is a licensed clinical social worker, advised that when she first met the student after she arrived at Family Foundation, she was "angry, sullen, and withdrawn" (id. at p. 1). The director advised that the student had made significant progress since her enrollment and that although there was still a "long way to go," she reported that the student was "moving forward in recovery," had become "substance free," and had improved her relationships with peers and her family (id. at p. 2). The director further reported that the student completed her homework assignments, attended all of her classes, and was making academic progress (id.).

By due process complaint notice dated March 9, 2009, the parents requested an impartial hearing (Parent Ex. 1 at p. 2). The parents alleged that the district denied the student a free appropriate public education (FAPE) because the district and all school administrators ignored the

[5] The hearing record suggests that this administration of the MACI to the student was overseen and interpreted by a psychologist at Family Foundation (Tr. pp. 492-93).

student's suspected disability and should have classified their daughter as a student with an emotional disturbance under the Individuals with Disabilities Education Act (IDEA) (id. at pp. 2-3). Specifically, the parents alleged that the district and its administrators were on notice that the student was an "at-risk" student and that her emotional problems were interfering with her ability to succeed in school (id. at pp. 3-4). They alleged that the district was aware that the student had cut numerous classes and had begun to receive failing grades, but the district ignored its own "code of conduct and cutting class policies by not taking proper action" (id. at p. 3). They further alleged that during the 2006-07 school year while the student attended a district school, the student attempted suicide and was hospitalized and the district did not address this behavior or initiate or require evaluations of the student (id. at pp. 3-4). They alleged that the district failed to request that a psychological evaluation be done to assess whether the student was a danger to herself or others and failed to address "numerous parental concerns" (id.). They further alleged that the district failed to perform a functional behavioral assessment (FBA) and to develop a behavioral intervention plan (BIP) to address the student's needs (id. at p. 3). The parents alleged that the district failed to classify the student as a student with an emotional disturbance (id. at pp. 4-5). They also alleged that the unilateral placement of the student at Family Foundation was appropriate and that there were no equitable considerations barring reimbursement to the parents (id. at pp. 5-6). The parents requested tuition reimbursement for the costs of placing the student at Family Foundation for the 2007-08, 2008-09, and 2009-10 school years; direct payment to Family Foundation for the 2010-2011 school year "until [the student] graduates from [h]igh [s]chool;" payment of attorneys' fees and expenses; and reimbursement for travel expenses to and from Family Foundation (id. at pp. 3, 7).

On March 27, 2009, the district submitted a response to the parents' due process complaint notice contending that the student was not at that time, and was not at the time that she attended the district's school, a student with a disability (Dist. Ex. E). The district further contended that the parents, by removing the student from the district's school, had "effectively prevented the district from carrying out its 'child find' responsibilities" (id.). The district alleged that Family Foundation was not appropriate for the student and that equitable considerations barred the parents' reimbursement request because they had failed to provide notice to the district that they would seek reimbursement "until over…1 1/2 years after making the placement" at Family Foundation (id.).

Subsequent to filing their due process complaint notice, by letter dated April 9, 2009, the parents requested that the district evaluate the student and conduct assessments necessary for the Committee on Special Education (CSE) to review and assess the student (Dist. Ex. C). The parents provided the name of and contact information for Family Foundation's vice president for external relations and requested that the district contact him to begin the evaluation process (id.). The parents also attached to the letter a signed copy of the district's "Consent For Initial Evaluation" form dated April 8, 2009, which acknowledged that they had received a copy of "A Parent's Guide to Special Education" (id. at p. 2).

The district's school psychologist conducted a psychological evaluation of the student at Family Foundation on May 12 and 13, 2009 and generated a report dated May 18, 2009 (Dist. Ex.

