The University of the State of New York

The State Education Department
State Review Officer
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No. 13-087

Application of the BOARD OF EDUCATION OF THE MAHOPAC CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Keane & Beane, PC, attorneys for petitioner, Ralph C. DeMarco, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Tracey Spencer Walsh, 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 offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at Cherry Gulch for the 2011-12 school year. The parents cross-appeal from the IHO's determination which denied their request for compensatory education and for reimbursement for travel expenses incurred by the parents relative to the student's attendance at Cherry Gulch. 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 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

In this case, the student attended a general education class in a district school public from kindergarten through eighth grade and received some special education services early during that time period (see Dist. Ex. 4 at pp. 3-4; see also Parent Exs. O at p. 2; MMM at p. 1). The hearing record shows that, during the 2010-11 school year, the parents arranged for the student to receive psychotherapy and visit a psychiatrist, initiated a persons in need of supervision (PINS) diversion program, and initiated a coordinated children's services initiative (CCSI) report (see Tr. pp. 86,

149, 1429-30, 1434-35, 1437-39, 2732-33, 2799-2801; see also Parent Ex. E).[1] The student was hospitalized three times during the 2010-11 school year, on January 22, 2011 (for three days), on May 13, 2011 (for seven days after transfer from another hospital), and on May 26, 2011 (for five days) as a result of the student's negative and, at times, impulsive or aggressive behaviors (see Tr. pp. 1439-42, 1458-68; Dist. Exs. 9 at p. 1; 10 at p. 1; 11 at p. 1). In addition, the hearing record shows that the student was admitted to a partial hospitalization program from February 7 until February 11, 2011 but that the student walked out of the program and refused to return (see Dist. Ex. 10 at pp. 2-3; Parent Ex. DDD at p. 20).

On or about May 31, 2011, the parents requested in writing that the district evaluate the student (Dist. Ex. 41). On June 8, 2011, the parent signed consent for referral to and evaluation by the CSE (Dist. Ex. 43). On June 23, 2011, the parents enrolled the student in an out-of-State program, which was described as an "adolescent treatment program that utilizes the experiential opportunities of a wilderness setting with a clinically focused intervention" (the wilderness program) (Dist. Ex. 45 at p. 1; see Dist. Ex. 64; see also Tr. p. 1378-79, 1383-87).[2]

On August 3, 2011, the CSE convened to conduct an initial review and to develop an IEP to be implemented beginning on September 6, 2011 (see Dist. Ex. 1 at p. 1). Finding the student eligible for special education as a student with an emotional disturbance, the August 2011 CSE recommended that the student be placed in an 8:1+1 special class (id. at pp. 1, 6).[3] In addition, the August 2011 CSE recommended on the IEP related services of two 30-minute sessions per week of individual counseling and one 30-minute session per week of counseling in a small group (id.). Meeting notes from the August 2011 CSE meeting specified that, because "there was not an in-district program that would meet [the student's] needs[, a]ll parties agreed to seek a special class placement" at either a public or nonpublic site outside the district (Parent Ex. Q at p. 1; see Tr. pp. 908-09; Parent Ex. P at p. 2; QQ at p. 5).[4]

On August 3, 2011, the parents signed a "consent for release of information" form authorizing the district to send "information packets" to six out-of-district schools (Parent Ex. VV). On August 10, 2011, the parents submitted an application for the student's enrollment at Cherry Gulch (see Dist. Ex. 65 at p. 1).[5]

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[1] The hearing record reveals that CCSI is a county program that offers support to adolescents outside of school (see Tr. pp. 224-25, 922, 949, 1048, 1057-58, 1068-70).

[2] The parents do not seek reimbursement for the costs of the student's attendance at the wilderness program.

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

[4] The chairperson of the August 2011 CSE meeting testified that the notation in the August 2011 IEP indicating that the "placement recommendation" was the "home public school district" was not consistent with the CSE's determination (Tr. p. 932; see Dist. Ex. 1 at p. 1).

[5] The evidence in the hearing record shows that Cherry Gulch is an out-of-State nonpublic "ranch style therapeutic boarding school" (see Parent Ex. EE at p. 1). The Commissioner of Education has not approved Cherry Gulch as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

By letter dated August 16, 2011, the parents notified the district that they had not received "an IEP or a recommended placement" for the student for the 2011-12 school year and that "unless the district timely recommend[ed] a program and placement that [was] appropriate," the parents intended to enroll the student in Cherry Gulch (Dist. Ex. 15 at p. 2). The parents also indicated that they would seek public funding for "all costs related to [the student's] education," including travel and hotel expenses incurred by the student or the parents in the course of visiting each other (id.).

By letters dated August 16, 2011, the district sent referral packets to six out-of-district day treatment programs in an effort to locate an appropriate placement for the student (see Parent Exs. H-M; see also Dist. Ex. 50). Two of those school sites responded shortly thereafter, indicating that their programs were not appropriate for the student and that the student may require a residential placement (see Parent Exs. N; Y).

By letter dated August 25, 2011, the district provided the parents with the names and contact information for four out-of-district school sites for possible attendance for the 2011-12 school year and advised the parents that the parents were expected to "follow up on the intake process" (Dist. Ex. 16). The district acknowledged information provided by the parent that the student would not be available for intake as he was attending the out-of-State wilderness program, but informed the parent that their "failure to make [the student] available for the intake process may inhibit the ability of the [CSE] to offer" the student a free appropriate public education" (id.). The parents, without the student, visited several of the school sites (see Tr. pp. 89-90, 187, 2615-16, 3111-14).

On September 8, 2011, the student completed the wilderness program (see Dist. Ex. 45 at p. 1). On September 9, 2011, the parents signed an enrollment contract with Cherry Gulch for the student's attendance during the 2011-12 school year and, on the same day, the student began attending Cherry Gulch (see Tr. pp. 1516-18; Parent Ex. RRR at pp. 1-3).

On September 12, 2011, the CSE convened to conduct a "requested review" and to develop an IEP to be implemented between September 12, 2011 and June 22, 2012 (see Dist. Ex. 2 at p. 1). The September 2011 CSE again noted the student's eligiblility for special education as a student with an emotional disturbance (id.). The September 2011 CSE recommended two-hour sessions of consultant teacher services five times per week in "interim placement home" (id. at pp. 1, 6). In addition, the September 2011 CSE recommended related services of three 30-minute sessions per week of individual counseling (id.). The September 2011 CSE also recommended support in the IEP for management needs, such as a small structured supportive environment with an intense therapeutic component, close supervision throughout the day, refocusing and redirection, and access to class notes, as well as a transition plan and annual goals (id. at pp. 4-8). The September 2011 IEP indicated that the student required a behavioral intervention plan (BIP) and that one would be "developed at the recommended setting" (id. at p. 4).

The meeting notes from the September 2011 CSE meeting indicated that the CSE continued to seek an appropriate special class at an out-of-district site for the student (Parent Ex. Q at p. 2). The notes also indicated that the September 2011 CSE reviewed "the need for the student to be made available for the intake for day programs" and that "failure to do so [was] impeding the district's ability to offer a [FAPE]" (id.; see Dist. Ex. 48 at p. 2; see also Tr. p. 264).

