



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 09-130

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Eastchester Union Free School District**

**Appearances:**

Law Offices of Neal Howard Rosenberg, attorneys for petitioner, Stewart Lee Karlin, Esq., of counsel

Keane & Beane, P.C., attorneys for respondent, Stephanie L. Burns, Esq., of counsel

### DECISION

Petitioner (the parent) appeals from the decision of an impartial hearing officer which denied her request to be reimbursed by respondent (the district) for her son's tuition costs at Change Academy Lake of the Ozarks (CALO) for the 2008-09 school year. The appeal must be dismissed.

At the time of the impartial hearing, the student was attending CALO, a private out-of-State residential treatment center (Tr. pp. 18, 23). CALO has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The hearing record reflects that the student's history includes multiple behavioral concerns from an early age and difficulties with authority, anger, and self-esteem (Dist. Ex. 10 at pp. 2-5). The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute in this appeal (Tr. p. 27; see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The student entered the United States and the district in 2003, when he was approximately ten years old and in fourth grade (Tr. pp. 648, 651; Dist. Ex. 10 at pp. 2-3). At this time, the student struggled academically as English was not his first language of instruction (Tr. p. 651).

In December 2003, a private psychiatrist determined that the student met the criteria for a diagnosis of a "reactive attachment disorder of infancy, severe, disinhibited type" (RAD) and

provided medication management for him (Tr. pp. 540, 702-03; Dist. Ex. 19).<sup>1</sup> The hearing record reflects that at that time, the student experienced difficulties including fire setting, aggression toward his sister, stealing, lying, and sneaking out of the house (Tr. p. 655). In 2005, when the student was 11 years old and in fifth grade, he was admitted to a psychiatric hospital at the suggestion of his private psychiatrist (*id.*). A private psychodiagnostic evaluation was conducted by the hospital's director of psychology to assist in differential diagnosis, treatment planning, discharge planning, and to assess the student's educational needs (Dist. Ex. 9 at p. 1). The private psychologist indicated that throughout the evaluation the student appeared alert, oriented, and adequately attentive to tasks (*id.*). However, the psychologist also indicated that the student appeared inconsistent in his motivation, whereby he either spent too much time on a task or he gave up prematurely (*id.*). The private psychologist conducted a variety of formal tests (*id.* at pp. 2-5, 9-19). The psychodiagnostic evaluation report indicated that overall, the student's intellectual potential appeared to fall in the average range for basic information processing, working memory, visual memory, verbal and non-verbal problem solving abilities, and executive cognitive functions (*id.* at p. 7). The evaluation report noted some variability in sustained attention, but the student did not display severe and pervasive impairments in attention associated with a diagnosis of an attention deficit hyperactivity disorder (ADHD), and test performances were inconsistent with a diagnosis of a specific learning disability (*id.*). The evaluation report reflected that at the time of the psychodiagnostic evaluation, the student's spelling skills appeared to lag behind his age and grade level, likely as a result of the fact that English was still a second language for him (*id.*).

The private psychologist further indicated that the student likely engaged in a pattern of behavior prior to his admission to the hospital consistent with a diagnosis of conduct disorder (Dist. Ex. 9 at p. 7). Evaluation data suggested to the psychologist that the student's basic coping resources were "quite limited;" the student had little capacity to regulate his emotional responses; the student generally dealt with life's demands through a combination of denial and acting out; and the student had little self-awareness, no insight, and a very limited ability to process social cues (*id.* at pp. 7-8). The private psychologist noted that evaluative data predicted a chronic pattern of impulsive behavior, poor judgment, emotional volatility and interpersonal conflicts in the student, who was likely to be "strikingly unresponsive to punishment or corrective feedback" (*id.* at p. 8). The evaluation report further indicated that although at times the student might appear "quite distressed, acutely agitated, or irrational in his behavior," according to the private psychologist, the evaluative data was not consistent with either a mood disorder or a psychotic disorder (*id.*).

According to the private psychologist, given the student's deficient coping resources, inadequate emotional controls and incompetent social skills suggested by evaluative data, the student would likely function best in a setting that provided him with a "very high level of attention and structure," with clear and consistent contingencies imposed on his behavior so that he would begin to internalize more adequate self-controls, greater self-awareness, and more appropriate social skills (Dist. Ex. 9 at p. 8). The private psychologist further noted that it was "entirely

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<sup>1</sup> The student's private psychiatrist testified that reactive attachment disorder (RAD) has the following diagnostic features: a very early experience in which a child experiences either parental neglect or abuse, institutional neglect, such that a child is left on his own with little human contact and a disregard for a child's basic needs (Tr. pp. 526-28). The private psychiatrist explained that there are two basic types of RAD (Tr. p. 529): the "inhibited" type, in which a child presents as hypervigilant, with a high startle reaction, and very ambivalent when other people are around, and the "disinhibited" type, in which the child presents with a severe disturbance in the ability to relate, such that there is a true social indiscriminate way of relating to people (*id.*). According to the private psychiatrist, a child having a diagnosis of the disinhibited type of RAD lacks judgment, selectivity, and choice (Tr. pp. 529-30).

reasonable to hypothesize" that the problems evident in the student's personality organization at that point in time in his development were at least in part due to his early history (id.). However, according to the private psychologist, evaluative data did not indicate excessive inhibition in interpersonal interactions or a diffuse pattern of attachments that would define RAD, and such, a diagnosis was not appropriate for the student at the time of the psychodiagnostic evaluation (id.).

The Committee on Special Education (CSE) initially deemed the student eligible for special education programs and services as a student with an emotional disturbance for the 2005-06 school year (Tr. pp. 27, 91, 654).<sup>2</sup> The hearing record further indicates that at that time, the student was attending a collaborative class in a district middle school (Tr. p. 658). He received a number of special supports including push-in and pull-out programs and was encouraged to participate in groups run by a social worker (id.).<sup>3</sup>

On or about August 1, 2006, when the student was about to enter seventh grade, the parent filed a Person In Need of Supervision (PINS) petition regarding the student (Dist. Ex. 12 at p. 1). Initially, the student was enrolled in the PINS diversion program and subsequently in the probation program (Tr. pp. 663, 664-66).<sup>4</sup>

In connection with the PINS program and as a result of a Family Court order, on November 26, 2007, when the student was in eighth grade, a forensic mental health evaluation of the student was conducted by an agency working on behalf of the Family Court (Dist. Ex. 10 at p. 1). The evaluator indicated that the student presented in an aloof manner during the interview portion of the evaluation, but that during psychological testing, the student presented with a motivation to perform well (id. at p. 2). Administration of the Wechsler Abbreviated Scale of Intelligence (WASI) yielded a full scale IQ score of 92, in the average range (id. at pp. 6, 9). The evaluator found that the student's verbal IQ score of 88, in the low average to average range, was statistically significant in that it was lower than his performance IQ score of 98, suggesting the existence of a language based learning disability (id.). According to the evaluator, these results were consistent with the student's early language formation difficulties as well as with English being his second language (id. at p. 7).

Administration of the Wechsler Individualized Achievement Test - Second Edition (WIAT-II) revealed the student's performance on the word reading subtest to be at the cusp of the low average to average ranges (19th percentile, age equivalent score 11.8 years) when compared to his chronological peers (Dist. Ex. 10 at pp. 6, 9). The student's performance on the spelling subtest was also within the low average range (10th percentile, age equivalent score 10.0 years) and in the average range (30th percentile, age equivalent score 12.0 years) on the numerical operations subtest (id.).<sup>5</sup> According to the evaluator, all scores on the WIAT-II revealed that the student appeared to be functioning below age equivalency in all basic areas assessed (id. at p. 6).

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<sup>2</sup> The 2005-06 IEP is not included in the hearing record.

<sup>3</sup> The hearing record does not elaborate as to the nature or frequency of the group sessions in which the student was encouraged to participate (Tr. p. 658).

<sup>4</sup> The hearing record reflects that the PINS diversion program attempts to keep students out of probation and to correct behavior (Tr. p. 665).

<sup>5</sup> The forensic mental health evaluation reported results of the numerical operations subtest of the WIAT-II in the body of the report as noted above (Dist. Ex. 10 at p. 6). However, in the appendix, the student's performance on the same subtest was noted to be in the 39th percentile, in the average range (id. at p. 9).

Additionally, the evaluator indicated that the student's learning difficulties were exacerbated by his attention and concentration difficulties whereby he needed academic support and remediation as well as continued therapeutic interventions (id. at p. 7).

With respect to the student's mental status, the evaluation report indicated that the student presented as somewhat aloof during the interview regarding his interpersonal relationships (Dist. Ex. 10 at p. 7). The evaluation report indicated that the evaluation revealed an underlying depressive symptomatology, manifested by the student's perception of being unloved and disliked by others (id.). Furthermore, the evaluator indicated that the student's stated motivation to change his "bad reputation" contradicted his remote attitude and revealed a yearning for the formation of interpersonal relationships (id.). In addition, the student presented with impulse control difficulties in the areas of fire setting and trichotillomania, a condition that results in intense urges to pull out body hair, including eyelashes, when anxious (Tr. p. 371; Dist. Ex. 10 at p. 7).

The evaluator also indicated that in consideration of the student's attachment difficulties, "placing him in a residential facility would likely exacerbate his sense of loneliness and interpersonal ambivalence" (Dist. Ex. 10 at p. 8). The evaluator recommended that the student continue to participate in pharmacotherapy to address his difficulties with attention, concentration, impulse control and depression, and that he participate in individual counseling with a mental health professional who had expertise related to attachment and impulse control difficulties (id.). Regarding the student's attachment difficulties, the evaluator recommended that counseling focus on the development of the student's emotional safety within his environment, and that the parent should also undergo counseling to address concerns that affected her relationship with the student and her behavior toward him, and to improve their relationship and develop attachment (id.). Cognitive behavioral therapy was recommended to address the student's impulse control difficulties, to assist him with a reduction of tension associated with the urge to pull out his eyelashes, to teach him relaxation techniques, and to address his distorted thinking that added to the stress that triggered his hair pulling behavior (id.). Additional recommendations included behavioral management to enhance the student's decision making, academic support and remediation, and the appointment of an educational advocate to assist the parent and the student with available options related to the student's academic performance (id.).

