The University of the State of New York

The State Education Department
State Review Officer
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No. 15-116

**Application of the BOARD OF EDUCATION OF THE WEST GENESEE 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:**
Ferrara Fiorenza, PC, attorneys for petitioner, Susan T. Johns, Esq., of counsel

Getnick, Livingston, Atkinson & Priori, LLP, attorneys for respondent, Patrick G. Radel, 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 respondent's (the parent's) daughter and ordered it to reimburse the parent for the costs of the student's tuition at the Carlbrook School (Carlbrook) for the 2014-15 school year and for a portion of the 2015-16 school year. The appeal must be sustained in part.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, 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 began attending a district middle school in sixth grade (see Tr. pp. 134-36).[1] The student attended the same district middle school for seventh grade, but for eighth grade, the parent decided to home school the student due to her increasing headaches and "anxiety"

[1] Prior to sixth grade, the student attended a nonpublic school (see Tr. p. 135).

(see Tr. pp. 136-39; Dist. Ex. 10; see also Tr. p. 35).[2,3] For ninth grade during the 2011-12 school year, the parent reenrolled the student in the district high school because the student expressed an interest in participating in extracurricular activities, such as the "color guard" in the marching band (see Tr. p. 139; Dist. Ex. 7 at pp. 1, 3-7). The student completed ninth grade at the district high school, earning 7.50 credits and passing all of her classes—including Regents courses and Regents examinations—with a final overall average of 80.85 (see Dist. Ex. 7 at p. 5). According to the student's final report card for the 2011-12 school year, the student was absent from classes between "10" to "27" times (Dist. Ex. 7 at p. 5).

For 10th grade during the 2012-13 school year, the student continued to attend the district high school (see generally Dist. Exs. 19-20; 29). On November 1, 2012, the student was admitted to a hospital due to "increased depressed mood and self[-]injurious behavior" (Dist. Ex. 8 at p. 2). Following a "decrease in acute mental health symptoms," the hospital discharged the student on November 8, 2012, and released the student to return to school on November 9, 2012 with no restrictions, other than recommending "[a]dditional support [and] guidance as needed" (Dist. Ex. 9). Additionally, in a letter to a "[s]chool [o]fficial" dated November 8, 2012, hospital staff recommended that a "CSE meeting be held to determine if a [section] 504 plan would be appropriate to help [the student] transition back to her home and school environment" (Dist. Ex. 8 at p. 2).[4] Upon receipt of the November 8, 2012 letter, a district counselor referred the student to the district's "Building Educational Support Team" (BEST), noting in the referral that the student "struggle[d] with concentration and anxiety due to severe depression" and that the parent and the student's doctors expressed "concern about [the student's] anxiety upon returning to school" (Dist. Ex. 10; see Tr. pp. 30-36).[5] The district counselor also noted in the BEST referral that the student "might benefit from a copy of class notes and extra time to complete assignments," the parent home schooled the student for eighth grade "due to anxiety," and that she, herself, would "meet with [the student] regularly" (Dist. Ex. 10).[6] According to the BEST referral, the district counselor notified the student's teachers "regularly" about the student's "mental state when she need[ed] assistance organizing and prioritizing her work load" (id.).

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[2] During the student's attendance at a district middle school, the parent requested an evaluation of the student to assess her for "any learning disabilities" (Tr. p. 148). At that time, the district did not evaluate the student, but instead, the district met with the parent and then provided the student with a "reading lab" for approximately one year (Tr. pp. 148-49). The parent testified that when she decided to home school the student for eighth grade, she did not pursue her request to evaluate the student and "dropped the issue" (id.).

[3] Both regular education and special education students may receive instruction at home or outside of school (see 8 NYCRR 100.10, 175.21[a], 200.6[i]). For example, students may be home schooled by their parents (8 NYCRR 100.10); students with disabilities may receive home or hospital instruction as a placement on the continuum of services (8 NYCRR 200.6[i]; see 8 NYCRR 200.1[w]); or students may receive homebound instruction if they are "unable to attend school because of physical, mental, or emotional illness or injury" (8 NYCRR 175.21[a]; see Educ. Law § 3602[1][d]).

[4] See 29 U.S.C. § 794 (1998) (Section 504 of the Rehabilitation Act of 1973) (section 504).

[5] During the November 2012 hospitalization, the student received the following diagnoses: "Major Depression Single episode severe without psychosis" but with a history of "separation anxiety" (Dist. Ex. 8 at p. 1).

[6] At the impartial hearing, the district counselor testified that she "initiated the process of determining if a [section] 504 plan or an IEP was needed by holding a BEST meeting, . . . , as per [the district's] process" (Tr. pp. 32-33).

As a result of the BEST meeting held on November 27, 2012, the district prepared a "Student Improvement Plan," initiated school-based counseling services (one session per week with the district counselor), and noted that the student needed positive reinforcement and a schedule for the student to attend "Interaction Time" (see Dist. Ex. 11-12).[7,8] Based upon information provided by the student's teachers who attended the BEST meeting, the student did not require additional time for testing; however, notes taken during the BEST meeting reflected that the student's "absences" affected her "anxiety level [and] work load" and that she needed to complete some assignments (Dist. Ex. 11). The "Student Improvement Plan" identified the "Skill Deficit Targeted for Intervention" as the student's "anxiety and absenteeism (as a result of her mental health issues)" (Dist. Ex. 12 at p. 1). The BEST team identified the goal of the "Student Improvement Plan" as allowing the student to "make up all missed assignments" and to "seek assistance if it [was] needed" (id.). In addition, the "Student Improvement Plan" included interventions to be used with the student, how to assess the student's progress, who would be responsible for implementing the interventions with the student, and the criteria for evaluating the student's success with the plan (id. at pp. 1-2).[9] Based upon the BEST meeting, the district determined that the student need not be referred for a section 504 plan or an IEP (see Dist. Ex. 12 at p. 2; see also Tr. pp. 42-46).

In an e-mail dated April 10, 2013, the parent contacted the district counselor to "elaborate" upon their previous telephone conversation (Dist. Ex. 13 at p. 1). In the e-mail, the parent agreed that while the student exhibited "passive aggressive issues" similar to "many teenagers," other issues existed with the student, including "learning issues . . . , anger issues, [and] emotional problems" (id.). Among other things, the parent indicated that the student's depression had improved, but "stress" triggered the student's anxiety and she believed the student was in danger of "failing and repeating some courses" (id.). At that time, the parent wondered what else the district could do to "help" the student, noting that the district "refused to test her for any learning disability" and the student had been "denied" a "504 plan" (id.).[10] The parent also expressed

[7] During spring 2012, the student began receiving counseling outside of school (private counseling) (see Tr. pp. 139-41). The student continued to receive private counseling services throughout the 2012-13 and 2013-14 school years (see Tr. pp. 141-42, 151-52; Dist. Exs. 17 at p. 1; 25 at p. 1).

[8] The district's "Interaction Time" allowed students to stay after school for a 40-minute period to "meet with their teachers or other support to get academic assistance" (Tr. pp. 72-73).

[9] The interventions recommended for the student included the following: positive reinforcement to engage the student in lessons when she experienced "'bad' days," reducing assignments or requesting that the student meet with the teachers during "Interaction Time" to make up work, communicating with the parent regarding work the student needed to make up, initiating regular communication between the district counselor and the student's private counselor and the development of an "at-risk/safety plan" for the student, initiating communication between the district's school nurse and the student's district counselor when the student visited the nurse's office, and initiating weekly check-ins with the student by the district counselor (Dist. Ex. 12 at p. 1). The BEST team determined that the student's progress would be assessed every five weeks and the criteria for evaluating the student's success would be based upon the following: whether the student attended school and whether the student received passing grades in her classes (id. at p. 2).

[10] At the impartial hearing, the parent clarified in testimony that these statements in the April 10, 2013 e-mail referred to the experience in middle school when she requested that the district evaluate the student (compare Dist. Ex. 13 at p. 1, with Tr. pp. 148-49).

appreciation to the district for providing the student with "extra time to complete assignments"—noting, however, that regardless of these efforts, the student continued to "ignore[] them" (id.).

On April 11, 2013, the parent sent another e-mail to the district counselor (see Dist. Ex. 14 at p. 1). In this e-mail, the parent noted that her "last email was to ask for a plan for [the student]," and the parent then explained an additional diagnosis the student received during her hospitalization in November 2012, the effect of this diagnosis on the student's social/emotional health and her relationships, and the potential district programs that the student may be interested in attending for 11th grade (id. at pp. 1-2).[11] On or around April 19, 2013, the district counselor received "[a]nother referral" for the student, and she discussed this information with the district school psychologist (Dist. Ex. 12 at p. 2; see Tr. pp. 46-48). At that time, the district decided to "start [a] 504 application" for the student; however, on April 24, 2013—the same date the district counselor was scheduled to meet with the parent to discuss the section 504 application—the student received an out-of-school suspension and the district did not proceed with the section 504 application (Dist. Ex. 12 at p. 2; see Tr. pp. 48-49, 150-51; Dist. Exs. 13 at p. 2; 16).[12]

In a letter dated April 28, 2013, the student's private counselor—at the parent's request—wrote to the district counselor concerning the student's recent out-of-school suspension (see Dist. Ex. 17). In part, the private counselor noted that the student's "academic performance" fell "below average due to her lack of motivation to complete assignments, as well as her struggles with mental illness" (id.). The private counselor further noted that it appeared that the student's "current setting" was not "working for her," and the student "would benefit from finishing out the school year as well as the rest of her academic years in an alternative" program (id.). Moreover, the private counselor recommended that if an alternative setting was not available, the student "should be assigned to the in school suspension program versus in home suspension" given the parent's "limited supports" (id.). The private counselor also indicated that in light of the student's "history of suicidal ideation, self[-]harming behaviors and anxiety," the student required "supervision and academic instructions" to complete the school year (id.).

Based upon the evidence in the hearing record, the district provided the student with home instruction during her suspension, and then thereafter, through the conclusion of the 2012-13 school year because the student did not return to school (see Dist. Ex. 30 at p. 1; see also Tr. pp. 52, 115, 151). Although the student completed 10th grade, she only earned 2.50 credits and failed all but three of her classes (Living Environment science, dance, and physical education)—including Regents courses and Regents examinations—with a final overall average of 64.35 (see Dist. Ex. 29; see also Dist. Exs. 19-20).[13] According to the student's third quarter report card for

[11] The evidence in the hearing record indicates that the district counselor telephoned the parent in response to the April 2013 e-mails to discuss a variety of topics with the parent, including the following: the differences between a learning disability and a section 504 plan; alternative district programs for the student to attend; a section 504 plan; and that teachers did not observe "learning needs" with the student as much as "attendance," "mental health," and "anxiety" issues with the student (Dist. Ex. 13 at p. 2; see Tr. pp. 50-53).

[12] On April 23, 2013, the district's school nurse sent an e-mail to the district counselor expressing concerns about the student (see Dist. Ex. 15).