I at p. 1).[6] The psychological evaluation report contained a detailed educational and psychological history of the student (id. at pp. 1-6). The psychologist administered the Wechsler Abbreviated Scale of Intelligence – Third Edition (WAIS-III) (id. at p. 7). The student's performance yielded a verbal IQ score of 105 (63rd percentile), and a performance IQ score of 106 (66th percentile) for a full scale IQ score of 106 (66th percentile) (id.). Administration of selected subtests of the Woodcock-Johnson Tests of Cognitive Abilities - Third Edition (WJ-III COG) yielded standard scores (percentile ranks) of 85 (15) in visual-auditory learning and 94 (34) in rapid picture naming, which was considered to be within normal limits (id. at pp. 8, 11-12). As measured by the WJ-III COG, within the auditory processing cluster, the student received standard scores (percentile ranks) of 107 (67) in sound blending and 86 (17) in incomplete words indicative of an average performance when compared to same age peers (id. at pp. 8, 12). The student also received a standard score (percentile rank) of 100 (51) in analysis-synthesis within the fluid reasoning cluster (id. at p. 8). The psychologist also administered the Woodcock- Johnson Tests of Achievement – Third Edition (WJ-III ACH.) (id.). The student achieved a broad reading standard score of 88 (22nd percentile), a broad math standard score of 101 (53rd percentile), and a broad written language standard score of 99 (48th percentile) (id.).

The psychologist assessed the student's social/emotional functioning through interviews with the student and Family Foundation staff, as well as administration of formal rating scales (Dist. Ex. I at pp. 7, 13).[7] The psychologist described the student as presenting as a "sensitive and caring individual, who seeks approval, aims to please, and is remorseful of many of the choices she has made" (id. at p. 13). The psychologist noted that the student did not report significant feelings of depression or anxiety and that while she was confident in her improved coping skills, she reported some anxiety regarding returning to the setting where her "past influences" remained (id.). The psychologist advised that although the student did not report significant internalizing problems, externalizing problems, inattention/hyperactivity, school problems or adjustment difficulties; "looking closer" at some of her responses revealed problems with attention and restlessness and a continuing interest in risky behaviors (id. at p. 14). The psychologist reported that according to the parents, the student had made great changes and improvements that were in "stark contrast" to her behavior prior to entering Family Foundation (id.). The parents reported that they remained concerned with the student's anxiety, but that their concerns about her behavior had been alleviated "to an extent" (id.).

In his summary and recommendations, the psychologist noted that the student was not recognized by the district as exhibiting behavioral difficulties while in school, and had "failed just one course (English 9)" while in the district's school (Dist. Ex. I at p. 14). The psychologist further noted that at home, the student's behavior and "social choices" had become "increasingly … worrisome" beginning in seventh grade (id.). The psychologist reported that the student was

[6] There are several versions of this psychological evaluation report contained in the hearing record. The evaluation report was dated May 18, 2009 and was subsequently revised three times with updated information. For purposes of this decision, I will discuss the latest version of the evaluation report that was available to the May 28, 2009 CSE, which is the version dated May 28, 2009 (see Dist. Exs. I; K).

[7] The evaluation report reflected that results of two assessments were not available at the time the report was written, the Behavioral Assessment System for Children - Second Edition - Teacher Report (BASC-2) and the Conners' Teacher Rating Scales – Revised Long Version, although the results of five other behavioral assessments were available and were incorporated into the report (Dist. Ex. I at p. 7).

attentive to and diligent in the tasks presented to her throughout the evaluation and that the results of the evaluation appeared to be an accurate assessment of her abilities (id. at p. 15). The psychologist concluded the evaluation and stated that:

> According to the results of the evaluation, [the student's] profile does not reveal significant deficits in specific cognitive ability areas that are empirically related to achievement in the areas of reading, writing, and math. Nor does [the student's] performance on measures of achievement reveal normative deficits. These results are not suggestive of a learning disability in any area.

(id. at p. 15).

The psychologist recommended that the final determination of whether the student was eligible for IDEA services should be made by the CSE, and that the CSE should consider, among other things, the student's cognitive and achievement abilities, as well as the student's emotional functioning and her academic performance and behavioral functioning (id. at pp. 15-16).

