



The University of the State of New York

The State Education Department

State Review Officer

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No. 10-106

**Application of a STUDENT SUSPECTED OF HAVING A
DISABILITY, by her parent, for review of a determination of a
hearing officer relating to the provision of educational services
by the New York City Department of Education**

Appearances:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, Jesse Cole Cutler, Esq., of counsel

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

DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed for her daughter's (the student) tuition costs at La Europa Academy (La Europa) for the 2008-09 school year. Respondent (the district) cross-appeals from, among other things, the impartial hearing officer's determination that the student was eligible to receive special education and related services for the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be sustained.

The student enrolled in La Europa in April 2008, and completed part of her 10th grade school year (2007-08) and her entire 11th grade school year (2008-09) there (Tr. pp. 345-46; Dist. Exs. 10 at p. 1; 11; 14 at p. 1; 16 at p. 1; Parent Exs. A at pp. 1, 4, 7; F at p. 1; G at p. 1;¹ H; I; J at

¹ The hearing record contains duplicative exhibits. For the purposes of this decision, I cite only to District exhibits where District exhibits and Parent exhibits are identical. It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]; see Application of the Bd. of Educ., Appeal No. 10-047; Application of the Bd. of Educ., Appeal No. 10-014; Application of a Student with a Disability, Appeal No. 09-134; Application of the Bd. of Educ., Appeal No. 09-124; Application of a Student with a Disability, Appeal No. 09-096; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 09-038; Application of a Child with a Disability, Appeal No. 07-119; Application of the Bd. of Educ., Appeal No. 06-074).

p. 1; see Tr. pp. 285-89, 291). La Europa has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related 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]).

According to the hearing record, the student was educated in a public elementary school from kindergarten through fifth grade (Dist. Ex. 11 at p. 1; Parent Ex. A at pp. 1-2; see Tr. pp. 330-31). In third grade, the student began to experience intense depression and began working with a private therapist (Dist. Exs. 11 at p.1; 13 at p. 2; 14 at p. 2).² The student attended a public middle school from sixth through eighth grades (Parent Ex. A at pp. 2-3).

In September 2004, while in seventh grade, the student was hospitalized for treatment of an eating disorder (Dist. Ex. 12 at p. 2). After approximately three weeks, the student was discharged and returned to the public school (Tr. pp. 333-34; Dist. Ex. 12 at p. 2). In May 2006, the student, then in eighth grade, was hospitalized for a second time for treatment of an eating disorder (Tr. pp. 334-35; Dist. Ex. 12 at p. 2). Shortly thereafter the student entered an out-of-State residential center for eating disorders and remained there for three months (Tr. pp. 536-38; Dist. Ex. 12 at p. 2). The student completed ninth grade (2006-07) in a public high school (Tr. pp. 338, 340-41; Dist. Ex. 12 at p. 2; Parent Ex. F at p. 5). In September 2007 (10th grade) the student was admitted to an eating disorders unit in a hospital where she received diagnoses of anorexia nervosa (anorexia) and a major depression, recurrent moderate (Dist. Ex. 12 at pp. 1, 3, 6; see Tr. p. 334; Dist. Exs. 6 at p. 5; 7 at p. 1; 8 at pp. 1-2; 9 at pp. 1-2; 10 at p. 1; 11 at pp. 1, 3; 13 at p. 1; 14; 17; Parent Exs. A at p. 3; F at pp. 1, 6; H; I; J at pp. 1-3). The student was discharged eight days later, with "follow-up to be done with her outpatient team and possible referral to a partial program" (Dist. Ex. 12 at pp. 5-6).³

The hearing record reflects that in October 2007 the student attempted suicide (Dist. Exs. 8 at p. 1; 14 at p. 2). At parent request, the district began to provide the student with home instruction in November 2007 (Parent Ex. A at p. 3; Dist. Ex. 8 at p. 1). The hearing record suggests that at this time, the student also attended a psychiatric day program which focused on decreasing the student's eating disorder symptoms and addressing her depression and anxiety (Tr. pp. 343-44; Dist. Ex. 17 at p. 1). She continued to receive home instruction until she traveled out of the country in early 2008 (Tr. p. 344; Dist. Ex. 9 at p. 2). While abroad, the student again attempted suicide (Tr. p. 345; Dist. Ex. 14 at p. 2). On April 4, 2008, the parent signed an admissions agreement with La Europa, identified in the hearing record as a therapeutic residential program, and on April 7, 2008 the student enrolled there (Tr. pp. 345-46; Parent Exs. A at p. 4; D

² The hearing record indicates that the student received private therapy continuously since third grade (Tr. pp. 337, 341-42, 365-67; Dist. Ex. 13 at p. 2; see Dist. Exs. 9; 11 at p. 2; 12 at p. 1; 17).

³ According to the hearing record, at the time of her discharge, the student was under the care of a private psychiatrist from May 18, 2007 through December 30, 2008 who offered diagnoses of anorexia and major depression (see Dist. Ex. 9) and a private therapist from March 2007 through January 2008, who offered Axis I diagnoses of anorexia, a major depressive disorder (recurrent, severe), and a generalized anxiety disorder; an Axis II diagnosis of borderline personality traits; an Axis III diagnosis of health issues related to low body weight; and Axis IV diagnoses of family conflict, social difficulties, and academic stressors (see Dist. Ex. 17).

at p. 1; J at p. 1; see Tr. pp. 246-48, 272, 274, 318-19, 327, 390; Dist. Ex. 14 at p. 1; Parent Exs. B at pp. 2, 11; C at p. 1; E at pp. 1, 9; F at p. 1).