[13] During summer 2013, the student completed additional coursework and earned 2.00 credits: one credit for English 10 (final average, 84) and one credit for Global History 10 (Regents examination, 70; final average, 86) (see Dist. Ex. 29).

the 2012-13 school year, the student was absent from classes between "3" to "29" times (Dist. Ex. 19 at p. 2; see Dist. Ex. 30 at pp. 1-2 [documenting a total of approximately 29 absences for the 2012-13 school year]).[14]

For 11th grade during the 2013-14 school year, the student returned to the district and attended courses at the district high school and at a Board of Cooperative Educational Services (BOCES) program as selected and agreed to by the student and parent (see Tr. pp. 46-49, 79-80, 90-98, 100-01, 157-61; Dist. Ex. 21 at p. 2; see generally Dist. Exs. 22-23; 27-29).[15] On October 24, 2013, the student was admitted to a hospital for "escalating depressive symptoms and anxiety as well as a concern for safety relating to suicidal ideation" (Dist. Ex. 25 at p. 1). At the time of her discharge from the hospital on October 31, 2013, the student received the following diagnoses: mood disorder not otherwise specified (NOS), post-traumatic stress disorder, learning disorder NOS, and migraine without aura (see id. at p. 3). The discharge checklist included recommendations for individual counseling, family counseling, and a continued medication regimen (id. at p. 2). Following discharge, the student returned to school and continued to attend the program at the district high school and BOCES until February 2014 (see Dist. Exs. 28 at pp. 4-5; 30 at pp. 3-4). At that time, the student stopped attending school due to personal relationship difficulties, which caused her to experience "more severe depression and a lack of motivation, anxieties" (Tr. pp. 162-63).[16] Between February 2014 and June 2014, the district provided home instruction to the student pursuant to a request from the student's psychiatrist (see Tr. pp. 163-64; Dist. Ex. 30 at pp. 3-4). The student completed 11th grade, earning 6.75 credits and passing all but one of her classes (physical education)—including Regents courses and Regents examinations—with a final overall average of 69.64 (see Dist. Ex. 29; see also Dist. Exs. 19-20).[17] According to the student's third quarter report card, the student was absent from classes between "4" to "43" times (Dist. Ex. 28 at p. 4; see Dist. Ex. 30 at pp. 3-4 [documenting a total of approximately 89 absences for the 2013-14 school year]).[18]

During summer 2014, the parent sent the student to an eight-week wilderness program to address the student's "[substance] use and behavior" (Tr. pp. 165-69). Following the student's completion of the wilderness program and with the assistance of an "academic adviser," the parent

[14] The total number of absences results from tallying the first column in the document, which denoted the student as "absent," regardless of the reason noted for the student's absence on a particular date (Dist. Ex. 30 at pp. 1-2).

[15] The district high school component of the student's 11th grade program included one study hall that provided the student with access to a social worker and a teacher assistant (see Tr. pp. 47, 95-96).

[16] The student's BOCES program during 11th grade required her to participate in a certain number of instructional hours in order to complete the program (see Tr. pp. 79-81, 84-85, 161). Eventually, the student's increasing absences forced her to drop the BOCES program; however, to enable the student to continue to earn credit toward graduation, the district counselor enrolled the student in an online science class for the remainder of the 2013-14 school year (see Tr. pp. 79-81, 84-85, 105, 109-12, 116, 120-21, 161; Dist. Exs. 28-29).

[17] The student's final report card for 11th grade indicated that she earned 9.75 credits during the 2013-14 school year with a final overall average of 70.55 (see Dist. Ex. 28 at p. 5). Based upon the student's school transcript, at the conclusion of 11th grade the student had earned a total of 18.75 credits out of the 22.00 credits required in order to graduate from high school (see Tr. pp. 111-12; Dist. Ex. 29).

[18] The total number of absences results from tallying the first column in the document, which denoted the student as "absent," regardless of the reason noted for the student's absence on a particular date (Dist. Ex. 30 at pp. 3-4).

unilaterally placed the student at Carlbrook (see Tr. pp. 169-72).[19] On or about September 10, 2014, the student began attending a 15-month program at Carlbrook (see Tr. pp. 173-75).

### A. Due Process Complaint Notice

By due process complaint notice dated March 25, 2015, the parent asserted that based upon the district's failure to "evaluate and identify" the student as a student with a disability, the parent enrolled the student at Carlbrook in September 2014 in order to address her "educational needs" (Dist. Ex. 1 at p. 4). The parent indicated that the student had "documented mental health issues," which resulted in two separate hospitalizations to "treat her mental health issues" (id.). Upon discharge from the November 2012 hospitalization, the parent alleged that the district failed to act upon a recommendation made to evaluate the student (id.). The parent also alleged that upon a request by the student's psychiatrist following the second hospitalization in "November 2013," the student remained "out of school for nearly the entire [s]pring 2014 semester" (id.). In addition, the parent noted that although the district provided the student with "homebound services during this time," the district failed to evaluate the student for an "educational disability" (id.).

After exploring "private school settings," the parent noted that Carlbrook accepted the student and Carlbrook provided the student with "on-site counseling" and a psychiatrist to "monitor medication in a very structured setting" (Dist. Ex. 1 at p. 4). The parent indicated that "even if" the district evaluated the student and determined that she was a "student with a disability," the district could not provide the student with the "services" offered at Carlbrook (id.). As relief, the parent requested reimbursement for the costs of the student's tuition at Carlbrook for the "duration of her enrollment" (id.).

### B. Impartial Hearing Officer Decision

On July 9 and 10, 2015, the parties conducted the impartial hearing (see Tr. pp. 1-249). In a decision dated November 9, 2015, the IHO found that the district violated its child find obligations for the 2012-13 and 2013-14 school years, and thus, the district failed to offer the student a free appropriate public education (FAPE) for both the 2012-13 and 2013-14 school years; the student met the criteria to be eligible for special education and related services as a student with an emotional disturbance for the 2012-13 and 2013-14 school years; and Carlbrook was an appropriate unilateral placement for the student (see IHO Decision at pp. 16-32). The IHO also found equitable considerations did not bar or otherwise limit the parent's entitlement to tuition reimbursement for the costs of the student's attendance at Carlbrook for the 2014-15 school year and for a portion of the 2015-16 school year (September 2015 through December 2015) (id. at pp. 33-35). As relief, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Carlbrook as an award of compensatory educational services (id. at pp. 33-36).

With regard to child find, the IHO initially found that the district failed to present any evidence describing the child find procedures it used to "identify students . . . who [were] suspected of having a disability and referring" those students to the CSE for an evaluation (IHO Decision at p. 16). Additionally, while testimonial evidence indicated that the district used prereferral procedures with the student—in particular, the "BEST" procedures and providing counseling with

[19] The Commissioner of Education has not approved Carlbrook as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

the district counselor—the IHO found that the hearing record lacked sufficient evidence to determine whether the district had child find procedures in place to "guide [d]istrict staff in identifying students that may have a disability and referring them for an evaluation" (id. at pp. 16-17). As a result, the IHO found that the absence of sufficient evidence regarding the district's child find procedures contributed to a finding that the district failed to offer the student a FAPE (id. at p. 17).

Next, the IHO determined that for the 2012-13 school year, the district violated its child find obligations, and thus, failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at p. 17). More specifically, the IHO found that the district failed to identify the student as a "student suspected of having a disability" in light of the "significant" decline in the student's grades and attendance during ninth grade and the subsequent "intensity" of the student's social/emotional issues during the 2012-13 school year in 10th grade (id. at pp. 17-18). The IHO also noted that the district failed to refer the student to the CSE despite its receipt of a "discharge report recommending a referral" to the CSE following the student's hospitalization in November 2012 (id. at p. 18). Additionally, even though the district held a BEST meeting and created a "Student Improvement Plan" after the student's discharge, the IHO indicated that the district did not evaluate the student (id.). Moreover, the IHO noted that the district's school psychologist was not "involved in providing any services" to the student or "monitoring" the student notwithstanding her "very significant mental health issues, including anxiety and depression that were impacting [the student's] grades and attendance" (id.). The IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year based, in part, upon the district school psychologist's lack of involvement with the student in addressing her "'significant mental health needs'" (id.).

The IHO also determined that several instances triggered the district's child find obligation to refer the student to the CSE for an evaluation, including the following: the parent's April 13, 2013 e-mail to the district counselor, the private counselor's April 28, 2013 letter to the district counselor, the district school nurse's observations of the student's together with "other information" about the student's "inability to function appropriately in school because of emotional problems," the student's "underperformance academically and social-emotionally"—noting specifically the student's "failing grades and chronic absenteeism" during the 2012-13 school year, and the student's inability to "remain in school and make progress" (IHO Decision at pp. 18-21).[20] Therefore, the IHO also concluded that the district failed to offer the student a FAPE for the 2012-13 school year based, in part, upon its failure to evaluate the student in response to these triggering events and its failure to following the child find procedures (id.).

Having concluded that the district violated its child find obligations, the IHO then found that based upon the evidence in the hearing record the student met all five of the criteria to be eligible for special education and related services as a student with an emotional disturbance for the 2012-13 school year (see IHO Decision at pp. 21-23). The IHO rejected the district's arguments that the student's "emotional difficulties centered on substance abuse or social maladjustment," noting that the student's November 2012 hospital discharge report did not mention such "issues as relevant to the student' anxiety or depression" (id. at pp. 23-24). Thus, the IHO determined that

[20] It appears that the IHO mistakenly reported the date of the parent's e-mail to the district counselor, dated April 10, 2013, in the decision because the evidence in the hearing record does not include an e-mail from the parent to the district counselor dated "April 13, 2013" (see Dist. Exs. 13-14).

the district's failure to "classify the student" resulted in a finding that the district failed to offer the student a FAPE (id. at p. 23).

Turning to the district's child find obligations related to the 2013-14 school year, the IHO initially indicated that the hearing record did not reflect "any improvement" in the student's ability to function at school or that the change in the student's program (i.e., the addition of the BOCES component) reduced the student's "symptoms of emotional disturbance" or otherwise improved the student's "academic performance" (IHO Decision at p. 24). The IHO further noted that at the time of the student's second hospitalization in "November 2013" due to her "escalating depressive symptoms and anxiety as well as a concern for safety related to suicidal ideation," the student's academic performance fell below that expected of a "solid 'B' student" and continued to decline during the 2013-14 school year (id.).[21] The IHO also noted the student's inability to remain at school due to her "emotional difficulties" after February 2014 (id. at pp. 24-25). Based upon the evidence in the hearing record, the IHO determined that the student's "attendance . . . remained abysmal;" that she was absent between "15" to "85" times in particular classes; and due to mounting absences, the student could not continue with the BOCES component of her 11th grade program (id. at p. 25). In addition, the IHO indicated that the student's successful completion of an online science class evidenced her "inability to achieve academically in the regular school environment because of her emotional issues despite having the capability of doing so" (id.). In light of the foregoing, the IHO concluded that the district remained responsible under its child find obligations to "learn" about the student's "continued inability to attend school and her inability to perform even close to her 'B' potential academically," and thus, the district violated its child find obligations for the 2013-14 school year and failed to evaluate the student in "all areas of suspected disability" (id.).

Having concluded that the district violated its child find obligations, the IHO then found that based upon the evidence in the hearing record the student continued to meet all five of the criteria to be eligible for special education and related services as a student with an emotional disturbance for the 2013-14 school year (see IHO Decision at pp. 25-26). In summary, the IHO noted that the district's failure to refer the student to the CSE, its failure to evaluate the student, and its failure to "classify" the student during the 2013-14 school year supported a finding that the district failed to offer the student a FAPE for the 2013-14 school year (id. at p. 26). Finally, the IHO noted that the evidence in the hearing record did not support a finding that "substance abuse or maladjusted behaviors factored into [the student's] emotional difficulties in school" (id.).

