The University of the State of New York

The State Education Department
State Review Officer
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No. 12-001

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

Appearances:
Law Offices of Thomas M. Volz, PLLC, attorneys for respondent, Thomas M. Volz, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for respondent (the district) to reimburse them for their son's tuition costs at the Family Foundation School (Family Foundation) for the 2010-11 and 2011-12 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross- appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the impartial hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

After referral by the "director" of the district's Committee on Special Education (CSE) due to increasingly "disruptive behavioral tendencies" both in school and in the home, the student was evaluated by a psychiatrist who conducted a psychiatric evaluation on December 4, 2008 (Dist. Exs. 18; 34 at p. 1; Parent Ex. M at p. 5). The evaluator concluded that the student met the criteria for an "Oppositional Defiant Disorder [ODD] – moderate to severe degree and untreated" (Dist. Ex. 34 at p. 2). The student was referred to the CSE on December 23, 2008 and on January 26,

2009, a district school psychologist conducted a psychoeducational evaluation and recommended, among other things, placement of the student in a "structured educational program" for students with "behavior difficulties" (Dist. Exs. 18; 29 at pp. 1, 7). On February 11, 2009, the student was found eligible for special education and related services as a student with an emotional disturbance and an individualized educational program (IEP) was developed for the remainder of the 2008-09 school year, which placed the student in a "split" program at both the district's middle school and high school with behavioral supports and counseling services (Tr. p. 56; Dist. Ex. 16; Parent Ex. M at p. 5).[1]

During the 2009-10 school year the student served probation stemming from an incident that occurred outside of school (Tr. pp. 779-80, 785). The hearing record reflected that the student exhibited behavioral and academic improvement during ninth grade, and on April 27, 2010, the CSE convened and determined that the student was no longer eligible for special education and related services as a student with a disability (Tr. pp. 40, 222-23, 225, 786-87; Dist. Exs. 7; 9; 12). In August 2010, the student's probation ended early due to good behavior (Tr. pp. 789-90). However, upon the student's probation ending, his behavior rapidly deteriorated, evidenced by several domestic incidents occurring during late summer 2010 (Tr. pp. 790-99). On September 13, 2010, the student began to attend the district's high school, but was frequently absent (Tr. pp. 479-80, 547-48, 976, 1090). On September 21, 2010, the parents placed the student in a "wilderness program," located within the State (Tr. pp. 1090-92; Parent Ex. N at p. 1).

The parents did not immediately notify the district that the student had been unilaterally placed in a wilderness program, and after the student had been absent from the high school for several weeks, a district school counselor and a district assistant superintendent contacted the parents regarding the student's absence (Tr. pp. 450-54, 469-70, 509-11, 976-77, 1093-94). In a letter dated October 17, 2010, the wilderness program informed the district that the student was attending its program (Dist. Ex. 57).[2]

While the student attended the wilderness program, a private psychological evaluation was conducted on October 19, 2010, resulting in a report dated October 27, 2010 (Parent Ex. M at p. 1). Following the administration of assessments measuring the student's cognitive and academic achievement skills; completion of interviews with both parents and the student, behavioral observations, a review of records, and consultation with the student's counselor, the psychologist

[1] The transcripts of the impartial hearing contained in the hearing record were organized into separate volumes for each witness, rather than by hearing date, and were not consecutively paginated, resulting in duplicative pagination on the same hearing dates. To address this issue, the Office of State Review consecutively numbered an electronic copy of each page of transcript in the order that the testimony was taken on January 11, 2012 (see Tr. pp. 1-1545). Unfortunately, after the transcript was consecutively paginated, the Office of State Review received a replacement volume of testimony with regard to one of the witnesses, which noted that the testimony was taken on the afternoon of September 8, 2011. The same testimony had previously been identified in a transcript volume dated September 29, 2011, and can be found on transcript pages 1413-49. An electronic copy of the repaginated transcript has been provided to the parties with this decision and included in the hearing record. In the event that the district files another hearing record with the Office of State Review, it should file consecutively paginated transcipts.

[2] The student's father testified that he caused this letter to be sent after discussing the need to give the district notice of removal from the district school with a district assistant superintendent at a Board of Education meeting (Tr. pp. 1093-94).

determined that the student met the criteria for the following Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) diagnoses: conduct disorder, adolescent onset, moderate; parent child relational problems; cannabis abuse; and features of an attention deficit hyperactive disorder (ADHD) (id. at p. 18). The psychologist opined that "in the event of quieted emotional and motivational factors, [the student] would probably be able to demonstrate high average to superior levels of functioning in most areas" of cognition and achievement, and indicated that the student did not exhibit evidence of a significant learning disorder, nor were features of an ADHD his "chief issue" (id. at pp. 18-19). The psychologist reported that the student exhibited inappropriate and maladaptive attitudes and actions of a "chronic and intractable nature," and a "chronic failure to respond to multiple interventions" (id. at p. 19). According to the psychologist, the student's previously diagnosed ODD had evolved into a conduct disorder that if "unchecked an[d] untreated appears to be on a downward spiral toward adult personality disorder with multiple features" (id. at p. 19; see Dist. Ex. 34 at p. 2). Among other things, the psychologist recommended placement of the student in a residential treatment center (RTC) offering a "structured, controlled, supervised setting with strict boundaries and clear expectations" that included multidisciplinary efforts applied over an extended period of time, individual and group counseling, and an assessment of substance abuse/dependence issues and resultant substance rehabilitation treatment if necessary (Parent Ex. M at pp. 19-20).

On October 25, 2010, the parents obtained the services of a private educational consultant to assist them with determining where the student should be placed after the wilderness program concluded (Tr. pp. 1172-74; Parent Ex. C at p. 2).