On April 15, 2008 the student's primary therapist at La Europa conducted a psychosocial assessment of the student, which noted that upon admission, the student presented with depression, anxiety, family and relationship problems, an eating disorder, and self-esteem and body image problems (Dist. Ex. 13 at p. 1; see Dist. Ex. 8 at p. 1).⁴ The evaluator recounted the student's struggles with depression, anxiety, an eating disorder, cutting, and suicidal gestures; noted that the student had not responded favorably to numerous short-term inpatient and outpatient programs; and reported that the student's parents believed that if the student remained at home, her problems would intensify, thereby necessitating her placement in a residential treatment center (Dist. Ex. 13 at pp. 1-2). The evaluator identified the student's strengths as intelligence, a supportive family, courage, a willingness to cooperate with assessment, insight, creativity, and a desire to survive (id. at p. 3). She assessed the student's limitations as family dysfunction, a mood disturbance, a denial of treatment issues, a tendency to relapse, and medical health problems (id.). The student's treatment goals included building positive relationships, decreasing resistance to treatment, building self-esteem, understanding the root causes of her eating disorder, decreasing depression, and developing healthy living skills (id.). The evaluator noted that the student expressed a desire to find healthy ways "to find peace" and demonstrated a willingness to look at "why her eating disorder and depression have so much control over her" (id.).

On April 30, 2008 La Europa staff, including the student's primary therapist, developed a master treatment plan for the student, which included therapeutic, residential, medical, and educational components, which would be integrated to address the student's areas of concern (Parent Ex. F at p. 1). The master treatment plan confirmed Axis I diagnoses of bulimia nervosa, a major depressive disorder (severe) without psychotic features, a generalized anxiety disorder, panic attacks without agoraphobia, marijuana abuse, and parent/child relational problems (id.). The student's Axis II diagnoses were deferred due to age; however, the master treatment plan commented that unspecified "borderline features" were present (id.).

The therapeutic component of the master treatment plan identified four areas of concern relative to the student, including depression, anxiety, an eating disorder, and family problems (Parent Ex. F at pp. 1-5). The master treatment plan described the student's behavior as it related to each concern, and detailed goals, short term objectives, and intervention strategies for dealing with each concern (id.). It called for the student to participate in weekly individual and family therapies facilitated by her primary therapist, who would "[draw] from cognitive-behavioral, emotional, narrative, solution-focused, and systems focused therapeutic interventions," as well as bi-weekly recreational therapy and weekly art and dance groups (id. at p. 1). The student's parents would participate in bimonthly "parent days" with their daughter and in weekly family therapy sessions (id.).

⁴ The hearing record contains an unsigned report from an initial psychiatric evaluation of the student conducted on April 8, 2008 which identifies neither the place of evaluation nor the identity of the evaluator (Dist. Ex. 8). Presumably, the evaluation occurred at La Europa, because the student had enrolled there the previous day. This report included diagnoses of an eating disorder (bulimia), a major depressive disorder – recurrent (moderate to severe), panic attacks without agoraphobia, and parent/child relationship problems (id. at p. 4).

According to the residential component of the master treatment plan, the student was to be assigned to a community of up to 16 students, and, during meetings, her treatment team would determine appropriate behavioral, emotional, and cognitive interventions to be implemented by residential staff (Parent Ex. F at p. 5). She was to participate in a "level system" of advancement, which would be individualized to the student's specific goals, with privileges to be determined according to the student's level (id.).⁵ The medical component of the student's master treatment plan called for an initial psychiatric evaluation of the student and for the student to meet with the staff psychiatrist as needed to adjust the student's medication regimen. (id.).

The educational component of the student's master treatment plan noted the student's previous attendance at a public high school where she had completed 10.50 credits toward high school graduation (Parent Ex. F at p. 5). Noting that the student had neither a special education classification nor an individualized education program (IEP), the student's master treatment plan afforded modifications, interventions, and accommodations to the student consisting of a general education program, citizenship grades, monthly progress reports, term grades, daily work and observation, term parent-teacher-student conferences, academic probation, and a small class size (id. at p. 6).⁶ The student's master treatment plan also recommended education goals addressing her academic progress, eating disorder/perfectionism, anxiety, depression, and family relationships, with the La Europa "citizenship rubric" to be used as the primary measurement tool for many of these goals (id. at pp. 5-6).⁷

Subsequent to the student's enrollment at La Europa, the parent referred her daughter to the Committee on Special Education (CSE) for an initial evaluation to determine whether the student was eligible for special education programs and services as a student with a disability (see Tr. pp. 349, 388-89). In furtherance of this evaluation, the district completed an initial social history of the student on June 3, 2008, with the parent serving as informant (Dist. Ex. 11 at p. 1).⁸ The initial social history confirmed prior diagnoses of anorexia and major depression and referenced the student's prior history of attempted suicide and cutting behavior (id. at pp. 1, 3). It also indicated that "[d]ue process rights were discussed and reviewed with [the parent] and a copy of the Procedural Rights Booklet was provided" to her (id. at p. 3).

