The University of the State of New York

The State Education Department
State Review Officer
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No. 13-164

Application of the BOARD OF EDUCATION OF THE KATONAH-LEWISBORO UNION FREE 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:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, James P. Drohan, Esq., of counsel

Law Office of Deborah A. Ezbitski, attorneys for respondents, Deborah A. Ezbitski, 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') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Ironwood School and Residential Treatment Center (Ironwood) for the 2011-12 school year. The parents cross-appeal from the IHO's determination that equitable considerations required a reduction in the award of tuition reimbursement by fifty-five percent. The appeal must be sustained. The cross-appeal will be dismissed.

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

With respect to the student's educational history, the hearing record shows that the student was referred to the district's Case Study Team (CST) during January 2010 due to a continued decline in her academic performance, attendance problems, arriving to class late and leaving for "long periods of time," and inattentiveness, distractibility, and "home issues," all of which

contributed to her "downward spiral" (Dist. Ex. 4 at p. 19).[1] The CST met on January 15, 2010 and referred the student to the CSE for an initial evaluation (see Dist. Ex. 5 at pp. 21-22; see generally Dist. Ex. 6).

The CSE convened on March 23, 2010 to conduct the student's initial review and to determine the student's eligibility for special education (see Dist. Ex. 17A at p. 1).[2] Finding the student eligible for special education as a student with an other health-impairment, the March 2010 CSE recommended that, for the remainder of the 2009-10 school year, the student continue to attend a general education classroom and begin receiving one 30-minute session of individual counseling per week and daily 40-minute sessions of "academic support lab" services in an 8:1 group setting (id.). The March 2010 CSE also developed a second IEP for the student to be implemented during the 2010-11 school year (see Dist. Ex. 17B at p. 62). The March 2010 IEP for the 2010-11 school year recommended that the student receive daily 40-minute sessions of resource room services in a 5:1 group setting, as well as one 40-minute session per week of individual counseling (id.).[3]

Shortly after the March 2010 IEPs were developed, the student began receiving in-school suspensions for cutting classes and failing to comply with staff directions (Tr. pp. 449-50; Dist. Ex. 19 at pp. 70-74). On June 10, 2010, the student received a five day out-of-school suspension resulting from allegations that the student engaged in violent behavior toward another student and, consequently, a superintendent's hearing and a manifestation determination review (MDR) were scheduled (Tr. pp. 450-51; Dist. Ex. 21 at pp. 79-96). The student received tutoring services during the period of out-of-school suspension (see Dist. Ex. 23 at p. 107).

The CSE convened, on June 16, 2010, to review the student's educational program for the 2010-11 school year (see Dist. Ex. 23 at p. 103). The June 2010 discussed a range of options for the student for the 2010-2011 school year, including resource room services, a special class, and a therapeutic day program; however, the parents asked that recommendation for a more restrictive placement be postponed until information about the student's performance in summer school was available (id. at p. 108).[4] The June 2010 CSE recommended a general education class setting for

[1] Unlike the parent's exhibits, all of the district's exhibits are numbered cumulatively, in sequential order (e.g. the first page of District Exhibit 2 was enumerated as page "009" rather than Exhibit 2 page 1); however, the value of this approach is unclear and it made the parties' references to the district's exhibits difficult to follow in some instances. Reluctantly, the citations in this decision will rely on the district's assigned pagination. In addition, the hearing record contains many duplicative exhibits. Unless otherwise specified, only district exhibits are cited in instances where both a parent and a district exhibit are identical. The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). I also remind the IHO of his obligation to exclude evidence that he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

[2] The pagination of district exhibit 17A does not conform to the pagination assigned to the district's exhibits as a whole; this decision will refer to district exhibit 17A by reference to the page numbers handwritten on each page of the document (see Dist. Ex. 17A at pp. 1-7).

[3] The hearing record shows that both the academic support lab and the resource room offered the same type of special education support and both were taught by a special education teacher (Tr. p. 428).

[4] The mother informed the CSE that the student would attend for English and global studies (see Dist. Ex. 23 at p. 107).

science and mathematics and a 15:1 special class for English, social studies, and an "academic support period," as well as one counseling session per week (id. at pp. 103, 108). According to the June 2010 IEP, the student's therapist expressed to the CSE that the student's needs related to a diagnosis of an oppositional defiant disorder should be prioritized (id. at p. 107). The June 2010 IEP also reflects that the student remained involved with the persons in need of supervision (PINS) program (id.). The June 2010 CSE recommended that the student undergo a psychiatric evaluation and that the CSE reconvene after such evaluation (id. at p. 108). As per the CSE recommendation, the student underwent a psychiatric evaluation on June 21, 2010 (see Dist. Ex. 26).