By letter to the district dated October 20, 2011, the parents rejected the day schools as not appropriate for the student because none of four visited sites: "offer[ed] any of the supervision a residential therapeutic school would have;" offered "after school activities;" or provided supervision during the students' "individual time" (Dist. Ex. 19). The parents also indicated that the school sites dismissed students at the end of the school day, which was something a student with depression could not handle, noting that this would result in the student spending "more time in his room or sneaking out" (id.). The parents also informed the district of the student's progress at the unilateral placement (id.). In addition to pointing out other deficiencies with the visited school sites, the parents concluded that, "[i]n order for [the student] to succeed[,] he needs an environment that motivates him yet supports him emotionally," which the parents stated that they did not observe at any of the visited school sites (id.).

By letter dated November 15, 2011, the parents rejected the September 2011 IEP, indicating that they, at no time, "agree[d] that a home instruction program was appropriate" for the student (Dist. Ex. 21). The parents expressed surprise that the September 2011 IEP recommended home instruction, since such an option "was mentioned only briefly" at the CSE meeting and because the district requested that the parents visit "one more therapeutic day school" (id.). Noting that the district had not followed up with the name of another day school for the parents to visit, the parents reiterated their intention to seek reimbursement from the district for the costs of the student's education at Cherry Gulch for the 2011-12 school year (id.).

By letter dated November 18, 2011, the district informed the parent that the September 2011 CSE recommended interim home instruction and counseling "pending exploration of day programs/placements for [the student], which was originally recommended" by the August 2011 CSE (Dist. Ex. 22 at p. 1). The district further reminded the parent that the student was required "participate in the intake process for any interested day programs/placements" and that, although the parents appeared only interested in a residential program, the district was required to consider the LRE for the student (id.). With respect to the day school sites visited by the parents, the district "respectfully disagree[d]" with the parents' criticisms (id.). The district indicated that four of the school sites were "unable to make a determination on whether to issue an acceptance to [the student] since [the parents had] not made him available for the intake process" and that three of those four day school sites were "still interested in screening" the student (id.; see Dist. Exs. 18; 20 at p. 2). The district also informed the parent that another day school remained interested in screening the student but that, because the parents did not bring the student with them when they visited, the school no longer had an opening (Dist. Ex. 22 at p. 2; see Dist. Ex. 17). The district notified the parents that it considered their "failure to make [the student] available for the intake process to be a lack of cooperation" that was "impeding" the ability of the district to offer the student a FAPE in the LRE (Dist. Ex. 22 at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated March 21, 2012, the parents alleged that the district had reason to suspect that the student was eligible for special education as a student with a disability, yet the district failed to properly refer him to the CSE for an initial evaluation (IHO Ex. III at pp. 8-10). Specifically, the parents alleged that the student's problematic behaviors, report cards, and deteriorating performances over the years indicated that the student had a disability, yet the district failed to timely identify the student as eligible for special education (id.

at pp. 8-9). In addition, the parents asserted that the district "misstated" the student's progress (id. at p. 8). The parents also asserted that the student, who had received preschool special education services, was wrongfully declassified and allowed "to fall through the cracks" (id. at p. 9). Thus, the parents alleged that the district's failure to identify the student's needs constituted a "gross failure" that prevented the student from receiving special education services (id.).

The parents also alleged that the district failed to offer the student a FAPE for the 2011-12 school year on both substantive and procedural grounds (IHO Ex. III at p. 2). With respect to both the August 2011 and September 2011 CSEs, the parents alleged that: (1) the August 2011 and September 2011 CSEs were untimely, in that no IEP was developed for the student until after the commencement of the 2011-12 school year; (2) the August 2011 CSE was not duly constituted; (3) the district engaged in impermissible "predetermination" in developing the student's IEPs; (4) the August 2011 and September 2011 CSEs deprived the parents the opportunity to meaningfully participate in the development of the student's IEPs by, for example, failing to communicate with the student's teachers and providers, failing to consider private evaluations, failing to develop annual goals at the CSE meetings, and failing to timely provide evaluations, meetings minutes, and copies of the student's IEPs to the parents; and (5) the district failed to adequately assess and evaluate the student (id. at pp. 3-7). Turning to the resultant IEPs, the parents alleged that: (1) the annual goals listed in the August 2011 and September 2011 IEPs were not sufficient to meet the student's needs, failed to indicate objective methods of measurement, were vague, ambiguous, and not individualized, were not based on the student's needs, and, in particular, did not adequately address the student's behaviors, or needs with respect to self-care, interactions with peers, anger management, or self-confidence and self-esteem; (2) the August 2011 and September 2011 CSEs failed to recommended an extended school year for the student; (3) the August 2011 and September 2011 CSEs failed to recommend adequate levels and frequencies of related services and, in particular, recommended inadequate counseling "to address [the student's] severe psychological needs;" (4) the August 2011 and September 2011 CSEs failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) and improperly abdicated responsibility for the development of the BIP by proposing that a BIP would be "developed at 'the recommended setting;'" (5) the August 2011 and September 2011 CSEs failed to offer consistency in programming or a "transition plan;" (6) the August 2011 and September 2011 CSEs failed to offer adequate supports for school personnel on behalf of the student; (7) the August 2011 CSE recommended post-secondary goals without having evaluated the student; and (8) the August 2011 and September 2011 CSEs failed to consider "what, if any, core educational methodologies and approaches" would benefit the student (id. at pp. 3-7). With respect to the August 2011 IEP in particular, the parent alleged that the recommended 8:1+1 special class was not appropriate, had not been recommended by any professional who had evaluated the student, and did not constitute the LRE (id. at pp. 3-4). Moreover, the parents asserted that the August 2011 CSE failed to meaningfully consider the continuum of placements options and, in particular, failed to consider a residential placement for the student, which had been recommended in a private evaluation of the student (id. at pp. 4, 6-7). With respect to the September 2011 IEP in particular, the parents asserted that, despite the student's identified management needs for a structured supportive environment with an intense therapeutic component and close supervision, the CSE offered only two hours per day of home instruction, which the parents asserted was not the LRE (id. at p. 4).

The parents also alleged that the district deprived them of the opportunity to meaningfully participate in the selection of the particular school site for the student to attend for the 2011-12

school year (IHO Ex. III at p. 7). With respect to particular school sites, the parents alleged that they visited several day treatment programs but that none of them were appropriate, "as none offered a residential therapeutic setting" (id. at p. 8). Furthermore, the parents alleged that the district never provided an additional school site for them to consider (id.).

In addition, the parents alleged that their unilateral placement of the student at Cherry Gulch was appropriate and that equitable considerations weighed in favor of their request for relief (IHO Ex. III at p. 10). As relief, the parents requested that the IHO order the district to pay for the costs of the student's tuition at Cherry Gulch for the 2011-12 school year, as well as the costs of travel and hotel expenses relative to the student's and the parents' visits to both the home and the out-of-state unilateral placement (id.). In addition, the parents requested "compensatory education" for the district's "'gross' FAPE deprivations" (id.). The parents also requested "compensatory education" for any and all services that the student failed to receive through pendency (id.).