The hearing record reflects that the student began the 2007-08 school year in the district middle school (Tr. p. 33). The hearing record reflects that in January 2008 the student was removed from the district by court probation and placed in a non-secure detention center, however, there is no indication in the hearing record that the district initiated the student's removal (Tr. p. 33; Dist Ex. 26 at p. 5).

A January 25, 2008 social history update was completed by a district psychologist (Dist. Ex. 11 at pp. 1-2).<sup>6</sup> In addition to other information consistent with the hearing record, the social history report indicated that the student performed better with "experiential learning," the student was also talented mechanically and with the computer and was interested in music (id. at p. 2). At the time of the social history report, social studies was noted as an area of relative strength for the student, and writing and spelling were listed as areas of weakness (id.). Although the student was described in the social history as having a poor relationship with his mother and sister, the social history indicated that the student had a "relatively good" relationship with his mother's partner

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<sup>6</sup> Although the social history report does not explicitly note the informant, it appears from the content of the social history report that the parent acted as informant (see Dist. Ex. 11 at pp. 1-2).

(id.). The report also indicated that the student was popular and outgoing with his friends but tended to be dominant toward his friends and not always nice to them; however, the report further revealed that the student "got a lot of positive feedback through peer relationships" (id.). The student was also described as "remote and unwilling to engage" (id.).

Also on January 25, 2008, a subcommittee of the CSE convened for a "Special Review" of the student (Dist. Ex. 26 at p. 1). Attendees included the director of pupil personnel services, who also served as chairperson, a speech-language teacher, a guidance counselor, a special education teacher, a regular education teacher, a school psychologist, the program director of the department of community mental health, the student's probation officer, the student's education consultant from the probation department, and the parent (id. at pp. 1, 5).<sup>7</sup> At the parent's request, an additional parent member was excluded from attending the CSE prior to the meeting (id. at p. 5). The CSE subcommittee recommended continuation of the student as eligible for special education programs and services as a student with an "emotional disability" (id. at p. 1). Information included in the resultant January 25, 2008 individualized education plan (IEP) indicated that according to the student's probation officer, the student was "doing very well" at the non-secure detention facility (id. at p. 5). The January 2008 IEP reflected that the probation officer reported that the student met with a caseworker and participated and interacted with other residents, although the student was noted to have "some fear" of other residents whom the IEP reflected were characterized as more "hard core" (id.). The IEP reflected that the November 2007 forensic mental health evaluation report was also discussed at the meeting (id.). Additional discussion reflected in the January 2008 IEP involved the student's fire setting history and that the student had not had any fire setting incidents within the past year (id.). The parent reported that the student was very angry with her and that he did not understand the relationship between his behavior and his subsequent court ordered placement at the non-secure detention facility (id.). The January 2008 IEP further indicated that because the student was doing well at the non-secure detention facility, the representatives from the probation department anticipated they would recommend that the student go home with more services in the community (id.). The January 2008 IEP also reflected that the student was described as having reacted appropriately in all situations since his placement at the non-secure detention facility and that when a court advocate observed the student in a group at the detention center, the student was noted to be compliant, although guarded (id.). The January 2008 IEP reflected that the CSE considered the possibility of the student coming back to the district school, but the parent did not think that was an appropriate choice given the student's past history of noncompliant behavior at home (id.).

Ultimately, the January 2008 CSE recommended a "TSP [Board of Cooperative Educational Services] (BOCES) program" because the student had done well in a small structured setting (Dist. Ex. 26 at p. 5).<sup>8</sup> According to the meeting minutes, the county representative stated during the meeting that the student would be appropriate for the recommended BOCES program and multi-systemic therapy through the county, indicating that he would work with probation to coordinate the student's services with the district's guidance department (id.). The IEP further reflected that to address the parent's concern about the student coming home before the

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<sup>7</sup> The district's director of pupil personnel services testified that during her tenure with the district, she had previously held the positions of director of special education and CSE chairperson (Tr. p. 25). For purposes of consistency in this decision, the director of pupil personnel services will be referred to as such.

<sup>8</sup> It is presumed within the context of the hearing record that "TSP" is an abbreviation for "Therapeutic Support Program."

recommended BOCES program was available, the CSE agreed to implement two hours per day of home instruction until the aforementioned BOCES placement was secured via an expedited referral process with BOCES (*id.*). Ultimately, the January 2008 IEP reflected a recommendation of home instruction for two hours per day to begin on February 4, 2008 and continue until June 27, 2008 (*id.* at p. 1).

Additional recommendations included in the January 2008 IEP pertaining to program modifications, accommodations, supplementary aids and services were for preferential seating, modified homework as needed, checking for understanding, an extra set of textbooks for home, modified tests as needed, a copy of class notes as needed, and access to a computer (Dist Ex. 26 at pp. 1-2). Testing accommodation recommendations were for directions clarified/repeated, flexible seating, extended time (1.5), access to a computer, use of a calculator, and tests read as needed (*id.* at p. 2). The January 2008 IEP also included a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (*id.* at pp. 4-5).

On January 29, 2008, a psychiatric evaluation was conducted at the non-secure detention facility by the director of the "FCAP" who reported that the student's behavior had been "good" while attending the FCAP (Dist. Ex. 12 at pp. 1, 2, 4).<sup>9</sup> The director's recommendations included an extension of the student's probation as the student was only partially compliant with the orders and conditions of his probation, continued community supervision as opposed to residential placement as the "latter will only further his estrangement and alienation," a highly structured academic placement such as a therapeutic support program, continued pharmacotherapy, and family therapy to address limit setting, consistent structure, sibling rivalry, and other family related concerns (*id.* at p. 4).

On March 14, 2008, a subcommittee of the CSE met for a "Special Review" regarding the student with the director of pupil personnel services who also acted as chairperson, a speech-language teacher, a guidance counselor, the principal of the Westchester BOCES Collaborative High School (CHS), the student's special education teacher from CHS, the student's regular education teacher from CHS, the student's social worker from CHS, and the parent were in attendance (Dist. Ex. 3 at pp. 1, 5). At the parent's request, an additional parent member was excluded from attending the CSE subcommittee prior to the meeting (*id.* at p. 5). The resultant March 14, 2008 IEP reflected that on January 30, 2008, the student was dismissed from the non-secure detention facility whereupon he received home instruction services until on or about March 11, 2008, when the student entered the CHS program (*id.*). Information included in the March 2008 IEP noted that although the student had only attended CHS for three days prior to the March 14, 2008 CSE subcommittee meeting, the principal reported that the student presented as "quiet," "on-time," "making some friends," "participating in a few social activities," and "doing what he needs to do while trying to find his way" (*id.*; *see* Dist. Ex. 24 at p. 1). The March 2008 IEP meeting minutes also reflected that the student's academic teachers reported that the student was acting appropriately, was respectful, was interacting, and was trying to get comfortable (Dist. Ex. 3 at p. 5). According to the March 2008 IEP meeting minutes, some work avoidance by the student was noted along with difficulty initiating to task (*id.*). Although the student did well when given adult assistance, he was noted to experience difficulty doing independent tasks/work activities (*id.*). The March 2008 IEP further noted that the parent reported the student was doing "okay," that she wanted information and feedback from the school psychologist and psychiatrist, and that

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<sup>9</sup> It is presumed within the context of the hearing record that "FCAP" is an abbreviation for "Family Court Assistance Program."

the district guidance counselor would coordinate math tutoring for two hours per week to supplement the student's then current high school math class (id.). The March 2008 IEP also reflected that the student continued to receive services from probation (id.).

The March 2008 CSE subcommittee recommended to continue the student's eligibility for special education services as a student with an "emotional disability," placement at CHS in an integrated 12:1 special class with individual counseling services one time per week for 30 minutes and group counseling as part of the program one time per week, along with a psychiatric consultation one time per month for 30 minutes (Dist. Ex. 3 at pp. 1, 5). Recommended modifications, accommodations and supports, testing accommodations, and the coordinated set of school to post school transition activities were the same as those recommended in the January 2008 IEP (compare Dist. Ex. 3 at pp. 1-2, 4-5, with Dist. Ex. 26 at pp. 1-2). The IEP indicated that the recommendations were effective from March 2008 and would continue through the end of June 2008, that all participants were in agreement, and that the CSE would reconvene at the end of the 2007-08 school year to review the student's placement (id. at pp. 1, 5).

The student's May 16, 2008 five-week progress report from CHS revealed that in world history I, the student displayed difficulty with subject skills, completed some class work, and had late or missing assignments (Dist. Ex. 22 at p. 1). His world history teacher noted that all of the student's missing assignments for the fourth marking period needed to be completed and submitted by June 10, 2008 (id.). The student's world history teacher further commented that the student worked well when given individual help (id.). The world history teacher described the student's behavior as "on-task" and assigned the student a grade of 76 (id.). The progress report further reflected that the student had no absences in the world history class for the quarter (id.). The five week progress report specific to the student's music class reflected that the student regularly completed class work and handed in his homework on time (id. at p. 2). Behaviorally, the music teacher described the student as displaying appropriate behavior (id.). According to the music teacher, the student was a "model" student, had earned a grade of 85 in the class at the time of the progress report, and had two absences for the quarter (id.). The student's five week progress report specific to computer "apps," indicated the student needed to be concerned with his work, had achieved a grade of "C-" in the class at the time, and had two absences for the quarter (id. at p. 3). The student's English 9 teacher commented that the student refused to complete any work, was often unfocused and off-task, had difficulty following directions, and she assigned the student a grade of "F" for the class at the time of the progress report (Parent Ex. A at p. 1). The student's English 9 teacher further reported that the student was absent seven times during the quarter (id.). Similar comments were noted on the student's environmental science progress report and the student had a grade of "F" in the course at that point in time (id. at p. 2). In career development, the teacher remarked that the student completed little class work, did not regularly hand in homework, and was often unfocused and off-task (id. at p. 3). The student's career development teacher assigned the student a grade of "C" in the course at that point in time and the teacher further noted that the student had five absences (id.). The student's mathematics teacher described the student's attendance as "excellent" (id. at p. 4). According to the student's mathematics teacher, the student completed some class work, but had late or missing homework assignments, and the mathematics teacher assigned the student a grade of "F" in the course at that point in time (id.).