Next, the IHO turned briefly to the issue of relief in this case (see IHO Decision at p. 26). The IHO found that because Carlbrook was an appropriate unilateral placement for the student, the parent was entitled to tuition reimbursement for the 2014-15 school year—as well as a portion of the 2015-16 school year—as a "compensatory award" (id.). The IHO then analyzed the issue of whether the student's placement at Carlbrook was appropriate (id. at pp. 26-33). According to the IHO, although the hearing record was "not optimal" because the parent's case relied "almost exclusively on parent testimony with minimal documentation from the school," the IHO found that

[21] Although the parent's due process complaint notice and the IHO's decision both referred to the student's second hospitalization as the "November 2013" hospitalization, the evidence in the hearing record reveals that the student was actually hospitalized from October 24, 2013 through October 31, 2013 (compare Dist. Ex. 1 at p. 4, and IHO Decision at p. 24, with Dist. Exs. 25-26). For purposes of clarity, the student's second hospitalization will be referred to as the "October 2013" hospitalization throughout the decision.

the "parent's testimony was thorough and credible" and thus, "sufficient to support the appropriateness" of Carlbrook (id. at p. 28-29).

In finding Carlbrook an appropriate unilateral placement, the IHO first acknowledged that the parent's decision to place the student in an eight-week wilderness program prior to the student's enrollment at Carlbrook was appropriate (see IHO Decision at p. 29). The IHO indicated that through the wilderness program, the student became "available to learn by engaging in therapy to address mal-adoptive [sic] behaviors and [substance] use, and build self-awareness" (id.). As to the student's placement at Carlbrook, the IHO found that the parent relied upon "appropriate information" in making the decision to send the student to Carlbrook and by hiring an "education consultant . . . to locate appropriate educational programs" for the student—especially when the parent had no district evaluations of the student to assist her in making the decision (id.). Based upon the evidence in the hearing record, the IHO found that the parent's selection of a "therapeutic boarding school" was appropriate and supported by the district's "documented failures of the student," including the following: the student's "poor academic performance in the regular school setting, chronic absenteeism from classes, substantial depression and anxiety in school, multiple hospitalizations, and the need to be removed from school for prolonged periods" of time during both the 2012-13 and the 2013-14 school years (id.).

According to the IHO, the parent identified several "necessary" supports for the student at Carlbrook:

> therapy in a controlled environment, positive reinforcement of behavior, removal from the environment triggering anxiety and depression, monitoring by the school for [illegal substances], small school environment (approximately 65 students), small classrooms with a better student-teacher ratio of 6:1 or smaller, a structured environment in and out of school, mandatory study halls, tutoring, and, importantly, individual and group therapy by licensed therapists, and therapists available throughout the day and evening

(IHO Decision at p. 30). In addition, the IHO noted that the parent identified "[o]ther reasons" for selecting Carlbrook for the student: "remote location to reduce exposure to inappropriate activities or substances, integration of boys and girls for social development, formal dress code, and honor system" (id.). Based upon this evidence, the IHO concluded that Carlbrook was "reasonably calculated to result in student progress" and therefore, was appropriate to meet the student's needs (id.).

Next, the IHO discussed the student's progress at Carlbrook (see IHO Decision at pp. 31-32). While noting that the student's progress was not a necessary factor in determining whether Carlbrook was an appropriate unilateral placement, the IHO nonetheless concluded that the student made "significant progress" academically between September 2014 and May 2015—earning 4.50 credits—and further noting that by July 2015, the student expected to earn and additional 1.50 credits (id. at p. 31). Moreover, the IHO found that the student made "very significant social/emotional progress, which enabled her to make the academic gains" (id.). The IHO rejected the district's arguments that Carlbrook was not appropriate because it did not "use special education strategies to instruct students" and the student did not "need such supports in any event" (id. at p. 32). However, in rejecting those arguments, the IHO did note that while he agreed that the student

"did not have any particular learning issues requiring special education," the IHO "disagreed with the idea that she had no special education needs"—noting in particular that the student did not perform "close to her academic capability in the regular school setting" for at least two years, the student was "chronically absent" due to her "emotional disturbance," and the student was "out of school entirely for prolonged periods" as a result of the "same emotional issues interfering with her learning in school" (id.). The IHO also rejected the district's argument that Carlbrook was not an appropriate unilateral placement based upon least restrictive environment (LRE) considerations (id. at pp. 32-33).

Upon examining equitable considerations, the IHO found that while the parent did not provide the district with "timely notice" of her intentions to remove the student from the public school and to enroll the student at Carlbrook at district expense, the district failed to present sufficient evidence to conclude that it informed the parent of her responsibility to provide such notice (IHO Decision at pp. 33-34). The IHO also indicated that the parent's "alleged desire to remove [the student] from the home environment to be educated" did not weigh against the parent as an "equitable factor against reimbursement" (id. at p. 34). Finally, the IHO rejected the district's argument that Carlbrook's monthly tuition costs were "unreasonable" because it included "activities outside the school day in the community" (id. at pp. 34-35).

Turning to relief, the IHO found that the evidence in the hearing record supported an award of 1.5 years of compensatory educational services to remedy the district's failure to offer the student a FAPE from approximately "March or April, 2013 and continuing through the end of the 2013/14 school year" (IHO Decision at p. 35). The IHO further explained that the compensatory educational services award "should result in [the student] obtaining a high school diploma if obtainable" in approximately 1.5 years (id.). However, given that the student only needed 4.00 additional credits to earn a high school diploma when she left the district, the IHO found no evidence in the hearing record to find that the student "must attend Carlbrook in the 2015/16 school year until December, 2015 in order to obtain a high school diploma" (id.). Therefore, the IHO declined to "order payment until appropriate evidence [was] produced" (id.). In summary, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Carlbrook for the 2014-15 school year and for a portion of the 2015-16 school year upon appropriate proof of payment and attendance (id. at p. 36).

## IV. Appeal for State-Level Review

The district appeals, and initially asserts that the IHO erred in finding that the district did not have a child find process in place or procedures to assist district staff in identifying students suspected of having a disability. Next, the district alleges that the IHO erred in finding that the district violated its child find obligations for the 2012-13 and 2013-14 school years. Similarly, the district contends that the IHO erred in finding that the student was eligible for special education and related services as a student with an emotional disturbance for both the 2012-13 and 2013-14 school years. With regard to the parent's unilateral placement, the district argues that the IHO erred in finding that Carlbrook was appropriate to meet the student's needs. Finally, the district asserts that the IHO erred in finding that equitable considerations did not bar an award of tuition reimbursement or compensatory educational services.

In an answer, the parent responds to the district's allegations and argues to uphold the IHO's decision in its entirety.[22]

## 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, 180-83, 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]). 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).

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

[22] Consistent with State regulation and upon request by an SRO, the parent submitted additional documentary evidence for the limited purpose regarding whether the student completed her program at Carlbrook, when the student completed such program, and proof of the student's attendance at Carlbrook from September 2015 through December 2015 (see Answer Exs. A-F [including the parent's affidavit and supplemental affidavit]; 8 NYCRR 279.10[b]). The district also submitted additional documentary evidence pursuant to the same request by an SRO, which indicated that the district did not "issue a high school diploma" to the student.

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]). 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]).

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]), 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]).

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).

## VI. Discussion

### A. Child Find

Initially, the district contends the IHO erred in finding that the district did not have a "process to identify students with an IDEA disability" and that the district was required to have "specific criteria or procedures to 'guide [d]istrict staff in identifying students that may have a disability and referring them for an evaluation by the CSE.'" In particular, the district argues that it is not under any legal requirement to have any "written guidelines with instructions" in place to identify students suspected of having a disability, and the IHO's findings ignore State law requiring a district to implement pre-referral interventions with a student prior to referring the student for

special education.[23] In opposition, the parent argues that the IHO correctly determined that the absence of evidence in the hearing record describing the district's child find policies and procedures contributed to the district's failure to offer the student a FAPE.

The "child find" provision of the IDEA places an ongoing, affirmative duty on State and local educational agencies to develop policies and procedures to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111[a][1][i]; 8 NYCRR 200.2[a]; see Forest Grove, 557 U.S. at 245; Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 659-60 [S.D.N.Y. 2011]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 224-25 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). Courts have interpreted the child find obligation as "distinct from the requirement [for a school district] to provide [a] FAPE to its residents" (E.T., 2012 WL 5936537, at *11, quoting Dist. of Columbia v. Abramson, 493 F. Supp. 2d 80, 85 [D.D.C. 2007]; see also 20 U.S.C. § 1412[a][10][A][ii]; 8 NYCRR 200.2[a][7]).

At the impartial hearing, the district's director of special education (director or director of special education) testified about the district's process for referring students to the CSE (see Tr. pp. 122-33). The director acknowledged that the district could receive referrals to the CSE in a "number of ways," including from "outside physicians or clinical psychologists," from district staff, and from parents (Tr. p. 122). The director testified that if a staff member at the district's high school believed a student required an IEP, the district's process required the staff member to first list the student's name on the "agenda for the administrators to review," and then "it [got] placed on BEST" (Tr. p. 123). The director also testified that the "purpose" of the BEST meeting was to "look at the student's history, look at their cumulative file, take a look at inside and outside things that may be going on with the student, to look at current interventions and then to make sure that we've provided interventions for a duration of time" (Tr. p. 124).[24] Then, if the BEST team determined that there was a "possibility that an educational disability exist[ed], they complete[d] a referral packet and sen[t] it to [the director of special education]" (Tr. pp. 123-24). Additionally, the director testified that the BEST team would "typically re-meet" to review whether the interventions implemented with the student resulted in progress (Tr. pp. 124-25).

[23] In support of its argument that a district must implement pre-referral interventions prior to referring a student for special education, the district cites to Education Law §4401-a and 8 NYCRR 200.2(b)(7). However, neither legal authority supports the district's argument: rather, both the State law and regulation require that a district "must adopt a written policy that establishes administrative practices and procedures" for implementing "school-wide approaches, which may include a response to intervention process pursuant to section 100.2(ii) of this Title, and preferral interventions in order to remediate a student's performance prior to a referral for special education" (8 NYCRR200.2[b][7]; see Educ. Law §4401-a[5]). Moreover, Education Law §4401-a[3] specifically indicates that "[n]othing contained in this section shall in any way impede a [CSE] from continuing its duties and functions under this article with regard to a student referred for special education or a parent's access to the committee, except that, if the parent concurs in writing with the building administrator to the provision of educational alternatives to special education, the referral shall be deemed withdrawn" (Educ. Law §4401-a[3]).

[24] The director testified that she did not attend BEST meetings unless invited, which occurred "very infrequent[ly]" (Tr. p. 133).

The director testified that if she, herself, received a letter from a parent directly referring a student to the CSE, the district followed a different process: she forwarded the parent's letter and a copy of a "procedural flowchart" to the "building administrator," who would meet with the parent to determine whether to "move forward with the CSE referral" or whether the parent would "withdraw" the referral and "wait to see what other interventions [the district could] put into place" (Tr. pp. 132-33). The director further testified that the district followed a similar process when a student was referred to the CSE from an "outside source:" that is, advancing a copy of the referral letter and the procedural flowchart to the building administrator to determine, with the parent, whether to move forward with the CSE referral or whether to withdraw the referral in order for the district to implement other interventions (Tr. pp. 128-29). Notably, the director never received "any information" indicating that this particular student needed "special education services," and she was not otherwise "aware of her as a student" until the district received the "request for the due process" (Tr. pp. 126-27).