On October 29, 2010, the student's father telephoned the district's director of pupil personnel services/special education (director) and informed her of the student's behaviors that resulted in his placement at the wilderness program, and requested a CSE meeting (Tr. pp. 29, 33-34, 39-42, 1306). On November 3, 2010, the director compiled a preliminary list of approved residential schools because the behaviors described during the phone call led her to believe that the student may need a residential placement (Tr. pp. 51-52; Dist. Ex. 55). The director e-mailed the list she compiled to the student's father the same day; the list contained detailed information regarding 14 different potential residential schools including information about the age range, disabilities, intellectual functioning, and student concerns that each school served (id.).

On November 5, 2010, the CSE convened to conduct an initial eligibility determination meeting (Dist. Ex. 82 at p. 1). In attendance were the director who served as the CSE chairperson, the district's assistant director of special education, a district regular education teacher, a district school psychologist, the parents; and by telephone, the psychologist who conducted the October 19, 2010 evaluation and the student's therapist from the wilderness program (Tr. p. 542; Dist. Exs. 5; 6 at p. 1; 82 at p. 5; Parent Ex. N at p. 1). The November 2010 CSE found the student eligible for special education programs and related services as a student with an emotional disturbance and recommended a residential placement, location to be determined, and one 30-minute individual counseling session per week (Dist. Ex. 82 at p. 1). The student's November 2010 IEP also included testing and program modifications, annual goals, post secondary goals, and transition activities (id. at pp. 2-7). The IEP noted, among other things, that the meeting was "requested at the urgency of the parents," and that the CSE reviewed the October 27, 2010 psychological evaluation report, a therapist's summary report, the student's 2009-10 report card, teacher observations, and concerns raised by the parents (id. at p. 5). The IEP also noted the parents' concerns that the student's recent

gains at the wilderness program would be in jeopardy should he return to the district and/or the home, and that he required an immediate residential placement after he completed the wilderness program (id., see Tr. pp. 350-52). The IEP further noted that it was the consensus of the CSE to classify the student and to recommend a residential placement, and that the parents had "actively engaged" in the meeting and agreed with the recommendations (Dist. Ex. 82 at p. 5). Contemporaneous with the November 5, 2010 CSE meeting, the director was informed that the student would attend the wilderness program until the end of November or possibly into the first week of December 2010 (Tr. p. 290). The CSE discussed a variety of placement options, including the possibility of placing the student on home instruction; however the parents indicated that they would not allow the student to return to the home after the student completed the wilderness program and instead the student would need to transition directly to a residential placement (Tr. pp. 290-93, 350-52, 427-29).

On November 8, 2010, the district sent packets to 14 different potential in-State, approved residential schools containing information about the student (Tr. pp. 95-96, 98; Dist. Ex. 54). The director was in frequent contact with both the potential residential schools and the parents during this step of the process for selecting a residential school (Tr. pp. 96-99). Shortly thereafter, the district began receiving responses from the potential residential schools, three of which were willing to proceed with the next steps of the intake process (Tr. pp. 99-100, 257-59).

During the third week of November, 2010, the private educational consultant met with the parents and recommended two schools as potential placements for the student; one of those schools was Family Foundation, the other was a similar school located in Utah (Tr. pp. 1316-18). Family Foundation has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. p. 917; see 8 NYCRR 200.1[d], 200.7). Shortly thereafter the student's father contacted the director and asked her if she was familiar with Family Foundation and her opinion of the school (Tr. pp. 100-03). On November 22, 2010, the parents visited Family Foundation and met with staff there (Tr. pp. 984-85). On November 23, 2010, the student was accepted at Family Foundation and was discharged from the wilderness program, having completed the program (id.; Parent Ex. N at pp. 1-3).[3] On November 24, 2010, the parents transported the student to Family Foundation and unilaterally placed him into the program (Tr. pp. 984-85; see IHO Ex. V at p. 5).[4] On November 26, 2010, the student's father informed the district that the student had been placed at Family Foundation (Tr. pp. 109-10, 1326). The director told the parents that Family Foundation was not a State-approved residential school

[3] The wilderness program's discharge report states that the student would be attending Family Foundation, but, according to the student's father, a copy of the discharge report was not shared with the district until the March 2011 CSE meeting (Tr. pp. 1341-42; Parent Ex. N at p. 3).

[4] A number of exhibits in the hearing record that were not marked by the IHO have been identified as IHO exhibits by the Office of State Review. IHO Exhibit I is a due process complaint notice dated June 6, 2011; IHO Exhibit II is a district supplemental response to due process complaint notice dated July 7, 2011; IHO Exhibit III is a district notice of insufficiency and motion to dismiss the due process complaint notice dated July 7, 2011; IHO Exhibit IV is an e-mail from the IHO to the parties' counsel dated July 21, 2011; IHO Exhibit V is a due process complaint notice dated August 5, 2011; IHO Exhibit VII is a district response to the second due process complaint notice dated August 18, 2011; IHO Exhibit VII is a response to change in hearing complaint and insufficiency claim from the IHO to the parties' counsel dated August 19, 2011, and; IHO Exhibit VIII is a document describing "case issues to be resolved" from the IHO to the parties' counsel dated September 14, 2011.

and that the district would have to exhaust all of the available in-State, approved residential facilities before it could begin to consider out-of-State approved or non-approved residential schools (Tr. pp. 101-03). The director sent an e-mail to the parents on December 6, 2010 informing them that the three potential in-State, approved residential treatment centers (RTCs) had attempted to contact the parents, but the parents had not responded, and informed the parents that these facilities were waiting for the parents to schedule intake interviews with the student (Tr. pp. 99-104; Parent Ex. J at p. 3).[5] According to the director, the student's father responded that he would "follow through" with the required intake procedures and would contact the three RTCs (Tr. pp. 104-05).

