



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-065

**Application of the BOARD OF EDUCATION OF THE KATONAH-LEWISBORO UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

### **Appearances:**

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by James P. Drohan, Esq.

Law Office of Peter D. Hoffman, PC, attorneys for respondents, by Peter D. Hoffman, Esq.

## **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 Grove School (Grove) for a portion of the 2014-15 school year and summer 2015. The appeal must be remanded for further proceedings.

### **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**

The student was the subject of a prior administrative appeal (Application of a Student with a Disability, Appeal No. 13-162). Accordingly, the parties' familiarity with the student's educational history is assumed and it will not be repeated in detail. Briefly, the student enrolled

in Grove in September 2012 (Dist. Ex. 20 at p. 1; Parent Ex. E at p. 1).<sup>1</sup> She reportedly has diagnoses of a bipolar disorder and a borderline personality disorder (moderate to severe) (Dist. Ex. 12 at p. 27). In addition, the student has diagnoses of an attention deficit disorder, a reading disorder, and a disorder of written expression (id.).<sup>2</sup>

On May 29, 2013, the CSE convened for an annual review of the student's program and to develop her IEP for the 2013-14 school year (Dist. Ex. 3 at p. 1). The May 2013 CSE found the student continued to be eligible for special education and related services as a student with an emotional disturbance and recommended a 10-month, 8:1+1 special class placement in a BOCES therapeutic support program (BOCES TSP), in addition to daily home-based before and after school intervention services (BASIS) (id. at pp. 1-2, 8-9).<sup>3</sup> The May 2013 CSE also recommended that the student receive individual and small group counseling, and a weekly psychiatric consultation for the "team and home" (id. at pp. 1, 8-9).

In a letter dated August 20, 2013, the parents advised the district that they "decided to continue [the student's] placement at the Grove School," which they considered to "be an appropriate placement to meet [the student's] needs" (Parent Ex. E). The parents rejected the district's program recommendation (id.).

On June 13, 2014, the CSE convened for an annual review of the student's program and to develop her IEP for the 2014-15 school year (Dist. Ex. 4). In a letter dated June 13, 2014, provided to the district in advance of the June 2014 meeting, the parents advised the CSE of their opinion "that the BOCES-Fragile program, or any other therapeutic day program, [wa]s not appropriate for [the student] for the 2014-2015 school year" (Dist. Ex. 21 at p. 1; see Tr. p. 104). Rather, the parents stated that they were "firm that the Grove School [w]as the appropriate school for [the student]" (Dist. Ex. 21 at p. 4). The June 2014 CSE found that the student continued to be eligible for special education and related services as a student with an emotional disturbance and recommended a 12-month 8:1+1 special class placement in BOCES TSP with the BASIS component for the 2014-15 school year (Dist. Ex. 4 at pp. 1-3, 10). Related services recommendations included counseling on an individual and small group basis (id. at pp. 1, 10). The June 2014 CSE also recommended a weekly psychiatric consultation for the "team and home" (id. at p. 10). Additionally, the June 2014 CSE recommended that the student receive extended school year (ESY) services comprised of an 8:1+1 special class placement in addition to counseling on an individual and small group basis (id. at pp. 1, 3, 10-11).

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<sup>1</sup> Grove 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).

<sup>2</sup> A September 2014 private psychological evaluation report reflected that the student had been given diagnoses of a reading disorder and a disorder of written expression; however, the evaluator's testimony does not support or confirm these diagnoses (see Tr. pp. 847-48, 852, 857-64).

<sup>3</sup> 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]).

On June 24, 2014, over a five-day period, a private psychologist evaluated the student (Dist. Ex. 12). The private evaluation report, dated September 30, 2014, contained information regarding the student's academic and social/emotional functioning (see generally Dist. Ex. 12). The evaluator indicated that the student presented with dual diagnoses of bipolar disorder and borderline personality disorder, and recommended, among other things, that she attend a therapeutic residential placement (id. at pp. 27-29). On September 30, 2014, the evaluator provided the parents with a copy of the September 2014 evaluation report, and she met with them to discuss her findings (Tr. pp. 802, 886; Dist. Ex. 12 at p. 38). The private evaluator subsequently emailed a copy of the September 2014 report to the parents and the district (Tr. pp. 803-04, 1050).

The student attended Grove for the duration of the 2014-15 school year (see Parent Exs. HH; II; NN; PP). On May 13, 2015, the CSE convened for an annual review of the student's program and to develop her IEP for the 2015-16 school year (Dist. Ex. 5). The May 2015 CSE found that the student continued to be eligible for special education and related services as a student with an emotional disturbance and recommended a 12-month 8:1+1 special class placement in BOCES TSP with the BASIS component (id. at pp. 1-2, 9-10). Related services recommendations included counseling on an individual and small group basis (id. at pp. 1, 9-10). The May 2015 CSE also recommended a weekly psychiatric consultation for the team and home (id. at p. 9). Additionally, the May 2015 CSE recommended that the student receive ESY services comprised of an 8:1+1 special class placement in addition to counseling on an individual and small group basis (id. at pp. 1, 10). The CSE chairperson determined to "send referral packets to all appropriate programs and reconvene the CSE to consider responses/programs" (id. at p. 2). The parents rejected the May 2015 IEP as written and indicated their intention to request reimbursement for the cost of the student's tuition at Grove (id.).

In a letter dated May 20, 2015, the CSE chairperson advised the parents that completion of the Grove program "would be equivalent to a New York State Local Diploma" (Dist. Ex. 13).

In a letter to the CSE chairperson dated June 5, 2015, a representative from BOCES advised the district that the student had been accepted in the BOCES TSP program, including for summer 2015 (Dist. Ex. 14).

On June 11, 2015, the CSE reconvened and continued the program recommendation set forth in the May 2015 IEP (compare Dist. Ex. 5, with Dist. Ex. 6). According to the committee meeting information, the CSE sent referral packets to "appropriate programs" that would be able to support programming that would result in the student attaining a State or local diploma (Dist. Ex. 6 at p. 1). The parents continued to disagree with the CSE's recommendations (id. at p. 2).<sup>4</sup>

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<sup>4</sup> The hearing record reflects that the student graduated from Grove in August 2015 (Tr. pp. 365, 382; Parent Exs. NN at p. 2; FFF at p. 1). Subsequently, the student enrolled in college (see Tr. p. 1099).

## A. Due Process Complaint Notice

By amended due process complaint notice dated July 30, 2015, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14, 2014-15, and 2015-16 school years (see generally IHO Ex. I).<sup>5</sup> As relevant to this appeal, regarding the 2013-14 school year, the parents alleged that the district failed "to consider parental input, thereby impeding the [their] right to meaningful participation in the CSE process" (id. at p. 17). Next, the parents asserted that the district recommended "the exact same program that [they] had rejected for the 2012-13 school year," and disregarded the progress that the student had made at Grove (id. at pp. 17-19). The parents further asserted that the BOCES TSP program with BASIS was not appropriate to address the student's special education needs, particularly the student's need for supervision and structure (id. at p. 18). Rather, the parents alleged that a "residential setting was the appropriate placement to meet [the student's] unique learning and behavioral needs" (id. at p. 19).

With respect to the 2014-15 school year, the parents alleged that the district "once again ignored [their] concerns in forming the 2014-15 IEP" (IHO Ex. I at p. 21). They further alleged that "[t]he CSE once again recommended the BOCES program with BASIS, a program that had been considered and rejected by the Parents two times already," that the CSE failed to account for the progress the student had made at Grove, and that the recommended program was inappropriate (id. at pp. 23-25). Next, the parents contended that although the September 2014 private evaluation report was not available at the time of the June 2014 CSE meeting, the district failed to reconvene a CSE meeting to review the private evaluator's report recommending placement in "a therapeutic residential program with continued psychotherapy and therapeutic interventions" (id. at pp. 23-24).