The hearing record suggests that the district scheduled an initial evaluation of the student for the week of July 14, 2008; however, on July 9, 2008, the student's therapist at La Europa apprised the district in writing that "[b]ecause of the severity of [the student's] issues she will not be able to travel back to New York for her appointment" (Dist. Ex. 15; see Tr. pp. 185-86, 389, 393-94).

⁵ According to the hearing record, the La Europa level system addressed the following basic issues: level I, trust; level II, realization; level III, accountability; level IV, self-actualization; level V, proactivity and empowerment; and level VI, wholeness and balance (Parent Ex. F at p. 5).

⁶ The master treatment plan did not specify the exact class size; however, the hearing record indicates that the general class sizes at La Europa ranged from six to ten students (Tr. pp. 261, 263).

⁷ The hearing record does not contain an explanation of the La Europa citizenship rubric.

⁸ The initial social history report contained in the hearing record, which is identified in the exhibit list as a three-page document, contains two identical pages numbered "2" and "3," respectively (see Dist. Ex. 11 at pp. 2-3).

On December 9, 2008 a district school psychologist conducted a psychoeducational evaluation of the student, who, at the time, was in 11th grade at La Europa (Dist. Ex. 7 at p. 1). The evaluator noted the student's history of anorexia, depression, and anxiety, and was informed by the parent that she did not anticipate that the student would complete the program at La Europa for another eight months, or that the student would be able to return to a public school setting after leaving La Europa, regardless of whether she completed the program there (Dist. Ex. 7 at p. 1). Rather, the parent expressed her belief that the student required a small school setting, preferably private, with the "type of support" the student would need in order to succeed (*id.*). She described her daughter as a "bright" student who had done well academically despite her problems (*id.*).

The evaluating school psychologist described the student as "polite and cooperative" and recorded her denial of having any academic problems at La Europa (Dist. Ex. 7 at p. 1). The evaluating school psychologist further commented that the student's language appeared to be within age expectancy for conversational purposes; that the student had no difficulty following multi-step directions or instructions; that the student's ability to focus and pay attention appeared to be within age expectations during one-to-one testing; and that the student's work habits and motivation were "excellent" (*id.* at p. 2). She acknowledged that the student exhibited perfectionist tendencies, and observed that "[s]he worked in a very organized and planful manner, although not always efficiently" (*id.*). The student also advised that "she felt pressured with items that had time constraints" but denied that extra time for test/class work would be helpful, maintaining that she was capable of completing academic work within given time limits (*id.*).

Administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB5) yielded a verbal IQ of 119 (90th percentile), a nonverbal IQ of 103 (58th percentile), and a full scale IQ of 111 (77th percentile), placing the student's overall intelligence in the high average range (Dist. Ex. 7 at p. 2). The evaluating school psychologist clarified that the student's highest factor index score was in fluid reasoning, which she described as "the ability to solve verbal and nonverbal problems using inductive or deductive reasoning," while the student's poorest performance was in visual-spatial processing, which she described as "the ability to see patterns, relationships, spatial orientations, or the 'Gestalt' – the whole among the diverse pieces – of a visual display" (*id.* at p. 4). The student's academic achievement, as measured by the Kaufman Test of Educational Achievement, Second Edition (KTEA – II), exceeded what her IQ alone would predict, and, based on the student's performance on the KTEA – II, the evaluating school psychologist opined that academically, the student was "functioning basically on a 12th grade level" (*id.* at pp. 4, 6-8).

Also on December 9, 2008, the district updated the student's initial social history (Dist. Ex. 10). The parent again served as informant for the updated social history, and, according to the social worker who completed the social history, the parent expressed concern regarding the fees at La Europa and advised that she requested that the district evaluate her daughter "to explore her future options (whether or not [the student] completes the program at La Europa)" (*id.* at p. 1). The parent further maintained that La Europa had an excellent program for students with emotional problems and that "given the severity of [the student's] emotional issues, it is the best placement for her at this time" (*id.*). She reported that her daughter was "making slow but steady progress" at La Europa (*id.*). The parent further described her daughter as a "caring, compassionate, well-behaved and compliant" individual who tended to be "'very hard on herself' and to isolate" (*id.* at p. 2). The social worker noted that according to the parent, the student had several age appropriate friends with whom she related well, but also had "'abandonment issues'" and tended "to be cautious

about forming new relationships" (id.). The updated social history also indicates that the social worker "re-discussed" the parent's due process rights with her (id.).

The hearing record also establishes that while in New York during December 2008, the student consulted her private psychiatrist on December 30, 2008 and her private therapist (see Dist. Exs. 9; 17).⁹ The private psychiatrist opined that the student had improved slightly since entering the residential program, noting that while "still preoccupied with her body image and eating" the student's "mood was slightly improved" and that for the first time the student "seemed to be engaged with life in some way" (Dist. Ex. 9 at p. 2). She acknowledged that the student was still depressed and had frequent suicidal ideas, but observed that "for the first time it appeared that she saw a possible way out" (id.). The private psychiatrist cautioned that the student required "a very structured setting" without which "she would resume her old eating disorder behaviors immediately" and characterized the student's depression as "treatment resistant," with her survival depending on close, constant supervision (id.). The private psychiatrist credited La Europa as "the only helpful therapeutic modality" for the student and forecasted that the student's condition would "deteriorate immediately, if she was discharged prematurely" (id.).