On June 6, 2008, a subcommittee of the CSE met for the student's annual review and to develop the student's program for the 2008-09 school year, with the director of pupil personnel services who also acted as chairperson, a guidance counselor, the principal of CHS, the student's special education teacher from CHS, the student's regular education teacher from CHS, the

student's social worker from CHS, the parent, and the student in attendance (Dist. Ex. 4 at pp. 1, 4-5). Information included in the resultant IEP and in part based upon a June 6, 2008 teacher progress summary, indicated that the principal stated at the meeting that the student required individual attention, but would complete work (*id.* at p. 5). The June 2008 IEP indicated that the student had made "little progress" at that point in time, but that his behavior was "very good" (*id.*). In math, the June 2008 IEP indicated that student was always on time, completed little work, but could do some work when the teacher sat next to him (*id.*). In English, meeting comments revealed that the student did "some work" (*id.*). The principal and the special education teacher also reported that the student came to school every day, and was "very respectful to teachers and peers" (*id.*). The meeting minutes from the June 2008 IEP also reflected that the student "hit it off well" with his music teacher (*id.*). The student's ELA (English language arts) teacher stated at the meeting that if work was left for the student, he would eventually do it and she further reported that every day for the last few days at the time of the June 2008 meeting, the student had been reading (*id.*). The June 2008 IEP also indicated that the student had made some friends and was socializing with other students (*id.*). The student's social worker commented that the student had been more verbal, was "coming out of his shell," and was not getting into trouble (*id.*). The IEP noted that the student's probation officer indicated that the student was participating in group and doing well, drug testing had been negative, and that the parent had advised the probation officer that the student had been very compliant at home (*id.*).

Annual goals reviewed addressed study skills, writing, mathematics, and social/emotional/behavioral needs (Dist. Ex. 4 at pp. 5-8). The June 2008 IEP further reflected that the parent indicated she was considering a program for the student in Arizona for the summer (*id.* at p. 5). In addition, the June 2008 CSE subcommittee meeting minutes indicated that a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) would be implemented at the beginning of the 2008-09 school year to consider how to help the student be more successful (*id.*).<sup>10</sup> The June 2008 IEP also noted that although the student had a math tutor, he did not always attend his tutoring session, but the student would do the work (*id.*). For the 2008-09 school year, the June 2008 CSE recommended continuing the student's program at CHS in an integrated 12:1 special class with related services of counseling and psychiatric consultation, and that the student would be eligible for extended school year (ESY) services (*id.* at pp. 1, 5). To address the parent's concerns regarding how to motivate the student, the social worker agreed to make referrals to help the parent obtain family counseling (*id.* at p. 5). The principal of CHS also indicated that CHS could set up some "family sessions" as part of the student's program (*id.*). Overall, the June 2008 CSE noted that the student had transitioned to the specialized program "nicely" and at that point in time had a positive experience (*id.*).

By letter dated June 16, 2008 to the district's director of pupil personnel services, the parent indicated that "no IEP had been developed" by the conclusion of the June 2008 CSE meeting (Dist. Ex. 4A).<sup>11</sup> The parent further noted that contrary to the principal's belief that the student was "doing fine" at CHS, and that the student should return to CHS, the parent noted that she had yet

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<sup>10</sup> In New York, an FBA is defined as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]). A BIP is defined as "a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior" (8 NYCRR 200.1[mmm]; see 8 NYCRR 201.2[a]).

<sup>11</sup> The parent did not raise this as an issue at the impartial hearing nor is it an issue raised on appeal.



to receive any official document specifying the student's placement for the upcoming school year (id.). In addition, the parent advised that she strongly disagreed with the CSE subcommittee's recommendation that the student continue to attend CHS (id.). According to the parent, it was clear that the student required a 12-month therapeutic residential program in order to make educational progress (id.). Consequently, the parent informed the director of pupil personnel services that as of June 20, 2008, she planned to enroll her son in a specific private wilderness program in Arizona for six weeks (id.).<sup>12</sup> The parent stated that based on the recommendations of the wilderness program, she would then make a decision about where to enroll the student in fall 2008 and further noted that she would keep the district apprised of any evaluations and recommendations made by the wilderness program (id.).

By letter dated July 1, 2008, the district's director of pupil personnel services responded to the parent's June 16, 2008 correspondence, noting that the CSE "did in fact develop and IEP" during the June 2008 CSE meeting (Dist. Ex. 5). She forwarded the parent a copy of the student's June 2008 IEP and further advised the parent to contact the district should she have any questions (id.). The director of pupil personnel services also asked the parent to inform her whether the student would be available to attend the recommended summer tutoring in math and English (id.). In the event that the parent had any new information regarding the student or desired an additional meeting, the director of pupil personnel services indicated that such a meeting would be arranged (id.).

By letter dated July 20, 2008 to the district's director of pupil personnel services, the parent stated that the student would be completing the private wilderness program in which he was enrolled the following week and that she was travelling to the private wilderness program and planned to meet with the program's staff "for a debriefing" (Dist. Ex. 7). According to the parent, the student's therapist at the wilderness program had already made a "general recommendation" that the student go directly to a residential placement that could meet his emotional and academic needs (id.). Although the parent did not identify a particular residential placement, the parent indicated that there were "several good centers" that would work primarily on RAD, which the parent characterized as the student's "most significant underlying problem" (id.). The parent further explained that without this specialized intervention, she and the student's therapist were of the opinion that the student was unlikely to progress emotionally or academically (id.). Next, the parent reiterated that she strongly disagreed with the CSE subcommittee's recommendation that the student return to CHS (id.). The parent indicated that she believed that the student had not made scholastic progress at CHS and she was concerned about the student's "freedom of movement off campus" (id.). Lastly, the parent informed the director of pupil personnel services that she was preparing to take the student to an "appropriate residential facility" and requested an emergency CSE meeting as soon as possible (id.).

By correspondence dated July 25, 2008, the student's therapist from the wilderness program reported that since the student's admission to the wilderness program approximately one month earlier, the student had participated in the program to a "moderate degree" (Dist. Ex. 17).<sup>13</sup> The therapist stated that the student was able to derive some benefits from the program, such as

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<sup>12</sup> The parent is not seeking tuition reimbursement for the student's enrollment in the wilderness program in this appeal.

<sup>13</sup> The July 25, 2008 letter from the student's therapist from the wilderness program is addressed to "to whom it may concern" (Dist. Ex. 17).

increased self-confidence and the willingness to self-evaluate his goals for life; however, she opined that the student's greatest struggle was his inability to form genuine, authentic relationships (id.). The therapist further indicated that the student had strongly resisted all attempts by staff to get to know him on any meaningful level, and that the student had engaged in negative behaviors toward both staff and peers to present an image of himself as something he was not (id.). According to the therapist, the student's behaviors were indicative of a diagnosis of an inhibited RAD, which she explained typically developed in the first two years of life, as a result of a disruption in an infant's life that prevented bonding with a primary caregiver (id.). The therapist cautioned that an untreated RAD usually manifested in the development of a personality disorder, at which point treatment interventions had a dramatically decreased chance of success (id.). With respect to the student, the therapist noted that he had already begun to experiment with illegal substance use and poor peer association and it was imperative that the student receive specialized treatment for his attachment difficulties while the student was still young enough to benefit from these interventions (id.). The therapist further opined that with the help of a residential placement facility specializing in attachment and trauma concerns, the student could begin to learn how to form genuine, authentic relationships, which she described as the foundation for the student learning to be a successful, contributing member of the community (id.). According to the therapist, without receiving the appropriate attachment based treatment, the student would likely "walk down a path where he engage[d] in behaviors that [we]re increasingly more frequent, severe and intense" (id.). She advised that any program under consideration should be family focused, in order to assist the parent in understanding how to learn and apply appropriate interventions for the students (id.). The therapist recommended that immediately upon the student's discharge from the wilderness program, the student should be admitted to a facility specializing in attachment disorders, and she further cautioned that in the event of a delay in his admission, the student would lose the preparatory benefits of having attended the wilderness program (id.). The therapist further advised that should the student be allowed to return home, he posed a potential flight risk and that he had indicated that he would like to run away from home to live with his friends (id.).

On August 2, 2008, the student was admitted to CALO (Dist. Exs. 20; 32-A).

The CSE met on August 8, 2008 for a "Special Review" with the CSE chairperson/director of pupil personnel services, CSE chairperson/Committee on Preschool Special Education (CPSE) chairperson, principal of CHS (by telephone), a special education teacher, a regular education teacher, a psychologist, a social worker (by telephone), a representative from community health, the parent, and an additional parent member in attendance (Dist. Ex. 8 at pp. 1, 5). Information included in the resultant IEP indicated that following a review of the minutes of the June 6, 2008 annual review meeting, the parent stated that she did not say at the previous meeting that the student "was doing fine" at home (id. at p. 5). Instead, she indicated that the student did no work at school and that he tended to leave the building (id.). The parent also claimed that the student was not tested for drug use (id.). According to the parent, the student smoked marijuana in school and that the student was "high" when he attended the previous CSE meeting (id.). The parent indicated that the student set a fire in a dumpster in April 2008, but that this was not brought up at the June 2008 CSE meeting (id.). The parent reported that the student was going to probation "fairly regularly," but he did miss sessions (id.). Additionally, the parent indicated that she was "involved" with a therapist in a neighboring town and that she had tried everything recommended to help her son (id.). After the wilderness program, the parent explained that she had placed the student in CALO, an out-of-State private residential treatment facility that the parent stated specialized in attachment concerns and that she further described as "family oriented" (id.). In response to the concerns raised by the parent, the CHS principal indicated that there were no

incidents at the time the student attended CHS that staff was aware of regarding the student smoking marijuana, that they would know if he did so and that staff never noticed marijuana on his breath or clothes (id.). The CHS principal indicated that in school the student was quiet; however, he participated in some of the classes and responded with a sense of humor (id.). In addition, the CHS principal reported that the student enjoyed going to physical education and that although the student returned late a few times from lunch, he did come to school (id.).