On January 4, 2011, the student's father telephoned the director and informed her that he was still working with the private educational consultant, and had asked the consultant to review the three RTCs that the CSE determined were potential placements, but that the consultant had not yet gotten back to the parents (Tr. pp. 116-18; Dist. Ex. 48). According to the student's father, he received a letter from the private educational consultant dated January 11, 2011 wherein the consultant stated that he did not recommend any of the three RTCs suggested by the CSE and that he continued to recommend Family Foundation (Tr. pp. 1263-65; Parent Ex. QQ).

On January 20, 2011, the director sent a letter to the parents that stated the three RTCs were still awaiting a response from the parents in order to continue the intake process, and that the parents' participation in the intake process was essential in order for the CSE to complete its responsibilities (Tr. pp. 118-20; Dist. Ex. 47).

In March 2011, the parents visited the three potential RTCs identified by the CSE, two of which were visited with the district's school psychologist (Tr. pp. 260-69). The district's school psychologist stated that the parents informed him that they were happy with Family Foundation and were not interested in moving the student unless it was necessary (Tr. p. 261). During this time, it was made clear to the district that Family Foundation was "refusing" to allow the student to leave the school in order to attend intake interviews at any of the RTCs, and that Family Foundation had also declined to allow an interview by telephone and refused to allow one of the RTCs to send staff to Family Foundation in order to conduct an intake interview with the student (Tr. pp. 269, 731, 1013, 1016, 1359-60, 1363, 1369).

On March 25, 2011, the CSE convened at the request of the parents to review their visits to the three RTCs identified by the CSE (Tr. p. 122; Dist. Ex. 83 at p. 1). At the meeting, the parents expressed their concerns about the RTCs, and the director agreed to gather information about Family Foundation in order to gain a clearer understanding of the type of program the parents were seeking (Tr. pp. 123-24). According to the director, the parents were aware that the district was required to go through the intake process at each of the in-State, approved RTCs before the CSE could consider something else (Tr. p. 124). At the meeting, the CSE also determined that one of the RTCs would not be an appropriate placement for the student and removed it from the list of potential placements, leaving two remaining RTCs (Tr. pp. 123, 265-67, 1352-53; Dist. Ex. 83 at p. 5). The March 25, 2011 IEP continued to recommend a residential placement at a location to

[5] The hearing record reflects that the district considered the three in-State approved residential schools that expressed interest in continuing the intake process with the student to be RTCs, and for that reason and to maintain consistent language, this decision will refer to these schools as "RTCs" (Tr. pp. 118-19; Dist. Ex. 83 at p. 5).

be determined (Dist. Ex. 83 at p. 1). At the March 2011 meeting, the parents did not formally reject the two remaining potential RTC placements (Tr. pp. 1352-53).

In or about April 2011, the director spoke with the student's father by telephone and the student's father indicated he was "not pleased" with the idea of placing the student in either of the two remaining potential RTCs, or interested in moving the student from Family Foundation, where he felt the student was progressing (Tr. pp. 125-27).

On May 25, 2011, the CSE convened at the parents' request and again recommended, among other things, a residential placement for the student at a location to be determined (Tr. pp. 274-75; Dist. Ex. 1 at pp. 1, 5). The CSE continued to recommend the two remaining potential RTCs and the parents informed the CSE that they were "not in agreement with the CSE recommendations," and, for the first time, refused to consider either of the RTCs as possible placements (Tr. pp. 127-29; Dist. Ex. 1 at p. 5). The director and the district's school psychologist decided that the CSE was "stuck on third base" regarding what the district could provide for the student in light of the parents' rejection of the two in-State, approved RTCs and refusal to allow the RTCs to conduct an intake interview with the student; therefore the director provided the parents with procedural safeguards information and information about how to obtain legal services (Tr. pp. 128-29, 270, 274-75, 1275; Dist. Ex. 1 at p. 5). The May 2011 IEP indicated that the CSE reviewed information about the student's progress at Family Foundation and the IEP recommendations and goals, and noted that the parents continued to feel that the goals were appropriate (Dist. Ex. 1 at p. 5). The May 2011 IEP provided a projected end date of June 24, 2011 (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated June 6, 2011, the student's parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year because the CSE failed to have an appropriate placement for the student when the wilderness program ended, the CSE never determined that either of the two potential RTCs were appropriate and that, in any event, the two proposed RTCs were not appropriate for the student for a variety of reasons (IHO Ex. I at pp. 1-5).

The district submitted a "notice of insufficiency and motion to dismiss due process complaint" and a "supplemental response to due process complaint" both dated July 7, 2011 (IHO Exs. II; III). The IHO informed the parties on July 21, 2011 that the district's motion to dismiss the parents' June 6, 2011 due process complaint notice was denied and directed the parties to proceed with the impartial hearing (IHO Ex. IV).

In a second due process complaint notice dated August 5, 2011, the parents asserted that the district failed to offer a FAPE for the 2010-11 school year because the CSE failed to offer a definite placement and that the two placements proposed for the 2010-11 school year were inappropriate for the student (IHO Ex. V at pp. 4-6). The parents argued that the district failed to offer a FAPE for the 2011-12 school year because the CSE failed to convene and develop an IEP for that school year (id. at p. 5). The parents further asserted that their unilateral placement at Family Foundation during both the 2010-11 and 2011-12 school years was appropriate and that equitable considerations favored the parents (id.). The parents requested reimbursement for tuition

at Family Foundation for both school years and reimbursement for the cost of the October 27, 2010 private psychological evaluation (id.).

The district submitted a "response to second due process complaint" dated August 18, 2011, wherein it contested many of the parents' factual allegations and asserted that it offered the student a FAPE during the time period in question, that the parents had failed to comply with required intake procedures at the potential RTCs, that the parents' unilateral placement was not appropriate, and that equitable considerations favored the district and barred reimbursement to the parents (IHO Ex. VI). The district's response also alleged that the parents' second due process complaint notice was insufficient (id. at p. 12).

