



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 10-079

### **Application of the BOARD OF EDUCATION OF THE Warwick Valley Central School District for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Gervin & Ferlazzo, P.C., attorneys for petitioner, Karen Norlander, Esq., of counsel

Sussman & Watkins, attorneys for respondent, Michael H. Sussman, Esq., of counsel

#### **DECISION**

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Family Foundation School (Family Foundation) for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was attending Family Foundation (Tr. p. 401; Joint Exs. 14 at p. 26; 25 at p. 59). The hearing record reflects that the student exhibited overall cognitive and academic achievement skills within the average range, with difficulties noted in organizational and attention skills (Joint Exs. 17; 28). The student has a history of in-school underachievement, lack of assignment and homework completion, and reduced motivation (Joint Exs. 17 at pp. 32-33; 27 at pp. 70, 72). The hearing record further reflects that the student had significant difficulties at home, including physical altercations with his father and sibling, and behaviors described as hostile, manipulative, defiant, and confrontational (Dist. Ex. 1 at p. 3; Joint Exs. 25; 27; 28; 33).<sup>1</sup> Family Foundation is a private school which 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 student's eligibility for special

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<sup>1</sup> I note the parents' assertion in their answer that District Exhibit One was not entered into the hearing record, and further that District Exhibit One is not included in the impartial hearing officer's list of exhibits in evidence (see IHO Decision at pp. 50-52); however, a review of the hearing record reflects that District Exhibit One was admitted into evidence on June 8, 2010 (Tr. pp. 865-66).

education programs and services as a student with a learning disability is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The hearing record reflects that the student attended public school in the district from first through seventh grade (Tr. pp. 362-63).<sup>2</sup> While in second grade, the student was found eligible for special education programs and services and placed in a full-time 12:1+1 special class (Joint Ex. 28 at p. 74).<sup>3</sup> For third through fifth grades, the student remained in a special class but attended "collaborative" science and social studies classes (Tr. pp. 393-94). The hearing record described the collaborative classes as "mainstream" classes consisting of a teacher and either an "instructional aide" or a special education teacher providing support (Tr. pp. 393-94; Joint Ex. 33 at p. 93). By fourth grade the hearing record reflects that the student exhibited signs of academic progress and at the end of the student's fifth grade school year the Committee on Special Education (CSE) determined that the student was no longer eligible for special education programs and services as a student with a learning disability (Joint Exs. 27 at p. 69; 33 at p. 93).

During the 2005-06 school year, the student attended sixth grade at the district's middle school (Joint Ex. 20). According to the hearing record, during sixth grade the student "wanted to perform well" but instead his grades dropped and he "really struggled," becoming anxious, frustrated, and disorganized (Joint Exs. 27 at p. 69; 33 at p. 93). He exhibited poor time management skills and was "never prepared for class" (Joint Ex. 33 at p. 93). His parents reported that the student had no interest in school, began exhibiting more "acting out" behaviors and "tried to be funny in class" (Joint Ex. 28 at p. 74). By the middle of the school year, the student was reclassified as a student with a learning disability (Joint Exs. 25 at p. 59; 27 at p. 69; 33 at p. 93). In June 2006, the student had achieved the following final averages: English language arts (ELA) (83), science (70), math (75), and social studies (83); and had passed art, music, physical education, and orchestra (Joint Ex. 20).<sup>4</sup> Comments recorded on the student's report card included concerns about the student's lack of homework completion, difficulty with organization and study skills, distractibility and inattentiveness, and inconsistent effort toward work (*id.*). Some of the student's teachers commented that he was a pleasure to have in class, that he was making satisfactory progress, and that his quality of work was "excellent/commendable" (*id.*). At the end of sixth grade, the parents obtained the services of "some local mental health providers," including two psychiatrists who offered brief trials of medication, and therapists who provided counseling services (Joint Ex. 33 at p. 93A).<sup>5</sup>

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<sup>2</sup> The student attended first grade in another school district where he exhibited difficulty in reading and math and received "reading recovery" services (Joint Ex. 33 at p. 93). The student repeated first grade upon his relocation into the district (Joint Ex. 33 at p. 93).

<sup>3</sup> The parents reported that the student's placement in self-contained special classes "stigmatized him and impacted his identity" (Joint Exs. 28 at p. 74; 33 at p. 93).

<sup>4</sup> Designations of "P" on the student's report card are presumed to indicate that he had passed the course.

<sup>5</sup> The Office of State Review received two missing pages of Joint Ex. 33 from the district subsequent to the district's submission of the record on appeal. The two pages provided by the district have been numbered sequentially by staff at the Office of State Review as pages 93A and 93B in order to provide a clear and efficient means of reference to the record on appeal and the pages will be referenced herein as Joint Ex. 33 at pages 93A and 93B.

During the 2006-07 school year (seventh grade), the student continued to attend the district's middle school in a general education program with inclusion science and social studies classes and resource room services "for additional academic support" (Joint Exs. 21 at p. 50; 28 at p. 74). The parents reported that their son displayed an increasingly negative attitude and that he did not care about school (Joint Ex. 27 at p. 70). In addition, they reported that the student's self-esteem was poor, he felt "stupid," and as his academic grades declined, he became "difficult and somewhat aggressive at home" (id.).

On March 2, 2007, a district school psychologist conducted a psychological evaluation of the student as part of the "three year re-evaluation" of the student's special education classification and programming (Joint Ex. 21 at p. 50). The resultant evaluation report noted that a review of cognitive testing results from first and fourth grades indicated the student's "cognitive functioning [was] within the average range" and academic testing conducted during fourth grade indicated that he exhibited delays in reading, math, and written language skills (id. at pp. 50-51). The March 2007 administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a verbal comprehension index score of 100 (average), a perceptual reasoning index score of 96 (average), a working memory index score of 94 (average), a processing speed score of 97 (average), and a full scale IQ score of 97 (average) (id. at p. 51). The school psychologist reported that the student's performance on current cognitive testing was commensurate with the results of previous evaluations (id. at p. 53). Results of March 2007 academic achievement testing using the Wechsler Individual Achievement Test-Second Edition (WIAT-II) included a word reading standard score of 87 (low average), a numerical operations standard score of 75 (borderline), and a spelling standard score of 85 (low average), indicating that the student's skills in these areas were "below expectancy" (id. at pp. 52-53). The school psychologist reported that she administered projective measures to the student to assess his social and emotional adjustment and perception of the world (id. at p. 53). She indicated that the student presented himself as a "pleasant adolescent who appear[ed] to get along with others," and one who saw himself as an athletic and creative person (id.). The school psychologist concluded that the student's social, emotional, and behavioral development was "within age appropriate expectation," and that his delays in reading, mathematics, and written language skills continued to be areas of concern (id.).

At the end of the 2006-07 school year, the student had achieved the following final averages: science (69), math (65), ELA (69), social studies (77), "HCS" (70),<sup>6</sup> art (87); and his report card indicated that he had passed physical education (Joint Ex. 22). Teacher comments included on the student's report card indicated that in science he had achieved low scores on tests and quizzes and that he was inattentive in class; in math he had shown improvement during the last 1-2 weeks of the marking period; in ELA he had demonstrated an overall lack of effort; and in social studies, he was working up to his potential and that his test and quiz scores varied (Joint Ex. 22).

For the 2007-08 school year the student's parents placed him in a private parochial middle school for eighth grade "in an effort to remove him from the negative peers in his resource room class" and because they did not believe he had received enough special education supports at the

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<sup>6</sup> The hearing record does not indicate what the acronym "HCS" represents.

district (Dist. Ex. 1 at pp. 2-3; Joint Exs. 27 at p. 70; 28 at p. 74).<sup>7</sup> The student did not receive any "special services" during the 2007-08 school year (Tr. p. 24; Joint Ex. 28 at p. 74).

On April 3, 2008, the district's CSE subcommittee conducted the student's annual review (Joint Ex. 17 at p. 35). Reports indicated that the student was "adjusting well" and that he needed reminders to complete work and stay on task (*id.*). According to the CSE subcommittee minutes, the student worked well in groups, followed directions, was neat, polite and respectful, and had "managed to fit in with the other students" (*id.*). It was reported that academically the student was passing all subjects, that he "ha[d] the ability" and was doing well, and that with reminders he was able to keep up in class (*id.*). The CSE subcommittee noted that the student had "poor self esteem and that [could] get him in trouble at times" (*id.*). The hearing record reflects that the student "graduated" from the private parochial middle school and that for the upcoming school year the parents enrolled him in a private parochial high school outside of the district (Joint Exs. 27 at p. 70; 28 at p. 74).

On August 22, 2008, the CSE from the district of location of the private parochial high school convened for a review of the student's ninth grade 2008-09 special education program (Joint Ex. 19 at pp. 46-48). The resultant individualized education services program (IESP) noted that the student had been parentally placed at a private parochial high school and that he was also dually enrolled in the district of location (*id.* at p. 46). The August 2008 district of location's CSE recommended that for the 2008-09 school year the student receive daily resource room services and the following program modifications: signed planner, provision of examples and formulas, extended time to complete assignments, use of a classroom copy of texts, repetition/clarification of directions and instructions, textbooks kept at home, organizational skills monitored, spelling requirement waived, preferential seating, study guides, use of a calculator, and access to a spelling device (*id.* at p. 47). Testing accommodations offered to the student included use of a calculator, extended time, a separate location, and use of a spell check device (*id.* at pp. 47-48).