On May 28, 2009, a CSE meeting occurred and the CSE determined that the student was not eligible for special education programs and services as a student with a disability under the IDEA (Tr. pp. 248, 267, 283).[8] The hearing record shows that at the meeting, participants discussed the need for a psychiatric evaluation of the student and options for "aftercare" in the district for the student in relation to her substance abuse upon the student's anticipated return to the district after she finished the 2008-09 school year at Family Foundation (Tr. pp. 248, 267-68).[9] The student did not return to the district for the 2009-10 school year and, according to the parents' petition, attended a private school other than Family Foundation (Pet. ¶ 4).

The impartial hearing was conducted over three dates beginning June 16, 2009 and ending on September 25, 2009 (Tr. pp. 1, 377).

In his decision dated December 21, 2009, the impartial hearing officer denied the parents' request for tuition reimbursement (IHO Decision at p. 17). Regarding the parents' argument that the district's failure to identify and classify the student constituted a denial of FAPE and a failure to abide by its child find duties,[10] the impartial hearing officer first noted that the parents did not raise this allegation in their due process complaint notice (id. at p. 11). Nevertheless, he reviewed

---

[8] The hearing record does not contain any evidence identifying the participants of the May 28, 2009 meeting of the CSE, although a district school social worker testified that the parents attended and the parents do not argue that they were present (Tr. pp. 240, 248-49).

[9] A private psychiatric evaluation was conducted on August 31, 2009 at the direction of the district, but due to difficulties in scheduling the evaluation, the evaluation report was not available until the impartial hearing was in progress (Dist. Ex. L). The private psychiatric evaluation report was sent to the parents on September 15, 2009 (id.). The results of the psychiatric evaluation are consistent with the district's May 2009 psychological evaluation that was available to the CSE (compare Dist. Ex. I; with Dist. Ex. L).

[10] For regulations pertaining to a district's child find responsibilities under the IDEA, see U.S.C. § 1412(a)(3). See also Educ. Law §§ 4402(1)(a);4410(4); 34 C.F.R. § 300.111; 8 NYCRR 200.2(a).

this claim and found that the hearing record supported a finding that the district had appropriate procedures in place to identify and refer to the CSE a child whom they suspected of having a disability (id. at pp. 9-12). Additionally, the impartial hearing officer found that the hearing record showed that "there was insufficient evidence present during the 2006-07 school year, or any school year prior [to that], for the [d]istrict to suspect that [the student] had a disability under the IDEA" (id. at p. 13). More specifically, the impartial hearing officer found that the student had no significant academic or emotional issues during middle school and that she passed all of her classes and graduated to the district's high school at the end of eighth grade (id.). He also found that the student "performed adequately" in all of her academic classes during the first half of the 2006-07 school year (ninth grade), and that although the student had experienced emotional and psychological difficulties during the second half of the 2006-07 school year, her emotional issues were not pervasive and did not exist for an extended period of time (id. at pp. 13-14). The impartial hearing officer concluded that the student did not meet the definition for a student with an emotional disturbance as she did not meet any of the criteria for such a disability (id. at pp. 14-17). He further determined that the hearing record was "insufficient to support the parents' contention" that the student attempted to commit suicide in 2007, and even if this event did occur, he determined that it "was an isolated incident and not related to her ability to perform in an academic setting" (id. at p. 15). Lastly the impartial hearing officer found that because the student was not eligible for classification as a student with an emotional disturbance under the IDEA and the parents were not entitled to reimbursement, he need not reach the issue of whether Family Foundation was an appropriate placement or examine equitable considerations (id.). Therefore, he dismissed the parents' due process complaint notice in its entirety.

The parents appeal, and request that the decision of the impartial hearing officer be reversed in its entirety and further request a finding that the district failed in its child find obligations and failed to offer the student a FAPE. The parents also assert that Family Foundation was an appropriate placement for the student and seek an award of tuition reimbursement for Family Foundation and attorneys' fees.[11] The parents restate the arguments put forth in the due process complaint notice and further argue that the impartial hearing officer failed to give proper consideration to the evidence. The parents further contend that had the student been evaluated while she attended the district's school during the 2006-07 school year, she would have been properly classified as a student with an emotional disturbance under the IDEA. The parents argue that the district's child find obligation is an affirmative one that does not require the parents to request that the district begin an evaluation and that the obligation remains even when a student is passing from grade to grade. The parents further contend that the district did not have proper procedures in place to perform its child find obligation. The parents argue that the district teachers who saw the student on a daily basis were aware that the student had excessive cuts and emotional outbursts and that knowledge, coupled with the student's eight-day hospitalization for an attempted suicide and an older sibling with "similar issues," should have triggered a referral to the CSE or the learning support team and response to intervention procedures. The parents argue that by the time the district did evaluate the student, after the student had received two years of "intensive