Relative to the pending disciplinary matter, the district, student, and parents executed a stipulation of settlement (stipulation) on July 5 and August 8, 2010, respectively, which provided that the student would plead guilty to the disciplinary charges and that the parents and student would waive their rights to a superintendent's hearing, "as well as any other administrative and/or judicial proceedings pertaining to the discipline," and an MDR, as well as their right to appeal the matter (Dist. Ex. 21 at pp. 97-98). Pursuant to the stipulation, the student was immediately suspended for the remainder of the 2009-2010 school year and the first quarter of the 2010-11 school year (id. at pp. 98). The stipulation also required the student to consistently participate in private counseling and in alternative instruction provided by the district, consent to communications between the school and private counselors, and refrain from entering school grounds during the term of suspension (id. at pp. 98-99). Finally, the stipulation required that, when the student returned to school, she would meet regularly with the principal, participate in counseling, have her right to campus walk-off privileges revoked, and remain on probation during the rest of her time in the high school (id. at p. 99). The stipulation was made part of the student's disciplinary record (id. at p.100).

In accordance with the stipulation, the student served her out-of-school suspension and was subsequently permitted to return to the district high school on November 15, 2010, at the start of the second quarter of the 2010-11 school year (see Tr. p. 871; Dist. Ex. 21 at p. 98). However, shortly thereafter, on November 22, 2010, the student was admitted to the hospital for over one week and, on December 1, 2010, entered the hospital's outpatient day program (Tr. pp. 872-73, 876-77; Dist. Exs. 32 at p. 135; 39). The district provided academic instruction for the student for up to 10 hours per week while the student was admitted to the hospital and when she attended the hospital day program. (see Dist. Exs. 30; 31).

The CSE reconvened on December 6, 2010, to review the student's educational program (see Dist. Ex. 36 at pp. 147, 151). The December 2010 CSE reviewed, among other things, the June 2010 psychiatric evaluation report, including the diagnoses offered by the evaluating psychiatrist (id. at p. 151). The district informed the parents that "issues with drugs and alcohol and behaviors stemming from conduct disorder" were not within the purview of special education (id.). As to the student's educational placement, the student's mother preferred that the student return to the district high school, but the student's father expressed interest in an out-of-district program for the student (id. at p. 151; see Tr. p. 107). The December 2010 CSE recommended a search for an appropriate therapeutic day program and planned to reconvene after completing such a search (Dist. Ex. 36 at p. 151). On December 13, 2010, the district sent referral packets to six therapeutic day programs (Dist. Ex. 38 at pp. 158-63).

The hospital day program discharged the student on December 17, 2010 due to her "unwillingness to follow program rules" (Dist. Ex. 39; see Tr. pp. 877-79). After several attempts to schedule a CSE meeting in January 2011 (see Dist. Exs. 42-44), the CSE reconvened on February 4, 2011 (Dist. Ex. 47 at pp. 186, 190). The February 2011 CSE recommended that the student receive fifteen hours of home instruction and individual counseling during the timeframe that the district continued to search for a therapeutic day program (id. at pp. 186, 191). The tutoring was provided at the public library, and the mother testified the student "mostly" attended the sessions (Tr. p. 911).

Two of the six therapeutic day programs requested an intake interview with the student (Dist. Ex. 47 at p. 191). The other programs declined to accept the student into their programs (see Dist. Exs. 48 at pp. 198-201; 49).[5]

The CSE reconvened again on April 29, 2011 (Dist. Ex. 60 at pp. 220, 224).[6] The April 2011 CSE changed the eligibility classification to a student with an emotional disturbance (id. at p. 225). The CSE recommended that the 15 hours per week of home instruction be continued throughout the search process so that the student could continue earning academic credits (id.). As to the search for a therapeutic day program leading up to the April 2011 CSE meeting, the IEP documented that the parents and/or the student had refused to visit or participate in the intake process at a few different programs (id. at pp. 224-25). After the district informed the parent that the CSE would not recommend home instruction for the student as more than a temporary placement, the father and the student's private therapist agreed that intakes would be scheduled at two therapeutic day programs and that the student would participate in the intake process (id. at p. 225). A meeting was scheduled for May 31, 2011 to finalize the student's IEP (id.).

The district informed the parents, on May 12, 2011, that the student had been accepted at one of the therapeutic day programs (Dist. Ex. 73; see also Dist. Ex. 78 at pp. 276-77). The father responded, stating that the student needed a "therapeutic boarding school" for her needs related to diagnoses of borderline bipolar and oppositional defiant disorders (Dist. Ex. 75 at p. 262). He also stated that the student was "incapable of attending any program on her own and without supervision" and that a day program was "unsuitable and completely inappropriate" (id.). The father informed the district that the parents had "found a program that w[ould] work and w[ould] get [the student] back on track and possibly get her focused again on the idea of going to college" and, therefore, requested a CSE meeting to take place before May 31, 2011 to discuss the parents' proposal in detail (id.).