Therefore, while the IHO faulted the district for not presenting any documentary evidence upon which to conclude that the district had written child find policies and procedures, the hearing record does contain some evidence describing the district's child find policies and procedures as implemented through the district's BEST or pre-referral process (compare IHO Decision at pp. 16-17, with Tr. pp. 122-33). Neither the IHO nor the parent points to any legal authority for the proposition that a district must have written policies and procedures in place to satisfy its child find obligations under the IDEA, its implementing regulations, State law, or State regulations. However, regardless of whether the district had written child find policies and procedures in place, the evidence in the hearing record supports the IHO's conclusion that the district did not satisfy its child find obligations for the 2012-13 and 2013-14 school years.

**1. 2012-13 School Year**

Turning first to the 2012-13 school year, the district argues that the IHO erred in determining that it failed to identify the student as suspected of having a disability based upon the student's declining grades, and the student's "'emotional immaturity'" and "'inability to handle stress and other anxieties in school.'" The district also contends that the IHO erred in characterizing the student's November 2012 hospitalization and accompanying discharge report, the parent's April 2013 e-mail to the district counselor, the private counselor's April 2013 letter to the district counselor, and the student's "academic and social/emotional underperformance" and "chronic absenteeism" as triggering the district's child find obligation to refer the student to the CSE. The parent rejects these assertions and argues that the IHO properly characterized the abovementioned events as triggering the district's child find obligation to refer the student to the CSE and to evaluate the student. Upon review and consideration, the evidence in the hearing record initially supports a finding that the district violated its child find obligations by failing to refer the student to the CSE for an evaluation upon its receipt of a discharge report recommending that a CSE meeting be held, which constitutes a procedural violation that, in this case, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student for the 2012-13 school year.

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for

special education programs and services" (8 NYCRR 200.4[a]).[25] If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]; see also 34 CFR 300.300[a]). State regulations also provide that upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]).[26] Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

Here, it is undisputed that the district counselor received a discharge report and letter, dated November 8, 2012 following the student's discharge from the hospital, within which hospital staff recommended that a "CSE meeting be held to determine if a [section] 504 plan would be appropriate to help [the student] transition back to her home and school environment" (Dist. Ex. 8 at p. 2). At the impartial hearing, the district counselor testified that upon receipt of this letter, she found the "terminology was a little confusing because a CSE meeting [was] not held for a 504 plan," explaining further that a "504 plan [was] separate from [the] CSE" and the district did not hold a CSE meeting to "determine if a 504 plan [was] appropriate" for a student (Tr. p. 32; see Tr. pp. 67-68).[27] But rather than clarifying her own confusion about the "terminology" of the November 2012 letter by either contacting the hospital staff who signed the letter or seeking guidance from district staff, such as the director of special education, the district counselor—based upon her own "feeling" and her own interpretation of the November 2012 letter—thought the student "may need a medical plan to help her transition back to school from this setting," and therefore, she did not forward the letter to the CSE chairperson (or to the director of special education) to initiate an evaluation of the student (Tr. pp. 32-33; see Dist. Ex. 8 at p. 2; see also Tr. pp. 126-27). Instead, the district counselor referred the student to BEST through the district's process to determine whether the student required a 504 plan or an IEP (see Tr. pp. 32-33; Dist. Exs. 10-12).

Although the November 2012 letter recommended that a CSE meeting be convened, the district counselor essentially disregarded the need for a CSE meeting and read unnecessary requirements for specific language into the applicable State regulations; however there is no such mandate that a request to refer the student to the CSE for an evaluation must include any specific

[25] A district "must initiate a referral and promptly request parental consent to evaluate the student" to determine whether 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 programs (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

[26] It appears that the district acted in accordance with State regulations when the parent requested an evaluation of the student during middle school (see Tr. pp. 148-49).

[27] According to the district counselor, if a student needed to be referred to the "504 committee," the process required a BEST meeting and the BEST team would make a determination regarding whether to "make an application" for a section 504 plan to another individual at the district (Tr. pp. 107-08).

language (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]; Dist. Ex. 8 at p. 2). As a result, the district counselor ignored circumstances at hand and the plain language of the State regulations that required her to immediately forward the request to the CSE chairperson, wherein the district must, within 10 days of receipt of the referral, have requested the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]). In addition to withholding the November 2012 letter from the CSE chairperson, the hearing record is devoid of any evidence that the district counselor—or for that matter, any employee of the district—contacted the parent to discuss the November 2012 letter from hospital staff recommending that the district hold a CSE meeting to determine if the student needed a section 504 plan (see Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F). In failing to contact the parent about the November 2012 letter referring the student to the CSE, the district effectively cut the parent out of the process of determining whether to move forward with the referral and initiate an evaluation or to determine whether the student would benefit from additional general education support services as an alternative to special education (see 8 NYCRR 200.4[a][9]; see also Educ. Law §4401-a[3]). Here, the district's failure to act in accordance with State regulation constitutes a procedural violation, which resulted in the district's failure to refer the student to the CSE and to evaluate the student and which significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student for the 2012-13 school year (see Simmons v. Pittsburg Unified Sch. Dist., 2014 WL 2738214, at *11 [N.D. Cal. June 11, 2014]).[28]

Even assuming for the sake of argument, as the district contends, that the district counselor reasonably interpreted the November 2012 letter as recommending a "medical plan" to assist the student's transition back to school and she was not required by regulation to immediately refer the student to the CSE, the evidence in the hearing record supports a finding that the district violated its child find obligations.

The "child find" requirements apply to "[c]hildren 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 CFR 300.111[c][1]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S., 826 F. Supp. 2d at 660). 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. Dist. of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool 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).[29] A district's child find duty is triggered when the district has "'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, quoting New Paltz, 307 F. Supp. 2d at 400 n.13). Additionally, the "standard for triggering the

[28] Additionally, State regulations did not preclude the district counselor from pursuing both a referral to the CSE as well as a referral to the district's BEST process (8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]–[a][5]).

[29] However, a student may be referred by a student's parent or person in parental relationship (see 34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).

Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability" (Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D.Conn. Aug. 7, 2009]). To support a finding that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent in failing to order testing,' or there must have been 'no rational justification for not deciding to evaluate'" (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

In resolving the merits of a child find claim, the first inquiry focuses on when the district suspected or should have suspected that the student had a disability. The evidence in the hearing record reveals that, aside from the receipt of the November 2012 letter recommending a CSE meeting, the district had sufficient information about the student at the time of the November 2012 BEST meeting to suspect that the student was a student with a disability, and the district should have referred the student to the CSE for an evaluation.

At the impartial hearing, the district counselor testified that she first became familiar with the student when the parent registered the student prior to ninth grade (see Tr. p. 25). At that time, the parent made the district counselor aware of "some of [the student's] needs" (id.). The district counselor acted as the student's guidance counselor for ninth grade (see Tr. pp. 25-26).

At the impartial hearing, the district counselor testified that she knew about the student's November 2012 hospitalization prior to receiving the November 8, 2012 facsimile alerting her to both the student's discharge from the hospital and the student's diagnoses of major depression, single episode severe without psychosis, and history of separation anxiety (see Tr. pp. 30-32; Dist. Ex. 8 at p. 1). At that time, the district counselor understood that the student's hospital admission was as a result of "having difficulty, emotional difficulty" (Tr. p. 30). The district counselor also testified that she knew about "a lot of situations" in the student's life at that time, including the death of her father after a long illness, recent medical diagnoses of the student's mother and extended family members, and the student's "difficulties with peer relationships that caused her some anxiety" (Tr. pp. 30-31). At the impartial hearing, the district counselor characterized the student's difficulties with peer relationships as "normal teenage girl, . . . , drama" (Tr. p. 31; see Tr. pp. 66-67 [noting, however, that after she became aware of the student's hospitalization in November 2012, the district counselor no longer thought that the student had "normal teenage anxiety"]). In addition to receiving the November 8, 2012 facsimile regarding the student's discharge, the district counselor also received a physician release form, dated November 8, 2012, which indicated the student's need for "[a]dditional support [and] guidance as needed" (Dist. Ex. 9; see Tr. pp. 32-33). The district counselor interpreted this recommendation as a need for her to be "checking in with [the student], finding out if she need[ed] anything, [and] checking in with teachers to see what they're seeing," which the district counselor did (Tr. p. 33; see Dist. Ex. 9).

In the referral to BEST, dated November 8, 2012, the district counselor reported the reason for the referral as the student's "struggles with concentration and anxiety due to severe depression" and that the parent and the student's doctors expressed "concern about [the student's] anxiety upon returning to school" (Dist. Ex. 10; see Tr. pp. 30-36).[30] At the impartial hearing, the district counselor explained that at that time, she was aware that the student "was having a difficult time

[30] At the impartial hearing, the district counselor testified that when she sent the BEST referral to a district administrator, she attached documentation from the student's hospitalization—entered into evidence as District Exhibits 8 and 9—to the BEST referral (see Tr. p. 34).

due to her anxiety and depression and then coming back from the hospitalization, wanted to address those concerns in the classroom" (Tr. p. 34). The district counselor also noted in the BEST referral that the student "might benefit from a copy of class notes and extra time to complete assignments," the parent home schooled the student for eighth grade "due to anxiety," and that she, herself, would "meet with [the student] regularly" (Dist. Ex. 10).[31] Finally, in the BEST referral, the district counselor indicated that she notified the student's teachers "regularly" about the student's "mental state when she need[ed] assistance organizing and prioritizing her work load" (Dist. Ex. 10).

On November 19, 2012, the district counselor; a district school psychologist; and the student's science, English, and mathematics teachers conducted the BEST meeting (see Dist. Ex. 11). At the impartial hearing, the parent testified that she first became aware of the November 2012 BEST meeting in her attorney's office the previous week (i.e., late June or early July 2015) (see Tr. pp. 1, 145). The parent also testified that no one "directly" sought her input for the BEST meeting (Tr. p. 145).[32] As noted previously, the director of special education also did not attend—nor was she invited to attend—the BEST meeting (see Tr. pp. 36-37, 126-27, 133; Dist. Ex. 11).

In addition to having knowledge about the student's November 2012 hospitalization and resulting diagnoses, the BEST meeting notes revealed that the district staff attending the meeting were also aware that the student's "suicidal ideation continue[d]," she received diagnoses of "anxiety [and] depression," the student exhibited self-harming behaviors (i.e., "cutting"), and the student continued to be "at risk [for] suicide" (Dist. Ex. 11; see Tr. pp. 37-38 [describing the district counselor's knowledge of the student's suicidal ideation and self-harming behaviors]).[33] The BEST meeting notes also documented the district staff's awareness that the student received privately obtained counseling services "outside of school" and that "peer influence" was an "issue" for the student (Dist. Ex. 11). In addition, a review of the BEST meeting minutes reveals information provided by the student's teachers regarding the student's classroom performance and affect: generally, the teachers reported that the student had "[n]atural abilities," but that "absences impact[ed] her anxiety level [and] work load;" she lacked some completed assignments; and the student knew "what to do" and needed to "advocate for herself" and stay for "Interaction Time" (id.). At least one teacher did not think the student required testing accommodations at that time, and another teacher indicated that he "reduc[ed] [the student's] anxiety by giving reduced assignments and just asking her for bare basics" (Dist. Ex. 12 at p. 2). Another teacher indicated

[31] At the impartial hearing, the district counselor testified that a district middle school counselor informed her about the student not attending eighth grade due to "some peer issues" and receiving home schooling from the parent prior to the student reenrolling in the district for ninth grade (Tr. pp. 34-35). The district middle school counselor did not otherwise elaborate about these noted peer issues with the district counselor (see Tr. p. 35).

[32] The parent testified that although she was not aware of a plan put into place for the student as a result of the BEST meeting, she did recall communicating with teachers "regarding making up work" for the student and that the student received some testing accommodations (i.e., a separate room or extra time) (Tr. pp. 145-46; see Tr. pp. 226-27).

[33] In or around October 2012, the district counselor learned from the student that she had attempted suicide in February 2012, during ninth grade (see Tr. pp. 42-43). The district counselor documented this incident in the "Student Improvement Plan," but the BEST meeting minutes do not reflect this information (compare Dist. Ex. 11, with Dist. Ex. 12 at p. 1). In addition, the district counselor testified that she observed evidence of the student's anxiety and depression at the "[b]eginning of her sophomore year" (Tr. pp. 78-79).

that the student "kn[ew] what she need[ed] to do, but [wasn't] doing it" and she had failed a quiz (id.).

At the impartial hearing, the district counselor confirmed that the student "missed a lot of class" but was otherwise "capable of the work," and she characterized the student's experiencing a "bad day" at school as the student not "feeling motivated towards school, towards being there; [or] if there's a situation with a friend" (Tr. p. 39). In addition, the district counselor testified that at the BEST meeting, she learned for the first time that the student left classes to go to the nurse's office when she experienced "feelings of anxiety or was having a . . . social situation," or at times, to avoid work (see Tr. p. 119). According to the district counselor, the student went to the nurse's office because she knew "it was a place she could go and take a break" and the student reported "her feelings of anxiety and depression" to the nurse (id.). Based upon the discussions at the BEST meeting, the district counselor testified that the student's teachers needed her to "attend class," and the BEST team recommended that the student receive counseling in school once a week with the district counselor, communications with the parent and the student's private counselor, and increased nurse involvement with the district counselor (Tr. pp. 39-40, 45-46, 119; see Dist. Exs. 11; 12 at p. 2).[34] Moreover, the BEST team concluded that the student did not require either a section 504 plan or an IEP because the student was "now medicated," "in counseling," and she did not require "extra time on tests" (Dist. Ex. 12 at p. 20; see Tr. pp. 45-46 [explaining that the teachers did not think the student required "additional support," but rather, the student just needed to "walk[] into the classroom and be[] present and ready to learn"]).[35]

While the BEST meeting minutes reflected the discussions that took place at the meeting, the meeting minutes do not reflect what, if any, documentation the BEST team reviewed as part of its decision-making process (see Dist. Ex. 11). Notably, the director of special education testified that the "purpose" of the BEST meeting was to "look at the student's history, look at their cumulative file, take a look at inside and outside things that may be going on with the student, to look at current interventions and then to make sure that we've provided interventions for a duration of time" (Tr. p. 124).[36] In this case, had the BEST team reviewed the student's ninth grade report cards and progress reports—which, presumably, were a part of the student's cumulative file—the

[34] The district counselor testified that after the BEST meeting, she "check[ed] in" with the student once a week in person, and the meetings lasted "[a]s long as they were needed" (Tr. p. 85). Sometimes, the check-ins were "quick," and sometimes the student went to the district counselor more than once a day (Tr. pp. 85-86).

[35] To the extent that the district asserts in the petition that the BEST team did not determine during the 2012-13 school year that the recommended interventions for the student "were not effective," the evidence in the hearing record reveals that the BEST team never reconvened to review the effectiveness of the interventions during the 2012-13 school year (see Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F). While the district also asserts that the district counselor followed-up with the student's teachers to monitor her performance in accordance with the BEST recommendations, the hearing record lacks sufficient evidence to support this assertion, other than including the "Student Evaluation[s]" sent to the student's teachers during 11th grade (see Dist. Exs. 23; 27; see generally see Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

[36] Given the broad scope of information to be reviewed and considered at a BEST meeting, it is wholly unclear why the parent and the director of special education would not be required members of this team (compare Tr. p. 124, with Dist. Ex. 11). In any event, while the hearing record includes some evidence that the district counselor knew about some of the "outside things that may be going on with the student," it is highly likely that the parent could have added relevant information to the BEST team's decision-making process (see Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

team would have observed a steady decline in the student's grades in a majority of her classes throughout the school year, as well as an increasing number of absences (see Dist. Ex. 7 at pp. 1-5). The BEST team would have also read teachers' comments, which indicated that as early as the first quarter the student was not completing all of her assignments, and by March and April 2012, the teachers described the quality of the student's work as "inconsistent" and that she continued to not complete all of her assignments (id. at pp. 1, 3). In a final progress report, dated June 2012, the teachers continued to comment on the student's absences, as well as her need to "improve study skills, organization, and work habits" and her need to "re-evaluate priorities" and "allow more time for study" (id. at p. 5). And in the final progress report, the student's grades indicated that in the fourth quarter she received a failing grade in science and barely passed two Regents classes (English and Global History) (id.).

Moreover, when the BEST team met on November 27, 2012, the district had issued the student's first quarter report card for 10th grade (compare Dist. Ex. 11, with Dist. Ex. 19). Had the BEST team reviewed this report card as part of the student's cumulative file, the team would have observed that the student received failing grades in two classes and accumulated between 7 and 15 absences in the first quarter (see Dist. Ex. 19).

Therefore, in light of the information available to the BEST team in November 2012, the hearing record includes sufficient evidence to conclude that the district should have suspected that the student had a disability and referred the student to the CSE for an evaluation at that time. The evidence demonstrates that the student's academic progress during ninth grade was somewhat unremarkable, with a steady decline in her grades in many of her classes, as well as increasing absences, difficulty in completing assignments, and her need to improve study skills, organization, and work habits (see Dist. Ex. 7 at pp. 1-5). In addition, although the evidence does not reveal significant social/emotional difficulties during ninth grade, the district counselor was aware at the time of the BEST meeting in November 2012 that the student attempted suicide in February 2012 (see Tr. pp. 42-43). By comparison, the evidence indicates that the student's wellbeing clearly took a turn for the worse in the 2012-13 school year: the district counselor testified that she observed symptoms of the student's anxiety and depression at the beginning of the 2012-13 school year in 10th grade; the student's first quarter report card for 10th grade reflected failing grades and between 7 and 15 absences; and due to escalating depression and suicidal ideation, the student was admitted for a psychiatric hospitalization on November 1, 2012 (see Tr. pp. 78-79; Dist. Exs. 8 at pp. 1-2; 19). At the BEST meeting, the district then became aware of the student's diagnoses of major depression, single episode severe without psychosis, and history of separation anxiety; the student's difficulty with peer issues and peer influence; the student continued to be at-risk for suicide; the student demonstrated self-harming behaviors; and the student failed to complete assignments (see Dist. Exs. 10-12).

Here, while no singular piece of evidence alone conclusively demonstrated the student's need for an evaluation, the "mosaic of evidence in this case clearly portrays a student who was in need of a special education evaluation," and the district's failure to refer the student to the CSE for an evaluation constituted a procedural violation (Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 603 [M.D. Pa. 2014]; see Pennsbury Sch. Dist., 65 IDELR 220, 115 LRP 11649 [SEA Pa. Mar. 2, 2015], citing Forest Grove, 557 U.S. at 230, 241 [finding that while it remained to be "determined whether or not the [s]tudent [was] actually IDEA eligible," the district's failure to refer the student for an evaluation violated its child find obligations, which, as a procedural violation, satisfied the "first prong of the Burlington/Carter test in and of itself"]; see also Compton

Unified Sch. Dist. v. Allen, 598 F.3d 1181 [9th Cir. 2010] [noting that a district "cannot afford to ignore a student's ongoing academic struggles, especially when they are combined with emotional or behavioral difficulties," and further, that a district's failure to evaluate a student "suspected of having a disability can lead to liability for a child find violation"]).

Moreover, although the district defended its position by asserting that the student's private counselor never referred her to the CSE; the student's psychiatrist never referred her to the CSE; it had no reason to suspect that the student had a "learning disability;" the hearing record lacked evidence of any request to evaluate the student; and the hearing record lacked evidence that the parent sought any section 504 accommodations for the student—all of these arguments ignores the district's nondelegable duty pursuant to child find to propose an evaluation of the student when a student is suspected of having a disability (34 CFR 300.111[c][1]; 8 NYCRR 200.4[a]; see D.K., 696 F.3d at 249; J.S., 826 F. Supp. 2d at 660; Reid, 401 F.3d at 518). In addition, the district's argument that it did not violate its child find obligation because the student did not require special education is belied by the fact that the BEST team recommended that the student receive counseling services (see Dist. Ex. 11-12).[37] As a result of the foregoing, the district's failure to refer the student to the CSE for an evaluation violated its child find obligations and significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student for the 2012-13 school year. Consequently, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year.

**2. 2013-14 School Year**

With regard to the 2013-14 school year, the district argues that the IHO erred in finding that the student should have been referred to the CSE for an evaluation because she "missed classes and did not perform to her 'B' potential academically." In its memorandum of law, the district further argues that the IHO erred in concluding that either the student's "'inability to function in the regular school environment'" or the student's October 2013 hospitalization triggered the district's obligation to refer the student to the CSE under child find. The parent rejects these contentions. Relying upon the same legal standard set forth above, a review of the evidence in the hearing record reveals that similar to the rationale expressed with regard to the 2012-13 school year, the district had sufficient information about the student available at the start of the 2013-14 school year—or at the latest, after the student's hospitalization in October 2013—to suspect that the student was a student with a disability, and the district should have referred her to the CSE for an evaluation.

Significantly, the evidence in the hearing record demonstrates that by the start of the 2013-14 school year, the district accumulated a substantial amount of additional information about the student's continued social/emotional difficulties following the BEST meeting in November 2012 and during the remainder of the 2012-13 school year (see generally Tr. pp. 1-249; Dist. Exs. 1-2;

[37] According to State law, special education "means specially designed instruction which includes special services or programs as delineated in subdivision two of this section" (Educ. Law §4401[1]). Subdivision two of the Education law defines "[s]pecial services or programs" as including related services, which "shall include . . . counseling including rehabilitation counseling services, . . . , psychological services, school health services, school nurse services, [and] school social work" services (Educ. Law §4401[2][k]; see 8 NYCRR 200.1[qq] [defining related services under State regulation]).

6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F). In March 2013, the student received a "warning" for leaving school grounds without permission (Dist. Ex. 16). In an e-mail to the district counselor dated April 10, 2013, the parent expressed concern about the student's "anger issues," "emotional problems," and challenges with stress and anxiety (Dist. Ex. 13 at p. 1). In addition, the parent indicated that the student was "in danger of failing and repeating some courses," and she asked about other "options" for the student (id.). In another e-mail to the district counselor, dated April 11, 2013, the parent noted that her "last email was to ask for a plan for [the student]," and to inform the district counselor of an additional mental health diagnosis (Dist. Ex. 14 at p. 1).