[11] The parents' petition is unclear which school years they are seeking reimbursement at Family Foundation for, although their petition refers to the 2007-08 and 2008-09 school years. However, unlike in their due process complaint notice (Parent Ex. 1), on appeal, the parents do not appear to seek reimbursement or direct payment of tuition at Family Foundation for the 2009-10 school year or any subsequent school years and their petition reveals that the student did not attend Family Foundation beyond the 2008-09 school year (Pet. ¶ 4).

therapy" at Family Foundation, she "no longer presented" with the issues she had during the 2006-07 school year.

Next, the parents argue that their unilateral placement of the student at Family Foundation was appropriate because the school addressed her unique needs by providing a residential therapeutic environment, extensive therapy delivered by professional staff, and an individualized crisis management plan. Further, the parents argue that the student made significant progress while at Family Foundation both academically and emotionally. The parents also argue that the equities favor their claim for reimbursement because they were fully cooperative with the district and were forthcoming and proactive in their efforts to engage with the district. 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 written notice that they were unilaterally placing the student in a private school and seeking tuition reimbursement.

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 Family Foundation was not an appropriate placement 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 their placement of the student at Family Foundation and their intent to seek tuition reimbursement.

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. Second, the district argues that the parents' reimbursement request should be barred by the doctrine of laches as a matter of equity because the parents waited for more than 18 months after the unilateral placement to contend that their daughter required special education services.

In their reply, the parents respond to the first procedural defense raised by the district and argue that they properly served the notice with petition upon the district along with the petition. The parents do not reply to the district's second affirmative defense. The parents also argue that the district's answer should be rejected as untimely.

Preliminarily, I will address two procedural issues. 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. To initiate an appeal, a parent must serve a notice of intention to seek review and subsequently, a notice with 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], 279.3). Here, the parent served a notice of intention to seek review but did not serve a notice with petition. However, the district answered the parents' allegations in this case in a timely manner. Under the circumstances, I decline to dismiss the petition for the failure to

serve the notice with petition (see Application of a Student Suspected of Having a Disability, Appeal No. 09-132; 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.[12]

In their reply, the parents also request that the district's answer be rejected and dismissed in its entirety for failing to answer in the time required by 8 NYCRR 279.5. In sum, the parents' counsel contends that she verbally consented to a short extension in the district's time to answer the petition, but the district's request for an extension to this office stated that the parents' counsel had consented to a longer extension. The district timely requested in writing and received from this office an extension of time in which to serve their answer.[13] Thereafter, the district filed and served their answer in compliance with the extension granted. I find that the district's answer was timely and in my discretion I decline to dismiss it.

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

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally 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"

[12] The same issue was addressed with the parents' counsel in an unrelated prior case (Application of a Student Suspected of Having a Disability, Appeal No. 09-132).

[13] See 8 NYCRR 279.10(e) regarding extensions of time to answer or reply.

(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 available to an eligible student who needs special education and related services even though the student is advancing from grade to grade (8 NYCRR 200.4[c][5]).

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 and that the district violated its "child find" obligations. For the reasons set forth below, I find that the district did not violate its "child find"

obligations and that the CSE appropriately found the student ineligible for special education services.

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]; see also 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111; 8 NYCRR 200.2[a][7]). 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 Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400, n.13 [N.D.N.Y. 2004]). 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 Student Suspected of Having a Disability, Appeal No. 09-132; 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).