[5] Reasons provided by the day programs that declined the student admission into their programs, included: (1) the student attended the intake but then refused to spend a day in the program to determine acceptance; (2) the program did not have an opening; (3) the program did not offer appropriate services for the student's needs; and (4) the student required a more restrictive level of care (Dist. Exs. 48 at pp. 198-201; 49). In addition, the father informed the district that the student did not visit one of the remaining programs because she felt betrayed by the district (Dist. Ex. 50 at pp. 203-04).

[6] The district originally scheduled a CSE meeting for March 18, 2011, which the mother responded that she would attend; however, on the day of the meeting, the father requested a postponement so that he could consult with an attorney (Tr. p. 912; Dist. Exs. 52 at pp. 205-06; 53 at pp. 207-08; 56).

By correspondence to the district, dated May 15, 2011, the father reiterated his position that the student needed a "therapeutic-boarding/residential school" and that her therapist was in complete agreement that she would not cooperate with a day program (Dist. Ex. 77 at p. 270). He also informed the district about changing family dynamics and that the student had missed tutoring and intakes because of her defiance and inability to cooperate (id.). He thought that the student was "incapable and unwilling to get on the bus to and from all schools and programs" or to "attend[] any program on her own without supervision" (id. at p. 271). He expressed concerns about the district's handling of the student's education, including the "constant detention," suspensions, the lack of an MDR and superintendent's hearing, the district's failure to develop a transition plan when the student returned to school after the suspension and after the hospitalization, the district's failure to communicate with tutors during the student's absences, and the district's failure to develop a BIP to address the student's behavioral needs (id.). Based on these concerns, the father informed the district that he wanted to enroll the student at Ironwood, an out-of-state residential school that offered a "very restrictive environment" in a secluded setting, so there was "minimal" risk that the student could run away (id. at pp. 271-72). He indicated that, unless the district agreed to pay a percentage of the student's tuition at Ironwood, he intended to seek full tuition reimbursement at public expense (id. at p. 272). The hearing record reflects that the district responded to the father on May 16, 2011 and informed him that the district did not have the authority to recommend an out-of-state residential placement for the student (id. at p. 269).

On May 18, 2011, the father submitted an application for the student's enrollment at Ironwood (Dist. Ex. 92 at pp. 350-57). On May 25 and May 27, 2011, the parents executed enrollment contracts with Ironwood for the student's attendance, effective May 27, 2011 (id. at pp. 362-373).

On May 31, 2011, the CSE convened to develop the student's IEP for the 2011-2012 school year (Dist. Ex. 81 at p. 282).[7, 8] Finding the student eligible for special education as a student with an emotional disturbance, the May 2011 CSE recommended an 8:1+1 special class placement in a particular board of cooperative educational services (BOCES) program, as well as two 30-minute sessions of individual counseling per week (id. at pp. 282, 285, 290, 293). The May 2011 IEP also included modifications/accommodations for the student (clarification of directions, checks for understanding, refocusing and redirection, and preferential seating), as well as testing accommodations, indicated the student's need for a "therapeutic approach" to help "monitor risky behaviors and oppositional behaviors," and recommended development of a behavioral intervention plan (BIP) that "target[ed] school attendance, compliance, and task completion" (id. at pp. 287-88, 290-91). The annual goals included in the May 2011 IEP targeted the student's needs related to study skills and social/emotional/behavioral skills (id. at pp. 289-90). The May

[7] On May 30, 2011, the father informed the district that he had a job interview and asked that the CSE meeting, scheduled for the next day, be postponed; however, the district did not agree to his request (Dist. Exs. 80 at p. 280; 81 at p. 283). On May 31, 2011, the mother called in to the meeting and also asked to have the meeting postponed, but the district did not agree (Tr. pp. 936-37). The mother participated by telephone and, subsequently, arrived at the meeting (id.; see Dist. Ex. 81 at p. 283).

[8] Although the district CSE consultant, who attended the May 2011 CSE meeting, testified that the IEP was intended to be implemented immediately, the IEP reflects a projected start date of September 6, 2011 (see Tr. p. 648; Dist. Ex. 81 at p. 282).