The August 2008 CSE meeting minutes also indicated that the student was beginning to connect with students and that he was building relationships with adults (Dist. Ex. 8 at p. 5). According to the August 2008 meeting comments, the student was described to give staff a hug and a handshake, was beginning to assimilate into the program and was smiling a lot (id.). Although the principal agreed with the parent that the student did not do all the work he was supposed to do, meeting comments reflected that the student was beginning to make better choices around the work he was supposed to do (id.). It was further noted that the student passed the high school algebra course (id.). Meeting comments further revealed that the student met with the social worker at school, and toward the end of the school year, the student was opening up more and doing his work (id.). The student's regular education teacher reported that the student progressed from not wanting to look at the teacher to saying hello (id. at pp. 5-6). According to the meeting comments, the student also started to choose books to read and he read daily (id. at p. 6). The August 2008 IEP indicated that as a result of leaving school before the end of the 2007-08 school year, the student had missed final examinations and the opportunity to make up work (id.). However, the August 2008 IEP noted that the student passed math, music, career development, and physical education (id.). According to the meeting comments, the parent did not want to talk about the student attending CHS for the 2008-09 school year (id.).

The CSE meeting comments reflected that the CSE chairperson/director of pupil personnel services indicated that the CSE, in considering the least restrictive environment (LRE), could add a 1:1 aide for the student in the CHS program to assist him to "stay on track" and complete more work, as well as to provide the student with more supervision during lunch (Dist. Ex. 8 at p. 6). In addition, meeting notes revealed that the district would work with the county and probation department to continue to help the student in the community (id.). The CHS principal indicated that the CHS program staff developed a "strategic plan" for the student and had met regarding the student's behaviors (id.). The county representative indicated that the county did not recommend a residential facility at that point in time, but that the county would look at outpatient providers to provide the student with intensive help on an outpatient basis (id.). The August 2008 IEP also reflected that the psychologist and psychiatrist, who conducted the court ordered evaluations, did not recommend that the student be placed in a residential facility because such a placement would intensify the student's feelings of abandonment; however, staff from the wilderness program recommended a residential facility to address the diagnosed attachment disorder (id.). According to the meeting notes, the parent disagreed with the CSE's recommendation for the student to remain at CHS with a 1:1 aide (id.). Recommended placement modifications, accommodations and supports, testing accommodations, the coordinated set of transition activities from school to post-school, and annual goals were the same as those that were recommended in the June 2008 IEP, with the addition of a 1:1 aide to be integrated into the student's day for five hours on a daily basis (id. at pp. 1-2, 4-9).

By memorandum dated August 8, 2008 to the director of pupil personnel services, the CHS principal recounted the August 2008 CSE's recommendation that the student was expected to

return to CHS with a 1:1 aide in September 2008 (Dist. Ex. 14).<sup>14</sup> The principal stated that because the student was reportedly making some progress before leaving the program in mid-June 2008 and did not have the opportunity to make up missing assignments/quizzes, the student would receive "incompletes" in courses where he was previously assigned a final average grade of "F" (id.). The principal further opined that given the 1:1 support and opportunity to submit the completed assignments, it was the expectation that the student would pass those courses as well (id.).

By letter dated August 9, 2008, the student's private psychiatrist stated that on December 2, 2003, he had his first medical consultation with the student (Dist. Ex. 19).<sup>15</sup> The psychiatrist stated that the student had a diagnosis of a "reactive attachment disorder of infancy, severe, disinhibited type" (id.). According to the psychiatrist, it was medically necessary that the only treatment that could stabilize the student was a residential treatment facility that focused on RAD (id.). He further opined that attempts at all other treatment modalities had failed and as a result of those failures, a residential treatment facility specializing in attachment disorders was the only option (id.). Lastly, the psychiatrist advised that "at this critical juncture in his life," the student was in need of this level of care to avoid a worsening prognosis (id.).

By letter dated August 18, 2008 from the parent to the student's probation officer, the parent advised that she had placed her son at CALO pursuant to the recommendations of the student's therapist from the wilderness program and the student's private therapist (Parent Ex. F). The parent described her decision to unilaterally place the student at CALO as the culmination of a long process in which various interventions had been tried (id. at p. 1). The parent recalled that she had been hesitant to relinquish her custodial rights to have the student sent to a court ordered residential facility, because at the time the parent believed that the student could be managed at home and in the local school system and that she did not consider any of the residential options appropriate or helpful to the student (id.). Next, the parent noted that she agreed with the probation officer that the program team from the wilderness program might offer valuable recommendations for the student's treatment and transition after the program (id.). She attached a copy of the recommendation from the student's therapist at the wilderness program, and noted that the student's treatment team all agreed that the student should not return home after the wilderness program, but rather that the student should go directly to CALO, which the parent noted specialized in the treatment of RAD (id.). Although the parent described CALO as having excellent academics, she noted that its primary focus was on "this emotional disability that [wa]s at the core of the [the student's] academic and behavioral problems" (id.). The parent requested that the probation officer verify the facts expressed in the August 18, 2008 letter so that the parent could begin documenting the history of the student's case in the event that she commenced an impartial hearing against the school district (id. at pp. 1-2). In closing, the parent explained that given the student's academic failure and what she deemed his increasingly problematic behavior at home and in the community, the student's residential placement seemed to have been inevitable (id. at p. 2).

In an undated letter to the district director of pupil personnel services, co-authored by CALO's founder/chief executive officer (CEO) and CALO's medical director, it was reported that

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<sup>14</sup> The hearing record reflects that by letter dated August 27, 2008, the district sent a copy of this memorandum to the parent (Dist. Ex. 16).

<sup>15</sup> The psychiatrist's August 9, 2008 letter is not addressed to a particular individual; however, the parent was copied on the letter (Dist. Ex. 19).

CALO's admissions team was unanimous in its determination to accept the student into their program and that they believed that the student fit well in their "treatment window" (Tr. p. 309; Dist. Ex. 20).<sup>16</sup> The CEO and the medical director noted that since his enrollment at CALO, the student had been further monitored relative to "fit" and treatment planning, and that the parent had provided them with additional information regarding family dynamics and how the student presented himself in school and in the community (Dist. Ex. 20 at p. 1). According to the CEO and the medical director, that information was consistent with their in-house assessments (id.). They further explained that they would offer the student a diagnosis of a moderate to severe RAD (id.). With respect to the student, the CEO and the medical director explained that the student's diagnosis of RAD manifested itself in ways that might be incorrectly diagnosed as having a conduct disorder and opined that it was critical that the student receive "specialized treatment" if he were to make substantial interpersonal and individual progress, which the CEO and the medical director indicated could be accomplished at CALO or another facility that specialized in attachment disorders (id.). In addition, the CEO and the medical director recommended that wherever the student was placed, that placement should be enough of a distance from home that the student would be able to make a break from negative peer relationships (id.). They also advised that the parent was involved in the student's treatment, that she would be visiting CALO to attend family therapy every six weeks, and that she would be participating in weekly telephone sessions with the student and his therapist (id. at p. 2).

By letter dated September 9, 2008 to the district director of pupil personnel services, the student's private therapist advised that the student had been in his care since March 2007 (Dist. Ex. 21). The private therapist stated that except during the student's "residential stay," summer camp and some vacation, the therapist saw the student on a weekly basis for individual counseling and family therapy (id.). According to the private therapist, the student had demonstrated an inability to connect with adults in a meaningful way and the private therapist further noted that it was extremely difficult to help the student develop goals and motivate him to work toward them (id.). The private therapist opined that this had not just happened clinically, but also academically (id.). Without providing specific examples, the private therapist stated that each of the academic interventions that had been instituted during his work with the student, seemed to not result in progress, and the student's performance, behavior, and motivation seemed to decrease (id.). The private therapist also added that in his opinion, not only clinically, but also as an educator, the student would only progress through a residential placement that would remove the student from his then current environment and replace it with one where the student would be unable to avoid developing relationships with adults who would inevitably create his success (id.).

On October 23, 2008, a subcommittee of the CSE met for a "Special Review" regarding the student with the director of pupil personnel services, the principal of CHS, a special education teacher, a regular education teacher, the program director of the county department of community mental health, the student's probation officer, the psychiatrist on staff at CHS, and the parent in attendance (Tr. p. 81; Dist. Ex. 18 at pp. 1, 5).<sup>17</sup> Information included in the resultant IEP indicated that at that time, the student had been parentally placed at CALO and that the parent presented reports written by the educational advocate and the student's private therapist to the October 2008

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<sup>16</sup> The letter is marked as having been received by the district on September 9, 2008 (Dist. Ex. 20).

<sup>17</sup> Although the meeting minutes from the October 2008 CSE meeting did not indicate which committee member also served as CSE chairperson, the director of pupil personnel services testified that she chaired that meeting (Tr. p. 80; Dist. Ex. 18 at p. 5).