The parents contend that the district should have suspected that the student had an emotional disturbance and should have evaluated the student. 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]; see also Maus v. Wappingers Cent. Sch. Dist., 2010 WL 451046 [S.D.N.Y. Feb. 9, 2010]; A.J. v. Bd. of Educ., East Islip Union Free Sch. Dist., 2010 WL 126034 [E.D.N.Y. Jan. 8, 2010]). While the term 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 (34 C.F.R. § 300.8[c][4]; see 8 NYCRR 200.1[zz][4]; New Paltz, 307 F. Supp. 2d at 398).

In this matter, as set forth more fully below, the hearing record reflects that 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 an emotional disturbance and did not have a disability requiring special education. Under these circumstances, I find that the district did not violate its "child find" duty.

As an initial matter, I agree with the impartial hearing officer that the district did not violate its child find obligation to this student. As relevant herein, the hearing record reflects that the district had a learning support team (LST) that would discuss students who appeared to be having academic difficulties and would refer students to the CSE, and that the district's teachers and administrators were familiar with the process of referring students suspected of having a disability to the CSE for evaluations (Tr. pp. 68-69, 80-82, 195-96, 247, 227-28, 239).

The parents further allege that the district ought to have referred the student to the CSE as a student suspected of having an emotional disturbance while the student was attending the district's school because the district was aware that the student had an older sibling with a history of drug abuse, that the student had emotional outbursts at home, that the student had begun to cut a significant number of classes by the end of her ninth grade year, and that she was hospitalized for eight days following a suicide attempt in May of her ninth grade school year (2006-07). For the reasons discussed below, I find that the hearing record does not support the parents' contentions.

In this case, the student's cutting of classes toward the end of the 2006-07 school year, is not necessarily evidence that the student was a student with an emotional disturbance (see Application of the Bd. of Educ., Appeal No. 10-006). In this case, the student reported that she cut her fashion marketing class because she did not like the teacher and was avoiding the class (Tr. pp. 53-54). The student reportedly missed English classes because she also did not like the teacher and would take her time getting ready for school in the morning, often resulting in her missing he first period English class (Dist. Ex. I at p. 3). The student's father alerted her guidance counselor about the cutting notices that he had received and the guidance counselor had a counseling session with the student about the importance of attending classes and brought the matter to the attention of another school administrator (Tr. pp. 52-55). There was one incident during the 2006-07 school year wherein the student left in the middle of a class and did not return that the district was aware of and that led to an in-school suspension (Tr. pp. 316-17). Although the student had been seeing a counselor from a local drug and alcohol center for some time prior to the end of the 2006-07 school year, the parents did not make the district aware of this (Tr. pp. 352-55).

The hearing record reflects that the district's administrators and teachers who testified at the impartial hearing did not observe any behaviors in school that led them to suspect that the student might have a disability. The district's school psychologist testified that the student did not meet the criteria for an emotional disturbance under the IDEA (Tr. p . 127). Regarding the first characteristic of emotional disturbance, the school psychologist further testified that the student's academic achievement was in the average range, as indicated by the student's testing results and class performance (id.). In relation to the second criteria of an emotional disturbance, the school psychologist stated that the student was able to relate well with adults and her peers (id.). The

school psychologist also testified that the student did not exhibit any of the three remaining characteristics of an emotional disturbance (id. at pp. 127-28). The student's math teacher during the 2006-07 school year testified that the student did very well for the first three quarters of the school year and that she was a "nice girl" and that he "couldn't be happier with her" (Tr. pp. 184, 187).[14] The math teacher reported that during the first three quarters of the school year, the student had maintained an average grade of 90 and had participated in class (Tr. pp. 188, 191). The math teacher testified that he was familiar with the system of referring students to the CSE, had done so on several occasions in the past, but that he had not seen any reason to refer this student to the CSE while he was her teacher (Tr. pp. 195-96). When asked about each of the five criteria for an emotional disturbance, the math teacher testified that he had not observed the student to exhibit any of the criteria (Tr. pp. 196-98). Likewise, when asked about each of the five criteria for emotional disturbance, the student's school counselor testified that he had not observed the student exhibiting any of the criteria (Tr. pp. 70-71). The student's ninth grade summer school English teacher also testified that the student did very well in her class, earning a final grade of 94, that she volunteered in class, that she was a "sweet girl," and that she had friends in the class (Tr. pp. 216, 218, 225, 231). The English teacher testified that she had training as an "inclusion teacher," was very familiar with the process of referring students suspected of having a disability to the CSE, and had referred students on many occasions in the past for suspected emotional disturbances and other disabilities, but had seen no reason to refer the student in this instance (Tr. pp. 227-29, 239). When asked about each of the five criteria for emotional disturbance, the English teacher testified that she had not observed the student exhibiting any of the criteria (Tr. pp. 229-30). The district's school social worker testified that he was a member of the district's LST and that although the district is "monitoring the students all year long," he was "taken off guard" by the student's hospitalization and had never suspected that the student had a disability that would warrant referral to the CSE (Tr. pp. 240, 246-47). In the 2006-07 school year, the student passed and received credit for every class except English, which she passed and received credit for in summer school earning a final grade of 94 (Parent Ex. 50).