At the impartial hearing, the district counselor testified that during spring 2013, the student presented as both anxious and depressed; as reported by the student, she experienced anxiety related to "other people and settings" (Tr. pp. 87-88). Toward the end of 10th grade, the student also began experiencing increased levels of discomfort in "certain classes," and she expressed an interest in taking her tests in a "separate location" (Tr. pp. 89-90). The district counselor also testified that the student's anxiety and depression affected her ability to "perform" and "be successful" in school, especially in regard to her "attendance" and "her perception of relating to teachers and students in the building" (Tr. pp. 116-17).

A review of the student's April 12, 2013 report card revealed that while the student's overall absences remained fairly consistent between the second and third quarters, the student's grades steadily declined to the point that she was failing all but three of her classes (see Dist. Ex. 20). On or about April 19, 2013, the district counselor documented the receipt of "[a]nother referral" upon the student's return from a "hospitalization," which she then discussed with a district school psychologist (Dist. Ex. 12 at p. 2; see Tr. pp. 46, 52-53; see also Dist. Ex. 15). At the impartial hearing, the district counselor testified that based upon her conversation with the district school psychologist, they decided that the student should be "referred to Pro[-]School or STARS," and to "start [a] 504 application" for the student (Tr. pp. 46-49; Dist. Ex. 12 at p. 2).

On April 23, 2013, the district's school nurse sent an e-mail to the district counselor expressing concern about the student (see Dist. Ex. 15). In the e-mail, the school nurse indicated that she observed "recent self[-]inflicted" wounds on the student's upper left arm and on her leg (id.). The district counselor forwarded the school nurse's e-mail to the district school psychologist, noting that she "put in a referral for [the school psychologist] to see [the student] for counseling" (id.).[38] On April 24, 2013—the same day the district counselor met with the parent and the district's director of guidance to discuss the alternative settings for the student ("STARS and Pro-School" programs) as well as a section 504 application—the student received a suspension and remained out of school through the conclusion of the 2012-13 school year (Tr. pp. 48-49, 52, 115, 151; Dist. Exs. 12 at p. 2; 13 at p. 2; 16; 30 at p. 1). In a letter dated April 28, 2013, the student's private counselor wrote to the district counselor concerning the student's out-of-school suspension and suggested seeking an alternative program for the student to complete school (see Dist. Ex. 17). In the letter, the private counselor noted that the student's "academic performance" fell "below average due to her lack of motivation to complete assignments, as well as her struggles with mental illness" (id.). The private counselor also indicated that in light of the student's "history of suicidal

[38] The hearing record contains no evidence that the district school psychologist provided any counseling services to the student during either the 2012-13 or 2013-14 school years (see generally Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

ideation, self[-]harming behaviors and anxiety," the student required "supervision and academic instructions" to complete the school year (id.).

While the district counselor did not pursue a section 504 application for the student in April 2013 due to the student's suspension from school, the district counselor did continue her efforts to secure an alternative setting for the student for the 2013-14 school year (see Tr. pp. 48-49; Dist. Exs. 12 at p. 2; 13 at p. 2; 14 at p. 1; 17 at p. 1; 21 at pp. 1-3). In a referral form for an alternative high school setting, dated June 25, 2013, the district counselor documented the student's need for a "smaller, more supportive environment" (Dist. Ex. 21 at pp. 1, 3). The district counselor described the student's "behavioral and attitudinal patterns in school" as the following: poor attendance, poor behavior in class, homework not completed, and known or suspected substance use (id.). In addition, the district counselor indicated that the student's "biggest behavior issues were refusal to work, missing assignments, and sleeping in class" (id.). The district counselor further indicated in the referral form that that the student "was absent from school 13 days this year (not including her 15 day suspension), [and] she was signed out of school early 16 times"—noting in particular that many of the absences were "due to her mental health" and that the student had received the following diagnoses: "anxiety, depression, post[-]traumatic stress disorder, and borderline personality disorder" (id.). In addition, the district counselor described the home instruction the student received, and further commented that the student had "poor attendance" and she "failed most of her classes" (id.). In the referral form, the district counselor indicated that the as a result of the home instruction, the student "took her finals in a separate location and ha[d] always felt this [was] helpful to her, though she still had several issues during testing despite being in a separate location" (id.). The referral form included information about the student's "outside counseling," her "medication" management by a psychiatrist, the student's self-harming behavior that she used as an "attention seeking behavior," and that the student "sometimes 'hid[] out'" in the bathroom, in the nurse's office, or the district counselor's office when she was "avoiding work and other responsibilities" (id.).

As noted previously, although the student completed 10th grade, she only earned 2.50 credits and failed all but three of her classes; during summer 2013, the student earned 2.00 credits for completing English 10 (final average, 84) and for completing Global History 10 (Regents examination, 70; final average, 86) (see Dist. Ex. 29; see also Dist. Exs. 19-20). For the 2012-13 school year, the student accumulated a total of 29 overall absences (see Dist. Ex. 30 at pp. 1-2).

According to the evidence in the hearing record, when the student returned to school in fall 2013 for 11th grade, the district counselor consulted with the district school psychologist about whether to proceed with a section 504 application for the student in or around October 2013 (see Tr. p. 49; Dist. Ex. 12 at p. 2). In a handwritten notation, the district counselor indicated the need for "new documentation of [a] diagnosis" in order to continue with the section 504 application; at the impartial hearing, the district counselor testified that she did not receive this information (Dist. Ex. 12 at p. 2; see Tr. pp. 49, 75).

A review of the student evaluation forms completed by her teachers by October 2, 2013, indicated that the student's quiz scores in English began "slipping," and the teacher did not know if this was due to the student "not reading or being in the classroom" (Dist. Ex. 23 at p. 2-3; see Dist. Ex. 22). The student's history teacher commented that although the student had not "asked once to leave the room to complete any of her work," the student did become "very anxious" during a "pre-test" and she "asked to go to guidance" (Dist. Ex. 23 at pp. 3-4).

At the impartial hearing, the district counselor testified that while the student "had a good start" to the new school year, the student was admitted on October 24, 2013 for a second psychiatric hospitalization "secondary to escalating depressive symptoms and anxiety as well as [a] concern for safety relating to suicidal ideation" and was discharged on October 31, 2013 (Tr. pp. 49-50; Dist. Exs. 22-26). Upon discharge, the student received the following diagnoses: mood disorder, NOS; post-traumatic stress disorder; learning disorder, NOS; and migraine without aura (see Dist. Ex. 25 at p. 3). At the impartial hearing, the district counselor testified that after receiving a discharge checklist related to the student's October 2013 hospitalization, she did not "see a need to refer" the student to the CSE because the document did not include any "recommendations" to change the student's "education" (Tr. pp. 57-58; Dist. Ex. 25). She also testified that she did not complete a section 504 application for the student in October 2013 because the student's "needs were changing" (Tr. pp. 74-75, 77).

In addition, the district counselor testified that although the discharge checklist included a list of the student's diagnoses, she did not make a section 504 application; instead, she discussed the matter with the district school psychologist "to bring the new information to her" and to discuss "what the next step was" (Tr. pp. 76-77). At that time, the district school psychologist told the district counselor that she needed to follow-up with the student's teachers but that she did not need to hold another BEST meeting (see Tr. p. 77). The district counselor testified that the teachers reported that they did not "feel that a 504 plan was needed" for the student because a "504 plan d[id] not get a student to attend" (id.). She further testified that generally the teachers thought the student needed "accommodations to be more successful" (id.). In addition, the district counselor testified that a "504 plan didn't seem appropriate" given that the student presented with "[s]ignificant mental health needs," such as anxiety and depression (Tr. p. 78). Moreover, the district counselor thought that the student's interest in her current BOCES program would motivate her to attend and to be in school regularly (see Tr. pp. 79-81; see also Tr. pp. 158-59 [describing the parent's similar belief that the student's participation at BOCES would motivate her to attend and provide a more "structured" classroom setting]).

When the student returned to school after the October 2013 hospitalization, the district counselor testified that she continued to meet with the student to "[c]heck in, find out how school [was] going, [and to] see if she had any current things she wanted to discuss" (Tr. p. 59). The district counselor further testified that when she met with the student, the meetings entailed what she "perceived to be, . . . , normal teenage, . . . , relationship, friend sort of things" (id.).

A review of the student's first quarter report card for 11th grade, dated November 1, 2013, reveals that the student received a failing grade in one class (55), and in three other classes, the student received grades of 67, 68, and 74 (see Dist. Ex. 28 at p. 2). At that time, the student had also been absent in the same four classes between five and nine times (id.). Teacher comments on the report card indicated that the student demonstrated either an "inconsistent" or "good" quality of work, but also that she failed to complete some assignments (id.).

In light of the foregoing, and again, while no singular piece of evidence alone conclusively demonstrated the student's need for an evaluation, the student continued to present with a mosaic of evidence that triggered the district's obligation to refer the student to the CSE for an evaluation, and the district's failure to do so constituted a procedural violation (see Jana K., 39 F. Supp. 3d at 603; see Pennsbury, 65 IDELR 220, 115 LRP 11649; see also Compton, 598 F.3d 1181), that significantly impeded the parent's opportunity to participate in the decision-making process

regarding the provision of a FAPE to the student for the 2013-14 school year. Consequently, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year.

**B. Eligibility: 2012-13 and 2013-14 School Years**

The IDEA defines a "child with a disability" as a child with a specific physical, mental or emotional condition, "who, by reason thereof, needs special education and related services" (20 U.S.C. § 1401[3][A]; Educ. Law § 4401[1], [2][k]). In order to be eligible for special education and related services, a student must not only have a specific physical, mental or emotional condition, but in most of the disability categories enumerated under the IDEA, such condition must adversely affect or impact upon a student's educational performance to the extent that he or she requires special education and related services (see 34 CFR 300.8[a], [c]; see also 8 NYCRR 200.1[zz]; see, e.g., Application of the Dep't of Educ., Appeal No. 11-152; Application of the Bd. of Educ., Appeal No. 09-087). Generally, New York addresses the issue of whether a student's condition adversely affects his or her educational performance on a case-by-case basis (Corchado v. Bd. of Educ. Rochester City Sch. Dist., 86 F. Supp. 2d 168, 176 [W.D.N.Y. 2000] [holding that each child is different and the effect of each child's particular impairment on his or her educational performance is different]; see Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 297-98 [S.D.N.Y. 2010] [emphasizing that educational performance is focused on academic performance rather than social development or integration]; see, e.g., Application of the Dep't of Educ., Appeal No. 11-152; Application of a Student Suspected of Having a Disability, Appeal No. 11-021; Application of the Bd. of Educ., Appeal No. 09-087; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; see also C.B. v. Dep't of Educ., 2009 WL 928093 [2d Cir. April 7, 2009] [finding insufficient evidence that student has suffered an adverse impact on educational performance because the student continuously performed well and tested above grade level on the district's psychoeducational evaluation and a psychological evaluation]; Muller v. E. Islip Union Free Sch. Dist., 145 F.3d 95, 103-04 [2d Cir. 1998]; A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 308-11 [E.D.N.Y. 2010] [noting the difficulty of interpretation of the phrase "educational performance" and that it must be "assessed by reference to academic performance which appears to be the principal, if not only, guiding factor"]; N.C. v. Bedford Cent. Sch. Dist., 2008 WL 4874535 [2d Cir. Nov. 12, 2008] [holding that there is insufficient evidence that the student's educational performance was adversely impacted because the student did not fail any of his classes and his grade-point average (GPA) declined only nine points]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 399 [N.D.N.Y 2004]); Eschenasy v. New York City Dep't of Educ., 604 F. Supp. 2d 639, 649-50 [S.D.N.Y. 2009] [finding that the SRO's conclusion that there was insufficient evidence of an adverse effect on the student's educational performance was "directly contradicted by [the student's] failing grades, repeated expulsions, suspensions, need for tutors and need for summer school]; W.G. v. New York City Dep't of Educ., 801 F. Supp. 2d 142, 170-75 [S.D.N.Y. 2011] [finding insufficient evidence that the student's "academic problems –which manifested chiefly as truancy, defiance and refusal to learn – were the product of depression or any similar emotional condition"]).

**1. Disability Category**

The district contends that the IHO erred in finding that the student was eligible for special education and related services as a student with an emotional disturbance for both the 2012-13 and

2013-14 school years. More specifically, the district argues that the student did not require special education and related services, the evidence in the hearing record did not support the IHO's conclusion that the student met the criteria necessary for eligibility as a student with an emotional disturbance, and the IHO failed to address the question of whether the student exhibited one or more of the required characteristics of an emotional disturbance "over a long period of time and to a marked degree." The parent objects to the district's arguments.

State regulation describes an emotional disturbance as a "condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance:"

> (i) an inability to learn that cannot be explained by intellectual, sensory, or health factors[;]
>
> (ii) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
>
> (iii) inappropriate types of behavior or feelings under normal circumstances;
>
> (iv) a generally pervasive mood of unhappiness or depression; or
>
> (v) a tendency to develop physical symptoms or fears associated with personal or school problems.

(8 NYCRR 200.1[zz][4]). In addition, although the term "includes schizophrenia," the term does not "apply to students who are socially maladjusted, unless it is determined that they have an emotional disturbance" (8 NYCRR 200.1[zz][4]).[39]

In this case, a determination of whether the student was eligible for special education and related services as a student with an emotional disturbance is especially problematic because the hearing record failed to include any evaluations of the student that described her functional development, academic skills, or social/emotional functioning, or information related to enabling

[39] Neither party asserts that the student would be eligible for special education and related services as a student with a disability under any other disability category, such as other-health impairment. Nevertheless, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]).

her to participate in, and make progress in, the general education curriculum (see 34 CFR 300.304[b][1]; 8 NYCRR 200.4[b][1]; see generally Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).[40]

In addition, the IHO's findings that the student met all five of the criteria under the disability category for an emotional disturbance for the 2012-13 school year are not well supported by the evidence cited by the IHO. For example, the IHO noted that the student's "grades declined precipitously" after the November 2012 hospitalization (IHO Decision at p. 22). The IHO reasoned that since the hearing record included no other evidence of "any intellectual, sensory, or[] health factors causing the decline," it could not be "disputed that [the student's] anxiety and depression as expressed in the school environment was at the root of her academic decline" (id.). However, a review of the student's final report card for the 2012-13 school year demonstrates that although the student continued to receive failing grades in four classes in the second quarter following her hospitalization, the student also received passing grades in her other four classes during the same quarter and the rate of her absences decreased from the first quarter (see Dist. Ex. 20). As another example, the IHO noted that the student had difficulty maintaining satisfactory relationships with teachers and peers in 10th grade, finding specifically that the student "could not relate to her science teacher and avoided class" and that the student's absences evidenced her inability to maintain relationships with her peers in class (see IHO Decision at p. 22). But as the district points out, the IHO did not appear to weigh this evidence against other evidence in the hearing record demonstrating that the student did, in fact, maintain friendships (even if the parent did not prefer those friends), the student had a boyfriend, and she participated in activities both in school and outside of school during 10th grade (see Tr. pp. 36, 54, 59, 62, 163 211).

Next, the IHO found that because the student "suffered from intense anxiety and depression in the school environment impacting both grades and attendance," the student met the third criteria for an emotional disturbance: "expressing inappropriate types of behavior or feelings under normal circumstances—attending school" (IHO Decision at pp. 22-23). The district argues, however, that given the student's life circumstances, anxiety and depression were not "abnormal" (Dist. Exs. 23; 25). The IHO also noted that the student's tendency to "leave class to be with the school counselor or nurse" supported a finding that the student met not only the third criteria for an emotional disturbance, but also the fourth and fifth criteria: "a generally pervasive mood of unhappiness or depression in school . . . and a tendency to develop physical symptoms or fears associated with personal or school problems" (id.) (emphasis in original). However, the hearing record lacks sufficient evidence regarding the frequency that the student left class to go to the nurse's office or to the district counselor's office as a result of her anxiety or depression (see generally Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

For the 2013-14 school year, the IHO indicated that the student's "emotional condition that included anxiety and depression continued to result in poor academic performance given her capability, and the student's significant attendance problems mirrored the 2012/13 school year" (IHO Decision at p. 25). The IHO then concluded, without citing to any evidence in the hearing record, that the student met each of the five criteria for an emotional disturbance (id. at pp. 25-26).

[40] As a reminder, during an impartial hearing the IHO may request an "independent educational evaluation as part of a hearing" (8 NYCRR 200.5[j][3][viii]).

Notwithstanding these infirmities in the decision, a far more serious flaw in the IHO's analysis in reaching the conclusion that the student was eligible for special education and related services as a student with an emotional disturbance for both the 2012-13 and 2013-14 school years was the failure to address—as the district correctly argues—whether the student exhibited one or more of the required characteristics of an emotional disturbance "over a long period of time and to a marked degree," as required by State regulation (see IHO Decision at pp. 21-24, 25-26).[41] On this point, the district contends that the student's successful performance during 9th grade, the beginning of 10th grade, and for the "first half" of 11th grade weigh against finding that the student exhibited one or more of the required characteristics over a long period of time and to a marked degree (Dist. Mem. of Law at p. 14). The district also argues that although the student was hospitalized twice, neither discharge report "indicated symptoms characteristic of an emotional disturbance" (id.). The parent argues that the student met the criteria for emotional disturbance, but does not otherwise set forth any arguments related to whether the student exhibited one or more of the required characteristics of an emotional disturbance over a long period of time and to a marked degree (see generally Answer; Parent Mem. of Law). As I have already concluded as described above, that the district denied the student a FAPE for the 2012-13 and 2013-14 school years due to its failure to include the parent in the IDEA evaluation and decision making process, it is unnecessary to compel an answer to the question of the student's eligibility for special education as neither party presented pertinent facts or legal arguments regarding the IHO's failure make the required findings of whether the student exhibited one or more of the required characteristics of an emotional disturbance over a long period of time and to a marked degree, as required by State regulation. Given that the hearing record does little to nothing to illuminate that issue with evaluations of the student, I will direct the district to complete an evaluation of the student and convene a CSE so that it may determine whether the student is eligible for special education (see Simmons, 2014 WL 2738214, at *14-*15 (N.D. Cal. June 11, 2014).[42]

However, had it been necessary to reach a determination at this juncture about the student's eligibility, this issue presents one of those "very few cases" in which the available evidence was in equipoise, which would necessarily result in a conclusion weighing against the district (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d

[41] Upon review, neither the district's petition nor its accompanying memorandum of law sets forth any arguments that the student's condition did not adversely affect or impact upon her educational performance (see generally Pet.; Dist. Mem. of Law). With regard to the district's contention that the student also did not require special education and related services as a result of her condition, the district's argument—which the district also asserted in defense of its position that it did not violate its child find obligation—is similarly unpersuasive here when the BEST team recommended that the student receive counseling services (see Dist. Ex. 11-12; see also Educ. Law §4401[1], [2][k]; 8 NYCRR 200.1[qq]).

[42] I considered whether sending the eligibility issue to the CSE at this time would be a fruitless exercise due to the student's graduation from Carlbrook; however, the district has not answered the question I put to it— whether the student has earned a New York State diploma from the district—quite distinct from its response about whether the district issued a diploma to the student (T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289, 294-95 (N.D.N.Y. 2012). Evidence of graduation from Carlbrook, located in Virginia, does not clarify the matter of ineligibility due to graduation in New York. Accordingly, directing the CSE to examine the evaluation and eligibility issues with the parent is appropriate since the student may very well have continuing statutory eligibility for special education as she cannot be said to have graduated under New York law and she has not reached age 21, thus a determination should be made by the CSE based upon a comprehensive initial evaluation of the student conducted in accordance with the requirements of the IDEA.

Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]).[43]

**VII. Unilateral Placement—Applicable Standards**

Having concluded that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years, the next inquiry is whether the parent's unilateral placement of the student at Carlbrook for the 2014-15 school year, as well as a portion of the 2015-16 school year, was appropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

[43] Relatedly, the evidence in the hearing record reveals that the district did not present sufficient evidence disproving that the student was eligible for special education and related services as a student with an emotional disturbance (see generally Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

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

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

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

**A. Appropriateness of Carlbrook—Specially Designed Instruction**

Initially, the district asserts that the IHO erred in finding Carlbrook was an appropriate unilateral placement. In particular, the district argues that the IHO overlooked the "total absence" of any evidence that Carlbrook provided specially designed instruction to the student, and moreover, that the IHO erred in finding that the parent's testimony, alone, provided "competent and sufficient" evidence upon which to conclude that Carlbrook was an appropriate unilateral placement. The parent rejects these contentions. In this case, a review of the evidence in the hearing record supports the district's contention that the hearing record lacked sufficient evidence to establish that Carlbrook provided the student with the specially designed instruction necessary for an award of tuition reimbursement as relief.

In this case, the parent testified that at the conclusion of 11th grade, she enrolled the student in an eight-week, out-of-State "wilderness treatment program" during summer 2014 to address the student's "[substance] use and behavior" (Tr. pp. 165-67). The parent also testified that by sending the student to the wilderness treatment program, she hoped to "get [the student] away from the neighborhood where she was getting the drugs from, to get her in a drug-free environment totally, to get her to start taking responsibility and get her into a safe place" (Tr. p. 167).

At the impartial hearing, the parent also testified that when the student successfully completed the wilderness treatment program and graduated in September 2014, she did not intend to send the student back to the district (see Tr. pp. 168-69).[44] Rather, the parent made "alternate plans" to enroll the student in a "therapeutic boarding school" (Tr. p. 169). The parent testified

[44] The parent also testified that she enrolled the student at Carlbrook for the 2014-15 school year because although the student was "fewer than four credits from graduation" at the district at that time, she did not "see the system changing" based upon the student's experience at the district during the "previous three years" (Tr. pp. 212-13). The parent explained that she did not see the student changing "without more structure in her life, more discipline, more guidance," and she could not "take the chance that she was going to fail out" of the district (Tr. p. 213).

that she decided to place the student in this type of setting "[b]ecause of the drugs and the people and her friends who she associated with, and the anxiety, the depression" (id.). When asked if her decision to enroll the student in a therapeutic boarding school had "anything to do with school" or "academics" or any "other reasons, additional reasons," the parent responded affirmatively, and explained that the student "struggled in school" and she believed that a "therapeutic boarding school would address [the student's] academics as well as her [need for] therapy in a controlled environment where the consequences and behavior could be positively reinforced" (Tr. pp. 169-71). Additionally, the parent testified that "academically," she wanted the student in a "place that was not associated with the triggers and the anxiety" (Tr. p. 171). The parent also testified that she wanted to give the student a "fresh start in a new academic setting" and "typically boarding schools [were] very small and the classrooms [were] very small" (Tr. pp. 171-72). The parent also believed that the "dress code" at Carlbrook "set the benchmark to dress successfully" and would instill a more "professional mind-set" in the student (Tr. pp. 205-06).

In reaching the decision to enroll the student at Carlbrook, the parent testified that she thought the student would "benefit from small classroom sizes, which would allow her to have a better student-to-teacher ratio," and because, generally, "boarding schools" provided "very structured environments where students [were] accounted for off campus or out of school," and students' "time" was structured "such that there's mandatory study halls usually and tutoring" (Tr. p. 172). In selecting Carlbrook, the parent worked with an educational adviser and researched the school online; in addition, the parent testified that she chose Carlbrook because of its "structure, the discipline, the teacher-to-student ratio, the high success rate, the high level of academics, [and] the monitoring of the students for any kind of drugs or alcohol" (Tr. p. 173).[45]

At the impartial hearing, the parent described Carlbrook's program (Tr. pp. 173-76, 188-98, 201-02, 205-13, 221-26).[46] In particular, the parent indicated that Carlbrook was approximately a "15-month program" with a "rolling enrollment" that allowed students to earn a "quarter credit" per 10-week term (Tr. pp. 173-74). In addition, the parent testified that Carlbrook was "located 20 miles from the nearest town, so the chances of getting off campus [was] very slim" (Tr. p. 174). Students attended classes for approximately 6.5 hours per day, and the parent indicated that "peer group tutoring was available for the students during [daily] study halls" (id.). Additionally, the parent testified that Carlbrook provided students with "group therapy three days a week and individual therapy one day a week," as well as "tutoring," and "therapists" remained "on campus" until the students went to sleep around 9:30 or 10:00 p.m. (id.).[47] Next, the parent testified that approximately 65 students attended Carlbrook, and Carlbrook's classes typically ranged from two to six students (Tr. p. 175). Since the student's enrollment at Carlbrook beginning

[45] According to the parent, the educational adviser assisted her in determining if a particular "school was going to meet [the student's] needs or not meet her needs" (Tr. pp. 172-73). For example, the parent testified that "some schools didn't take students with self-harm [behavior], some schools were less structured, less restricting, less student accountability and there was more opportunity for drugs on campus" (id.). In addition to Carlbrook, the parent considered, but ultimately rejected, other out-of-State nonpublic schools (see Tr. pp. 203-06). The parent selected Carlbrook over other choices, in part, because it had a "dress code and honor system and [a system to] earn[] privileges by gaining more responsibilities and working through a positive reinforcement" (Tr. p. 205).

[46] The parent was the sole witness presented for her case-in-chief at the impartial hearing (see Tr. pp. 134-246).

[47] The parent described the "therapists" as "trained therapists" usually with a "master's degree" and these same therapists provided students with individual therapy (Tr. pp. 174-75).

September 10, 2014, the student had only visited home on one occasion (see Tr. pp. 175-76). The parent explained that Carlbrook had "rules" about "leaving campus," which meant that a student needed to "achieve" or complete four levels of care or "therapeutic workshops" before being allowed a "home visit" (Tr. pp. 176-77, 188-89). More specifically, the parent testified that each "two-to-three day" intensive, peer group workshop explored issues or areas in students' lives, such as "integrity," honesty and friendship (Tr. pp. 176-77, 188-93).[48]

A review of the student's unofficial transcript reveals that, while at Carlbrook during the 2014-15 school year, she received instruction in English 11, Algebra II, chemistry, science, U.S. Government, Latin I, fine arts, and progressive dance (see Parent Ex. B).[49] The parent testified that she received "progress reports" about the student, which the student's adviser prepared at the end of each 10-week academic term (Tr. p. 193). According to the parent, the "end-of-term report summarize[ed] [the student's] progress academically and relationally and in therapy, what her short-term goals [were], long-term goals, [and] progress that she[] made" (id.). The parent did not, however, enter any of the student's progress reports from Carlbrook into the hearing record as evidence during the impartial hearing (see generally Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

In describing the student's typical day at Carlbrook, the parent testified that the student participated in "different types" of "mandatory therapy three days per week" (Tr. pp. 196-97). The first type of therapy consisted of "peer therapy with all the students" she would graduate with in December 2015; the second type of therapy involved an "all-girls" therapy session; and the parent could not recall any details about the third type of therapy the student received (Tr. p. 196). In addition to the three mandatory therapy group sessions per week, the student also received individual therapy to work on "issues" related to the student's "emotional state at the time," including "issues in her life and taking responsibility and learning how to take on leadership roles at school as she progresse[d] through the workshops" (Tr. pp. 206-08). The parent did not, however, enter any of the student's therapy notes or any counseling reports from Carlbrook into the hearing record as evidence during the impartial hearing (see generally Tr. pp. 1-249; Dist. Exs. 1-2; 6-17; 19-32; Parent Exs. B-D; IHO Exs. I-III; Answer Exs. A-F).

While the hearing record did not include any progress reports related to either the student's academic instruction or therapy sessions, the parent did enter five letters prepared by Carlbrook's "HealthCare Director" into the hearing record as evidence (see generally Parent Ex. D). Generally, the letters—which the parent received—reported the outcomes of the student's appointments with a psychiatrist between October 2014 and June 2015 (see id.). For example, the October 2014 letter indicated that the student "recently had an initial appointment" with the psychiatrist and, after providing a brief student history, indicated that she was "settling in" at Carlbrook (id. at p. 6). In addition, the October 2014 letter noted that although the student "made friends" and felt "comfortable," she still had an "occasional thoughts of self-harm and a follow-up appointment

[48] The parent testified that Carlbrook held the therapeutic workshops every two to three months, and parents—while not allowed at the students' workshops—participated in workshops "separate" from the students in a different location (see Tr. pp. 188, 191-92).

[49] According to the transcript, the student received passing grades in all of her classes with an "80" average or higher; in addition, documentary evidence demonstrated that the student remained in "good standing" and had "no unexcused absences" (Parent Exs. B-C).

would be scheduled in "one month" unless "otherwise directed" by the parent (id.). The November 2014 letter reported that the student had been "working on being honest and taking accountability," and "this ha[d] led to her being in detention" (id. at p. 5). At that time, the student was reportedly doing "quite well in school" and she felt a "sense of relief and more positive about making positive change" (id.). The student was scheduled to follow-up with the psychiatrist in two months (id.). Subsequent letters continued to report that the student was doing well in school, she experienced less anxiety and decreased thoughts of self-harm, and she continued to work on issues concerning her "behavior patterns in relationships" and had been "successful in reducing the negative aspects such as attention seeking and victimization" (see id. at pp. 1-3).

As noted above, to qualify for reimbursement under the IDEA, a parent must demonstrate that the unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

In this instance, while the parent's testimony provided general information about the student's program at Carlbrook, neither the testimonial nor the documentary evidence in the hearing record provides sufficient evidence to establish how Carlbrook adapted, as appropriate to the student's needs, the content, methodology, or delivery of instruction to address the unique needs that resulted from the student's disability such that it provided the student with specially designed instruction (see generally Tr. pp. Tr. pp. 173-76, 188-98, 201-02, 205-13, 221-26; Parent Exs. B-D; Answer Exs. A-F). Regardless of the fact that the student's anxiety issues appeared to improve while attending Carlbrook, as well as her grades and attendance, the evidence in the hearing record demonstrates that the parent primarily selected Carlbrook to remove the student from what she considered to be inappropriate peer influences and relationships, as well as an environment that triggered the student's anxiety (see Tr. pp. 165-73).[50] However, a unilateral placement is not appropriate simply because it removes the student from an anxiety-provoking environment or inappropriate peer influences, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the unilateral placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at *9 [E.D.N.Y. Sept. 28, 2015]). In this case, the hearing record includes little, if any, evidence describing how Carlbrook's program was tailored to address the student's unique special education needs—or more specifically, how Carlbrook's program was tailored to address the student's anxiety by developing appropriate coping mechanisms or strategies to deal with the stressors that triggered her anxiety (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d

[50] While the hearing record offers some anecdotal information regarding the student's progress, it does not contain the objective evidence preferred by the Second Circuit to support that the student made progress in her areas of need during her enrollment at Carlbrook (see Hardison v. Bd. of Educ., 773 F.3d 372, 387 [2d Cir. 2014]). Under the circumstances presented, given the very limited amount of objective information contained in the hearing record documenting the student's progress, the evidence does not support the conclusion that Carlbrook was an appropriate unilateral placement solely based on the progress the student made during the 2014-15 school year or during the 2015-16 school year from September through December 2015 (see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 364; see also M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

467, 489-90 [S.D.N.Y. 2013]). Instead, the evidence in the hearing record demonstrates that Carlbrook provided the student with the types of advantages—including a small class size—"that might be preferred by the parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451-52 [2d Cir. 2015]).

Accordingly, the hearing record lacks sufficient evidence to conclude that Carlbrook provided the student with specially designed instruction to address the student's social/emotional needs, as opposed to providing a different environment than the one in which she experienced anxiety (John M., 2015 WL 5695648, at *9). Without further evidence of the services provided, a determination cannot be made regarding whether the services the student received at Carlbrook addressed the student's needs (see Hardison v. Bd. of Educ., 773 F.3d 372, 387 [2d Cir. 2014] [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's unilateral placement was appropriate]; see also L.Q., 932 F. Supp. 2d at 490 [rejecting the parents' argument that counseling services met the student's social/emotional needs absent the counselor's testimony or evidence about the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]). Consequently, the parent is not entitled to reimbursement for the costs of the student's attendance at Carlbrook for the 2014-15 school year or for that portion of the 2015-16 school year the student continued at Carlbrook.

**VII. Conclusion**

In summary, a review of evidence in the hearing record demonstrates that the district failed to sustain its burden to establish that it offered the student a FAPE in the LRE for the 2012-13, 2013-14, and 2014-15 school years. However, having determined that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at the Carlbrook School for the 2014-15 school year and for a portion of the 2015-16 school year (September 2015 through December 2015) for an award of tuition reimbursement, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations supported an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

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

**IT IS ORDERED** that the IHO's decision, dated November 9, 2015, is modified by reversing that portion which determined that the Carlbrook School was an appropriate unilateral placement for the student; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated November 9, 2015, is modified by reversing that portion which ordered the district to reimburse the parent for the costs of the student's tuition at the Carlbrook School for the 2014-15 school year and for a portion of the 2015-16 school year (September 2015 through December 2015) upon proof of payment; and,

**IT IS FURTHER ORDERED** that the district shall conduct an initial evaluation of the student in accordance with federal and State regulations within 45 days from the date of this decision and thereafter convene the CSE within 10 days to determine whether the student is eligible for special education and related services.

**Dated:** **Albany, New York**
**February 18, 2016**

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