CSE (Dist. Ex. 18 at p. 5). The October 2008 IEP reflected that both reports were read "in full context" and that the CSE chairperson reviewed an October 23, 2008 report from CALO (*id.*). According to the meeting minutes contained in the October 2008 IEP, CHS staff reported that the student had started to make connections, although all his grades did not always reflect this (*id.*). Meeting minutes further reflected that the probation officer noted that there were no "significant issues in the community at the time of [the student] going to his residential placement" (*id.*). Although the parent indicated that the student had set a fire in a dumpster, meeting minutes indicated that the probation officer stated that she had no police report regarding that incident (*id.*). According to the October 2008 IEP, the parent had concerns about the student leaving school and getting "high" (*id.*). Despite the parent's concerns, the CHS principal stated that the student came to school every day and was beginning to make connections to other students and staff, and that the principal had no information that the student was "high" at school (*id.*). The October 2008 IEP further noted that the parent withdrew the student from the alternative high school placement within the district with no notice prior to the end of the school year (*id.*). With the exception of the parent, who did not agree, the October 2008 CSE found that the 12:1 special class program with related services that was recommended for the 2008-09 school year with the addition of a 1:1 aide remained appropriate for the student (*id.*). The county health representative also discussed available transition services back to the district school upon the student's return to the district (*id.*).

On November 10, 2008, the parent, through counsel, filed a due process complaint notice and requested an impartial hearing seeking reimbursement of tuition and room and board at CALO, as well as reimbursement for "other related educational expenses and services that the parents are providing" for the 2008-09 school year (Dist. Ex. 1). The parent alleged that the IEP for the 2008-09 school year did not offer the student a free appropriate public education (FAPE)<sup>18</sup> and would not confer meaningful educational benefits to the student but, instead, would cause the student to regress or at least, not progress educationally (*id.* at p. 2). Without differentiating between the three IEPs that were developed for the student for the 2008-09 school year and without further elaboration of her claims, the parent asserted that "the IEP has procedural and substantive defects that render the IEP invalid" and that the IEP did not provide a sufficient level of integrated support in a full-time therapeutic residential school (*id.*). The parent maintained that the student required a residential placement in order to access his education for the 2008-09 school year and that the district's placement recommendation in a collaborative class was inappropriate (*id.*). The parent further argued that "the IEP" was invalid because the student needed a specialized residential school to treat RAD in order to continue to progress academically, adding that the student required "intensive monitoring and treatment" (*id.*). In addition, the parent alleged that the student required a "24/7 approach" to be able to achieve academic success because the student's emotional disability was "inextricably intertwined with his academic success" (*id.*). Next, without specifying which of the three IEPs developed for the 2008-09 school year she was challenging, the parent contended

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<sup>18</sup> The term "free appropriate public education" means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

(20 U.S.C. § 1401[9]; *see* 34 C.F.R. § 300.17).

that the goals enumerated in "both IEPs" were inadequate to address the student's academic and emotional needs (id.). Lastly, the parent asserted that the district did not have trained personnel on staff that was equipped to address the student's diagnosis of RAD, which she maintained required the student to be away from home in order to be effectively treated (id.).

On April 2, 2009, an impartial hearing convened and concluded on August 6, 2009, after five days of testimony (IHO Decision at p. 1; Tr. pp. 1-729). By decision dated October 20, 2009, the impartial hearing officer denied the parent's request for tuition reimbursement for CALO for the 2008-09 school year (id. at p. 53). First, the impartial hearing officer noted that the district convened several CSE meetings to develop the student's program for the 2008-09 school year (id. at p. 43). Next, with respect to the parent's claim that the CSE was improperly constituted because no one from CALO or any treating professional of the student participated in the development of the student's IEP, the impartial hearing officer concluded that the participants at all CSE meetings were "very familiar" with the student and she further found that all CSE meetings were composed of the requisite participants (id. at pp. 43-44). Moreover, the impartial hearing officer noted that the CSE reconvened specifically for the purpose of discussing reports from the student's treating professionals and that the CSE met more than once specifically to address the parent's concerns (id. at p. 44). As such, the impartial hearing officer determined that the parent had every opportunity to participate in a meaningful way, and that certain changes were made to the student's program, such as the addition of a 1:1 aide, to address the parent's concerns (id.). She further noted that the student had only attended CALO for a brief period by the time that the CSE convened in October 2008, and there was no evidence in the hearing record showing that if the parent had wanted a representative from CALO to take part, that the parent would have been precluded from doing so (id.). Next, the impartial hearing officer found that the CSE made changes to the student's program in accordance with the Individuals with Disabilities Education Act's (IDEA's) LRE requirements, further concluding that the district considered a residential placement for the student and rejected it as too restrictive based on reports that such a placement would exacerbate the student's sense of loneliness and personal ambivalence (id. at p. 45). Turning next to the parent's claim that the student's recommended counseling services had not been properly implemented while he attended school in the district, the impartial hearing officer took note of the social worker's testimony that the social worker did not always force the student to attend counseling; however, the impartial hearing officer went on to find that the social worker explained that it would not have been clinically productive to force the student to attend counseling (id.). The impartial hearing officer further noted that the school social worker had testified that by June 2008, the student had become more verbal, more social with peers and school staff, and had greater interaction with teachers (id. at p. 46). Under the circumstances, the impartial hearing officer determined that regardless of whether the student had missed "some of his 'scheduled counseling,'" ultimately, the student made progress because of implemented strategies put in place by district staff (id.).

Next, the impartial hearing officer determined that the goals were discussed and reviewed at the CSE meeting and were based on information by district staff and the student's probation officer (IHO Decision at p. 46). She further noted that the parent was present at the CSE meeting and did not request any change or modification with respect to the goals (id. at pp. 46-47).<sup>19</sup> Although the impartial hearing officer found that the student's IEPs did not contain speech-language goals, the impartial hearing officer noted that language was addressed through the student's writing goals (id. at p. 46). Moreover, the impartial hearing officer found that the first

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<sup>19</sup> The impartial hearing officer did not specify which CSE meeting during her analysis of the goals (see IHO Decision at pp. 46-47).

goal in each IEP for the 2008-09 school year specifically addressed reading and she took note of testimony from the district's principal who described all of the student's goals and explained why the CSE deemed them appropriate (*id.*). Based on the above, the impartial hearing officer concluded that the goals developed by the CSE for the student were specific enough to provide his evaluators with detailed objectives and timeframes with regard to the student's social, emotional, and behavioral needs (*id.* at p. 47). With respect to the development of an FBA for the student, although the district conceded that it did not conduct an FBA for the student while he was attending CHS, the impartial hearing officer found that the CSE recommended that an FBA be done at the beginning of the 2008-09 school year and that a BIP be developed at that time as well (*id.*).

Next, regarding the parent's assertion that the student required a residential placement in order to receive educational benefits, the impartial hearing officer concluded that "there was ... evidence to the contrary" (IHO Decision at p. 47). The impartial hearing officer noted that the student's private psychiatrist opined that the student required a residential placement in order to meaningfully access his education; however, she found that it was unclear on what the psychiatrist was basing his opinion given that the private psychiatrist had never inquired about how the student was functioning in school and had not seen the student since 2007, nor did the private psychiatrist have any awareness of what educational programs were provided to the student during the 2007-08 school year (*id.*). Concluding that a residential setting was too restrictive for the student, the impartial hearing officer also noted evidence that at the end of the student's time at CHS, he was forming relationships with peers and that he was not described as building relationships while attending the residential wilderness program (*id.*). In addition, contrary to the parent's claim that the district's program was deficient because of its failure to have a staff member who was trained in and familiar with RAD, the impartial hearing officer determined that the evidence showed that the student had started to form relationships with peers and staff at CHS and had begun to make academic progress there (*id.* at p. 48). More specifically, the impartial hearing officer found that the student was able to make progress in social and emotional areas at CHS, which she described as the primary concern of RAD, although the student had attended the program for an abbreviated period of time (*id.* at pp. 48, 50). Additionally, although the impartial hearing officer acknowledged that she was not in a position to diagnose conditions, it remained unclear to the impartial hearing officer how the student's diagnosis of RAD was reached (*id.* at p. 48). She further noted that the psychiatric hospital that had previously treated the student did not offer him a diagnosis of RAD (*id.* at p. 49).

Next, despite the parent's claim that the student's behavior had not improved as evidenced by, among other things, the student's substance abuse; the impartial hearing officer determined that there was no other evidence that the student had engaged in substance abuse aside from the parent's testimony (IHO Decision at p. 49). Moreover, the impartial hearing officer noted that the district had implemented new policies and added a 1:1 aide to student's program to address the parent's concern that the student was returning late from his breaks (*id.* at pp. 49-50). In light of the foregoing, the impartial hearing officer concluded that the IEP developed for the student for the 2008-09 school year was likely to produce progress and offered the student a FAPE in the LRE (*id.* at p. 50).

Although the impartial hearing officer indicated that in light of her findings, it was not necessary to address the appropriateness of CALO and whether equitable considerations would have supported the parent's claim for relief, in order to complete the hearing record, the impartial hearing officer addressed these matters (IHO Decision at p. 50). The impartial hearing officer found that CALO was too restrictive of a setting and not appropriate for the student (*id.* at p. 52).



With respect to equitable considerations, the impartial hearing officer determined that the equities would not bar the parent from relief (id.).

The parent appeals and requests that the impartial hearing officer's determination be annulled and vacated. The parent challenges the impartial hearing officer's determination that the student was offered a FAPE in light of the following allegations: (1) no one from CALO participated in the October 2008 CSE subcommittee meeting; (2) the goals in the August 2008 and October 2008 IEPs were not appropriate because the IEPs did not contain spelling or reading goals although the student had significant deficits in those areas; (3) the IEPs did not contain a sufficient amount of counseling for the student, which was not properly implemented; (4) the district's failure to develop an FBA and a BIP resulted in a denial of a FAPE to the student; (5) the student needed to be in a therapeutic residential placement that had experience and training in treating students having a diagnosis of RAD; (6) the district's failure to have a staff member familiar with RAD resulted in a denial of a FAPE; (7) the student did not make progress while attending the district's program; (8) CHS was not an appropriate placement due to the nature and severity of the student's disability; and (9) the student required a residential placement and could not be successfully educated in a day program. With respect to the student's placement at CALO, the parent argues that the impartial hearing officer erred in finding that CALO was too restrictive and that it was not appropriate for the student, citing the significant progress made by the student at CALO. The parent asserts that while attending CALO the student has demonstrated improvements in academics, as well as his ability to trust. Lastly, the parent contends that the equities support an award of reimbursement.