In a "response to change in hearing complaint and insufficiency claim" dated August 19, 2011, the IHO stated that the parents wished to have their claims regarding the 2011-12 school year "added to their complaint" and denied the district's second insufficiency motion to dismiss and again directed the parties to proceed with the impartial hearing (IHO Ex. VII; see Tr. p. 1368).

B. IHO Decision

An impartial hearing convened on July 28, 2011 and concluded on October 11, 2011, after ten days of proceedings (Tr. pp. 1-1546). In a decision dated November 21, 2011, the IHO determined that the CSE prepared appropriate IEPs for the student for the 2010-11 school year and that the parents' failure to complete the intake procedures at any of the RTCs that the CSE found to be potentially appropriate thwarted the district's ability to identify a specific residential placement (IHO Decision at pp. 7, 17-18). The IHO also found that either of the identified RTCs ultimately recommended by the CSE would have been appropriate for the student because the district is only required to offer an appropriate placement and is not required to maximize the potential of students with disabilities (id. at p. 10). Regarding the parents' argument that the student required an immediate, emergency residential placement upon being released from the wilderness program and the district failed to do so, the IHO found that in light of their concerns the parents should have acted promptly to accomplish intake interviews with the student at the potential RTCs, but instead decided to unilaterally place the student at Family Foundation (id. at pp. 16-17). The IHO identified several concerns with the annual goals in the IEPs at issue but ultimately determined that none of these concerns constituted a failure to offer the student a FAPE (id. at pp. 6, 14).

The IHO also determined that the district offered the student a FAPE during the 2011-12 school year, despite not producing an IEP for that school year, because the district correctly understood that the parents would maintain the student's placement at Family Foundation; the district continued to recommend the two remaining potential RTCs; and because the parents never objected to any procedural violations in their due process complaint notices, but only brought procedural objections as the impartial hearing progressed (IHO Decision at pp. 12-13, 18-19). In light of his finding that the district offered the student a FAPE during both the 2010-11 and 2011-12 school years, the IHO concluded that he need not determine whether the parents' unilateral placement at Family Foundation was appropriate or whether equitable considerations allowed reimbursement (id. at p. 17). Lastly, the IHO denied the parents' request for reimbursement for the October 27, 2010 private psychological evaluation conducted while the student attended the wilderness program because that evaluation was not an "independent educational evaluation [IEE]

at public expense" in that the parents did not request an evaluation by the district and "therefore had nothing to disagree with" prior to obtaining the private psychological evaluation (id. at p. 19).

IV. Appeal for State-Level Review

The parents appeal the IHO's decision, arguing that the IHO erred in finding that the district offered the student a FAPE during the 2010-11 and 2011-12 school years. More specifically, the parents argue, in part, that the IHO erred in determining that the district offered the student a FAPE during the 2010-11 school year because the student required an immediate, emergency placement upon completion of the wilderness program, and the district's proposal to place the student on temporary home instruction pending the location of a residential placement would have been inappropriate given the emergency nature of the student's needs. The parents contend that there was never a consensus at the CSE meetings regarding whether the identified RTCs would be appropriate for the student, and the CSE chairperson made a unilateral decision and failed to allow the CSE to "fully vet" the list of possible placements. The parents further argue that the IHO erred in finding that either of the RTCs ultimately recommended by the CSE would have been appropriate because they were inappropriate and the CSE withheld information from the parents that showed they were dangerous. Regarding the IHO's finding that the parents failed to make the student available for intake interviews, the parents contend that they were advised by Family Foundation that doing so could be detrimental to the student and, in any event, there was no reason to remove the student from Family Foundation because he was making progress there. The parents contend that the IHO erred in finding that the parents failed to comply with the requirement to give notice to the district 10 days prior to removing the student from the district because such notice is not required during an "emergency situation." The parents further contend that the annual goals in the student's IEP were generic and were the same on each of the three IEPs developed for the student. Regarding the 2011-12 school year, the parents contend that the IHO erred in finding that the district offered the student a FAPE because the CSE failed to convene for an annual review and failed to develop an IEP for the 2011-12 school year. The parents also contend that their unilateral placement at Family Foundation was appropriate for both the 2010-11 and 2011-12 school years and that equitable considerations favor reimbursement to the parents. Lastly, the parents contend that the IHO erred in failing to order the district to reimburse the parents for the cost of the October 27, 2010 private psychological evaluation because the hearing record shows that the district accepted the evaluation, used it for a variety of purposes, and "can be considered the requestor of an evaluation."

In its answer, the district contends that the portions of the parents' petition should be rejected because it includes arguments that are identified as originating from a "consultant opinion" that the parents obtained after the IHO rendered his decision and, because this material constitutes "additional evidence," it is improperly offered and is not required by an SRO to render a decision. The district next argues that the IHO properly denied the parents' application for tuition reimbursement for the 2010-11 and 2011-12 school years and requests that the parents' appeal be dismissed in its entirety. Regarding the 2010-11 school year, the district argues that it offered the student a FAPE and that the only reason the district was unable to make a final placement recommendation was because the parents refused to comply with the required intake procedures at the proposed RTCs. The district further contends that both of the potential RTCs were appropriate, and that any deficiencies in either RTC did not rise to the level of a denial of a FAPE. Regarding the parents' argument that the student required an immediate placement after

completion of the wilderness program, the district contends that the district was aware of the need for a prompt placement of the student in a residential setting, did everything it could have done in order to make a placement available, and would have been able to secure a specific residential placement for the student before the student completed the wilderness program had the parents responded to the communications from the RTCs and made the student available for intake interviews. Regarding the parents' contention that the annual goals in the student's IEPs were not appropriate, the district asserts that the adequacy of the IEP goals was not raised in either of the parents' due process complaint notices and that, in any event, the goals were sufficient and in no way constituted a procedural denial of FAPE. Regarding the 2011-12 school year, the district contends that the IHO's finding that the district offered a FAPE was correct, that it was apparent in May 2011 that the parents were formally rejecting both of the RTCs identified by the CSE, had no intention of cooperating with the intake procedures those placement required, and had decided to unilaterally place the student in Family Foundation for the 2011-12 school year.