Regarding the 2015-16 school year, the parents alleged that the May 2015 CSE ignored the private evaluator's recommendations for a "residential therapeutic placement and continued to recommend that [the student] attend the BOCES program with BASIS for the 2015-16 ESY period prior to transitioning into college" (IHO Ex. I at p. 26). The parents further argued that, when the CSE reconvened in June 2015, it "once again recommended the BOCES and BASIS program as the only program [it was] offering to [the student]," which was inappropriate for the student (see id. at pp. 27-28). Additionally, the parents asserted that the 2015-16 IEP was inappropriate as written to meet the student's educational and behavioral needs and could not be appropriately implemented by the district (id. at p. 29).

The parents argued that Grove was an appropriate placement for the student and that equitable considerations supported their request for relief (see IHO Ex. 1 at pp. 29-35). As relief, the parents requested reimbursement for the costs of the student's tuition at Grove for the 2013-14 and 2014-15 school years, including summer 2015 (id. at p. 35).

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<sup>5</sup> In a prior due process complaint notice dated May 27, 2015, the parents initiated the impartial hearing prior to the student's acceptance into the BOCES TSP program in June 2015 (see IHO Ex. II).

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

After three prehearing conferences; the parties proceeded to an impartial hearing on October 14, 2015, which concluded on November 7, 2016 after 11 days of proceedings (IHO Decision at pp. 1-2; July 8, 2015 Tr. pp. 1-11; Tr. pp. 1-1539). By decision dated June 29, 2017, the IHO concluded that the district offered the student a FAPE for the 2013-14 school year and the first portion of the 2014-15 school year, but failed to offer the student a FAPE for the portion of the 2014-15 school year beginning November 1, 2014, and for summer 2015 (IHO Decision at p. 8).<sup>6</sup>

Specifically, regarding the 2013-14 school year, the IHO found that the CSE considered reports and input from Grove personnel and the parents, and recommended that the district conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (IHO Decision at p. 10). The IHO ultimately concluded that the parents did not bring any new evaluative information to the CSE to "merit a different placement recommendation," and "no reason was presented to the District why its placement recommendation was not appropriate and should change" (*id.* at p. 11).

Turning next to the 2014-15 school year and summer 2015, initially, the IHO reviewed the evidence regarding the June 2014 CSE meeting and resulting IEP and determined that there was no "new evaluations, reports, evidence, or information [presented] to the CSE to merit a different placement recommendation [than the BOCES TSP with BASIS placement] and in light of the prior litigation decisions there was no reason that was presented to the District as to why its placement recommendation should change" (IHO Decision at p. 12). The IHO further determined that the parents' concerns regarding the BOCES TSP with BASIS placement were addressed by the CSE and the CSE explained how the BASIS services would address these concerns (*id.* at p. 11).

Next, the IHO also found that the September 2014 private psychoeducational evaluation was not an independent educational evaluation (IEE) (*id.* at p. 12). The IHO determined that upon receipt of the private evaluation, the district "had an affirmative obligation to conduct a CSE to review and discuss the most recent and updated psychological evaluation for the student" (*id.* at pp. 13-14). He further found that the September 2014 private evaluation offered a new diagnosis for the student, and that if the district disagreed with the private evaluator's recommendation that the student should attend a residential placement, it should have convened a CSE meeting to discuss such a recommendation with her or requested that the student undergo a new psychiatric evaluation for the purpose of determining whether a residential placement was necessary to offer the student a FAPE (*id.* at pp. 14-15).

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<sup>6</sup> The IHO indicated that the parties' post hearing briefs were received on December 21, 2016; however, the IHO did not close the hearing record until June 16, 2017 (IHO Decision at p. 2). The IHO is reminded that although the IHO is required by regulation to determine when the record is closed and issue a decision no later than 14 days from the date the record is closed (8 NYCRR 200.5[j][5], [j][5][v]), the State Education Department has indicated that "a record is closed when all post-hearing submissions are received by the IHO" ("Changes in the Impartial Hearing Reporting System," Office of Special Educ. [Aug. 2011], available at <http://www.p12.nysed.gov/specialed/duprocess/ChangesinIHRSAug2011.pdf>).

The IHO acknowledged that the parents did not request that the CSE reconvene to review the private evaluation; however, the IHO decided that "the IDEA requires a CSE to reconvene when it receives a new report with a new diagnosis from the parents and such report was presented to the District in October 2014" (IHO Decision at pp. 13, 16). The IHO further found that there was no basis to find a denial of a FAPE prior to October 2014 but that once the district was in possession of the private evaluation, its failure to reconvene the CSE denied the student a FAPE (id. at pp. 16-17). In particular, the IHO determined that the district failed to establish that the BOCES TSP program with BASIS recommended for the 2014-15 school year and summer 2015 "was an appropriate substitute for a residential therapeutic placement," and that the testimony of district witnesses to the contrary was either not credible or not well-informed (id. at pp. 17-20).

The IHO proceeded to conclude that the private evaluator's testimony "was the foundation for [his] finding that the District's proposed placement for 2014-2015 (November 2014 to June 2015) and 2015-2016 (summer of 2015) school years to be not appropriate" (IHO Decision at p. 20). The IHO found credible the evaluator's testimony that a residential placement was appropriate in light of the student's history of "reckless sexual behavior, drug use, poor hygiene," and significant safety concerns in the home (id.). Moreover, the IHO related the evaluator's testimony that because the student had engaged in cutting and self-injurious behavior, in addition to hypersexualized behaviors, and because she presented as a suicide risk, a residential placement was required for safety reasons (id. at p. 21). The IHO concluded that a residential placement was appropriate to address the student's frustration tolerance, the "creation of drama surrounding [her] relationship with peers," self-cutting behaviors, anger, aggressive outbursts, and "very depressed mood" (id. at p. 22).

Conversely, the IHO found that the evidence in the hearing record failed to explain how the BASIS part of the recommended program would provide for the "24/7 support" recommended by the private evaluator (IHO Decision at p. 22). Furthermore, the IHO concluded that the district failed to address the parents' concern regarding how the proposed program would address the underlying problems caused by the student when she was home (id. at pp. 22-23). The IHO further noted that the hearing record contained evidence of the student threatening harm to family members as well as herself, which he characterized as "two very troubling pieces of information, both of which require an increased amount of intervention and not an issue that can be appropriately addressed in a day program like the BOCES program being offered even with its at home BASIS component" (id. at p. 23). In view of the foregoing, the IHO determined that the hearing record supported a finding that the district failed to offer the student a FAPE from November 1, 2014, until her graduation from Grove in August 2015 (id. at pp. 23-24).

Next, the IHO determined that the student's program at Grove for the 2014-15 and 2015-16 school year was individually designed to meet the student's needs for therapeutic residential support (IHO Decision at pp. 25-29). Furthermore, the IHO found that the student made measurable progress while attending Grove, which he concluded was evidence of the appropriateness of the unilateral placement (id. at pp. 27-29). Regarding equitable considerations, the IHO determined that the hearing record supported a finding that the parents "fully cooperated with the District at every turn," provided notice to the district of their intention to place the student at Grove at district expense, and that there was no evidence to support a finding that the parents predetermined to send the student to Grove (id. at pp. 29-30). However, the IHO determined that

"equity demand[ed] that the tuition reimbursement be awarded only from the time period from when" the district received the private evaluation and "failed to act upon it" (id. at p. 30). Accordingly, the IHO directed the district to reimburse the parents for the costs of the student's tuition for the period of November 1, 2014 through August 2015 (id. at pp. 30-31).

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

The district appeals and requests that the IHO decision be reversed to the extent that he determined that the district failed to offer the student a FAPE for a portion of the 2014-15 school year and the 2015-16 school year. More specifically, the district argues that the IHO erred in finding that the private evaluation was not an IEE. Next, the district asserts that the IHO erred in concluding that the district had an affirmative obligation to reconvene the CSE upon receipt of the private evaluation report. The district also alleges that the IHO erred in implying that it denied the parents meaningful input in the CSE process because it did not review the IEE report until May 2015. Next, the district argues that the IHO erred in finding that given the private evaluator's recommendation for residential placement, the district should have obtained its own psychiatric evaluation. Further, the district claims that the IHO erred in finding that the district school psychologist failed to provide any reasons for disagreeing with the parents' evaluator's recommendation for residential placement. Additionally, the district asserts that the IHO erred in finding that the student required "24/7 support for her emotional needs" and that the BOCES TSP program with the BASIS component was not appropriate. The district further contends that the IHO improperly relied on "the non-educational impacts of the Student's disability" in reaching his determination, and that the student's social/emotional needs did not affect her academic functioning to the extent of requiring a residential placement.

Regarding the parents' unilateral placement, the district alleges that the IHO incorrectly found that Grove was appropriate to address the student's unique educational needs. In particular, the district asserts that the student did not receive therapy for a majority of the period for which the IHO awarded reimbursement, and that Grove was not the least restrictive environment for the student. The district further argues that the IHO erroneously determined that equitable considerations supported the parents' request for relief.

In an answer, the parents generally admit and deny the district's allegations and request an order affirming the IHO's decision in its entirety. The parents argue that the IHO properly found that the CSE was obliged to reconvene upon receipt of the private evaluation, and its failure to reconvene to discuss the recommendation for a residential placement supports a finding that the district failed to offer the student a FAPE. The parents further allege that the evidence in the hearing record supports a conclusion that a residential therapeutic placement was appropriate for the student, whereas the recommended day placement at BOCES TSP with BASIS was not appropriate for her. Next, the parents argue that the IHO did not err in finding Grove to be appropriate for the student. Finally, the parents allege that equitable considerations support their request for relief.



## 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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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).

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

## **VI. Discussion**

### **A. Preliminary Matter—Scope of Review**

Before reaching the merits of the instant case, it is worth noting which matters are properly before me. In this instance, neither party appeals the findings and conclusions reached by the IHO other than as discussed above, namely, the appropriateness of the May 2013 IEP and the substantive adequacy of the June 2014 IEP recommending the BOCES TSP with BASIS are not challenged by either party (see IHO Decision at pp. 8, 10-11). As neither party appeals these findings, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6, \*10 [S.D.N.Y. Mar. 21, 2013]).

### **B. November 2014-August 2015**

Initially, regarding the student's needs, which the parties do not dispute, as reported in her IEPs, the student scored in the average range of intelligence overall on intelligence tests in 2012 and 2014, with below average scores in processing speed and cognitive fluency (Dist. Exs. 1 at pp. 4, 6-7; 2 at p. 7; 3 at p. 4; 4 at p. 6; 12 at pp. 5, 16).<sup>8</sup> Academically, the student's most recent achievement scores (June and July 2014) reflected performance primarily in the average range on the Wechsler Individual Achievement Test, Third Edition (WIAT-III) with a relative weakness in reading comprehension and relative strengths in math fluency in both addition and subtraction (Dist. Ex. 12 at p. 12). The student has a history of requiring support related to study skills and homework completion and further required structure and consequences in order to "maintain academically" (Dist. Exs. 3 at p. 1; 4 at p. 2; 20 at p. 2). She struggled with motivation, needed ongoing staff support, guidance and often remediation to maintain her grades, and her academic success was often impeded by her social/emotional difficulties; however, when the student was "emotionally available for support with her academics," she was able to respond positively (Tr. p. 1462; Dist. Ex. 20 at p. 2; see Tr. p. 988). The student received a diagnosis of a bipolar disorder and, as further described below, she later received a diagnosis of borderline personality disorder, both of which are managed with medication, and she has also received a diagnosis of an attention deficit disorder (Dist. Exs. 4 at p. 7; 12 at p. 27; 19; see Dist. Ex. 2 at p. 3). She also has a reported history of cutting behaviors and suicidal gestures,<sup>9</sup> struggles with interpersonal relationships and sustaining healthy boundaries with peers and adults, exhibits a high level of intensity in pursuing relationships, and has great difficulty taking the perspective of others, often blaming the actions of others for her lack of success with relationships, as well as poor self-concept and school and homework avoidance (Dist. Ex. 4 at pp. 2, 6, 7; 12 at pp. 2, 27; 20 at p. 2; 21 at p. 1). The hearing

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<sup>8</sup> The September 2014 private psychological evaluation report reflected that the student's intellectual status was within the average range according to a recent administration of the Wechsler Adult Intelligence Scale–Fourth Edition (WAIS-IV) and, while the student's processing speed score was assessed to be in the average range, her working memory score was reported to fall in the low average range of functioning (Dist. Ex. 12 at pp. 5, 16).

<sup>9</sup> The parents stated concerns regarding cutting or self-mutilation as early as June 2011 and the evidence in the record points to an instance of cutting as late as approximately February 6, 2014.

record reveals that at the time of the June 2014 CSE meeting, the student had significant difficulty with family relationships to the extent that she preferred to remain at school rather than go home for visits (Tr. p. 1427; Dist. Exs. 4 at p. 2; 20 at p. 2). Lastly, the parents reported that the student had threatened to hurt family members as well as herself (Dist. Ex. 21 at p. 3).

Turning to the issue at hand, among the documents the June 2014 CSE reviewed included a March 12, 2014 letter from the student's psychiatrist at Grove, which provided information regarding the student's then-current psychiatric status (Tr. pp. 103-04, 1036-37; Dist. Exs. 4 at p. 2; 19). According to the student's psychiatrist, at Grove the student had done "a lot of hard work in dealing more maturely with peers in her social milieu, and taking ownership of her bipolar disorder and personality issues," and had learned much about "how to prevent and manage dysregulated mood, and how to manage stressors in her life so as not to trigger bipolar exacerbations" (Dist. Ex 19). The letter further indicated that the student had learned how to take care of her sleep, nutrition, and exercise needs, had participated in family therapy, successfully navigated conflictual relationships, and grown closer to her parents and her sister (*id.*). On the other hand, the psychiatrist also indicated that the student "[was] still at risk for self-injurious behavior when stressed" and continued to need "constant supervision and modeling done by round the clock staff" to address her unhealthy personality issues (*id.*). According to the Grove psychiatrist, the student was beginning to take responsibility for her problematic behavior at home, though the dynamics of the family system still left the student feeling vulnerable at times, which the psychiatrist opined needed to be further addressed (*id.*).

Additionally, the June 2014 CSE reviewed a March 13, 2014 letter from the student's therapist at Grove that summarized the student's functioning at the therapeutic residential school, shedding light on the student's need to be away from her home environment and her need for a residential therapeutic setting (Tr. p. 1037; Dist. Exs. 4 at p. 2; 20). The therapist indicated that home visits and communication with her family continued to be a significant treatment theme for the student although the student had established a healthier, more honest line of communication with her mother that had carried over in a positive manner to off campus visits (Dist. Ex. 20 at p. 2). According to the therapist, the student "ha[s] trouble deciphering her role within her family . . . [and] a hard time appreciating how her role within the family can exist in a positive manner" (*id.*). The therapist's March 2014 letter reflected that the student often preferred to remain at Grove for weekends instead of going home and that the student both dismissed and craved a closer connection to her family, despite her inability to allow herself to be less guarded in her interactions (*id.*). The student's therapist opined that, based on the student's "diagnoses and the therapeutic relationships she ha[d] with her treatment team," and given the student's complex emotional, social and academic needs, the student's need for a structured, residential treatment setting was "all the more crucial" (*id.* at pp. 2-3). Moreover, the therapist noted that the student's "tendency to engage in splitting dynamics and the tendency to engage [in] relationships in a disordered manner ma[de] her particularly vulnerable and managing such vulnerabilities in an outpatient setting would likely put [the student] in harm's way; potentially jeopardizing her psychiatric and physical well-being" (*id.* at p. 3).

In addition, the parents advised the June 2014 CSE that the student would take "a couple steps forward and a couple steps backward" (Dist. Ex. 4 at p. 2). In a June 13, 2014 letter to the CSE, the contents of which the June 2014 CSE discussed, the parents indicated that prior to

attending Grove, there were "many instances" in which their safety and the student's safety were threatened (Tr. pp. 104, 1032; Dist. Ex. 21 at p. 3). According to the parents, the student's home visits "still present[ed] a significant challenge for" them (Dist. Ex. 21 at p. 3). Specifically, they reported that the student threatened to kill them while they slept, threatened to cut herself or them, caused damage to their home, and that they "lived in fear of the chaos [the student] created and what she might do" (*id.*). The parents further indicated that "[b]ad memories" made it difficult for the student to be at home (*id.*). According to the parents, the student felt like cutting herself while in the home environment (*id.*). Likewise, the parents noted that during the student's recent three-week break, she remained in her room for the majority of the time and was reluctant to engage with her family (*id.*). While the parents indicated that they continued to work on their family dynamic, and were making progress in weekly family therapy with the student at Grove, if the student "were to move back home at this time it would have a detrimental, dysfunctional effect on all of [them]" (*id.*).

Much of the events described above, and in particular the increase reported self-injurious behavior and threats of harm on family, occurred after the student began attending Grove and post-date the events underlying the case presented in Application of a Student with a Disability, Appeal No. 13-162 and subsequent judicial review.<sup>10</sup> Notes in the June 2014 CSE indicated that the information provided by the Grove psychiatrist seemed to be conflicting insofar as the psychiatrist also indicated that the student had "learned a lot about her diagnosis, she manages her medications well, has learned to incorporate exercise and take care of her health and is making progress with developing positive family relationships" (Dist. Ex. 4 at p. 2). According to the CSE chairperson, Grove represented that "while the student responds to structure/consequence, she continues to need that type of reinforcement to maintain academically" (*id.*). The CSE indicated that it believed that the student's needs could be met through the provision of an 8:1+1 BOCES TSP special class placement, along with the BASIS program and counseling services, and the notes in the IEP described the structure of the BOCES TSP and BASIS placement (Dist. Ex. 4).

As noted above, the IHO found that the district explained to the parents how the BASIS program would address their concerns, that none of the information presented at the June 2014 CSE meeting warranted a change in the CSE's placement recommendation, and he concluded that there was no basis for finding that the BOCES TSP with BASIS program recommended in the June 2014 IEP denied the student a FAPE (IHO Decision at pp. 11-12, 17). As this determination was not appealed by either party, as noted previously it became final and binding upon the parties and I am constrained to adhere to it. Accordingly, the appropriateness of the June 2014 IEP, at the time it was created, is not at issue in this appeal and the appropriateness of that IEP recommendation at that time can no longer be pursued further as a basis for finding a denial of a FAPE. Instead, as pled by the parties and described in greater detail below, the IHO's finding that the district denied the student a FAPE is premised exclusively on the district's alleged failure to reconvene the CSE after the district received the information contained in the private September 2014 evaluation report (sent to the district in October 2014) and impartial hearing testimony subsequent thereto.

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<sup>10</sup> In re Katonah-Lewisboro Sch. Dist., 2016 WL 4939559 (S.D.N.Y. Sept. 14, 2016).

## 1. Obligation to Reconvene the CSE upon Receipt of the Private Evaluation

The district alleges that it is undisputed that the September 2014 private evaluation was an IEE. In any event, the district argues that the IHO erred in concluding that it failed to offer the student a FAPE because it did not immediately reconvene the CSE upon receipt of the evaluation. The district alleges that the parents did not request that the CSE convene to review the September 2014 private evaluation, and to the extent that its failure to convene the CSE resulted in a procedural violation, the district argues that the evidence in the hearing record does not support a finding that it failed to offer the student a FAPE, because the evaluation did not offer any new information regarding the student's needs which rendered the recommended program and placement inappropriate. Conversely, the parents argue that the CSE was obliged to reconvene regardless of whether the private evaluation status was an IEE because the private evaluation offered new information in the form of a diagnosis of a borderline personality disorder. The parents allege that in October 2014, the private evaluation brought new information to the CSE, and confirmed the student's diagnosis of a bipolar disorder and her need for residential placement. They further argue that neither they, the private evaluator, or Grove staff believed that the student's needs could be addressed in a day placement.

The evidence in the hearing record reveals that the district received a copy of the private psychological evaluation on October 21, 2014 (Tr. p. 128). It is also undisputed that neither the parents or their attorney requested that the CSE reconvene following the district's receipt of the report (Tr. p. 129). While the district had some knowledge of the student's self-injurious behavior prior to receiving the private September 2014 psychological report, new information in the report reflected that the student regressed to previously exhibited cutting behavior when she was "temporarily out of her 24 hour/7 day a week therapeutic environment" (Dist. Ex. 12 at pp. 3, 27; see Dist. Exs. 1 at p. 2; 2 at p. 8; 3 at p. 5). Specifically, the parent reported to the evaluator that, when at home on Christmas break during the 2013-14 school year, the student returned to cutting behavior and hid the cuts, which the report reflected made "her suicidal risk significant," and required that her clinical interventions be intensified (Dist. Ex. 12 at p. 3). The psychological evaluation report did not describe the manner in which the student's clinical interventions at Grove were intensified to address her recurrent cutting behaviors.<sup>11</sup>

In the recommendations section of her report, the evaluator indicated that "the residential setting [wa]s necessary to provide a safe environment to promote learning, coping, appropriate socialization, to provide alternative learning experiences and to enable [the student] to determine more age appropriate independent living and coping strategies" (id at p. 28). Later, during the

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<sup>11</sup> There does not appear to be a contemporaneous record of this cutting behavior contained in the hearing record. In particular, January 2014 Grove documentation did not reference suicidal ideation or cutting behavior while the student was at home over the preceding Christmas break (Parent Exs. TT at pp. 17-18; YY; see Tr. pp. 1437-39, 1448). To the contrary, the student's "dorm notes" indicate that the student "expressed having a great break" and reference cutting behavior that occurred on January 18, 2014 after she had returned to Grove (Parent Ex. RR at p. 12; Dist. Ex. 33 at pp. 36, 44, 50). Furthermore, the parents' June 2014 letter to the CSE referenced the student's threats to harm herself, but did not reference any instances in which she had done so (Dist. Ex. 21). The district CSE chairperson acknowledged being informed of the student's cutting behaviors, but indicated that Grove staff described it as superficial (Tr. pp. 452-53).

impartial hearing, the private evaluator testified that a residential therapeutic setting for the student was essential in light of the symptoms with which the student presented, such as self-injurious behavior, poor judgement, reckless behavior, hypersexuality and promiscuity, suicide attempts, cutting behaviors, her history of strained social relationships, alienation from people as well as from herself, and her history of poor everyday functioning with regard to hygiene and school (Tr. p. 821). The private evaluator further explained that "the magnitude and nature" of the student's symptoms indicated that her judgement was impaired and that this impairment was "not limited to nine to three," but was "24/7" in nature (Tr. p. 828). The evaluator further indicated that as a clinician, she took suicide and suicide attempts very seriously, and abided by the axiom of "safety first," opining that "[y]ou have to insure safety" and noting that sometimes suicide is attention seeking or a cry for help, and that it could happen accidentally (Tr. pp. 821-22).

With regard to the student's home environment, the September 2014 psychological evaluation report reflected that, at the time of the report, the student did not like change and required a long time to adjust when returning home from her therapeutic residential school (Dist. Ex. 12 at p. 3). According to the student's mother, the student did not like coming home and caused problems with her twin sister, including fighting and stealing (*id.*). As noted above, the student's mother further reported to the private evaluator that while at home on Christmas break during the 2013-14 school year, the student had regressed to previously exhibited cutting behavior, causing "significant gashes to her arms" (Dist. Ex. 12 at p. 3).<sup>12</sup> The evaluator noted in her report that during the evaluation the student "spoke about feeling uncomfortable at home" and that she "couldn't wait to get back to Grove" (*id.* at p. 4). Accordingly, as noted above, in her recommendations, the private evaluator opined that a "residential setting was necessary in order to provide a safe environment to promote learning, coping, appropriate socialization, to provide alternative learning experiences and to enable [the student] to determine more age appropriate independent living and coping strategies" (*id.* at p. 28). Later during the impartial hearing, the evaluator further clarified that it was her opinion that the strife occurring in the home had an impact on the student's ability to access her education because it was difficult for the student to think clearly while experiencing symptoms of that degree (Tr. p. 826). The evaluator further explained that the student experienced impaired judgment related to paranoid ideation, for example, thinking people were out to get her, or were envious of her or that they are being cruel because they made her do things she did not want to do, and opined that when "you can't think straight, how are you going to be able to learn" (Tr. pp. 826-27).

The hearing record reveals that the private evaluation also included a new diagnosis of a borderline personality disorder (Tr. p. 407). In addition to the student's bipolar disorder diagnosis, the private evaluation reflected that the student displayed a pattern of "unstable and intense interpersonal relationships characterized by vacillations between idealization and devaluation, identity disturbance with markedly and persistently unstable sense of self, impulsivity in sex, reckless behavior, eating issues, recurrent suicidal behavior gestures or threats or [sic] self-mutilating behavior, affective instability due to a marked reactivity of mood, inappropriate intense anger, transient, stress-related paranoid ideation" (Dist. Ex. 12 at pp. 26-27). During the impartial

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<sup>12</sup> The private evaluator admitted during in testimony at the impartial hearing that the student's therapist at Grove described the cuts as physically superficial (Tr. p. 892).

hearing, the private evaluator also agreed that borderline personality disorder is not generally diagnosed until age 18; however, she felt she "was on safe ground because" the student "was 17 and a half and because of [her] clinical expertise" (Tr. p. 878).

With regard to the September 2014 private evaluation, the IHO concluded that it did not constitute an IEE by recounting a portion of the regulatory procedures for parents to obtain an IEE at public expense (see 34 CFR 300.502[b]); however, whether or not the information presented in the September 2014 report was contained in an IEE at public expense is not relevant to a determination of the disputed issue in this matter because even if it was an IEE at private parental expense, federal regulations would require that such a privately obtained IEE be considered by the CSE in the same manner as one obtained at public expense (34 CFR 300.502[c][1]).<sup>13</sup> Nonetheless, I agree with the district that the IHO erred in determining that the private evaluation was not an IEE, as an IEE is defined as an evaluation of a student with a disability conducted by a qualified examiner who is not employed by the district (8 NYCRR 200.1[zz]), and the evaluation in question meets that definition.<sup>14</sup> The IHO also reached his decision that the district denied the student a FAPE on procedural grounds by presuming that a CSE is always mandated to reconvene upon a parent's submission of an IEE (IHO Decision at p. 16), but the IHO cites no authority regarding the timing for a CSE to consider an IEE. Federal regulations provide that an IEE "[m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child (34 CFR 300.502[c][1]), but the IDEA procedures do not mandate that CSEs must automatically reconvene within a specified period to review an IEE. The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]), but in this case the district personnel did not recommend any change in placement. The parties in this case do not dispute that the CSE did not immediately reconvene upon receipt of the September 2014 private evaluation.

I note that similar to federal regulations, State regulation requires that the district consider an IEE "in any decisions made with respect to the provision of a free appropriate public education for the student," but again, regulations do not require that a district immediately reconvene the CSE to review the results of an IEE (8 NYCRR 200.5[g][vi]). Under State regulation, parents may refer a student to the CSE for review if they believe that the student's IEP is not appropriate (8 NYCRR 200.4[e][4]), and this would include meeting to review an IEE obtained by the parents; however, the IHO explicitly found that the parents did not request to reconvene the CSE. The IHO's determination to substantive question in this case was made on procedural grounds and it was based upon flawed assumptions.

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<sup>13</sup> The evaluation report itself indicates that the district agreed to fund the September 2014 private evaluation (Dist. Ex. 12 at p. 1; see Tr. p. 188).

<sup>14</sup> The other requirement that an IEE meet agency criteria was not a factor in the IHO's determination (see 34 CFR. 300.502 [e]).



The manner in which the IHO reached the conclusion that the district denied the student is contradictory. While the diagnosis of borderline personality disorder in the private evaluator's report was new information to the district, the description of the student's actual emotional behaviors, symptoms and needs was similar to information reflected in the student's previous IEPs, especially the June 2014 IEP calling for a therapeutic day placement at BOCES TSP with BASIS that which the IHO found appropriate was appropriate and neither party appeals. Those behaviors and needs included that she was argumentative and combative with family, engaged in risky behaviors and sexually provocative communications with older boys, exhibited a significant amount of mood lability and irritability including temper tantrums, demonstrated poor social boundaries, was interpersonally volatile, and had exhibited self-injurious behaviors (see Tr. pp. 535-36; Dist. Exs. 1 at pp. 2, 7; 2 at pp. 3, 7-8; 3 at pp. 5-6). The IHO noted that the private evaluator explained that she was familiar with the BOCES TSP program (IHO Decision at p. 21). The evidence shows that the evaluator indicated that she had had patients who had attended the program; however, the evaluator also qualified her answer further, indicating that since she had visited four years earlier, the program had changed its character, and that she had not spoken with anyone at the program (Tr. pp. 807-08).<sup>15</sup> The IHO explained that the private evaluator had stated that residential placement for a person with borderline personality disorder such as the student was essential (IHO Decision at p. 21), but in describing her opinion, the private compared the Grove program, describing it as a "24/7" program, to the district's program, which she described as "limited to nine to three"(Tr. p. 827-28), which is an unfair and inaccurate characterization of the placement recommended by the district. The evaluator's opinion, upon which the IHO relied so heavily, does not seem to take into account at all the BASIS component of the school district's recommendation of the BOCES TSP. No one asked the evaluator about the BASIS program recommended by the district, and she did not discuss the prospect of a therapeutic day placement with BASIS in her evaluation report. The record is replete with opinion that the student should stay in Grove, but the private evaluator does not seriously engage contrary viewpoints regarding a the BOCES TSP with BASIS in a meaningful way. The IHO then turns to credibility determinations, based in no small part on body language, in order to assess the relative strengths of the expert opinions presented in the case. As far as the credibility determinations, I have no doubt about the witnesses' resolve regarding their own viewpoints and opinions however, the credibility findings did not help answer the substantive question presented in the case. The IHO was required ensure that there was an adequate record to resolve what is in essence a highly nuanced LRE question regarding a therapeutic residential placement versus a therapeutic day program with home based supports. For instance, the record does not describe how late the BASIS program staff can support the student in the evenings, and how such support was similar to or different from the support that the student received at Grove. The IHO also appeared to assume that the district witnesses were required to explain why a residential program was not appropriate (see, e.g., IHO Decision at pp. 18-19), when, more accurately the initial presumption of district personnel should run in favor of selecting a nonresidential setting if possible and would be precluded from placing the student in in a residential unless the CSE reached a determination it was necessary. A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it

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<sup>15</sup> She indicated that she shared office space with BOCES teachers and knew that they were "on break."

is required for a student to benefit from his or her educational program (M.H. v Monroe-Woodbury Cent. Sch. Dist., 296 Fed Appx 126, 128, 2008 WL 4507592 [2d Cir 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. L. § 4402[2][b][2]; 8 NYCRR 200.6[j][iii][d]). The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

The IHO, in disposing of the matter on procedural grounds, also appeared to find that the district psychologist was required to accept the recommendation of the private evaluator in the IEE unless she requested another evaluation, stating that "[s]he had absolutely no basis to disagree with such recommendation and failed to request that the District conduct its own psychiatric evaluation to determine if an appropriate medical professional either agreed or disagreed with [the IEE] recommendation for a residential placement" (IHO Decision at p. 19). That was also error. The District Court already explained in the preceding case involving the student that the district failing to defer to the recommendation of a private evaluator does not amount to a procedural violation in and of itself (Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at \*16).

In summary, the IHO found that the June 2014 IEP was appropriate but then determined that the CSE was required to reconvene in November 2014 using flawed procedural presumptions and an analysis that blamed the district for failing to adopt the recommendations of the private evaluator in the absence of a new evaluation that resulted in a different recommendation. The IHO skipped the task of conducting a substantive LRE analysis in favor of focusing on a procedural analysis. Neither party seriously disputes that the student could derive educational benefit from a residential setting, but the private evaluator's concerns regarding the student's cutting and verbal threats to her family were not fully developed by either party in the hearing record. In essence the private evaluator seemed unaware or did not discuss aspects of the district's proposed BOCES TSP with BASIS placement, and the record is therefore left with gaps on an issue in which the presumption usually favors a lesser restrictive environment. I will remand the matter so that the parties and the IHO can engage in the required fact development and analysis. The IHO should require the parties to pay particular attention to how the private evaluator's safety concerns, as stated in her September 2014 evaluation report differed from the concerns that were before the June 2014 CSE and how they would or would not be addressed by the IEP proposal to place the student in the BOCES TSP with the BASIS placement in the time period following the district receipt of the evaluation report.

## **2. May 2015 IEP**

Regarding summer 2015, the CSE convened in May 2015 for the student's annual review, and reviewed the September 2014 private evaluation, at which time the private evaluator participated in the meeting via telephone (Tr. pp. 828-29; Dist. Ex. 5 at pp. 1-2). The district did not accept the private evaluator's recommendation to place the student in a residential setting. A comparison of the student's June 2014 and May 2015 IEPs reflects that the district offered the student essentially the same placement—BOCES TSP—for the 2015-16 school year as the 2014-15 school year (compare Dist. Ex. 5, with Dist. Ex. 4; see Tr. pp. 443-44). The May 2015 CSE

again recommended individual and group counseling, for both the summer program and the balance of the school year, beginning in September 2015, as well as continuation of the daily provision of the BASIS program in the student's home for the 12-month school year (Dist. Ex. 5 at pp. 1, 9, 10). According to the meeting minutes, the May 2015 CSE agreed to develop the student's transition plan with Grove personnel (Dist. Ex. 5 at p. 2). The May 2015 IEP also reflected a testing accommodation of extended time by 1.5 and management needs, specifically, a highly structured, therapeutic classroom environment throughout the school day to provide supervision, preview and review of academic concepts and behavior supports, as well as a BIP (Dist. Ex. 5 at pp. 6-7, 10). A review of the annual goals on both IEPs indicates that all nine annual goals included in the May 2015 IEP were carried over from the June 2014 IEP with two annual goals (arriving for class and activities on time and attending school every school day for the entire length of the school day) not carried over to the student's May 2015 IEP (compare Dist. Ex. 4 at p. 9, with Dist. Ex. 5 at p. 8; see Tr. p. 443). Like the June 2014 IEP, the program modifications and accommodations on the May 2015 IEP included the use of a calculator for math computation as well as the provision of BASIS, however, the May 2015 IEP no longer provided for additional time for classwork (compare Dist. Ex. 4 at p. 10, with Dist. Ex. 5 at p. 9). Both IEPs reflected that a 30-minute weekly psychiatric consultation for the team and home was recommended as a support for school personnel on behalf of the student (compare Dist. Ex. 4 at p. 10, with Dist. Ex. 5 at p. 9). The May 2015 CSE discussed that the student remained eligible for programming until she attained a New York State local or Regents diploma, and planned to ask the guidance department whether a Grove diploma was equivalent to a New York State local diploma (Dist. Ex. 5 at p. 2). With regard to transition to post high school activities, the May 2015 CSE indicated the student would have the opportunity to participate in the 12th grade curriculum in order for the student to attain a New York State local or Regents diploma with the support of the therapeutic support program, included counseling to support the transition from residential school to day school to a college environment, and provided the opportunity to meet with a school counselor to identify classes needed to attain a New York State local or Regents diploma and transition to college (id. at pp. 10-11).<sup>16</sup> The IHO failed to make distinct findings regarding the IEP for the 2015-16 school year, and his conclusion that the CSE committed a procedural violation by failing to review the private evaluator's report does not apply to the May 2015 CSE, since the CSE did consider the report in May 2015 and reached a different conclusion. On remand, the parties and the IHO should consider the student's progress at Grove during the preceding year and whether the IDEA would require placement in a residential setting for the 2015-16 school year or whether the district's less restrictive placement recommendation should be upheld.

### **C. Appropriateness of Grove**

Although I am remanding for further proceedings regarding whether the BOCES TSP with BOCES program was the student's LRE, I turn now to the parties' contentions surrounding the appropriateness of Grove. The district argues that the IHO erred in finding Grove to be appropriate. As explained in greater detail below, the evidence in the hearing record supports the

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<sup>16</sup> As noted above, by letter dated May 20, 2015, the CSE chairperson advised the parents that completion of the Grove program "would be equivalent to a New York State Local Diploma" (Dist. Ex. 13).

IHO's finding that, based on the totality of the circumstances in this case, Grove constituted an appropriate placement for the student.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). 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. of the City Sch. Dist. of Yonkers, 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. of Hyde Park, 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 a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the 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] ["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 appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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).

The hearing record reflects that Grove is a coeducational therapeutic residential school (Tr. pp. 1158, 1321). The school is considered a college preparatory school, is accredited by the New England Association of Schools and Colleges, and follows Connecticut state guidelines for credits (Tr. pp. 1158, 1170; see Dist. Ex. 5 at p. 2). Grove is reported to work with students across the diagnostic spectrum but does not accept students with significant drug use or those who are extremely violent (Tr. p. 1158). The 24-hour emotional support provided by the residential portion of the school enables students to sustain being in school (Tr. p. 1164).<sup>17, 18</sup>

The hearing record reflects that the program offered at Grove is individualized, with respect to both the students' academic and social/emotional needs. In this regard, a comprehensive service plan is developed for each student (see Tr. pp. 971, 1018; see also Parent Exs. JJ; KK; LL; WW; AAA). Testimony by the student's advisor at Grove indicated that a comprehensive service plan is put together for each student when they come to Grove that includes an advisor report, a learning profile or education report, and a clinical report (Tr. pp. 1182-83). Each of these reports includes individualized goals and objectives for the student related to specific areas: social/emotional goals and objectives to support the student's therapeutic (residential) program, educational/classroom goals to support the student's academic program, and treatment goals to address the student's clinical needs (see Tr. pp. 1183-85, 1213-14, 1383-85; Parent Exs. JJ; KK; LL; WW; ZZ; AAA; BBB; CCC).<sup>19</sup>

With regard to behavior management, Grove uses a check-in system to monitor and supervise students from the time they enter the school (Tr. p. 1160). This requires students to be supervised by staff at all times initially (Tr. pp. 994, 1160). Once a student has completed certain benchmarks, they are allowed to socialize independently for 15 minutes after which they must check in with dorm staff (Tr. pp. 1160-61). Students earn independence in longer increments, and

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<sup>17</sup> With regard to the student in the instant case, testimony by the student's advisor indicated that the student struggled to manage her moods and deal with frustration, exhibited a lot of "drama" with her peers that required staff intervention, was at times angry, could be "very angrily aggressive towards herself and mean to herself," and could become very depressed, and as such, needed the residential component at Grove to help structure herself so that she was prepared for her academic day (Tr. p. 1177). Daily notes related to the student's behavior in the residential component were kept by residential staff at Grove (see Tr. p. 1270; see also Parent Ex. RR; Dist. Ex. 33).

<sup>18</sup> Regarding the district's contention that Grove constituted an overly restrictive setting for the student, generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105), parents are not held as strictly to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 839 [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D.-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]).

<sup>19</sup> Testimony by the parent indicated that the comprehensive service plan was updated every quarter and that progress reports were issued in between report cards (Tr. pp. 971, 1018). However, she also testified that beginning in the 2014-15 school year, the educational program utilized a trimester schedule (Tr. pp. 1065, 1068; see Parent Exs. HH; II; PP).

ultimately earn the privilege of going into town (Tr. pp. 994, 1161). Each increment is attached to benchmarks that students must follow and as such, a student can move up or down the scale depending on their behavior (Tr. p. 1161).

Students are placed in classes at Grove based on the credits they need to complete and are grouped with other students, keeping in mind individual learning profiles, behavioral issues, and levels of academic functioning (Tr. p. 1162). Academic supports provided to students include a regular study hall and a supervised study hall for students that need extra assistance with their school work (Tr. p. 1159). If students do not maintain classroom expectations academically, they may be subject to academic discipline (Tr. p. 1161). Previous IEPs reflect that the student benefitted from these supports at Grove (see Dist. Exs. 3 at p. 1; 4 at p. 1).

To address the student's social/emotional needs, the therapeutic component at the school provides students with a variety of therapies and psychological supports (Tr. p. 969). Each student is assigned to a treatment team consisting of a psychiatrist, a psychologist/therapist, and an advisor, who work together to develop a treatment plan with the student (Tr. p. 1167). The role of the psychiatrist is primarily to work with medication (Tr. p. 1166). The hearing record reflects that the student meets with her treating psychiatrist a minimum of twice per month (Dist. Ex. 20 at p. 1).

The role of the therapist at Grove is to provide family therapy once a month, individual therapy twice per week (or more often if the student is in crisis), and to work in conjunction with the psychiatrist to treat the student (Tr. pp. 1166-67, 1390; see Tr. pp. 971-72; Dist. Ex. 20 at p. 1; see Parent Exs. ZZ; BBB; CCC; EEE).<sup>20, 21</sup> Students also participate in group therapy and are assigned to a therapy group that meets after school once per week and which is co-led by a therapist and an administrator (Tr. pp. 1390-91, 1458). Regarding the district's contention that there were gaps in the student's individual therapy sessions, the student's individual therapist testified that the

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<sup>20</sup> The parent testified that at times, they participated in family therapy at Grove more often than once per month (Tr. pp. 971-72).

<sup>21</sup> In the event that a student refused or missed a session, the student's therapist testified that Grove personnel attempted to arrange to schedule a session at a different time; however, sessions could not always be made up, if a student was unwilling to take part (Tr. p. 1393). In the words of the therapist, if a student continued to refuse therapy, "you can't drag them in here" (Tr. pp. 1392-93). The hearing record reflects that the student at times refused individual therapy and would request a make-up session; however, it appears that at times the student refused to attend therapy for longer periods of time (see Tr. pp. 1287-89, 1369; Parent Ex. EEE at pp. 4-5, 19). Testimony by the student's therapist during the 2014-15 school year indicated that while she considered it a significant issue, she would have been more concerned about the student's failure to attend individual therapy if she did not have the benefit of interfacing with the collective clinical team on staff and the administrative staff, in order to create different therapeutic interventions and find out what was going on with the student (Tr. p. 1423; see Tr. pp. 1470-71). She indicated that at Grove, the "therapy takes place in all different realms," and that at times, she saw the student spontaneously and informally on campus (Tr. p. 1472).

student participated in group therapy, and did not refuse to take part in sessions, although it was led by a different therapist than herself (Tr. pp. 1391, 1458).<sup>22</sup>

Each student is also assigned an advisor, and the student's advisor described her role as ensuring that students got everything they needed academically and residentially, and to make sure the student participates in Grove's whole program (Tr. pp. 1167-68). She indicated that by nature of the role, the advisor, who supervises the student's dorm and spends more time with the student, helps communicate pertinent information to the therapist and psychiatrist, and also works in conjunction with the case manager to ensure that the student is getting what they need in the school component (Tr. pp. 1168-69). The advisor testified that she was both the person who was there to be supportive, and was also the person that "drives behavioral interventions" when needed (Tr. p. 1168). For example, she indicated that it is the advisor's responsibility to put a student "on supervision" if the student gets into trouble (*id.*). According to the advisor, she worked in conjunction with the therapist and psychiatrist during crises, "communicat[ing] with other staff the ways in which the student needs to be handled at certain times" (*id.*). In addition, she indicated that advisors have a lot of contact with the students and their families (Tr. p. 1169). For example, they supervise the dorms, run program activities, and help teach parenting, working to help connect parents and students so they can work on issues at home, as well as helping develop plans for family vacation time (Tr. pp. 1169, 1171).

According to the parent, the student worked closely with her advisor to identify potential colleges and submit her application to college (Tr. p. 1055). Likewise, the student's advisor testified that she helped the student fill out her college applications and obtain the teacher recommendations, and ensured that the applications were timely submitted (Tr. pp. 1221-22). Consistent with this, as explained herein, the student's transition to college went well. Prior to the end of the 2014-15 school year at Grove, the student transitioned into a dorm that provided less staff interaction and supervision, had received the high level of check-ins where she was allowed to go to town on her own, and was functioning more independently (Tr. pp. 1217-18; *see* Tr. p. 1100). The student's therapist reported in June 2015 that the student had "articulated an investment to continue therapy and medication management through the counseling center at [the college]" when she arrived there (Parent Ex. ZZ). The student's therapist was also in contact with the college accessibility program about transitioning her to college (Tr. pp. 1100-01). Prior to the regular orientation to the college, the student attended three days of orientation for students who were enrolled in the disability services program (Tr. p. 1099).

Turning next to the district's contention that the student's progress at Grove was uneven, while the student's progress at Grove is certainly a factor to be considered, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; *see* M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. 2012]; L.K. v. Ne. Sch.

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<sup>22</sup> The hearing record reflects that the student also attended weekly dorm meetings to learn how to live with other students (Tr. p. 970).

Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). As described in greater detail below, a review of the evidence in the hearing record supports a finding that the student made progress at Grove.

The hearing record reflects that the student successfully graduated from Grove in August 2015 (Tr. pp. 365, 1099, 1229; Parent Ex. FFF at pp. 1-2). While the Quarterly Clinical Summary for June 2015, written by the student's therapist at Grove, reflected that the student experienced some sadness, if not depression, related to leaving the school, it also reflected that the student continued to "appropriately navigate her termination from Grove School in an age appropriate manner" noting that the student was better able to acknowledge and process her sadness over leaving Grove (Parent Ex. ZZ). As noted above, the student was accepted to a college and prior to the start of the semester, had participated in an early admission program that focused on aiding with the transition to college and assisting the student with connecting with services (Tr. p. 1099; Parent Ex. ZZ). The student had also agreed to continue therapy and medication management at the college (Parent Ex. ZZ).

An August 16, 2015 residential and activities discharge summary and recommendations report written by the student's advisor reported that the student had progressed from having difficulty leaving the dorm on time, following routines, and taking direction from authority, to living in the "honor dorm" without staff, managing all of her daily routines without staff prompts, and demonstrating the ability to keep her space clean and organized (Parent Ex. NN at pp. 2-3; see Tr. pp. 1217-18). The student was reported to be on time for meals, appointments, and meetings, and was "overall in charge of her daily life skills" (Parent Ex. NN at p. 2). The discharge summary stated that the student demonstrated the skills needed to live independently when she left Grove (id.). During her time at Grove, the student moved from focusing on peer drama, seeking romantic relationships, and having social struggles, to being an active participant in healthy activities including playing on the softball team, functioning as the backstage manager for theater performances at the school, and participating in many off-campus activities (id.). The student utilized her skills in horseback riding to volunteer at a nearby barn, and participated in the on-campus jobs programming (id.). According to the discharge summary, the student was a frequent volunteer of her time for community service related activities, and served as a peer mentor (id.).

With regard to family dynamics, the student worked to strengthen her relationship with both her parents and her sister, and over time, the family was able to shift into new patterns of communication (Parent Ex. NN at p. 2). The student gained a "tremendous amount of insight regarding her struggles with her family," and conflict at home decreased (id. at p. 3). According to the discharge summary, the student also increased her accountability and gained insight into her own behaviors (id. at p. 2). Moreover, the student decreased her impulsivity and at-risk behaviors and learn to communicate her feelings appropriately (id. at pp. 2-3). The discharge summary further revealed that the student gained an understanding of her mood disorder and recognized when she needed support or guidance and develop meaningful peer and staff relationships (id. at p. 3).



An August 16, 2015 clinical discharge summary and recommendations report, written by the student's therapist, reflected that the student's last year at Grove included significant growth and maturity and that she had developed a healthy understanding of her bipolar disorder, as well as the value of continued medication management and therapeutic treatment (Parent Ex. NN at pp. 5, 7; see Tr. p. 1385). In addition, the student's therapist reported that the student's self-concept improved, and her ability to tolerate her own emotionality began to expand (Parent Ex. NN at p. 5). The report further reflected that at the time of discharge and graduation from Grove, the student's relationship with her parents presented significant improvements and the dynamics with her sister showed intermittent periods of improved communication (id.).

Similarly, the student's therapist testified that the student had initially been tremendously angry about her diagnosis and mood dysregulation and looked to place blame somewhere (Tr. p. 1364). When the student was leaving Grove, she had begun to accept it as part of her reality and was more invested in understanding it (Tr. pp. 1364-65). The therapist further noted that the student had become more responsive to learning strategies to redirect her thinking, to refrain from acting on impulses, and to reach out and ask for help when needed (id.). According to the therapist, the student had progressed in her ability to make choices around peers, was relating to peers in a healthier way, and was choosing peers who were making healthier, age-appropriate decisions (Tr. p. 1388). Her testimony indicated that the student had progressed in that she was planning for life after high school, demonstrated maturity, and had progressed from dismissing or throwing relationships away to trying to resolve conflict and manage relationships more age appropriately (id.). She specifically noted that a huge mark in the student's maturation and progress was to see her being proactive with regard to college, pursuing and planning instead of avoiding life after school (Tr. pp. 1385-86). She described the student as "more invested in her potential as a student" (Tr. p. 1363).

In view of the foregoing, the totality of the circumstances presented in this case, including the academic supports provided to the student in the therapeutic residential setting addressing the student's needs related to school and homework avoidance and related to her dual diagnoses of a bipolar disorder and a borderline personality disorder, and the reports of the student's progress during the her tenure at Grove, support the IHO's conclusion that the supports provided by Grove sufficiently addressed the student's needs such that it was appropriate for the student for the period of November 2014 through August 2015. Based on the foregoing, the evidence in the hearing record leads me to conclude that the parents met their burden to establish that Grove provided the student with instruction and services specially designed to meet her unique needs.

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

Having concluded that Grove was an appropriate unilateral placement for the student for the period of November 2014 through August 2015, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the

private education was unreasonable"). The IDEA also provides that reimbursement may be reduced or denied when parents fail to 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]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IDEA allows that reimbursement may be reduced or denied if parents did 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 10 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 v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

The hearing record reflects that the parents cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, and did not fail to raise their concerns regarding the appropriateness of the recommended program in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming that the parents never intended to keep [the student] in public school"]). Based on an independent review of the evidence in the hearing record, I see no reason to disturb the IHO's conclusions with respect to equitable considerations.

## **VII. Conclusion**

The IHO's determination that the June 2014 IEP, at the time it was created, offered the student a FAPE has become final and binding upon the parties. As described above the matter must be remanded for factual development and a redetermination of the issue of whether the BOCES TSP with BASIS setting was the student's LRE as a result of the district's receipt of the September 2014 evaluation report in October 2014. This issue critical in this case to determining

whether the district must reimburse the parent for the student's tuition at Grove as the remaining two prongs of the Burlington/Carter analysis favor the parent.

**IT IS ORDERED** that the decision of the IHO, dated June 29, 2017, is modified, by vacating that portion of the decision that found that the district failed to FAPE from November 2014 forward and ordered the district to reimburse the parents for the costs of the student's tuition at Grove.

**IT IS FURTHER ORDERED** that the matter is remanded to the same IHO who issued the June 29, 2017 decision to determine the merits of the unaddressed issues regarding the provision of a FAPE to the student in the LRE consistent with the body of this decision; and

**IT IS FURTHER ORDERED** that, if the IHO who issued the June 29, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

**Dated:**           **Albany, New York**  
                          **October 2, 2017**

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