The student's father testified that he was a former public school teacher and that he was aware of the procedure for referring students to the CSE and had done so with other students on occasion himself during his career (Tr. pp. 290, 327-32). The student's father further testified that he was aware that as a parent he had the right to refer his daughter to the CSE for evaluation, but that he did not do so until after the student had been attending Family Foundation for the entire 2007-08 school year and most of the 2008-09 school year (Tr. pp. 327-32). According to the student's father, the counselor that the student had been seeing from the drug and alcohol center had never recommended that the student be referred to the CSE for evaluation (Tr. p. 420-21). Upon the student's discharge from the hospital in May 2007, the treating physician did not recommend that the student be evaluated by the CSE (Parent Ex. 42). After the student's hospitalization, the student began to see a private psychologist (Tr. p. 435). According to the student's father, the private psychologist never recommended that the student be referred to the CSE for evaluation (Tr. p. 422). After the student's hospitalization, the student also began to see a private licensed clinical social worker (Tr. pp. 380-81). The licensed clinical social worker testified that she was familiar with the process of referring a student to the CSE for evaluation, but

[14] This teacher also tutored the student during summer 2007 (Tr. p. 186).

that although she discussed with the parents the topic of the parents referring the student to the district, she never recommended that the parents do so (Tr. pp. 401-403).

In contrast, when asked about each of the five criteria for emotional disturbance and if they applied to this student, the licensed clinical social worker who worked with the student at Family Foundation testified that in her opinion, the student exhibited every criteria during the early stages of her attendance at Family Foundation (Tr. pp. 460-66). However, I find that the hearing record supports the impartial hearing officer's finding that the student's negative behaviors occurred primarily outside of school and did not adversely affect her academic performance. Accordingly, I find that the hearing record shows that there was insufficient evidence before the district while the student attended the its schools for the district to suspect that the student had a disability under the IDEA.

I also find that when the CSE met in May 2009, it properly declined to classify the student with a disability under the IDEA. At the time of the CSE meeting, the student's academic, behavioral, and emotional concerns exhibited at Family Foundation during the 2007-08 school year had significantly improved after declining subsequent to admission to the program and there is support in the hearing record for the CSE's determination. In their petition, the parents contend that by the time the CSE met to evaluate the student, she "no longer presented" with the issues that she had exhibited while she attended the district's school (Pet. ¶ 23). In their petition the parents do not specify which of the criteria for emotional disturbance they believe were satisfied and caused an adverse impact on the student's educational performance that required special education. According to the psychological evaluation conducted by the district prior to the CSE meeting, the student's problematic behaviors had dissipated during the time that the student attended Family Foundation and had only a "minimal" effect on her education (Dist. Ex. I at p. 15). The student's grades at Family Foundation during the spring semester of the 2008-09 school year were average to above average (Dist. Ex. A. at p. 71). The parents reported that the student's behavior was in "stark contrast" to her behavior prior to entering Family Foundation and the student's father testified that whatever her prior problems were, they did not appear to significantly affect her academic performance (Tr. p. 424; Dist. Ex. I at p. 14). After review of the hearing record as a whole, I see no reason to disturb the impartial hearing officer's determination on this question.

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**
March 29, 2010

PAUL F. KELLY
STATE REVIEW OFFICER