In its answer, the district requests that the impartial hearing officer's decision be upheld. The district maintains that the impartial hearing officer correctly determined that it offered the student a FAPE during the 2008-09 school year, because the 2008-09 IEP was reasonably calculated to provide the student with educational benefits in the LRE for the following reasons: (1) in making its program recommendation for the 2008-09 school year, the CSE developed a profile of the student's academic and social/emotional needs based upon current evaluative data; (2) although the CSE was cognizant that the student's private providers recommended a residential placement for the student, the CSE was also mindful that independent evaluators advised against residential placement due to concerns that such a placement would exacerbate the student's attachment difficulties; (3) although the student had only been enrolled in CHS for a brief period of time prior to his removal, the student had already begun to make behavioral, social and emotional progress and was starting to make limited academic progress there; and (4) the CSE addressed the parent's concerns regarding the student's attendance at CHS. In addition, the district asserts that the CSE was properly composed. Next, the district contends that the goals listed in the challenged IEPs appropriately addressed the student's needs. With respect to the parent's claim that the counseling portion of the student's 2007-08 IEP was not properly implemented, the district contends that the 2007-08 IEP was not properly challenged by the parent and that the 2007-08 IEP was appropriately implemented. Next, although the district admits that it did not develop an FBA during the period that the student attended CHS, the district maintains that district staff specifically met to discuss the student and develop strategies to increase his engagement in the classroom. Furthermore, the district alleges that the CSE recommended that the development of an FBA and BIP take place at the beginning of the 2008-09 school year.

In the alternative, the district asserts that the parent did not establish that CALO was an appropriate placement for the student in light of the following allegations: (1) a residential placement was an overly restrictive setting for the student; (2) although the student eventually

made academic progress at CALO, the student made minimal therapeutic gains; and (3) CALO did not provide the student with specially designed instruction to meet the student's unique special education needs. Lastly, although the district does not cross-appeal the impartial hearing officer's conclusion that equitable considerations would not preclude an award of relief to the parent, the district argues that the equities weighed against the parent's claim for tuition reimbursement.

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007, therefore, it is applicable in the case at bar (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the instant matter, as set forth in greater detail below, the hearing record supports the impartial hearing officer's conclusion that there were no procedural deficiencies surrounding the creation of the student's IEPs that denied the student a FAPE, and that the program recommended by the district for the student's 2008-09 school year would have conferred educational benefits to the student, was likely to produce progress, and offered the student a FAPE in the LRE (see IHO Decision at pp. 46, 50).

Initially, I agree with the impartial hearing officer's finding that the parent was afforded meaningful participation in the development of the student's program for the 2008-09 school year (IHO Decision at p. 44). An independent review of the hearing record illustrates that the district was responsive to the parent's concerns and that the CSE convened three times to develop the student's program for the 2008-09 school year (Dist. Exs. 4; 8; 18). The parent attended each CSE meeting, and voiced her objections to the CSE's recommendations during each of the meetings (Tr. pp. 684-85, 689-91; Dist. Exs. 4 at p. 5; 8 at p. 5; 18 at p. 5). The hearing record also reveals that the CSE convened in August 2008, pursuant to the parent's request (Tr. p. 58; Dist. Exs. 7; 8). During the August 2008 CSE meeting, in response to the parent's concerns that the student would have too much freedom of movement in the district's recommended program and that he would not do his schoolwork, the CSE added a 1:1 aide, which would provide an additional layer of supervision to the student as well as help him refocus in the classroom (Tr. pp. 58-59, 77; Dist. Ex. 8 at p. 6). Upon receipt of additional evaluative material regarding the student, the hearing record shows that in October 2008, a subcommittee of the CSE reconvened to review the new documentation (Tr. pp. 80-86; Dist. Exs. 18 at p. 5; 19; 20; 21). Moreover, a review of the comments on the August 2008 and October 2008 IEPs reflects that discussion at those CSE meetings primarily focused on the parent's concerns regarding the student's behavioral difficulties

at home and in the community, as well as the parent's interest in a residential placement (see Dist Exs. 8 at pp. 5-6; 18 at p. 5). Under the circumstances, given that the CSE was responsive to the parent's concerns regarding the student's program and that the CSE specifically met each time that it was provided with new information regarding the student, the hearing record reflects that the parent was afforded a meaningful opportunity to participate in the development of her son's IEP and was "significantly involved" in the process. (Cerra 427 F.3d at 195).

I will next consider the parent's assertion that the October 2008 CSE subcommittee was improperly composed, which resulted in a denial of a FAPE to the student because no one from CALO or a treating professional of the student, who would have served as the student's special education teacher, attended the meeting. State regulations, provide that "not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student" attend a student's CSE meeting (8 NYCRR 200.3[a][1][iii]). The district's special education teacher who participated in the development of each IEP for the 2008-09 school year had taught the student during his enrollment at CHS and was the student's teacher until his removal in June 2008 (Tr. pp. 190, 212, 236; Dist. Exs. 4 at p. 5; 8 at p. 5; 18 at p. 5; Parent Ex. A). Although it is not clear from the hearing record that the special education teacher would have taught the student during the 2008-09 school year, the hearing record reveals that she was his teacher at the time of the June 2008 CSE subcommittee meeting (Tr. p. 190; Dist. Ex. 4 at p. 5). Under the circumstances presented herein, there is no showing in the hearing record that the absence of a CALO staff member or one of the student's treating professionals resulted in a denial of a FAPE to the student. Although no one from CALO or one of the student's treating professionals took part in the October 2008 CSE subcommittee meeting, the hearing record establishes that the October 2008 CSE subcommittee was composed of individuals, including district staff and representatives from the county and the probation department, who were familiar with the student and his academic and behavioral history (Dist. Ex. 18 at p. 5). Moreover, the October 2008 CSE subcommittee convened for the purpose of reviewing updated evaluative data that included progress reports from CALO and letters from the student's private therapist and private psychiatrist (Tr. p. 80; Dist. Exs. 18 at p. 5; 19; 21). Additionally, a review of the hearing record also shows that the impartial hearing officer correctly found that there was no evidence presented at the impartial hearing to suggest that if the parent wanted to include a participant from CALO as a member of the CSE, that she would have been precluded from doing so (IHO Decision at p. 44).

Based on the foregoing, there is nothing in the hearing record to suggest that the absence of a participant from CALO or a treating professional of the student's from the October 2008 CSE subcommittee (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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]), or substantively denied the student a FAPE.

Next, the parent challenges the goals enumerated in the August and October 2008 IEPs, asserting that the IEPs lacked spelling and reading goals although the student presented with significant deficits in those areas. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and

schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 C.F.R. § 300.320[a][3]). Here, a thorough review of the hearing record reflects that the spelling and reading goals included in the June 2008, August 2008, and October 2008 IEPs were appropriate and addressed the student's special education needs as stated in those IEPs (Dist. Exs. 4 at p. 3; 8 at pp. 3-4; 9 at p. 10; 18 at pp. 3-4).

Although the parent contends that the student presented with significant deficits in the areas of spelling and reading and the student's spelling skills are characterized as a "weakness," the hearing record reveals that the November 26, 2007 forensic mental health evaluation report included results of administration of the spelling and word reading subtests of the WIAT-II, which yielded scores in the low average to average ranges (Tr. pp. 37, 63; Dist. Ex. 10 at pp. 6, 9)<sup>20</sup>. The June 2008, August 2008, and October 2008 IEPs reflected these evaluation results (Dist. Exs. 4 at p. 3; 8 at p. 4; 10 at pp. 6, 9; 18 at pp. 3-4).

A review of the goals included in the June 2008, August 2008, and October 2008 IEPs reveals that the recommended goals were the same in each IEP (Dist. Exs. 4 at pp. 5-8; 8 at pp. 6-9; 18 at pp. 6-8). The director of pupil personnel services indicated that there was no goal specific to spelling on either the August 2008 or October 2008 IEPs (Tr. pp. 105, 115-16). However, she also noted that the CSE agreed that the goal developed by the student's special education teacher at CHS that "[t]he student will submit a written assignment on a topic requested by teacher consisting of at least four paragraphs with complete sentences" with 75 percent success with moderate assistance over four weeks was appropriate for the student to address his difficulty in spelling (Tr. p. 71). She testified that because the student had difficulty in spelling, the CSE wanted to make sure the student had a writing goal; and that being able to write four paragraphs and use of pre-writing skills were good interventions for a student with some difficulty in reading and spelling (Tr. p. 71; Dist. Exs. 8 at p. 7; 18 at p. 7).

Concerning reading, the June 2008, August 2008, and October 2008 IEPs indicated that the student was able to read aloud fluently and make appropriate inferences (Dist. Exs. 4 at p. 3; 8 at p. 3; 18 at p. 3). The student's need specific to reading that was included in the IEPs stated that he needed to complete independent reading assignments (Dist. Exs. 4 at p. 3; 8 at p. 4; 18 at p. 4). Consistent with this need, the aforementioned IEPs included the following goal: "[t]he student will independently complete reading and writing assignments" with 65 percent success with moderate assistance over ten weeks (Tr. pp. 116, 189; Dist. Exs. 4 at p. 5; 8 at p. 7; 18 at p. 6). Testimony by the CHS principal regarding the June 2008 IEP indicated that the aforementioned goal was appropriate for the student because the student had the ability to be able to complete reading and writing assignments independently (Tr. p. 189). In addition, according to the director of pupil personnel services the following goal, "[t]he student will use the process of pre-writing, drafting, revising and proofreading to produce a (four) paragraph story or essay provided with visual/verbal prompts" with 75 percent success over four weeks provided for good interventions for a student, such as the student in the instant case, with reading and writing difficulties (Tr. p. 71; Dist. Ex. 4 at p. 6).