B. Facts Post-Dating the Due Process Complaint Notice

The hearing record shows that the parties participated in a resolution meeting on or about January 27, 2012 (Tr. pp. 374-75, 2561-62; Ex. 14 at p. 2). Subsequently, a CSE convened on March 13, 2012 (Tr. pp. 2561-62; Dist. Ex. 3 at p. 1). Review of the March 2012 IEP reveals that the same special education program and services were recommended as set forth in the September 2011 IEP (compare Dist. Ex. 2 at pp. 1-9, with Dist. Ex. 3 at pp. 1-9). The district administrator for middle school special education testified that, because the March 2012 CSE meeting "became emotional," the CSE decided to adjourn until after the student participated in certain scheduled intake interviews but that, in the meantime, "there were going to be no changes to the IEP" and "exploration of day-treatment programs" would continue to be pursued (Tr. p. 387; see also Tr. pp. 2559-60).

The hearing record shows that on March 14, 2012 the student participated in a Skype interview with a therapeutic day treatment program offered by the board of cooperative educational services (BOCES) (see Dist. Ex. 35 at p. 1).[6] By letter dated March 21, 2012, the parents requested a class and school profile from the particular BOCES program (Dist. Ex. 36). The district responded by letter dated March 23, 2012 and referred the parents to the particular BOCES website and indicated that the parents' request for a class profile would be forwarded to the school (Dist. Ex. 37).

By letter also dated March 23, 2012, the district acknowledged the student's participation in an intake via "Skype" for the particular BOCES program and indicated that three other potential school sites would not do an intake interview via Skype and, therefore, reminded the parents that the student's participation in the intake process was required for acceptance by an out-of-district day program and expressed disappointment that the district was not informed when the student had been in the district for a visit (Dist. Ex. 35 at p. 1).

The parents responded by letter dated April 3, 2012 and expressed disappointment that, since the student enrolled at Cherry Gulch, the district had not sought to assess or evaluate the

[6] The hearing record indicates that Skype is a form of live video call "through the computer system" (Tr. p. 100).

student and had never arranged for the student to participate in an intake process at a residential placement, despite the fact that various professionals had expressed that the student needed a residential placement (Dist. Ex. 39). The parents asserted that the district had "sent [the parents] on a fool's journey to explore day programs, knowing that they [were] on their face, entirely inadequate" (id. [emphasis in original]). The parents also emphasized that it was "crucial for [the student's] well-being that no one lead him down the primrose, delusional path to make him believe that he can actually attend a day program" (id. [emphasis in original]).

On April 12, 2012, the student was accepted to the out-of-district BOCES program (Dist. Ex. 38). After the student attended in-person intake meetings on May 4, 2012, another out-of-district day treatment program accepted the student, which the district ultimately recommended he attend for the 2012-13 school year (Tr. pp. 402-03; 3016-18; Parent Ex. HHH at p. 5).[7]

C. Impartial Hearing Officer Decision

On May 3, 2012, an impartial hearing was convened in this matter and concluded on December 20, 2012, after 20 days of proceedings (Tr. pp. 1-3253). By decision dated April 13, 2013, the IHO found that the district did not violate its child find obligations, the district failed to offer the student a FAPE for the 2011-12 school year, Cherry Gulch was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 27-45). Initially, the IHO determined that the district did not act "unreasonably in failing to refer [the student] for special education through its [c]hild [f]ind responsibilities earlier than the May 31, 2011 referral from the parents" (id. at p. 44).

The IHO held that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at pp. 27-37). The IHO determined that the evaluative information considered by the August and September 2011 CSEs was appropriate and adequately described the student's needs (id. at p. 27). The IHO also found that the district's failure to conduct an FBA did not result in a denial of a FAPE and that the August and September 2011 CSEs appropriately recommended that an FBA be conducted and a BIP developed at "the recommended placement" (id. at p. 28). However, the IHO found that the August and September 2011 CSEs engaged in impermissible "predetermination" in developing the student's IEPs by requiring the student's placement in a day treatment program "prior to a residential program regardless of the student's individual needs at the time" (id. at p. 34). The IHO concluded that the student required a residential placement and that no information considered by the August and September 2011 CSEs supported the appropriateness of a day treatment program for the student (id. at pp. 29-31). In reaching this conclusion, the IHO declined to rely on the opinions of the district CSE representatives with respect to the appropriateness of the day treatment program over the opinions express "in the parents' evaluations and reports" (id. at p. 33). The IHO found that, contrary to what appeared to be a district policy, the LRE provisions of the IDEA did not require a student "to try out a less restrictive program first before placement in a more restrictive placement" (id. at p. 34). Moreover, the IHO found that the evidence of the student's substance abuse and family problems, cited by the district in support of its position that it was not required to offer the student a residential placement,

[7] The hearing record shows that the CSE reconvened in June 2012 (Tr. p. 2561).

did not establish that the student's substance abuse was a primary factor in the student's disability and, in any event, the evidence was impermissibly retrospective (id. at pp. 34-35).

Next, the IHO concluded that the district deprived the parents a meaningful opportunity to participate in the selection of the particular school site which the student would attend for the 2011-12 school year (IHO Decision at p. 32). The IHO determined that no one at the August or September 2011 CSE meetings could explain to the parents how the recommended day treatment program would address the student's needs and, therefore, the parents were "deprived of any opportunity to ask the student's proposed teacher (or any representative of the proposed program) how [the student's] needs would be met in the recommended placement" (id. at pp. 31-32). Moreover, the IHO concluded that the district deprived the parents a meaningful opportunity to participate by failing to convene an additional CSE meeting at which a representative from a school site that accepted the student could explain the program to the parents (id. at p. 32). The IHO also held that it was not appropriate for the district "to place total responsibility on the parents to choose a placement through an application process that include[d] a student interview to the out-of-district placement" because it was the district's responsibility to make "timely and appropriate IEP and placement recommendations" (id. at pp. 32-33). Thus, the IHO concluded that "the parents were under no obligation to return [the student] to the [d]istrict for intake interviews at [day treatment programs] given there was no report indicating the appropriateness of such a placement" (id. at p. 33).

The IHO also concluded that the March 2012 CSE again predetermined the student's IEP and again failed to recommend a residential placement for the student (IHO Decision at p. 37). The IHO also rejected the district's position that it was not responsible for student's behaviors arising from social maladjustment and substance abuse (id.).

The IHO also determined that the parents satisfied their burden to establish that Cherry Gulch was an appropriate unilateral placement for the 2011-12 school year, finding that Cherry Gulch offered a program in the LRE for the student and that the student made progress during his attendance (IHO Decision at pp. 38-42). Lastly, the IHO determined that equitable considerations weighed in favor of the parents' request for relief because the hearing record indicated that they cooperated with the district, provided the CSE with all reports and evaluations of the student, attended all CSE meetings, communicated their concerns, actively searched for an appropriate day treatment program for the student, investigated the day school sites recommended by the district and reasonably determined those sites to be inappropriate for the student (id. at pp. 42-43). Furthermore, the IHO held that, by enrolling the student in a program outside of the State, where he was unavailable for interviews with potential day treatment programs, the parents did not thwart the CSE processes (id. at pp. 32, 43). Consequently, the IHO ordered the district to pay the costs of the student's tuition at Cherry Gulch for the 2011-12 school year (id. at p. 46). However, the IHO held that the travel and hotel expenses requested by the parents were not reasonable, particularly because there was no evidence of a meaningful attempt by the parents to find a unilateral placement for the student closer to their home (id. at p. 44). Finally, the IHO denied the parents' request for compensatory education (id. at pp. 44-45).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year, that Cherry Gulch was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. Contrary the IHO's decision, the district asserts that the CSE had good faith reasons to recommend a special class day treatment program for the student and did not engage in predetermination. In particular, the district asserts that the IHO misread the evaluations and documents considered by the August 2011 and September 2011 CSEs, which actually recommended that the student attend a day treatment program and not a residential placement. Furthermore, the district alleges that, in determining that the district should have recommended a residential placement for the student, the IHO failed to properly consider the student's substance abuse and family concerns and the district's evidence of such was not retrospective. The district asserts that the special class day treatment program recommended by the CSEs was the LRE for the student, in that the recommendation allowed the student to attend a school site closer to his home and receive private substance abuse treatment and other available supports through the county.