The private therapist observed improvement in the student's weight and affect, but learned that the student continued to struggle with negative thoughts about weight and eating and that she still felt "overwhelmed and depressed at times," although the student revealed that she was developing more effective techniques for handling her depression (Dist. Ex. 17 at p. 2). The private therapist credited La Europa as being "tremendously helpful to the student's progress" and suggested that "a continued stay will only teach her ways to maintain the vast gains that she ha[d] made" (id.). While acknowledging the progress that the student had made, the private therapist cautioned that she still required "the 24-hour support and therapeutic interventions of a residential program like La Europa" (id.).

Monthly clinical notes completed by the La Europa staff psychiatrist detailed the facility's efforts to manage the student's medication and monitor her anxiety, depression, and eating disorder (Parent Exs. H; I). The hearing record demonstrates that between April 2008 and March 2009, the student continued to struggle with her eating disorder and often experienced high levels of anxiety and depression (Parent Exs. H; I at pp. 1-6). However, the hearing record also establishes that during this time period, the student progressed from level I to level III in the La Europa level system, and was achieving straight As in her academic work, which included chemistry, algebra II and trigonometry, SAT preparation,¹⁰ drama, AP Spanish,¹¹ and world history; furthermore, while acknowledging that school was "stressful," the student also advised the staff psychiatrist that it was "going well" (Parent Exs. H at pp. 2, 4, 6, 9, 10; I at pp. 3, 5; see Tr. pp. 315, 324). In December 2008, the staff psychiatrist noted that the student had been experiencing high anxiety which was increasing her depression, but observed that the student's school work had not been affected (Parent Ex. H at p. 12; see Tr. pp. 315, 324).

⁹ The private therapist's report does not specify the exact date of her consultation with the student.

¹⁰ Although not defined in the hearing record, "SAT" likely refers to the Scholastic Aptitude Test.

¹¹ Although not defined in the hearing record, "AP" likely refers to Advanced Placement.

On March 11, 2009, the student's primary therapist at La Europa updated the student's initial April 15, 2008 psychosocial report (Dist. Ex. 14; see Dist. Ex. 13). In her updated report, the primary therapist cited the student's "slow but steady progress" made during her course of treatment at La Europa (Dist. Ex. 14 at p. 3). She reported that the student had refrained from engaging in eating disorder behaviors, was learning how to live a more balanced, healthy life, and felt "a little more power over the negative thoughts in her head," but qualified that these negative thoughts "were still very present" and that the student remained "extremely fragile" (id.). The student reported feeling "very depressed," and her primary therapist expected that due to the severity of the student's depression and eating disorder, her progress would be slow (id.). The student related that she did not feel strong enough "to fight the battle without 24/7 support," and her primary therapist opined that the student would not be able to function at home and would require therapeutic support after her discharge from La Europa to "fight her intense battle with her eating disorder" (id. at pp. 3-4).

On March 18, 2009, the CSE convened for the student's initial review meeting; in attendance were a district representative, regular education teacher, special education teacher, school psychologist, social worker, additional parent member, and both of the student's parents (Dist. Exs. 3; 6 at pp. 1-2). During the meeting, which lasted approximately 2.5 hours, the CSE noted that the student was currently functioning at a high average level intellectually, and, according to the results of standardized testing, was performing at a 12th grade level as an 11th grader, and that her informal writing sample was "within grade expectations" (Tr. pp. 51-52; Dist. Exs. 3; 6 at pp. 3-4). The CSE acknowledged the student's prior diagnoses of anorexia, a major depressive disorder, and a general anxiety disorder, and noted her multiple prior hospitalizations; however, the March 18, 2009 IEP described her academic functioning as demonstrated by testing as "optimal" and characterized her work habits and motivation during testing as "excellent" (Dist. Exs. 3; 6 at pp. 5, 7). The CSE considered the student's behavior to be age-appropriate and did not deem a behavior intervention plan (BIP) necessary (Dist. Ex. 6 at pp. 5-6). No health or physical management needs were noted (id. at p. 7). The CSE acknowledged the parents' view that the student's emotional concerns interfered with their daughter's ability to attend school; however, the CSE concluded that these emotional issues did not affect the student's ability to learn, and declined to classify the student as eligible for special education programs and services as a student with an emotional disturbance (Dist. Exs. 3; 6 at pp. 1-2). The CSE meeting minutes also indicate that two copies of the procedural safeguards notice were furnished to the parents during the meeting, and that after the meeting concluded, the student's "mother gave [the] Committee – documents/psychiatric, etc." (Dist. Ex. 3; see Tr. pp. 75-76).¹²

¹² There is no reference to the specific document(s) provided by the parent elsewhere in the CSE meeting notes or in the March 18, 2009 IEP. However, the district's social worker, who attended the March 18, 2009 CSE meeting, explained that at the beginning of the meeting, she asked the parent if she "ha[d] any additional documentation or any reports," and it was not until the end of the meeting that the parent "put down some reports in front of me" (Tr. pp. 44-45, 65-67; see Dist. Exs. 3; 6 at p. 2). The social worker added "... I know it was a psychiatric report. It's not clear whether it was the one that [the parent] had faxed to us that had no heading and signature or if it was another one" (Tr. pp. 65-66; see Parent Ex. 8). The social worker was unclear whether the March 18, 2009 CSE reviewed this report prior to the meeting, stating "[s]o we might have, in fact, considered it prior to the meeting because we had it even though it wasn't in a format that could officially be accepted, but we still reviewed it" (Tr. p. 66).