2011 IEP also included a transition plan and recommended special transportation (id. at pp. 288-89, 292-93).

The mother did not agree with the recommendations in the May 2011 IEP and requested a residential placement (see Dist. Ex. 81 at pp. 283). By letter, dated May 31, 2011 and received by the district on June 15, 2011, the father expressed that the student could not attend a day program and attached a letter from the student's therapist in support of his position (Dist. Ex. 83 at p. 300). The private therapist stated that the student needed a residential placement "for a prolonged period of time so that significant change in behavior might be achieved" (id. at p. 302). The therapist included with his letter a letter that he had addressed to a family court judge on May 3, 2011, regarding the then-pending PINS petition (id. at pp. 303, 304-05). The attached letter set forth the therapist's understanding that the court had given the student two options: a boarding school (if accepted by one) or a court-determined placement (id. at p. 304). The letter informed the court that the therapist and student's treating psychiatrist agreed that the student required a "living situation that took her out of her home" in order for her to "make any improvement in her behavior" (id.).

According to the hearing record, the student enrolled at Ironwood as of June 9, 2011 (see Dist. Ex. 92 at p. 381; Parent Ex. QQQ at p. 1).[9] By letter, dated August 18, 2011, the father informed the district that he would be unilaterally placing the student at Ironwood at public expense (Parent Ex. III).

A. Due Process Complaint Notice

In a due process complaint, dated March 22, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2008-09 through 2011-12 school years (see generally Parent Ex. A). The parents alleged that the district failed to meet its child find obligations by not evaluating the student during the 2008-2009 school year and most of the 2009-10 school year, even though it had sufficient evidence that the student's behaviors had changed significantly around that time (id. at pp. 2-3, 6). For the 2009-10 school year, the parents alleged that the district failed to implement the March 2010 IEP for the remainder of the 2009-10 school year (id. at pp. 3, 6.).

Turning to the 2010-11 and 2011-12 school years, the parents asserted that they were denied the right to meaningfully participate in the decision-making process regarding the student's education as a consequence of the district's: failure to provide prior written notice; refusal to consider the recommendation of the student's doctors and therapist; and refusal to search for a therapeutic residential program for the student (Parent Ex. A at p. 7). In addition, specific to the 2010-11 school year, the parents alleged that the district failed to employ transition plans relative to the student's return to school after an extended out-of-school suspension and, again, after a hospitalization (id. at p. 4). With respect to the 2011-12 school year, the parents asserted that the district failed to reconvene at the beginning of the school year to review the student's IEP and consider the results of a psychiatric evaluation report (id. at pp. 4, 6). As to the May 2011 IEP, the parents argued that the recommended day BOCES program did not address the student's needs

[9] According to the hearing record, the student graduated from Ironwood on April 2, 2012 (Parent Ex. QQQ at p. 1).

and, particularly, did not take into account the student's propensity to run away (id. at p. 5). Relative to the IEPs developed for the student for both the 2010-11 and 2011-12 school year, the parents asserts that they were substantively and procedurally flawed because: the recommended educational programs did not offer sufficient instruction, supports, and services to allow the student to make educational progress; the annual goals were not specially designed to meet the student's needs and were not prepared or discussed at the CSE meetings; and the recommended counseling services were insufficient to meet the student's needs (id. at pp. 6 -7).

For a remedy, the parents requested that the IHO order the district to reimburse them for the cost of the student's tuition at Ironwood for the period of June 9, 2011 through June 30, 2012, as well as other related costs (Parent Ex. A at p. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 26, 2012 and concluded on November 27, 2012 after six days of proceeding (Tr. pp. 1-1193). In a decision dated July 28, 2013, the IHO found that the district denied the student a FAPE for the 2011-12 school year, that Ironwood constituted an appropriate unilateral placement, and that equitable considerations warranted a 55 percent reduction in the amount of tuition reimbursement awarded (IHO Decision at pp. 3, 17-25).[10]

Initially, the IHO held that the parents were estopped from raising any IDEA claims prior to the second quarter of the 2010-11 school year because of the stipulation they had executed with the district relating to the student's disciplinary charges (IHO Decision at p. 19). Next, the IHO held that the district should have updated its evaluations in November and/or December 2010, when the student returned to school after her suspension and, again, after her hospitalization, "to get to the root of the problem" rather than modifying the IEP and providing her with home instruction (id.). Specifically, the IHO held that the district should have conducted a functional behavioral assessment (FBA) to determine why the student could not function at school (id. at pp. 19-20). The IHO also held that the district should have updated the student's social history and that doing so would have "revealed the Family Court status, involved the law guardian and potentially provided access to the evaluative information which was the product of the substantial Family Court system" (id. at p. 20). The IHO further opined that such inquiry on the part of the district could have resulted in exploration of "[c]ustodial arrangements" and establishment of "a communication protocol" (id.). Additionally, the IHO found that the district should have done more to understand the breadth of the student's "problem behaviors," including her drug use, PINS involvement, arrest and assault, and starting a fire (id. at p. 21). The IHO opined that the district could have filed for an interim alternative education placement or pursued various court proceedings (id. at p. 22). The IHO concluded that the district's action in recommending home instruction under an interim IEP insufficient to address the student's significant social/emotional and behavioral concerns "that were at the heart of her educational decline" and that "[t]his lack of educational balance resulted in a denial of FAPE" (id.). Although finding that district's failure to evaluate "implicated the [s]tudent's right to a FAPE," the IHO determined that the student had not been deprived of an educational benefit as a result because she passed all of her academic courses