During the 2008-09 school year, the student attended the "learning center" at his private parochial high school, which the student's mother described as functioning "like a resource room," where the student received support for all of his core curriculum/academic subjects (Tr. p. 366). She indicated that the student was often inattentive, not focused, and had difficulty keeping track of his assignments (*id.*). The student's mother stated that the parents tried to work with the student's learning center teacher, but that the student "shut down," became frustrated, and ignored the teacher's efforts to help him (Tr. pp. 368-69). The parents reported that the student did not complete homework, never studied, and lied to them about staying after school to receive extra help (Joint Ex. 28 at p. 74). The student's first marking period grades during the 2008-09 school year included: pre-algebra (72), writing (85), biology (70), English (73), global studies (74) and religion (72), and the report card indicated that he had "passed" learning center (Parent Ex. A at p. 1).

According to the private parochial high school's discipline report, from October 2008 to March 2009, the student received a total of seven detentions for infractions such as being tardy to

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<sup>7</sup> The exhibit designated as the student's 2007-08 private parochial middle school report card is largely unreadable; however, it appears that the majority of the student's academic grades were in the 70 range (Joint Ex. 23). He also received a conduct grade of "F" (consistently unacceptable) (*id.*).

class on three occasions, and for one instance each of violating the school's dress code by not wearing a belt, throwing garbage in class, engaging in misconduct on the school bus, and using profanity (Parent Ex. A at pp. 6-7).<sup>8</sup> The student's mother stated that the private parochial high school was unaware of instances that occurred at school in late spring 2009 in which the student purchased "BB" and paintball guns as well as knives, and also stole and resold items such as calculators (Tr. pp. 377-81). She further indicated that these events reflected the student's behaviors that the parents "couldn't handle" and that her son caused "a lot of upset and upheaval and pandemonium in the family;" stating "from school [the student] brought this home to us" (Tr. pp. 378-79).

The hearing record reflects that during the winter of the 2008-09 school year, the student's mother obtained counseling services for her son lasting several months from both a "counselor" and a pediatric psychiatrist due to concerns about his low self-esteem, depression, and anxiety (Tr. pp. 363-65). At that time, the student's mother was also in contact with the county Mental Health Association family support coordinator and attended its family support groups (Tr. pp. 364, 463-64). The parents indicated that the private psychiatrist "considered" offering the student diagnoses of a mood disorder, an obsessive compulsive disorder, and an attention deficit disorder (ADD), for which medication was briefly attempted and subsequently discontinued due to student refusal (Dist. Ex. 1 at p. 3; Joint Ex. 28 at p. 75). According to the student's mother, at that time the student was "very angry and violent and had trouble regulating his emotions" (Tr. pp. 364-65). The parents were concerned about physical altercations between the student and his father, as well as the student's treatment of his siblings (Joint Ex. 28 at p. 75). The student's mother discussed with the private parochial high school guidance counselor that the student was "uncontrollable at home" and that the behavior he exhibited at school was not the behavior he exhibited at home (Tr. pp. 380-81).

At the end of the 2008-09 school year, the student had achieved the following final grades: pre-algebra (65), "Comp. Apps." (68),<sup>9</sup> biology (65), English (71), global studies (65), and religion (68), with an academic grade point average of 69 (Parent Ex. A at p. 9; Joint Ex. 24). The student earned credits toward all of the above listed courses and passed learning center (Joint Ex. 24). Teacher comments contained in the student's report cards throughout the school year included the need for the student to be more attentive, show more effort on homework, and increase his study time for tests (Parent Ex. A at pp. 1, 5). Teacher comments also indicated that the student was talkative in class, missing homework/assignments, and did not make up work (id.).

In spring 2009, the parents visited Family Foundation for the day (Tr. pp. 463-65) and on April 22, 2009, the student's mother completed an application for the student to attend Family Foundation (Tr. p. 848; Dist. Ex. 1). The application included a questionnaire, which provided background information about the student's educational experiences and performance leading up to the 2008-09 school year (Dist. Ex. 1 at pp. 2-3). In the Family Foundation questionnaire, the student's mother indicated that "[t]he main reason that we would like to enroll [the student] in the Family Foundation is strictly due to his aggressive behavior to family members" and indicated that

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<sup>8</sup> The student's mother stated that on at least one occasion during the 2008-09 school year the student had been suspended (Tr. p. 692).

<sup>9</sup> The hearing record reflects that during the 2008-09 school year the student's writing course changed to a course entitled "Comp. Apps." (Parent Ex. A at p. 9).

the student exhibited physically aggressive, hostile, manipulative, and defiant behaviors (Dist. Ex. 1 at p. 3; Tr. pp. 157-58). The student's mother expressed that her son was in denial about his difficulties and that he refused to take medication or participate in receiving "professional help" (Dist. Ex. 1 at p. 3). Regarding school, the student's mother indicated that the student did not care about his grades and did not complete homework; she further reported that he was only passing because of the resource room support he received (*id.*). At home, the student's behavior remained "confrontational in every situation," while "outside the home" he could be "on good behavior" (*id.*). The student's mother concluded that it was "becoming increasingly difficult to live in constant turmoil under these circumstances" and that the structure the student needed could no longer be provided (*id.*). The parents provided a nonrefundable enrollment fee to Family Foundation by check dated May 5, 2009 (Joint Ex. 12; Parent Ex. D).

By letter dated May 6, 2009, the district inquired as to whether the parents wanted it to develop an individualized education program (IEP) for the student for the 2009-10 school year (Joint Ex. 1). The district enclosed consent forms and advised the parents that if they wanted a publicly funded placement, the consent forms must be completed and returned in order for an IEP to be developed for the following year (*id.*). The letter indicated that "[w]ithout written consent to conduct a reevaluation, the [d]istrict [wa]s unable to proceed further" (*id.*). On May 26, 2009, the student's mother signed and returned the district's form indicating that she did not want an IEP for the 2009-10 school year "at this time" and the consent forms were not returned to the district (*id.* at p. 2). On June 8, 2009, the student's mother faxed a note to the district requesting a CSE meeting "due to personal matters in the past week" (Joint Ex. 2).<sup>10</sup> On June 10, 2009, the district sent to the student's parents a notice of a subcommittee "[a]nnual [r]eview" meeting scheduled for June 23, 2009 (Joint Ex. 3). The meeting was rescheduled for June 22, 2009 to accommodate a request by the student's mother that the director of pupil personnel services (who was also the CSE chairperson)<sup>11</sup> attend the meeting (Tr. pp. 29-30, 381-84; Joint Exs. 4; 5).<sup>12</sup>

On June 22, 2009, the district convened a meeting (Tr. pp. 30-31, 98-100; 384-387).<sup>13</sup> Attendees at the meeting included the CSE chairperson, a district school psychologist, two of the student's 2008-09 private parochial school learning center teachers, and the student's mother (Tr. pp. 30-31, 386). According to the CSE chairperson and the district school psychologist, the student's mother explained that the parents were "really having a lot of difficulty at home and that [the student] was basically out of control" (Tr. pp. 31-32, 171). The student's mother indicated at

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<sup>10</sup> Subsequent to receipt of the fax from the student's mother, and before the June 22, 2009 CSE meeting, the CSE chairperson spoke with the student's mother on the telephone (Tr. p. 30). The CSE chairperson testified that the student's mother told her that she needed to "pick" the chairperson's brain and get her expertise, but never asked for an IEP at that time (Tr. pp. 30, 882-84). The student's mother testified that during this telephone conversation, she informed the CSE chairperson that the parents were in a "crisis situation" and that the student needed an individualized education program (IEP) for the 2009-10 school year, but that the student would not be returning to the public school (Tr. p. 382).

<sup>11</sup> This person will hereafter be referred to as the CSE chairperson.

<sup>12</sup> The student's mother indicated that she wanted the CSE chairperson at the meeting because "[t]hese matters were much more serious than the interim supervisor could handle" (Tr. pp. 383).

<sup>13</sup> The district witnesses testified that the June 22, 2009 meeting was not an annual review CSE meeting, but another meeting convened at the parent's request; the student's mother testified that she believed the June 22, 2009 was a CSE meeting (Tr. pp. 39, 170, 384-85).

the meeting that her younger children were "out of the home" because she was "afraid of the circumstances" (Tr. pp. 32, 172-73). She also informed participants at the meeting that the student's behavior was becoming "very volatile, very aggressive, threatening," and that the student and his father had been fighting (Tr. pp. 172-73). The hearing record reflects that the student had performed "poorly" at the private parochial high school, although at the meeting the learning center teacher reported that it appeared the student was going to pass all of his classes and that he would be "moving on" (Tr. pp. 37-38, 174-75, 263). The student's mother advised district staff that due to the "acute crisis in the home" she was planning an "intervention" for her son and that he would be escorted to Family Foundation (Tr. pp. 32-33, 107-08, 173, 263, 387-88). She also informed participants at the meeting that she would seek reimbursement from the district (Tr. pp. 389-90). The CSE chairperson responded that the district would not financially assist the parents with their placement of the student at Family Foundation (Tr. pp. 32, 110, 390). The school psychologist discussed considering a psychiatric evaluation or hospitalization to determine "what was going on with [the student]" (Tr. pp. 33-34, 173-74, 462). At the meeting, the school psychologist expressed his concern that Family Foundation might not be the most appropriate placement, noting the lack of information about the student's current psychiatric status (Tr. pp. 176, 264-66). At the conclusion of the meeting, the CSE chairperson and school psychologist were left with the impression that the student's mother would contact the CSE chairperson in a day or two to let her know whether the student was going to attend Family Foundation or if she wanted to work with the district to find a program for her son (Tr. pp. 35-36, 176-78). The student's mother indicated that she informed the CSE chairperson at the meeting that the parents were "most definitely" going to place the student at Family Foundation, that he was enrolled there as of June 25, 2009 and would be starting classes on July 6, 2009, but the student's mother recalled that the district CSE chairperson and psychologist asked her to get back to them once she confirmed her plans (Tr. pp. 396-98, 480-81).

On June 25, 2009, an escort accompanied the student to Family Foundation where he was enrolled by his parents (Joint Ex. 25 at p. 59). The director of admissions described Family Foundation as a "private college preparatory therapeutic boarding school" offering a "rigorous high school Regents academic program" and instructing approximately 160 residential students in grades nine through twelve (Tr. pp. 742-43, 777-78). According to the director of admissions, students who attend Family Foundation exhibit "difficulty following rules and adapting to normal kind[s] of school and home environments" and also academically underachieve (Tr. pp. 742-43). Students typically have received diagnoses including attention deficit hyperactivity disorder (ADHD), ADD, oppositional defiant disorder, anxiety, depression and mood disorders (Tr. pp. 743, 747-48). Between 30-40 percent of students are eligible to receive special education services through their home school districts (Tr. p. 743).

On July 3, 2009, Family Foundation developed an individual crisis management plan for the student (ICMP) detailing the student's safety concerns, current issues-potential triggers, high-risk behaviors, and intervention strategies (Joint Ex. 25). According to the ICMP, the student had experienced difficulty "since middle school," when he was classified as having a learning disability and exhibited difficulty with visual processing (*id.* at p. 59). The ICMP further indicated that during sixth grade when the student was not receiving special education services, his "attitude about school changed" and he became "oppositional" toward school and his parents (*id.*). The ICMP reported that despite enrollment at different schools, the student's behavior had declined, and that currently he was exhibiting "very oppositional" behavior toward both school and his

parents (id.). The student's difficulties with his family included fighting with, stealing from and being verbally abusive to his parents, as well as engaging in arguments and physical altercations with his siblings (id.). According to the ICMP, the parents had attempted to take the student to counseling and he was prescribed medication, both of which he had refused (id.). The student reported that he had engaged in physical violence with his father and was "not treating his siblings well" (id.). The student denied drug or alcohol use and did not report a history of suicide attempts or cutting behavior (id.).<sup>14</sup> He further reported that his behavior in school was "good" (id.).

On July 16, 2009, Family Foundation administered the Millon Adolescent Clinical Inventory (MACI) to the student and on August 19, 2009, Family Foundation's psychologist conducted the student's initial evaluation (Joint Exs. 26; 27). According to the psychologist's resultant September 9, 2009 report, the student believed that he was attending Family Foundation because of "significant family turmoil," stating that his parents could not "control" him and that he exhibited "disrespectful" behaviors at home and school (Joint Ex. 27 at p. 68). The student reported that he brought paintball and "BB" guns to school, engaged in "pranks" at school, and had been suspended on one occasion (id. at pp. 68-69). According to the student, during the 2008-09 school year, he resolved that he "had enough" and increased his resistance to family discipline (id. at p. 68). Regarding his behavior at home, the student reported that he had physically fought with his parents and that at times the police had been called (id.). He further reported physical fighting with his younger brother and verbal aggression with his younger sister (id.). Additionally the student reported "yelling at everyone in his family, and using foul language" (id.). The student had never been arrested and denied significant drug or alcohol use (id. at p. 69). He admitted involvement in "some" theft and selling the stolen items (id.).

The parents reported to the Family Foundation psychologist that although academics were a "major problem" for their son, the student's aggressive behavior at home was the primary reason for their referral (Joint Ex. 27 at p. 70). The parents further reported that the student was "constantly" fighting, had conflicts with his younger siblings and continually used profanity at home (id.). The parents indicated that their relationship with the student had "deteriorated," he did not listen to them, he had been aggressive toward his mother, and he exhibited manipulative, hostile, and defiant behaviors (id.). According to the parents, the student was in denial that he had an ADHD or needed to take medication, and indicated that he would not participate in therapy (id.). The parents reported that the student had barely passed the previous school year and refused to complete homework (id.).

A review of prior cognitive and educational testing results indicated to the Family Foundation psychologist that despite cognitive skills in the average range, the student was "underachieving significantly" in reading, mathematics, and spelling (Joint Ex. 27 at p. 70). The psychologist's report also contained a review of the results from the student's July 2009 MACI administration, which reflected fear/worry and his "family life" as the student's "primary problems" (id.). According to the psychologist's report, the student's profile showed an "anxious, rather dependent individual who [was] looking for acceptance and reassurance from others" along

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<sup>14</sup> The hearing record reflects that the student did not appear to have engaged in significant drug or alcohol use (see Tr. p. 813; Joint Exs. 28 at pp. 75-76; 33 at p. 93B).



with feelings of insecurity, pessimism, guilt, and self-condemnation (id.). Due to these emotions, at times the student displayed anger (id.).

Regarding the student's then-current mental status, the Family Foundation psychologist reported that the student presented as a "very serious looking, grim, anxious individual" who also felt "poorly about himself" and exhibited symptoms of depression (Joint Ex. 27 at p. 71). At the time of the initial evaluation, the student had attempted to run away from Family Foundation on one occasion but had returned on his own after approximately 20 minutes (id. at p. 69). The psychologist indicated that the student exhibited evidence of "fluctuating mood states," slightly below average cognitive skills, and below average judgment and insight (id. at p. 71). The psychologist offered Axis 1 diagnoses of an ADHD, learning disorder, and dysthymic disorder (id.). According to the psychologist, there was no evidence of "psychosis or Bipolar Disorder" present at that time (id.). The psychologist concluded that the student "clearly [had] learning problems" and performed poorly without academic support; combined with "seriously compromised attention which cause[d] him to lose focus, and to lack organization" (id. at p. 72). He further reported that the student was in denial about his problems with learning and attention, and that he responded with denial and aggression to anyone who confronted him about his difficulties (id.).

Within the recommendations contained in the evaluation report, the Family Foundation psychologist stated that the student was "not going to do well academically" and that he needed "a great deal of academic support" (Joint Ex. 27 at p. 72). Although the student should be encouraged to take advantage of individualized help from other students and staff when available, it was important "not to expect a great deal from him," at most to expect "honest effort, and seeking of extra help" (id.). Additional recommendations included: helping the student find his strengths; engaging the student in activities that he would succeed in; and combating displays of depression, anger, despair, and anxiety (id.). Medication to treat the symptoms of the student's ADHD was recommended as was providing explanations to the student regarding his behavior (id. at p. 73).

On July 28, 2009, the district received a "Ten Day Notice Letter" from the parents' attorney requesting that the district reimburse them for tuition and lodging for the student's placement at Family Foundation for the 2009-10 school year beginning June 25, 2009 (Joint Ex. 6). The letter asserted that the CSE failed to offer a program or placement to the student for the 2009-10 school year in compliance with the IDEA and that the student was "unilaterally placed" at Family Foundation (id.). By letter dated July 31, 2009 addressed to the student's parents, the district requested consent to enable the district to conduct evaluations and to secure copies of the student's educational records to develop an IEP for the student; consent forms were enclosed with the letter (Joint Ex. 7). In addition, the district asked the student's parents to forward any evaluations that they wanted the CSE to consider (id.). The district indicated that "[i]n order to develop an IEP for September, please sign and return to me the consent forms immediately or fax ... if possible" (id.). By letter dated August 9, 2009, the student's father requested a resolution session and appointment of an impartial hearing officer (Joint Ex. 8). The parents stated in the letter that "[w]e do not expect to engage in further letter writing in these regards" (id.). The consent forms were not returned to

the district with this letter (id.).<sup>15</sup> By letter dated August 24, 2009, the district advised counsel for the parents that, instead of challenging the parents' August 9, 2009 request for a hearing on sufficiency grounds, the district would incorporate the July 28, 2009 "ten day notice" as a factual basis upon which to base the request for reimbursement for the student's unilateral placement at Family Foundation (Joint Ex. 9 at p. 11). The district responded to the "consolidated complaint;" denied that it failed to comply with the IDEA; and denied that the meeting held on June 22, 2009 was an annual review that obligated the CSE to develop an IEP for the 2009-10 school year at that time (id.). Regarding the student's unilateral placement at Family Foundation, the district denied that the student was placed there because it had not appropriately met his educational, social, emotional and behavioral needs in the least restrictive environment (LRE), and denied all other allegations (id.). In response to the parents' request that the district fund the student's placement at Family Foundation, the district denied the request on grounds that the CSE needed to conduct current evaluations to develop an IEP for the 2009-10 school year and that as of the date of the letter, the district had not received the parents' consent to conduct the necessary evaluations (id.). The district further indicated that, as "previously advised," the district was prepared to propose an IEP at such time as parental consent for testing was received, the student was made available to enable the district to conduct the testing, and the CSE reconvened for review (id.). By letter dated August 31, 2009, the district wrote to the parents and advised them that they had not received the parents' consent to authorize the district to arrange for evaluations and had not received the parents' "release" that would allow the district to obtain the student's educational records (Joint Ex. 13 at p. 19).

On September 1, 2009, the parents returned the consent forms authorizing the district to evaluate the student and a release form authorizing Family Foundation to share information regarding the student with the district (Joint Ex. 13 at pp. 20-24). The request for an impartial hearing was withdrawn by the parents' attorney (Pet. ¶ 47; Answer ¶ 47).<sup>16</sup>

The district received the parents' consent to evaluate the student on September 1, 2009 (Tr. p. 45; Joint Ex. 13 at pp. 20-24). The hearing record reflects that the CSE chairperson spoke to the district school psychologist and the Family Foundation psychologist to determine what evaluations of the student could be conducted (Tr. p. 46). The hearing record further reflects that Family Foundation staff was not comfortable with the student leaving campus at that point in his program, therefore on October 5 and 6, 2009, the district school psychologist traveled to Family Foundation to conduct the student's psychological and educational evaluations and prepare a social history (Tr. pp. 47, 114, 183, 282; Joint Ex. 28). As part of the student's evaluation, the school psychologist conducted interviews with the parents, the student, and staff from the private parochial high school that the student attended during the 2008-09 school year; administered cognitive and academic achievement evaluations and behavior/personality assessments; reviewed

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<sup>15</sup> By letter dated August 17, 2009, the district sent the parents a notice scheduling a resolution session for August 24, 2009 and enclosed the procedural safeguards notice (Joint Ex. 10). A resolution session was held on August 24, 2009 (Joint Exs. 11; 13).

<sup>16</sup> In the petition, the district asserts that the parents, through their attorney, withdrew the first request for an impartial hearing to enable the district to conduct evaluations and develop an IEP thereafter (Pet. ¶ 47). In the answer, the parents "[d]eny as stated;" and assert that the "withdrawal without prejudice followed the appointment of the hearing officer and was done in the context of a stay of that proceeding pending the development of an IEP" (Answer ¶ 47).

the student's records; and observed him in class at Family Foundation (Tr. pp. 183-84; Joint Ex. 28 at p. 74).

The district school psychologist reported that during the two full school days of the evaluation, the student was "most cooperative" and his "thinking was logical and goal directed" at all times (Joint Ex. 28 at p. 75). The student did not display signs of psychosis or suicidal ideation and was "clearly related in all spheres" (*id.*). Information from the parent and student interviews contained in the school psychologist's evaluation report consistently reflected that the student had exhibited academic and learning difficulties as a younger student (*id.* at pp. 74, 76). The student expressed that earlier in his educational career he was unable to concentrate, learn and process information and also that he was very distracted (*id.* at p. 76). He further described himself as "a big procrastinator" and reported that he did not complete homework, although also recalled that he did not exhibit any behavioral problems at that time (*id.*). The student and his parents related to the school psychologist details about the family discord that occurred during the 2008-09 school year, including verbal and physical altercations between the student and his father and concerns about the student's aggressive treatment of his siblings (*id.* at p. 75). According to the student, on one occasion the police were called to his home by a neighbor and he admitted to bringing knives into his home (Tr. pp. 284-85; Joint Ex. 28 at p. 75). The student further admitted to the school psychologist that when he resided in the district he was "one way with my friends, I was a monster at home" (Joint Ex. 28 at p. 75).

Interviews with the principal, assistant principal, and four of the student's private parochial high school teachers yielded consistent responses regarding the student's behavior and academic performance during the 2008-09 school year (Joint Ex. 28 at p. 77). School staff described the student as a "very fidgety, unfocused student who did just the minimal work to get by," who completed little class work, did not take notes, and did not complete homework (*id.*). However, at the end of each quarter, the student "rallied," asked his teachers what he needed to do in order to catch up, and "managed to maintain his grades and pass all subject areas," earning grades ranging from 65-85 (Joint Ex. 28 at p. 77; *see* Joint Ex. 24). According to the student's 2008-09 biology teacher, the student passed the Regents examination in biology without studying (*id.*). The student's learning center teacher reported that the student was a "very dependent learner" who would only work when she was in close proximity (Joint Ex. 28 at p. 77). Teachers remarked that the student "often had his head down on his desk and appeared to display little energy or motivation," and described him as having "limited socialization" in that he was not involved in activities and was best described as a "follower" (*id.*). The student was disciplined on several occasions for "mostly minor infractions" and was also suspended on several occasions (*id.*). According to the district school psychologist's report "[e]veryone reported that they saw a different picture in school [than] what was being described by [the student's] parents at home;" none of the teachers witnessed any form of aggressive or violent behavior, and the principal directly stated that the student would have been welcomed back for the 2009-10 school year (*id.*).

During an observation of the student in his science class at Family Foundation, the district school psychologist noted that the student had come to class unprepared, and as part of the student's program of "restrictions," required an escort back to his house to retrieve the needed class supplies

(Joint Ex. 28 at p. 76).<sup>17</sup> During the class, although the student did not verbally participate, the school psychologist observed the student writing in his notebook, calculating a problem, maintaining eye contact with the teacher, taking notes, and complying with all teacher requests (id.).

Following administration of the WISC-IV, the district school psychologist reported that the student's general cognitive ability was within the average range of intellectual functioning as measured by his full scale IQ score of 107 (68th percentile) (Joint Ex. 28 at pp. 77-78). WISC-IV verbal comprehension, working memory, and processing speed index scores were also in the average range (102, 94, 106, respectively), and his perceptual reasoning index score was in the high average range (115) (Joint Ex. 28 at p. 77). Administration of the Kaufman Test of Educational Achievement, Second Edition yielded subtest standard scores within the average range as follows: letter and word recognition (95), reading comprehension (95), math concepts and applications (97), math computation (87), written expression (101), and spelling (101) (Joint Ex. 28 at p. 80). The school psychologist noted that the student's relatively lower math computation score, although still in the average range, reflected some relative weaknesses in the areas of number concepts, fractions and decimals, and a minimally developed knowledge of algebra (id. at pp. 80, 83). The school psychologist also noted that although the student's reading skills were in the average range he was somewhat dysfluent, and the evaluation report provided suggestions to improve reading decoding, rate, and understanding of inferential comprehension (id. at p. 83). The school psychologist opined that the student's scores were "not indicative of a student with a learning disability" (id.).

The district school psychologist administered several measures to assess the student's current level of emotional and social functioning, including the Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A), both the Behavior Assessment System for Children, Second Edition (BASC-2) Self-Report of Personality and Parent Report, and the "Draw a Person Test" (Joint Ex. 28 at pp. 74, 80). The school psychologist reported that the student's responses to the MMPI-A yielded elevated scores on the Psychopathic Deviate (Pd) clinical scale, which measured acting out behaviors such as rebelliousness, disruptive family relations, lying, impulsiveness, and school or legal problems (Tr. pp. 298-99; Joint Ex. 28 at p. 80). The student's responses also resulted in elevated scores on the Paranoia (Pa) clinical scale, which according to the school psychologist's report was often associated with "being suspicious, aloof, shrewd, guarded, worrying and overly sensitive" and the potential to be hostile and argumentative and exhibit problems in school (Joint Ex. 28 at pp. 80-81). Results of completion of the BASC-2 by the student yielded scores in the "[a]t-[r]isk" range on scales measuring locus of control, social stress, inattention/hyperactivity, attention problems, and relations with parents; while none of the student's scores were in the "[c]linically [s]ignificant" range (id. at p. 82).<sup>18</sup> Results of the Parent Rating Scales Report indicated that "across the board" the student's scores were "extremely high," with scores in the following areas in the clinically significant range: hyperactivity, aggression,

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<sup>17</sup> According to the school psychologist, the need for an escort was one of the student's restrictions as a consequence for failing several classes (Joint Ex. 28 at p. 76).

<sup>18</sup> According to the school psychologist's report, BASC-2 scores in the at-risk range "identify a significant problem that [is] not yet severe enough to require formal treatment but identify the potential of developing a problem that needs careful monitoring," and scores in the clinically significant range "suggest a high level of maladjustment" (Joint Ex. 28 at p. 82).

conduct problems, depression, atypicality, withdrawal, attention problems, adaptability, social skills, leadership, activities of daily living and functional communication (Joint Ex. 28 at p. 82).<sup>19</sup>

The district school psychologist concluded that results of the student's emotional and social functioning assessments "clearly indicate[d] significant behavioral issues," adding that the data presented on both the MMPI-A and the BASC-2 correlated "very closely" and represented an accurate assessment of the student's clinical, emotional, and social status as described by the student and his parents (Joint Ex. 28 at p. 83). The school psychologist opined that

the way [the student] presents at home and the way he presents at school are very different as confirmed by test responses. At home [the student] is inclined to be moody, irritable, impulsive and ar[g]umentative, therefore causing him to be aggressive and physically combative. There are no indicators that these behaviors are manifested in school. Testing also confirms that conditions in his environment contribute to his aggressive and hostile behavior. This finding on the MMPI-A was confirmed by both [the student] and his parents when they reported the turmoil that existed in their home.

(id.).

The district school psychologist further opined that the student would benefit from anger management instruction, including role modeling, and behavioral rewards for appropriate behavior as well as other cognitive-behavioral programs that teach self-control (Joint Ex. 28 at p. 83). The school psychologist recommended considering further inquiry into the student's possible alcohol and/or drug use and diagnoses of an ADHD, depression or mood disorder, obsessive compulsive disorder (OCD), reporting that the "data thus far indicate[d] that [the student] may be diagnosed with Oppositional Defiant Disorder with the possible emergence of a Conduct disorder" (id. at p. 84).

As of October 2009, the student had achieved the following grades at Family Foundation: algebra 1A (40), earth science (86), English 10 (61), global II (63), home economics (77), living skills (80), physical education (95), and Spanish I (45) (Joint Ex. 29 at p. 85).<sup>20</sup> Prior to November 10, 2009, the district school psychologist met with the parents and reviewed the findings of his evaluation of the student with them "in detail" (Tr. pp. 404-05).