On March 18, 2009 the district generated a final notice of recommendation to remain in general education (Dist. Ex. 4). On March 20, 2009 the district issued a final notice of recommendation (FNR) placing the student in a general education placement in a district high school (Dist. Ex. 5). On March 30, 2008, the parent forwarded correspondence to the CSE purportedly enclosing unspecified "documentation regarding [the student's] condition" which she contended "were not adequately discussed at our [March 18, 2009] IEP meeting," and requesting a second CSE meeting (Dist. Ex. 2; see Tr. pp. 70-71, 136, 140; Dist. Ex. 1).

On May 13, 2009 the CSE reconvened at the parent's request (Dist. Ex. 1; see Tr. pp. 70-71, 136, 140). In attendance were a social worker, school psychologist, and special education teacher, an additional parent member, and the student's parents; the student's primary therapist from La Europa participated telephonically (id.; see also Tr. p. 71).¹³ According to the CSE meeting notes contained in the hearing record, the student's primary therapist from La Europa advised the CSE that the student was "doing well academically" and was "meeting expectations," while advising that La Europa's "curriculum [was] not being modified" and that the student was "working on her approach to academics" (Dist. Ex. 1). The CSE determined that academically, the student was performing at grade level and that La Europa was assisting her with her eating disorder; consequently, the May 13, 2009 CSE adhered to its initial determination that the student was ineligible for special education and related services as a student with an emotional disturbance (id.; see Tr. pp. 134-36).¹⁴ The hearing record indicates that during the May 13, 2009 meeting, the CSE furnished the parents with another copy of their procedural safeguards and additional copies of the March 18, 2009 IEP and the CSE meeting minutes (Dist. Ex. 1).

On August 5, 2009, the parent filed a due process complaint notice (Parent Ex. A), alleging that the district denied the student a free appropriate public education (FAPE) during the 2008-09 school year on both procedural and substantive grounds, and advising the district that she unilaterally placed her daughter at La Europa for 11th grade and intended to seek tuition reimbursement for her 2008-09 school year there (id. at pp. 1, 4-7). The parent adduced the following arguments: (1) the district's determination that the student was ineligible to receive special education and related services during the 2008-09 school year as a student with an emotional disturbance was an error which deprived her of a FAPE for the 2008-09 school year; (2) the March 18, 2009 CSE was improperly composed; (3) by declining to classify the student, the district violated its child find obligation pursuant to 20 U.S.C. § 1412[a][3], 34 C.F.R. § 300.111[a], and 8 NYCRR 200.2[a][7]); (4) La Europa, the parent's unilateral placement, was an appropriate placement for the student for the 2008-09 school year, in that it addressed her academic and social/emotional needs, conferred educational benefit upon her, and enabled her to make reasonable progress; and (5) because the parent cooperated with the CSE in a reasonable manner, equitable considerations favored her tuition reimbursement claim (id.). The parent sought an order

¹³ It is unclear from the hearing record whether the May 13, 2009 CSE included a regular education teacher (see 20 U.S.C. § 1414[d][1][B][ii]; 34 C.F.R. § 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). However, I note that the parent did not allege that the May 13, 2009 CSE was improperly composed in the due process complaint notice or during the impartial hearing, nor did she raise the issue in the petition (see Parent Ex. A).

¹⁴ According to the hearing record, there was no IEP generated after the May 13, 2009 CSE meeting (Tr. p. 96).

from an impartial hearing officer awarding tuition reimbursement for La Europa for the student's 2008-09 school year (id. at p. 1).¹⁵

On March 18, 2010, an impartial hearing convened,¹⁶ and concluded on April 30, 2010 after three days of testimony.¹⁷ On September 23, 2010, the impartial hearing officer issued a decision¹⁸ which is the subject of the appeal at bar.

With respect to the issue of improper composition of the March 18, 2009 CSE, the impartial hearing officer determined that the parent failed to adduce any evidence supporting her claim that the CSE was improperly composed (IHO Decision at pp. 10-11). Second, he found that based upon the evidence contained in the hearing record, the district erred in declining to determine the student eligible for special education and related services as a student with an emotional disturbance (id. at p. 11). Third, he concluded that the district did not violate its child find obligation, because the evidence contained in the hearing record established that the district's evaluation of the student was delayed due to the fact she was attending school outside the State (id. at p. 12). Next, the impartial hearing officer found that by declining to classify the student as eligible for special education and related services, the district denied the student a FAPE for the 2008-09 school year (id. at pp. 13-14). Fifth, he determined that the parent met her burden of proving that La Europa was an appropriate placement for the student for the 2008-09 school year (id.). Sixth, the impartial hearing officer concluded that equitable considerations supported the parent's claim for tuition reimbursement (id. at pp. 14-15). Seventh, while acknowledging that the evidence contained in the hearing record established that the parent did not provide the district with timely notice of her intention to place the student at La Europa and to seek reimbursement, he determined that because there was no indication in the hearing record that the parent was aware

¹⁵ The hearing record indicates that the student was discharged from La Europa on August 25, 2009 "because she successfully completed the six levels of the program and her related treatment goals" (Parent Ex. J).

¹⁶ The hearing record indicates that at the time of the impartial hearing, the student was attending 12th grade at an in-State private high school (see Tr. p. 390).