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<sup>20</sup> In addition to testimony by the director of pupil personnel services as noted within the body of this decision, testimony by the CALO assistant academic director of boys/lead teacher described the student's spelling skills as "not quite where they need to be" (Tr. p. 636).

Furthermore, the hearing record reflects that the parent and the student's special education/English teacher from CHS attended each of the CSE meetings (Tr. p. 170; Dist. Exs. 4 at p. 5; 8 at p. 5; 18 at p. 5). The director of pupil personnel services testified that the goals were discussed at the June 2008 CSE meeting, and specifically with respect to the goal that addressed the student's reading and writing, the student's English teacher that attended the meeting would have sought to change the goal if she thought it necessary (Tr. pp. 189-90). Testimony by the director of pupil personnel services indicated that during the August 2008 CSE meeting, the parent did not request any additional goals, or seek any change or modification to the existing goals at the time of that meeting (Tr. p. 76). Additionally, the hearing record offers no indication that the parent requested modification of the student's goals during the October 2008 CSE meeting (see Dist. Ex. 18 at p. 5). I note that notwithstanding the absence of a goal specific to spelling, the hearing record does not reflect that the district's recommended program would have been rendered inappropriate for the student and would have risen to the level of a denial of a FAPE. Moreover, as noted above, I find that the hearing record demonstrates that the annual goals in each of the challenged IEPs were appropriate to meet the student's needs and provided sufficient specificity to enable the student's teachers and related service providers to understand the CSE's expectations with respect to each goal and what the student would be working on over the course of the school year (see Tarlowe v. Dep't of Educ., 2008 WL 2736027, at \*9 [S.D.N.Y. July 3, 2008]); Application of a Student with a Disability, Appeal No. 09-082; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096; Application of a Student with a Disability, Appeal No. 08-086; Application of a Child with a Disability, Appeal No. 07-117; see also M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]).

I now turn to the parent's contentions that the IEPs for the 2008-09 school year failed to contain a sufficient amount of counseling for the student, and that counseling was not properly implemented during the period that the student attended CHS.<sup>21</sup> The June 2008, August 2008, and October 2008 CSEs recommended that the student receive individual counseling one time per week for 30 minutes, group counseling as part of the recommended program one time per week for 30 minutes, and a psychiatric consultation one time per month for 30 minutes (Dist. Exs. 4 at p. 1; 8 at p. 1; 18 at p. 1). The CSEs developed annual goals for the student that were aligned with his identified present levels/abilities in the area of social development and consistent with the recommendations made in the November 26, 2007 forensic mental health evaluation (compare Dist. Exs. 4 at p. 7; 8 at p. 8; 18 at p. 8 with Dist. Exs. 4 at p. 4; 8 at p. 4; 18 at p. 4 and Dist. Ex. 10 at p. 8). Additionally, comments included in the June 2008 IEP indicated that the parent expressed concern about how to motivate the student, that the CSE responded by suggesting family counseling, and that the district social worker would make referrals to help the parent obtain the service (Dist. Ex. 4 at p. 5). Moreover, according to the June 2008 IEP, the CHS principal stated that it would be possible to set up family sessions as part of the student's program (*id.*). Under the circumstances presented herein, given that the CSE developed its counseling recommendation based upon the parent's concerns and the student's needs, I find that the recommended levels of

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<sup>21</sup> A review of the due process complaint notice reflects that the previous school year's IEP (2007-08) is not in dispute in the instant matter (Dist. Exs. 1; 3). However, the impartial hearing officer considered the parent's claim that the counseling portion of the student's March 2008 IEP was not properly implemented (IHO Decision at pp. 45-46). Additionally, the parent raised the issue during the impartial hearing and the hearing record reflects that the district did not object (see Tr. pp. 264-66). Therefore, I will review the parent's claim that counseling was not properly implemented during the student's enrollment in CHS.

counseling in the student's IEPs were reasonably calculated to confer educational benefits on the student.

In addition, the parent maintains that the student's counseling sessions were not properly implemented by the district. In order to prevail on a claim that a district failed to implement a student's IEP, resulting in a denial of a FAPE, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material," (see e.g. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

In the instant case, testimony by the social worker who worked with the student when he attended CHS between March and June 2008 indicated that she met with the student on several occasions for counseling, and would see him in the halls and check in on him in the classroom (Tr. p. 243). Consistent with the June 2008, August 2008, and October 2008 IEPs, the student was scheduled to see the social worker on a weekly basis for 30 minutes (Dist. Exs. 4 at p. 1; 8 at p. 1; 18 at p. 1). According to the social worker's testimony, the student verbalized during their initial session together that he did not want to meet with her on a regular basis (Tr. p. 244). Subsequently, the student did not show up for the counseling sessions as scheduled (Tr. pp. 243-44). The social worker reported that when the student initially arrived at the CHS program, if he did not appear in her office for counseling sessions, she sought him out and removed him from his classes for counseling (Tr. pp. 244, 266). By the end of the school year, she allowed the student to come in to her office as needed (Tr. p. 244). Based on the student's reaction to regularly scheduled counseling sessions as well as the social worker's clinical experience, the social worker determined it was unwise to "push" the student to come to regularly scheduled counseling sessions because any effort to force him to come to counseling might have an adverse affect (id.). The social worker explained that when the student initially entered CHS in March 2008 she checked in on him every morning to make sure he was positively transitioning and acclimating into CHS (Tr. p. 245). She also discussed the student and his performance with the CHS principal and other staff members at weekly staff meetings and developed a plan for the student, whereby strategies were developed to motivate the student to work, including "chunking" the student's work by increments of work time and break time, and leaving his work on his desk to allow him to work on it (Tr. pp. 246-48). Moreover, as explained below, the hearing record supports the impartial hearing officer's finding that the student made social/emotional progress as a result of the strategies developed and utilized, despite the fact that he did not receive all of his regularly scheduled counseling sessions (IHO Decision at p. 46). Under the circumstances, the parent's claim that the district failed to implement the student's counseling sessions fails to rise to the level of denying the student a FAPE (see Van Duyn, 502 F.3d at 822).

The parent next asserts that the district failed to develop an FBA/BIP which in turn resulted in a denial of a FAPE to the student. When a student's behavior impedes his or her learning or that of others, the CSE must consider positive behavioral interventions and supports, and other strategies, to address such behavior (20 U.S.C. § 1414[d][3][B][i]; 34 C.F.R. § 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). In addition to the federal requirement, State regulations require that an evaluation include an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities (8 NYCRR 200.4[b][1][v]; see Connor v. New York City Dep't. of Educ., 2009 WL 3335760, at \*4 [S.D.N.Y. 2009]).<sup>22</sup> Additionally, under State regulations, when considering more restrictive programs or placements as a result of the student's behavior, a CSE "shall consider the development of a behavioral intervention plan" (8 NYCRR 200.22[b]). Here, although the district conceded that an FBA had not been conducted during the period that the student attended CHS, the June 2008 IEP indicated that an FBA/BIP would be implemented at the beginning of the 2008-09 school year to consider how to help the student be more successful (Dist. Ex. 4 at p. 5). Additionally, the principal from CHS testified that an FBA would have been developed for the student, had staff deemed it necessary (Tr. p. 235). She further noted that it was not unusual for students to attend the program for a period of time and not have an FBA, and that CHS staff wanted the student in the instant case to have an opportunity to attend CHS and acclimate to the program (Tr. pp. 235-36). The principal from CHS further recalled that during the June 2008 CSE meeting, the student's special education teacher, whom the principal characterized as "a very tough teacher that sets extremely high standards" was very excited that as a result of applying the strategies in the way she had implemented them, she had seen positive results from the student (Tr. p. 236). Regarding the positive results that the student's special education teacher observed, the principal from CHS described the student's demeanor as more relaxed (*id.*). Moreover, the student's IEPs reflected goals that incorporated strategies to address behavioral concerns that were identified as need areas. For example, the student's "Social/Emotional/Behavioral" annual goals reflected that the student would

use effective coping strategies when faced with conflict situations (e.g., ignore, walk away, and request adult supervision), discuss and assess a problem situation and review alternative solutions without acting impulsively, identify 4 possible causes and intra/interpersonal consequences of emotional stress (e.g., relationship problems, difficulty in school), identify 4 effective methods to cope with emotional stress or difficult life situations rather than self-destructive methods (e.g., withdrawal, truancy, acting-out behavior, drug and alcohol abuse), seek out appropriate people to ask for help when under stress, and identify feelings or fears

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<sup>22</sup> In developing an IEP and considering "special factors," when a student's behavior impedes learning, federal regulations (34 C.F.R. § 300.324[a][2][i]) and State regulations (8 NYCRR 200.4[d][3]) require consideration of strategies to address that behavior as part of the development of the IEP. Federal regulations (34 C.F.R. §§ 300.530[d][1][ii], 300.530[f][1][i]) and State regulations (8 NYCRR 201.3) also address preparation of, or review of, an FBA and BIP in disciplinary situations. In addition, State regulations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]), but not federal regulations, require consideration of an FBA and BIP in certain non-disciplinary situations.



that interfere with the ability to attend school and will formulate 4 strategies to appropriately cope with such feelings (Dist. Ex. 4 at p. 7; 8 at pp. 8-9; 18 at pp. 7-8).

According to the director of pupil personnel services, the August 2008 CSE recommended that an FBA be completed, because the student remained unfocused in class and was not getting his homework done (Tr. p. 61).<sup>23</sup> Therefore, she explained that "the CSE wanted to look at the function of that behavior" (*id.*). Although the director of pupil personnel services stated that CHS had its behavior plan and worksheet, the CSE wanted to do something in addition to that, which would have been much more specific (*id.*). The hearing record does reflect that the student benefited from strategies developed by CHS staff. Therefore, the failure to conduct an FBA did not procedurally or substantively rise to the level of a denial of a FAPE.

I now turn to the parent's contention that the impartial hearing officer erred in finding that the student made progress while attending CHS. Contrary to the parent's assertion that the student did not make progress while attending CHS, as a whole, the hearing record reflects that the student made progress in some of his courses and in his social/emotional development. Testimony by the director of pupil personnel services indicated that at the time of the June 2008 CSE meeting, the student was not doing much academic work, characterized by the student not handing in many assignments, and not being focused in academic classes (Tr. p. 45). CHS staff consensus at that time was that the student passed four classes including math and he did very well in music (*id.*). The director of pupil personnel services also indicated that the staff consensus at the time was that the student was coming to school on time every day and coming to class, something that he did not do when he was in middle school (Tr. pp. 45, 87-88). Furthermore, the CSE noted that the student was forming relationships with staff, and he had an especially good relationship with a music teacher (Tr. p. 45). The June 2008 IEP indicated that the student had shown improvement in math<sup>24</sup> and that it was one of his strengths; he was usually attentive and participated in class (Tr. p. 46; Dist. Ex. 4 at p. 3).

In regard to the student's emotional functioning at CHS, the director of pupil personnel services indicated that staff reported at the June 2008 CSE meeting that the student was making connections and based on the information the CSE had at the time of that meeting, the student made progress emotionally and behaviorally, and was noted to be very respectful to teachers and peers (Tr. pp. 47-48). The June 2008 IEP reflected that the student had made some friends and was socializing with other students (Dist. Ex. 4 at p. 5). Testimony by the student's social worker indicated that he was more verbal, was coming out of his shell, and was not getting into trouble (Tr. p. 48; Dist. Ex. 4 at p. 5). Additional information included in the IEP noted that the student's probation officer indicated the student was participating in group and doing well and that drug testing had been negative (*id.*). I note that the aforementioned progress demonstrated by the student was particularly significant in light of his abbreviated enrollment at CHS during the period between March 11, 2008 and June 20, 2008, before the end of the school year when the parent

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<sup>23</sup> I note that the student's IEPs provided for program modifications, accommodations, and supplementary aids and services to address the student's difficulty with focus and homework completion that included preferential seating, modified homework as needed, checking for understanding, an extra set of textbooks for home, modified tests as needed, and a copy of class notes as needed (Dist. Exs. 4 at pp. 1-2; 8 at p. 2; 18 at p. 2).

<sup>24</sup> Testimony by the director of pupil personnel services indicated that the June 2008 CSE recommended math tutoring over the summer because math was a difficult subject for the student; the CSE wanted to make sure there were no gaps in the student's math, and to supplement the student in math (Tr. p. 46).

removed the student from CHS (Dist. Exs. 4A; 17). Furthermore, a June 30, 2008 report card indicated that the student earned incomplete ("INC") grades for English 09, global history I, and environmental science, not because the student could not do the work, but because he was not completing the work and handing in assignments (Tr. p. 67; Dist. Exs. 14 at pp. 1-2; 15; 16 at p. 3). The same report card indicated that the student passed integrated algebra, music, career development, computer applications, and physical education (Tr. pp. 67-68; Dist. Exs. 14 at pp. 1-2; 15; 16 at p. 3). As detailed above, I find that the hearing record sufficiently demonstrates that the student had made educational progress during the previous (2007-08) school year while enrolled in CHS (see Application of the Bd. of Educ., Appeal No. 08-091; see generally Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008] [noting that although not dispositive, an IEP that is modeled upon an IEP that generated some progress in the past is likely to continue to confer educational benefit]).

I will next address the parent's claim that CHS was not an appropriate placement for the student due to the nature and severity of his disability. Specific to the parent's claim, the parent maintains that the student required a placement in a therapeutic residential program that had experience in training and treating students with RAD. A student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428; W.S., 454 F. Supp. 2d at 148). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 C.F.R. § 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

The Second Circuit employs a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see

also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). Determining whether a student with a disability can be educated satisfactorily in a regular class with supplemental aids and services mandates consideration of several additional factors, including, but not necessarily limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22).<sup>25</sup> Behavioral problems do not afford a basis for concluding that a student requires a residential placement absent evidence that the student was otherwise regressing educationally in a day program as a result of those problems (see Walczak, 142 F.3d at 131-132 [residential placement not appropriate where student made meaningful social and academic progress in a day program]; c.f. Mrs. B., 103 F.3d at 1121-22 [residential placement necessary where behavioral problems resulted in the student not advancing more than one grade level in any subject in three years while in a day special education program with a therapeutic component]).

Here, the hearing record fails to support a conclusion that the student required a residential placement. The November 26, 2007 forensic mental health evaluation and the January 29, 2008 a psychiatric evaluation report conducted at the non-secure detention facility recommended against placement in a residential setting because such a placement would likely "exacerbate his sense of loneliness and interpersonal ambivalence," and "further his estrangement and alienation" (Dist. Exs 10 at p. 8; 12 at p. 4). The January 2008 psychiatric evaluation report recommended a highly structured academic placement such as a therapeutic support program, continued pharmacotherapy, and family therapy to address limit setting, consistent structure, sibling rivalry, and other family related concerns (Dist. Ex. 12 at p. 4). Testimony by the district director of pupil personnel services indicated that by all accounts and all of the information that the June 2008 CSE had available, and in consideration of the fact that the student had been at CHS for only a short period of time, the student displayed social, emotional and behavioral progress (Tr. p. 49). Although the district does not dispute that at the time of the June 2008 CSE meeting "the academic piece was not there" yet, the student's main difficulty involved his social, emotional and behavioral progress, something that was consistent with his eligibility for special education as a student with an emotional disturbance (id.). In addition, the director of pupil personnel services reported that she had seen many students at CHS start off academically in a manner similar to the student (id.). The director of pupil personnel services opined that it was not unusual for a student enrolled at CHS to not "get down to work" until emotionally and socially, a student had his or her behaviors and feelings under control (id.). Furthermore, the director of pupil personnel services stated that CHS staff was very positive about the student's progress, something that had not been the case when the student previously attended middle school (Tr. pp. 49-50). The district concluded that

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<sup>25</sup> 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).

CHS was an appropriate program for the student because it constituted the student's LRE, where he could receive therapy, have contact with the psychiatrist on staff who could consult with the parent, the student's psychiatrist or psychologist, and because CHS was a small program that was individualized to meet the student's special education needs (id.).

The parent alleges that the student required a residential placement and could not be successfully educated in a day program, the student needed to be in a therapeutic residential placement that had experience and training in treating students having a diagnosis of RAD, and the district's failure to have a staff member familiar with RAD resulted in a denial of a FAPE. The parent's concerns and personal accounts of incidents regarding the student's reported fire-setting and drug related behaviors, defiance, lack of compliance, lying, fleeing from school, and inability to establish relationships with others were inconsistent with information available to the CSE and not corroborated in the hearing record in the form of police or probation reports, or school incident reports (Tr. pp. 679-82; 684-85; Dist. Exs. 4 at p. 5; 8 at pp. 5-6; 18 at p. 5). In addition, the district correctly points out that although the wilderness program recommended residential placement for the student, that recommendation was not based upon the student's educational needs; rather, it was based upon concerns that the student was perceived as a flight risk (Dist. Ex. 17). Similarly, the hearing record reflects that the student's psychiatrist recommended residential placement for the student because the psychiatrist deemed it "medically necessary" that the student be placed in a facility that focused on RAD (Dist. Ex. 19). Moreover, not all of the student's providers and evaluators concurred with the diagnosis of RAD offered by the student's psychiatrist (see Dist. Ex. 9). Lastly, the August 2008 IEP reflected that the county and probation agencies would "partner" with each other to initiate outpatient services for "intensive help" with the student's supervision (Dist. Ex. 8 at p. 6). The program director from the county department of community and mental health indicated that many of the parent's concerns could be addressed on an outpatient basis and that at that point in time, a residential placement was not appropriate for the student (id.). Based on the foregoing, the parent's assertion that the district's placement recommendation was not appropriate for the student due to the nature and severity of his disability is not persuasive. On the contrary, the hearing record supports the impartial hearing officer's conclusions that the district recommended the student's program in accordance with the IDEA's LRE requirements, that the student was progressing in his day program, such that a residential facility was not required for the student to receive educational benefits and that there was no evidence that the student would not continue to progress at CHS (IHO Decision at pp. 45, 51).

In consideration of all of the above, and in particular the aforementioned discussion regarding the June 2008, August 2008, and October 2008 CSE meetings and the student's progress during the brief time he attended CHS between March and June 2008, the hearing record demonstrates that the district appropriately addressed the student's academic, social, emotional and behavioral needs as well as the parent's concerns regarding appropriate supervision for the student by providing a 1:1 aide and offering family counseling as part of the student's recommended program (Dist. Exs. 8 at pp. 5-6; 18 at p. 5). Based on the above, I find that the June, August, and October 2008 IEPs accurately reflected the student's needs and that the district's recommended program was reasonably calculated to confer educational benefits to the student in the LRE (Viola v. Arlington Cent. Sch. Dist., 414 F. Supp. 2d 366, 382 [S.D.N.Y. 2006], citing J.R. v. Bd. of Educ. of the City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 n.13 [S.D.N.Y. 2004]). Therefore, I find that the impartial hearing officer correctly found that district offered the student a FAPE for the 2008-09 school year.

Having found that the district offered the student a FAPE for the 2008-09 school year, I need not reach the issues of whether CALO was appropriate or whether equitable considerations support the parent's request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                      **January 15, 2010**

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**PAUL F. KELLY**  
**STATE REVIEW OFFICER**