On November 10, 2009, the CSE convened to develop the student's IEP (Tr. pp. 47-48; Dist. Ex. 17 at p. 30). Attendees included the CSE chairperson; the district school psychologist; a special education teacher; a regular education teacher; counsel for the district; counsel for the parents; the parents; and Family Foundation staff, including the director of admissions, the

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<sup>19</sup> On the BASC-2 Parent Rating Scales Report, the student's score in the area of anxiety was in the at-risk range (Joint Ex. 28 at p. 82).

<sup>20</sup> The Family Foundation report card indicates that a passing grade is 75 (Joint Ex. 45).

student's counselor, and another staff member (Joint Ex. 17 at p. 35).<sup>21</sup> According to the CSE chairperson, after the November 10, 2009 CSE reviewed the student's evaluative information, teacher reports, and the parents' concerns, the CSE discussed the student's classification in relation to the need for a psychiatric evaluation, and the Family Foundation director of admissions informed the CSE that Family Foundation's psychiatrist planned to conduct a psychiatric consult with the student (Tr. pp. 48, 50-51). The CSE agreed to "wait and see" the results of the consult before determining whether the student needed a "full psychiatric evaluation" (Tr. pp. 50-51, 150-51, 664). The CSE chairperson indicated that the district was also "looking at getting the BASC[2] and the [Behavior Rating Inventory of Executive Function] BRIEF" completed (Tr. p. 53; see Tr. p. 195). A limited discussion about placement occurred, and the CSE chairperson indicated that the student's mother was "very opposed" to a recommendation for special classes, and also that no one at the CSE meeting believed that the student needed special classes (Tr. pp. 52-53). Following the initial drafting of the student's present levels of performance and needs statements, the meeting adjourned with the understanding that the CSE would reconvene in a week to continue the student's review (Tr. pp. 48-49). A copy of a draft IEP was sent to the student's mother before the next CSE meeting on November 17, 2009 (Tr. p. 638; Joint Ex. 18).

On November 17, 2009, the CSE reconvened with the same participants who had attended the November 10, 2009 CSE meeting (Tr. p. 62).<sup>22</sup> For the remainder of the 2009-10 school year, the November 17, 2009 CSE recommended placement of the student in a consultant teacher program, consisting of one 30-minute session per week of indirect consultant teacher services in English and social studies, and daily direct consultant teacher services in math and science (Tr. p. 65; Joint Ex. 17 at p. 30). The CSE also recommended that the student receive daily resource room services, and individual counseling services twice weekly for 45-minute sessions, in addition to specific program modifications and testing accommodations (Joint Ex. 17 at pp. 30-31). The parents objected to the district's recommendations, stating that the student needed placement at Family Foundation and expressed their concerns about the effect on their family if the student were to return home (Tr. pp. 67-68, 330). In a letter dated November 23, 2009, sent via e-mail and regular mail, the district sent a copy of the student's 2009-10 IEP to the student's parents (Joint Ex. 44 at p. 114). The district indicated that they were waiting to learn the results of the psychiatric consultation arranged at Family Foundation the previous week, and were also awaiting the results of the teachers' reports on the BASC and would forward the teachers another questionnaire for the BRIEF, an assessment of executive functioning (id.).

On November 30, 2009, the district received copies of e-mails from Family Foundation teachers regarding the student's performance in their classes, the contents of which, along with teacher reports, the director of admissions had referred to at the November 10, 2009 CSE meeting (Tr. pp. 58-60; Joint Ex. 34 at p. 1; see Joint Exs. 18 at p. 41; 43). The student's Family Foundation English teacher reported that the student was a "bright young man" who did very well when he worked at school, but that "most of the time he would rather not" (Joint Ex. 43 at p. 110). The teacher further commented that in English class "it [was] 100% an attitude problem" and that the student "hates school" (id.). Regarding the student's potential in algebra class, the Family

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<sup>21</sup> Family Foundation staff participated by telephone conference (Joint Ex. 17 at p. 35).

<sup>22</sup> The hearing record is unclear whether the Family Foundation director of admissions participated in the November 17, 2009 CSE meeting (Tr. pp. 62, 874-76, 881, 884).

Foundation teacher reported that the student understood most concepts and was "capable of doing much better," but that he needed to do more work outside of class (id. at p. 111). She commented that the student engaged in negative behavior with other students, needed constant reminders to quiet down, and often went to class unprepared (id.). While in algebra class, although he participated "quite often," the student rarely took notes, did not complete approximately 75% of his homework, and did not utilize the homework time provided at the end of class (id.). The Family Foundation teacher of an unidentified class reported that the student's performance in her class was "very poor" in that he "space[d] out a lot," did not often complete homework, and exhibited "low" effort (id. at p. 112). Although the teacher further indicated that the student's attitude was not "bad" and that he did not seem angry, he was "very disorganized" and often went to class unprepared (id.). The student's Family Foundation physical education teacher reported that the student was "never a problem" and that he played to the best of his abilities (id. at p. 113). At the end of the Fall 2009 semester, the student had achieved the following grades: algebra 1A (37), earth science (67), English 10 (63), global II (49), home economics (78), living skills (79), physical education (94), and Spanish 1 (48) (Joint Ex. 45).

On or about November 30, 2009, the district also received BASC-2 Teacher Rating Scales from five of the student's Family Foundation teachers (Tr. p. 150; Joint Exs. 31; 34 at p. 1). The district school psychologist compiled the results, which indicated the following: at least one of the student's teachers reported scores in the clinically significant range in the areas of aggression, behavioral symptoms, conduct problems and learning problems; at least two of the student's teachers reported scores in the clinically significant range in the areas of hyperactivity, externalizing problems, depression and school problems; and at least three of the student's teachers reported scores in the clinically significant range in the area of attention problems (Joint Ex. 31).

On December 1, 2009, the district received the Family Foundation psychiatrist's report of a psychiatric consult he conducted with the student on November 19, 2009 (Tr. pp. 71-72; Joint Ex. 30). According to the resultant report, the student was scheduled to see the psychiatrist to "consider a trial of ADD meds in the context of [the student's] deteriorating academic grades" (Joint Ex. 30). The report contained a history of the student's classification as a student with a learning disability, placement in special classes, and an indication that he had reviewed the "circumstances of [the student's] enrollment at Family Foundation" (id.). The psychiatrist reported that the initial Family Foundation evaluation report mentioned a "possible diagnosis of ADHD" with the recommendation to consider a trial of medication (id.). The psychiatrist's report noted that the student lost things, was disorganized, had trouble focusing on work and was easily distracted, although during the consult he was "not fidgety or squirming" (id.). Additionally, according to the psychiatrist, during the consult the student's speech was "clear and goal directed," he exhibited good eye contact, and he did not interrupt (id.). The psychiatrist's "impression" of the student reflected a "learning disorder by history; current attentional problems" and the plan he developed for the student included a trial of a specific medication due to the student's history of forgetting, poor focus, and declining grades (id.). The psychiatrist reported that he would evaluate the student in one month to determine the medication's effectiveness, and he concluded that "[a] more extensive psychiatric evaluation is not indicated at this time" (id.).

In a December 8, 2009 e-mail, the CSE chairperson asked the director of admissions to share the results of the BASC-2 Teacher Response Forms with the Family Foundation psychiatrist to confirm whether that information would in his opinion, support a diagnosis of an ADD for the student (Joint Ex. 38 at p. 102). On December 10, 2009, the director of admissions replied by e-

mail, indicating that the psychiatrist had reviewed the scores and that he stood by his original diagnoses of the student (id.).

In a December 10, 2009 e-mail to the CSE chairperson, the parents requested that an "independent" psychiatrist conduct the student's full psychiatric evaluation, which they stated must be conducted at Family Foundation to minimize disruption to the "continuity of [the student's] schooling and therapy" (Joint Ex. 37 at p. 101).<sup>23</sup>

In a due process complaint notice dated December 21, 2009, the assertions by the parent included, among other things, that the November 23, 2009 IEP, placing the student at his local high school, was not appropriate because the student had not succeeded in "such settings," the student would have to reside with his family, and the conflict between the student and his family made it "highly unlikely" that he would be able to gain substantial educational benefit (Joint Ex. 14 at p. 25). In addition, the parents asserted that counseling for 45 minutes, two times per week, was insufficient; that the student needed a "therapeutic environment" to deal with his family relationship; that the student's "attentional issues" required smaller classes; and that direct consultant services in English and social studies once a week for thirty minutes were inadequate to meet the student's needs (id.). The parents further asserted that the student's management needs required a "more intensive and sustained" program; that the student's difficulties with "focusing, organization, motivation, time management and work refusal" presented a "substantial obstacle to educational attainment;" and that the IEP did not propose strategies sufficient to facilitate the student's access to significant educational advance; or properly address the student's behavioral issues through a functional behavioral assessment (FBA) or behavioral intervention plan (BIP) (id. at p. 26). In addition, the parents asserted that the CSE failed to meet or come forward with a viable educational alternative at the time that the parents enrolled the student in Family Foundation in summer 2009 and that "[o]nce enrolled at [Family Foundation], it would be counterproductive for [the student] to be transitioned to another educational setting mid-year" (id.).