The district also contends that the parents' unilateral placement at Family Foundation was not appropriate, and that equitable considerations prevent reimbursement to the parents because they failed to give required notice and failed to cooperate with the CSE. Lastly, the district contends that the IHO correctly determined that the parents should not be reimbursed for the cost of the October 27, 2010 private psychological evaluation because that evaluation did not meet the requirements of an IEE.

V. Applicable Standards

Two purposes of the IDEA 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 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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 IHO'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 CFR 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 CFR 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 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 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).

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

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]).

VI. Discussion

A. Consultant Services

The district contends that portions of the parents' petition consisting of material identified as originating from a "consultant opinion" that the parents obtained after the IHO rendered his decision constitutes additional evidence that is improper and is not required by an SRO to render a decision (see Pet. pp. 13-20). I disagree with the district's characterization of the allegation s in the petition as "additional evidence." The due process procedures under the State and federal regulations permit a parent to be accompanied and advised by an individual with special knowledge or training with respect to the problems of students with disabilities (8 NYCRR 200.5[j][3][vii]; see 34 CFR 300.512[a][1]). With respect to the review of the evidence in the hearing record and the reasoning set forth in the IHO's decision, I will consider the written arguments regarding the IHO's findings, conclusions, and orders that are attributable to the consultant as allegations that have been adopted by and set forth by the pro se parents. However, to the extent that any of the allegations in the petition may be construed as setting forth new facts or expert opinion on factual issues, I will not consider them and will confine my review solely to the evidence contained in the hearing record (8 NYCRR 279.12[a]; see 34 CFR 300.514[b][2][i]).

B. Scope of Review

The district also contends that the parents allege for the first time on appeal that the CSE's failure to update the student's annual goals constituted a procedural error. According to the district, this claim, along with other arguments in the petition made for the first time on appeal, must be dismissed because they are not properly before an SRO. I note that the IHO addressed the issue of the student's annual goals in his decision, and found that "someone" should have determined if the student's goals established by the November 2010 CSE needed to be updated by the subsequent CSEs, but went on to find that the district complied with the IDEA's procedural requirements and offered the student a FAPE (IHO Decision at pp. 6, 14, 18). The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at an impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). It is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties and then base his or her determination on the issues raised sua sponte. Here, the parents did not assert in their June 2011 or August 2011 due process complaint notices that the annual goals were inappropriate (see IHO Exs. I; V). Further, the hearing record does not reflect that the parents requested, or that the IHO authorized, a further amendment to these due process complaint notices to include this additional issue. Thus, the IHO should have confined his

determination to the issues raised in the parents' due process complaint notices and erred in reaching the issue of whether the annual goals in the student's IEP were appropriate (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156).[6]

C. IHO Bias

In their petition, the parents contend that the IHO was biased against them, as evidenced by his adverse determinations and his characterization of the evidence and testimony in the hearing record. I note that, pursuant to 8 NYCRR 200.5(j)(5)(v), the decision of an IHO must be based solely upon the record of the proceeding before the IHO. In essence, the parents' contentions appear to be that the IHO deviated from acceptable norms of a fact-finding process. I find that the IHO did not deviate acceptable norms in the process of conducting the hearing or making his findings of fact. As one court has noted "while it would of course be preferable for hearing officers to explain their analysis in as much detail as possible, a hearing officer's failure to meet this aspirational standard does not provide a basis for concluding that the factual findings contained in a statutorily compliant written opinion were not regularly made (J.P. v. County School Bd. of Hanover County, Va., 516 F.3d 254, 262 [4th Cir. 2005]). I also note that the IHO did not make any credibility findings with respect to any particular witness. Moreover, I find that both parties were afforded an opportunity to be heard and that the impartial hearing was conducted in a manner that was consistent with the requirements of due process (34 CFR § 300.514[b][2][ii]; see Educ. Law § 4404[2]). Although the parents disagree with the conclusions reached by the IHO, that disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). In sum, upon careful consideration of the hearing record, I find that there is no evidence that the IHO displayed bias against the parents.

[6] The district is also correct in its contention that the parents raise arguments for the first time on appeal, including that the district impeded the parents' right to participate in the decision making process due to eight identified reasons, the CSE's April 27, 2010 determination to declassify the student was improper, the district failed to address student's interfering behaviors, and the transition services recommended by the CSE were inadequate (see Pet. ¶¶ 8, 13; Pet. pp. 13-14, 17-18). Consequently, I find that those claims are not properly before me since they have only been raised for the first time on appeal, and are, thus, beyond the scope of review (see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-158; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-026; Application of a Student with a Disability, Appeal No. 08-020; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-072; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

D. 2010-11 School Year

In New York, the Office of Special Education has explained the process for identifying out-of-State facilities by which a CSE's recommendation for residential placement should be effectuated (see "Placements of Students with Disabilities in Approved Out-of-State Residential Schools and Emergency Interim Placements for the 2011-12 School Year," April 2011, located at http://www.p12.nysed.gov/specialed/applications/outofstateplacement-memo-411.pdf) (April 2011 policy guidance). The April 2011 policy guidance describes the process by which the CSE must discuss with the student's parents or guardians the requirement that districts first refer students to appropriate in-State programs, even if the student is already placed in an out-of-State approved private school or emergency interim placement, as well as the need of the parents to cooperate with the district's efforts to identify a facility that will accept the student (id.).[7] The responsibility in the process extends to the parents who are "integral partners" in the referral process and must cooperate with the intake process, specifically the policy guidance provides that "[t]he CSE should emphasize to the parents the importance of the intake interview for the residential school to obtain needed comprehensive information about the student and his/her needs and for the parents to learn about the school" (id.). The guidance also provides that a parent's disagreement with a placement or preference for another school does not justify a decision by the CSE to not recommend an approved in-State program that has accepted the student where there is a determination that it would be able to implement the student's IEP (id.).