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[10] Although the IHO's decision is dated July 28, 2012, the IHO's decision cover letter to the parties, as well as the context of the surrounding proceedings, reveals that the actual date of the decision was on or about July 28, 2013 (see IHO Decision at p. 29).

but one during the 2010-11 school year (id.). The IHO also held that the district's actions, or lack thereof, had not impeded the parents' right to meaningfully participate in educational decision-making for the student (id.).

For the 2011-12 school year, the IHO referenced his analysis relative to the 2010-11 school year and found that the district again failed to update its evaluations and "discharge their duty to provide the [s]tudent a FAPE" (IHO Decision at p. 23). In so finding, the IHO relied heavily on the mother's testimony about the student's problems in tenth and eleventh grades and the emotional and academic impact of the lengthy suspension (id. at pp. 23-25). The IHO found that, if the district had conducted "proper evaluations," by the May 2011 CSE meeting, the district may have perceived "the emergency nature of the situation" (id. at p. 25).

As to the unilateral placement, the IHO found that, although the testimony of the two witnesses from Ironwood was "generic," "vague and speculative," and provided "nothing specific pertaining to the Student," the discharge summary was evidence that Ironwood had "helped the [s]tudent and her individual set of needs" (IHO Decision at p. 26). The IHO noted that the therapist's portion of the summary reported that the student had "learned to manage her behavior and emotions, improved her relationship with her parents, and [had become] committed to living a healthy lifestyle" (id. at p. 27). Additionally, the IHO observed that the student had obtained a high school diploma and had "future vocational and educational goals," including going to cosmetology school (id.). The IHO determined that the evidence in the discharge summary was sufficient to find that the parents met their burden of establishing the appropriateness of Ironwood (id.).

With regard to equitable considerations, the IHO faulted both parties for failing to communicate with each other (IHO Decision at p. 28). However, the IHO found that this failure did "not excuse the [p]arents who were ambiguous about providing the [d]istrict the statutory 10-day notice" or their "reticence" to inform the district of the student's drug use and other "dangerous" behaviors (id.). The IHO expressed "concern" about the "lack of information in the record" about the student's time at Ironwood—which he found was due to the student's "restraining" Ironwood's executive director from speaking directly about her case—as well as the lack of testimony from any treatment provider from Ironwood (id.). Because the IHO that the parents "barely" demonstrated the appropriateness of the unilateral placement and because the district "was prejudiced in their ability to challenge the [p]arents' case" as a consequent, the IHO ordered a that the award of tuition reimbursement be reduced by 55 percent (id. at pp. 28-29).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district deprived the student of a FAPE, that Ironwood was an appropriate unilateral placement, and that equitable considerations warranted relief in the form of partial reimbursement for Ironwood.

The district asserts the IHO could not validly conclude that the district had denied the student a FAPE in the 2010-11 school year because he had also held that the parents were estopped from raising any IDEA claims that occurred before the second quarter of 2010. The district argues that the district could not have conducted an FBA or developed a BIP for the student during the 2010-11 school year since the student was not available to be observed in the district public school.

The district further argues that the IHO's finding that the district failed to update the social history in January 2011 does not consider that less than 10 months had passed since the initial evaluation, that a psychiatric evaluation had been done in June 2010, and that the father had misinformed the district about the student's drug use. Because the IHO's determination that the district denied the student a FAPE was based on the foregoing erroneous procedural violations, the district contends that this portion of the decision is "clear error."

As to school year 2011-2012 school year, the district argues that the IHO erred in finding that the district failed to properly evaluate the student. The district notes that the May 2011 IEP called for the development of a BIP for the student. Further, the district asserts that, that the February 2011 and May 2011 CSEs had sufficient information about the student's needs related to her social history and her behaviors and addressed those needs, as evidenced by the CSEs' decision to change the student's eligibility classification, the development of new annual goals relating to behavior, and the determination to search for and, ultimately, recommend a therapeutic day program. Further, the district asserts that the February 2011 and May 2011 IEPs accurately reflected the student's present levels of performance.