With respect to the IHO's decision that the district denied the parent's a meaningful opportunity to participate in the search for an appropriate out-of-district school site for the student, the district asserts that the IHO failed to acknowledge that the August 2011 CSE had undertaken an initial review of the student and that, leading up to the September 2011 CSE meeting and afterwards, the student had not been made available for intake appointments with proposed day schools and, as such, no representative from a specific day school could attend the CSE meetings because none had yet accepted the student.

The district also alleges that the IHO erred in finding Cherry Gulch to be an appropriate unilateral placement because the school was too restrictive. With respect to equitable considerations, the district alleges that the parents did not seriously intend to enroll the student at a school site offered by the district and made up their minds to enroll the student at Cherry Gulch within weeks of the August 2011 CSE meeting and failed to ensure the student's availability for appointments with out-of-district school sites recommended by the district. Consequently, the district seeks an order reversing the IHO's decision to the extent that he ordered the district to pay the costs of the student's tuition at Cherry Gulch for the 2011-12 school year.

In an answer and cross-appeal, the parents respond to the district's petition by denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year, that Cherry Gulch was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition.[8] However, the parents assert that the IHO should have made additional findings with respect to the district's alleged child find violations and, as a remedy, awarded the student compensatory education in the form of an additional six months of

[8] The parents' June 13, 2013 pleading is improperly captioned as an answer when it also contains a cross-appeal. In this instance the district submitted a responsive pleading to the cross-appeal as contemplated by State regulations, thus minimizing any prejudice; however, I caution the parents' attorneys to caption pleadings correctly or risk dismissal.

reimbursement for Cherry Gulch. Furthermore, the parents assert that IHO erred in denying their request for the costs of travel and hotel expenses relative to visits to and from Cherry Gulch.

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 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., 394 Fed.Appx. 718, 720 [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, 361 Fed. App'x 156 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [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. Evaluative Information

In this instance, although the sufficiency of the evaluative data available to the September 2011 CSE is not at issue, a review thereof facilitates the discussion of the issue to be resolved—the appropriateness of the program recommendations set forth in the September 2011 IEP.[9]

The hearing record demonstrates that, in formulating the student's August and September 2011 IEPs, the CSEs utilized: a December 2010 privately obtained neuropsychological evaluation report; January 25, May 20, and May 31, 2011 discharge summaries from hospitals at which the student was treated;[10] a June 10, 2011 social history report; a July 18, 2011 letter from the student's psychiatrist; a July 28, 2011 letter from a private psychologist; an August 2, 2011 letter from a psychologist from the wilderness program attended by the student; a record of the student's attendance and the student's report card from the 2010-11 school year; and a July 30, 2009 report of a physical examination of the student (Dist. Exs. 1 at p. 2; 2 at p. 2; 4; 9; 10; 11; 12; 44 at p. 5; 46; Parent Exs. B; C; F; Z). In addition, the hearing record shows that the August and September 2011 CSEs considered a June 2, 2011 handwritten letter from the student's psychiatrist (Tr. pp. 130-31, 1494-95; Parent Ex. A).

The December 2010 neuropsychological evaluation of the student indicated that it was conducted pursuant to the parents' request "due to increasingly problematic and difficult to manage behavior, most notably in the home setting" (Dist. Ex. 12 at p. 1). The psychologist who completed the evaluation reported that the student had been diagnosed with an attention deficit hyperactivity disorder (ADHD) and was prescribed medication and had been receiving psychotherapy, "although reportedly little progress ha[d] been observed" (id.). The psychologist noted that, "[d]espite these interventions," the student's behaviors worsened, "as evidence by dropping grades, school refusal, poor familial relationships, not following rules at home, and explosive, irritable and aggressive behavior at home" (id.). The neuropsychological evaluation included an assessment of the student's cognitive functioning, language skills, visuo-spatial and visuo-motor skills, attention and

[9] The IHO's finding that "the information the CSE had before it in making the August and September IEPs was appropriate and accurately described the student's needs" was adverse to the parents (IHO Decision at p. 26). However, the parents did not assert a cross-appeal or otherwise address this issue in their answer. Therefore, the IHO's determination regarding the sufficiency and accuracy of the evaluative information considered by the August and September 2011 CSEs is final and binding on the parties and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Furthermore, to the extent that the parents have incorporated by reference or argued this issue solely within the memorandum of law, a memorandum of law is not a substitute for a pleading and, as such, the arguments have not been properly asserted in a pleading and I decline to consider or address them (see 8 NYCRR 279.4, 279.6; Application of the Bd. of Educ., Appeal No. 10-122; Application of the Dep't of Educ., Appeal No. 09-051

[10] The August and September 2011 IEPs set forth dates of the discharge reports which corresponded with either the date of student's discharge or the date of the report's transcription or printing (compare Dist. Exs. 1 at p. 2; 2 at p. 2, with Dist. Exs. 9 at p. 1; 10 at p. 1; 11 at p. 1). For the purposes of this decision, the discharge reports will be identified by the date of the student's discharge from the hospital.

inhibitory controls, executive functioning, academic achievement, and social/emotional functioning (id. at pp. 5-9). The psychologist observed that the student's cognitive functioning fell within the "superior range for his verbal skills, and the high average range for his nonverbal, perceptual skills" (id. at p. 9). Having assessed the student both on and off his ADHD medication, the psychologist reported support for the diagnosis, indicating that the student's sustained attention without the medication was impaired but was substantially improved after the dose (id.). With respect to language processing skills, the evaluator reported that the student's skills were "suppressed as compared to his potential" (id.). According to the psychologist, the student's "executive functioning skills [were] predominantly intact," but his complex planning skills were "an area of weakness" (id.). The psychologist indicated that, even when the student had received his ADHD medication, his focused, auditory attention was impaired (id. at pp. 9-10). With respect to the student's psychological profile, the psychologist reported that the student presented with a "depressed, labile mood, low self-esteem, pessimism and hopelessness," along with diminished appetite, irregular sleep habits, deteriorating family relationships, accompanied by negativity, explosiveness, and a vitriolic tone (id. at p. 10). The psychologist noted that the student's profile was consistent with a depressive disorder but lacked the intensity of a major depressive disorder, suggesting dysthymic disorder (id.). Based on the evaluation results, the psychologist recommended, among other things, that the student continue to receive medication for ADHD, and that possible pharmacologic options for the student's depression be explored, along with individual and family therapy, and possible treatment at a facility that works with children with mood disorders (id. at pp. 10-11; see Tr. p. 408).