Here, the parents were made aware of the details of the residential placement process that was required in order for the CSE to secure a placement and finalize the student's IEP on or before the November 5, 2010 CSE meeting (Tr. pp. 91-93, 106, 253-54, 553-54, 978-80, 986-87, 1297-99). Between the November 5, 2010 CSE meeting and the May 25, 2011 CSE meeting at which the parents made it clear that they did not intend to complete the intake process at any of the district identified RTCs, the district frequently reminded the parents of their required role in the intake process, including the need to have the student interviewed, and the status of that process both verbally and in writing (Tr. pp. 98-99, 300, 1124-25, 1289-90, 1351-57, 1429-32, 1500-01, 1525-26, 1538-39; Parent Ex. J at p. 3). Regarding the parents' contention that the student required an immediate placement upon completing the wilderness program, I note that the parents were able to quickly and effectively enroll the student at their preferred placement at Family Foundation only days after their consultant recommended the program, but were unwilling or unable to promptly return phone calls from the three district identified RTCs, did not visit any of the RTCs for over three months, and in general took no prompt action to comply with the intake process at any of the district identified RTCs (Tr. pp. 100-07, 260-69, 300-01, 1106; Parent Ex. J at p. 3). The parents could have engaged in the intake process at the CSE identified RTCs shortly after the November 2010 CSE meeting, but chose instead to unilaterally place the student at Family Foundation, and only informed the district of their decision after the transition had been completed (Tr. pp. 100-07, 109-10, 1325-26). The district's director testified that she believed a final placement offer could have been completed before the student completed the wilderness program had the parents cooperated with the intake process (Tr. pp. 290-93, 427-28). The parents' contention that they

[7] 8 NYCRR 200.6(j)(iii)(e) provides that where the CSE recommends placement of a student in an approved out-of-State educational facility, documentation must be provided that there are no appropriate public or approved private facilities available within the State.

were justified in refusing to produce the student for intake interviews is not persuasive given the evidence in the hearing record that the intake interviews could potentially have been conducted by telephone, or on the grounds of Family Foundation (Tr. pp. 120, 269; 1359-60).

In light of the above, in light of the fact that the district and the parents agree that the student required a residential placement, and in the absence of any determination that the student's IEPs were otherwise inappropriate, I find that the district offered a FAPE during the 2010-11 school year and would have implemented the student's services in conformity with the IEP, had the parents not thwarted the intake process at the district identified potential RTCs by failing to make the student available and by otherwise failing to cooperate with the district (see M.R., 2011 WL 6307563, at *11 [finding that although the CSE in that matter did not make a final placement recommendation, it nonetheless offered a FAPE because the parents thwarted the placement process by failing to make the student available for intake interviews]; Application of the Bd. of Educ., Appeal No. 11-096).

E. 2011-12 School Year

It is clear from the impartial hearing record that the CSE did not convene for an annual review to develop an IEP for the student's 2011-12 school year, and there is no IEP covering any portion of that school year in the hearing record (Tr. pp. 407-09, 1011, 1375; see Dist. Exs. 1, 82-84). The district's director testified that during the March and May 2011 CSE meetings, the CSE was also considering the student's needs for the 2011-12 school year, but that the district could not follow through and develop an IEP because the parents had made it clear that they would not accept either of the two district identified RTCs as placements for the student (Tr. pp. 330, 407-08; 1525-26). However, the parents' refusal to participate in the intake process due to their disagreement with the particular RTCs identified by the district is not the same as refusing to participate in a CSE meeting at which the student's performance could be reviewed, and an IEP could be developed for the student, particularly where, as here, there is no indication that the parents had no desire to receive services from the public school for their son. The district is reminded that it has an affirmative obligation to offer the student a FAPE (20 U.S.C. § 1400[d][1][A]; Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Rowley, 458 U.S. at 180-81; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). With certain exceptions, a student's IEP is required to be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). A school district's failure to provide a student's parents with a timely IEP may afford a basis for concluding that the school district did not offer an appropriate program to the student (Application of a Child with a Disability, Appeal No. 06-030; Applications of the Board of Educ. and a Child with a Disability, Appeal Nos. 00-091 and 01-018; Application of a Child with a Disability, Appeal No. 99-81). For the foregoing reasons, I cannot concur with the IHO's determination that the district has offered the student a FAPE for the 2011-12 school year, and find instead that the district failed to offer the student a FAPE during the 2011-12 school year

F. Parent's Unilateral Placement 2011-12 School Year

I will next consider whether the parents met their burden of proving that Family Foundation was an appropriate placement for the student during the 2011-12 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at

370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364 [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a

> handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The dean of admissions (dean) at Family Foundation testified that Family Foundation is a "private college preparatory therapeutic boarding school," which is registered with the New York State Education Department to provide a Regents curriculum and diploma (Tr. pp. 847, 849, 934). The dean further described Family Foundation as providing a character-building "therapeutic program" to students to address the underlying emotional and behavioral difficulties that interfered with their success (Tr. p. 849). At the time of the impartial hearing, approximately 115 students attended Family Foundation, most of whom exhibited "a level of oppositionality and defiance that has gotten in the way of them being successful, both at home and in traditional settings . . . " (Tr. p. 851). Some students at Family Foundation also exhibit difficulty with attention, substance abuse, eating disorders, social anxiety, depression, and anxiety (Tr. pp. 852-53).

The student began attending Family Foundation on November 24, 2010 and on November 30, 2010 the dean developed an individual crisis management plan (ICMP) for the student (Tr. pp. 1049-50; Dist. Ex. 20 at p. 3; Parent Ex. TT). According to the dean, an ICMP is developed within a few days of a student attending the school, based upon an interview the dean conducts with the student (Tr. p. 1049). The purpose of the ICMP is for Family Foundation personnel to understand the student's history and "triggers" from the student's perspective, and to provide advice to personnel "on how to best respond to that student if they're in crisis" (id.). The ICMP identified the student's diagnoses, family relationship difficulties, and past "high-risk behaviors" (Parent Ex. TT at p. 1). The ICMP also identified the student's triggers that result in anger, and what occurs subsequent to a trigger event (escalation, outburst, recovery) (Parent Ex. TT).

On January 11, 2011, Family Foundation's psychologist conducted an initial psychological evaluation of the student (Dist. Ex. 20). The resultant report dated February 10, 2011 indicated that the psychologist had conducted interviews with both the parents and the student, reviewed the student's ICMP developed by the dean, and the student's prior psychological and psychiatric evaluation reports (id. at pp. 1-4). The psychologist administered the Millon Adolescent Clinical Inventory (MACI) to the student, prepared a description of the student's mental status, and subsequently offered diagnoses of a conduct disorder (by history), depressive disorder not otherwise specified, and cannabis abuse (id. at pp. 4-5). The psychologist concluded that "in spite of many interventions," the student's anti-authoritarian, negativistic, and oppositional behaviors have persisted (id. at p. 5). The student experienced relationship difficulties with family members, exhibited difficulty evaluating the difference between right and wrong, lacked appropriate guilt and remorse, and "appeared to have a risk taking/rebelliousness component to his personality" (id. at p. 6). The psychologist recommended that the student's counselor or sponsor relate to the student on a personal level to prevent him from "slid[ing]" through the program, and that family group therapy address his relationships within his family (id.).

The dean testified that the therapeutic program at Family Foundation is comprised of a cognitive behavioral model integrated with a "12-step" model (Tr. pp. 855-60). The clinical personnel at Family Foundation include a psychiatrist, a psychologist, social workers, and a "mix of Master Degree prepared people" (Tr. pp. 905-07). All students are assigned to an individual

therapist, and participate in group counseling sessions, and therapy sessions with their biological families (Tr. pp. 855-56, 865-67). The family counselor who provided the student's individual, large group, and family counseling services from November 2010 through approximately August 2011 testified that she is a licensed clinical mental health counselor and a certified school counselor (Tr. pp. 1134-37, 1141, 1149, 1397). She testified that Family Foundation was composed of four different "families or houses" that include a family or individual counselor, two family leaders, and approximately 25-30 students (Tr. p. 1137). The student participated in large group therapy sessions conducted by the family counselor that occurred daily within each "family" for approximately one hour, and one session every other week of individual therapy (Tr. pp. 1136, 1138, 1390). The family counselor's testimony reflected her opinion that the student had made progress within Family Foundation's therapeutic program during the timeframe she worked with him (Tr. pp. 1140-43, 1147-53, 1155-57, 1390-92, 1405-06). The student's academic record from January to April 2011 reflected grades within the following ranges: algebra (83-88), chemistry (82-87), English (80-91), and global (76-82) (Parent Ex. X).

The district argues in its answer that in October 2010 the psychologist recommended that the student attend an RTC, and indicated that a therapeutic boarding school, which Family Foundation is, "would not likely meet [the student's] needs at this time" (Tr. p. 849; Dist. Ex. 21 at pp. 19-20). I note that the relevant timeframe in question for this analysis is the 2011-12 school year, and as described above, the hearing record reflects that Family Foundation met the student's social/emotional and behavioral needs and also that he exhibited progress both behaviorally and academically since his admission to Family Foundation (Tr. pp. 899-900, 1140-43, 1147-53, 1155-57, 1390-92, 1405-06; Parent Ex. X). Given the information in the hearing record concerning the students needs and the services offered by Family Foundation, and in light of the student's performance at Family Foundation during the 2010-11 school year, the hearing record supports a finding that Family Foundation was reasonably calculated to meet the student's needs for the 2011-12 school year.[8] Accordingly, I find that the parents have established the appropriateness of their unilateral placement of the student for the 2011-12 school year (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

G. Equitable Considerations 2011-12 School year

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents

[8] As stated previously, the hearing record indicated that the district did not conduct an annual review of the student for the 2011-12 school year (Tr. p. 1504). Testimony by the district's director indicated that in May 2011, although the student's behavior had improved, it was not at a level requiring less than a residential placement (Tr. pp. 1508-09).

(20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Moreover, equitable principles dictate that parents cannot deliberately withhold their child from an intake interview and impede a district's ability to offer a FAPE and also secure a future award of tuition reimbursement at a private school of their choosing (see Bettinger, 2007 WL 4208560 at *7-*8; see also Application of a Child with a Disability, Appeal No. 06-025; Application of a Child with a Disability, Appeal No. 05-075).

In this case, the parents' course of conduct during the 2010-11 school year continued into the 2011-12 school year. Although the parents removed the student from the public school shortly after the start of the 2010-11 school year in September 2010, they failed to provide written notice to the district of this action until weeks later, and the district learned of it when the wilderness program informed the district in October 2010 that the student had been placed there (Dist. Ex. 57). Next when the parents transitioned the student from the wilderness program to Family Foundation in November 2010, they again failed to provide notice to the district until after the transition occurred (Tr. pp. 109-10, 984-85, 1326). Additionally, in neither of these instances did the parents inform the district of their intent to enroll the student in a private school at public expense (Tr. 1282).[9] With regard to the 2011-12 school year, the parents continued the student's unilateral placement at Family Foundation beginning in summer 2011 (IHO Ex. V at p. 5). The district did not receive written notice of the parents' intent to obtain tuition reimbursement from

[9] This is not to imply that the parents have sought reimbursement for the cost of tuition at the wilderness program as the parents' due process complaint notices contain reimbursement requests for Family Foundation only (IHO Exs. I; V).

the district for their unilateral placement during the 2011-12 school year until the parents' second due process complaint was submitted on August 5, 2011, well after the statutory commencement of the 2011-12 school year (IHO Ex. V; see Educ. Law § 2[15]). As described above, it is undisputed that the parents never made the student available for an intake interview at any of the district identified RTCs, despite the apparent willingness of these placements to explore minimally intrusive options for conducting an interview (Application of a Child with a Disability, Appeal No. 06-025; Application of the Bd. of Educ., Appeal No. 05-116; Application of a Child with a Disability, Appeal No. 05-075 contrast Application of a Student with a Disability, Appeal No. 11-135). Moreover, the parents made it clear at the May 25, 2011 CSE meeting, when plans for the student's 2011-12 school year were discussed, that they had no future intention to cooperate with the CSE in finalizing a recommended placement for the student (Tr. pp. 407, 587-88, 1505-06), and the CSE meeting minutes do not reflect that the parents informed the CSE during the meeting that they intended to unilaterally place the student at public expense (Dist. Ex. 84 at p. 5). Accordingly, the parents did not provide the district with the required notice before unilaterally placing him at the Family Foundation for the 2011-12 school year (see Carmel, 373 F. Supp. 2d at 414-15 [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that each year that FAPE is at issue, the parents must comply with the notice requirements and inform the district of their dissatisfaction prior to enrolling the student in a private school and seeking reimbursement]; S.W., 646 F. Supp. 2d at 362-63; Application of a Student with a Disability, Appeal No. 11-103; Application of the Dep't of Educ., Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-099). If the parents' intentions were not clear when they declined to participate in the RTC intake process during the 2010-11 school year, I find that their intentions became very clear when they ended their cooperation with the CSE at the May 2011 CSE meeting as described above, and that such conduct was not reasonable when they also intended to pursue public funding for Family Foundation (see J.P. v New York City Dep't of Educ., 10-cv-3078 at *23-*24 (E.D.N.Y. Feb. 2, 2012). Accordingly under the circumstances of this case, equitable considerations preclude tuition reimbursement for the 2011-12 school year because the parents did not provide adequate notice of their intent to unilaterally place the student in a private program at public expense, failed to cooperate with the reasonable efforts of the district to finalize a placement recommendation for the student, and did not seriously consider a potential public placement (see Wood, 2010 WL 3907829, at *7; S.W., 646 F.Supp.2d at 364; Carmel, 373 F. Supp. 2d at 417-18).

H. Reimbursement for Private Evaluation

I now turn to the parent's request for reimbursement for the October 27, 2010 private evaluation, which the parents contend constituted an IEE (Parent Ex. M). Federal and State regulations provide that, subject to certain limitations, a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 CFR 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial

hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii];[10] 8 NYCRR 200.5[g][1][iv]; see, e.g., A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]; Application of the Bd. of Educ., Appeal No. 09-109; Application of a Student with a Disability, Appeal No. 08-101). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; DeMerchant v. Springfield Sch. Dist., 2007 WL 2572357, at *6 [D. Vt. Sept. 4, 2007]; Application of a Student with a Disability, Appeal No. 08-039; Application of a Child with a Disability, Appeal No. 07-126; Application of a Child with a Disability, Appeal No. 06-067; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027).

First, upon review, I find that the hearing record does not indicate that the parent disagreed with an evaluation obtained by the school district as required by federal and State regulations that govern when a parent is entitled to an IEE at public expense (34 CFR 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35; Application of a Student with a Disability, Appeal No. 10-101; Application of a Student with a Disability, Appeal No. 10-033; Application of a Student with a Disability, Appeal No. 09-144). Moreover, I find that that the parents' argument that the district "can be considered the requester" of the evaluation, because the district's director asked if an evaluation existed and then considered the evaluation during the November 2010 CSE meeting, to be unconvincing given that the evaluation was completed before the director inquired as to whether there was a recent evaluation (compare Parent Ex. M at p. 1 with Parent Ex. F). Accordingly, I see no reason to depart from the IHO's determination that the district was not required to reimburse the parents for the cost of the October 27, 2010 psychological evaluation (IHO Decision at p. 19).

VII. Conclusion

Based on the foregoing, I find that the district offered the student a FAPE for the 2010-11 school year, that the district failed to offer the student a FAPE during the 2011-12 school year, that the parents' unilateral placement during the 2011-12 school year was reasonably calculated to meet the students educational needs, that equitable considerations precluded tuition reimbursement for the 2011-12 school year, and that the IHO correctly determined that the parents were not entitled to reimbursement for the cost of the October 27, 2010 psychological evaluation.

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

[10] The Analysis of Comments accompanying the federal regulations implementing the provisions for an IEE state that "[a]lthough it is appropriate for a public agency to establish reasonable cost containment criteria applicable to personnel used by the agency, as well as to personnel used by parents, a public agency would need to provide a parent the opportunity to demonstrate that unique circumstances justify selection of an evaluator whose fees fall outside the agency's cost containment criteria" (Independent Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the IHO's decision dated November 21, 2011 that found that the district offered the student a FAPE during the 2011-12 school year is annulled.

Dated: **Albany, New York**
February 6, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER