



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-210

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

**Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to determine respondents' (the parents') daughter to be eligible for special education and offer her an appropriate educational program and ordered it to reimburse the parents for their daughter's tuition costs at the New Haven Residential Treatment Center (New Haven) for the 2011-12 school year. The parents cross-appeal from those portions of the IHO's determination finding that their initial referral did not constitute informed consent for the district to evaluate the student and that the district's failure to timely evaluate the student constituted harmless error. The appeal must be sustained in part. The cross-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, a school psychologist, and a school district representative (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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

Due to the nature of the student's disability and the complex factual history that preceded the parties' instant dispute, a recitation of the student's educational history is warranted. At the age of 21 months, the student was diagnosed with retinoblastoma, a cancer of the retina (Tr. p. 788). After an MRI of the student's brain to determine if the cancer had spread, the student received a diagnosis of agenesis of the corpus callosum (AgCC) (Tr. p. 788).<sup>1</sup> The student's eligibility for special education and related services as a student with an emotional disturbance, a learning

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<sup>1</sup> The hearing record indicates that agenesis of the corpus callosum is a condition in which the bundle of nerves connecting the hemispheres of the brain (the corpus callosum) does not develop, causing the hemispheres of the brain to be only marginally connected and sometimes leading to learning disabilities and developmental delays in the areas of communication, social/emotional functioning, and executive functioning (Tr. pp. 166-69, 789-91).

disability, or an other health-impairment is in dispute in this proceeding (see 34 CFR 300.8[c][4], [9], [10]; 8 NYCRR 200.1[zz][4], [6], [10]).

The student's mother indicated that the AgCC caused the student to process information slowly; caused delays in toileting, walking, and developing vocabulary; and caused her to have difficulty controlling her anger and rigid thinking (Tr. pp. 789-90). The parent also reported that the student's teachers in nursery school told her that the student was not "engaging," did not seem to know what was going on, and would not talk to the teachers (Tr. p. 790). The parent stated that when the student was approximately three years of age, they sought the help of a child psychologist to address her defiant behaviors (Tr. p. 791).

From the time she entered school through the 2009-10 (eighth grade) school year, the student attended a variety of nonpublic schools (Parent Ex. EE at p. 2). According to the student's mother, the student first attended a private country day school from kindergarten to second grade, but struggled with the academic demands and homework and by second grade began to exhibit extreme levels of anxiety, having anxiety attacks almost nightly and struggling academically (Tr. pp. 792-93). In addition, the student had difficulty engaging with other children at the school (Tr. p. 795). The parents removed the student from the private country day school and enrolled her in a private school utilizing the Waldorf approach, which she attended from third to eighth grade (Tr. p. 796). The student's mother testified that schools employing the Waldorf approach focus on the arts and music, areas in which the student excelled, but that the student struggled with her academic classes in reading, writing, and math (Tr. pp. 797-98). Although she struggled in reading, writing, and math in third grade, the school was a slow paced and low pressure environment; and according to the parent, the student "seemed to do okay" (Tr. p. 798). In sixth grade the student's teacher reported to the parents that the student had difficulty picking up on social cues (Tr. pp. 798-99). The student's mother reported that as the student aged, her social abilities became less age-appropriate (Tr. p. 799). Also during sixth grade, the student began falling further behind academically, a trend which continued in seventh and eighth grade, at which point the parents obtained a tutor to work with the student (Tr. pp. 799-800). At this point, the parents believed it was clear that the student could no longer remain in the private school, and they began to look at other programs (Tr. p. 800).

For the student's ninth grade year (2010-11), the parents considered schools for students with learning disabilities and behavior problems because while the student had never exhibited behavior problems at school, her behaviors at home had become increasingly dangerous and difficult to manage (Tr. pp. 800-01). The student was ultimately placed at a nonpublic boarding school in Massachusetts (the out-of-State NPS) that specialized in teaching students with learning disabilities for the 2010-11 school year (Tr. p. 801). The parent reported that the student "was extremely anxious" at the out-of-State NPS and called the parents "hysterically crying" on a nightly basis (Tr. p. 804). Additionally, whenever the student returned home for a holiday or the parents visited the student, the student would refuse to return to the school (Tr. pp. 804-05). Over the winter break, the student was seen by a private psychiatrist, who prescribed medication to address the student's anxiety and concentration difficulties, which seemed to help (Tr. pp. 165, 805-06). According to the psychiatrist, at that time the student received a primary diagnosis of AgCC, with additional descriptive diagnoses of an attention deficit hyperactivity disorder (ADHD); a mixed expressive/receptive language disorder; a generalized anxiety disorder; and other learning disabilities (Tr. p. 182). The psychiatrist also informed the parents that at that time the student's learning and behavioral issues all stemmed from her AgCC (Tr. p. 806). While the out-of-State

NPS initially informed the parents that the student would not be able to attend for the 2011-12 school year, as it was unable to address her emotional difficulties, the student began to show improvement; the school subsequently decided to allow the student to come back for the next school year and the student advanced from ninth to tenth grade (Tr. pp. 807-08). The student's secondary school record indicated that she attained A and B grades in all subjects during the 2010-11 school year while attending the out-of-State NPS, except for a C+ in algebra (Parent Ex. GG).

In September 2011, the student refused to return to the out-of-State NPS, and had to be brought back forcibly (Tr. pp. 809-11). The student resumed her phone calls to the parents several nights a week despite medication administration, which surprised both the parents and the psychiatrist (Tr. pp. 811, 816). In an attempt to pursue other education options for the student, by letter dated October 3, 2011, the parents referred the student to the CSE and requested that the district "provide a Free Appropriate Public Education" to the student, indicating their belief that she required special education services (Parent Ex. B at p. 1; see Tr. pp. 811-12). The letter indicated that the student was then attending the out-of-State NPS and requested that the district "consider this letter [the parents'] consent to evaluate [the student]" (id.).

The parents visited the student at the out-of-State NPS over Columbus Day weekend 2011 (Tr. p. 812). The parents took the student out for the weekend and on the trip back to the out-of-State NPS, the student refused to return, tried to take control of the steering wheel, and locked herself inside the car upon reaching the school (Tr. pp. 812-13). The parents took the student home, after which the student fell into a deep depression (Tr. pp. 814-15). The student refused to see her psychiatrist, who suggested she attend a day program in the district (Tr. p. 815).

Over the course of four days in October 2011, the parents had the student privately evaluated by a psychologist, who conducted a psychoeducational evaluation to assess her academic, cognitive and emotional functioning, and to guide educational planning for the student (Tr. p. 244, Parent Ex. M).<sup>2</sup> The parents made these arrangements because the student had not been evaluated by a psychologist since third grade, and to obtain "a better indication of how she was functioning" with respect to her anxiety and learning abilities (Tr. pp. 817-18).

By letter dated October 26, 2011, the district acknowledged receipt of the parents' referral of the student to the CSE and indicated that it would be in contact to schedule a social history and request the parents' consent to an initial evaluation of the student (Dist. Ex. 5). By a second letter of the same date, the district requested that the parents submit a physical examination of the student (Dist. Ex. 6). By letter dated October 31, 2011, the district scheduled an appointment for December 14, 2011, at which it sought to obtain a social history and conduct psychological and educational assessments of the student (Dist. Ex. 7).

The parents considered three private school programs located within the district, one of which the student subsequently agreed to attend (Tr. p. 824). On November 10, 2011, the parents submitted an application for the student to attend that school to which she was agreeable (the in-State NPS) (Parent Ex. EE). The application indicated that although the parents considered the out-of-State NPS to be appropriate academically for the student, she did not do well in a boarding

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<sup>2</sup> The psychoeducational evaluation report indicated that the student was seen October 6, 10, 18, and 21, 2011 (Parent Ex. M at p. 1), but the student's mother indicated that the parents first contacted the psychologist a week or two after removing the student from the out-of-State NPS (Tr. pp. 817-19).

school environment (*id.* at p. 2). According to the student's mother, the head of school at the in-State NPS expressed uncertainty regarding its appropriateness for the student as it was not a "special ed school", but that the school could offer the student "flexibility" (Tr. pp. 824-25). The head of the program asserted that the changes that were made for the student were based not on academic issues, but on personal issues; specifically, the student's failure to consistently attend school (Tr. p. 360).

The parents hired a private tutor to work with the student from October 2011 to January 2012 (Tr. p. 737). When the student began attending the in-State NPS, the tutor primarily helped the student with her homework (Tr. p. 745). The student was initially "pretty content" at the in-State NPS, but after one week began to exhibit difficulty with the work and with consistent attendance, and became stressed (Tr. pp. 747-48). In addition, the student often refused to go to school because she was embarrassed about not having completed her homework (Tr. p. 751). The private tutor indicated that initially the student tried to complete her work, but over time she had difficulty with the work, and often refused to do it or made excuses about not having done the work (Tr. pp. 760-61).

By letter dated November 17, 2011, the parents contacted the CSE and indicated their concern that no CSE meeting had yet been conducted or IEP developed (Parent Ex. C). The letter indicated that the parents had enrolled the student in the in-State NPS, effective December 2, 2011, for which placement the parents intended to seek reimbursement if the district did not develop an appropriate program for the student (*id.*).<sup>3</sup>

On December 14, 2011, the parents appeared for the social history appointment without the student (Tr. pp. 76, 320-22). The student's mother indicated that the student did not attend because the parents were unable to wake the student before early afternoon (Tr. pp. 822-23, 826). That day, the student's father signed a form granting the district consent to evaluate the student using assessments including a social history, psychoeducational evaluation, classroom observation, and other assessments necessary to determine her needs (Dist. Ex. 8). The consent form indicated that assessments for students not attending district schools would be conducted at a district office (*id.*).

The social history was conducted on December 14, 2011 with the parents as reporters; it indicated that the student had learning difficulties in the areas of verbal expression, organization skills, and math (Parent Ex. L at p. 1). The parents expressed their concern that the student was "in a downward spiral" (*id.*). The parents also informed the social worker preparing the social history that the student was under the care of a psychiatrist and indicated that they would forward a psychiatric evaluation report to the district (*id.*). A Level I Vocational Interview was also conducted that day with the parents as reporters, which indicated that the parents' primary concerns were with the student's interpersonal and writing skills, and stated that the parents considered the student to require instruction in several areas in the domain of independent living skills (Dist. Ex. 12). Also at this time, the parents provided the district with the October 2011 private psychoeducational evaluation report and indicated their reservation of the right to seek reimbursement (Tr. pp. 77, 80; Parent Ex. D).

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<sup>3</sup> Other evidence in the hearing record indicates that the student began attending the in-State NPS on November 14, 2011 (Parent Ex. GG at p. 1).

On December 19, 2011, the student was evaluated by a private psychiatrist (Parent Ex. N). The student received diagnoses at that time of an ADHD, predominantly inattentive type; an expressive/receptive language disorder; a generalized anxiety disorder; and a learning disorder, not otherwise specified (NOS) (Tr. p. 182; Parent Ex. N at pp. 3-4).

By letter dated December 23, 2011, the district scheduled an appointment for the student to undergo a clinical interview on February 1, 2012 (Dist. Ex. 14). At that time, the district was not seeking to conduct a psychological evaluation but intended to rely on the private evaluation report provided by the parents (Tr. pp. 104-05). Another notification of this appointment was sent by the district to the parents by letter dated January 11, 2012 (Dist. Ex. 15).

By letter dated January 25, 2012, the student's father informed the CSE chairperson that the student had experienced "a severe psychiatric incident" and required an immediate full-time therapeutic residential placement (Parent Ex. E at p. 1). Because the student had threatened to harm herself, the parents stated that they had placed her at New Haven, located in Utah, "on an emergency basis until the [district] can assist us in finding an appropriate residential placement for her" (*id.*).<sup>4</sup> Accordingly, the parents indicated that the student would not be available for the scheduled clinical interview at the district, and instead offered to make the student available for the interview via the internet or to pay for a district staff member to fly to Utah to interview the student (*id.*). The parents indicated that if the district was unable to find an appropriate placement for the student, they reserved the right to seek public funding for her New Haven tuition (*id.*).

By letter dated January 26, 2012, the district informed the parents of a CSE meeting scheduled for February 9, 2012 (Dist. Ex. 17). A district school psychologist indicated that she received the letter notifying the district of the student's placement at New Haven later that same day (Tr. pp. 85-86). She telephoned the parents and informed them that the district needed to evaluate the student in the district, that a district staff member would not fly to Utah to evaluate the student, and that the case would be closed if the parents did not produce the student for an evaluation (Tr. p. 82). At that time, the student's mother indicated "very clear[ly] that she did not want the case closed" (*id.*).

By letter dated January 30, 2012, the parents reiterated the contents of a conversation with the district's school psychologist indicating the district's need to evaluate the student in person (Parent Ex. F at p. 1). The parents indicated that the student's treating psychiatrist considered the student to be "too fragile" to return to the district and stated that any additional testing required by the district could be conducted at New Haven (*id.*). If the district did not consider this to be an acceptable solution, the parents reiterated their offer to have the student videoconference with a district evaluator or fund a district staff member's trip to Utah to evaluate the student (*id.*). The parents closed by restating the request that the CSE meeting proceed as scheduled (*id.*).

By letter to the student's mother dated February 2, 2012, the district indicated that the parents had "not responded to the evaluation" and, accordingly, the district would not evaluate the student at that time (Dist. Ex. 20). On February 8, 2012, the district's school psychologist left a voicemail for the parents indicating that the district was cancelling the CSE meeting scheduled for the next day (Tr. pp. 83, 87; Dist. Ex. 2 at p. 3). The school psychologist indicated that the meeting

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<sup>4</sup> New Haven 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).

was cancelled because the district had insufficient evaluative information to determine the student's needs, as the evaluative data available to the district did not support the student's need for a residential placement (Tr. pp. 129-31). In particular, she opined that the private psychoeducational evaluation report did not indicate a need for 24-hour supervision and support (Tr. p. 92). By letter dated that day, the parents indicated that they did not consent to the cancellation of the CSE meeting (Parent Ex. G at p. 1). The parents requested that the district inform them of "exactly what additional information [the district] require[s] to complete the evaluation process in order to hold a meeting" (*id.*). The parents again reiterated the student's inability to travel, stating that the student's psychiatrist had reported that it was "not medically indicated for [the student] to travel home" at that time as she was "too emotionally fragile to tolerate coming home and going to a meeting with the CSE," with which assessment the student's providers at New Haven were in agreement (*id.*). The parents again stated their desire for the district to develop an IEP for the student and also restated their offers to fly a district staff member to Utah to assess the student in person or to arrange a meeting via internet videoconferencing (*id.*).

By letter to the parents dated February 17, 2012, the district scheduled an appointment for the student to be assessed by a psychologist on February 28, 2012 (Dist. Ex. 21). The school psychologist indicated that this was an attempt to "reach out to the [p]arents and give them another opportunity" to produce the student for evaluation, because of their insistence that the student's case not be closed (Tr. pp. 87, 137-39). Although the psychologist agreed that the private psychoeducational evaluation supported its recommendation for certain classroom accommodations, she opined that the CSE required additional evaluative data because of the student's placement in a residential setting and the need to obtain other assessments, including a classroom observation, a vocational assessment, and a medical examination (Tr. pp. 91-92, 136). By letter dated February 23, 2012, the parents responded to the district's February 17 appointment letter, reiterating the student's inability to return to the district for an evaluation and the alternatives previously proposed to make the student available for evaluation (Parent Ex. I at p. 1). The student's mother indicated that she believed she had made reasonable attempts to accommodate the district's need to evaluate the student and asserted that the district was violating the student's right to a free appropriate public education (FAPE) by failing to convene a CSE meeting (*id.*).

By letter to the parents dated February 28, 2012, the district again indicated that the parents had "not responded to the evaluation" and that it would not evaluate the student at that time (Dist. Ex. 23). By letter to the district dated February 29, 2012, the parents questioned the district's assertions that they had not responded to district attempts to evaluate the student (Parent Ex. K at p. 1). The parents noted their attempts to reach a solution to the district's desire to evaluate the student and their provision of evaluative data to the CSE (*id.*). The parents once more requested that the student's case not be closed (*id.*).

### **A. Due Process Complaint Notice**

By due process complaint notice dated February 21, 2012, the parents requested an impartial hearing, asserting that the district denied the student a FAPE for the 2011-12 school year (Parent Ex. A). Specifically, the parents asserted that the district failed to classify the student as a student with a disability despite her history of academic difficulties (*id.* at p. 2). The parents contended that when the district failed to take action, they "had no other option" but to place the student at the in-State NPS (*id.*). The parents also stated that after the district failed to develop a program for the student, it was necessary to effectuate an emergency placement at New Haven (*id.*). Next the parents contended that after they notified the district that the student could not

attend the scheduled clinical interview at the district on February 1, 2012, the district cancelled the CSE meeting scheduled for February 9, 2012 despite the parents' requests that the district evaluate the student at New Haven and hold the CSE meeting as scheduled (*id.* at p. 3). For relief, the parents requested that the CSE be directed to convene and classify the student as a student with a disability; reimburse them for the student's tuition at the in-State NPS; reimburse them for the student's tuition at New Haven; provide door-to-door special education transportation; provide reimbursement, compensatory education, or district provided services for related services obtained for the student from December 2011 through June 2012; and reimburse them for the costs of the privately obtained psychoeducational and psychiatric evaluations (*id.* at pp. 3-4).<sup>5</sup>

## **B. Impartial Hearing Officer Decision**

After a prehearing conference at which evidentiary and scheduling matters were addressed (Tr. pp. 1-26), an impartial hearing was convened on May 3, 2012 and concluded on July 19, 2012, after six hearing dates (Tr. pp. 27-911).<sup>6</sup> In a decision dated September 27, 2012, the IHO found that the district had not offered the student a FAPE for the 2011-12 school year (IHO Decision). Specifically, the IHO determined that the student met two of the five criteria for a student with an emotional disturbance over a long period of time and to a marked degree (*id.* at p. 11). The IHO further found that the student's emotional disturbance "hurt her educational performance" (*id.* at p. 13). Therefore, she concluded that the student was eligible for special education as a student with an emotional disturbance (*id.*).

The IHO determined that district failed to request informed consent from the parents to conduct evaluations of the student within the 30 days from the receipt of the parents' referral mandated by law (IHO Decision at pp. 14-15). She concluded that the district had "committed a procedural violation when it inexplicably delayed the referral and consent process for more than a month" (*id.* at p. 15). However, while acknowledging that there would have been some difficulty awakening the student for an 8:30 AM appointment, the IHO also found that the parents failed to produce the student for the December 14, 2011 clinical interview that had been scheduled by the district and that the parents subsequently removed the student from the jurisdiction before the CSE had a chance to complete the necessary evaluations (*id.* at p. 15). Consequently, the IHO concluded that the parents' actions with regard to the December 14 clinical interview relieved the district of its responsibility to complete the evaluations within 60 days (*id.* at pp. 15-17). The IHO determined, therefore, that the district's procedural violation discussed above amounted to a harmless error (*id.* at pp. 17-18).

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<sup>5</sup> At the impartial hearing, the parents withdrew their claims for tuition reimbursement for the in-State NPS and reimbursement for the privately obtained psychiatric evaluation (Tr. p. 160).

<sup>6</sup> There are gaps in portions of the hearing transcript, making it difficult to determine the precise contours of some witness testimony, apparently due in part to "background noise" (see, e.g., Tr. pp. 69, 86, 88, 100, 135, 296, 308, 318, 333, 376, 389, 409-12, 442-43, 481-84, 491-95, 500-09, 511-25). I remind the district of its obligation to ensure that a "verbatim record" of the impartial hearing is kept for use by the parents, the IHO, and subsequent administrative and judicial review (20 U.S.C. § 1415[h][3]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]). In the event that a hearing record is inadequate to conduct a meaningful review of the underlying proceedings, it may become necessary to consider whether to remand for a reconstruction proceeding (see *Kingsmore v. Dist. of Columbia*, 466 F.3d 118, 120 [D.C. Cir. 2006]). Because the hearing record is sufficient for review of the issues presented, in this instance I decline to do so—but I strongly caution the district to ensure that it maintains a verbatim record of the impartial hearing.



Regarding the parents' claim for tuition reimbursement, the IHO found that because she had determined the student qualified for special education programs and services as a student with an emotional disturbance, and because the CSE failed to classify her and develop an IEP to address her needs, the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at p. 18).

Turning to the parents' unilateral placement, the IHO found that New Haven was appropriate for the student (IHO Decision at pp. 19-20). According to the IHO, New Haven provided an academic, therapeutic residential program that was tailored to the student's needs (*id.* at p. 19). Although the IHO held that a full-time residential setting was highly restrictive, she also concluded that it was the type of setting recommended by the student's psychiatrist, it met her "burgeoning needs during a particularly difficult time," a less restrictive option would not have been appropriate for the student at that time, and the parents were under "a great deal of stress" while attempting to find a suitable school for the student (*id.*).

Lastly, the IHO determined that equitable considerations favored the parents' request for relief, stating that she could not ignore the district's "extremely late" receipt of consent which delayed the performance of a classroom observation within in the timelines; noting that one was never performed (*id.* at p. 21). The IHO also noted that the district made the choice to cancel the CSE meetings despite the parents' willingness to attend them even if their daughter could not return at the time for the clinical interview (*id.*).

For relief, the IHO ordered the district to pay tuition and costs at New Haven for the portion of the 2011-12 school year the student had attended that school (IHO Decision at p. 24). The IHO also ordered the CSE to reconvene within 30 days of the date of her decision, classify the student with an emotional disturbance, and formulate an IEP to meet her needs (*id.*).

#### **IV. Appeal for State-Level Review**

The district appeals, contending that the IHO erred in finding that it denied the student a FAPE, that New Haven was an appropriate placement for the student, and that equitable considerations favored the parents' request for tuition reimbursement. Specifically, the district contends that it was not required to and could not classify the student because the parents failed to produce her for evaluations. The district alleges that the IHO erred in finding that it committed a procedural violation by not obtaining parental consent for the student's initial evaluation within the 30-day time frame mandated by law. However, the district maintains that the IHO was correct in finding that even if there was a procedural error, such error was harmless because the parents failed to produce the student for the December 14, 2011 clinical interview. Moreover, the district asserts the parents failed to produce the student for evaluations scheduled for February 2012 as well.

Next, the district alleges that the IHO erred in finding that the student should be classified as a student with an emotional disturbance. First, the district notes the parents did not allege in their due process complaint notice that the student should be classified specifically as having an emotional disturbance; therefore, the district contends that the IHO exceeded her scope of authority in making that determination. Second, the district asserts that the IHO erred in finding that the student satisfied two of the factors for an emotional disturbance over a long period of time and that it adversely affected her educational performance.

Regarding the parents' unilateral placement of the student at New Haven, the district contends that it was not appropriate because the program was not specially designed to meet the unique needs of the student; the way in which the student was transported to the school was "traumatic;" and the school, a full-time residential placement, was overly restrictive for the student. The district also contends that equitable considerations preclude an award of tuition funding because the parents failed to produce the student for evaluations, failed to provide the CSE with the private psychiatric evaluation report, and failed to provide notice of their removal of the student to a unilateral placement. The district further alleges that the parents never intended to send the student to a public school. The district seeks vacatur of the IHO's decision.

The parents answer, contending that by failing to appeal the IHO's determination that the parents were entitled to a CSE meeting during which the student would be classified as having an emotional disturbance, the district has conceded that obligation. The parents also contend that the student required a residential program to make educational progress and that any failure on the part of the parents to cooperate with the CSE was due to the district's procedural failures. The parents allege that they did nothing to obstruct the placement process and they were not required to provide 10-day notice before enrolling the student at New Haven. The parents next contend that the IHO's decision was well-reasoned and that she made credibility determinations that cannot be disturbed. The parents also argue that New Haven provided educational instruction specially designed to meet the student's needs and that the district failed to obtain consent to evaluate the student in a timely fashion<sup>7</sup> and that it was "inappropriate" for the district to schedule the evaluations in the morning because the student had insomnia. The parents also allege that the district failed in its child find obligations. The parents also assert that they made the CSE aware of the private psychiatric evaluation, but did not provide it because the district canceled the scheduled CSE meeting and closed the file. The parents also allege that had the CSE convened for a meeting, the district had enough evidence to classify the student with an emotional disturbance. Moreover, the parents contend that they did not refuse to produce the student for evaluations; rather, the student was too medically fragile to travel home for the scheduled evaluations. They also maintain that the parents requested in their due process complaint notice that the student be classified and they need not request a specific classification in order to place that in issue before the IHO. The parents also contend that the IHO was correct in finding that the student should have been classified with an emotional disturbance.

In a cross-appeal, the parents dispute the IHO's finding that the district did not obtain consent for evaluations from the parents until December 14, 2011 and assert that the district had the parents' consent on October 5, 2011.<sup>8</sup> The parents also cross-appeal the IHO's finding that the district's failure to evaluate the student in a timely fashion was harmless error, asserting that the district's failure to evaluate and identify the student as a student with a disability led to the failure to offer a FAPE.

In its answer to the cross-appeal, the district asserts that it obtained informed parental consent to evaluate the student on December 14, 2011 and disputes the parents' contention that

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<sup>7</sup> The parents, however, make an inconsistent argument insofar as they assert that the district failed to timely obtain consent to evaluate the student while also contending that the district was not required to obtain such consent.

<sup>8</sup> The cross-appeal set forth in the answer contains unnumbered paragraphs; I remind counsel for the parents that State regulation requires numbering of all paragraphs in a pleading (8 NYCRR 279.8[a][3]).

their initial referral letter to the district constituted informed consent.<sup>9</sup> Furthermore, the district contends that it followed appropriate procedures by informing the parents of the need to obtain written consent prior to evaluating the student and providing them with notice of procedural safeguards. In any event, the district argues that the IHO properly found that the procedural violation of failing to timely obtain informed consent was a harmless error because the parents' failure to produce the student for evaluation on December 14, 2011 prevented the district from timely evaluating the student and offering her a program. Additionally, the district asserts that it is authorized to determine what evaluative data is necessary to ascertain the student's needs and that the district did not fail to fulfill its obligation to evaluate the student because the parents refused to return the student from her out-of-district placement for evaluation. The district also asserts that the student's removal from the district frustrated its attempts to timely obtain evaluations despite repeated attempts by district personnel to secure the student's attendance. Even if it was still obliged to evaluate the student, the district argues that its failure to timely do so constituted harmless error because it was the actions of the parents that prevented the district from doing so, the hearing record does not support the student's classification with a disability, and the district had no reason to believe the student required a therapeutic residential placement.

The district next asserts that the child find arguments raised in the parents' answer were not set forth in their due process complaint notice or raised at the impartial hearing, and should not be addressed by an SRO. If considered, the district asserts that no challenge was raised to the manner in which the district conducts child find with respect to students parentally placed in nonpublic schools. Furthermore, because the student attended the out-of-State NPS at the time of the parents' initial referral of the student to the CSE, the district contends that the district of location held the child find responsibilities to the student. Even if the district had child find obligations with respect to the student, the district asserts that it had no reason to suspect that the student was a student with a disability, and cannot be held liable for failing to so identify her.<sup>10</sup>

## **V. Applicable Standards**

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

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<sup>9</sup> The answer to the cross-appeal contends that the parents asserted facts in their memorandum of law that were not contained in the answer and requests that they be stricken. I agree that the parents improperly sought to incorporate by reference factual assertions in their memorandum of law but note that I remain obligated to conduct an independent review of the IHO's findings, conclusions, and decision by examining the entire hearing record; ensuring that the procedures at the hearing were consistent with the requirements of due process; and rendering an independent decision based solely upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). I also note that the district specifies no particular facts of which it wishes me to take no notice.

<sup>10</sup> The parents submitted a reply to the answer to the cross-appeal; however, the reply is not verified as is required of all pleadings submitted to the Office of State Review (8 NYCRR 279.7) and the document is beyond the permissible scope of a reply (see 8 NYCRR 279.6 [permitting replies solely for the purposes of responding to procedural defenses or additional documentary evidence submitted with an answer]). Additionally, the reply does not set forth the allegations of the parents in numbered paragraphs (8 NYCRR 279.8[a][3]) and repeats arguments made in the answer and cross-appeal. To the extent the reply purports to respond to procedural defenses interposed by the district in the answer to the cross-appeal, I decline to consider the parents' reply but note that nothing contained therein would affect my determination.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; 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 procedural violations are 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]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; 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], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 R.E., 694 F.3d at 184-85; 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. Scope of the Impartial Hearing and Review**

Initially, I note that although the IHO denied the parents' claim for reimbursement for the private psychoeducational evaluation, the parents do not raise that issue in their answer and cross-appeal. Additionally, although not addressed by the IHO, the parents do not request that I award them reimbursement for special education transportation or related services obtained by them for

the student.<sup>11</sup> Accordingly, despite an indefinite assertion that they "do not waive any issues on appeal," I find that the parents have abandoned their claims to be reimbursed for transportation and related services costs by failing to identify them before me in any fashion or make any legal or factual argument as to how certain unaddressed issues would rise to the level of a denial of a FAPE.<sup>12</sup> Therefore, these claims are not properly before me and the IHO's determination denying the parents reimbursement for the psychoeducational evaluation has become final and binding on the parties (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

Next, the district argues that the parents did not raise the issue of child find in their due process complaint notice, such that it would be improper for me to address it now. Although not specifically enumerated and labeled as "child find," I find that the assertions raised in the due process complaint notice, including the parents' recitation of the student's history of diagnosed disorders and the behavioral and cognitive effects of her AgCC during and prior to the 2010-11 school year, and the district's failure to address these issues (Parent Ex. A at p. 2), may be reasonably read to put the district on notice that a challenge was being brought to its failure to do so (see P.K. v. New York City Dep't of Educ., 2013 WL 2158587, at \*4 n.6 [2d Cir. May 21, 2013]).<sup>13</sup>

## **B. IEP Development Process and Parent Participation**

Turning now to the merits of the appeal, I find, as discussed more fully below, that the district denied the student a FAPE on the basis that it significantly impeded the parents' ability to participate in a determination regarding whether to classify the student and develop an appropriate educational program for her. The IDEA provides that "the determination of whether the child is a child with a disability as defined in [20 U.S.C. § 1401(3)] and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child" (20 U.S.C. § 1414[b][4]; see 34 CFR 300.306[a][1]). In New York the initial eligibility determinations must be made by the CSE and "other qualified individuals" (8 NYCRR 200.4 [c][1]). The CSE is required to make its determination of eligibility and provide a program recommendation—or, for a student found to be ineligible for special education, indicate the reasons for such determination—within 60 school days of receipt of the parents' consent to evaluate (8 NYCRR 200.4[d], [d][1]).

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<sup>11</sup> Nor did the parents request in their post-hearing briefs that the IHO award them reimbursement on these claims (Parent Exs. KK at pp. 28-29; LL at p. 6).

<sup>12</sup> I note that there is no evidence in the hearing record regarding any related services being provided to the student during the period for which reimbursement was requested, with the exception of the counseling she received at New Haven, the cost for which appears to be included in the student's tuition.

<sup>13</sup> To the extent that the parents argue that the district did not appeal the finding that the student would suffer serious emotional harm if she was returned to the district to be evaluated, I note that the IHO made no such finding; rather, she found that the student's "parents and psychiatrist determined that bringing her back to [the district] for a clinical interview would be dangerous to her" (IHO Decision at p. 17). To the extent the parents assert that the district failed to appeal the finding that the CSE should have found the student to be eligible for services as a student with an emotional disturbance, I note that the district in fact appealed that determination, asserting that "the IHO erred by finding that [the student] should be classified as a student with an emotional disturbance" (Pet. ¶¶ 31, 33-37) and that the CSE had insufficient information about the student's needs to classify her as a student with a disability (Pet. ¶ 32).

The week before the scheduled February 2012 evaluation appointment at the district, the student's mother called the CSE to explain that the student could not be brought in to be evaluated, to which the district's school psychologist replied that the district had to evaluate the student to continue with the IEP development process (Tr. pp. 849-50). The mother testified that the district's school psychologist insisted that the student's case would be closed unless she was brought to the district for evaluation (Tr. pp. 850-51). The district's school psychologist and the student's mother each testified that the parents did not provide the district with any documentation indicating the student could not return to the district to be evaluated (Tr. pp. 139-40, 897-98, 902). The day before the scheduled CSE meeting, the school psychologist cancelled the meeting because the parents had not produced the student for evaluation (Tr. p. 854). The school psychologist testified that the CSE could not convene a meeting without first conducting additional assessments of the student including a classroom observation, vocational assessment, and medical examination (Tr. pp. 110, 115-16).<sup>14</sup> The district's CSE chairperson testified that the district had no mechanism in place by which it could evaluate students who had been privately placed in out-of-State nonpublic schools (Tr. p. 616). Rather, he opined that a student in such a circumstance "should be observed and taken care of by the local educational board" (Tr. p. 621).

It is beyond cavil that the primary purpose of the IDEA is to ensure that all students with disabilities are provided with a FAPE and to protect their rights and those of their parents (20 U.S.C. § 1400[d][1][A]-[B]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). The hearing record reflects that the district had several options available to it upon being informed by the parents that the student could not return to the district for evaluations; however, it chose instead to cancel the CSE meeting and close the student's case. As noted recently by the Court of Appeals for the Ninth Circuit, "[n]othing in the statute makes that duty [to meet and develop an IEP for an eligible student] contingent on parental cooperation with, or acquiescence in, the state or local educational agency's preferred course of action. To the contrary, the IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency" (Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 [9th Cir. 2012]). That Court has held that "participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents" (*id.*). In this case, the district made some initial efforts to cause an evaluation of the student to be conducted by making appointments; however, the district thereafter reverted to the tactic of blaming the parents when its efforts to have the student evaluated in New York did not materialize as it planned and the district then unilaterally refused to convene a CSE meeting (Tr. pp. 82-83, 85-88, 91-92, 94-95, 110--13, 115-19, 122-23, 129-31, 136-40, 616-21, 630-31; Dist. Exs. 5-7; 14-15; 17; 20-21; 23). While parental refusal to produce a student for evaluation may "factor[] into the equitable calculus" (J.S. v. Scarsdale Union Free Sch. Dist., 826 F.Supp.2d 635, 669 [S.D.N.Y. 2011]) and thereby constitute a basis for reducing or denying reimbursement for an appropriate unilateral placement (20 U.S.C. § 1412[a][10][C][iii][II]), that does not lessen the district's obligations to have the student evaluated or convene a CSE meeting and if appropriate, develop an educational program. Notwithstanding that the student may have been unilaterally placed by the parents in an out-of-State facility for treatment reasons, the Court of Appeals for the Second Circuit has determined that in these instances, the district of the student's residence in New York is responsible for making a FAPE available to the student while he or she is located in an

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<sup>14</sup> To the extent the school psychologist testified that the computer software the district used would prevent the CSE from convening prior to obtaining these assessments (Tr. pp. 117-19), I remind the district that it must fulfill its obligations under the IDEA regardless of the computer software it chooses to use.

out-of-State facility (Catlin v. Sobol, 93 F.3d 1112, 1122-23 [2d Cir. 1996]; see Letter to McAllister, 21 IDELR 81 [OSEP 1994] [explaining that the district of residence had obligations to a student who had been placed in an out-of-State facility in Utah).

Even if the district did not wish to have its own employees conduct an evaluation of the student in Utah, the district should have convened the CSE meeting as scheduled, encouraged the participation of the parents and the student's service providers at New Haven, and on reviewing the existing evaluative data expressed its opinion that further data was required to determine whether the student was eligible for services and the extent of her needs (34 CFR 300.305[a][2]). Alternately, the district could have but failed to explore other evaluation options, such as contracting with an appropriately credentialed evaluator in Utah who would meet the district's criteria for evaluation or using the procedures under the IDEA for obtaining parental consent to have the district in which New Haven was located conduct an evaluation of the student and provide it to the CSE (34 CFR 300.131[a], [f]; 300.622[b][3]). The district cites to no authority for its position that it may unilaterally and completely dispense with the need for a CSE meeting without the parents' consent or that it may refuse to discuss a student's needs with her parents if the parents fail to comply precisely with its demands to evaluate the student in a certain manner.<sup>15</sup> To the contrary, as stated by the Supreme Court, "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. West, 546 U.S. 49, 53, [2005]; see Rowley, 458 U.S. at 205-06). As stated recently by the Ninth Circuit, when a district is "confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA . . . the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE" (Doug C. v. Hawaii Dep't of Educ., 2013 WL 2631518, at \*6 [9th Cir. June 13, 2013]). To insist that the parents participate in the evaluative and decision-making process regarding the provision of a FAPE to the student on the district's terms and then refuse to hold a CSE meeting so clearly and significantly impedes the parents' right to participate in the process for identifying the student as a student with a disability and precludes them from any opportunity to develop an appropriate IEP for their child that I find a denial of a FAPE in this instance on this basis (see Doug C., 2013 WL 2631518, at \*1, \*3-\*7; Application of the Bd. of Educ., Appeal No. 07-137; Application of the Bd. of Educ., Appeal No. 07-087).

Because I have found that the district impeded the parents' opportunity to participate in the decision-making process with regard to determining their child's needs and the appropriate way to address them, thereby denying the student a FAPE, it is unnecessary for me to discuss at length the parties' remaining arguments with regard to the provision of FAPE to the student.<sup>16</sup> I note my

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<sup>15</sup> While the district is not required to convene a CSE meeting or develop an IEP for a student whose parents refuse to provide consent to the receipt of special education and related services (20 U.S.C. § 1414 [a][1][D][ii][III][bb] [emphasis added]), the hearing record contains no indication that the district ever sought such consent.

<sup>16</sup> In particular, I express no opinion with regard to whether the district would have been required to find the student to be eligible for special education and related services as a student with a disability had the February 2012 CSE meeting been held as scheduled. Although it is possible to make such a determination at this juncture, at the time the district was required to make a determination it was not privy to all relevant extant information regarding the student's needs that was later produced at the impartial hearing. It is unclear from the hearing record what further relevant information (such as the December 2011 psychiatric evaluation report and reports from the student's teachers and service providers at New Haven) the parents would have provided to the CSE had the CSE meeting been conducted as scheduled.



agreement, for substantially the reasons stated by the IHO (IHO Decision at pp. 15-18), with her finding that the district's failure to obtain the parents' consent to an evaluation of the student within 30 days of referral did not contribute to the denial of a FAPE, as the district's failure to conclude its evaluation of the student within 60 days was occasioned by the parents' failure to produce the student at the scheduled interview on December 14, 2011 (see 8 NYCRR 200.4[b][7][ii]).<sup>17</sup> I further find that the parents' child find arguments cannot reasonably be addressed in any meaningful way, as the hearing record contains insufficient documentary evidence to determine the student's eligibility for special education services prior to the private psychoeducational evaluation and the parents are seeking no remedy for the district's alleged failure to offer the student a FAPE prior to her enrollment at New Haven in January 2012.<sup>18</sup>

### C. Appropriateness of the Unilateral Placement

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 must provide an educational program which meets 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. at 13-14; 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, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). 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; 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

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<sup>17</sup> Although the parents assert that the district was obligated to attempt to evaluate the student in the afternoon because of her difficulty waking in the morning, no authority is cited for this proposition, nor has independent research found any.

<sup>18</sup> I note that once the student was enrolled in New Haven, the school district where the student was located was responsible for child find (34 CFR 300.131[f]). Notwithstanding that, upon the parents' request, the district retained the obligation to offer the student a FAPE (Letter to Eig, 52 IDELR 136 [OSEP 2009]; see E.T. v. Bd. of Educ., 2012 WL 5936537, at \*14-\*15 [S.D.N.Y. Nov. 26, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 664-68 [S.D.N.Y. 2011]). I note that this did not preclude the district from considering whether it wished to make arrangements with staff of the district of location to provide it with evaluative data with respect to the student; an approach that would have been appropriate for it to consider in light of the student's asserted inability to travel to New York State for evaluation by district personnel.

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, quoting Frank G., 459 F.3d at 364-65).

Initially, the district asserts that New Haven was not an appropriate placement for the student because the student was enrolled in a regular education program and it did not provide her with "proper special education services." To the extent that the district contends the placement was inappropriate because "only one of the teachers [at New Haven] had a degree in special education," that contention is in direct conflict with the Supreme Court's explicit holding in Carter that private placements need not meet State standards with regard to employing certified special education teachers (510 U.S. at 14). The district is correct; however, that the IDEA only requires reimbursement for a unilateral placement if the private school offers the student instruction that is specially designed to meet the student's unique needs (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65). Instruction is specially designed to meet a student's needs when the content, methodology, or delivery of the instruction is adapted as appropriate to address the student's unique needs resulting from his or her disability, and to ensure the student's access to the general curriculum, so that the student might meet educational standards applicable to students without disabilities (34 CFR 300.39[b][3]; 8 NYCRR 200.1[vv]).

Turning to a review of the student's needs, in October 2011 a private psychologist administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) and Tests of Cognitive Abilities (WJ-III COG), the Nelson-Denny Reading Test (Form H), the Test of Written Language-Fourth Edition (TOWL-4), a "Projective Questions Test," the Sentence Completion Test, the House-Tree-Person Test, the Thematic Apperception Test (TAT), and the Rorschach Inkblot Test to the student (Tr. pp. 247-48, 270-71; Parent Ex. M at pp. 3, 18-19). The student initially presented as quiet,

reserved, anxious, and withdrawn (Tr. pp. 246-47, 256-57; Parent Ex. M at p. 3). According to the resultant psychoeducational evaluation report, the student was cooperative and appeared to try to do well on the testing (Parent Ex. M at p. 4). The student was focused and attentive during most of the evaluation, although when presented with increasingly difficult tasks, she became less attentive (id.). The private psychologist opined that test anxiety and word retrieval problems may have compromised the student's performance to some extent (id.). The student's scores on the WISC-IV were variable, ranging from well below average to solidly in the average range for her age group (id. at p. 6). She obtained a full scale IQ of 87, in the upper end of the low average range (id.). The student displayed relative strengths in working memory and weakness in visual processing speed (id.). The student's oral vocabulary was weak and she reported word retrieval problems (id. at p. 7). The student was able to read fluently, and displayed strength with decoding skills, although she was marginally below average when reading sentences for comprehension within a certain time frame (id. at pp. 8, 11). The private psychologist opined that although the student possessed some basic reading skills, she would need to build vocabulary and learn strategies to understand complicated text in order to keep up with high school level work (id. at p. 9). Overall, the student demonstrated average skills in word identification, reading unfamiliar words, spelling, written math and applied math problems (id. at p. 16). Her vocabulary and reading comprehension were both below average (id.).

In the area of oral comprehension, the student's performance was solidly in the average range for her age group (Parent Ex. M at p. 9). The private psychologist opined; however, that due to the student's difficulties with attention and language processing, the student may have difficulty with extended or complex language, such as that used for classroom lectures (id.). The student's spelling and writing skills were average for her age group, and she displayed strength in written expression as compared to verbal expression (id.). The private psychologist opined that the student should be encouraged to use writing as a means of self expression (id.).

With regard to the student's math skills, she demonstrated average skills in written calculation, marginally average performance on applied math word problems, and well below average on a measure assessing conceptual understanding (Parent Ex. M at p. 10). The student worked relatively slowly while solving simple calculation problems; however, she was attentive to the task and her work was accurate (id.). The student demonstrated variable performance on tasks related to processing speed of simple visual information (id. at p. 11). Therefore, the examiner stated that the student may take more time than average to perform written calculation problems (id.). However, the student displayed greater ease in processing pictures, which the private psychologist opined suggested that the student is a concrete learner and would benefit from concrete examples and explanations of abstract concepts (id.).

The student performed "least well" on processing speed tasks involving sentence comprehension and numbers and improved considerably when the task was more visual and concrete (Parent Ex. M at p. 12). The student also performed below average on retrieval fluency tasks, which required her to generate words on demand within a specific time frame; in addition to exhibiting word retrieval difficulties throughout the evaluation (id.). Although capable of learning by relying solely on her working memory and visual memory, the private psychologist opined that the student would likely benefit from a multisensory approach to learning (id.). The student performed below average on tasks requiring visual spatial thinking and attention, although she performed above average on a vigilance task involving attention to auditory stimuli (id. at p. 13).

The private psychologist concluded that the student would benefit from a program that addressed her language-based needs, provided structure and emotional support, a multisensory approach to learning, and counseling to build her self esteem (*id.* at p. 16). The private psychologist further recommended the following classroom accommodations: extended time on tests and assignments; copies of notes provided; instructions read, broken down and repeated; use of a tape recorder for the student to review material; use of math manipulatives; individual and group counseling and psychotherapy; and continued medication for attention and mood (*id.* at p. 17). At the impartial hearing, the private psychologist indicated that at the time of her evaluation, the student required a structured educational setting, providing emotional support and language-based instruction, with a multisensory approach to learning, and individual and group counseling (Tr. pp. 258-59).

The psychiatric evaluation conducted in December 2011 offered the student diagnoses of an ADHD, predominantly inattentive type; an expressive language disorder; a generalized anxiety disorder; and a learning disorder, not otherwise specified (Parent Ex. N at pp. 3-4). However, the psychiatrist noted that these diagnoses were "more descriptive in that the underlying neurological psychopathology is driven by the underlying neuropsychopathology of complete agenesis of the corpus callosum" (Parent Ex. N at p. 4). According to the psychiatric evaluation report, neuropsychological testing revealed significant deficits in processing speed, executive functioning, math skills, reading comprehension, word retrieval, and expressive language (*id.*). The psychiatrist also explained that many of the student's symptoms—such as her difficulties with communication and intellectual, social, and emotional functioning—were consistent with many features of individuals with AgCC (*id.*). The psychiatrist's testimony indicated that the student had chronic difficulty with interpersonal relationships and was rigid, inflexible, and misread social cues (Tr. p. 170). The psychiatrist recommended that the student receive intensive individual psychotherapy, social skills group treatment, and family therapy, and continue taking medication to address her anxiety and attention issues, with possible medication for mood stabilization (Parent Ex. N at p. 5). With regard to the student's academic needs, the psychiatrist recommended that the student be placed in a full-time residential therapeutic setting providing a small, highly structured classroom setting to permit the student to learn, make academic progress, and increase her levels of functioning (*id.*). This recommendation was based on the student's need for constant redirection and emotional reinforcement, and indicated that the student's academic progress should be monitored on a daily basis (*id.*). Furthermore, the psychiatrist recommended that the student be given social skills training to assist the student in interacting with her peers and family and help her to express her emotions in a positive way (*id.*). With regard to the student's executive functioning difficulty, the psychiatrist recommended organizational interventions such as extended time for tests, taking exams in a distraction-free environment, and use of a coach or organizer (*id.*).

The student's mother testified that the parents felt compelled to place the student in a residential placement because she was becoming increasingly angry, defiant, depressed, and anxious, and her behaviors worsened significantly (Tr. pp. 836-37). The student's mother further reported that during the period the student attended the in-State NPS, she made suicidal threats and engaged in episodes of aggressive behavior almost every day (Tr. pp. 837-38). The hearing record indicates that after consulting with the student's psychiatrist after the student "had two or three major blow-ups" that "terrified" the parents, they decided in January 2012 to place the student at a therapeutic boarding school (Tr. pp. 840-41). Within five days of that decision, on January 22, 2012, the student was taken by force to New Haven (Tr. pp. 841-45, 903).

New Haven is described in the hearing record as "a comprehensive school for girls, grades 7-12 [that provides] smaller, individualized classes offer[ing] college preparatory classes, along with providing accommodations and/or modifications for students with specialized learning needs" (Parent Ex. R at p. 1).<sup>19</sup> The education director at New Haven (education director) stated that between ten and twenty percent of the students at New Haven had IEPs, and that all had received diagnoses including substance abuse, depressive disorders, anxiety disorders, obsessive compulsive disorders, attention deficit disorders, ADHDs, learning disabilities, and school avoidance (Tr. pp. 380-81). At the time of the education director's testimony, the math, science, English, and history teachers at New Haven were certified teachers (Tr. p. 381).<sup>20</sup> Testimony by the education director indicated that when students first come to the school, she works closely with the students and their families to ensure that they receive an appropriate educational program (Tr. p. 377). In addition, the education director indicated that the mission of the school was to meet the academic, emotional, and therapeutic needs of its residents (Tr. p. 379). In furtherance of this goal, New Haven individualized instruction based on individual student needs (Tr. pp. 411-12). As explained below, many of the student's needs as described by the privately obtained evaluations were addressed by the school, such as her need for structure, extra time, copies of notes provided to her in advance, and a multisensory approach to instruction (Parent Ex. M at pp. 16-17).

The clinical psychologist at New Haven evaluated the student shortly after her arrival and offered her diagnoses of oppositional defiant disorder, generalized anxiety disorder, depressive disorder NOS, cognitive disorder NOS, and a rule-out diagnosis of an ADHD, combined type (Tr. p. 677). He opined that the student's AgCC affected her by leading to rigidity of thought, difficulty concentrating and focusing, oppositional and aggressive behavior, diminished nonverbal communication skills and processing speed, and emotional lability (Tr. pp. 677-78).

The education director indicated that New Haven staff reviewed the student's records prior to her arrival in order to determine her classroom placements to meet her academic needs and attempt to ensure her timely graduation from high school (Tr. p. 395). Upon her arrival, the student had significant school refusal issues and would either refuse to attend or leave classes several time per week, but would return once asked to by staff (Tr. pp. 549-50). Staff implemented various interventions to encourage the student to attend classes, primarily by utilizing their relationships with the student to encourage good behavior and determining the underlying cause of the refusal (Tr. pp. 550-51, 560-61). Staff at New Haven attempted to assist the student not only in going to school, but also to help her understand the long-term effects of her actions toward others (Tr. p. 557). Her school refusal issues were more pronounced for classes in which she did not do well or had a lack of understanding regarding the subject matter (Tr. p. 554).

In the student's "lower level" English class, her teacher described her as quiet and attentive (Tr. p. 395; Parent Ex. HH at p. 2). According to the teacher, the student's strength was her verbal skills, and she did well with visual images and organization (Parent Ex. HH at p. 2). She displayed

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<sup>19</sup> The hearing record indicates that New Haven is licensed by the state of Utah to grant high school diplomas and uses a curriculum that meets the standards of the Utah State Office of Education (Tr. pp. 382, 389).

<sup>20</sup> Elsewhere the hearing record indicates that the student's science instruction was provided by a paraprofessional (Parent Exs. U at p. 2; W; HH at pp. 1-2). As noted above, this is irrelevant to my analysis of whether New Haven constituted an appropriate placement for the student.

weakness in her writing skills, and in completing her assignments (*id.*).<sup>21</sup> The student reportedly worked well in a pair, but became overwhelmed with too many people talking (*id.*). The student was provided typed notes for lectures, an accommodation recommended in the private psychoeducational evaluation report, and the teacher was available after school for individual support (Tr. pp. 395, 408; Parent Exs. M at p. 17; HH at p. 2). With these accommodations, the student was making progress in English (Tr. p. 409).

The student initially refused to attend her Spanish class and was permitted instead to work individually with the teacher and received extended time for assignments to alleviate her stress associated with the class, an accommodation recommended in the private psychoeducational evaluation report (Tr. pp. 397-98, 426-27, Parent Ex. M at p. 17). According to the education director, the student was progressing slowly but had earned a grade of 95 in Spanish class at the time of her testimony (Tr. pp. 398-99). Although the student's progress had been slow, the director opined that for the student, the fact that she had not dropped the class was progress (Tr. p. 400).

In math, the student was placed in pre-algebra due to her difficulties with math and was working on a sixth to seventh grade curriculum which encompassed basic math concepts, decimals, fractions, percentages and some geometry (Tr. pp. 400-01). As with the student's Spanish class, she worked individually with the teacher and was doing well to address her aversion to class (Tr. pp. 401-02, 426-27). The student was performing satisfactorily with help in geometry and her behavior improved after she was moved to a smaller class with only two other students (Parent Ex. HH at p. 2).

The student's biology teacher reported that the student was quiet and compliant in the classroom (Parent Ex. HH at p. 1). The student was very resistant to attending biology; the education director initially required the student to attend class for ten minutes, then gradually increased the amount of time the student was expected to remain in class (Tr. p. 403). Although not happy about these rules, the student responded well to setting of boundaries and expectations (*id.*). While she initially had refused to go to biology class, her teacher reported that she had since done well, worked hard and independently, asked for help when needed, but sometimes got stuck and shut down (Parent Ex. HH at p. 1). The teacher further indicated that the student's interaction with other students was minimal but that she would occasionally do so and had recently asked to be a part of the class (*id.* at p. 1-2). The student received individual assistance in the class and would on occasion engage with the teacher and expressed a desire to join the other students (Tr. pp. 403-05).

The student was able to go to history class initially without any problem, presumably because of her enjoyment of the subject but which was unexpected because it was a larger class of 20 students (Tr. p. 407). She received extended time on tests and assignments, as well as teacher notes, and the history class featured multisensory activities, a strategy recommended for the student by the private psychologist (*id.*, Parent Ex. M at pp. 16-17). Her overall behavior in history class was appropriate and she was usually quiet in class but would occasionally ask questions

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<sup>21</sup> As noted above, the October 2011 private psychoeducational evaluation report indicated that the student exhibited average writing ability and that written language was a relative strength for her as compared to her difficulties with verbal expression (Parent Ex. M at p. 9).

(Parent Ex. HH at p. 2). She struggled to complete assignments on time and to work independently but her writing skills were on grade level (id.).

The education director reported that the student did exhibit refusal at times at New Haven in the form of crying, showing anger, shutting down and exhibiting oppositional behavior (Tr. p. 402). This behavior was addressed by identifying boundaries for the student (Tr. p. 403). The education director stated that she felt the student benefitted from the safety, structure, boundaries and expectations that the school offered her, and which the private psychologist had recommended (Tr. p. 403, Parent Ex. M at p. 16). The supervisor of the house in which the student lived also emphasized the benefit of this structure, as it assisted the student with her rigidity of thought and difficulty with transitions (Tr. pp. 562-63). In addition, the education director testified that the student benefitted from gradually increasing the length of time she was expected to remain in class, because eventually she wanted to be in class (Tr. p. 405). The New Haven clinical psychologist indicated that the student experienced academic anxiety with regard to her ability to focus and perform to expectations (Tr. pp. 700-01).

The student's grades as reported by New Haven in the undated academic report ranged from 70 in world history to 95 in algebra, with grades of 93 in biology and Spanish, and a grade of 85 in English literature and composition (Parent Ex. HH at pp. 1-2). The report indicated that the student was in New Haven's regular school program with accommodations based on her learning and emotional needs (id. at p. 1). In keeping with a recommendation from the psychiatric evaluation report, the student was provided with a planner at New Haven (Tr. p. 411; Parent Ex. N at p. 5). In general, testimony presented at the impartial hearing reflects that the student had become less school avoidant since arriving at New Haven; staff had worked with her on her attendance and her comfort level with her teachers and the other students had increased (Tr. pp. 416, 423, 427). At the time of the impartial hearing, the student tended to exhibit school refusal behaviors when she was "overwhelmed with something or behind in classes or struggling a little" (Tr. p. 550). I find that the foregoing supports the education director's assertion that New Haven met the student's needs by modifying the curriculum and providing the necessary accommodations (Tr. p. 437).

The student's social worker and family therapist at New Haven (New Haven social worker) indicated that the student was extremely negative and had difficulty building and maintaining relationships when she arrived at the school (Tr. pp. 473-475). The student also isolated herself from the other residents at first but developed relationships over time (Tr. pp. 508-09). The New Haven social worker indicated that when the student was in a negative place emotionally, it affected her executive functioning abilities and judgment (Tr. p. 512). According to the master treatment plan developed by the New Haven social worker, the student exhibited limitations including poor insight into her difficulties, rigidity, verbal and physical aggression, and limitations associated with her AgCC (Parent Ex. X at p. 1). Further, the report indicated that the student exhibited limitations related to mood disturbance, poor school attendance and skipping classes, denial regarding treatment issues, lack of community involvement or extracurricular activities, lack of concern for rules and authority, behavioral disabilities, anger management issues, and medical health problems (id.). The report also stated that the student's parents expressed their inability to manage her behaviors (id. at p. 2). The New Haven social worker indicated that the student had a negative sense of identity, which she expressed in her feelings that acting in a positive manner would not assist her in obtaining her goals (Tr. p. 522). Accordingly, the treatment plan included goals to address the student's needs in the areas of communication, coping, relationships,

boundaries, trust, self worth, and self esteem (*id.*; Parent Ex. X at pp. 2, 4). The plan set educational objectives for the student to communicate her educational needs and concerns openly and honestly, while respecting the advice of the teaching staff; use positive coping strategies within the school setting to maintain focus, manage school work, and complete her assignments 80% of the time; demonstrate compliance within the school setting 90% of the time; and maintain her grades at a C or better (Parent Ex. X at pp. 3, 5-6). To assist her in meeting these goals, the student received 20 hours of therapy per week including individual therapy, group therapy, family therapy, and specialized group therapy (Tr. pp. 476, 509-10, 512-13, 638-44, 667-69). The education director reported that the student became very upset and angry when she was anxious, but responded well to receiving extra attention and given time to process her feelings and frustrations (Tr. pp. 402, 413-15, 423). The New Haven social worker opined that the therapeutic component of New Haven was meeting the student's social/emotional needs and enabling her to make academic progress (Tr. pp. 523-24, 649-51). He also indicated that the student had progressed with regard to the amount of time she could participate in family therapy before becoming emotionally and physically abusive to her parents or therapists (Tr. pp. 477-78, 480, 646-47). Similarly, as the student began to build relationships with the teaching staff, it increased the amount of time she would remain in class and comply (Tr. pp. 482-84, 517). As the student's self-esteem grew, her academic performance improved and lessened her feelings of inadequacy and assumptions that she would fail (Tr. pp. 495-96, 520-21). The New Haven clinical psychologist admitted that the student's progress had been slower than desired, due to her rigidity and that her processing speed deficits and "brain development" hindered her progress, but her anger and aggression had declined steadily nonetheless (Tr. pp. 706-07). At New Haven, the student lived in a house where she was under constant supervision in a 5:1 ratio (Tr. pp. 383-84). The residents were under supervision on a 24-hour basis, with strict structure to the activities in which they participated, which met the student's need for a high level of structure as noted in the psychiatric evaluation report (Tr. pp. 415-16; Parent Ex. N at p. 5).

Based on the evidence above, I find that the hearing record sufficiently establishes that New Haven provided the student with specially designed instruction that addressed her unique academic and social/emotional needs (see Frank G., 459 F.3d at 365-66).

Next, I address the district's contention that New Haven was inappropriate because it was "overly restrictive" for the student and the student did not require a residential placement to make educational progress.<sup>22</sup> Although the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at \*19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not as strictly held to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15). The Circuit Courts of Appeal have adopted varying tests to determine whether unilateral residential

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<sup>22</sup> With regard to the district's argument that New Haven was too restrictive a placement for the student because the manner of her removal from the district was "fraught with anxiety and trauma" for the student, I note that the district fails to indicate in any way how the student's cross-country transportation impacted upon her subsequent placement and education at New Haven. The parents are not requesting reimbursement for the cost of transporting the student to New Haven, in which event such contentions may be relevant. I decline to find the unilateral placement inappropriate based on the manner in which the student was physically placed at the private school, without any argument connecting it to her ability to receive educational benefits once there.



placements are reimbursable under the IDEA (see, e.g., Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 297-300, 298 n. 8 [5th Cir. 2009] [holding that a residential placement must be essential for the student to receive meaningful educational benefits and primarily oriented toward enabling the student to receive an education]; Mary T. v. Sch. Dist., 575 F.3d 235, 242-44 [3d Cir. 2009] [holding that a residential placement must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process]; Dale M. v. Bd. of Educ., 237 F.3d 813, 817 [7th Cir. 2001] [holding that the services provided by the residential placement must be primarily oriented toward enabling the student to obtain an education, rather than noneducational activities]). However, it is not necessary to select a particular test to employ in this case, as the 2d Circuit has recently reaffirmed that when evaluating a unilateral parent placement in a residential setting, the operative determination is the appropriateness of the placement to meet the student's educational needs, not whether it was necessary to meet them (D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at \*1 [2d Circuit Dec. 26, 2012]; see Mrs. B., 103 F.3d at 1120-22; see also Jefferson County Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227, 1238-39 [10th Cir. 2012], cert. denied 2013 WL 1233055 [June 24, 2013] [holding that the essential question is whether the residential placement provides specially designed instruction and related services to meet the student's unique needs]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 775-77 [8th Cir. 2001] [holding that the relevant inquiry is not whether the problems are themselves educational, but whether the social/emotional problems prevent the student from receiving educational benefits and must be addressed in order for the student to learn]).<sup>23</sup>

Here, as noted by the parents, all of the witnesses who evaluated the student opined that she required a residential placement to receive educational benefits. Testimony by the student's psychiatrist indicated that at the time of the October 2011 psychoeducational report, it was his opinion that the student was not in need of a residential placement (Tr. pp. 187-88). However, by the time of his evaluation and report, he recommended that the student be placed in a highly structured residential setting and continue to receive individual psychotherapy, social skills group treatment, family therapy, and psychopharmacological management (Parent Ex. N at p. 5). At that time the student's behaviors had deteriorated, including outbursts on a daily basis and "adamant[]" school refusal, despite attempts to manage her anxiety and provide her with academic support (Tr. pp. 181-82, 188-89). The psychiatrist believed that the student would not make academic progress in any placement other than a residential setting (Tr. pp. 235-36). The psychiatrist recommended New Haven in particular because it employed an on-staff psychiatrist and had experience with students with similar learning and social/emotional issues to the student, and he opined that it had met both her academic and social/emotional needs (Tr. pp. 203-05). The private psychologist who evaluated the student agreed that, at the time she assessed the student, the student did not require a residential placement, but that the deterioration in her behaviors necessitated the provision of a therapeutic school setting (Tr. pp. 265-67). The education director at New Haven testified that the

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<sup>23</sup> To the extent that some circuits have relied on regulatory language providing that a residential program must be provided only if "necessary to provide special education and related services" (34 CFR 300.104; see Ashland Sch. Dist. v. Parents of Student R.J., 588 F.3d 1004, 1009 [9th Cir. 2009]; Richardson, 580 F.3d at 299; Mary T., 575 F.3d at 244), I consider these cases inapposite, as the regulation refers to the district's obligation to offer a FAPE (20 U.S.C. § 1412[a][1], [10][B]), not the remedies of which parents may avail themselves once the district has failed to meet its obligations (20 U.S.C. § 1412[a][10][C]; see Residential Placement, 71 Fed. Reg. 46,581 [Aug. 16, 2006] [stating that 34 CFR 300.104 "applies to placements that are made by public agencies in public and private institutions for educational purposes and clarifies that parents are not required to bear the costs of a public or private residential placement if such placement is determined necessary to provide FAPE"]).

student required both "intensive therapeutic support" and an "inclusive residential" setting to be successful academically, and that she could not make academic progress without the level of structure provided at New Haven (Tr. pp. 427-28, 437). The New Haven social worker indicated that the level of care provided by a residential therapeutic placement was "paramount" to the student's success and was necessary to address her social/emotional needs (Tr. pp. 523-25, 652-53). New Haven's clinical psychologist opined that the student's social/emotional and behavioral needs could not be met in a non-therapeutic, public school setting, based on her past failure to perform well in such a setting (Tr. pp. 712-13). He further opined that the student had "virtually" no chance of success in school outside of a therapeutic setting (Tr. p. 713). The student's private tutor testified that by the end of January 2012 the student's behavior had deteriorated and she was more stressed, angry, and aggressive (Tr. pp. 761-62, 764, 772). The headmaster of the in-State NPS indicated that the NPS recommended sometime in December 2011 that the parents consider placing the student in a therapeutic residential placement (Tr. p. 368).

Once the district failed to offer the student a FAPE, although it may have been more in keeping with the principles underlying LRE considerations for the parents to consider options other than an out-of-State residential therapeutic placement, their choice of New Haven was not inappropriate (see, e.g., C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 990-91 [8th Cir. 2011]). I find that in light of the student's social/emotional needs and the level of support required by the student, LRE considerations do not preclude a finding in this instance that the parents' unilateral placement was appropriate (see Mrs. B., 103 F.3d at 1120-22; Application of a Student with a Disability, Appeal No. 12-001; Application of a Student with a Disability, Appeal No. 11-135). I note in particular that the parents acted under significant time constraints in finding a placement for the student and that I therefore give less weight to the fact that the student was enrolled in an out-of-State residential school far away from her family and the district.<sup>24</sup>

#### **D. Equitable Considerations**

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 (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 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

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<sup>24</sup> This is not to say that the district, had it determined the student to be eligible for special education and related services as a student with a disability, would have been required to offer the student a residential placement in order to provide her with a FAPE. However, as the district failed to avail itself of its right and obligation to convene the CSE and determine the student's needs, it will not now be heard to argue that the student's placement was inappropriate because it was not required by educational factors alone.

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).

Initially, I agree with the district that the parents' failure to produce the student for evaluation in December 2011 weighs against their request for reimbursement. Although there is information in the hearing record supporting the fact that the student did not like to get up in the morning and was reluctant to do so (Tr. pp. 750-51, 755), the psychiatrist testified that the student's difficulty sleeping was sometimes a result of anxiety and sometimes a result of the student purposely staying up late to watch television (Tr. pp. 200-01). The psychiatrist further testified that the student could be woken but would refuse to get up early in the morning (Tr. p. 202). The private psychologist indicated that although the student reported difficulty sleeping, she refused to elaborate (Tr. p. 267; Parent Ex. M at p. 5). Although the parents assert that the IHO found that it was inappropriate for the district to schedule early morning evaluations for the student as a result of her insomnia, the hearing record contains no indication that the student received a diagnosis of insomnia and the IHO found only that the mother's testimony that she had requested a later appointment was credible testimony (IHO Decision at p. 7). The parents have pointed to no authority for the proposition that a student's unwillingness to wake early in the morning is a factor that must be accommodated by the district, and I note that before the district could arrange for another evaluation, the parents had unilaterally placed the student. I accordingly find that the failure to produce the student supports some diminution in the reimbursement to be awarded the parents (Carmel Cent. Sch. Dist. v. V.P., 373 F.Supp.2d 402, 417-18 [S.D.N.Y. 2005]).<sup>25</sup>

Next, addressing the district's argument that the parents failed to provide notice of their intention to place the student unilaterally, I agree that the parents should have provided the district with notification that they were considering a unilateral residential placement for the student prior to her placement at New Haven. It is unclear from the hearing record why the parents failed to notify the district that they believed the student required a residential placement in December 2011, when the private psychiatrist first informed them of his opinion to that effect (Tr. pp. 205-06).<sup>26</sup> Furthermore, although the student's mother testified that the parents did not provide the district with the psychiatric evaluation report because they had already informed the district social worker of the student's rapid decline (Tr. pp. 897-98), the psychiatric evaluation report was the only existing documentation at the time of the student's removal that indicated the student's circumstances had declined so severely as to warrant consideration of an immediate residential placement (Parent Ex. N at p. 5). Accordingly, I find that the failure to notify the district of the recommendations contained in the report impeded the district's ability to evaluate the student, determine her eligibility for special education, and develop an appropriate educational program for her.

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<sup>25</sup> I make this finding only with respect to the December 2011 appointment. I decline to find that the parents' failure to make the student available to the CSE after she had been removed to Utah weighs against their request for reimbursement (see Jefferson County Sch. Dist. R-1 v. Elizabeth E., 798 F. Supp. 2d 1177, 1190-91 [D. Co. 2011], aff'd 702 F.3d 1227; Application of the Dep't of Educ., Appeal No. 11-131).

<sup>26</sup> The student's mother testified that the psychiatrist recommended that the parents place the student in a residential program sometime in early January (Tr. pp. 839-40); she did not offer a rationale for not providing the district with this information prior to the student's removal from the district.

However, I find the district's argument that the parents never intended to place the student in a public school placement to be without merit. The district contends that the parents could have enrolled the student in a public school subsequent to the time she left the out-of-State NPS; however, I note that the parents referred the student to the CSE prior to her removal from the out-of-State NPS and that the district offered no placement prior to her enrollment in the in-State NPS. To the extent that the district argues that the parents did not intend to enroll the student in a public school because they did not consider a State-approved private school prior to enrolling the student at New Haven, I note that the fact that the parents did not attempt to enroll the student in a State-approved private school has no bearing on their willingness to accept an appropriate public educational program developed by the district.

While I deeply sympathize with the parents as their daughter's behavior later spiraled out of control and she was placed out of State, that does not justify ignoring their earlier failures to produce the student for the scheduled December 2011 evaluation or provide the district with the psychiatric evaluation report that formed the basis for their decision to remove the student to New Haven. The evaluative materials that were made available to the district at the time of the student's removal from the district did not support the need for a therapeutic residential placement. I also agree with the district that it had no objective evidence supporting the parents' assertions that the student could not be returned to the district for evaluation after her removal to New Haven.<sup>27</sup> However, the district's failures to engage with the parents to explain what information it required before it could develop a program for the student, or to make alternate arrangements to obtain such information, weigh against denying completely the parents' request for reimbursement. Having considered the entirety of the hearing record, I find that the evidence shows that culpability for the defects in the process which impeded the district's ability to develop an appropriate educational program for the student rests with both parties equally in this instance; that is, with the parents failure to produce the student in December 2011, provide the already-existing evaluative information regarding residential placement to the district, or notify the district of their intent to unilaterally place the student in a residential setting, as well as the district's failure to offer any plausible explanation for its insistence upon obtaining evaluations through a single, inflexible procedure or to adhere to its obligation to convene a CSE meeting, include the parents, consider the input offered thereat and render a determination of eligibility based upon whatever information was available. Accordingly, I will modify the IHO's award of full reimbursement and order the district to reimburse the parents for one-half of the cost of the student's tuition at New Haven for the 2011-12 school year, upon satisfactory proof of payment by the parents (see J.S. v. Scarsdale Union Free Sch. Dist., 826 F.Supp.2d 635, 671-76 [S.D.N.Y. 2011]).<sup>28</sup>

I also direct the district, if it has not already done so, to convene a CSE, consider the evaluative information that was made part of this hearing record, determine what if any further

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<sup>27</sup> This is not to say that I approve of the district's course of action. As stated above, the district should have either sought to have the student evaluated by the district of location, or convened a meeting with the parents to determine what further evaluative data was required to make a decision regarding the student's eligibility for services.

<sup>28</sup> While the IHO awarded reimbursement for the cost of the student's enrollment fees at New Haven, the parents did not make a request to be reimbursed for such costs in the due process complaint notice or their post hearing briefs (Parent Exs. A at pp. 3-4; KK at pp. 28-29; LL at p. 6). However, as the district does not assert that the enrollment fees should be treated separately from the tuition costs, I consider this amount included within the student's tuition fees for purposes of this decision.

evaluative information is necessary to fully consider the student's needs, make a determination of her eligibility for special education and related services, and develop an appropriate IEP if it finds her to be so eligible. In the event that the student is still in residence at New Haven (or another location outside the district) and, upon a written declaration of her inability to return to the district for evaluation signed by a licensed psychologist or psychiatrist, the parents—if they still wish the district to provide the student with a FAPE—shall consent to have the district of location within which such facility is situated evaluate the student and provide the results of the evaluation to the district (34 CFR 300.131[a], [f]; 300.622[b][3]).

## **VII. Conclusion**

Lastly, I remind both parties of the urgent need that they work collaboratively in the future to meet the needs of the student rather than focusing on the impediments that were faced by both parties in this difficult situation. On the one hand, the rigidity with which the district approached the process of determining the student's eligibility and/or developing an appropriate educational program for the student only made more difficult any attempts to appropriately meet the student's needs while, on the other, the student would have been better served had the parents been more forthcoming with producing the student for evaluation in December 2011, offering the available evaluation report, and expressing to the district their belief that the student required an out-of-State therapeutic residential placement.

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein. In any event, they would not affect my ultimate determination.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated September 27, 2012 is modified, by reversing those portions which found that equitable considerations fully supported the parents' request for reimbursement and ordered the district to reimburse the parents for the student's tuition at New Haven for the 2011-12 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parents for 50 percent of the student's tuition costs at New Haven for the 2011-12 school year; and

**IT IS FURTHER ORDERED** that, if it has not already done so, the CSE convene within 30 days of the date of this decision to determine what additional evaluative data it requires to determine the extent of the student's needs, determine whether the student should be classified as a student with a disability, and develop an IEP in the event that she should be; and

**IT IS FURTHER ORDERED** that the district shall complete its review of existing evaluative data, make a determination of eligibility, and develop an IEP (if necessary) for the student in accordance with the timelines contained in 8 NYCRR 200.4(b)-(e).

**Dated:**           **Albany, New York**  
                          **July 25, 2013**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**