The January 25, 2011 discharge report indicated that the student was admitted to the hospital on January 22, 2011 after he was sent to the emergency room by his therapist due to worsening agitation and mood dysregulation (Dist. Ex. 9 at p. 1). The treating physician detailed the student's recent behaviors, including staying up all night, waving a knife at his parent, refusing to complete homework, and smoking marijuana, as well as family medical and social history, including the parents' recent separation (id. at pp. 1-2, 5). The report indicated that the student's global assessment functioning (GAF) score was 55 (id. at p. 1).[11] The physician discharged the student to his home but indicated that he should attend an appointment with a partial hospitalization program the following week (id. at p. 6). The report also indicated that the parents and the physician discussed that the student could attend the wilderness program if he did not willingly participate in treatment (id.).

The May 20, 2011 discharge report indicated that the student was admitted to a psychiatric hospital on May 13, 2011 after transfer from another hospital and upon the student's own request as a result of "increasing impulsive, violent and reckless behaviors" (Dist. Ex. 10 at p. 1). The physician who completed the report indicated that, in addition to becoming sexually active, sneaking out in middle of the night, and smoking marijuana, the student's "most disturbing" behaviors constituted physical altercations at school, one of which resulted in an assault charge (id.). The physician also reported information provided by the parent that the student had harassed a young girl on Facebook and wielded a knife on more than one occasion (id. at p. 2). The report

[11] Evidence in the hearing record indicates that a GAF score was used to determine student's functioning level, whereby a score of 100 would indicate "superior functioning" and 10 would indicate "persistent danger of severely hurting self or others" (see Dist. Ex. 62; see also Tr. pp. 412-13, 2019-20).

indicated that, after the student's January 2011 hospitalization, the student walked out of the partial hospitalization program to which he had been referred and refused to return (id. at pp. 2-3). The physician concluded that the student's behaviors had "escalated to a point of violence and he require[d] inpatient hospitalization for his own safety and the safety of others" (id.). The report indicated that the student's GAF score was 20 upon admission to the hospital and 52 upon discharge (id. at p. 1).

The May 31, 2011 discharge report indicated that the student was admitted on May 26, 2011 presenting with another aggressive outburst (Dist. Ex. 11 at pp. 1-2). The report indicated that the student's GAF score was 50 (id. at p. 1). The physician indicated that an intensive outpatient program or a partial hospitalization program that focused on depression would be an appropriate after care option for the student but noted that the student did not want to participate in an intensive outpatient program (id. at p. 6). According to the report, the "parents intended to have [the student] stay with his uncle while a school plan was formulated with the district" (id.).

In the June 2, 2011 handwritten letter, the student's psychiatrist recommended that, given the student's "instability at his home," the negative effect of certain peers upon the student, and the "anticipation of placement in a residential therapeutic school," the student not return to school for the remainder of the 2010-11 academic school year (Parent Ex. A at p. 1). The letter further stated that the student, who had diagnoses of a depressive disorder, an ADHD, and an oppositional defiant disorder (ODD), would temporarily reside with a relative out of state (id. at pp. 1-2).

The June 10, 2011 social history report was conducted by a district social worker as a result of the student's referral to the CSE (Dist. Ex. 4 at p. 1). The report indicated that the student had previously been diagnosed with an ADHD and depression, for which he received medication and psychotherapy, his academic, emotional, and social behavior had declined throughout the 2010-11 school year, and he was involved a pre-PINS program, received other services through CCSI, and was hospitalized three times with diagnoses of a mood disorder and ODD (id.). The social worker indicated the student's then-current diagnoses included mood disorder–not otherwise specified, ODD, nicotine dependence, and cannabis abuse (id.).

The July 18, 2011 letter from the student's psychiatrist described the student as "a very bright, emotionally fragile adolescent whose behavior [had] deteriorated since January of [2011]" (Dist. Ex. 44 at p. 5). The psychiatrist recommended that, after the student completed the wilderness program, he attend "a small, therapeutic classroom program" (id.).

The CSE also considered a letter dated July 28, 2011 from the psychologist who completed the December 2010 neuropsychological evaluation of the student (Parent Ex. B). The psychologist reported that the student's behaviors had deteriorated after the December 2010 evaluations (id.). She noted that the student had "never functioned optimally in a public school setting" and that, although he was "incredibly bright," he required a "significant level of structure, clear expectations, and accountability for his behaviors" (id.). Thus, the psychologist concluded that "[o]ptimally," the student would benefit from "a specialized residential setting" that could "stimulate his intellect while addressing his behavioral and emotional difficulties" (id.).

By letter dated August 2, 2011 the psychologist from the wilderness program attended by the student also offered her assessment of the student, noting that the student presented "as a

severely depressed adolescent," who lacked motivation and appropriate coping skills, and depended on others to take core of his basic care and psychological needs (Parent Ex. C). The psychologist reported that the student's "history of physical aggression towards both of his parents, his explosive outbursts, his disregard for rules at home and in the school setting, his use/dependence on marijuana for the past year, his pattern of school refusal, [and] his need to be hospitalized on three separate occasions since January 2011 all indicate[d] a significant deterioration in his overall level of functioning" (id. at p. 2). The psychologist noted that the student did not take accountability for his behaviors (id.). Based on the foregoing, the psychologist concluded that it was "imperative that [the student] be allowed the opportunity to receive psychological and educational support in a residential treatment center" and, in particular, "in a highly structured program which [could] meet his myriad of needs" (id.).

B. Child Find

The parents assert that the IHO erred in concluding that the district lacked a reasonable basis to suspect that the student had a disability and was in need of special education programs and related services and, therefore, that the district complied with the IDEA's child find provisions.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446. F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F.Supp.2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. March 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 C.F.R. 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 C.F.R. 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to find such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. D.C., 401 F.3d 516, 518 [D.C. Cir. 2005] ["School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction."]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To determine that a child find violation has occurred,

school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate (A.P., 572 F.Supp.2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F.Supp.2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]).

In this case, the issue presented is not whether the district had procedures in place, but whether, upon the facts presented, the student should have been referred to the CSE prior to the parents' May 31, 2011 referral because there was reason to suspect a disability and reason to suspect that special education services may be needed to address that disability.

The district social worker testified that the student's achievement leading up to the 2010-11 school year was "exemplary" (Tr. p. 86). The hearing record shows that the student performed at a level 4 (meeting learning standards with distinction), with the exception of one level three (meeting learning standards), on the New York State testing program assessments for English language arts (ELA) and mathematics for grades three through seven (Dist. Exs. 4 at p. 5; 5). The district social worker indicated that achievement of such scores was "not a small feat" (Tr. p. 86).

District witnesses testified that the student adjusted well to the middle school and the student's report cards for the 2008-09 and 2009-10 school years reflected grades in the 80s and 90s with positive teacher comments (Tr. pp. 54, 1018). The parents testified that, during the 2009-10 school year, the student "was a good student as he had been in all the years prior" (Tr. p. 1423). The student's performance on the report card for the 2010-11 school year revealed decreased success, with final average grades in the core academic subjects ranging from 54 to 79 and absences in these classes ranging from 41 to 46, the majority of which occurred during the fourth term (Dist. Ex. 8). The district social worker testified that the student's absences were, in part, as a result of the student's hospitalization (Tr. pp. 57-58, 247). In addition, the parents elaborated that, during May and June 2011, the student also refused to go to school (Tr. pp. 1469-70, 2572-73). The parents testified that, in the first half of the 2010-11 school year, the student's "grades were up" even though they did not observe him doing homework or studying (Tr. p. 1446). They testified that at some point they began receiving emails from the student's teachers about his lack of participation and failure to complete homework assignments, which the parents described as "a marker" that the student's behavior was affecting his performance in school (Tr. pp. 1450-51). The hearing record includes emails dated in March 2011 from the student's teachers, informing the parents about the student's poor academic performance (Parent Ex. EEE at pp. 20, 22). The social worker testified that the student's declining grades constituted a "red flag" for the student (Tr. pp. 233).

The parents testified that, as of the second half of the 2009-10 school year, the student's behavior "took a bit of a turn" (Tr. p. 1424). The parents testified that, during the beginning of the 2010-11 school year, the student's "behavior at school seemed to be . . . okay" (Tr. p. 1446). A behavior detail report recorded incidents at the school in which the student was involved from the

2003-04 school year through and including the 2010-11 school year (Dist. Ex. 13 at pp. 1-2). The behavior detail report included very few incidents leading up to the 2010-11 school year (id.). The report indicated that, in March 2011, the student received in-school suspension for drawing an inappropriate symbol (id. at p. 1; see Parent Ex. YY). The hearing record also shows that, in March 2011, the student received in-school suspension and detention for his involvement in "disrupting the normal dismissal process" and "assaulting another student" relating to an incident near the school buses that resulted in criminal charges (see Tr. p. 82, 417-18, 1457-58; Parent Ex. ZZ). The student's guidance counselor stated that the student's behaviors, as reported in the behavior detail report, did "not stand out . . . as a red flag," and that the student was a "typical middle school student," who did not cause trouble or act disrespectful (Tr. pp. 1101-02).

With respect to the student's behavior outside of school, the parents reported that, by the end of the 2009-10 school year, the student became "very antagonistic" and that, during the summer of 2010, he began associating with a new set of friends and "evading" his parents (Tr. pp. 1428-30). The student's guidance counselor testified that, in approximately September 2010, the parents contacted her and informed her that the student was experiencing "some problems at home" (Tr. pp. 1025-26). Nonetheless, the student's guidance counselor testified that she did not believe the student was "in crisis" during the 2010-11 school year, but rather that he had "issues going on at home that needed to be addressed" (Tr. p. 1110). The guidance counselor testified that, as of November, she did not refer the student for an evaluation or an assessment because the student was not exhibiting failing grades or social/emotional deficits in school, particularly not over a sustained period of time, and because the parents had certain supports in place outside of school (Tr. pp. 1192-93). In particular, the parents pursued the CCSI report, which culminated in a meeting in December 2010, attended by the district social worker, the student's guidance counselor, the student's English education teacher from the 2010-11 school year, the parents, and representatives from CCSI (Parent Ex. Exs. E at p. 1; PP). The meeting participants discussed the possibility that the student might have been suffering from depression (Tr. p. 1171; Parent Ex. DDD at pp. 8-9). The parents testified that, after the student's first hospitalization, his "antagonism" got worse (Tr. pp. 1448-50). The parents procured a private neuropsychological evaluation of the student shortly after the CCSI meeting and provided a copy to the district sometime between March and June, 2011 (Dist. Ex. 4 at p. 3; Parent Ex. EEE at pp. 20, 35; see Dist. Ex. 12).

Based on the parents' own testimony, the student's academic and behavioral needs did not surface in the school setting until the middle of the 2010-11 school year, shortly after which the student was referred to the CSE (Tr. pp. 1446-51, 1469-70, 2572-73; see Dist. Ex. 41). Furthermore, the evidence in the hearing record supports the conclusion that, initially, the student's negative behaviors occurred primarily outside of school and did not begin to adversely affect his academic performance until just before the parents' referral.

In summary, based upon the evidence contained in the hearing record as discussed above, I find that although there were some previous indications that the student was struggling, and, in particular, evidence of conflict within the home environment, the student's hospitalizations, declining grades, and negative behaviors in the school environment, all of which culminated during the period of time from January 2011 through May 2011 (see Dist. Exs. 8; 10; 11; Parent Exs. P at pp. 20, 22; YY; ZZ), it was reasonable for district personnel to conclude that there was insufficient evidence prior to May 2011 to attribute his decline to one of the disability categories in the IDEA

or that, even if there was such a disability, that special education services were necessary to address it. The parents referred the student to the CSE shortly after this period of time by letter dated May 31, 2011 (Dist. Ex. 41) and the CSE process began in a reasonable fashion thereafter. As such, the IHO's decision that the district did not violate its child obligation is supported by the evidence in the hearing record and the parents' request for compensatory education is denied.

C. September 2011 IEP: Interim Home Instruction

Initially, I must clarify which CSE recommendations are properly before me. The August 2011 IEP was superseded as a result of the September 2011 IEP meeting, which recommended consultant teacher services in the "interim placement home" (Dist. Ex. 2 at pp. 1, 6; see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Therefore, although the district largely defended, at the impartial hearing, the CSE's recommendation for an out-of-district "therapeutic day treatment program," that was not the recommendation on the IEP that was operative following the September 2011 CSE meeting (see Dist. Ex. 2 at pp. 1, 6).[12]

According to the district social worker, because the student was not available to attend intake appointments with potential out-of-district day treatment programs after the August 2011 CSE meeting, the September 2011 CSE recommended an interim placement, whereby the student would receive two hours per day of consultant teacher services in the home (Tr. p. 93).[13] The district offered little at the impartial hearing to establish how this recommendation for the student was appropriate even on an interim basis, relying instead on assertions that the parents conduct made such a recommendation inevitable.

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 district had several options available to it upon being informed by the parents that the student could not return to the district for intake interviews; however, it chose instead to recommend an "interim

[12] While not determinative in this case, I note that the CSE intended to locate an appropriate out-of-district therapeutic day treatment program for the student and that such a recommendation was discussed at the August and September 2011 CSE meetings and explained to the parents, but that neither the August nor the September 2011 IEP accurately reflected this recommendation (see Tr. pp. 824, 908-09, 1500, 1555-56, 1582-83, 3107; Dist. Exs. 1; 2; 48 at p. 2; Parent Exs. P at p. 2; Q at pp. 1-2; see also Parent Ex. VV).

[13] State regulations provide that consultant teacher services are designed to provide services to students with disabilities who attend regular education classes, or to their regular education teachers (8 NYCRR 200.6[d]). "Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher . . ., to a student with a disability to aid such student to benefit from the student's regular education classes," while "[i]ndirect consultant teacher services means consultation provided by a certified special education teacher . . . to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m][1], [2]). Although the IEP indicated that the consultant teacher services would be "indirect," the district social worker testified that the IEP should have said "direct" (Tr. p. 93; Dist. Ex. 2 at p. 1). The district administrator for middle school special education explained that the CSE intended that the services would be delivered by a teacher at the student's home (Tr. pp. 609-10).

placement" of home instruction. 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]). The Court further held that "participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents" (Anchorage Sch. Dist., 689 F.3d at 1055). In this case, by recommending an interim placement of home instruction without changing any other aspects of the IEP, it appears that the district was attempting to mitigate its inability to recommend a day treatment program and there is no indication that district personnel believed that home instruction was appropriate.