¹⁷ I remind the impartial hearing officer that State regulations set forth provisions for conducting a prehearing conference to simplify or clarify the issues that will be addressed in an impartial hearing (8 NYCRR 200.5[j][3][xi][a]). There is no indication in the hearing record that a prehearing conference was conducted in the instant appeal.

¹⁸ Two procedural irregularities in this case should be noted. The hearing record contains no explanation for the delay of more than seven months between the filing of the due process complaint notice and the commencement of the impartial hearing, or for the delay of almost five months between the conclusion of the impartial hearing and the issuance of the impartial hearing officer's decision. Federal and State regulations require an impartial hearing officer to render a decision within 45 days after the expiration of the resolution period (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the Federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring the careful granting and written documentation of any extensions of time and the reasons why extensions were granted, as well as the inclusion of such documentation as part of the hearing record on appeal (see 8 NYCRR 200.5[j][5][i]-[iv]). In the present case, the impartial hearing officer failed to document in the hearing record or include in his decision information about any extensions that may have been granted and the reasons why they were granted. The timing of the due process complaint notice, the date of the impartial hearing, and the date of the decision suggest that one or more extensions were granted. I remind the impartial hearing officer to comply with Federal and State regulations.

of her obligation to provide such notice, the 10-day notice provision of 20 U.S.C. § 1412(a)(10)(C)(iii) did not preclude the award of tuition reimbursement under these circumstances (*id.* at p. 15). Lastly, relative to the issue of standing, the impartial hearing officer found that because the parent failed to establish that she either paid any tuition herself or incurred any actual expenses, she lacked standing to seek tuition reimbursement for the 2008-09 school year (*id.* at pp. 15-17).¹⁹

The parent appeals, contending that the impartial hearing officer's determination that the parent lacked standing to seek tuition reimbursement was erroneous, and seeks an order from a State Review Officer vacating that portion of the September 23, 2010 so finding. The district, through counsel, answers, countering that the impartial hearing officer was correct in his determination that the parent lacked the standing to seek tuition reimbursement, but erred in finding that the district should have classified the student, that La Europa was an appropriate placement for the student, and that equitable considerations favored the parent. The district also maintains that because the parent did not appeal those portions of the decision determining that the March 18, 2009 CSE team was sufficiently composed and that the district met its child find obligations, those portions of the decision are final and binding upon the parties. The district also cross-appeals the impartial hearing officer's determinations that the district should have classified the student, that La Europa was an appropriate placement for the student, and that equitable considerations favored the parent's claim for tuition reimbursement, contending that these findings were erroneous and should be overturned.

At the outset, a procedural matter must be addressed. I note that the parent did not appeal those portions of the impartial hearing officer's decision determining that the March 18, 2009 CSE team was sufficiently composed and that the district met its child find obligations. 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]). Accordingly, those aspects of the impartial hearing officer's decision have become final and binding upon the parties.²⁰

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally *Forest Grove v. T.A.*, 129 S. Ct. 2484, 2491 [2009]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

¹⁹ State regulations provide that "[t]he impartial hearing officer shall attach to the decision a list identifying each exhibit admitted into evidence. Such list shall identify each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). The impartial hearing officer did not attach an exhibit list to his decision. I remind the impartial hearing officer to ensure compliance with this regulation in the future.

²⁰ I note, however, that the impartial hearing officer misallocated the burden of proof to the parent on the issue of CSE composition (IHO Decision at pp. 10-11) and that this burden should have been allocated to the district.

(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][iii]; 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]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029;

Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Initially I will address the district's cross-appeal from that portion of the impartial hearing officer's decision that determined that the March 2009 and May 2009 CSE's decisions that the student was ineligible for special education and related services as a student with an emotional disturbance deprived the student of a FAPE for the 2008-09 school year.

A student with a disability is defined as student who, after being duly evaluated, falls within the definition of one of the enumerated disabilities categories (i.e. emotional disturbance) and who, by reason thereof, needs special education and related services (34 C.F.R. 300.308[a][1]; 8 NYCRR 200.1[zz]). 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.). 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 disability adversely affects his or her educational performance, 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 the Bd. of Educ., Appeal No. 10-006; Application of the Dep't of Ed., Appeal No. 09-136; 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 the Dep't of Ed., Appeal No. 08-112; Application of the Dep't of Ed., Appeal No. 08-099; 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 some courts have held that consideration of a student's eligibility for special education and related services should not be exclusively 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 his September 23, 2010 decision, the impartial hearing officer determined that evidence contained in the hearing record established that "the student suffered with depression and from inappropriate behaviors, such as cutting, refusing to leave the home sometimes, and being consumed by her eating disorder," adding that the student exhibited "[t]hese conditions ... since at least middle school and ... to such a marked degree that she would either not attend school or required therapeutic interventions to maintain her educational performance (IHO Decision at p. 11). Furthermore, the impartial hearing officer qualified that although the student continued to achieve academically, "there were times when her disorder so consumed her that she was not able to attend school" and noted the student's previous hospitalizations for her condition (id. at p. 13). These factors, combined with the testimony of the parent, which, according to the impartial hearing officer "further substantiated the adverse impact of [the student's] condition on her school functioning," prompted the impartial hearing officer to conclude that the district erred in declining to classify her as a student with an emotional disturbance, and that the district's decision deprived the student of a FAPE during the 2008-09 school year (id. at pp. 11, 13). The district, in its cross-appeal, contends that the evidence contained in the hearing record does not support a determination that the student's depression or eating disorder adversely affected the student's academic functioning.

The evidence contained in the hearing record shows that the student met at least two of the characteristics. The student's "inappropriate types of behavior or feelings under normal circumstances," were demonstrated by her significant anxiety and body image problems, her cutting behavior, and her eating disorder, which was so severe as to require multiple inpatient

hospitalizations and visits to a residential treatment facility; the hearing record also indicates that the student exhibited features of a personality disorder (Tr. pp. 159, 164-65, 309-10, 332, 335, 339-40, 345, 373-77, 380, 392; Dist. Exs. 8 at pp. 1-2; 9 at p. 1; 10 at p. 1; 11 at pp. 1, 3; 12 at pp. 1-3; 13 at p. 2; 14 at pp. 1-4; 17; Parent Exs. A at pp. 1-5; F at p. 1; H; I at pp. 3-10; J; see Tr. pp. 133-34, 159, 164-65).

The evidence contained in the hearing record also establishes that the student exhibited "a general pervasive mood of unhappiness or depression" beginning in third grade and, despite ongoing treatment, continued to do so throughout high school (Tr. pp. 224, 304-05, 307, 309, 311, 313, 334, 340, 352-53, 360, 361, 366, 388; Dist. Exs. 3; 6 at pp. 5, 7; 7 at p. 1; 8 at pp. 1, 4; 9 at pp. 1-2; 10; 11 at pp. 1, 3; 12 at pp. 3, 6; 13 at p. 1; 14 at p. 1; 17; Parent Exs. A at pp. 1-2, 5; F at pp. 1-2, 6; H; I at pp. 3-10; J at pp. 1-2). In addition, the hearing record reveals that the student experienced suicidal ideations and overdosed on medication on several occasions (Tr. pp. 153, 302, 335, 375; Dist. Exs. 8 at p. 4; 9 at p. 1; 11 at p. 1; 13 at p. 2; 14 at p. 2; Parent Ex. A at pp. 1, 5).²¹

However, although I find that the evidence contained in the hearing record establishes that the student exhibited these characteristics over a long period of time, I do not find that the hearing record demonstrates that she exhibited these characteristics to a marked degree that adversely affected the student's educational performance to the extent that she required special education and related services. "Special education" means "specially designed instruction which includes special services or programs...and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability" (N.Y. Educ. Law § 4401[1], [2]; 8 NYCRR 200.1[ww]); see 20 U.S.C. § 1401[25][A], [B]; 34 C.F.R. § 300.39). State regulations define "specially designed instruction" as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

The term "related services"

means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes speech-language pathology, audiology services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, school social work, assistive technology services, other appropriate developmental or corrective support services, appropriate access to recreation and other appropriate support services.

²¹ It does not appear from the district's cross-appeal or the parent's answer to the cross-appeal that the parties dispute that the student suffered from depression or an eating disorder. Rather, the district's cross-appeal is predicated on its argument that these conditions did not adversely affect the student's academic functioning. Accordingly, it is unnecessary to examine the applicability of the remaining three criteria enumerated in the Federal and State regulations in the contexts of this appeal and cross-appeal.

(8 NYCRR 200.1[qq]; see 20 U.S.C. § 1401[22]; N.Y. Educ. Law § 4401[2][k]; 34 C.F.R § 300.34). A determination of whether related services are appropriate for a particular student must be made based upon the unique needs of the student (Cedar Rapids Community Sch. Dist. v. Garrett F., 526 US 66, 73 [1999]).

With respect to academics, the parent advised that the student "did well" and "got good grades" both in public schools and during home instruction, and acknowledged that her daughter did not need special education from an academic standpoint, but because "she wasn't functioning properly" (Tr. pp. 359-60, 387, 392-93; Dist. Ex. 7 at p. 1). She added that the student "got As" in her classes at La Europa (Tr. pp. 358-59), which was corroborated by La Europa's assistant clinical director, who also served as the student's primary therapist (Tr. pp. 315, 324). Hospital admission notes from September 2007 (tenth grade) commented that she was "an excellent student with good grades" (Dist. Ex. 12 at p. 2), and monthly clinical notes compiled by the student's staff psychiatrist at La Europa reported that she was working at or above grade level, was achieving "straight As" and "As and Bs," that her concentration in school ranged from "slightly down" to "good," and that even during periods of increased anxiety and depression, her school work remained unaffected (Parent Exs. H at pp. 4-7, 9, 12; I at pp. 4-7, 9-10; see Dist. Ex. 3). The school psychologist who evaluated the student in December 2009 characterized the student as "compelling," remarked that "I don't often have the opportunity to test a student who is so bright," confirmed that at the time of the evaluation, "the student functioned ... at or above the standard range in pretty much every area," and opined that "[her] academic performance exceeds ... what her IQ scores alone would predict" (Tr. pp. 220-22; see Dist. Ex. 7 at pp. 4-8; see also Dist. Ex. 6 at pp. 3-5). The hearing record further establishes that the student achieved these results in a general education program at La Europa that contained no curriculum modifications or special education services to accommodate her (Tr. pp. 55-56, 61-62, 71-74; Dist. Ex. 1).