Subsequent to December 21, 2009, the district received BRIEF Teacher Profile Forms, a measure of executive functions, from five of the student's Family Foundation teachers, results of which were compiled by the district school psychologist (Joint Ex. 32; see Joint Ex. 41).<sup>24</sup> According to the school psychologist, the teachers' ratings generally indicated that the student exhibited "less problems with behavioral regulation in areas such as inhibition, shifting and emotional control" (Joint Ex. 32 at p. 3). Assessment results indicated that the student experienced "more significant difficulty with Metacognition in the areas of initiating, working memory, planning/organizing, organizing materials, sequencing and self monitoring" (id.). The school psychologist opined that the "pattern of ratings [was] less indicative of emotional and behavioral issues and more indicative of difficulties with attentional disorders without hyperactivity" (id.).

On January 30, 2010 and February 2, 2010, a private psychiatrist conducted a psychiatric evaluation of the student at district expense (Tr. pp. 668-69; Joint Ex. 33). The private psychiatrist's report stated that the purpose of the evaluation was to "assess the impact of any

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<sup>23</sup> According to the CSE chairperson, the Family Foundation psychiatrist was "adamant" that additional psychiatric assessments of the student were not needed (Tr. pp. 74-76).

<sup>24</sup> According to the school psychologist, the results indicated a high level of assessment reliability and validity (Joint Ex. 32 at p. 88).



underlying Psychiatric issues upon this student's behavioral/academic functioning" (Joint Ex. 33 at p. 91). The private psychiatrist indicated that he had reviewed the October 5, 2009 psychological evaluation report, the results of the student's BASC-2 and BRIEF findings prepared by the district, Family Foundation psychiatrist's records and "documentation" provided by Family Foundation (id. at pp. 91-92). Additionally, the private psychiatrist met with the student's treating Family Foundation counselor, and obtained developmental history and background information from the student and his parents (Joint Ex. 33).

Following a recitation of information obtained from the above listed sources and examination of the student, in his report the private psychiatrist opined that "within a reasonable degree of medical certainty" the student continued to demonstrate an ADD, inattentive subtype, which was "superimposed" upon his longstanding learning, self-esteem, and anger-control difficulties (Joint Ex. 33 at p. 95). The student, his parents, the Family Foundation psychiatrist, and the Family Foundation counselor had all reported improvements in the student's functioning and academic performance since the initiation of medication to treat the student's ADD (Joint Ex. 33 at pp. 92, 93A, 94). The psychiatrist noted that following medical treatment of the student's ADD, the student's secondary depressive symptoms appeared to have resolved (id. at p. 95). The psychiatrist's report further indicated that the student did not appear to be a candidate for antidepressant medications as he did not exhibit "sufficient" mood or anxiety symptoms at that time (id.). The psychiatrist reported that the student also presented with an oppositional defiant disorder, based upon the behavior he demonstrated upon admission to Family Foundation (id.). Recommendations included the continuation of pharmacotherapy for the student's "long standing" ADD, and also individual and family counseling (id.). Noting that treatment of attention deficit disorders requires integrating medical and educational providers with the student and parents, the psychiatrist stated in his report that the student would also benefit from the "specific accommodations" available to students identified with an ADD (id.).

The CSE chairperson indicated that the CSE did not convene to review the private psychiatrist's evaluation report because she received correspondence from the parents indicating that no further CSE meetings would take place (Tr. pp. 77, 79-80). She stated that she had discussed the November 2009 CSE's recommendations with the private psychiatrist to ensure he understood what had been recommended, and he assured her that the CSE's recommendation for the student was "fine" (Tr. p. 79). The CSE chairperson further stated that, in her opinion, the private psychiatrist's report did not contain information that would have changed the recommendations of the CSE (Tr. p. 78).

An impartial hearing convened on April 22, 2010 and concluded on June 8, 2010, after four days of proceedings (Tr. pp. 1, 258, 508, 737). In a decision dated July 14, 2010, the impartial hearing officer found that the district's "final" IEP (which is the November 2009 IEP covering the 2009-2010 school year) was not reasonably calculated to enable the student to receive educational benefit, and that therefore the district did not offer the student a free appropriate public education (FAPE) (IHO Decision at p. 41). In his decision, the impartial hearing officer concluded that the district did not offer the student appropriate support services, finding that the IEP did not address the student's anger, depression, and the "causal learning problems" (id. at p. 39). The impartial hearing officer noted that the IEP "only provided two 45-minute periods a week of counseling," provided indirect consultant teacher services for English and social studies and direct consultant teacher services for math and science, and lacked reading goals, in finding that the IEP "could not meet [the student's] problems and does not offer meaningful educational benefits" (id. at pp. 38-

39). The impartial hearing officer found that in order to receive educational benefits, the student needed a "strong therapeutic program" that was residential (*id.* at p. 40). The impartial hearing officer noted that, although it seemed that the student was passing his classes at the private high school that he was attending before his placement at Family Foundation, he was ranked 151 out of 154 students with a final academic grade point average of 69 (*id.* at pp. 40-41). The impartial hearing officer further found that the hearing record showed a "downward spiral" that was not addressed by the student's IEP and that "initial failures at [Family Foundation] were part of this downward trend" (*id.* at p. 41). The impartial hearing officer further found that the parents' unilateral placement of the student at Family Foundation was appropriate and that the student made "meaningful progress" and "significant academic gains" between January and June 2010 (*id.* at pp. 41-45). In addition, the impartial hearing officer found that the student's progress was "directly related" to the Family Foundation's "milieu" (*id.* at p. 43). The impartial hearing officer found that the student's anger and anger management improved; that the student's grades and social interactions improved; that the student and his family participated in counseling offered by Family Foundation; that drug therapy helped the student; and that the student participated in the "full course of positive interventions" offered by Family Foundation (*id.*). The impartial hearing officer further found that the equities favored full tuition reimbursement for the parents (*id.* at pp. 44-45). The impartial hearing officer specifically found that the parents cooperated with the district and the CSE in the IEP process; that the parents did not fail to make the student available for evaluations; and that "[u]nder the circumstances, with the hostility at home, they never acted unreasonably" (*id.* at p. 44). In addition, the impartial hearing officer further found that the district had "appropriate and necessary notice" that the parents were dissatisfied with the district's "educational plan" and were interested in sending the student to Family Foundation or another residential program (*id.*).

On appeal, the district asserts that the impartial hearing officer's finding that the district did not offer the student a FAPE was not supported by the weight of the evidence, failed to address the proper legal standard, improperly relied on evidence not available to the CSE at the time of the recommendation, and ruled on issues not raised in the parents' complaint. The district further asserts that the impartial hearing officer's finding that Family Foundation offered the student an appropriate educational program was not supported by the weight of the evidence and failed to address the proper legal standard. In addition, the district asserts that the equities did not favor the parents, noting that the parents repeatedly failed to respond to the district's requests for consent to evaluate the student beginning in May 2009; that the parents withheld consent for two months after they placed the student and four months after the district first sought their cooperation to conduct the requested evaluations. In addition, the district asserts that the impartial hearing officer ignored the weight of the evidence that supported a finding that the parents' interest in involving the district was to obtain funding for Family Foundation, not to collaborate with the district to identify a FAPE; and that the parents' failure to provide the "ten day notice" until a month after they placed the student at Family Foundation contributes to a finding that the parents failed to cooperate with the district to develop a timely IEP.

In an answer, the parents assert that the impartial hearing officer properly found that the district failed to prove that it had offered the student a FAPE for the 2009-10 school year; that the IEP developed by the district was not timely; that the parents had met their burden to establish that Family Foundation was appropriate; and that the equities supported an award of full tuition reimbursement. In addition, as an affirmative defense, the parents assert that the petition should

be rejected as untimely because, although the initial verified petition was timely served, the notice of petition was not served with it, as required by 8 NYCRR 279.3, and the subsequent service of the notice of petition was not timely. In their reply, the district admits that the notice of petition was inadvertently omitted when the petition was initially filed (see Reply at ¶ 1). The district explains, in an attorney affidavit in support of the verified reply, that on August 18, 2010, the district served upon the parents its verified petition and memorandum of law and further that on August 19, 2010, when counsel for the district realized that the notice of petition was inadvertently omitted, the notice of petition was e-mailed to counsel for the parents (Reply Affidavit at ¶¶ 2, 3). Thereafter, on August 26, 2010, the district served and refiled its amended petition with the required notice of petition (*id.* at ¶ 6).<sup>25</sup> The district asserts that the parents suffered no prejudice warranting dismissal of the petition.

Preliminarily, I will address the procedural issue. The parents contend that the district's petition must be dismissed for failure to include the notice of petition with the verified petition as required by 8 NYCRR 279.3 in a timely manner. To initiate an appeal, a notice of petition, petition, memorandum of law and any additional documentary evidence must be served upon the respondent within 35 days from the date of the decision sought to be reviewed (8 NYCRR 279.2[b]). I note that the parties do not dispute that the verified petition was timely served, and after consideration, I find that the district's failure to include the notice of petition with its timely filed verified petition did not prejudice the parents. I further note that the notice of petition was e-mailed to the parents' attorney the day after the verified petition was filed; that eight days later the district served and refiled an amended petition with the notice of petition in accordance with the leave granted by a State Review Officer; that the parents filed a comprehensive answer; and that the parties do not allege that the answer was untimely. Under the circumstances, I decline to dismiss the petition for the failure to serve the notice with petition in a timely manner (see Application of a Student Suspected of Having a Disability, Appeal No. 10-009; Application of a Student Suspected of Having a Disability, Appeal No. 09-132; Application of a Child with a Disability, Appeal No. 07-117); however, I remind the parties to adhere to the State regulations in future appeals.

I will now turn to the substantive issues in this appeal.

Two purposes of the Individuals with Disabilities Education Act (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

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<sup>25</sup> On August 20, 2010, the Office of State Review returned the district's verified petition and memorandum of law because the verified petition exceeded page limit requirements, and granted the district leave to refile an amended complaint until September 1, 2010 (Reply Affidavit at ¶ 5).

(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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148). The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

After review, I find that the impartial hearing officer's decision that the district did not offer the student a FAPE for the 2009-10 school year is not supported by the hearing record. First, I find that the hearing record supports a finding that the student's November 2009 IEP accurately reflected the results of evaluations to identify the student's needs (see 34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe, 2008 WL 2736027, at \*6), established annual goals related to those needs (see 34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provided for the use of appropriate special education services (see 34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]). The hearing record reflects that the following information was reviewed by the November 10, 2009 CSE: the student's 2007-08 and 2008-09 report cards; Family Foundation's July 3, 2009 ICMP, August 19, 2009 initial evaluation report including results of the MACI, the student's report card and teacher reports; the district's October 5, 2009 psychological evaluation report; and parent concerns (Tr. pp. 53-60, 164-65, 197-99, 336-37, 339-42, 673-74; Joint Ex. 17 at p. 35).<sup>26</sup> The November 10, 2009 CSE developed statements of the student's present levels of performance and needs, and began writing the annual goals (Tr. pp. 48-50, 52, 154-56)<sup>27</sup> and the November 17, 2009 CSE reviewed the draft IEP "line by line," and the hearing record supports a finding that, at the conclusion of the review, there was no disagreement about the student's present levels of performance or needs statements (Tr. pp. 60-62, 208-09).<sup>28</sup> The student's mother testified that the IEP academic and social present levels of performance and needs reflected accurate statements of the student's then-current functioning (Tr. pp. 645-47, 652-55, 657-59). The CSE

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<sup>26</sup> The student's mother denied that the student's district and private parochial school report cards were discussed at the November 10, 2009 CSE meeting (Tr. p. 410-12).

<sup>27</sup> I note that the director of admissions testified that the interactions among CSE members were "collaborative," and that there was no disagreement regarding the description of the student, his needs, his annual goals or his classification (Tr. pp. 854-57, 885-86; Joint Ex. 17 at p. 35).

<sup>28</sup> At the November 17, 2009 CSE meeting, the CSE determined that it did not have any information that would warrant a change in the student's classification, and the student's mother testified that at that time she agreed to her son's classification as a student with a learning disability (Tr. pp. 64, 639-41).

chairperson testified that the November 10, 2009 IEP was reflective of information provided by Family Foundation, including the director of admissions (Tr. p. 884).

The district school psychologist, who holds a "graduate degree in special education of emotionally disturbed children," a Ph.D. in school psychology, and who is certified in New York as a school psychologist, testified that at the time of the November 17, 2009 CSE meeting, the student's most significant needs were in the areas of organization and attention skills (Tr. pp. 167-68, 208-09, 344). He stated that most CSE members believed that the student "had a pretty good capacity to perform the academic work, both cognitively and in terms of his academic capacity" but that his motivation level and attention skills were areas of concern (Tr. pp. 209, 344). This impression is consistent with the hearing record and the November 2009 IEP, which reflect the student's average cognitive and academic achievement skills, yet poor academic performance and his description as a student who lacks motivation and meaningful engagement in academics; who puts forth little or no effort; and who fails to complete assignments/study or respond to academic assistance offered by teachers (Joint Exs. 17 at pp. 32-33; 28; 43 at pp. 110-112). The November 2009 IEP also referenced concerns regarding the student's attention skills and his need to complete home/class work assignments, and to develop active learning, study, time management and organizational skills (Joint Ex. 17 at pp. 32-33; see Joint Exs. 27 at p. 71; 28 at p. 82-84). Additionally, the IEP noted the student's somewhat dysfluent reading skills, his weaknesses in specific areas of mathematics, and his need to develop organization for written language tasks (Joint Ex. 17 at pp. 32-33). Accordingly, the hearing record supports a finding that the student's November 2009 IEP accurately reflected the results of evaluations which identified the student's needs.

Moreover, I find that the impartial hearing officer's finding that the November IEP did not address the student's "anger, depression and the causal learning problems" is not supported by the hearing record. I note that the November 2009 IEP acknowledged the history of "serious problems with behaviors at home" between the student and his family, and his limited socialization with peers and adults (Joint Ex. 17 at p. 33). The CSE identified the student's need to develop positive relationships with peers and adults, address problems via "pro-social" means, request and accept academic assistance, develop strategies to obtain goals, and identify areas of interest and pursue them via extracurricular activities (id.).

In addition, I find that the impartial hearing officer's finding that the student's November 2009 IEP did not provide appropriate support services is not supported by the hearing record. The November 2009 IEP indicated that the student required "built-in special education supports in mainstream classes with counseling," adding that the student also required "small group instruction" to develop study, organization, and time management skills; complete assignments; and prepare for tests (Joint Ex. 17 at p. 34). According to the CSE chairperson and school psychologist, the November 2009 CSE reviewed the continuum of special education programs beginning with the least restrictive and arrived at a consensus that the student did not need placement in special classes (Tr. pp. 68-69, 225). The November 2009 IEP offered the student a "consultant teacher model" program that included both indirect and direct consultant teacher services and daily 5:1 resource room services (Tr. p. 65; Joint Ex. 17 at p. 30). Regarding the student's indirect consultant teacher services, the CSE chairperson explained that the student's resource room teacher would collaborate with the student's English and social studies teachers about the student's needs in those classes, to ensure that the needs were addressed during resource room (Tr. pp. 66-67; Joint Ex. 17 at pp. 30-31). The CSE recommended daily direct consultant

teacher services in mathematics and science classes, which in addition to the regular education teacher, was composed of a special education teacher in the classroom providing assistance to students (Tr. pp. 145-46; Joint Ex. 17 at pp. 30, 34). Twice weekly individual counseling services were recommended to help the student transition to the district's high school and to address identified social and emotional needs (Tr. pp. 67, 221-22; Joint Ex. 17 at p. 34).

In addition, I note that the student's mother acknowledged that she agreed with the recommended program modifications, testing accommodations, and the statement of the student's participation in state and local exams (Tr. pp. 641-42). The November 10, 2009 IEP program modifications offered the student preferential seating, use of a spell check device, use of a computer or word processor, and the breakdown of assignments into manageable components (Joint Ex. 17 at p. 31). Recommended testing accommodations included extended time, use of a calculator except when assessing computation skills, minimal auditory and visual distractions, and confirmation of the student's understanding of the directions (id.).

Regarding the finding by the impartial hearing officer that the November 2009 IEP failed to include reading goals, I note that the IEP included one goal to address concerns about the student's reading comprehension and that the goal specifically provided for the use of strategies to highlight important information when reading content area text (Joint Ex. 17 at p. 36). Moreover, the issue of reading goals was not raised in the due process complaint notice and therefore should not have been considered as a basis to find the IEP inappropriate (see Application of the Bd. of Educ., Appeal No. 10-063; Application of the Bd. of Educ., Appeal No. 10-013; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Bd. of Educ., Appeal No. 07-043; see also Lago Vista Indep. Sch. Dist. v. S.F., 50 IDELR 104 [WD Tex. Oct. 24, 2007]; John M. v. Bd. of Educ., 502 F.3d 708, 713 [7th Cir. 2007]). Regarding the student's annual goals, I note that the student's mother testified that the CSE worked on the student's annual goals at "great length," and the CSE chairperson and school psychologist did not recall any disagreement among any members of the CSE regarding the annual goals ultimately proposed by the district (Tr. pp. 63, 209, 355-56, 709-10; Joint Ex. 17 at pp. 35-37). In the area of study skills, the November 10, 2009 IEP annual goals relate to the student's need to identify and bring necessary supplies to and from school; complete homework and assignments; use an organizer for assignments; independently seek out assistance to complete assignments; and develop and use study skills to prepare for tests (Joint Ex. 17 at pp. 35-36). In the area of writing, annual goals for the student included the use of graphic organizers/other strategies during writing assignments and the process of pre-writing, drafting, revising and proofreading to complete grade appropriate writing assignments (id. at pp. 36-37). In mathematics, the student's annual goals related to his ability to solve fraction/decimal/percents conversion problems; identifying the appropriate operation to use when solving word problems; and using graphic organizers/semantic maps to categorize information in word problems (id. at p. 37). In the social/emotional/behavioral area, the November 2009 IEP offered annual goals relating to the student's need to identify the antecedents to his frustration and anger and to develop and use appropriate strategies to address them; identify areas of interest and regularly engage in at least one extracurricular activity (id.).

Based upon a careful review of the hearing record, I find that the November 2009 IEP accurately reflects the student's present levels of performance as articulated by the evaluative data and reports available to the November 10 and 17, 2009 CSE, that it includes annual goals consistent with the student's needs as identified in those reports, and that it recommends a special education program to address those needs in the LRE in which the annual goals could have been achieved.

I further find that the impartial hearing officer's determination that the recommended program was not appropriate because the student had failed to succeed at the private parochial high school is not supported by the hearing record. First, I find that the hearing record does not support a finding that the student failed courses during the 2008-09 school year (see Joint Ex. 24; Parent Ex. A). Moreover, I find that the student's private parochial high school placement for the 2008-09 school year (where an August 22, 2008 IESP was in effect) is not comparable to the program offered to the student by the November 2009 CSE for the 2009-10 school year because the student's November 2009 IEP provides for more special education support than the student had previously received (compare Joint Ex. 19, with Joint Ex. 17).

Regarding the parents' allegation that the recommended program failed to propose strategies to address behavioral problems or offer an FBA and BIP, 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).<sup>29</sup> In addition to the federal requirement, State regulations require that the CSE include an FBA<sup>30</sup> 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, 2009 WL 3335760, at \*4). 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]).<sup>31</sup> Upon review of the hearing record I find that the claim is premature as the student had never attended the recommended program with the recommended special education and related services (see M.M. v. New York City Dep't. of Educ., 2008 WL 4656876, at \*10 [S.D.N.Y. Oct. 21, 2008]; E.H., 2008 WL 3930028, at \*11; Application of the Bd. of Educ., Appeal No. 09-103; Application of the Dep't of Educ., Appeal No. 08-122; Application of a Child with a Disability, Appeal No. 07-012, Application of the Bd. of Educ., Appeal No. 05-023; Application of a Child with a Disability, Appeal No. 04-033) However, I note that the November 2009 IEP includes a specific goal to address the student's frustration and anger in addition to counseling

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<sup>29</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.

<sup>30</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]).

<sup>31</sup> In New York, 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]).



twice a week with the school psychologist (Joint Ex. 17 at pp. 30, 37). Moreover, I find that, despite the impartial hearing officer's finding to the contrary (see IHO Decision at pp. 38-39), the hearing record does not support a finding that twice a week counseling with the school psychologist (see Joint Ex. 17 at p. 30), in addition to his availability to the student and his teachers as needed (see Tr. pp. 168-69), would not have offered the student a sufficient level of support. I note that the school psychologist opined that the recommended program, which reflected the consensus of the CSE regarding the student's identified special education needs, annual goals and accommodations, had an excellent "track record" for success with students with needs very similar to the student (Tr. pp. 348-49).

Next, I find that the impartial hearing officer erred by determining that, at the time of the November 2009 CSE meeting, the student's needs required placement in a residential program (see IHO Decision at p. 40). 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>32</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]).

Upon review, I find that the hearing record reflects that the main reason the student's parents placed the student at Family Foundation was because of his behavior at home (Dist. Ex. 1 at p. 3; Tr. pp. 157-58). The hearing record further reflects that the CSE considered whether or not the student required a residential placement in order to address his special education needs and concluded that a non-residential program was appropriate (Tr. pp. 68-69, 126, 225). The district psychologist indicated that "[i]t's been my impression that the decision to place [the student] residential[ly] was based on ... his behavior at home, not his inability to learn; because in spite of all that he was going through ... he was passing everything in every venue that he was in and at times without any kind of special education service at all" (Tr. p. 225).

Notwithstanding the parents' claim that the student required a residential setting, the hearing record reveals that such evidence was not before the November 2009 CSE and therefore, was not a relevant factor in developing a program for the student at that time (J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]). I note that instead of relying upon the assessments that were before the CSE at the time of the November 2009 CSE meeting, the impartial hearing officer relied on testimony of the parents' witness, a clinical psychologist referred to the parents by their attorney in March 2010 (Tr. pp. 512, 565-66). In addition, although the impartial hearing officer relied on the testimony of the parents' witness, the hearing record reflects that the witness did not prepare a written report (Tr. pp. 567, 569), and that none of the information presented by the witness at the impartial hearing in June of 2010, including his April 2010 Rorschach "testing" (see Tr. p. 517) was available to the November 2009 CSE. As noted above, the November 2009 CSE developed an IEP for the student based on information that was before it at the time of the meeting (see North Colonie, 586 F. Supp. 2d at 84 citing J.R. v. Bd. of Educ. of

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<sup>32</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).

City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004]) [holding that a determination of whether an IEP is reasonably calculated to enable a student to receive educational benefits is a necessarily prospective approach and courts must refrain from engaging in "Monday morning quarterbacking"). Accordingly, retrospective information should not be considered because it has no bearing on whether the IEP was reasonably calculated to benefit the student at the time that it was developed (Antonaccio v. Bd. of Educ. of Arlington Cent. Sch. Dist., 281 F. Supp. 2d 710, 724 [S.D.N.Y. 2003]); but see D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 599 (2d Cir. 2005) [noting that there may be value in distinguishing between IDEA claims that dispute the validity of a proposed IEP, on one hand, and suits that question whether an existing IEP should have been modified in light of changed circumstances, new information or proof of failure]; see also Application of the Bd. of Educ., Appeal No. 06-017 [finding a denial of a FAPE, where the district failed to timely revise a student's IEP, given the change in the student's educational needs]).

Accordingly, in relying significantly on the testimony of the parents' witness, which was based on evaluative information first presented at the impartial hearing after the CSE deliberations, the impartial hearing officer improperly considered retrospectively new information which should have had no bearing on whether an IEP developed in November 2009 was designed to afford the student educational benefit (see Antonaccio, 281 F. Supp. 2d at 724). Based on the information available at the time of the November 2009 CSE meeting, I find that the November 2009 CSE appropriately determined that the student did not require a residential placement for the 2009-10 school year.

Next, I will address the parents' contention that the district did not offer the student a FAPE because an IEP was not in effect at the beginning of the school year by September 2009. First, I note that this claim was not raised in the parents' December 21, 2009 due process complaint notice. Furthermore, I note that this position was not addressed by the impartial hearing officer in his decision. In addition, I note that the district did not address this claim in its petition. Upon review, I find that the parents' claim that the district did not offer the student a FAPE because an IEP was not in effect at the beginning of the school year in September 2009 is not properly before me as such was not identified in the parents' due process complaint notice, is raised for the first time on appeal, and is thus beyond the scope of review (see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at \*9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912442, at \*6-\*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 08-158; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of the Bd. of Educ., Appeal No. 08-026; Application of a Student with a Disability, Appeal No. 08-020; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Child with a Disability, Appeal No. 07-122; Application of a Child with a Disability, Appeal No. 07-072; Application of a Child with a Disability, Appeal No. 07-051; Application of a Child with a Disability, Appeal No. 06-139).

A review of the December 21, 2009 due process complaint notice indicates that the parents asserted that they "enrolled [the student] in Family Foundation in the summer 2009 at a time when the CSE had failed to meet or come forward with any viable educational alternative" (Joint Ex. 14 at p. 26). Upon review, I find that there is no evidence in the hearing record to support a finding that the student required an extended school year (ESY) or that the district was required to have an IEP in place in summer 2009. According to State regulations, "[s]tudents shall be considered for [ESY] special services and/or programs in accordance with their needs to prevent substantial regression" (8 NYCRR 200.6[k]; Application of the Bd. of Educ., Appeal No. 09-047; Application

of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 07-089; Application of a Child with a Disability, Appeal No. 07-082; Application of a Child with a Disability, Appeal No. 07-039; Application of the Dep't of Educ., Appeal No. 07-037; Application of a Child with a Disability, Appeal No. 07-004; Application of the Bd. of Educ., Appeal No. 04-102; see 34 C.F.R. § 300.106 [defining ESY]; 8 NYCRR 200.4[d][2][x] [noting that a student's IEP shall indicate whether the student is eligible for a special service or program on a 12-month basis]). The State regulations define substantial regression as "the student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).<sup>33</sup> Accordingly, the lack of evidence of substantial regression in the hearing record supports the conclusion that the district was not responsible for having an IEP in effect for the student at the time that the parents had unilaterally enrolled the student in Family Foundation, which was June 25, 2009 (see Joint Exs. 6; 25 at p. 59).<sup>34</sup>

Accordingly, I find that the hearing record supports a finding that, based on the above, the district's recommended program for the 2009-10 school year offered the student a FAPE because it offered an individualized educational program designed to meet the unique needs of the student and was reasonably calculated to confer educational benefits in the LRE. Having determined that the district offered the student a FAPE in the LRE, I need not reach the issue of whether Family Foundation was appropriate for the student and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of the Bd. of Educ., Appeal No. 10-026; Application of a Student with Disability, Appeal No. 08-158;

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<sup>33</sup> In February 2006, the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) published a guidance memorandum, dated February 2006, which states the following regarding ESY services:

A student is eligible for a twelve-month service or program when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year. The typical period of review or reteaching ranges between 20 and 40 school days. As a guideline for determining eligibility for an extended school year program a review period of eight weeks or more would indicate that substantial regression has occurred.

(<http://www.vesid.nysed.gov/specialed/publications/policy/esy/qa2006.htm>).

<sup>34</sup> Moreover, I find that a review of the facts of this case, including the district's May 6, 2009 letter to the parents, which asked if the parents wanted an IEP for the 2009-10 school year, enclosed consent forms, and advised the parents that they needed to complete and return the forms in order for the CSE to develop an IEP for the 2009-10 school year; the parents' communication to the CSE on May 26, 2009 that the student's mother did not want an IEP for the 2009-10 school year "at this time;" the parents' unilateral placement of the student at Family Foundation on June 25, 2010; as well as subsequent letters dated July 31, 2009 and August 31, 2009 from the district to the parents requesting consent to evaluate the student; and the failure of the parents to provide the district with consent to evaluate the student until September 1, 2009 demonstrate that the actions of the parents prevented the district from having an IEP in place before the beginning of the school year in September (see Joint Exs. 1; 6; 7; 13; 25 at p. 59). I note that the parents do not assert that the district unreasonably delayed conducting the evaluations and that the parents do not assert that the evaluations conducted by the district were not required in order to identify the student's current needs.

Application of the Dept. of Educ., Appeal No. 08-095; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED**, that the impartial hearing officer's decision dated July 14, 2010 is annulled in its entirety.

**Dated: Albany, New York  
October 22, 2010**

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**ROBERT G. BENTLEY  
STATE REVIEW OFFICER**