While the parent's refusal to produce the student at the day treatment program intake interviews may be a understandably challenging, or even frustrating experience for district personnel, it factors into equitable considerations, as discussed below, but it does not diminish the district's obligations to develop an appropriate educational program in an IEP. 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 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]).

With respect to the September 2011 CSE's recommendation for a home instruction interim placement, the parents allege that the district failed to have a final IEP in effect for the student at the beginning of the school year. The IDEA requires that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). While development of an interim IEP and delay in the creation of a final IEP may be appropriate under some circumstances, it may not stand as a substitute for a final IEP (see E.H., 2008 WL 3930028, at *9-*10 [finding an interim IEP appropriate where the parties contemplated that the student would remain in his home schooling placement to allow the parents to evaluate possible classrooms in anticipation of a final IEP and where the final IEP was complete by October]; see also McCallion, 2013 WL 237846, at *8). To ensure that the temporary placement does not become the child's final placement, CSEs should endeavor to develop an interim IEP with specific conditions and timelines, ensure that the parents are allowed to participate in the formation of the interim placement plan before it is carried out (and that prior written notice is issued), set a specific timeline and conduct a CSE meeting at the end thereof for the purpose of finalizing the IEP (see E.H., 2008 WL 3930028, at *9).

In the present case, the evidence in the hearing record shows that the district did none of the above to ensure that home instruction did not become the student's final placement. The September 2011 IEP specified that the anticipated dates for implementation of the "interim" placement included, in essence, the entire 2011-12 school year (Dist. Ex. 2 at p. 1). The parents

were not included in the development of the interim placement recommendation. The parents could not recall a discussion about home instruction during the September 2011 CSE meeting and testified that they were "confused" about the recommendation for home instruction, since all discussion leading up to and including the September 2011 CSE meeting revolved around a residential or therapeutic day program (Tr. p. 1582-83). Furthermore, while the district provided the parents with a prior written notice, the document did not provide an explanation for the CSE's recommendation for interim home instruction in conformity with the procedural safeguards of the IDEA and State regulations (Parent Ex. S at pp. 1-2; see 34 CFR 300.503[b]; see also 8 NYCRR 200.5[a]).

Moreover, while the district vigorously defended the appropriateness of a therapeutic day treatment program for the student, the hearing record is devoid of evidence supporting the appropriateness of home instruction for the student for an interim basis or otherwise. On the contrary, as exemplified by the evaluative information detailed above, the evidence in the hearing record reveals that the student struggled more in his home environment than in the school setting, making home instruction highly unlikely to result in any benefit for the student, meaningful or otherwise (Mrs. B., 103 F.3d at 1120; see Rowley, 458 U.S. at 192). Furthermore, there is no indication in the record how the district could ensure that the student's management needs, identified on the IEP (such as small structured supportive environment with intense therapeutic component and close supervision throughout the day) could be addressed in the home environment (see Dist. Ex. 2 at p. 3). Finally, there is little question that 10-hours per week of home instruction was not an appropriate level of instruction for the student, whose academic abilities were above average (see Dist. Ex. 12 at p. 9; see also W.C. v. Summit Bd. of Educ., 2007 WL 4591316 , at *6 [D.N.J. Dec. 31, 2007]).

D. March 2012 IEP

The district asserts that the CSE's recommendation for an interim home instruction placement continued to be appropriate for the student, in light of the parents' failure to ensure the student's attendance at intake interviews with potential day treatment programs.[14] For the same reasons as set forth above with respect to the September 2011 IEP, the district's recommendation for an interim home instruction placement was not appropriate for the student (see Dist. Ex. 3 at pp. 1, 6). On the contrary, the fact that the "interim" recommendation remained intact six months

[14] Although the parents did not raise issues relating to the March 2012 IEP in their due process complaint notice, the hearing record reveals that the district "opened the door" with respect to issues relating to the student's present levels of performance and the recommendations for consultant teacher services at the student's home contained in the March 2012 IEP by soliciting testimony from district witnesses (see, e.g., Tr. pp. 99-100, 377-79, 383-88, 425, 434, 437, 481-82). The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]).

after the September 2011 IEP, further supports the conclusion that the interim placement recommendation was not sufficiently limited in time.

Lastly, the district made much of the parent's obligation to produce the student for intake interviews, and I certainly understand the district's position. However, it is not difficult to imagine circumstances in which a student may be a district resident and entitled to a FAPE, but is out of State, and unable to return through no fault of the parents. In such a circumstance, a district is not going to be able to blame the parents for its own inability to identify, evaluate, and provide an educational placement to the student for the sole reason that the student is not physically present within the district. A school district in this unenviable position would nevertheless be well served to have procedures to address such a situation while maintaining compliance with the IDEA. In this case, I note only that the hearing record indicates that, while some of the day schools suggested by the district expressed the need to do face-to-face intake interviews on site during fall 2011, not all of them did.[15] As noted below, an alternative means of intake clearly became available in one instance later in the school year.

E. Appropriateness of Cherry Gulch

Having determined that the district did not offer the student a FAPE for the 2011-12 school year, I now turn to the appropriateness of the parents' unilateral placement of the student at Cherry Gulch. 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 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; 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

[15] It is also understandable why a State-approved day school program may initially indicate that as a routine procedure, a face-to-face interview is required, but there is no legal authority cited and no indication in this hearing record whether there are circumstances that mandate face-to-face interviews in all situations.

placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][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, at *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).

Cherry Gulch is described in the hearing record as a therapeutic boarding school catering to boys aged 10 to 14 with an academic program in a "special ed[ucation] environment," along with individual, group, and family therapy, as well as "in-the-moment" therapy as needed (Tr. pp. 1610-11). In considering the appropriateness of Cherry Gulch, the IHO detailed the educational and therapeutic resources available at Cherry Gulch, including the individualized service plan developed for the student (IHO Decision at pp. 39-41; see Tr. pp. 1610-19, 1622-23, 1632-33, 1643-44, 1662, 1665, 3031, 3034-35; Dist. Ex. 32; Parent Ex. FFFF). Furthermore, while indicating that the student's progress was not determinative, the IHO noted the "substantial educational progress" made by the student while attending Cherry Gulch (IHO Decision at p. 42; see Tr. pp. 1649-53, 1678, 2276-77, 3038-39; Parent Ex. GGGG).[16] The district failed to identify in its petition any grounds for reversal of these portions of the IHO's decision other than a generalized assertion that Cherry Gulch was not appropriate for the student. As detailed by the IHO, the evidence in the hearing record supports the conclusion that Cherry Gulch appropriately

[16] Although progress alone is not determinative of the appropriateness of a unilateral placement, it is a relevant consideration and "grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit" (Frank G., 459 F.3d at 364-65).

addressed the student's social/emotional and academic needs during the 2011-12 school year. Therefore, I find no reason to disturb this portion of the IHO's decision.

The district also asserts that Cherry Gulch was not the LRE for the student. 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 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]; see also Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 432 [3d Cir. 2013]). However, it is not necessary to select a particular test to employ in this case, as the Second Circuit has 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. Southhold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. 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] [holding that the essential question is whether the residential placement provides specially designed instruction and related services to meet the student's unique needs], cert. denied 133 S. Ct. 2857 [June 24, 2013]; 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]).[17]

Here, certain evaluators of the student opined that he required a residential placement to receive educational benefits (see Parent Exs. B; C at p. 2). Furthermore, the hearing record shows that the student was educated at Cherry Gulch in regular education classrooms with special

[17] 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"]).

education resources such as accommodations, and "[OT] interventions in the classroom," as well as access to therapists throughout the school day (Tr. pp. 2218-20).