With respect to the student's social/emotional functioning, the student herself reported that she had a difficult time making and keeping friends, and the parent opined that the student had "abandonment issues" and exercised caution about forming new relationships; yet the hearing record also revealed that she enjoyed "excellent" and "close" relationships with both her parents, both sets of grandparents, and her sibling, and "ha[d] several age-appropriate friends with whom she relate[d] well" (Dist. Exs. 10 at p. 2; 11 at p. 2; 13 at p. 2; but see Dist. Ex. 12 at p. 2 [noting the student "ha[d] conflicted relationships with both parents"]). The hearing record further reveals the student's "strong interest in singing, writing, and drawing" and participation in yoga (Dist. Exs. 10 at p. 2; 11 at p. 2; 12 at p. 2).

With respect to school attendance, the parent advised that the student "wasn't functioning" and had a lot of absences" during the first three weeks of the 2007-08 school year (10th grade) (Tr. p. 342-43). The student's private therapist added that from March 2007 to January 2008 (the time frame during which she treated the student), the student's anorexia frequently interfered with her thought process and made going to school every day difficult, as social expectations and the student's preoccupation with her appearance and weight "created an incredible amount of anxiety, depression and fear" (Dist. Ex. 17 at p. 1). By contrast, the September 2007 hospital admission notes, while acknowledging that the student had difficulty the previous year with school attendance due to her depression and eating disorder, advised that the student commented that "[t]his year, she said she was able to attend school" (Dist. Ex. 12 at p. 2). In addition, the private psychiatrist who treated the student between May 2007 and December 2008 reported that the student "was able to function in school but saw her concentration and memory deteriorate" (Dist. Ex. 9 at p. 1). The

student's private therapist reported that by January 2008, the student was attending a psychiatric day program, consistently seeing a nutritionist, and attending bi-weekly therapy sessions, but still required more intensive therapeutic support; "it was then decided that the student required the 24-hour support and supervision of a therapeutic, residential program that could address her psychological issues" (Dist. Ex. 17).

The hearing record suggests that the CSE relied upon current and accurate evaluative information in arriving at its decision, and that all participants were afforded the opportunity to meaningfully participate at both the March 18, 2009 and May 13, 2009 CSE meetings; the parent does not allege the contrary (Tr. pp. 46-47, 49-53; Dist. Exs. 1; 2; 3; see Tr. pp. 90, 95; Parent Ex. A). The hearing record further establishes that the CSE complied with the parent's request for another CSE meeting after she contended that some documentation had not been adequately discussed at the March 18, 2009 CSE meeting (see Dist. Exs. 1; 2). Based upon its review, the CSE concluded that academically, the student did not fit the classification for a student with an emotional disturbance, insofar as "[s]he didn't appear to demonstrate educational needs. She didn't appear to demonstrate that she would ... require any modification in the curriculum whatsoever, because she was so high functioning and so adept" (Tr. pp. 60-62, 90, 95, 154-55, 159; see Dist. Exs. 1; 3; 6 at pp. 2-5). While acknowledging that the student's emotional challenges affected her functioning in school, the district's social worker, who participated in both CSE meetings, commented that the testing reports and evaluative data reviewed by the CSE proved that "she was able to maintain very significant academic skills despite the psychiatric problems" and that the student was "a very bright young woman who had also demonstrated [that] she was able to compensate academically while she had these ongoing problems" (Tr. p. 48; Dist. Exs. 1; 3).

The greater weight of the testimonial and documentary evidence contained in the hearing record demonstrates that the student's medical/psychiatric conditions, although extremely serious, did not adversely affect her educational performance to the extent that the student required special education and related services in order to learn, or that the student was unable to attend school and access the general curriculum without modification of the content, methodology, or delivery of instruction (C.B. v. Dep't of Educ., 2009 WL 928093, at *22 [2d Cir. Apr. 7, 2009]; N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535, at *13 [2d Cir. Nov. 12, 2008]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 297-98 [S.D.N.Y. Feb. 9, 2010]; E.D. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. Jan. 8, 2010]). Furthermore, the evidence contained in the hearing record establishes that under the circumstances present in this appeal, a residential placement was not intended or designed to be responsive to the student's learning needs, but rather, was designed to address medical and social/emotional problems severable from the student's learning process (see Mary T. v. Sch. Dist. of Philadelphia, 575 F.3d 235, 246 [3d Cir. 2009] [discussing Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 694 [3d Cir. 1981]]; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997][noting that district's may be responsible to pay for residential placement when medical needs are created by or intertwined with an educational problem]).

Consequently, I do not find that the impartial hearing officer's determinations that the district erred in determining that the student was ineligible to receive special education and related services during the 2008-09 school year as a student with an emotional disturbance and that such determination denied the student a FAPE during the 2008-09 school year to be supported by the evidence contained in the hearing record, and I will annul those portions of the impartial hearing officer's September 23, 2010 decision to that effect.

Having determined that the impartial hearing officer incorrectly concluded that the district failed to offer the student a FAPE, it is not necessary to reach the issue of whether La Europa was an appropriate placement for the student for the 2008-09 school year and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Student with Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

It is unnecessary for me to address the parties' remaining contentions light of my determination herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated September 23, 2010 which found that the district failed to offer the student a FAPE for the 2008-09 school year is hereby annulled.

Dated: **Albany, New York**
 January 24, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER