The University of the State of New York

The State Education Department
State Review Officer
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No. 16-045

Application of the BOARD OF EDUCATION OF THE WAPPINGERS 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:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, Neelanjan Choudhury, Esq., of counsel

Littman Krooks, LLP, attorneys for respondents, Marion M. Walsh, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Spring Ridge Academy (Spring Ridge) for the 2015-16 school year. The parents cross-appeal from the IHO's determination which denied their request for reimbursement for their daughter's tuition costs at Spring Ridge for the 2014-15 school year. The appeal must be dismissed. The cross-appeal must be sustained.

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

As relevant to these proceedings, the hearing record reflects that, at a young age, the student experienced the loss of several primary caregivers (Parent Ex. G at pp. 3-4). By age five, she exhibited challenging behavior and had difficulty bonding with new caregivers (id. at p. 3). She began attending psychotherapy (id. at pp. 3-4). The student attended public schools for

kindergarten and first grade (id. at p. 4).[1] In second grade, she moved to the district where she attended elementary school continuously through fifth grade (id.). During this time the student did "adequately well" in school; however, she experienced problems related to work habits, social skills and behavior (Parent Ex. C at p. 1). At age seven the student received a diagnosis of attention deficit hyperactivity disorder (ADHD)–inattentive type (Parent Ex. A at p. 6). Her parents subsequently requested that the district evaluate the student, due to their concern that she may have a learning disability (Parent Ex. B; see Parent Ex. D). A CSE convened on May 15, 2006 and found the student ineligible for special education (Parent Ex. D at p. 7).

When student entered sixth grade for the 2009-10 school year, she began missing assignments, did poorly on tests, and struggled with social difficulties (Parent Ex. G at p. 4). Although the student was reportedly granted accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (section 504), she continued to struggle socially and academically and, in February 2010, the student's parents withdrew her from the district and placed her at a nonpublic school (id.). The student worked with a "'life coach'" at the private school (id.).

The student transitioned to a private boarding school for high school beginning in ninth grade (the 2013-14 school year), where she was placed in an academic skills program and met with a school psychologist (Parent Ex. G at p. 1). However, the student resisted going to the academic skills program, and treatment with the psychologist was suspended due to the inability to establish a comfortable bond (id.). In or around December 2014, during tenth grade, the student's emotional status deteriorated, such that she engaged in unsafe and self-harming behaviors (id.). Due to concern for the student's health and safety, the boarding school recommended the student for a medical leave, as well as interim consultation with her psychiatrist and updated psychological testing (id.). The student returned home and underwent a psychoeducational evaluation in December 2014 (id.).[2] Around this time. the parents made initial contact with the district via the school guidance counselor in order to explore options for the student within the district (see Tr. pp. 48-49, 52, 747, 750-51; see Dist. Exs. 2 at p. 1; 3).[3] The student returned to the boarding school on or about January 4, 2015 but was expelled because of another incident of self-harming behavior (Tr. p. 749; Parent Ex. G at p. 2). The boarding school did not feel that it could safely manage the student and recommended that the student attend a therapeutic boarding school (Parent Ex. G at p. 2).

[1] The student received speech-language therapy through Early Intervention for oral-motor and articulation weaknesses (Parent Ex. G at p. 4). She was later found eligible for special education as a student with a speech or language impairment, but was declassified at the end of first grade (id.). However, the student continued to receive speech-language services through the beginning of third grade (id.).

[2] The resulting report, dated February 2, 2015, recommended, among other things, placement in a therapeutic boarding school (Parent Ex. G at p. 12). The same clinical psychologist previously evaluated the student in April/May 2010, shortly after the student withdrew from the district (id. at p. 2).

[3] In an email dated January 14, 2015, the district guidance counselor notified the district response to intervention and 504 coordinator of the student's situation and asked for advisement on how to proceed (Dist. Ex. 3; see Tr. p. 47).

In an email dated January 18, 2015, the parents advised the district that they had enrolled the student in Spring Ridge, a therapeutic residential placement in Arizona (Dist. Ex. 2 at p. 1).[4] The email also indicated that the parents would contact the district if they required assistance with placement once the student had stabilized and returned home (id.). The hearing record reflects that the student was enrolled at Spring Ridge on January 19, 2015 (Parent Ex. JJ).

In a letter dated March 19, 2015, the parents referred the student to the CSE and requested a meeting as soon as possible (Parent Ex. H at p. 1). The letter advised the district that the parents had removed the student from the district due to its failure to address her needs despite having reason to suspect the student was a student with a disability for many years (id. at p. 2). The letter also indicated that the parents would seek reimbursement from the district for the tuition costs and related expenses for the student's attendance at Spring Ridge and that they reserved the right to seek compensatory services and reimbursement for private evaluations (id.).

On April 15, 2015, the district requested parental consent to evaluate the student (Dist. Ex. 23). On April 19, 2015 the parents provided consent for the district to conduct psychoeducational testing and also requested that the testing include some measure of social/emotional functioning since the student's needs were "primarily in the social-emotional-behavioral area" (Dist. Exs. 21; 22). On May 9, 2015, the parent completed a social history about the student, and, on May 19, 2015, the district completed a psychoeducational evaluation of the student at Spring Ridge (Tr. p. 92; Dist. Ex. 18; Parent Ex. I; see Tr. p. 187; Dist. Exs. 16; 17).

The CSE convened on June 25, 2015 to conduct an initial review and determine the student's eligibility for special education (Tr. pp. 850-51; Parent Ex. K at p. 1).[5] Finding the student eligible for special education as a student with an emotional disturbance, the June 2015 CSE recommended a 12-month school year program, two 60-minute sessions of psychological counseling per week in a group setting, two 60-minute sessions of parent counseling and training per month, and completion of a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) pending a placement search (Parent Ex. K at pp. 1, 5, 7).[6] The June 2015 IEP also reflected that a search for placement, including both "day and residential . . . therapeutic schools" within the State would be completed and that the CSE would "reconvene pending the search for placement" (id. at p. 1; see Tr. pp. 118-19). The management needs section of the IEP further indicated that the student had "significant emotional delays and require[d] an intensive, small teacher-to-student ratio program provided in a special school environment in order to academically progress" (Parent Ex. K at pp. 4-5). However, the IEP also indicated that the student's placement was the "Home Public School District" at a particular public high school (id. at p. 1).

[4] Spring Ridge has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[5] The IEP incorrectly reflected that the June 25, 2015 CSE meeting was an annual review (Tr. p. 242; Parent Ex. K at p. 1).

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

In an email dated July 2, 2015, the parents provided consent to allow the district to send out information packets to potential, out-of-district schools for the student's placement (Tr. pp. 117-19; see Dist. Ex. 11 at p. 2; see also Dist. Ex. 14). On August 12, 2015, also via email, the district assistant director of special education provided an update to the parents regarding the responses from the potential schools (Dist. Ex. 11 at p. 1).

On August 19, 2015, via email and certified mail, the parents notified the district that they were rejecting the June 2015 IEP for the 2015-16 school year because it was not appropriate to meet the student's educational needs and because they had not yet received a placement for the student for the 2015-16 school year, noting that they had not received any referrals or invitations for intakes at any appropriate programs (Parent Ex. L). The parents further noted that the student's intensive needs could not be met in a therapeutic day placement but that, instead, based on the severity and longstanding nature of her needs, she required a residential placement (id.). The letter reflected the parents' intent to maintain the student's enrollment at Spring Ridge for the 2015-16 school year and to seek reimbursement from the district for the costs of tuition and related expenses (id.).

On September 16, 2015 the parents filed their original due process complaint notice, which was later amended on December 30, 2015 (IHO Exs. 1 at p. 18; 3).

On October 14, 2015, despite being under a high level of observation, the student eloped from Spring Ridge; however, she was found safe, several hours later (Tr. pp. 219-20, 362, 373, 375; Dist. Ex. 1 at p. 2; Parent Ex. P at p. 2). Based on the recommendation of Spring Ridge and the agreement of the parents, the student was placed at WinGate, a wilderness therapy program (the wilderness program) the following day, where she remained for a period of 10 weeks (Tr. pp. 377-79, 806-07; Dist. Ex. 1 at p. 2; Parent Exs. P at p. 2; AA at p. 4).[7]

On December 11, 2015, the parents emailed the district to inquire whether it was time to start looking into approved out-of-State schools for the student since the parents had not been contacted by very many of the placements to which the district had sent packets (Parent Ex. Y at pp. 3-4). The district agreed that it was time to pursue out-of-State placements for the student (id. at p. 3). On December 28, 2015 the student was discharged from the wilderness program and returned to Spring Ridge where she continued to attend at the time of the impartial hearing (Tr. p. 718; Parent Ex. FF at pp. 1-2).

A. Due Process Complaint Notice

By amended due process complaint notice dated December 30, 2015, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2010-11 through the 2015-16 school years (IHO Ex. 1). The parents claimed that the district violated its child find obligations by failing to have appropriate procedures in place and by failing to identify and evaluate the student during the 2010-11 through 2014-15 school years (id. at pp. 4-9, 17). The parents also claimed that the June 2015 IEP for the 2015-16 school year failed to offer the student a FAPE because the district never completed the process for locating and placing the student in an appropriate placement, insisted on exhausting the process for placing the student in a therapeutic

[7] By email dated October 16, 2015, the parents notified the district that the student had eloped from Spring Ridge and that she was being placed in a wilderness program (Dist. Ex. 1 at pp. 1-2).

day program before exploring therapeutic residential schools, and failed to expand its search to include out-of-State placement options in a timely manner (id. at pp. 9-13, 17). The parents contended that the CSE had sufficient information to develop appropriate goals for the student but deferred to the student's private therapist in drafting the IEP goals (id. at p. 11). Additionally, the parents asserted that the annual goals included in the IEP were "inappropriate and inadequate" (id. at p. 17). The parents also alleged that the CSE recommended an FBA and a BIP but that the district failed to even request consent for the evaluation (id. at p. 11). The parents also asserted that the June 2015 IEP provides for parent counseling and training but that they had received no offer of such services from the district (id. at p. 12).

Next, the parents contended that the student's unilateral placements at Spring Ridge and the wilderness program were appropriate and that equitable considerations weighed in favor of their request for relief (IHO Ex. 1 at pp. 13-17). For relief, the parents requested reimbursement for the cost of the student's attendance at Spring Ridge for part of the 2014-15 school year consisting of the months of January 2015 through June 2015, as well as tuition reimbursement for all of the 2015-16 school year, with the exception of the time the student was placed at the wilderness program (id. at p. 18). The parents also requested reimbursement for costs of attending the wilderness program and reimbursement for certain "therapeutic expenses" and private evaluations (id.). Lastly, the parents requested "at least 200 hours" of compensatory education from the district for violations of its child find obligations (id.).

B. Impartial Hearing Officer Decision

On March 7, 2016, the parties proceeded to an impartial hearing, which concluded on April 8, 2016 after four days of proceedings (Tr. pp. 1-1097). In a decision dated May 31, 2016, the IHO found that the district violated its child find obligations and failed to offer the student a FAPE for a portion of the 2014-15 school year but declined to order the district to reimburse the parents for the cost of the student's tuition at Spring Ridge for that school year (IHO Decision at pp. 22-23, 28-29). The IHO also found that the June 2015 IEP did not offer the student a FAPE for the 2015-16 school year, that the parents' unilateral placement at Spring Ridge was appropriate, and that equitable considerations did not bar tuition reimbursement; accordingly, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Spring Ridge for the 2015-16 school year (id. at pp. 19-22, 25-29).

With regard to child find, the IHO determined that the school district did not have an obligation to provide services to the student during the years that she attended nonpublic schools at parent expense and the parents did not contact the district (IHO Decision at pp. 22, 28).[8] However, the IHO found that the district had reason to suspect that the student was a student with a disability requiring special education after being informed by the student's mother in December 2014 "of an emergency situation" involving the student's social/emotional state and that the student had been sent home from the private boarding school (IHO Decision at pp. 21, 22-23, 28).

With respect to the June 2015 IEP and the student's recommended program for the 2015-16 school year, the IHO found that the IEP recommended a 12-month school year for the student

[8] According to the district's petition, prior to commencement of the impartial hearing, the parents withdrew their claims relating to school years prior to the 2014-15 school year (Pet. ¶ 6).

commencing July 1, 2015 and provisionally placed the student in a district general education high school pending a search for a therapeutic placement (IHO Decision at pp. 20-22). Although finding that an interim IEP may be appropriate in certain situations, and that the district did make some efforts to find an appropriate therapeutic school, the IHO determined that the district ultimately failed to offer the student a FAPE during the 2015-16 school year because it failed to have an IEP in place at the start of the school year that recommended an appropriate therapeutic placement and failed to reconvene the CSE and recommend such a placement during the school year through the date of the decision (id. at pp. 20-22, 28). Additionally, the IHO found that the annual goals in the June 2015 IEP could not have been implemented in the general education setting set forth on the face of the IEP and that the district advised the parents after the CSE meeting that goals would be added to the IEP (id. at p. 21).

Having concluded that the district failed to offer the student a FAPE for the 2015-16 school year, the IHO turned to the appropriateness of the unilateral placements (IHO Decision at pp. 24-26). Initially, with respect to the student's placement at a wilderness program during Fall 2015, the IHO determined that the hearing record did not support reimbursement because there was no evidence that described the program's educational, rather than therapeutic, services provided to the student (id. at pp. 24, 28-29). Next, after identifying the student's needs and describing the academic and therapeutic program at Spring Ridge, the IHO found that Spring Ridge provided the student with educational and therapeutic services that were appropriate to meet the student's needs (id. at pp. 25-26). Additionally, the IHO noted that the student had made "significant progress" in the social/emotional realm and "was successful in her academic studies" during her attendance at Spring Ridge (id.).

Upon examining equitable considerations, the IHO acknowledged that the student's need for a therapeutic placement in December 2014 arose as a result of a "crisis," and that the parents initially placed the student at Spring Ridge in January 2015 without first notifying the district in writing (IHO Decision at p. 26). The IHO nonetheless found that the parents cooperated with the district in formulating the June 2015 IEP and in trying to locate a publicly funded therapeutic placement (id. at pp. 26-27). The IHO also found that, although the parents did not agree to an intake interview at a specific therapeutic day program, it was because they believed only a residential program was appropriate (id. at p. 26). Further, the IHO noted that the parents reasonably determined that the student could not leave Spring Ridge to attend intake interviews due to her emotional condition at the time but that they made the student available for intake interviews via video conferencing (id. at pp. 26-27). Thus, the IHO concluded that equitable considerations weighed in favor of an award of tuition reimbursement for the 2015-16 school year (id. at p. 27).

For relief, the IHO ordered the district to reimburse the parents for the tuition costs of the student's attendance at Spring Ridge for the 2015-16 school year commencing July 1, 2015, and denied reimbursement for certain other expenses related to the student's attendance at Spring Ridge for "lack of specificity and documentation in the record" (IHO Decision at pp. 28-29).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district violated its child find obligations for the 2014-15 school year, that the June 2015 IEP failed to offer the student

a FAPE, that Spring Ridge was appropriate to meet the student's needs, and that equitable considerations did not bar an award of tuition reimbursement.

As for the district's child find obligations after December 2014, the district argues that its obligation to evaluate the student was not triggered because the parents did not inform the district guidance counselor that they wanted to refer the student to the CSE, the student's social/emotional status became severe only in December 2014, and the district had no notice that the student's academic performance was affected by her emotional state before this. Turning to the June 2015 IEP, the district argues that the IHO failed to account for the fact that the CSE required two meetings to finalize the IEP given the recommendation for an out-of-district program and for the parents' failure to allow the student to participate in the intake process. The district also sets forth various factual allegations in its petition, including that, once enrolled in a district program, a guidance counselor would have met with the student to discuss a coordinated set of transition activities and an FBA would have been conducted and a BIP developed.

With respect to Spring Ridge, the district asserts that the unilateral placement broke its own protocols by not requiring the student to participate in a wilderness program prior to enrolling, failed to address the student's attempted elopement, and failed to appropriately address the student's needs related to the diagnosis of reactive attachment disorder. The district further argues that the student did not make meaningful progress at Spring Ridge. As for equitable considerations, the district argues that the parents failed to provide the district with timely notice of their intention to unilaterally place the student, failed to cooperate in the CSE process, and refused to visit potential out-of-district programs which hampered the district's ability to locate an appropriate placement for the student. Lastly, the district contends that the parents engaged in spoliation by destroying documents in the form of e-mails germane to the impartial hearing, which should be weighed against an award of tuition reimbursement.

In an answer, the parents respond to the district's allegations and argue to uphold the portions of the IHO's decision assailed by the district. The parents also set forth factual allegations in support of claims relating to the district's failure to conduct an FBA or develop a BIP, the CSE's failure to develop an appropriate transition plan for the student, and the district's failure to offer the parents the parent counseling and training included in the June 2015 IEP. Further, the parents assert that they did not destroy any e-mails germane to the impartial hearing.

The parents also interpose a cross-appeal, contending that the IHO erred in failing to award tuition reimbursement for the cost of the student's attendance at Spring Ridge for the period of January 2015 through June 20, 2015 to remedy the district's failure to meet its child find obligations. While noting that the IHO's decision did not articulate the basis for denying the parents' request for tuition reimbursement for this period of time, the parents argue that, to the extent the IHO based it on equitable considerations—to wit, the timing of the parent's notice to the district of their intent to unilaterally place the student—the district never provided the parents with any procedural safeguards notice or otherwise informed the parents of their obligation to provide the district with notice of a unilateral placement.

In an answer to the parents' cross-appeal, the district responds to the parents' allegations concerning the 2014-15 school year and argues against tuition reimbursement for that school year on the basis that the district did not fail to meet its child find obligations, that Spring Ridge was

not an appropriate unilateral placement, and that equitable considerations barred tuition reimbursement. In a reply to the district's answer to the cross-appeal, the parents contend that the district's memorandum of law submitted with its answer to the cross-appeal should not be considered because it includes factual assertions that are not included in the answer to the cross-appeal and raises arguments that are outside the scope of the cross-appeal.[9]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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.,

[9] In addition, in letter to the Office of State Review, dated August 10, 2016, the district responds to the parents' assertion that its memorandum of law should be disregarded. By letter, dated August 14, 2016, the parents argue that the district's August 10, 2016 letter should be disregarded because it constitutes an impermissible pleading. In this matter, each party has had ample opportunity to make allegations of IHO error and respond to allegations made by the other party consistent with the dictates of due process. Review of all of the pleadings submitted in this matter indicates that, consistent with State regulation, both parties have sufficiently indicated within the appropriate pleadings the reasons for challenging the IHO's decision, identification of the findings, conclusions and orders to which exceptions are taken, and a statement of the relief sought (8 NYCRR 279.4). Further, even if additional facts are referenced in the memorandum of law, it is of little consequence as I have conducted an independent review of the entire hearing record (see 34 CFR 300.514[b][2]) including evidence pertaining to the facts summarized in the parties' submissions.

694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). 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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

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

VI. Discussion

A. Child Find

The district argues that the IHO erred in finding that the district violated its child find obligations after December 2014. The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District 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). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, a school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student

needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]). see also 8 NYCRR 100.2[ii]). The United States Department of Education's Office of Special Education Programs (OSEP) has opined that under child find duties, a district that is responsible for offering a student a FAPE must not decline a parent's request to conduct an eligibility evaluation of the student even if the student is attending a private school located in another district (Letter to Eig, 52 IDELR 136 [OSEP 2009]; see Moorestown Tp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1068-70 [D.N.J. 2011]; Regional Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *10 [D.Conn. Aug. 7, 2009]; District of Columbia v. Abramson, 493 F. Supp.2d 80, 84-85 [D.D.C. 2007] [rejecting the proposition that a district of residence did not have a child find obligation due to the fact that the student was parentally placed in a private school in another district and finding that both public school districts retained child find obligations]; Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student with a Disability, Appeal No. 11-011).

The district contends that the IHO incorrectly found that the district possessed sufficient knowledge to refer the student to a CSE for a determination on initial eligibility when the student's mother first contacted the district guidance counselor in December 2014. In the district's view, in order for a student to be eligible for special education as a student with an emotional disturbance, the student had to exhibit one or more of the required characteristics of the classification "over a long period of time to a marked degree" and, at the time the parent contacted the guidance counselor, the student had only been experiencing a deteriorating social/emotional status and self-harm behaviors in December 2014 (see 8 NYCRR 200.1[zz][4]). Thus, the district argues that, in December 2014, the student would not have met the criteria for classification as a student with an emotional disturbance.

The district's position is misguided for several reasons. First, a district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" and not, as the district's position implies, triggered only when the district knows with certainty that the student meets the classification requirements of a disability (J.S., 826 F. Supp. 2d at 660 [emphasis added]; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Cari Rae S., 158 F. Supp. at 1194). When the child find obligation is triggered, the result is referral to the CSE and evaluation of the student's needs, and that is the process by which it is determined whether or not a student meets the classification requirements of a disability.

The hearing record supports the IHO's conclusion that the district possessed sufficient information to suspect a disability as early as December 2014 (IHO Decision at pp. 16, 22-23). As summarized above, in December 2014, while attending the boarding school, the student's emotional status deteriorated, such that she engaged in unsafe and self-harming behaviors, and the boarding school recommended that the student take a medical leave (Tr. pp. 741-42, 744-45, 1017; see Parent Ex. G at p. 1). The student's mother contacted the district around this time (see Tr. pp. 48-49, 52, 747, 750-51; see Dist. Exs. 2 at p. 1; 3). According to the school guidance counselor, after speaking with the student's mother, she knew that the student was in crisis, that the student previously attended the district and received accommodations pursuant to a section 504 accommodations plan, and that the parent sought "direction" or "options" (Tr. pp. 60-64). As the

IHO found, the hearing record supports the conclusion that this communication triggered the district's child find obligations (IHO Decision at pp. 16, 22-23; see Tr. pp. 49-52, 65-69).

Further, because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child; thus, the district's contention that the parents were "aware" of the referral process is unavailing (see Reid, 401 F.3d at 518 [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).

Moreover, there is an alternative basis to sustain the IHO's child find determination. As set forth above, to satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate children who may have a disability (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]). There is insufficient evidence in the hearing record to find that the district had such procedures in place. The parents testified that, after removing the student from a district public school and placing the student in a nonpublic school in February 2010, the parents received no communications from the district directed at identifying or locating the student from that time until the parents themselves referred the student to the CSE in March 2015 (Tr. pp. 311-12, 320, 734, 736-37; Parent Ex. H). Furthermore, testimony from district personnel during the impartial hearing reveals significant uncertainty with the district's process of referring a student to the CSE for evaluation, as well as an email from the school guidance counselor to another district staff member demonstrating that the school guidance counselor was unaware of the process for placing a student in a district alternative day treatment program (Tr. pp. 44-48, 56-61, 64-71, Dist. Ex. 3). The district assistant director of special education testified that the district conducts no training protocol for district staff regarding child find procedures (Tr. pp. 168-69).

In light of the above, the evidence in the hearing record supports the IHO's finding that the district failed to establish that it satisfied its child find obligations. 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 Abramson, 493 F. Supp. 2d at 85; see also 20 U.S.C. § 1412[a][10][A][ii]; 8 NYCRR 200.2[a][7]). However, in contrast to a circumstance where a student is not ultimately deemed eligible, that factor was later taken off the table because the June 2015 CSE found the student eligible for special education services under the IDEA (see D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]) and the district was required in that circumstance to convince the finder of fact that there was no child find violation during the prior to the parents' explicit referral to the CSE, a period of time in which the district failed to develop a record in this case, relying erroneously on a presumption that the district had no duty prior to the parents referral. Therefore, under these particular circumstances, the district's child find violation will stand and will be examined in the context of the cumulative impact of the district's procedural violations related to the June 2015 IEP.

B. June 2015 IEP

1. Scope of Review

Before addressing the merits of the claims relating to the June 2015 IEP, it is necessary to determine which claims may be properly considered. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (20 U.S.C. § 1415[b][6], [7]; 34 CFR 300.507; 300.508; 8 NYCRR 200.5[i], [j]). In general, that party may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). This statutory provision prevents the party requesting an impartial hearing from bringing up claims during the hearing without providing "fair notice" to the opposing party (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014]; R.E., 694 F.3d at 187 n.4).

However, the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]). Such has been deemed to be the case, for example, when a respondent raises an issue at the impartial hearing in its opening statement, and then later elicits direct testimony from witnesses regarding the issue (see M.H., 685 F.3d at 250; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 283 [S.D.N.Y. 2013]; P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 515 [S.D.N.Y. 2013]).

On appeal, the parties dispute whether the district's failure to conduct an FBA and the CSE's failure to develop transition activities and postsecondary goals for the student amounted to procedural violations of the IDEA. The parents' amended due process complaint notice included a claim related to an FBA and a BIP but the manner in which the issue is now presented on appeal is different (IHO Ex. 1 at p. 1). Additionally, the parents' amended due process complaint notice did not include a claim challenging the CSE's failure to develop transition activities and postsecondary goals (see id. at pp. 1-17). The extent to which these claim have nonetheless been legitimately preserved and raised on appeal is addressed below.

2. Annual Goals

The IHO determined that the annual goals in the June 2015 IEP were not discussed at the CSE meeting but instead were developed by staff at Spring Ridge, and that they could not be implemented in the general education setting set forth on the IEP (IHO Decision at p. 21). Since neither party has appealed the IHO's determinations with respect to the annual goals, they have become final and binding on the parties and will not be further reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL

1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).[10] However, as the annual goals violations identified by the IHO are procedural in nature, they may contribute to the finding that the district failed to offer the student a FAPE for the 2015-16 school year, as discussed below.

3. Special Factors—Interfering Behaviors

At the time of their amended due process complaint notice the parents alleged that the CSE recommended an FBA and a BIP but that the district "failed to even request consent" for the evaluation (IHO Ex. 1 at p. 11).[11] The IHO did not address the issue of parental consent for conducting an FBA as framed in the due process complaint (see generally IHO Decision). On appeal, the issues of conducting an FBA and developing a BIP have evolved to focus on the appropriate timing for their completion. For example, the district asserts in its petition that the FBA and BIP "would be conducted pending placement search" (Pet. ¶ 39). In their answer and cross-appeal, the parents affirmatively assert that the June IEP is inappropriate because it calls for an FBA and a BIP for the student to be completed, but the CSE "chose to wait until some unidentified later date when [the student] was accepted and placed at an as-yet unidentified placement" to conduct the FBA or develop the BIP (Answer & Cross-Appeal ¶¶ 29, 32). Even if the allegations in the parents' due process complaint notice relating to the FBA and BIP could be read as excluding the issue of the timing of the FBA and BIP due to the purported issue of consent, the district nevertheless opened the door to the timing issue during the impartial hearing since the district pursued the issue of when the FBA and BIP would be completed during direct examination of a district witness for the purposes of defending the IEP (see Tr. pp. 121-22, see also Tr. p. 241). Therefore, based on the standards set forth above, the parties' dispute relating to the FBA and BIP will be reviewed as they have presented it on appeal (see M.H., 685 F.3d at 250-51).

Under the IDEA (and paralleled under state policy), a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others goes somewhat further than federal requirements and may also require that the

[10] Although the district sets forth in its memorandum of law facts in support of an argument that the annual goals in the June 2015 IEP were appropriate (Pet. Mem. of Law at p 7), the district does not articulate a challenge to the IHO's findings and conclusions in particular (8 NYCRR 279.4). Further, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 12-223).

[11] The evidence in the hearing record does not support the parents' claim to the extent it focused on the district's failure to request consent. The parents provided the district with consent to evaluate the student and the district's request for such consent set forth a series of assessments that the consent might encompass, which included an FBA (Dist. Exs. 20; 21; 23).

CSE consider developing a BIP for the student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).[12]

In more recent cases the Second Circuit has also weighed in on more recent State policy pronouncements and has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). How a "procedural violation" differs from a "serious procedural violation" and the relationship of each term to a FAPE under the Rowley standard and Congress's codification of the Burlington/Carter tuition reimbursement test in 20 U.S.C. § 1412, has been a matter that administrative hearing officers and jurists have wrestled with ever since the distinction was articulated in R.E. The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP adequately addresses the student's problem behaviors (R.E., 694 F.3d at 190). Similarly, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F., 746 F.3d at 80; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190). The Court did not explicitly discuss the timing of the development of FBAs or BIPs in R.E, but seemed to apply, as a foregone conclusion in each of the underlying proceedings, that the only logical time that an FBA could have been conducted was leading up to and during the IEP development process. However as described below, State policy makers did not originally set forth and SROs did not so narrowly construe the timing requirements for conducting FBAs and developing BIPs.

The June 2015 CSE determined that the student required strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded her learning or that of others, and that the student required a BIP (Parent Ex. K at pp. 1, 5). The IEP further reflects the CSE's recommendation that, pending a placement search for an appropriate NYSED therapeutic school, a BIP would be completed (id. at p. 5). The district assistant director of special education testified that the CSE intended that an FBA and a BIP would be completed at the school where the student was placed and that the staff at the placement, including social workers, school psychologists, and teachers would collect the data for the plan (Tr. pp. 121-22). She elaborated that the FBA would not be completed at Spring Ridge because the student had access to the particular positive behavioral supports available in that environment (Tr. p. 122).

[12] "[FBA] means the process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment. The functional behavioral assessment shall be developed consistent with the requirements in section 200.22(a) of this Part and shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it"(8 NYCRR 200.1 [r]). "A [BIP] means a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1 [mmm]).

With regard to the timing of FBAs and BIPs under State policy, the State Education Department explained that the student's need for a BIP must be documented in the IEP, and, prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The IEP development guidance post-dated and encompassed the Regent's establishment of 8 NYCRR 200.22 of State regulations (beginning in 2006), which addresses program standards for behavioral interventions, namely FBAs BIPs and the use of aversive behavioral interventions.

Once, in a summary order only, the Second Circuit explicitly addressed the timing for conducting an FBA in light of parallel IDEA and State regulatory standards then in effect, holding that it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). However, that decision was issued prior to and could not have addressed the timing factor in light of the State's subsequent promulgation of program standards in 8 NYCRR 200.22 and the addition of explicit definitions for the terms FBA and BIP to 8 NYCRR 200.1.[13] Since Cabouli was decided, and as mentioned previously, an FBA was thereafter defined by the State as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment (8 NYCRR 200.1[r]). Although FBAs and BIPs have become frequently litigated issues in New York in the special education context, none of the case law of which I am aware in New York has discussed in any significant detail either the timing factor or the environmental factor of the FBA, although a handful of cases have recognized and mentioned that such factors exist with respect to FBA's and BIPs (see, e.g., J.C.S., 2013 WL 3975942, at *13; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 365 [E.D.N.Y. 2014]; M.M. v. New York City Dep't of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]).

FBA/BIP disputes between districts and parents that end in due process and litigation are frequently premised upon fact patterns involving an anticipated change in placement at the time the CSE is convened and develops a student's IEP. In cases involving such anticipatory changes in placement, the express language in State regulations does not indicate whether the FBA should be conducted in the most recent placement that the student actually attended or in the future placement anticipated by the CSE. Instead, as mentioned above, State guidance suggests that the decision of timing and the environment in which an FBA should be conducted is a matter under State policy that has been left to the CSE to decide ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). When the facts of the particular case support the outcome, one can reason that, given the environment-focused nature of the assessment, there is at least some merit to the

[13] These are educational terms of art that are not defined by the IDEA.

proposition that an FBA, in some circumstances, would yield the educationally necessary information when conducted in the environment in which the resultant BIP would be implemented.

However, it is now questionable in light of more recent developments whether such a nuanced educational policy can be maintained. In L.O. v New York City Department of Education, the Second Circuit recently reiterated its views that prominently featured in its earlier decision in R.E., indicating that "we have repeatedly stated that the 'failure to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors.'" (822 F.3d 95, 113 [2d Cir. 2016] citing R.E., 694 F.3d at 194). In its opinion in R.E., the Court unambiguously stated that "the entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors" (694 F.3d at 190 [emphasis added]; see L.O., 822 F.3d at 111), evincing a view that an FBA must, in order to be procedurally compliant, always be drafted prior to or at the time of the development of the IEP, which must, by definition be completed before a student is placed. The Second Circuit's description of the process about crafting "a plan" to address the student's interfering behaviors could be read as referring to a plan in the sense of the 1) IEP planning document, 2) the BIP document, or most likely, 3) both planning documents.[14] The backdrop of R.E. and L.O also heavily emphasize the requirements for prospective analysis of IEPs and the general prohibition against rehabilitation of deficient IEPs through retrospective hearing testimony, and it appears that that a serious procedural violation is to be found in all cases if the student had interfering behaviors and an FBA was not conducted as part of the IEP development process. Providing parents with the opportunity, in the first instance, to have input into the IEP and BIP development at the time of the CSE meeting is one advantage in this approach. However, the conundrum has been trying to make practical sense of the environmental requirements in procedurally compliant FBA set forth in the State regulation in those subset of cases in which the student has yet to be placed in the environment at the time of the IEP in question is being drafted. In other words, the effects of the environment in question upon the student's behavior can only be assessed as envisioned under the regulations after the student has experienced the environment and, therefore, IEP drafters in this situation will always be operating without that information when the student has yet to experience the environment. I see only one solution that unquestionably accommodates both 1) the apparent need to always conduct an FBA prior to or at the time of the CSE meeting to avoid a serious procedural violation under binding Second Circuit authority and 2) the requirement that an FBA take into account environmental factors in the proposed setting as envisioned by State regulations, and that solution is to conduct two FBA's, completing one FBA in advance of the CSE meeting in the student's then current environment thereby avoiding the serious procedural violation, and then completing a second FBA in the new environment within a reasonable period after the student begins attending the new placement/setting recommended by the CSE in the IEP in order to satisfy the environmental factors envisioned by State regulations.

[14] In R.E. and L.O., the Court indicates that, if a student has interfering behaviors, a BIP must be developed, citing 8 NYCRR 200.22; however, the text of the regulation actually indicates that the CSE "shall consider the development of a [BIP]" (8 NYCRR § 200.22[b]), which language is less absolute. In my view, this allowed districts additional flexibility in determining how to address student's needs (i.e. changing placements to those with different class wide behavioral strategies and approaches, especially when changes in restrictiveness was not a factor).

The lengthy discussion of the legal standards above has been necessary since the facts of this case spotlight the tensions that have erupted over the past several years among the standards regarding FBAs the first prong a Burlington inquiry – procedural compliance. The parties in this case do not dispute whether an FBA was done or needed to be done, but sharply dispute whether an FBA was required at the time of the CSE meeting as the parent argues or could, as the district argues, be permissibly completed at later time after the student began to experience a new environment under an IEP. This procedural inquiry is particularly important because in the present case, the CSE's failure to conduct the FBA in advance of the June 2015 CSE meeting is not otherwise mitigated by any information in the IEP about the student's behavioral needs (see Parent Ex. K). The hearing record reflects that the parents referred the student to the CSE due to social/emotional concerns that impacted her overall academic success, and that she had become a danger to herself and required immediate placement (Parent Ex. I at p. 1). In preparation for the development of the student's IEP, the district conducted a psychoeducational evaluation of the student at Spring Ridge (see Tr. p. 92; Dist. Ex. 23 at p. 1). In completing the psychoeducational evaluation, the district assistant director of special education, who is also a school psychologist, relied upon a classroom observation of the student, the student's performance on certain standardized assessments, review of the May 2015 social history completed by the parents, the February 2015 private psychoeducational evaluation report, the student's report card, and interviews with the student and the staff at Spring Ridge (Parent Ex. I at p. 2; see Tr. p. 92; Dist. Ex. 18; Parent Ex. G). According to the May 2015 district psychoeducational evaluation report, the parent and/or staff from Spring Ridge reported to the evaluator that the student had received diagnoses of ADHD, mood disorder, oppositional defiant disorder, and reactive attachment disorder and had taken medication to address depression, as well as anti-psychotic medication (id. at pp. 1, 3). Spring Ridge staff shared with the evaluator that the student was bright but immature, would shut down if uncomfortable, but recovered quickly from being angry (id. at p. 3). Spring Ridge staff also indicated that, while some relationships were difficult for the student, she had developed friendships in the program (id.).

The May 2015 district psychoeducational evaluation report included results from administration of the Behavior Assessment System for Children-Second Edition (BASC-2), with the following informants: the parents (the father in January 2015 and the mother in January and May 2015), two teachers (on two dates in May 2015), and the student (in January and May 2015) (Parent Ex. I at p. 9). The BASC-2 yielded scores within the range of average to clinically significant with the following areas of concern: for the teachers, depression and withdrawal; for the parents, conduct problems, withdrawal, attention problems, somatization, activities of daily living, and functional communication; and for the student in May 2015, somatization, attention problems, relations with parents, and interpersonal relation, although the student's responses in January 2015 did not reveal any areas in the clinically significant rage (id. at pp. 13-14).

In addition, according to the hearing record, the district assistant director of special education testified that staff from Spring Ridge informed the CSE that the student's behavioral concerns related to immaturity but did not include explosive behaviors or unmanageability (Tr. pp. 137-38).

The June 2015 IEP described the student's social/emotional/behavioral needs in very broad terms by indicating that her "levels are generally within age appropriate expectations except for a significant delay in social skills with authority" (Parent Ex. K at pp. 4, 5). Further the IEP noted

that the student was friendly and polite but that she "ha[d] significant social/emotional needs which must be addressed by [s]pecial education" (id.). The IEP included four annual social/emotional/behavioral goals that indicated the student would improve "relational communication with teachers in the classroom," regulate emotions, monitor use of language during communications with her parents, and identify and appropriately use coping skills when expressing a negative emotion at school (id. at p. 6). The IEP also addressed the student's social/emotional/behavioral needs with the provision of counseling services twice per week for one hour in a group setting (id. at pp. 1, 7, 8).

One of the concerns that features prominently in this case is that the parties were engaged in the process of seeking an approved non-public school setting for the student through the packet/referral process that was discussed during the hearing. However, the information about specific interfering behaviors attendant to an FBA (i.e. frequency, duration, intensity and/or latency across activities, settings, people and times of the day as well as antecedent behaviors, reinforcing consequences of the behavior and reinforcer preferences) was not readily available to the nonpublic schools that needed to assess whether the student could be served in their programs.[15] The student exhibited behaviors that interfered with learning and required a BIP is undisputed by the parties in this matter. However, the IEP did not specifically describe the behaviors underlying the CSE's determination that the student required a BIP.[16] While there is little doubt that the completion of an FBA in this presented a logistical obstacle for the district given the student's attendance at an out-of-State residential placement, it is also unclear why the district director of special education, during her visit to Spring Ridge to conduct the student's initial evaluation for special education, could not have gathered information that might have allowed for greater specificity in the description of the student's behaviors to be included in the IEP, if not providing much of the preliminary data for completing a regulatory compliant FBA.[17] Under the factual circumstances discussed above and in light of the recent pronouncements by the Second Circuit regarding the purpose of FBAs and their use, I cannot conclude that the district has the stronger argument and could, in this case, wait until the student was placed in an approved nonpublic school before conducting the FBA. While the district's approach in this case might have been procedurally permissible at the time Cabouli was decided, it appears that the Second Circuit has more recently favored the parents' view, namely that FBAs must be conducted for the benefit of IEP drafters and be available at the time the CSE meeting is conducted. Accordingly, I find that the lack of an FBA in this instance constitutes a "serious procedural violation" and that the

[15] As mentioned above, even if such an FBA would not have been entirely accurate to the vision set forth in State regulations due to the student being in the Spring Ridge environment at the time of the CSE meeting and not the anticipated State-approved nonpublic school environment, such an FBA might have provided valuable insights for assessing how well a particular State approved nonpublic school setting might align with the student's needs.

[16] This is particularly concerning in the present case because, while it is unclear what documentation about the student that the district sent to potential therapeutic placements, to the extent that the main document was the IEP, it is unclear how the placements could evaluate whether the student would likely benefit from their particular programs without information about the student's social/emotional and behavioral deficits, which constituted her primary areas of need.

[17] State regulation requires that an initial evaluation include certain assessments, as well as "other appropriate assessments or evaluations, including [an FBA] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1]).

resultant IEP did not mitigate that serious violation to any significant degree because the June 2015 IEP failed to otherwise identify the student's interfering behaviors (L.O., 822 F.3d at 114). This serious procedural violation, at the very least, contributes to the denial of a FAPE that is further discussed below.

4. Transition Activities and Post-Secondary Goals

Similar to the district's assertions regarding the FBA, the district argues in its petition that, once the IEP was finalized and the student enrolled in a recommended placement, a transition plan would have been completed (Pet. ¶¶ 39, 48). In their answer and cross-appeal, the parents assert that the June 2015 IEP is inappropriate because it fails to contain a coordinated set of transition services or activities or any measurable post-secondary goals (Answer & Cross-Appeal ¶¶ 29, 44). As noted above, the parents' due process complaint notice made no mention of the lack of a transition plan in the June 2015 IEP (see IHO Ex. 1). Although these claims were not raised in the original or amended due process complaint notices, review of the hearing record reveals that the district once again "opened the door" to these claims by eliciting testimony on the topic during direct and re-direct examination of a district witness who participated in the June 2015 CSE meeting, in an effort to defend the contents of the IEP and, therefore, they are permissibly addressed in this appeal (Tr. pp. 116-17, 249; IHO Exs. 1; 3; see M.H., 685 F.3d at 250-51).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).[18] An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "the failure to provide a transition plan is a procedural flaw" (M.Z., 2013 WL 1314992, at *6, *9, citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see also A.D. v. New York City Dep't of Educ., 2013 WL 1155570, *11 [S.D.N.Y. Mar. 19, 2013]).

The June 2015 IEP recognized that a primary transition need of the student was to complete the necessary coursework required for graduation with a Regents high school diploma; however, it further noted that a vocational assessment would be completed pending a placement search (Parent Ex. K at pp. 6, 9). In testimony, the district assistant director of special education

[18] In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

acknowledged that, at the time the June 2015 IEP was created, the student was over the age of 16 and a coordinated set of transition services and post-secondary goals was required (Tr. pp. 204-06). The assistant director explained that the June 2015 IEP provided for a vocational assessment to be "completed pending search for placement" and that typically a guidance counselor would complete the assessment with the student (Tr. pp. 125-27). She further indicated that, had a placement in an approved therapeutic school been identified for the student, the school would have been represented at the CSE re-convene to finalize the IEP and provide necessary input on what post-secondary options would be available for a student attending the program (Tr. p. 249).

Rather than being based on post-secondary options available at a particular program, transition services must be based on the CSE's assessment of the student's needs, including her strengths, preferences, and interests (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]), not the proposed State-approved nonpublic school's assessment of those needs after the fact. State regulation contemplates that those needs would be ascertained by conducting a vocational assessment of the student (8 NYCRR 200.4[b][6][viii]). Therefore, it was not appropriate for the district to defer the completion of the post-secondary transition planning until the district located a therapeutic placement for the student. Based on the above, the lack of a transition plan is a procedural flaw, which contributes to a finding that the district denied the student a FAPE, as discussed below.

5. Placement / Finality of IEP

Turning to the placement aspects of the case, the IEP identifies the recommended placement as "Home Public School District" and specifies a particular public high school, while at the same time noting in the comments section of the IEP the conflicting notion that there will be "a search for placement, both day and residential NYSED therapeutic schools" and that the "CSE will reconvene pending the search for placement" (Parent Ex. K at p. 1). The district contends that "to the extent the IEP is incomplete," the fault lies not with the CSE, but with the parents' failure to fully cooperate with the district's search and intake efforts to have the student admitted in an approved school (Pet. ¶¶ 43-52, 104-09).

While specific to the process of placing students in approved out-of-State residential schools, State guidance sets forth the expected roles of parents and districts in the referral and placement process, which is persuasive in the present circumstances where the CSE agreed to search for both day treatment and residential placements and, ultimately, agreed to seek as noted above, an approved out-of-State placement for the student (Parent Exs. K at p. 1; Y at pp. 3-4):

> Parents are integral partners in the referral process and are expected to cooperate fully in the intake interview and screening process for the residential school. While the CSE must consider the concerns of the parents in the placement process, the district must take responsibility to secure an appropriate placement for the student in the least restrictive environment even in the instance where a parent does not fully engage with the referral and placement process.

("Placement of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ. Mem. [January 2016], at p. 7, available at http://www.p12.nysed.gov/specialed/applications/outofstate/documents/OOSAdvisory-

E.Bordenedits.pdf [emphasis added]). In a question and answer attachment to the guidance, in response to the query of what recourse a district has if a parent impedes the district in its effort to secure an approved residential school, the guidance directs that, even if a parent impedes the referral process, "[u]ltimately, the district must take affirmative actions to make arrangements for the student to complete the process" ("Placement of Students with Disabilities in Approved Out-of-State Residential Schools," Attachment 1, at p. 2).

Accordingly, while a district might find itself in an unenviable position of having to locate and secure a placement for a student without the parents' full engagement, "participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents" (Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1055 [9th Cir. 2012]). On the other hand, the district's contention that it should not be found responsible for a denial of a FAPE to the student is not entirely unreasonable but is more properly framed as a potential argument that the relief sought by the parents is unwarranted because there are equitable considerations concerning the parents' cooperation with the CSE process that should bar tuition reimbursement for the 2015-16 school year, and, therefore, that issue will be examined more fully below.

Thus, putting aside the question of the parent's cooperation in the placement search, a review of the hearing record supports the IHO's finding that the district failed to offer the student a FAPE. The district further argues that the June 2015 IEP was not intended to be a final IEP since the CSE intended to reconvene after an appropriate placement was located. Under the standard timeline for development and implementation of an IEP for a student not already identified as having a disability, the district must arrange for the appropriate special education programs and services to be provided within 60 school days of the receipt of consent to evaluate (8 NYCRR 200.4[d]). In the event the CSE recommends placement in an approved in-State or out-of-State private school, "the board [of education] shall arrange for such programs and services within 30 school days of the board's receipt of the recommendation of the committee" (8 NYCRR 200.4[e][1]). Federal and State regulations also require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6).

Here, the parents provided their consent for the CSE to evaluate the student on April 19, 2015 (Dist. Ex. 21). Further, the June 2015 IEP provided for a 12-month school year program and, therefore, the beginning of the school year would have been July 1, 2015 (Parent Ex. K at p. 8; see Educ. Law § 2[15]). However, the CSE never completed the student's IEP to identify a placement in an approved therapeutic school and continued the search for an approved placement for many months after these timeframes had elapsed (see Parent Ex. Y at pp. 3-4 [December 2015 email discussing expanding the search to include approved out-of-State placements]).

Furthermore, to the extent the June 2015 IEP provided for placement in a public high school in the district, no one is seriously asserting such a setting would have been appropriate for the student. Therefore, had the parents not placed the student at Spring Ridge, it is unclear from the June 2015 IEP or from the hearing record as a whole where the district would have placed the student for the beginning of the school year, whether on an interim basis until an approved day or

residential therapeutic placement could have been located, or otherwise. Under the facts of this case, the district's failure to provide the student with a final IEP constituted a procedural error that impeded the student's right to a FAPE for the 2015-16 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Eschenasy v. New York City Dep't. of Educ., 604 F. Supp. 2d 639, 650 [S.D.N.Y. 2009] [holding that because the district did not develop an IEP for the student, it had not made an appropriate recommendation]; Application of a Student with a Disability, Appeal No. 15-047).[19]

C. Cumulative Impact

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). A brief discussion is warranted in this case regarding the cumulative impact of the identified deficiencies in order to clarify the basis for the determination that the district failed to satisfy its child find obligation or offer the student a FAPE for the 2014-15 and 2015-16 school years (M.M. v New York City Dep't of Educ., 2016 WL 4004572, at *1 [2d Cir July 26, 2016]; L.O., 822 F.3d at 123 [finding that four procedural violations, three of which were identified as "serious," as well as "additional isolated deficiencies" in the IEPs, cumulatively denied the student a FAPE]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014] [noting that multiple procedural violations may not result in the denial of a FAPE when the "'deficiencies . . . are more formal than substantive'"] [ellipses in original], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 586 [S.D.N.Y. 2013]).

As noted above, the procedural violation arising from the district's failure to finalize an IEP for the student for the 2015-16 school year, standing alone, impeded the student's right to a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Further, the district's violation of its child find obligation warrants a review of the parents' request for relief for the time period before the beginning of the 2015-16 school year. On the other hand, the remaining violations, standing alone or when considered individually, might not result in the denial of a FAPE. These violations include the IHO's final and binding determinations regarding the annual goals, the district's failure to include a post-secondary transition plan in the student's IEP, and the district's failure to conduct an FBA, the lattermost of which has been described by the Second

[19] The parents also assert that the June 2015 IEP provides for parent counseling and training two times monthly for one hour, but that the district never implemented this portion of the IEP. Given that the district did not implement any portion of the IEP—because the IEP was effectively never finalized and therefore failed to offer the student a FAPE as set forth above—the district's failure to implement the parent counseling and training in the IEP is subsumed within that finding. In any event, the parents formally rejected the June 2015 IEP, by letter dated August 19, 2015, and the district was under no obligation to provide services to the parents after they rejected the public program (Parent Ex. L).

Circuit as a "serious procedural violation" (L.O., 822 F.3d at 114).[20] Were it not for the CSE's failure in placement, it is difficult to say whether the additional violations would have been sufficient in number or seriousness to warrant the finding that the district denied the student a FAPE solely on those grounds and the parties do not present such arguments (see id. at 123). However, in this case, it is sufficient to note that each violation adds more to the ultimate determination that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; R.B., 15 F. Supp. 3d at 434).

D. Appropriateness of Unilateral Placement at Spring Ridge

Having found that the district failed to offer the student a FAPE during the 2014-15 and 2015-16 school years, the appropriateness of the parents' unilateral placement at Spring Ridge during those school years will be examined. Although the parents also originally requested reimbursement for the cost of the student's attendance at the wilderness program during the 2015-16 school year, the parents have not appealed the IHO's determination denying reimbursement for the wilderness program and therefore, the issue is final and binding and will not be further discussed 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z, 2013 WL 1314992, at *6-*7, *10).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 13-14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides 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.,

[20] The IDEA does not define a "serious procedural violation."

459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. Spring Ridge, Generally

The hearing record reflects that Spring Ridge was a 12-month, all-girl, therapeutic boarding school serving students approximately 13 to 17 years of age in grades 9 through 12 (Tr. p. 656; Parent Ex. KK at p. 5).[21] According to promotional material in the hearing record, Spring Ridge offered a fully accredited college preparatory academic program and utilized a comprehensive approach to the therapeutic, academic, social, and physical needs of each student (Parent Ex. KK at p. 4). Spring Ridge admitted students who, although bright and capable, were often involved in risky and/or addictive behaviors that sabotaged their relationships and negatively affected their academic careers and who lacked the self-esteem and self-discipline necessary to be successful (id. at p. 5). Spring Ridge literature reflects that students who attended the academy presented with a variety of diagnoses that often fell into one of the following eight categories: conflict/defiance; depression/anxiety; attachment/adoption issues; grief and loss; focus/motivation issues; and body image/eating disorders (id.). Testimony by the executive director at Spring Ridge indicated that students came to Spring Ridge struggling with varying degrees of emotional difficulties, trauma, adoption, and loss (Tr. p. 339). These difficulties were a source of emotional dysregulation, which could present as self-harm, suicidality, substance abuse, promiscuity, conflict, or relational difficulties (Tr. p. 339; see Tr. pp. 583-84).

According to the executive director of Spring Ridge, upon admission to the academy, students who were under the care of a psychiatrist and/or were on psychotropic medications

[21] Testimony by the executive director of Spring Ridge indicated that students at Spring Ridge are 14 to 17 years of age upon admission (Tr. p. 335).

underwent an initial psychiatric intake evaluation (Tr. pp. 364-65).[22] A "Master Treatment Plan," described as an "overriding plan" of "therapeutic attack," was developed for each student, which included the student's diagnoses, reasons for admission, medications, a list of therapeutic needs ("master problem list"), and both long term/discharge/graduation goals and short term objectives to address these needs (Tr. p. 340; Parent Exs. N; Q; T; NN). According to the executive director, treatment plans were reviewed throughout the students' attendance at Spring Ridge and were updated either to add to, or to note the resolution or meeting of goals and objectives (Tr. p. 341; Parent Exs. N; Q; T).

In addition to the master treatment plan, the principal at Spring Ridge indicated that each student was assigned a treatment team made up of a therapist who was the "anchor" of the team, a teaching faculty member, and various community staff members, who met weekly to address the needs of the student (Tr. pp. 657-58; see Tr. pp. 596-97; see Parent Ex. S at p. 1).[23] According to the principal, in order to serve the individual needs of a particular student, the treatment team collaborated and planned together and developed objectives, consistent with the master treatment plan, related to how the student was doing in the classroom, how she interacted and related to her peers in the community, and how she was doing emotionally and therapeutically with her therapist (Tr. p. 658; compare Parent Exs. N at pp. 4-8; Q at pp. 4-8; T at pp. 4-9; NN at pp. 3-7 with Parent Ex. S at pp. 1-18).

A typical length of stay at Spring Ridge was 14 to 18 months, however, completion of the program was based upon students' attainment of treatment goals, which was evidenced by their practice of new appropriate patterns of thinking, feeling, and behaving (Tr. p. 338; Parent Ex. KK at p. 10).[24] Students moved through four stages or phases, each of which built on skills that were needed to transition home (Tr. pp. 338-39; Parent Ex. KK at p. 1; see Tr. pp. 348-54; Parent Ex. KK at pp. 10-11).[25] According to the executive director of Spring Ridge, students' movement through the four stage process dovetailed nicely into their treatment goals (Tr. p. 338). As students met their treatment goals, where they developed more competency in self-regulation and emotional control, they also moved slowly and methodically through the four phases of the program to integrate back into their homes and their lives outside of Spring Ridge (Tr. pp. 338-39).

With respect to the academic component at Spring Ridge, the principal of the academy testified that Spring Ridge was in session throughout the year and followed a two-semester system, with the first semester running from July to December and the second semester from January through June (Tr. pp. 656-57). Students attended classes at Spring Ridge Monday through Friday

[22] The school contracted with a licensed psychiatrist who visited the campus one day per week and was available via telephone when needed (Tr. pp. 337-38).

[23] Although treatment team meetings were held weekly, the meeting notes were recorded on a monthly basis (Tr. p. 448).

[24] Testimony by the executive director of Spring Ridge indicated that 60 to 75 percent of students completed the program within 14 to 18 months (Tr. p. 395).

[25] Spring Ridge literature indicates that most students entered Spring Ridge after completing a short-term intervention, such as a clinically-based wilderness program, and that Spring Ridge would apply the therapeutic work done in such a program to an environment with more demands (Parent Ex. KK at p. 10).

from 9:00 in the morning to 2:50 in the afternoon while therapy and other activities took place during the rest of the day (Tr. pp. 345, 672; Parent Ex. KK at pp. 8-10). Class size ranged from an average of 6 or 8 students to 12 or 14 students, although mathematics classes were limited to 6 or 7 students (Tr. p. 357; see Tr. p. 661). Students took six courses, typically four or five core courses and one or two electives, depending on their ability to manage their stress, responsibilities, and academic needs (Tr. pp. 345-46). The school followed a rotating A/B block schedule with three subjects meeting on A day and the other three subjects on B day (Tr. p. 672). Classes met for 90 minutes, which allowed teachers more opportunity for 1:1 interaction and to connect with individual students that could be distancing themselves (Tr. pp. 671-72). The teachers at Spring Ridge were certified to teach in their content areas and were all trained in "de-escalation and trauma and informed care, adolescent development" (Tr. p. 357).

2. Specially Designed Instruction

For the student in the instant case, the initial psychiatric intake evaluation, completed by Spring Ridge in February 2015, detailed the student's past psychiatric history and present illness, provided diagnoses of a mood disorder, not otherwise specified (NOS), and ADHD (per history) and outlined a treatment plan for the student (Parent Ex. M). The intake evaluation indicated, among other things, that the parents were in agreement with a slow wean off of all medications in order to ascertain if they were actually helping the student, and that the psychiatrist would continue to collaborate with the student's therapist (id. at p. 2).

In February 2015, Spring Ridge developed an initial master treatment plan that included the following diagnoses: depressive disorder NOS, bereavement, identity problem, and ADHD combined type (Parent Ex. NN at p. 1). The plan also noted that the student had problems with her primary support group (id.). Each of these diagnoses were included in a list of master problems (id.). For each problem, a description was given of the student's behaviors which evidenced the problem, along with corresponding long term goals and short-term objectives to address each problem, and recommended interventions (id. at pp. 1, 3-7). For example, the student's master treatment plan indicated that her "identity problem," was evidenced by "[d]ishonesty, no communication with mother, [and] no relationship with mother" (id. at p. 5). The student's long term/discharge/graduation goal for the identity problem was to "[d]evelop [an] age appropriate ego state," with corresponding short term objectives indicating that the student would complete a specific bibliotherapy reading and that the student and her parents "[would] be educated about the 5 core areas and 4 ego states within 30 days after enrollment" (id.). The recommended interventions included "Family Therapy (Telephonic) 1 times per month.; Group Therapy 3-4 time(s) per month.; and Individual Therapy 1 time(s) per month" (id.). The master treatment plan also identified the staff who created the objectives, as well as the staff member who was responsible for them (id. at p. 4). The same was true for the other four problems listed in the treatment plan (id. at pp. 3-4, 6-7).

A review of the hearing record shows that Spring Ridge regularly reviewed the student's master treatment plan and that changes were made to it over time based on the student's needs and completion or resolution of objectives (Parent Exs. N; Q; T).[26] The master treatment plan updates

[26] Testimony by the student's therapist indicated that master treatment plans are updated every three months (Tr. p. 604).

reflected that seven new short-term objectives were added to the student's plan between February 2015 and January 2016 (Parent Exs. N at pp. 4, 6, 8; Q at pp. 4, 5; T at pp. 7, 8); one new problem and diagnosis was identified (reactive attachment disorder) (Parent Ex. T at pp. 1, 4); one short-term objective was delayed until spring (id. at p. 6), and three short-term objectives were met or resolved (Parent Exs. N at p. 6; Q at p. 5). The treatment plan updates also reflected changes or additions to proposed interventions (Parent Exs. N at p. 7; Q at p. 6).

In addition to the master treatment plan, Spring Ridge employed a "Small Treatment Team" that reviewed the student's progress weekly and developed monthly objectives for the student (Parent Ex. S; see Tr. p 597). Here, each monthly team meeting note reflected the student's progress, based on her recent behavior, on objectives related to therapy, academics, and community participation, including the specific assignments and/or skills that the student was working on, and further identified objectives for the student to work on going forward, including continuation of objectives she had not yet met (see Parent Ex. S at pp. 1-18).

In order to address the student's unique needs, Spring Ridge chose specific therapeutic strategies to employ with the student. For example, the executive director of Spring Ridge testified that, while the school employed many types of therapies, the student benefited from the solution-focus style of therapy, as well as relationship-based therapy (Tr. pp. 344-45). She also indicated that, as part of attachment-focused work, Spring Ridge staff focused on a style of relating where they talked with the student about the experience another person had in their interactions or relationship with her (Tr. p. 345).[27] The student's therapist reported that a cognitive-behavioral approach and trauma-history work could not be used with the student, "because that's not how you work with reactive attachment" (Tr. p. 624). Both the executive director and the student's therapist opined that it was not helpful to focus on the student's past traumas, rather it was better to for the student to focus on her present relationships (see Tr. pp. 344-45, 624).

The hearing record details the numerous strategies that Spring Ridge used to address the student's problem behavior, including natural and logical consequences, losing or earning privileges such as a parent visit, losing or earning back personal possessions, receiving praise and attention for working behaviors, ignoring non-working behaviors, and movement up or down a phase for appropriate or inappropriate behavior and attaining or not attaining treatment goals (Tr. pp. 449-50, 467; Parent Exs. S at pp. 7, 9, 10, 18; W at p. 37; KK at p. 10). The student's therapist also provided the parents with advice on how to appropriately implement consequences for the student's lack of respect and kindness with regard to family interactions (Parent Ex. W at pp 22, 23).

The hearing record also shows that Spring Ridge responded to changes in the student's needs. When the student's problem behaviors escalated, Spring Ridge employed additional safety parameters by increasing supervision (Tr. p. 363). In addition, specific peers were assigned to interact with the student for the purpose of mentoring and guidance, and the student was prohibited from interaction with other students that might condone or participate in acting-out behaviors (id.).

[27] The student received individual psychotherapy for 50-minute sessions; group therapy for 1.5 hour sessions and family therapy for 50-minute sessions (Parent Ex. R at p. 1). Her current therapist testified that she will also intended to begin "EMDR" (Eye Movement Desensitization and Reprocessing) therapy which, as described, deals with reprocessing and desensitizing traumatic materials so that the student can live in a more adapted and age appropriate ego state (Tr. pp. 607-08; see Tr. p. 344).

Spring Ridge also provided supplemental therapeutic assignments to the student at times and changed her therapist and moved her caseload, in order to provide a fresh start and in order to do a separate review (Tr. pp. 363-64; 471-73, 571).

With respect to academics, the hearing record reflects that, when the student attended Spring Ridge during the 2014-15 school year, her core academic classes included Chemistry, Geometry, Sophomore English, and U.S. History (Parent Exs. O at p. 1; LL at pp. 1, 2).[28] For the 2015-16 school, year the student's core academic classes included Algebra 2, Biology, Creative Writing, and Junior English (Parent Exs. O at pp. 2, 4; GG at p. 1 MM at p. 1).[29] At the time of her testimony in April 2016, the student's then-current therapist indicated that the student was taking a more rigorous academic schedule including two algebra classes, biology, government, and English, and that she also worked as a teacher aide and tutored students outside the classroom (Tr. p. 615; see Parent Ex. GG at p. 1). Testimony by the principal at Spring Ridge indicated, that at that time, the student was enrolled in the SAT preparation workshop, had taken the PSAT and was planning to take the SAT in May 2016 (Tr. p. 681). Although the student had few academic needs, the Spring Hill principal opined that the student required a small class size as it allowed the teacher to bring the student's "shutting down" behavior to her attention and offer support and services in the moment (Tr. pp. 671-72).

Moreover, the hearing record further reflects that the academic and therapeutic components of the student's program were integrated at Spring Ridge (see Tr. p. 369). The student's therapist testified that she coached the student's teachers with regard to the type of language to use with the student when she was being disrespectful (Tr. pp. 613-14). The student's therapist and the Spring Ridge executive director cited an example, whereby the student would pull out a personal book to read in math class, and instead of managing it in a behavioral way and asking the student to put the book away, Spring Ridge staff would "tailor" the way they related to the student (Tr. p. 370). The teacher could say, "hey, it's not time for the book" and "here is how I feel when you take a book out in the middle of instruction and here is how you may affect the rest of the class" (Tr. p. 370; see Tr. pp. 613-14). In addition, the student's mother testified that, when the student was having difficulty in the classroom, her therapist "actually went into the classroom with her" (Tr. p. 1005; see Tr. p. 331).

The hearing record further reflects that the therapeutic and community components of the student's program were also integrated. The small treatment team developed, and community coaches (direct care staff) implemented, community participation objectives for the student designed to increase her emotional regulation and interpersonal skills (Tr. pp. 597, 619; Parent Ex. S at pp.1, 3, 5). In addition, the community coaches received training from the student's therapist on how to connect with the student (Tr. pp. 595-97; see Parent Ex. S at pp. 1-18). The student's therapist described several examples of how community coaches and Spring Ridge staff in general supported the student's community goals. In one instance, community coaches helped to

[28] The report cards and progress report for this time period indicated that the student also took additional courses including Art Within, Creative Expressions, Creative Writing, and Yoga; however, these classes do not appear consistently on the report cards and progress report for this time period (see Parent Exs. O at p. 1; LL at pp. 1, 2).

[29] Report cards and progress reports for this time period indicated that the student also took Beginning Dance, Physical Education, Art Spectrum, and Creative Expressions (Parent Exs. O at pp. 2, 4; GG at p. 1; MM at p. 1).

implement an exercise in which the student sat with a new group of girls at lunch twice a week and observed her own interactions and relationships with the girls (Tr. pp. 618-19). Afterward, she wrote in her journal about the experience, documenting, for example, whether she was anxious, nervous, or scared, and then shared it with her therapist (id.).[30] In another instance, a shift supervisor was enlisted to help make the student aware of the effect of her behavior on others (Tr. pp. 619-20). The student's therapist reported that the student was being disrespectful to a shift supervisor but subsequently turned her behavior around after the supervisor used feeling language and talked about how hurt she was by the student's behavior (Tr. pp. 619-20). Notably, the student also lacked self-awareness when her interaction with others was positive. Her therapist described an occasion in which the student was concerned that her performance as a "big sister" to a new student was "really bad" (Tr. p. 621). However, another "big sister" reported the student was doing a phenomenal job, that the new student felt safe with her, and that she was appropriately checking in with her, taking her under her wing, and going to staff when she was worried about her (Tr. pp. 621-22). According to the student's therapist, the student did regular check-ins with her coaches to let them know what was going on with her emotionally and her coaches knew to use specific emotionally-centered language with the student (Tr. p. 619). Lastly, the student's therapist reported that the shift supervisors and coaches implementing the student's plan would advise her of conflicts and they would facilitate a meeting (Tr. p. 620).

For the reasons set forth above, I find that Spring Ridge offered the student specially designed instruction that met her unique, and changing, needs for the 2014-15 and 2015-16 school years.

3. Progress

The district asserts that the IHO failed to address the student's lack of meaningful progress at Spring Ridge.

With regard to the student's behavior and her progress through the four phase program at Spring Ridge, the hearing record reflects that the student's behavior was initially inconsistent. For example, the student remained on phase one for over eight months, much longer than the four to eight weeks that was typical (Tr. pp. 489-50). The hearing record reflects that the student struggled to consistently demonstrate appropriate behaviors that would allow her to progress beyond phase one (see Parent Ex. S at pp. 7, 10). Notably, the student's therapist testified that therapy to address the student's reactive attachment disorder diagnosis was long-term work and therapy was moving at a slower pace (Tr. pp. 606, 629). In addition, the executive director opined that she believed the student's increase in behavioral dysregulation during fall 2015 was because, as the student received more therapy, discomforts, emotions, thoughts and beliefs surfaced at a rate that she could not manage, so she returned to her previous style of coping, which was to act out (Tr. pp. 370-71). However, the hearing record shows that, since returning to Spring Ridge from the wilderness program in December 2015, the student demonstrated significant progress. The student's therapist reported that since her return, the student had not attempted or expressed an interest in eloping, had not engaged in self-harm, and had not stolen anything (Tr. pp. 624-26).

[30] The hearing record reflects that the student had a contract involving both school and community wherein she would meet with the principal, check in and try to be more accountable in class and where she was going to try to be respectful of her coaches 85 percent of the time (Tr. pp. 999-1000; see Parent Ex. W at pp. 48-49).

Moreover, according to the student's therapist, the student had demonstrated significant positive behavior changes since returning to Spring Ridge, as evidence by her movement to phase three, integration, in March 2016, and her ability to remain there for about a month, at the time of the hearing (Tr. p. 627). The therapist reported that the student had "risen to the occasion on phase three" and had "really stepped up as a leader in the community" as well (Tr. p. 627). The executive director of Spring Ridge testified that, since January 2016, and following the wilderness program, the student was able to relate more consistently, better able to regulate her emotions and manage her safety, able to "experience adversity in a more resilient theater," able to build friendships more consistently, and more open to having relationships with multiple adults (Tr. pp. 381-82). Additionally, the student's mother testified that, at the time of the hearing, the student had made a few friends for the first time in her life, was being more respectful and accountable for her behaviors, and was willing to participate in therapy (Tr. pp. 999, 1001-02).

Academically, the hearing record reflects that the student's progress was attributable to her ability to manage her emotions within the classroom setting (see Tr. pp. 366-67, 384; Parent Ex. S pp. 3, 5, 7, 9, 11, 13, 17). The executive director of Spring Ridge testified that the student's projection of her own issues negatively affected her grades at times (see Tr. pp. 366-67). For example, her grades in art fluctuated significantly because, although her feelings were not well-founded, she did not like the art teacher, at times refused to do the work, did not ask questions when she needed to, or was late in completing assignments (Tr. p. 367; Parent Exs. O at p. 1; LL at p. 1). In other classes, the student was reported to be detached and disinterested, was not fully participatory, and often isolated herself, not only from the work but also her peers (Parent Ex. S at pp. 3, 5, 7). However, in February 2016 several of the student's teachers reported that she was demonstrating improvement in her attitude and approaching classes in a more positive way (Parent Exs. S at p. 1; GG at p. 1). The student's English teacher indicated that the student showed "a great deal of focus and engagement" during the quarter and her biology teacher indicated the student was one of the best teacher's aides he has had, reporting that the student was reaching out to other students that needed help and tutoring them outside of class (Parent Ex. GG at p. 1). The hearing record reflects that, despite the effects of the student's emotional status on her academic participation, she achieved grades predominantly of As and Bs throughout her attendance at Spring Ridge (Parent Exs. O at pp. 1, 2, 4; GG; LL; MM).

Accordingly, while the student's initial progress at Spring Ridge may have been slow, based on all of the above, the hearing record demonstrates that the student made overall progress during her attendance at Spring Ridge, particularly in the social/emotional/behavioral realm.

4. Specific District Concerns

The district asserts three discrete claims with respect to Spring Ridge that warrant individual treatment. First, the district asserts that Spring Ridge had a "protocol" of only accepting a student after she had completed a wilderness program, and this protocol was not followed with the student. Next, the district asserts that Spring Ridge did not adequately address the student's "pre-elopement" behaviors which led to the student successfully eloping from the Spring Ridge campus. Third, the district asserts that Spring Ridge did not adequately address the student's need related to her reactive attachment disorder diagnosis, which delayed her progress.

Turing first to the district's argument that Spring Ridge failed to follow its protocol for students to complete a wilderness program prior to enrolling in Spring Ridge, the evidence in the hearing record does not support a finding that the timing of the wilderness program rendered Spring Ridge inappropriate. Contrary to the district's claim that there is a "protocol," the hearing record reflects that most, rather than all, of the students at Spring Ridge, enrolled in a short-term intervention, such as a clinically-based wilderness program prior to attending Spring Ridge (Tr. p. 640; Parent Ex. KK at p. 10).[31] Furthermore, the hearing record reflects that it was not an error or oversight that the student did not first attend a wilderness program but, rather, was a decision based on discussion with the parents, the parents' educational consultant, the student's then-current social worker/therapist, and the student, as well as on information provided by the therapist regarding her collaboration with the student's psychiatrist (Tr. pp. 442-44, 493-94, 989). The executive director of Spring Ridge testified that she was part of the committee that determined whether to accept the student at Spring Ridge and was aware that the student had not attended a clinically-based program prior to entering Spring Ridge (Tr. pp. 396-97). She indicated that the discussion led them to believe that "to go to [the] length" of enrolling the student in a wilderness program "didn't seem warranted" at that time "based on the information at hand" (Tr. pp. 492-93). Additionally, the executive director indicated that the student had already undergone "a good bit of assessment over a long period of time" as well as "interventions," had also experienced being out of her home attending a traditional boarding school, and, at the time, was open to receiving help and attending Spring Ridge (id.). As such, she did not recommend the student attend a wilderness program prior to starting at Spring Ridge (Tr. p. 397).

With respect to the district's argument that Spring Ridge was inappropriate because it did not adequately address the student's elopement attempts, although the student eloped from the Spring Ridge campus on one occasion and was missing for several hours, Spring Ridge took appropriate measures to try to prevent the incident and responded adequately when it occurred. Spring Ridge addressed the student's attempts at elopement both preventatively (with a heavy focus on relationship therapy, provision of additional safety parameters, increased supervision, assignment of specific peers to serve as mentors, prohibitions on contact with students who might encourage acting-out behavior, and supplemental therapeutic assignments), as well as in the moment with the provision of additional strategies that were utilized when the student actually eloped (Tr. p. 363). When the student was at risk of eloping, staff at Spring Ridge periodically looked through the student's belongings with "a finer tooth comb" either randomly or as needed (id.). Staff began keeping a closer eye on her by watching where she went on campus, because her behavior seemed questionable (Tr. p. 373). When they lost sight of her, "run procedures" were followed including alerting the parents, the local sheriff, and a "run team" that would send out multiple staff and faculty to inform local businesses and to drive around to look for the student (Tr. pp. 374-76, 424-26). When the student was returned, she was on very heightened security parameters, called "1:1," which means "she [was] within an arm's reach of staff" (Tr. p. 375). Staff worked on having the student dialogue about her thoughts and feelings and someone was there to notice any distress the student may not be expressing verbally (id.). The student also had her belongings limited so as to limit her ability to have more comforts with her, in an effort to deter her from eloping again (Tr. p. 377). The elopement was also addressed by clinicians so they could

[31] Testimony by the executive director of Spring Ridge indicated that 90 percent of students attended a wilderness or other clinical program prior to entering Spring Ridge (Tr. p. 557). The individual and family therapist at Spring Ridge testified that the "majority over 50 percent go to wilderness first" (Tr. pp. 581, 640).

talk about their experience of the student being in danger, with the student (id.). As Spring Ridge staff believed it was necessary, the student ultimately left Spring Ridge to participate in a wilderness program for 10 weeks before returning to Spring Ridge (Tr. pp. 806-07).

Notably, testimony by the executive director of Spring Ridge indicated that, while they took all reasonable efforts to prevent students from eloping, some elopement was anticipated, due to the nature of the students' needs (Tr. pp. 537-38). She indicated that the students who attend Spring Ridge have "years of emotional baggage" and are "dysregulated emotionally" (Tr. p. 538). The executive director opined that, at Spring Ridge, students are in an environment where all of their unhealthy vices are taken away and that it is unrealistic to expect students to automatically learn how to manage their impulsivity, emotions, and dysregulation (id.). Accordingly, Spring Ridge's enrollment contract acknowledges the procedures that would be followed in the event that a student ran away from the control and supervision of Spring Ridge staff (Parent Ex. JJ at p. 2; see Tr. p. 537).

Third, the district argues that Spring Ridge failed to address the student's reactive attachment disorder diagnosis prior to 2016. It does not dispute the parent's contention that, as long as the student's treatment goals were appropriate, it did not matter whether the master treatment plan referenced reactive attachment disorder or not (see generally Tr. pp. 1045-46); however, the district specifically argues that, prior to 2016, the master treatment plan did not contain goals addressing anxiety or the ability to seek comfort, which it maintains are characteristics of reactive attachment disorder. Testimony by the clinical director at Spring Ridge revealed that the main component of the student's reactive attachment disorder diagnosis was her struggles in being able to connect and feel safe in relationships with others (Tr. pp. 878, 887).[32] As described below, the hearing record reflects that Spring Ridge did address the student's reactive attachment disorder diagnosis, as well as her difficulties establishing and maintaining positive relationships.

Testimony by the clinical director of Spring Ridge indicated that the student's history of early loss of caregivers would suggest that attachment could be an issue for her, so they "worked from that lens" in the design of her care (Tr. pp. 895-97, 931-32). According to the clinical director, although the circumstances of the student's birth and early life experiences fit with concerns relevant to a reactive attachment disorder diagnosis, they needed the sort of evidence that came with time before they formally made the diagnosis (Tr. pp. 931-32; see Tr. pp. 914-15).[33] However, testimony by the clinical director indicated that the student was receiving some interventions for her needs related to reactive attachment disorder before her master treatment plan reflected the diagnosis in January 2016 (Tr. pp. 930-32; Parent Ex. T at p. 1). The clinical director's testimony indicated that the kind of interventions that they would use to address the diagnoses and problems that were identified on the student's earlier master treatment plans, including parent/child

[32] The clinical director at Spring Ridge testified that the student exhibited anxiety and fear connected to establishing relationships (Tr. p. 887).

[33] Testimony by the student's current therapist indicated that clinicians sometimes hesitate to put reactive attachment disorder on a diagnoses chart as it is a significant disorder and it comes with a stigma (Tr. p. 590).

problems, identity problem, depression, and bereavement, would also address reactive attachment disorder (Tr. pp. 930-32; Parent Exs. N; Q; NN).

Review of the student's master treatment plan and subsequent updates, prior to January 2016 and her official diagnosis of reactive attachment disorder, supports the clinical director's assertion. For example, family therapy was one of the types of therapy that the master treatment plans provided (Parent Exs. N at pp. 4, 5, 6; Q at pp. 4, 5, 7, 8; NN at pp. 3, 4, 5). Each of the treatment plan updates indicated that three of the student's five "master problems" or areas of need involved difficulties with relationships and interactions with others (Parent Ex. N; Q; NN). Specifically, the February 2015 master treatment plan identified bereavement and the student's grief surrounding the loss of early relationships as a need to be addressed and included short-term objectives related to completing written grief therapy work (Parent Ex. NN at p. 4). The master treatment plan also listed "identity problem," evidenced by the student's dishonesty and the absence of communication and a relationship with her mother, as a need to be addressed and included short-term objectives related to reading a book about boundaries and developing understanding of ego states (id. at p. 5). Lastly, the master treatment plan identified the student's problem with her primary support group as a need to be addressed, and included a short-term objective related to engaging in more pro-social interaction with a family member (id. at p. 7).

The July 2015 master treatment plan update included a short-term objective related to the student's identity problem, wherein the student is expected to complete a timeline of significant childhood memories and review it with her therapist as a means of developing a functional perspective that allowed her to become accountable and responsible for her own choices while disengaging from the "carried reality" of others (Parent Ex. N at p. 6). The July 2015 update also included a new short-term objective for the student's problems with her primary support group, that targeted the student's relationships by working on her ability to demonstrate appropriate interactions with others, including being respectful, accountable, honest, and responsible (id. at p. 8).

Lastly, the October 2015 update of the master treatment plan includes a short-term objective related to the student's depressive disorder that targeted her ability to develop/identify ways to reduce irritable mood and anger (Parent Ex. Q at p. 4). In addition, the October 2015 update modified the master treatment plan to reflect parent child relational problems, as evidenced by the student's maladaptive patterns of relating and engaging with others, and noted that the student continued to work on accountability and responsibility in her interactions with others (id. at p. 8).

In addition, the student's mother testified that when the parents first enrolled the student in Spring Ridge, they informed staff of the student's history of difficulty forming relationships, as well as the therapies they had tried to address these difficulties, which is why Spring Ridge staff formulated ways to work with the student on concerns underlying reactive attachment disorder even though they didn't include the diagnosis on the student's plan "in the beginning" (Tr. pp. 1014-17). She indicated her belief that some interventions would work for both depression and reactive attachment disorder (Tr. pp. 1045-46).

The clinical director at Spring Ridge testified that she reviewed and signed off on the student's treatment plans to ensure that the information, diagnoses, and objectives made sense from

a therapeutic lens (Tr. p. 881). She indicated that she agreed with the student's initial therapist with regard to her diagnoses in February 2015, which did not include reactive attachment disorder (Tr. p. 882; Parent Ex. NN at p. 1).[34] However, the hearing record reflects that Spring Ridge had evidence over time that led them to say conclusively that the reactive attachment disorder diagnosis reflected the student's needs (Tr. pp. 896-97). Testimony by the executive director indicated that, as time went on and they dug deeper therapeutically and got to know the student better, they honed into more attachment-focused work and the student's attachment-related needs became more prevalent beyond the bereavement, depression, and ADHD (Tr. pp. 341-42).

Based on the above, the hearing record demonstrates that the student's difficulties related to reactive attachment disorder were addressed prior to the official reactive attachment disorder diagnosis that she received in January 2016, and, therefore, the evidence does not support the district's argument that Spring Ridge was inappropriate because it failed to address the student's reactive attachment disorder diagnosis.

E. Equitable Considerations

Having found that the parents' unilateral placement at Spring Ridge was appropriate for both the 2014-15 (after the student's enrollment in January 2015) and the 2015-16 school years, the next issue to consider is whether equitable considerations support the parents' request for reimbursement of the student's tuition costs.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

[34] The clinical director testified that her areas of expertise were in dealing with trauma and attachment-related issues (Tr. p. 870).

1. 2014-15 School Year

Although it is not entirely clear in the decision, it appears that the IHO denied the parents relief in the form of tuition reimbursement for the 2014-15 school year because the parents did not fully comply with the statutory requirement to provide notice of their intent to unilaterally place the student either at the most recent CSE meeting prior to removing the student from the district or by written notice ten business days before such removal (IHO Decision at pp. 26-29). The district contends that the IHO correctly denied reimbursement on this ground and asserts that the parents were aware of the requirement because they would have received a procedural safeguards notice identifying the requirement when they referred the student to the CSE in 2006. The parents counter that they were initially unaware of the requirement but complied with it as they were made aware of it by counsel.

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

According to the hearing record, the parents made the district aware of the student's need for a therapeutic placement shortly after the student was sent home from the private boarding school in December 2014, they repeatedly contacted the district during the short time that she remained at home, and notified the district of their decision to place the student at Spring Ridge in writing the day before she began to attend (Tr. pp. 46-50, 60-70, 747-53; Dist. Ex. 2). The student's mother testified that she was unaware of the 10-day notice requirement, and the hearing record supports her assertion that the parents provided notice once they were made aware of it by counsel (Tr. pp. 843-44; Parent Ex. H). Specifically, in a letter, dated March 19, 2015, the parents referred the student to the CSE and requested a meeting as soon as possible (Parent Ex. H at p. 1). The letter provided written notice that the parents had removed the student from the district due to their understanding that the district had failed to address the student's needs, despite that, for many years, it had reason to suspect the student was a student with a disability (id. at p. 2). The letter also indicated that the parents would be seeking reimbursement for tuition and all related expenses at Spring Ridge and that they reserved the right to seek compensatory services and reimbursement for private evaluations for previous school years (id.).

As the IHO observed, the student's need for a therapeutic placement came about as a result of a crisis, the student was a danger to herself and others when she was removed from the private

boarding school, and these exigent circumstances propelled the parents to locate a therapeutic school and place the student there quickly (IHO Decision at p. 26). Further, the student was not classified at the time of her placement at Spring Ridge, and the district failed to take steps necessary to begin the evaluation process until after the parents formally referred the student to the CSE in March 2015 (Tr. pp. 169-73; Parent Ex. H). One purpose of the notice requirement is to give the district time to convene a CSE and modify the student's recommended program, but this purpose would not be served in an instance such as this where the district had not yet begun the classification process at the time the student was removed from the district (see Greenland, 358 F.3d at 160). There is no dispute that, after the parents referred the student to the CSE, they cooperated fully with the CSE, consented to evaluations, made the student available to the CSE for those evaluations and participated in the CSE meeting.

In light of the above, the evidence in the hearing record supports a finding that the parents acted reasonably and in good faith. Therefore, the IHO's determination that equitable considerations barred tuition reimbursement for the portion of the 2014-15 school year that the student attended Spring Ridge is reversed.

2. 2015-16 School Year—Parent Cooperation

The district does not challenge the IHO's findings that the parents cooperated extensively with the district, promptly provided consent for evaluations and program applications, shared information and evaluations with the district, and participated in the June 2015 CSE meeting (IHO Decision at pp. 26-27). Rather, the district claims that the parents failed to cooperate with the CSE process by unreasonably refusing to visit certain State-approved placements. The district also asserts that the parents refused to allow the student to participate in in-person intakes, acting upon the recommendation of Spring Ridge staff who advised that it would be unsafe for the student to leave Spring Ridge grounds. The district contends that the parents' refusal precluded the CSE from finalizing the student's IEP and, therefore, the parents are not entitled to their requested relief. The parents argue that they would have preferred a State-approved placement selected by the CSE and did everything the district asked throughout the process. The parents assert that, although the student's therapists advised against her leaving Spring Ridge to attend intake interviews, the parents arranged for the student to participate in intake interviews via video conferencing.

The Supreme Court has stated that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer, 546 U.S. at 53, citing Rowley, 458 U.S. at 205-06). The Second Circuit has held that where parents cooperate with a district in its attempts to develop an appropriate educational program for their child, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]).

The hearing record contains a lot of evidence and testimony concerning the efforts made by the parties to secure a placement in an approved therapeutic program for the student. After the June 2015 CSE meeting, the district sent out "packets" to ten schools containing information about the student and inquiring whether the student could be appropriately placed in their respective program (Tr. pp. 117-20, 147-48, 208-09; see Dist. Ex. 11). According to the district assistant director of special education, it typically took a few weeks for the placements to respond and if it

took longer, the district would reach out to a school, make sure the packet was received, and inquire about the school's decision on whether to accept the student (Tr. p. 149). The assistant director also testified that some of the schools might reject the student based upon their determination that the student's needs were too great to be addressed in the program, while others may want to move forward with the process, conduct intake interviews, and have the student or the parents tour the school (Tr. pp. 147, 212).

As to the student's physical presence at intake interviews with potential placements, the student's mother testified about the advice she received from staff at Spring Ridge regarding the need for the student to stay at Spring Ridge for safety purposes until her treatment status improved (Tr. pp. 948-51). Early on in the placement search, during Summer 2015, the student's mother expressed her willingness to facilitate intake interviews with the student by video conference, asked potential placements if they would accept an intake by video conference, and instructed staff at Spring Ridge to make the student available for any interviews (Tr. pp. 943, 950-52).

Although packets were sent to ten schools, correspondence between the student's mother and the district assistant director indicates that, by August 6, 2015, the parents had only been contacted by two schools, and the student's mother inquired whether she was correct in thinking that she was supposed to wait for the schools to contact her because she "wanted to make sure [the parents were] doing everything [they were] supposed to be doing" (Dist. Ex. 11 at p. 1).

On August 12, 2015, the district assistant director of special education responded to the parents' August 5, 2015 inquiry and reported that the district had received no response from four different schools, that the Summit School had sent the district a rejection letter, and that Kaplan had sent a rejection letter, which noted that the parents had communicated that they were not interested in a day program for the student (Dist. Ex. 11; see Dist. Exs. 4; 12; Tr. pp. 210-11).[35] The assistant director noted that the CSE recommended a mix of residential and day programs and cautioned that, although the parents "may feel that day programs are not appropriate," it was important for the parents to "complete intakes so that [the schools] c[ould] be part of the decision as to whether or not the programs c[ould] appropriately support the needs" of the student (Dist. Ex. 11 at p. 1). The assistant director also indicated that, "if [they] continue[d] to receive rejections," it might be appropriate to send out additional packets, including to out-of-state approved schools (id.). By letter dated August 13, 2015, the Pleasantville Cottage School, a residential program, rejected the student's application, stating that the student's needs were too severe to be met in the program (Tr. pp. 210-11; Dist. Ex. 10).

On August 18, 2015, the district assistant director of special education sent a second email to the parents mentioning that "the Greenburgh North Castle REACH residential program" (referring to Kaplan's residential component, St. Christopher's) was trying to contact the parents but had been unable to reach them (Dist. Ex. 8; see Tr. pp. 1036-38; District Exs. 4; 6). The student's mother testified that the parents had been traveling and contacted St. Christopher's as soon as they returned (Tr. pp. 947-48, 1036-38). St. Christopher's insisted on an in-person intake interview and did not assent to the parents' offer of an interview with the student via video

[35] The hearing record also contains a third rejection letter from this time period, dated July 23, 2015, from the Karafin School, stating that, due to the nature of the student's needs, the school was unable to provide an appropriate program (Dist. Ex. 13).

conference (Tr. pp. 215, 264, 947, 1038-40; Dist. Exs. 6-7). Similarly, the student had been unable to attend an in-person intake interview at the George Jr. Republic School, a day and residential school, and the school had not accepted the student (Tr. p. 155; Dist. Exs. 7; 11 at p. 1).

As of September 2015, no placement had been secured, and there was no plan to reconvene the CSE to finalize the student's IEP (Tr. p. 216). After the rejections outlined above occurred, in December 2015, the parents pressed the district to widen its placement search to include out-of-State approved schools (Tr. pp. 963-64; Parent Ex. Y at p. 3). Around this time the district received notice that two other schools had not accepted the student (Tr. pp. 216-17; Parent Ex. Y at p. 2).[36] The student's mother expressed frustration that few schools had reached out to the parents directly (Parent Ex. Y at p. 3). On December 14, 2015 the district's assistant director emailed the student's mother and noted that the district had received six more rejections from residential schools not yet discussed in this decision and follow-up remained to be completed on five other schools (Tr. pp. 224-25; Dist. Ex. Y at p. 3).

On December 21, 2015 the district sent a consent form to the parents allowing the district to send intake packets to a number of out-of-State approved schools (Tr. pp. 226-27; Parent Ex. Y at p. 5). Although the hearing record is not entirely clear as to the outcome of the out-of-State placement search process, as it bears to the question of the parents' cooperation with the intake process, it appears that at least two schools responded and eventually video conference intake interviews were conducted with at least one but more likely with two schools (Tr. pp. 228, 324-26, 837-38). There is testimony that the student was accepted at both "Chamberlain" and "Foundations," but apparently neither school had a "bed" available for the student (Tr. pp. 533-34. 968-69).

Taking the hearing record as a whole into account, there are only two actions taken by the parents that could be viewed as obstructing the district's attempts to locate a placement for the student: the refusal to accept a day placement and the refusal to allow the student to attend in-person intake interviews. As to the former, the student's mother candidly admitted that she would not accept a day program (Tr. pp. Tr. pp. 947, 1036-37). While it is not necessary to render a determination as to whether the student required a residential placement in order to be appropriately placed, for the purposes of equitable considerations, it may indeed have been reasonable for the parents to insist on a residential placement in light of the fact that at one point the district recommended that the student be hospitalized and the parents believed that a residential placement was required to keep the student safe, and in light of the potentially confusing wording of the June 2015 IEP stating that the search for approved schools would include both day and residential schools (Tr. pp. 748, 862-63; Parent Ex. K at p. 1). Further, as to the intake interviews, the parents responded to concerns of Spring Ridge staff regarding the student's safety but compromised by attempting to facilitate the intakes via video conferences. Overall, the evidence in the hearing record supports a finding that the parents had a reasonable basis to take these positions and that they did so in a good-faith effort to ensure the student's safety and therapeutic progress. In all other manners, the parents cooperated with the district and, by all appearances,

[36] The hearing contains an October 8, 2015, letter from "the Jewish Board" stating that the parents were not interested in placing the student at Hawthorn Cedar Knolls, and there is some testimony regarding the potential placement there; however, there is not enough information in the hearing record to determine if this school only offered a day placement or if the school would only consider the student after in-person interview (Dist. Ex. 5; see Tr. pp. 145-50).

sincerely hoped that the CSE would locate an appropriate placement for the student both before and after the start of the 2015-16 school year.[37] In light of the above the IHO properly determined that equitable considerations favored tuition reimbursement for the cost of the student's attendance at Spring Ridge during the 2015-16 school year.

3. Other Considerations

In a final matter, the district asserts that the student's mother deleted certain emails between herself and staff at Spring Ridge that were "relevant to the hearing" (Pet. ¶¶ 123-124) and that the IHO erred in failing to address the actions of the mother in his decision.

The district concedes that a remedy for spoliation might not be available in an administrative proceeding (Pet. Mem. of Law at p. 19).[38] The district later goes further to state that it was not alleging spoliation "at this juncture" but instead intends to preserve the claim if this matter continues in State or federal court (Answer & Cross-Appeal Mem. of Law at p. 9). Instead, the district argues that the parents' deletion of emails is an equitable consideration that should be weighed against an award of tuition reimbursement.

According to the hearing record, the district sought the emails through a subpoena process. However, the district did not enter the subpoena into the record and there is no reference in the hearing record to the particular wording of the subpoena. Although the district indicates that the parents "acknowledge[d] [that] the scope of the [d]istrict's subpoena was for all emails relevant to the hearing in [the parents'] possession" (Ans. to Cross-Appeal Mem. of Law at p. 10 n.4), the parents did no such thing; rather, the parents alleged that they "responded to a subpoena by the [d]istrict and produced all emails in [the mother's] possession" (Answer & Cross-Appeal ¶ 75). Further, even if the subpoena included the language cited by the district, the district has not contended that the parents withheld any information or documentation relevant to the impartial hearing still in their possession after the subpoena was served. Therefore, regardless of which legal theory the district argues (equitable considerations or spoliation), without the subpoena in

[37] The student's mother testified that the parents continued to be open to a district placement well into the course of the 2015-16 school year (Tr. pp. 941-42, 964-65).

[38] The vast majority of the case law on the subject of spoliation is based on the violation of discovery provisions contained in the Federal Rules of Civil Procedure (Fed. R. Civ. Proc. 37) or the New York's Civil Practice Law and Rules (CPLR 3126) and the inherent power of the State and federal courts to regulate litigation and protect the integrity of the proceedings before them (see Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 [S.D.N.Y. 2003]). In New York State, the formal rules of evidence that are applicable in civil proceedings generally do not apply in impartial hearings (see Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996]). Accordingly, as the district acknowledged, it is questionable whether an administrative hearing officer has the authority to hear a claim or impose sanctions under the IDEA for spoliation of district records (see Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094; Application of a Student with a Disability, Appeal Nos. 11-059 & 11-061). I am especially wary of applying spoliation standards developed in the context of multimillion-dollar, multi-year litigation between national corporations with extensive resources (see, e.g., Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Sec., 685 F. Supp. 2d 456 [S.D.N.Y. 2010]; In re A&M Florida Props. II v. Am. Fed. Title Corp., 2010 WL 1418861 [Bankr. S.D.N.Y. Apr. 7, 2010]) to administrative proceedings under the IDEA, the regulations for which contemplate two days of hearing (8 NYCRR 200.5[j][3][xiii]), contain no express discovery provisions, and generally require a decision to be rendered within a 45-day timeline (8 NYCRR 200.5[j][5]).

evidence, it is impossible to evaluate whether the deleted emails included materials to which the district would have been entitled pursuant to the subpoena.

Finally, it is unlikely that the emails would have had any impact on the district's ability to investigate its defenses or otherwise present its case. During the impartial hearing, there was some discussion during cross-examination that the student's mother deleted some emails that she characterized as concerning "innocuous" matters such as scheduling therapists' appointments and that she deleted the emails at the same time she deleted other emails in her system that had nothing to do with the student (Tr. pp. 803, 1048-54, 1061-64). Presumably, the district sought the emails between the parents and Spring Ridge for the purpose of rebutting evidence establishing the appropriateness of Spring Ridge. However, as described above, there was sufficient evidence in the hearing record germane to whether Spring Ridge offered specially designed instruction tailored to meet the student's needs and it is unlikely that any email communications between the parent and Spring Ridge would have altered that outcome, even if they pertained to something less innocuous than scheduling.

Therefore, I find no support for a reduction or denial of the parents' request for tuition reimbursement based on the mother's deletion of emails.

VII. Conclusion

In summary, the IHO erred in failing to award tuition reimbursement for the costs of the student's attendance at Spring Ridge during the 2014-15 school year. The evidence in the hearing record supports the IHO's decision and orders with respect to the 2015-16 school year.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated May 31, 2016, is modified, by reversing those portions of the decision which determined that the parents' conduct barred an award of tuition reimbursement for the unilateral placement of the student at Spring Ridge for the portion of the 2014-15 school year that the student attended Spring Ridge; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of the student's unilateral placement at Spring Ridge for the portion of the 2014-15 school year that the student attended Spring Ridge.

Dated: **Albany, New York**
September 7, 2016

JUSTYN P. BATES
STATE REVIEW OFFICER