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 Cherry Gulch was not so restrictive that it was inappropriate (see, e.g., C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981, 990-91 [8th Cir. 2011]). Under the circumstances of this case, 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). It is noteworthy that the parents acted under significant time constraints in finding a placement for the student; therefore, I afford less weight to the fact that the student was enrolled in an out-of-State residential school far away from his family and the district.

F. Equitable Considerations

The district asserts that the IHO erred in finding that equitable considerations weighed in favor of the parents' request for relief because the parents failed to make the student available for intake appointments with potential therapeutic day programs.

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; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 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"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 34 CFR 300.148[d]; see T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289, 295 [N.D.N.Y. 2012]; J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens, 2010 WL 1005165, at *10; 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]; see also Frank G., 459 F.3d at 363-64; Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public

expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24 [6th Cir. 2003]; Rafferty, 315 F.3d at 27); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district also challenges the reasonableness of the parent's selection of a residential placement rather than a day program. A parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits (Jennifer D. v New York City Dept. of Educ., 550 F. Supp. 2d 420, 436 [S.D.N.Y. 2008]). However, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]). Additionally, a parent's failure to locate a placement closer to home—to obviate the need for a residential placement—may be considered as a factor in reducing tuition reimbursement (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *10 [S.D.N.Y. Feb. 4, 2013]).

Notwithstanding the inappropriateness of the September 2011 CSE's recommendation for an interim home instruction placement, the hearing record shows that all members of the CSE, including the parents, were aware that the ultimate intent of the August and September 2011 CSEs was to recommend that the student attend an out-of-district day treatment program, once an appropriate program was identified and accepted the student (see Tr. pp. 824, 908-09, 1500, 1556, 1582-83, 3107; Dist. Exs. 1; 2; 48 at p. 2; Parent Ex. P at p. 2; Q at pp. 2; see also Parent Ex. VV). However, the evidence in the hearing record shows that the parents' failed to fully cooperate with the district during the placement process in attempting to locate an appropriate out-of-district day treatment program.

According to the district social worker, after the August 2011 CSE meeting, several referral packets were sent to out-of-district day treatment programs or placements (Tr. pp. 91-92; see Parent Exs. H-N). The hearing record reveals that the parents visited out-of-district day treatment programs but the student did not attend because, at the time of those visits, he was enrolled in either the out-of-state wilderness program or Cherry Gulch (Tr. pp. 187, 189-90; see Dist. Exs. 16; 19). While understandable that the parents wished to visit the day treatment programs to assess their appropriateness, the intake process is for the purpose of the school's assessment of the student. Moreover, the district repeatedly notified the parents of their obligation to ensure the student's availability for the intake process (see Dist. Exs. 14 at pp. 2, 5; 16; 22 at p. 1; 35 at p. 1). Importantly in this case, and distinguishable from circumstances in which it is undisputed that a student simply cannot be moved, the district also points to three occasions when the student visited the district in November and December 2011, about which the parents failed to notify the district or otherwise arrange for the student to participate in intake interviews with the day treatment programs (Tr. pp. 385-86, 396-97, 1525-26, 2979-80, 2984-85, 2991-92, 2994-96; Dist. Exs. 35 at pp. 1-2; 39). On the other hand, notwithstanding the parents' failure to ensure the student's

participation in the intake process, two schools rejected the student based on the referral packet sent by the district and indicated that he might require a residential placement; however, the district did not inform the parents of these rejections (Tr. pp. 3127-29; Parent Exs. N; Y). However, three other out-of-district day treatment programs indicated their inability to determine the appropriateness of the particular program for the student without an intake interview (see Dist. Exs. 17; 18; 20). Finally, with respect to the IHO's finding that the student's fragility justified the parents' refusal to ensure the student's attendance at the intake interviews, such a finding would carry more equitable weight if the hearing record established that the parents relayed such information to the district (see IHO Decision at p. 31).

Having considered the entirety of the hearing record, 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 for intake interviews with out-of-district day treatment programs, as well as the district's failure to conduct its own evaluations upon the student's referral to the CSE, properly and accurately develop the student's IEPs, properly complete a prior written notice, and communicate at the CSE the intentions with respect to the recommended "interim" placement. Furthermore, while not rising to the level of predetermination, the failure to explain the rigidity with which the district approached the process of developing an appropriate educational program for the student only made more difficult any attempts to appropriately meet the student's needs. 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 Cherry Gulch for the 2011-12 school year, upon satisfactory proof of payment by the parents (see J.S., 826 F.Supp.2d at 671-76).

G. Travel Expenses

The parents interpose a cross-appeal asserting that the IHO erred in declining to award them travel and hotel expenses relative to parents' and the student's visits to and from Cherry Gulch. State regulations authorize expenditures related to suitable transportation of the student "from the student's home to the school at the commencement of the school year, from the school to the student's home at the conclusion of the school year, and no more than three additional trips to and from school for students enrolled in a 10-month program, . . . except as additional trips may need to be provided for the periods during which residential care is not provided to the students attending such school" (8 NYCRR 200.12[a]). The Office of Special Education Programs of the U.S. Education Department has opined that the reimbursement of a child's parents for other transportation expenditures not involving transporting the child to and from school, such as to attend conferences at the school, must be determined on a case-by-case basis (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]; see also Letter to Dorman, 211 IDELR 70 [OSEP 1978]). The OSEP opinion indicated that parental trips to and from school which could be considered to be contributing to the achievement of the student's IEP annual goals would be included within the Federal definition of the term "related services" to be provided at no cost to the parents as part of the student's free appropriate public education **(**Letter to Anonymous, 213 IDELR 164 [OSEP 1988]; see also Luke P. v. Thompson R2-J Sch., 46 IDELR 70 [N.D. Ill. Nov. 25, 2003] [noting that such expenses must relate to genuine educational concerns in order to justify reimbursement]; Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 [9th Cir. 1994] [finding that "the

language and the spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses . . . as related services"]).

Upon the record before me, and taking into account the equitable considerations set forth above, as well as the IHO's observation regarding the lack of evidence "of any meaningful attempt by the parents to find a residential placement closer to the student's home" (IHO Decision at p. 44), I find that the parents are entitled to one-half of the requested expenditures relative to the student's travel to his home or the parents' travel to Cherry Gulch.[18]

VII. Conclusion

Based on the above, the hearing record shows that the district did not violate its child find obligations, the district failed to offer the student a FAPE for the 2011-12 school year, Cherry Gulch was an appropriate unilateral placement for the student, and that equitable considerations warranted a reduction of tuition reimbursement.

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 April 13, 2013 which found that the district failed to offer a FAPE and that equitable considerations supported the parents claim is modified to the extent described in the body of this decision; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the one-half of the student's tuition costs at Cherry Gulch for the 2011-12 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for one-half of the requested travel expenses incurred by the parents to the extent described in the body of this decision.

Dated: **Albany, New York**
January 31, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[18] The evidence in the hearing record does establish that family visits were a significant part of the therapeutic program at Cherry Gulch (Tr. pp. 1611, 1618, 1646, 1654, 1661, 1688).