The district next asserts that the IHO erred in finding Ironwood was not an appropriate unilateral placement. The district argues that the parents presented no objective evidence that the student made progress at the unilateral placement or that the placement had an individual plan to address the student's needs. With respect to equitable considerations, the district argues that the parents' conduct "constituted such bad faith" that the IHO erred by failing to the deny the parents' request for tuition reimbursement in full.

In an answer and cross-appeal, the parents respond to the district's petition with admissions and denials of the allegations raised therein and asserting that the IHO correctly determined that the district failed to offer the student a FAPE and that Ironwood was an appropriate unilateral placement. In their cross-appeal, the parents assert that the IHO erred in his determinations concerning equitable considerations and the subsequent reduction of tuition reimbursement. Specifically, the parents assert that they did not impede the district's efforts to develop appropriate IEPs for the student, did not hide information from the district, and participated in the intake process for therapeutic day programs. Therefore, the parents seek an order requiring the district to reimburse them for the entire costs of the student's tuition, as well as the cost of transportation to and from Ironwood and "costs and fees."[11]

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

[11] The parents request that the matter be remanded to the IHO to determine the amount of transportation costs.

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. App'x 718, 720, 2010 WL 3242234 [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, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8

NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

As the parents did not assert a cross-appeal of the IHO's decision that the district's procedural violations did not rise to the level of a denial of a FAPE, that determination has become final and binding on the parties (IHO Decision at p. 22; see Educ. Law § 4404[1]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992,

at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[12] Moreover, review of the parents' due process complaint notice reveals that the parents did not request any relief to address their FAPE allegations other than tuition reimbursement for the student's attendance at Ironwood for the 2011-12 school year (see Parent Ex. A at p. 8).[13] As such, the only school year which must be reviewed is the student's 2011-12 school year. This does not, however, foreclose the review of events that occurred or evaluative information recorded about the student prior to the relevant timeframe, which was known by or available to the CSE when it developed the disputed IEP.

B. 2011-2012 School Year

1. Evaluative Information

The IHO largely based his determination that the district deprived the student of a FAPE for the 2011-12 school year on a finding that the CSE had insufficient evaluative information about the student and failed to conduct an FBA (see IHO Decision at p. 23). While it does not appear that these particular claims were before the IHO to review (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]; see generally Parent Ex. A), a review of the hearing record indicates that the CSE had before it ample information about the student, sufficient to understand the student's behavioral and other needs and to develop an IEP for the student's 2011-12 school year.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); additionally, a district must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related

[12] While there is some ambiguity in the IHO's ultimate determination regarding the 2010-11 school year (see IHO Decision at p. 22), on appeal, the parents frame the procedural violations identified by the IHO for the 2010-11 school year as supportive of his finding of a denial of FAPE for the 2011-12, rather than arguing that such violations resulted in a denial of a FAPE for the 2010-11 school year (see Parent Mem. of Law at p. 4 n. 1).

[13] Therefore, it is at least questionable whether or not the parents' claims relating to school years prior to the 2011-12 were "real and live," and not "academic" and, therefore, moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin, 583 F. Supp. 2d at 428; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]).

to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). As part of an initial evaluation or reevaluation, a group, which includes the CSE, must review existing evaluation data (8 NYCRR 200.4[b][5][i]; see 20 U.S.C. 1414[c][1][A]). Based on that review, the CSE, with input from the student's parents, must determine whether and what additional data are needed (8 NYCRR 200.4[b][5][ii]; see 20 U.S.C. 1414[c][1][B]).

The hearing record reflects that the January 2011 CSE considered several sources of evaluative information which, collectively, contained a significant amount of information regarding the student, including a February 2010 psychological evaluation report, a February 2010 educational evaluation report, a March 2010 classroom observation report, a March 2010 social history report, a June 2010 psychiatric evaluation report, a December 2010 progress report, and a December 2010 assessment evaluation report and discharge summary from the hospital day program, as well as the student's educational records and information from the student's parents and treating therapist (see Dist. Exs. 60 at p. 226; 81 at pp. 283-85; see generally Dist. Exs. 10; 11; 13; 15; 26; 32; 33; 39; 40).

According to the February 2010 psychological evaluation report, although the student had difficulty sustaining attention and appeared to lack self-confidence, she was able to focus when prompts and reminders were provided (Dist. Ex. 10 at p. 38). Administration of the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), yielded results indicating that the student's her intellectual functioning was in the average range (id. at p. 39). The student's subtest scores varied, with verbal comprehension in the above average range, perceptual reasoning and working memory in the average range, and processing speed in the low average range (id. at pp. 39-40). The psychologist also administered the Behavior Assessment Scale for Children (BASC-2), a self-reporting form, to assess the student's social/emotional functioning (id. at p. 41; see Tr. p. 65). According to this measure, the student reported organizational problems, feeling restless in class, "a constant need to keep moving," and a strained relationship with her mother (Dist. Ex. 10 at p. 41). The February 2010 educational evaluation report reported an assessment of the student's academic achievement based on administration of the Woodcock-Johnson III Test of Achievement (Dist. Ex. 11 at p. 43). The student's scores all fell in the average range, except for passage comprehension, which was in the low average range. (id.).

A district special education teacher conducted the March 2010 classroom observation during the student's geometry class (Dist. Ex. 13; see Tr. p. 71). The student did not know that she was being observed (Dist. Ex. 13). The observer noted the following: the student asked to leave the classroom after being there for eight minutes; she did not have her homework; and she was able to actively work with a partner after an initial period of letting her partner do the majority of the work (id.). The observer also reported that the student was able to follow directions, focus on her work, take notes, and complete the classroom work. (id.).

A district social worker completed the March 2010 social history report after interviewing both parents (Dist. Ex. 15 at p. 50).[14] According to the report, the father expressed concern about the student's focusing and attentional problems and said that a tutor told him that the student had a reading deficit. (id. at pp. 50, 54). The mother felt that the student's academic problems were related to anxiety. (id.). Although the student had moved back into the district to live with the mother about two months before the interview, the father reported she had been commuting from his out-of-state residence for the prior two years, which had "contributed to the attendance issues that [the student] ha[d] experienced" (id. at p. 51; see Tr. p. 974). The report acknowledged the impact of the parents' separation on the student's functioning (Dist. Ex. 15 at p. 51). According to the report, the parents described the student as exhibiting anxiety, having mood swings, and involvement in "at-risk" activities (id. at p. 52). The parents reported a change in the student, noting an increasing tendency to be argumentative, aggressive, and at odds with peers and adults (id. at p. 53). According to the report, the student was working with two private therapists at the time of social history (id.).

A November 2010 progress report from the student's home tutor relative to the first marking period of the 2010-11 school year reflected that the student benefited from the tutoring and received passing grades but tended to exhibit "little self-motivation" and a limited attention span (see Dist. Ex. 33 at p. 1).

In the June 2010 psychiatric evaluation report, the psychiatrist determined that the student met the criteria for diagnoses of attention deficit hyperactivity disorder (ADHD)–combined type, significant impulsivity, and anxiety disorder–not otherwise specified (NOS), and exhibited features of depressive and oppositional defiant disorders (Dist. Ex. 26. at p. 118). The report stated that "low frustration tolerance and impulsivity, core symptoms of ADHD, contributed to the student's maladaptive behaviors at school" (id.). The psychiatrist recommended additions and modifications to the student's medications, and that she continue in therapy, noting, in particular, that family therapy was "crucial" to address the family stressors contributing to her problems (id.).

The December 2010 hospital assessment evaluation report indicated that the student met the criteria for diagnoses of cannabis abuse, conduct disorder adolescent onset, and mood disorder–NOS (Dist. Ex. 32 at p. 138). The report also summarized the student's risky behavior and defiance of her parents, her behaviors and poor performance in school, her drug use, as well as her anxiety and irritability (id. at p. 136). The December 2010 hospital day program discharge summary indicated that the student was discharged from the program for not following rules (Dist. Ex. 39). The summary indicated that the student exhibited an unwillingness to look at how her behaviors were connected to her addiction (id.). Additionally, the summary noted that, based on misinformation provided by the student to the mother, the parents did not attend family group (id.). The December 2010 educational report, from the student's tutor during the period of per participation in the hospital day program, described the student as conscientious, cooperative, and compliant and indicated that she showed progress in her work (Dist. Ex. 40 at pp. 166-67).

[14] Contrary to the IHO's determination that the March 2010 social history report was untimely, given the information available to the May 2011 CSE as a whole, including information provided by the parents, there is no indication in the hearing record that an updated social history would have yielded any novel or different information.

Turning to the IHO's determination that an FBA was missing from the information about the student available to the CSE, while the student's need for a BIP must be documented in the IEP and, prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]). Initially, as described above, the May 2011 CSE had before it significant amount of information about the student's behavioral needs. In addition, there is merit to the district's assertion that an FBA would have lacked utility if conducted during the time leading up the May 2011 CSE meeting because the student spent the 2010-11 school year in a variety of environments, including the district high school, the home, and in both an inpatient and outpatient hospital program. Given this shifting context, the FBA may not have yielded information that would be useful to the educators in the new context of the recommended BOCES program.

Based on the foregoing, the hearing record supports a finding that the May 2011 CSE had before it sufficient information about the student to develop her IEP for the 2012-13 school year.

2. 8:1+1 Special Class in BOCES Program

Turning to the 2011-12 school year, the crux of the parties dispute relates to the May 2011 CSE's recommendation of an 8:1+1 special class placement in a BOCES program, as opposed to the parents' preference for a residential school (see Dist. Ex. 81 at pp. 282, 290, 293).

According to comments included in the May 2011 IEP, the 8:1+1 special class in the BOCES program was located on one floor of "a specialized building" and offered the student access to "a consulting psychiatrist and two social workers attached to the program" (Dist. Ex. 81 at p. 283). The IEP further described that the student would be able to obtain the necessary credits to graduate from with a Regents diploma in the recommended BOCES program (id.). District staff who had worked with the student supported the proposed program, both academically and in terms of her behavioral and social/emotional needs (id.).

Testimony from the impartial hearing further supports a finding that the BOCES program addressed the parents' concerns, discussed at the May 2011 CSE meeting, about the student's elopement and attendance, and the school's ability to handle the student's behavioral problems (see, e.g., Tr. pp. 174, 182-83, 259-65, 650-51). According to the social worker and the special education supervisor from the BOCES program, the other students in the program exhibited behavioral challenges similar to the student and the program utilized incentives and consequences to address behavioral needs and offered clinical and therapeutic interventions are provided throughout the day (Tr. pp. 174, 260-62, 264-65). The CSE consultant testified that the May 2011 CSE described to the mother that the BOCES location had security monitors at each of the two exits and that, given the parents' concerns, the district would request that the student not be permitted to leave the building at lunchtime (which was, in any event, a privilege the students at the program were required to earn) (Tr. pp. 650-51; see also Tr. pp. 182-83).

In addition to the significant support offered by the therapeutic day program, the May 2011 IEP also recommended counseling, annual goals to address the student's study skills and social/emotional and behavioral needs, and development of a BIP to target school attendance, compliance, and task completion (Dist. Ex. 81 at pp. 288-290). In particular, annual goals targeted to address the student's study skills included: being prepared for all academic classes with appropriate materials and supplies on time; turning in homework assignments on time; and, with prompts, refocusing on an assigned activity when distracted (id.). The social/emotional and behavioral goals included: identifying three situations that would lead to mood changes and identifying and implementing methods of dealing with anxiety, complying with classroom rules and teacher directive, arriving on time for class and activities, remaining in class for the entire class/period, attending school every school day for the entire length of the school day, and identifying three effective methods to cope with emotional stress or difficult life situations instead of self-destructive methods (id.).

While the parents' preference for a residential placement for the student was understandable given the student's risky and volatile behaviors, a residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v Monroe-Woodbury Cent. Sch. Dist., 296 Fed Appx 126, 128, 2008 WL 4507592 [2d Cir 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. L. § 4402[2][b][2]; 8 NYCRR 200.6[j][iii][d]).[15] While, the father informed the district, on May 12, 2011, of his preference for a residential placement for the student (Dist. Ex. 75 at p. 262), the CSE was already well into its search for an appropriate therapeutic day program for the student, no evaluative information reviewed by the May 2011 CSE included mention of a residential placement for the student, and the father did not offer the written recommendation of the student's private therapist for a residential placement until after the May 2011 CSE meeting (Dist. Ex. 83 at p. 300). Indeed, less than a year earlier, the mother rightly expressed hesitation when the June 2010 CSE discussed a "more restrictive" special class or therapeutic day program placement for the student—options considerably less restrictive than a residential placement (see Dist. Ex. 23 at p. 103). While it is clear that the student's needs escalated subsequent to the June 2010 CSE meeting, the supportive and therapeutic educational program recommended in the May 2011 IEP targeted these needs. The CSE was obligated to approach the student's serious needs with care; however, the IDEA further required the district to offer the student a FAPE in the LRE, and the hearing record supports a finding that the BOCES program represented the correct balance in this instance.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Ironwood was appropriate for the student or

[15] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

whether equitable considerations weighed in favor of the parents' request relief (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED THAT that the IHO's decision, dated July 28, 2013, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2011-12 school years; and

IT IS FURTHER ORDERED THAT that the IHO's decision, dated July 28, 2013, is modified by reversing that portion which ordered the district to reimburse the parents for the costs of the student's tuition at Ironwood for the 2011-12 school year.

Dated: **Albany, New York**
April 16, 2015

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JUSTYN P. BATES
STATE REVIEW OFFICER