The University of the State of New York

The State Education Department
State Review Officer
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No. 11-142

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:
Girvin & Ferlazzo, P.C., attorneys for petitioner, Karen S. Norlander, Esq., of counsel

Ranni Law Firm, attorneys for respondents, Joseph J. Ranni, Esq., of counsel

DECISION

Petitioner (the district) appeals from those portions of 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 Ironwood for portions of the 2009-10 and 2010-11 school years. The parents cross-appeal from the impartial hearing officer's determination which reduced reimbursement for their son's tuition costs on equitable grounds. The appeal must be sustained in part. The cross-appeal must be dismissed.

At the time the impartial hearing convened, the student was 17 years old and was enrolled as a non-matriculating student at a college in Vermont (Tr. pp. 1765-66; Parent Ex. H at p. 1; IHO Ex. D at p. 2). From April 24, 2010 to December 15, 2010 the student had attended Ironwood, described in the hearing record as an out-of-state residential treatment facility (Parent Exs. A at p. 1; L at p. 1). Ironwood 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). At the time of the parents' placement of the student at Ironwood, he was not classified by the district as a student with a disability (Joint Ex. 12 at p. 2).[1]

[1] The student was declassified as a student with an other health-impairment at a Committee on Special Education (CSE) meeting held on January 6, 2010 (Joint Ex. 12; see 34 C.F.R. § 300.8 [c][9]; 8 NYCRR 200.1[zz][10]).

Background

From kindergarten through fifth grade, the student attended the district's elementary school (Joint Exs. 4B at p. 2; 30 at pp. 1-14). The hearing record reflects that the student generally demonstrated average to above average school performance during the elementary school years, and the parent indicated that the student did "very well" prior to entering middle school (Tr. p. 1513; see Joint Ex. 30 at pp. 1-14; 31 at pp. 1-10). During seventh grade at the district's middle school, the parent became increasingly concerned about the student's spelling and written language skills (Tr. pp. 1454-55). The student's seventh grade final grades included: science 79, English language arts (ELA) 82, math 75, and social studies 79 (Joint Ex. 30 at p. 16). During seventh and eighth grades, the student exhibited behaviors described as "cavalier," and "disruptive," and reportedly demonstrated poor work habits, and engaged in conflicts with teachers and school administrators (Tr. pp. 1455-56; Joint Exs. 4B at p. 2; 32; 33 at pp. 2-3; 34).

In January 2007, during the student's eighth grade year, due to concerns about the student's spelling skills and insubordinate classroom behaviors, the district conducted classroom observations of the student, assessed his academic skills, and administered a behavioral rating scale to the parents, the student and his teachers (Tr. pp. 436, 443-46; Joint Exs. 27; 28; 29). The school psychologist responsible for the assessment concluded that the student exhibited areas of concern regarding conduct, attention within the classroom, and hyperactive behaviors (Tr. pp. 431-32, 454). Academically, the student demonstrated relative weaknesses in math computation and written expression skills, with other academic scores in the "solid average to high average" range of achievement (Tr. pp. 454-55). Based upon the results of the then current assessment, and a review of the student's prior educational performance, the school psychologist did not recommend a referral to the Committee on Special Education (CSE) (Tr. pp. 447-48, 455-58). At that time, the student was seeing a private therapist every other week to address behavioral concerns, and was under the care of a private psychiatrist once monthly for management of medication to address an attention deficit disorder (ADD) (Tr. pp. 1461, 1872-73; Joint Ex. 4B at p. 2). The student's eighth grade final grades included: science 65, ELA 65, math 51, and social studies 66 (Joint Ex. 30 at pp. 17-18).

The parents enrolled the student at a private parochial school for the 2007-08 school year (ninth grade), in part because the school offered "resource room" services (Tr. pp. 85, 1463, 1465-66; see Joint Ex. 4B at p. 1). Toward the end of 2007-08 school year, due to concerns about the student's processing skills, the private parochial school's learning center teacher recommended that the parents refer the student to the CSE in the district which the private school was located (district of location) (Joint Ex. 4B at p. 1).

Over three dates in May 2008, the district of location conducted a psychological evaluation of the student that included cognitive, academic and behavioral assessments, a classroom observation, and a social history (Joint Ex. 4B). Social history information contained in the resultant report indicated that the student generally got along with family members and that his parents disagreed regarding methods of discipline (id. at p. 1). According to the report, in first through sixth grades the student was "disinterested in school" and exhibited poor spelling and organizational skills (id. at p. 2). The report indicated that during seventh and eighth grades at the district's middle school the student displayed disruptive behavior, and poor work habits, and frequently conflicted with teachers and administration (id.). At the end of eighth grade, a

psychiatrist reportedly diagnosed the student as having an ADD for which medication was prescribed (id.). The report indicated that the parents enrolled the student at the private parochial school because it provided him with assistance from the learning center to address organizational needs (id.). According to the report, the parents indicated that the student had "never liked school," viewing it as "an obstacle that must be overcome" (id.). The parents described the student as an auditory learner who disliked reading, exhibited "horrid" spelling skills but neat handwriting, and had difficulty following directions (id.). The report further indicated that the student exhibited a low frustration tolerance and did not complete homework unless he had to (id.). As it was reported that the student developed "ingenious" solutions with his hands, he expressed a desire to attend a Board of Cooperative Educational Services (BOCES) Career & Technical Education Center (CTEC) program (id. at pp. 2-3; see Joint Ex. 13). Socially, the report indicated that the parents described the student as a "born leader," who had "many friends" (Joint Ex. 4B at p. 2). The student was reportedly not "intimidated" by authority figures, and "didn't like to be told what to do" (id.). According to the report, the student often "believe[d] that things [were] a scam" (id.).

The evaluator reported that the student appeared to be "alert and focused" throughout the two hour testing session, and that self-monitoring led to appropriate corrections of his work (Joint Ex. 4B at p. 4). Behaviorally, the evaluator described the student as initially "prickly" in his responses, and indicated that he required explanations and rephrasing of directions (id.). The evaluator reported that the student exhibited difficulty "changing his paradigm," providing an example of the student's inability to argue one point of view as in a debate, because he didn't believe in it (id.). According to the evaluator, the student was to some degree "quite aware of certain shortcomings," reflecting on his difficulty with short-term memory (id.).

An administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded an above average verbal comprehension index (standard score 114, 91st percentile), perceptual reasoning index (standard score 112, 79th percentile), and full scale IQ (standard score 112, 79th percentile) (Joint Ex. 4B at p. 4). The student's working memory index (standard score 120, 91st percentile) was in the high range of cognitive functioning (id.). According to the evaluator, "[m]uch-less developed and a significant weakness falling in the low average range (standard score 85, 16th percentile) was the processing speed index," a measure of the student's ability to perform simple and automatic tasks rapidly, when under pressure to maintain attention (id. at p. 5).

During academic achievement testing, the evaluator reported that the student's "conversational proficiency" appeared to be "limited" for his age, and that he was at times uncooperative (Joint Ex. 4B at p. 6). The student appeared to be "tense or worried, and often distracted" during testing (id.). According to the evaluator, the student "responded very slowly and hesitantly to test questions," and "would not try difficult tasks at all" (id.). Results of an administration of the Woodcock-Johnson III Normative Update Tests of Achievement (WJ III NU) indicated that the student's oral language, academic skills, and ability to apply academic skills were in the average range for his age (id. at pp. 6, 8). The student's standard scores in broad reading, brief reading, broad written language, written expression, and brief writing were in the average range, with low average broad mathematics and brief mathematics scores (id.). The student's math calculation standard score was in the low range for his age (id.).

Completion of the Achenbach Child Behavior Checklist by the student's father yielded total problem, internalizing, and externalizing scores and syndrome scales in the "normal" range (Joint Ex. 4B at p. 5). The student's completion of the Achenbach Youth Self-Report yielded scores in all areas but one in the normal range, and all syndrome scales in the normal range (id.). The student's responses to the aggressive behavior scale was scored in the above average range, due to his indication that he "often argues, was stubborn and got in many fights (verbal or physical)" (id.). The student's responses to the somatic complaints scale yielded results in the clinically significant range—indicating that he often felt tired, had headaches, aches, and pains without known medical causes (id.). The evaluator reported that when a teenager had very high scores in the somatic area, "it indicates strong suppression of troubling feelings/thoughts and a more accepted way of revealing one's pain" (id.). The student, his father, and the learning center teacher at the private school completed the Behavior Rating Inventory of Executive Functioning (BRIEF) (id.). In all eight executive functioning domains measured, the student and his father reported skills within the normal range (id.). The student's learning center teacher reported that of the domains measured, only the student's ability to inhibit impulsive responses was appropriate for his age (id.). The learning center teacher's reporting of the student's executive functions revealed many areas of concern, including his difficulty managing his behavior and emotions, and planning and organizing his approach to problem solving tasks (id.). Specifically, the learning center teacher indicated strong concerns about the student's ability to adjust to changes in routine or task demands, modulate emotions, sustain working memory, plan and organize problem solving approaches, organize his environment and materials, and monitor his own behavior (id.). The student's working memory and organization of materials were also two areas "scored as very problematic" (id.). The student's completion of sentences from the RET Sentence Completion Test & Associative Techniques reflected that he worried about failing school, was afraid of teachers, and hated going to school (id.).

The classroom observation of the student was conducted during a social studies class at the private school, consisting of 27 students and 1 teacher (Joint Ex. 4B at p. 3). During the observation, the student sat quietly at the rear of the class and did not interact with peers or volunteer answers (id.). The student appeared attentive during the lecture-style lesson, and followed the teacher's direction when asked to open his textbook to a specific page (id.). According to an interview with the learning center teacher, if the student did not understand directions for an assignment, he would not complete it, nor would he ask questions to clarify his confusion (id.). She reported that the student frequently required directions to be revised, as she found him to be a "rigid, linear thinker, which lends the impression that he is argumentative" (id.). The learning center teacher indicated that at times the student perseverated on his emotions, and opined that he had a "'damaged self-esteem'" (id.). The learning center teacher reported that the student's challenges included written expression, memorization, and organization (id.).

On June 10, 2008 the district of location's CSE convened (Joint Ex. 5). The CSE determined that the student was eligible for special education as a student with an other health impairment due to his "disability related to attentional and executive function skills which inhibit[ed] progress in the general education curriculum" (id. at pp. 1, 3). As the 2007-08 school year was at a close, the CSE recommended that the student receive 30 minutes daily of resource room services starting in September 2008, pursuant to an individual education services program (IESP) (id. at pp. 1, 5). For the 2008-09 school year, the CSE also recommended the use of a word processor for written assignments, and testing accommodations including waived punctuation and

spelling requirements, revised test directions, extended time, flexible setting, tests read, and use of a calculator (id. at p. 2). The IESP provided study skill and writing annual goals, and one goal addressing the student's need to "accept the responsibility and the consequences for inappropriate decisions" (id. at pp. 5-6). Information included in the IESP indicated that the CSE considered counseling services for the student due to social-emotional "issues" identified during the CSE evaluation; however, the CSE agreed that at the time, "it would not be beneficial to him, and possibly counter-productive" (id. at p. 5). The CSE indicated that counseling could be "broached at any time," if it was determined that the student would be "amenable to the service," noting that he approached the learning center teachers when he had concerns (id.). The student's ninth grade final grades included: science 79, English 69, math 76, social studies 76, and writing 78, and the IESP indicated that with the guidance and support of the learning center teachers, he had "managed to avoid major behavior problems" (id.; Joint Ex. 7).

The student continued to attend the private parochial school during the 2008-09 school year (tenth grade), and received services pursuant to the June 2008 IESP (see Tr. pp. 1469-70; Joint Ex. 37). In April 2009, the learning center director referred the student to the BOCES CTEC program, due to his preference for "hands-on programs" (Tr. p. 63). The hearing record describes CTEC as a half day, vocational welding program (Tr. pp. 63, 109, 1203, 1210-11). The student's tenth grade final grades included science 84, English 66, math 58, and social studies 77 (Joint Ex. 7 at p. 1).

In preparation for the student's return to district for the 2009-10 school year (eleventh grade), a subcommittee of the CSE convened on June 23, 2009 (Tr. pp. 1470, 1838; Joint Ex. 8; 8A; 9).[2] Attendees included the CSE chairperson, the district school psychologist, a social worker, a district guidance counselor, a special education teacher, an additional parent member, and the parents (Joint Ex. 9 at p. 4). According to the CSE chairperson, the CSE reviewed the student's 2008-09 IESP and psychological evaluation report from the district of location, and teacher and parent input (Tr. pp. 88-90; Joint Ex. 9 at p. 4). Present levels of academic performance and social development and management needs included in the resultant individualized education program (IEP) reflected information from the May 2008 psychological evaluation report (compare Joint Ex. 4B with Joint Ex. 9 at pp. 3-4). The CSE carried over the annual goals from the student's June 2008 IESP because, according to the CSE chairperson, the student's needs "had not really changed" (Tr. p. 93; compare Joint Ex. 5 at pp. 5-6, with Joint Ex. 9 at pp. 5-6). The CSE determined that the student was eligible for special education as a student with an other health-impairment, and recommended that he receive three 45-minute sessions of resource room services per six-day cycle (Joint Ex. 9 at p. 1). The student's IEP also provided for the use of a computer or word processor, and testing accommodations of waived spelling and punctuation requirements, flexible setting, use of a calculator, and extended time (id. at pp. 1-2). Comments from the CSE meeting contained in the IEP indicated that the student had been offered a diagnosis of an oppositional defiant disorder, and that his parents stated that the student "will do what he wants, when he wants" (id. at p. 4).[3] The IEP further indicated that the student would attend the CTEC program (id.). The hearing

[2] The student's mother stated that she was displeased with the private parochial school, and due to the student's desire to attend the district's high school, agreed to have him return to the district for the 2009-10 school year (Tr. pp. 1469-70, 1837-38).

[3] The hearing record showed that at the June 2009 CSE meeting the parents disclosed their suspicion that the student used marijuana (Tr. pp. 964, 1981-82).

record reflected that the parents and the CSE were in agreement with the June 2009 IEP (Tr. pp. 89-90, 905-09; Joint Ex. 9 at p. 4).

At the commencement of the 2009-10 school year, the student attended the CTEC program in the morning, receiving instruction in courses entitled welding, technical science, technical math, and technical reading and writing (Tr. p. 1213; Joint Ex. 30 at p. 22). In the afternoon, the student attended the district's high school where he was provided instruction in English, United States history, and physical education, and was offered resource room services (Tr. pp. 1399-1400; Joint Ex. 30 at p. 22).

According to the special education teacher assigned to provide the student's resource room services, after missing the first four to five scheduled resource room sessions of the 2009-10 school year, the student expressed to the special education teacher that he did not want to participate in resource room (Tr. pp. 1406-07). The special education teacher testified that he was directed by the assistant principal to refer the student for discipline when it was determined that the student purposely did not attend resource room (Tr. pp. 1406-07, 1413-14; see Parent Ex. E at pp. 2-4). The special education teacher also stated that he told the student "if you're gonna cut class, instead of cutting and getting in all this trouble, do it the right way; and if you really don't want to be here, get your parents to approve it, and then you're not in trouble anymore" (Tr. pp. 1421-22). In a letter received by the district on October 21, 2009, the student's father requested that the district allow the student to "withdraw from Resource Room" (Joint Ex. 11B). On November 9, 2009, the CSE chairperson and the parent agreed to amend the student's IEP by removing resource room services (Joint Exs. 8 at p. 1; 10).[4]

The student's grades at the end of the first quarter (November 15, 2009) included: English 50, United States history 50, welding 80, technical reading and writing 68, technical math 88, and technical science 80 (Joint Ex. 30 at p. 22). Comments from the district's teachers on the first quarter report card reported that the student failed to complete required homework, was frequently absent, was in serious danger of failing, and showed no effort (id.). By letter to the district's director of pupil personnel services (the director) dated November 28, 2009, the parents requested a CSE meeting to review their concerns that the student was not accurately classified, and "further evaluation" (Joint Ex. 11A). The parents advised that they would like to bring their private educational consultant to the meeting (id.; see Tr. pp. 1650-51).[5] Subsequent to the letter, the educational consultant discussed with the school psychologist her concerns regarding the student's academic performance and that the "nature of [the student's] learning disability . . . was not being properly attended to" (Tr. p. 656). The school psychologist stated to the educational consultant "some of the more significant concerns that the school ha[d] been expressing" such as the student's behavior difficulties, the oppositional quality to his behavior, and the "specter of substance abuse" (Tr. pp. 657, 1659-60; see Tr. pp. 634-35, 637, 947-48).

[4] The special education teacher testified that in addition to providing the student's resource room services, he was also designated as the student's "case manager," responsible for "overseeing" the student's schedule and grades (Tr. pp. 1399-1401).

[5] The parents retained the private educational consultant in November 2009 (Tr. pp. 1653-54).

The hearing record reflects that throughout fall 2009, the parents and district staff were in frequent communication about the student, and the parents continued to obtain private psychiatric services for medication management of the student's ADD, and the services of a private psychologist (Tr. pp. 927-28, 1482, 1636-37, 1872-73, 1926-27). The student's attendance and disciplinary problems continued throughout the fall semester (Parent Ex. E). In late November and early December 2009, CTEC advised the parents that the student had been absent from the program on six occasions since November 2, 2009 (Joint Ex. 13 at pp. 1-2). At this time, the hearing record reflects that from the parents' perspective, the student's behavior continued to "slide" regarding increased absences from school, difficulty waking up in the morning, and having panic attacks (Tr. p. 933). In December 2009, the student expressed an interest to the district guidance counselor in attending a BOCES Graduate Options (GO) program (Tr. pp. 1484, 1732, 1960). The guidance counselor indicated to the student that the GO program was not an option because it did not offer the special education supports the student might need (Tr. p. 1960). Subsequently, when the student's mother approached the guidance counselor about the GO program, he told her that "it wasn't the type of setting we send students, who are classified, because they don't have the resources we do, to support the student there" (Tr. p. 1961).

On January 6, 2010 the CSE subcommittee convened for a program review (Joint Ex. 12). Attendees included the CSE chairperson, the school psychologist, the student's special education case manager, the guidance counselor, a regular education teacher, and the parents (Tr. pp. 1484-86; Joint Ex. 12 at p. 2). According to notes prepared during the meeting by the CSE chairperson, the CSE acknowledged that as of the date of the meeting, the student had not been attending class or receiving special education services (Tr. p. 296-97; Joint Ex. 8A). The CSE chairperson's notes indicated that the "[p]arents do not feel [the student] would cooperate [with] testing," and that they requested that the student attend the GO program (Joint Ex. 8A). The hearing record reflects that options for the student the CSE discussed included additional testing, a special education program at another high school, the student's interest in attending the GO program, and declassification of the student from special education (Tr. pp. 103-06, 296-97, 304-05, 688-90, 933-36, 1484-86, 1491-92, 1973-74; Joint Exs. 8; 8A). The meeting resulted in the student's declassification from special education, the provision of declassification support services, and a referral to the GO program (Joint Exs. 8; 8A; 12; 12B).[6] According to the hearing record, the GO program provided "non-traditional educational experiences to students who [were] not succeeding in their present settings," and offered students alternative education program options and learning opportunities including block scheduling, individualized academic programs, and career guidance (Joint Ex. 12B at p. 2). The CSE chairperson stated that the GO program is not recommended by a CSE, but through the guidance department, because it is not a special education program (Tr. pp. 106-08).

The student began attending the GO program following his acceptance on January 14, 2010, and also continued attending the CTEC program (Joint Exs. 12A; 13 at p. 4). The hearing record indicated that the student's attendance problems increased and his grades declined at both the CTEC and GO programs and at the GO program he exhibited behavioral problems including failing to follow school rules and leaving class or the school building without permission (Tr. pp. 1213-14; Joint Exs. 13 at pp. 3-10; 14; 15). The student's grades at the end of the second quarter

[6] The CSE chairperson testified that the student's declassification support services consisted of the program modifications and testing accommodations that were on his IEP (Tr. p. 236).

included technical math 38, technical reading and writing 37, technical science 20, United States history 21, economics 25, and welding 20 (Joint Exs. 13 at pp. 9, 10; 15 at p. 1). Comments included on the second quarter report card indicate that the student cut class, wasted time, and that his absences hindered his work and lowered his participation grade (Joint Ex. 15 at p. 1). According to the parents, subsequent to the student's enrollment at the GO program, he had a "complete change" in friends, became increasingly involved in drug use, and was experiencing panic attacks (Tr. pp. 950-53, 957-64, 970-71, 973, 984-85, 1013-15, 1500-01, 1528-30, 1625).

On or about April 6, 2010, the student's mother contacted the district's school psychologist to request a CSE meeting and to inform him that the GO program was not working for the student (Tr. pp. 112-13, 755, 1502-03; Joint Ex. 20 at p. 1). The school psychologist contacted district special education administrators to set up a CSE program review meeting, and also the guidance counselors at both the CTEC and GO programs to obtain additional information about the student's failing grades, poor attendance, and behavioral difficulties (Tr. pp. 755-56, 759-61, 1203; see Joint Ex. 14).

In the period prior to the meeting, the parents discovered the student was abusing prescription drugs and marijuana and the student was overheard planning a series of robberies (Tr. pp. 973, 1539-41). On April 24, 2010, a private student transport service took the student to Ironwood, an out-of-state residential treatment center (Tr. pp. 973-75, 1791-92; Parent Exs. A at p. 1; B at p. 1).

In a letter to the district superintendent dated April 28, 2010 and received by the district April 30, 2010, the father requested reimbursement for the student's tuition costs at the private parochial school and Ironwood (Joint Ex. 17 at pp. 1-2). The father noted the results of testing performed by the district of location and the difficulties the student encountered after returning to the district high school for the 2009-10 school year (id. at p. 1). Specific problems raised by the father included that the district failed to sufficiently disseminate the student's IEP; the student's attendance and grades deteriorated throughout the year; and that the student was suffering from panic attacks and anxiety as a result of being bullied at CTEC (id. at pp. 1-2). The letter indicated that the student "was enrolled in a private education setting" on April 24, 2010, after the father received letters from the GO program and CTEC stating that the student was failing all of his classes and learned that the student was being suspended for leaving school grounds (id. at p. 2). The father opined "that the failure to act immediately would have likely resulted in physical and/or serious emotional harm" to the student (id.). On April 30, 2010, the student's guidance counselor documented the student's transfer from the district (Joint Ex. 16).

The hearing record indicates that on May 5, 2010, the parents, the school psychologist, and the CSE chairperson met to review the student's program (Tr. pp. 112-13, 116, 759; see Joint Ex. 20 at p. 1). At the meeting, the parents informed the district personnel that approximately two weeks prior they had placed the student at Ironwood, and they discussed their concerns about the student's performance (Tr. p. 117). According to the CSE chairperson, attendees at the meeting reviewed the discussions from the January 2010 CSE meeting regarding the possibility of conducting evaluations of the student and considering other programs for the student and declassification support services (Tr. p. 116). The CSE chairperson stated that the parents thought additional evaluations of the student were a "good idea," and she provided them with a release of

information form to enable the district to obtain information from Ironwood, and a consent form to allow the district to conduct evaluations of the student (Tr. pp. 116-118).

In a May 24, 2010 letter, the director responded to the father's April 2010 letter to the superintendent (Joint Ex. 20). The director noted that the CSE chairperson had "offered to work with [the parents] to develop an" IEP for the student and reiterated that the district required the parents to sign releases to enable the district to receive information from Ironwood (id. at p. 1). The director stated that once the district had "gather[ed] the information requested, [the district] will be able to determine what additional evaluations, if any, we require in order to develop . . . an IEP" (id.). The director also stated that the district denied responsibility for the student's tuition costs at Ironwood and the private parochial school, noting that (1) the parents had not placed FAPE at issue with respect to their placement of the student at the private parochial school; (2) certain of their claims were untimely; (3) the parents did not state their disagreement with the CSE's determination to declassify the student at the time; (4) the parents placed the student at Ironwood prior to providing the district an opportunity to evaluate him; and (5) the parents failed to give sufficient notice of their intent to enroll the student in a private school at public expense (id. at pp. 1-2). The letter states that the parents informed the district at the May 2010 meeting that they intended for the student to earn his high school diploma through a distance learning program while he attended Ironwood (id. at p. 2).

In a July 23, 2010 letter from the CSE chairperson to the parents, the chairperson noted that the parents had signed a release permitting Ironwood to share information with the district on June 1, 2010 (Joint Ex. 21 at pp. 1, 4). Attached to the letter was a facsimile from Ironwood to the CSE chairperson, dated June 21, 2010, in which Ironwood's director of education stated that the student was enrolled in three courses, including American literature, American history, and geometry, and that the student's June 2008 IESP from the district of location was attached (id. at p. 2). The chairperson referenced a July 14, 2010 conversation with the parents regarding Ironwood's response, and requested that the parents provide evaluations conducted by Ironwood to the district (id. at p. 1). The chairperson stated that if the parents were unwilling to share the Ironwood evaluations, the district "continue[d] to offer to conduct our own testing and wait to hear from you on the time to schedule it" (id.). In the event that the student would not be returning to the district in the near future, the chairperson suggested that the parents "may . . . want to refer him to the evaluation team in the District where Ironwood is located" (id.). In closing, the chairperson stated her understanding that the parents intended to have the student remain at Ironwood until November 2010, but that if the parents were "seeking anything other than financial assistance . . . toward the cost of his program at Ironwood, please let me know . . . In order to facilitate proper planning, I need to know exactly what you are asking the District to do" (id.).

In response, by letter dated August 3, 2010 letter, the father stated that the student was "not expected to return to [the district] until at least November 2010" (Joint Ex. 22 at p. 1). The father noted that the student was "attending an on-line High School" which was "relying on the existing IEP from the" district of location and that "[n]either Iron Wood nor the on-line program is conducting further testing to develop a new IEP" (id.).[7] As "it [was] expected that [the student]

[7] The "on-line" instructional program the parent referred to in the August 2010 letter is the Laurel Springs School (Laurel Springs), a provider of distance educational services (Tr. pp. 1806-07, 1814; Parent Exs. A at p. 15; H).

w[ould] complete his High School education using the existing IEP . . . at this time, we are not requesting any additional testing by the" district (id.). Additionally, the father stated that "if things continue as planned, [the district] will not need to provide [the student] with an education for his senior year" (id. at p. 2). The father reiterated his position regarding the district's complicity in the student's academic and personal deterioration as a result of its failure to properly identify his "significant learning deficits" while he was in the district middle school and set forth the expenditures the parents had made in an attempt "to get him on track academically and personally" (id. at pp. 1-2). However, although believing that the district was responsible for all of the expenses associated with getting the student "back on track," the father stated that the parents "would feel satisfied if the district were to contribute $25,000 toward the expenses we have incurred and will incur for" the student, noting that this amount was "much less than one-half the costs incurred and provides no compensation for the years of worry and anxiety" (id. at p. 2).

The superintendent responded to the parents' letter on August 23, 2010, stating that the district's Board of Education had "declined to make a monetary settlement to resolve the claims you allege against the district" (Joint Ex. 23). The superintendent noted that the CSE chairperson had "advised [the parents] on more than one occasion, that our Special Education Team is ready and willing to work with you to review the status of your son's need for special education and with your consent and cooperation, to develop and offer, as appropriate, a new program" (id.). Accordingly, the superintendent invited the parents to contact the CSE chairperson if they were "interested in exploring with the District a publicly funded program," so that they could "schedule a mutually convenient time to arrange a time when the District can evaluate [the student] so that together we can begin the process of review and placement" (id.).[8]

Due Process Complaint Notice and Response

By due process complaint notice dated December 23, 2010 and received by the district December 30, 2010 (Joint Ex. 1 at p. 1), the parents requested an impartial hearing and tuition reimbursement for the private parochial school and Ironwood (id. at p. 2). The parents asserted that the district had improperly refused to reimburse the parents, despite having failed to provide the student with a FAPE in a timely manner (id.). The parents argued that their noncompliance with unilateral placement notification requirements should be excused because of the emergency nature of the placement and the district's failure to comply with its obligations (id.). The parents also contended that the district had failed to properly evaluate the student and identify his needs over an extended period of time (id. at p. 3).[9] As a remedy, the parents sought reimbursement of $61,000 for the student's Ironwood tuition, $6,000 for the student's tuition for the on-line program (Laurel Springs), and $15,000 for the student's tuition at the parochial private school (id.).

In a response to the due process complaint notice, dated January 10, 2011, the district denied the allegations of the complaint "for the reasons stated in the [May 2010] letter" to the parents from the director (Joint Ex. 2 at p. 1). The district denied that it prevented the parents from giving timely notice of their unilateral placement of the student, and contended that claims for

[8] Attached as an enclosure to the letter was a copy of procedural safeguards (Joint Ex. 23; see 8 NYCRR 200.5[f]).

[9] Attached to the due process complaint notice were the April 28, 2010 letter from the student's father to the district superintendent, and the May 24, 2010 letter to the parents from the director (Joint Ex. 1 at pp. 5-6, 8-9).

tuition for the 2008-09 school year were untimely (id.). Furthermore, the district asserted that neither the private parochial school nor Ironwood was an appropriate placement and the equitable considerations did not support the parents' request for reimbursement (id.). The response indicated that the district had scheduled a resolution session, but that the district denied all liability and was prepared to waive the meeting (id.).

Pre-Hearing Proceedings, Motions, and Decisions

By letter dated April 4, 2011, the district moved to dismiss the complaint (IHO Ex. A).[10] The district asserted that claims arising from its alleged failure to properly evaluate the student during the 2006-07 school year, and for tuition reimbursement for the 2007-08 and 2008-09 school years, were barred by the IDEA's two-year statute of limitations (id. at pp. 4-5). To the extent that the complaint could be read to assert a claim for educational malpractice, the district asserted that such claims are not cognizable in New York (id. at pp. 5-6). The district also requested dismissal of the complaint on the ground that the parents had no interest in the district providing the student with a FAPE at the time they unilaterally placed him at Ironwood (id. at pp. 6-7). Additionally, the district argued that the complaint did not challenge the CSE's decision to declassify the student and that the parents requested that the student be permitted to attend the alternative high school program (id. at p. 2). The district also asserted that the complaint failed to challenge any current IEP or action taken by the CSE; rather than challenge the student's declassification, the parents had sought financial assistance from the district while refusing district offers to evaluate the student and develop an IEP (id. at pp. 7-9). Furthermore, the district argued that a reduction in reimbursement would be appropriate because of the parents' failure to provide timely notice of their removal of the student and their refusal to allow the district to evaluate the student after his removal (id. at p. 9).[11]

In a decision dated April 10, 2011, the impartial hearing officer denied the district's motion to dismiss the due process complaint notice (IHO Ex. C). The impartial hearing officer addressed the district's motion as though it were a challenge to the sufficiency of the complaint (see 20 U.S.C. § 1415[c][2][A], [C]-[D]; 34 C.F.R. § 300.508[d]) and found the complaint to be sufficient on its face (IHO Ex. C). The impartial hearing officer noted that the district had raised challenges to the substance of the claims asserted by the parents and held that "they should be dealt with in the process of the hearing, where the right of confrontation, subpoena, presenting evidence and argument can more fairly deal with the issues raised" (id.).

[10] Submitted with the motion to dismiss was an affidavit from the director, detailing events relating to the student during the 2009-10 school year which have been discussed above (IHO Ex. B). Attached to the affidavit were multiple letters between the parties, the relevant portions of which are summarized above.

[11] The hearing record is devoid of any reference to what occurred during the period from December 30, 2010 until the district's motion of April 4, 2011. As the first impartial hearing date was June 7, 2011, it does not appear that the impartial hearing was convened within the time contemplated by regulation (8 NYCRR 200.5[j][3][iii]), and there is no indication in the record that either party requested or was granted an extension of the time for convening or completing the impartial hearing (8 NYCRR 200.5[j][5]). By failing to include documentation of the extensions of the 45-day timeline, the impartial hearing officer has not complied with State regulations. I caution the impartial hearing officer to comply with State regulations in the future.

By motion dated May 2, 2011, the parents opposed the district's motion to dismiss and cross-moved for summary judgment (IHO Ex. D). The parents asserted that they were compelled to expend monies that they had saved for the student's college education as a result of the district's "failure to fulfill its statutory duty to identify, locate and evaluate [their] son, and to provide him a free and appropriate education" (id. at pp. 2, 17-18). As relevant to this appeal, the parents admitted that they agreed to the district's plan for the 2009-10 school year including the services specified on the student's IEP and his enrollment in the CTEC program (id. at p. 6). However, the parents noted that the student's grades deteriorated over the course of the 2009-10 school year, leading them to request reevaluation of the student in November 2009 (id. at pp. 6-7). The parents denied that they agreed with the district's determination to declassify the student (id. at p. 15). Rather, the parents contended that they agreed only to the student's enrollment in the GO program at the January 2010 CSE meeting, which they were told required his declassification, with the understanding that the student would be reclassified if necessary (id. at p. 7). When the student's grades continued to deteriorate, and he experienced bullying and panic attacks, the student's mother contacted the school psychologist to request a new placement (id. at pp. 7-8). Prior to the meeting, the parents placed the student at Ironwood out of concern that he was planning criminal activity (id. at p. 8). Responding to the district's arguments regarding the statute of limitations, the parents asserted that they could not have known that the student was denied a FAPE, and thus their claims did not accrue, until "they observed his rapid improvement at Ironwood" (id. at pp. 11-12). Furthermore, they asserted that the district should be estopped from interposing the statute of limitations (id. at pp. 13-14). The parents also denied that they sought to bring an action for educational malpractice, but asserted that the due process complaint notice specified that the district failed to comply with its obligation to identify, locate, and evaluate the student appropriately (id. at p. 14). The parents cross-moved for summary judgment for reimbursement for the tuition costs requested in their due process complaint notice (id. at pp. 16-17).

In a reply to the parents' opposition and cross-motion, dated May 13, 2011, the district asserted that the parents' claims accrued no later than June 2008, when the district of location developed an IESP for the student (IHO Ex. E at pp. 1-2). The district argued that the parents had acknowledged that all of their claims were based upon the district's alleged failure to properly identify the student as a student with a disability in middle school (id. at pp. 3-4). The district also asserted that the parents' arguments regarding the district's declassification of the student were raised for the first time in their opposition to the district's motion and were not properly before the impartial hearing officer (id. at p. 5). Even were the parents permitted to raise this claim, the district asserted that the parents should be estopped from challenging the student's declassification because of their failure to permit the district to evaluate the student between May 2010 and July 2010 (id.). The district also contended that allowing the parents to allege a new basis for tuition reimbursement "would unnecessarily extend litigation and provide[] an opportunity to do an end run around the statute of limitations" (id. at pp. 5-6).

In a reply, dated May 17, 2011, the parents argued that their "acquiescing in [the student's] declassification to attend the GO program was in no way a concession that classification was no longer needed" (IHO Ex. G at p. 4).

In a decision dated May 18, 2011, the impartial hearing officer denied the district's motion (IHO Ex. H at p. 5). Noting that the IDEA and its implementing regulations "provide for a simple streamlined process" with respect to submission of a due process complaint notice (id. at p. 1), the

impartial hearing officer found that it would be improper to make a determination with regard to the statute of limitations without hearing any evidence, as the determination of when the parents knew or should have known of the actions on which their claim was based is "of necessity" a fact specific inquiry (id. at pp. 2-3). The impartial hearing officer also questioned whether the April 2010 letter to the district could be deemed to be a due process complaint notice (id. at pp. 3 n., 4). The impartial hearing officer found that the parents should also be given an opportunity to establish whether either exception to the statute of limitations applied (id. at pp. 3-4). Furthermore, even if claims arising prior to December 2008 were barred, the impartial hearing officer found that there were "sufficient issues which fall into the period encompassed by the statute of limitations period to make a determination as to whether the parents are correct in stating a FAPE was denied" (id. at p. 4).

In a letter dated May 26, 2011 summarizing a prehearing conference, the impartial hearing officer stated that the parties would be required to present evidence regarding the parents' claims for the 2006-07 through 2009-10 school years (IHO Ex. I at p. 1). However, the impartial hearing officer agreed to bifurcate the district's burden by addressing the statute of limitations issue before proceeding to the parents' denial of FAPE claims (id. at p. 2).

Impartial Hearing and Decision

An impartial hearing was convened on June 7, 2011 and continued on June 8, 14, and 23, 2011, and concluded on July 14, 2011. In a decision dated September 26, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE during the 2009-10 school year and awarded the parents 90 percent of the requested tuition reimbursement for Ironwood (IHO Decision at pp. 40-41). The impartial hearing officer denied the parents' request for tuition reimbursement for the private parochial school, finding that they failed to establish that it was an appropriate placement (id. at p. 40). The impartial hearing officer also denied the parents' request for reimbursement for psychiatric services provided to the student at Ironwood, as it was not specifically requested in the due process complaint notice (id.).

The impartial hearing officer found that the parents' April 2010 letter "contain[ed] the essential statutory elements" to be considered a due process complaint notice, a conclusion he considered to be buttressed by the district's May 2010 response (IHO Decision at pp. 8, 40). However, the impartial hearing officer also found that the parents failed to produce evidence of the private parochial school's appropriateness, such that it was irrelevant whether the parents interposed a claim in April 2010 (id. at pp. 9, 39-40). Accordingly, the impartial hearing officer determined that "the only viable claim . . . is the period embracing the [student's] attendance in the 11th grade in his home district . . . as well as the parents' request for reimbursement" for Ironwood (id. at pp. 9-10).

The impartial hearing officer found that the district denied the student a FAPE for the 2009-10 school year by permitting the student and the parents to determine the course of the CSE's recommendations "as the easiest way out" (IHO Decision at pp. 11, 15, 18-19, 37, 40).[12] Specifically, the impartial hearing officer found that the district "failed" the student by not

[12] In what is apparently a typographical error, the impartial hearing officer's decision states that the district "failed to provide the student with a FAPE from September 2010 onward" (IHO Decision at p. 40).

conducting evaluations prior to his return to the district, thus failing to appropriately identify the student's behavioral needs (id. at pp. 37, 39). Additionally, the impartial hearing officer found that the district improperly permitted the student to withdraw from his resource room services (id. at p. 27-28, 37). The impartial hearing officer also found that the district improperly failed to conduct an evaluation of the student prior to declassifying him, despite there being no indication that the student no longer required special education programs and services, solely to facilitate his entry into the GO program (id. at pp. 13-15, 19, 21, 28, 37). Furthermore, the impartial hearing officer found that the district "left [the student] to flounder on his own" after he was declassified (id. at pp. 7, 14, 19, 38), despite being concerned with the student's social-emotional functioning (id. at p. 18). In general, the impartial hearing officer found the district's witnesses to be less credible than the parents (id. at pp. 12, 15, 17, 19-22, 24, 26-28, 38-39).

With respect to the parents' unilateral placement of the student at Ironwood, the impartial hearing officer found it appropriate to meet the student's needs, as it enabled the student to bridge the gap between his academic ability and achievement and integrated its therapeutic, educational, and behavioral components (IHO Decision at pp. 32-35, 40). The impartial hearing officer found that Ironwood allowed the student "to learn and deal with his educational disabilities" (id. at p. 38). The impartial hearing officer further found that the student's drug use was "inextricably intertwined" with his educational needs (id. at pp. 38, 40). Additionally, the student made significant progress with respect to his "academic functioning, demeanor and achievement, and . . . deportment and confidence in dealing with his disabilities" (id. at p. 36), thereby remedying the defects in the district's dealings with the student (id. at pp. 36-37). With regard to equitable considerations, the impartial hearing officer found that the parents had failed to establish that the necessity of placing the student was so great that it excused their not providing the district with notice of the student's unilateral placement until the May 2010 CSE meeting, warranting a 10 percent reduction in reimbursement (id. at pp. 39-41).

Appeal for State-Level Review

The district appeals from those portions of the impartial hearing officer's decision that found that it failed to offer the student a FAPE and awarded the parents partial reimbursement for the student's tuition costs at Ironwood and Laurel Springs. The district contends that the impartial hearing officer erred in not dismissing the due process complaint notice as untimely because it was based on actions taken during the 2006-07 school year, and for failing to state a cause of action on which a claim for tuition reimbursement could be based. Furthermore, the district alleges that the impartial hearing officer improperly raised and decided a number of issues not identified in the parents' due process complaint notice, including (1) that the district did not reevaluate the student prior to his return to the district for the 2009-10 school year and duplicated his IEP from the private parochial school; (2) the district induced the parents to request removal of resource room services from the student's IEP, to which the CSE improperly agreed; (3) the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP), despite the student's increasingly oppositional behaviors; (4) the January 2010 CSE was improperly constituted; (5) the district induced the parents to request declassification of the student by falsely stating that special education students could not attend the GO program; (6) the CSE improperly declassified the student in January 2010 without conducting a reevaluation; and (7) the April 2010

letter constituted a request for an impartial hearing.[13] The district also takes issue with certain of the impartial hearing officer's findings of fact, including that (1) the district waited two months to convene the January 2010 CSE meeting; (2) the district delayed in convening the May 2010 CSE meeting; (3) the student was bullied at CTEC and experienced anxiety and panic attacks with respect to school; (4) the hearing record did not explain why the student was enrolled in two separate BOCES programs, despite having a need to connect with his teachers; and (5) the CSE delayed allowing the student to return to special education in order to conduct evaluations.[14]

The district further asserts that even if it did not offer the student a FAPE, Ironwood was nonetheless not an appropriate placement for the student. Specifically, the district alleges that the Laurel Springs correspondence course was not a special education program, nor designed to meet the student's special education needs. Additionally, the district contends that Laurel Springs was not integrally related to the therapeutic program offered by Ironwood. In addition, the district asserts that the student's drug use was not intertwined with his educational needs. With respect to the equities, the district asserts that the record demonstrates that the parents were not seeking evaluations or a district placement; rather, the parents sought only financial assistance for the student's placement at Ironwood and refused the district's offer to conduct evaluations. Furthermore, the parents did not share Ironwood evaluative information with the district until the impartial hearing, preventing the CSE from reviewing the student's classification and recommending a district placement for the student. In addition, the parents did not inform the district of the student's difficulties with drug use, his deteriorating physical condition, or the recommendations of the private educational consultant, and did not arrange to have the consultant attend any CSE meetings.

Finally, the district contends that the impartial hearing officer was biased in favor of the parents "as demonstrated by his continuous advocacy role and throughout his decision in which he made extreme judgments and unnecessarily negative comments about" district personnel.[15]

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[13] While the district contends that the impartial hearing officer erred in addressing these contentions, it does not affirmatively assert in its petition that it offered the student a FAPE for the 2009-10 school year. Although the district does assert such in its memorandum of law, as well as additional findings allegedly raised by the impartial hearing officer sua sponte, a memorandum of law may not be used as a substitute for a pleading (8 NYCRR 279.4; 279.6; Application of a Student with a Disability, Appeal Nos. 11-059 & 11-061; Application of the Bd. of Educ., Appeal No. 09-057).

[14] I note that certain of the "findings" with which the district takes issue appear to be the impartial hearing officer's characterization of the testimony adduced at the impartial hearing, rather than findings relied upon by the impartial hearing officer to reach his conclusions.

[15] The parents answer and cross-appeal from that portion of the impartial hearing officer's decision that partially denied them reimbursement for the student's Ironwood and Laurel Springs tuition. An affidavit of service filed with the Office of State Review indicates that the petition was served on counsel for the parents by e-mail on October 31, 2011, pursuant to consent of counsel to accept service in this manner. Accordingly, the answer was due to be served on November 10, 2011 (8 NYCRR 279.5). The answer is dated November 11, 2011, and an affidavit of service indicates that it was served on counsel for the district November 14, 2011. No request for an extension of time in which to answer or interpose a cross-appeal was made by the parents, nor does the answer explain the failure to timely serve the answer and cross-appeal (8 NYCRR 279.10[e]). Accordingly, I will not consider the answer or the cross-appeal, as it was not included in an answer served within the time permitted by regulations (8 NYCRR 279.4[b]; 279.5; 279.10[e]). In addition, I note that the memorandum of law accompanying the answer is over 40 pages in length, in derogation of regulation limiting memoranda of law to

Applicable Standards

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 (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]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; 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,

20 pages in length (8 NYCRR 279.8[a][5]). Counsel is cautioned to comply with the Office of State Review's regulations governing practice before this office in further filings. In any event, even if I had considered the parents' filings, they would not have changed the outcome in this case. The district timely served an answer to the cross-appeal and a memorandum of law in support, which I have not considered.

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 least restrictive environment (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).

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]).

Discussion

Scope of the Impartial Hearing

The District's Motions to Dismiss the Complaint

The district contends that the impartial hearing officer erred in not dismissing the due process complaint notice as untimely because it was based on actions taken during the 2006-07 school year and did not state a claim on which the impartial hearing officer could grant tuition reimbursement. I note that the impartial hearing officer explicitly found that "any matter prior to April 28, 2008 is time barred by the statute of limitation and anything after that date is timely" (IHO Decision at p. 9). To the extent the impartial hearing officer discussed the district's failure to refer the student to the CSE during the 2006-07 school year (id. at p. 10), it was for the purpose of providing background regarding the student's educational history. Although the due process complaint notice alleged "the District's historical derogation of its responsibilities to" the student and referenced the district's "fail[ure] to properly identify [the student's] particular processing deficits" (Joint Ex. 1 at pp. 2-3), as discussed below, I find that the parents also sufficiently alleged claims in their due process complaint notice relating to the 2009-10 school year that they were entitled to an impartial hearing on them (20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]). Accordingly, I find that the impartial hearing officer did not err in denying

the district's motions to dismiss the due process complaint for untimeliness or failure to state a claim.[16]

Due Process Complaint Notice

I agree with the district that the impartial hearing officer improperly raised and decided a number of issues not identified in the parents' due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with as Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038). It is clear from the hearing record that the parents did not file an amended due process complaint notice. Accordingly, it is necessary to determine which issues were properly before the impartial hearing officer on the basis of the parents' due process complaint notice.

The impartial hearing officer found that the April 2010 letter to the district constituted a due process complaint notice, "separately and together" with the August 3, 2010 letter and the December 2010 due process complaint notice (IHO Decision at p. 8). This determination is based in part on the district's May 2010 letter response to the parent's April 2010 letter, as the impartial hearing officer noted that the district's response asserted the statute of limitations as a defense, "thus clearly treating the letter as a complaint under the applicable statute" (id.). I find this reasoning unsupported by the hearing record or the relevant statutes and regulations. The IDEA and federal and State regulations require that a due process complaint notice include (1) the student's name; (2) the student's residential address; (3) the name of the school the student is attending; (4) a "description of the nature of the problem of the child relating to such proposed or refused initiation or change, including facts relating to such problem"; and (5) "a proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR

[16] This case further establishes the importance of holding a prehearing conference for purposes of "simplifying or clarifying the issues" to be decided at the hearing (8 NYCRR 200.5[j][3][xi][a]; see Application of the Bd. of Educ., Appeal No. 11-077; Application of a Student with a Disability, Appeal No. 11-062). Although the use of summary disposition procedures akin to those used in judicial proceedings are permissible under the IDEA, such procedures should be used by the impartial hearing officer with caution and are appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the nonmoving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; Application of a Student with a Disability, Appeal No. 11-090; Application of the Bd. of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018).

200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]).[17] The April 2010 letter includes the student's first name and a return address, which I would consider sufficient to meet the first two requirements mentioned above (Joint Ex. 17 at p. 1). The letter did not reference Ironwood by name, calling it "a private education setting" (id. at p. 2). However, the letter does specify certain difficulties the student experienced during the 2009-10 school year, in greater detail than the due process complaint notice (id. at pp. 1-2). The letter noted the results of testing performed by the district of location and the difficulties the student encountered after returning to the district's high school (id. at pp. 1-2). Specific problems raised by the letter included that the district failed to sufficiently disseminate the student's IEP; the student's attendance and grades deteriorated throughout the 2009-10 school year; and that the student suffered from panic attacks and anxiety as a result of being bullied (id.). The letter stated that the parents were seeking reimbursement for the student's tuition costs at the private parochial school and Ironwood (id.). As the letter does not specify "the name of the school" (20 U.S.C. § 1415[b][7][A][ii][I]; 34 C.F.R. § 300.508[b][3]; 8 NYCRR 200.5[i][1][ii]); I find that the April 2010 letter was facially insufficient to constitute a due process complaint notice, such that the parent was not entitled to a hearing on the basis of its submission to the district (20 U.S.C. § 1415[b][7][B]; 34 C.F.R. § 300.508[c]; 8 NYCRR 200.5[i][2]).[18] Furthermore, even if the April 2010 letter had otherwise met the requirements of a due process complaint notice, I note that the letter does not contain any statements that may be reasonably read as invoking the parents' due process rights or request an impartial hearing to determine the appropriateness of a district or unilateral placement.[19] Had the district actually treated the April 2010 letter as a due process complaint as the impartial hearing officer did, it is very likely that the district would have appointed an impartial hearing officer through the rotational selection process in April 2010 instead of December 2010.

The August 2010 letter, on the other hand, provides the student's name, address, the name of the school he is attending, and a description of the problem and a proposed resolution (Joint Ex. 22 at pp. 1-2). The problem asserted is that the district failed to properly identify the student's needs while he was in middle school, leading to the parents' expenditures for tuition at the private parochial school and Ironwood, as well as tutoring costs (id. at pp. 1-2). To the extent that the August 2010 letter can be read to assert a claim for the 2009-10 school year, it is duplicative of claims raised by the due process complaint notice and need not be considered separately. Furthermore, the August 2010 letter seeks a compromise settlement, and once again does not

[17] In the case of a homeless student, the complaint must include contact information for the student, rather than a residential address (20 U.S.C. § 1415[b][7][A][ii][II]; 34 C.F.R. § 300.508[b][4]; 8 NYCRR 200.5[i][1][ii]).

[18] I also note that there is no indication in the hearing record that the parents forwarded a copy of the letters to the New York State Education Department, as required by regulation (34 C.F.R. § 300.508[a][2]).

[19] If the impartial hearing officer considered the April 2010 and August 2010 letters to constitute due process complaint notices, a matter that it appears was first raised by the impartial hearing officer sua sponte, rather than by the parents (IHO Ex. H at pp. 3 n., 4), it is unclear why he did not find that the district failed to offer the student a FAPE by virtue of its failure to grant the parents a hearing thereon (see 20 U.S.C. § 1415[f][1][A]; 34 C.F.R. § 300.511[a]; 8 NYCRR 200.5[j][3]; see also Dep't of Educ. v. T.G., 2011 WL 816808, at *8-*9 [D. Hawaii Feb. 28, 2011]; Blackman v. Dist. of Columbia, 277 F. Supp. 2d 71, 78-80 [D.D.C. 2003]). There is no indication in the hearing record that the parents considered their earlier letters to constitute due process complaint notices prior to the time that such a suggestion was raised by the impartial hearing officer (see Tr. pp. 32-35).

evince an immediate intent to bring the issue to an impartial hearing (id. at p. 2; see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at *8 [S.D.N.Y. Sept. 6, 2011]).

For the reasons stated above, I find that the April 2010 or August 2010 letters did not constitute due process complaint notices requesting initial of impartial hearing procedures. Rather, it appears that the purpose of the April 2010 letter was to interpose a request for tuition reimbursement, and the purpose of the August 2010 letter was to attempt to settle the matter without the necessity of filing a complaint (Joint Exs. 17; 22).

Further, I concur with the district's assertion that the due process complaint notice cannot be reasonably read to raise issues regarding whether (1) the district failed to offer the student a FAPE because it did not conduct evaluations on his return to the district and relied on the IESP developed by the district of location; (2) the district induced the parents to request removal of resource room services from the student's IEP; (3) the district failed to conduct an FBA or develop a BIP for the student; (4) the January 2010 CSE was improperly constituted; or (5) the district induced the parents to request the student's declassification by falsely stating that students receiving special education could not attend the GO program (Dist. Ex. 1). Further, the hearing record does not reflect that the parents requested, or that the impartial hearing officer authorized, an amendment to their December 2010 due process complaint notice to include additional issues. Accordingly, I find that the impartial hearing officer exceeded his jurisdiction by basing his decision on issues that were not identified in the parents' December 2010 due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at an impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). It is essential that the impartial hearing officer disclose his intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an impartial hearing officer has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the impartial hearing officer to raise issues that were not presented by the parties and then base his determination on the issues raised sua sponte. Thus, the impartial hearing officer should have confined his determination to issues raised in the parents' due process complaint notice (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 C.F.R. §§ 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of a Student with a Disability, Appeal No. 11-073).

However, I find that the parents' due process complaint notice may be reasonable read as alleging that the district had failed to properly evaluate the student and identify his needs to address the impartial hearing officer's findings that the district failed to properly evaluate the student before declassifying him. While the specificity of the parents' due process complaint notice may not have comported with pleading requirements in a court of law, for purposes of an administrative hearing under the IDEA, the due process complaint notice provided the district with sufficient notice that the parents sought an impartial hearing pursuant to State regulations regarding the evaluation and educational placement of the student.

Evaluation and Declassification

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 C.F.R. § 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 C.F.R. § 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 C.F.R. § 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 C.F.R. § 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 C.F.R. § 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 C.F.R. § 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 C.F.R. § 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 C.F.R. § 300.324[a]; 8 NYCRR 200.4[d][2]).

In their due process complaint notice, the parents allege that the student was denied a FAPE due to the district's failure to evaluate the student and identify his special education needs, findings generally upheld by the impartial hearing officer (Joint Ex. 1; IHO Decision at pp. 37-38). After concluding a careful read of the hearing record, I find that it supports the hearing officer's decision.[20]

[20] While the district focuses predominantly on the student's drug use as a cause of his difficulties in the district high school and BOCES' programs, because I find that the district failed to properly evaluate the student prior to declassifying him, the student's drug use is irrelevant to my analysis of whether the district offered the student a FAPE for the 2009-10 school year.

The IDEA and federal and State regulations require a district to evaluate a student upon the request of the student's parents, if the student has not been evaluated within one year of the request (20 U.S.C. § 1414[a][2][A][ii]; [B][i]; 34 C.F.R. § 300.303[a][2]; [b][3]); 8 NYCRR 200.4[b][4]; see Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10-*11 [S.D.N.Y. Feb. 9, 2007]). Furthermore, districts are required to conduct an evaluation of a student with a disability prior to making a determination that the student is no longer eligible for special education programs and services as a student with a disability (20 U.S.C. § 1414[c][5][A]; 34 C.F.R. § 300.305[e][1]; 8 NYCRR 200.4[c][3]).[21]

The CSE chairperson testified that the student was not evaluated prior to being declassified because the district's policy was to "[s]ee how they do with reduced [declassification] support services; and then, we do a full evaluation at some point during that" (Tr. pp. 417-18). Under the circumstances of this case, the district's practice with respect to this student conflicted with the IDEA and its implementing regulations regarding evaluating students prior to declassifying them from eligibility for special education programs and services.

The school psychologist testified that from the beginning of the 2009-10 school year the student exhibited an aversion to attending classes, and that "early on" several of the student's teachers expressed concerns to him about the student's inability to complete work and assignments, and his sleeping, unresponsiveness, and absences from class (Tr. pp. 630-31, 649-50). After meeting with the student on a few occasions, the school psychologist indicated that he became "a little disturbed" by the student's perceptions of "how the world works," and his belief that despite a "pretty significant oppositional-defiant quality" to the student's behavior, that the student did not really comprehend the value of school and learning (Tr. pp. 631-34). During the timeframe of September-October 2009, the school psychologist's thoughts surrounding additional testing of the student pertained to what degree, if any, the student was involved in substance abuse (Tr. pp. 633-34, 636). The school psychologist acknowledged that substance abuse was a factor to be ruled out, because the student was a "complex kid, who, again, was just not functioning academically, socially, behaviorally, et cetera" (Tr. pp. 636-37). The school psychologist testified that although it was his goal to connect with the student and become a resource for him, despite attempts on his part and on the part of his teachers, the student was "just about, at that point in time, unengageable" (Tr. pp. 631-32, 641-43). The hearing record reflected that although the special education teacher discussed his concerns about the student with the school psychologist, following the removal of the student from resource room in October 2009, the special education teacher no longer had direct contact with the student (Tr. pp. 643-44, 1400-01).

The school psychologist opined that the student may have found his guidance counselor "more available" regarding making a connection, and that the guidance counselor was the parents' main "go-to person" about their concerns (Tr. pp. 632, 654).[22] The guidance counselor's

[21] The district need not reevaluate a student with a disability whose eligibility terminates on the basis of age or graduation with a local high school or Regents diploma (20 U.S.C. § 1414[c][5][B][i]; 34 C.F.R. § 300.305[e][2]; 8 NYCRR 200.4[c][4]).

[22] The guidance counselor testified that the student had himself, the school psychologist, and the special education teacher as staff that was available if the student needed someone to go to (Tr. p. 1923). As stated previously, during fall 2009 the school psychologist met with the student two to three times, and the special education teacher no longer had direct contact with the student after October 2009 (Tr. pp. 638, 1400-01).

interactions with the student began with discussions surrounding his missing classes and homework, and he testified that his efforts to engage the student were "rebuffed most of the time" (Tr. pp. 1923-24, 1927-29).

The educational consultant testified that after the parents contacted her about their concerns regarding the student's school performance, she reviewed the May 2008 psychological evaluation report prepared by the district of location (Tr. p. 1651; see Joint Ex. 4B). She stated that in reviewing the results of the evaluation, "there were very strong indications from the BRIEF and the [Achenbach] and . . . the RET, that had been administered by the school psychologist in [the district of location], that indicated that there were serious emotional factors that seemed to be interfering with [the student], besides just [ADD]" (Tr. pp. 1652, 1676). The educational consultant testified that she suggested to the parent requesting updated psychological testing and a CSE meeting to "get the testing done and to look at . . . whether the classification was a true reflection of the difficulties that [the student] was having" (Tr. pp. 1652, 1677).[23] She also suggested that the parents contact a neuropsychologist and a psychiatrist due to her concerns about the student's depression, anger, and "physical issues that were coming out because of the emotions that [the student] was dealing with" (Tr. pp. 1652-53). The school psychologist testified that he had a conversation with the private educational consultant subsequent to the November 28, 2009 letter from the parents requesting additional evaluations of the student (Tr. pp. 655-56; Joint Ex. 11A). According to the school psychologist, the educational consultant expressed to him some concerns she had regarding the student's academic skills, that the nature of the student's learning disability was not being properly addressed, and that she asked what kinds of academic and cognitive testing might be conducted (Tr. pp. 656, 660-61). The school psychologist relayed to the educational consultant the district's "more significant concerns" about the student's behavioral difficulties, the oppositional quality to his behavior, and the "specter of substance abuse" (Tr. p. 657). The school psychologist testified that at this time, the district was planning a CSE meeting to "reach some kind of conclusion about what needs to be done, what assessments might or might not need to be done, what changes in [the student's] program might need to be done" (Tr. pp. 658-59, 662-63).

The parties presented conflicting testimony regarding the district's offer to conduct evaluations of the student at the January 2010 CSE meeting (compare Tr. pp. 103-04, 219, 696, with Tr. pp. 940-41, 1481-82, 1488-91, 1557-63, 1880-82). The hearing record does not contain documentary evidence of the parents' January 2010 refusal to consent to the CSE conducting evaluations of their son (see Tr. pp. 250, 346-47, 409-10).[24] The CSE chairperson stated that at the time of the January 2010 CSE meeting, the student was not doing well in his classes and his attendance was a concern (Tr. p. 106). At the January 2010 CSE meeting, the CSE discussed placement options for the student including a specific BOCES special education therapeutic day program, for students who exhibited "more behavior problems, some psychiatric problems, some learning problems, some attentional problems," and that offered smaller classes and more

[23] The educational consultant testified that a classification of emotionally disabled may have been "more reflective of the problems that [the student] was dealing with;" however, she did not make that recommendation to anyone (Tr. pp. 1676-77).

[24] As noted above, the hearing record does reflect that the parents "d[id] not feel [the student] would cooperate [with] testing" (Joint Ex. 8A).

opportunities for counseling (Tr. pp. 201, 246, 689). Although the CSE was concurrently discussing a therapeutic special education program for the student, the January 2010 CSE reached the decision to declassify the student because at that time he was not receiving special education services from the district, the GO program did not offer special education programming, and the student had expressed an interest in attending the GO program (Tr. pp. 106-08, 1125).[25] The CSE chairperson also testified that the student's present level of performance as reflected in the declassification document were derived from his IEP (Tr. pp. 218-22). She stated that she could not recall if the CSE discussed the manner in which the student's disability affected his participation in the general education environment at the time the CSE determined to declassify the student (Tr. p. 222).[26] The CSE chairperson testified that the basis for the student's declassification was the parents' request that the student attend the GO program (Tr. p. 222).

The hearing record reflects that the district did not conduct its own evaluations of the student (Tr. p. 158). Despite the district's position that the parents declined January 2010 offers to evaluate the student, and insisted that their son attend the GO program, given the CSE's awareness of the student's declining educational performance, behavioral difficulties, and the request by the educational consultant and the parents to conduct evaluations, I find that the district's failure to conduct evaluations of the student and identify his special education needs in order to recommend an appropriate special education program and placement denied him of a FAPE during the 2009-10 school year. I remind the district that despite the parents' expressed wishes that the student attend the GO program, it remained the district's obligation to offer the student a FAPE, and it may not abdicate its responsibility to develop an appropriate IEP that is based on the individual needs of the student to the desires of the parents or the student (20 U.S.C. § 1400[d][1][A]; Schaffer, 546 U.S. at 51; Rowley, 458 U.S. at 180-81; Frank G., 459 F.3d at 371; see Application of a Student with a Disability, Appeal No. 11-060; Application of the Bd. of Educ., Appeal No. 08-026; Application of the Bd. of Educ., Appeal No. 07-137). Furthermore, if the district believed it should be relieved from the obligation to provide a FAPE because the parents appeared to be revoking consent for continued provision of special education programs and services to the student, State regulations require that such revocation be in writing and that the district provide prior written notice before ceasing provision of special education programs and services (8 NYCRR 200.5[b][5][i]; see 20 U.S.C. § 1415[b][3], [c][1]; 34 C.F.R. § 300.503; 8 NYCRR 200.5[a]). In view of the forgoing, I find that the district failed to offer the student a FAPE during the 200-10 school year as a result of declassifying the student without evaluation and, therefore, I will turn to whether Ironwood was appropriate for the student.

Appropriateness of Ironwood

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the

[25] Although the director testified that had the student needed special education services such as resource room or related services at the GO program the district could have provided such services, the CSE chairperson's testimony did not indicate her awareness of this fact (Tr. pp. 1127-29; see e.g. Tr. pp. 106-07, 235).

[26] The resultant declassification document states that the student "has a disability related to attentional and executive function skills which affects progress in the general education curriculum," whereas the prior IEPs stated that the student's disability "inhibits progress in the general education curriculum" (compare Joint Ex. 12 at p. 3 with Joint Exs. 9 at p. 3; 10 at p. 3).

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

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

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

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

The impartial hearing officer determined that Ironwood provided education instruction specifically geared to meet the needs of the student, in that it offered behavioral therapy, smaller classes, one-on-one teacher relationships, and "flexibility in learning" (IHO Decision at pp. 36-37). The impartial hearing also found that the "primary purpose" of the student's placement at Ironwood was not for drug rehabilitation, but to address the student's inability to cope with his educational needs, which resulted in a lack of self-worth (IHO Decision at p. 38). As discussed in more detail below, the hearing record supports the findings of the impartial hearing officer and the student's need for an intensive therapeutic residential environment.[27]

Ironwood is described in the hearing record as an out-of-state, state-licensed residential treatment center that provides teenage students with a "highly structured treatment program" including therapeutic, clinical, and educational services (Parent Ex. A at pp. 1, 4). Students attending Ironwood often exhibit behaviors including poor self-esteem and academic performance, oppositional defiance, substance abuse, ADD, anxiety, and withdrawal (id. at p. 5). The average length of stay at Ironwood is 6 1/2 to 9 months, with some students staying as long as a year (Tr. pp. 1780-81).

The student's licensed clinical social worker (clinician) testified that upon arrival at Ironwood, students enter a "reflection" or "impact" phase of treatment where they are provided with time to "decompress" and complete writing assignments (Tr. pp. 1736, 1741-42). Upon completing the reflection phase, students enter the first of four levels in the Ironwood program, where they live "in the milieu" with peers in a structured setting (Tr. p. 1743).[28] According to the clinician, the goal of level one is for the students to be safe, and to comply with and follow simple boundaries and rules (Tr. p. 1744). Students at level one attend school daily from 9:00 AM to 12:00 PM, following which they complete structured "chore-like" activities" (Tr. pp. 1743-44). According to the clinician, students remain at level one on average from 45-90 days (Tr. p. 1743). As students become "a little more self-regulated, self-guided," no longer "need to be told everything," show that they understand the rules and boundaries, and exhibit some initiative, they enter level two of Ironwood's program (Tr. pp. 1744-45). Students at level three demonstrate the ability to "go through their day without a lot of reminders and guidance," showing that they

[27] As the Second Circuit has stated "[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" (Walczak, 142 F.3d at 132; see Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 [2d Cir. 1997]; Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 693 [3d Cir.1981]). The Circuit Courts of Appeal have adopted a number variations in the approach for determining whether a student requires a residential placement (Jefferson County Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B., 2011 WL 2565513, at *6 [D.Colo. Jun. 29, 2011][collecting cases]; see Richardson Independent School District v. Michael Z, 580 F.3d 286, 299 [5th Cir.2009]; Dale M. v. Board of Education of Bradley–Bourbonnais High School District No. 307, 237 F.3d 813, 817 [7th Cir.2001]; Tenn. Dep't of Mental Health & Mental Retardation v. Paul B., 88 F.3d 1466, 1471 [6th Cir.1996]; Clovis Unified Sch. District v. California Office of Administrative Hearings, 903 F.2d 635, 643 [9th Cir.1990]; Burke Cnty. Bd. of Educ. v. Denton, 895 F.2d 973, 980 [4th Cir.1990]; McKenzie v. Smith, 771 F.2d 1527, 1534 [D.C.Cir.1985]; Kruelle, 642 F.2d at 693).

[28] Although there is a level five, the Ironwood clinician testified that students are not necessarily expected to complete that level prior to graduating (Tr. p. 1747). The hearing record reflected that the student did not complete level five prior to leaving the Ironwood program (Tr. p. 1747).

understand their routine and leadership qualities (Tr. p. 1745).[29] Level four students are granted a practice home visit, to assess the family situation regarding communication and relationship issues (Tr. pp. 1746-47).

In a June 2, 2010 "Comprehensive Assessment" report, the student's Ironwood clinician indicated that the student was admitted to Ironwood "due to excessive opposition and non-compliance at home, school refusal and academic decline, low motivation, substance abuse . . . having established an inappropriate peer group with unhealthy boundaries, anger issues, verbal abuse towards family members, lying, and demonstrating behaviors intentionally provoking and antagonizing others" (Tr. pp. 1794-95; Parent Ex. C at p. 1; see Parent Ex. I). According to the report, the student's psychiatric history included "mild ADD and anxiety since early childhood" and indicated that his drug use developed in part in an effort to "self-medicate for anxiety, depression, and ADD" (Parent Ex. C at p. 1). The parents reported that their son was in a "downward spiral emotionally and physically," and that they needed to take immediate action to keep him safe (id.). The comprehensive assessment report provided information about the student's social, developmental, and family history, and identified the student's history, strengths, and needs in the areas of education, current relationships and functioning, life skills development, recreation, and vocation (id. at pp. 1-3). The social worker conducted a mental status examination of the student, noting that his mood was "[d]epressed, [a]nxious and [a]ngry," and offering working diagnoses of an oppositional defiant disorder and polysubstance dependence (id. at pp. 4-5).

The clinician testified that he first met the student upon his admission to Ironwood on April 24, 2010 (Tr. p. 1741). He described the student as being "straightforward and hard working," with the student's biggest area of need being the "gap" between his intelligence and his inability to express himself without help (Tr. pp. 1748-49, 1778). According to the clinician, this difficulty "caused [the student] a lot of grief, because he couldn't always figure out where to start, and he would get very aggravated if he couldn't explain what he was trying to say" (Tr. p. 1749). The student exhibited poor skills in coping with issues surrounding chronic pain from a prior accident, low stress tolerance, and low frustration tolerance, resulting in his becoming defiant and skipping school (Tr. pp. 1761-62). Identifying the student's anxiety and what overwhelmed him was "paramount" to the clinician's work with the student, as was improving his ability to slow down enough to express and productively solve the problem (Tr. pp. 1751, 1779). The clinician testified that the student's "biggest problem was . . . that he was going a hundred miles an hour in everything he did, and he was going nowhere in particular" (Tr. p. 1763). He added that the student was "thinking about everything without resolving any of it, without confronting any of it," and not taking responsibility (Tr. p. 1779).

The student's therapy focused on helping him to slow down and be creative in problem-solving, instead of "taking the easy way out" (Tr. p. 1763). The clinician testified that Ironwood therapeutically used dialectical behavioral therapy (DBT), which he described as a technique "teaching mindfulness about what is going on in my health, in my mind, in my surroundings, and what should I do about it;" learning to "pro-act" rather than react (Tr. p. 1762). According to the clinician, the student "dove right in," tried everything that he was asked to try, and reacted "very,

[29] Level three also encompasses a "farmhouse phase," which the hearing record describes as providing "cognitive therapy and positive peer culture in a farmhouse setting" (Parent Ex. A at p. 18).

very well" to the Ironwood program (Tr. pp. 1763-64). The clinician testified that the student was very involved in the DBT group, individual, and family therapy sessions (Tr. p. 1775).

The student's "Master Treatment Plan," developed by the clinician with the student and his parents, provided information about the student's primary diagnoses, a summary of the reason for his residential placement, and areas of concern and strengths (Tr. pp. 1756-58, 1768-71; Parent Ex. B at p. 1). The treatment plan described the evidence of the student's needs in the areas of behavior, education, family, substance abuse, and social skills (Parent Ex. B at pp. 1-4). For example, the treatment plan indicated that the student exhibited behavioral needs as evidenced by his non-compliance with rules, and defiance toward authority (id. at p. 1). Long-term and short-term goals were developed for each area of need, with identified "target dates" of completion (id. at pp. 1-4). Each area of need provided objectives, which identified actions the student would take in order to meet the goals; and strategies for Ironwood staff to use in monitoring the student's progress toward the goals (id.). The treatment plan indicated that the student received two 60-minute individual treatment sessions with the clinician per week, one weekly 45-minute therapy session with the clinician per week, and "[m]ilieu [t]herapy" provided by the residential counselors, 24 hours per day, every day (id. at p. 5; see Tr. pp. 1749-50). The clinician testified that the purpose of the treatment plan was so that all Ironwood personnel were "on the same page" and the student's treatment was monitored by everyone (Tr. pp. 1758-59).

Regarding the student's substance abuse, the clinician testified that when the student entered Ironwood, he was "being very reckless; and for lots of reasons, was running away from things that caused him stress" (Tr. pp. 1750, 1771). The clinician indicated that what "drove" the student's drug use was his inability to handle that stress (Tr. p. 1750). The student reported to the clinician that he did not use drugs for recreational reasons, but in part to "stop thinking about things that he didn't like thinking about" (Tr. pp. 1771-72).[30] The clinician found the student to be open and honest about his drug use, which was "not much of a limit" to the student's participation in therapy as he was "very interested in alternative ways of coping with stress" (Tr. pp. 1775-76). According to the clinician, the first steps to working with the student were removing the drugs from his system, and removing him from the environment that was "stressing him out" (Tr. p. 1776). When asked what part drug use played in the clinician's ability to help the student, the clinician testified that "it didn't limit [the student] for very long once he became clean and sober," and that "after a few days of not having any drugs to turn to, to take the easy way out and avoid things, he just started doing it," referring to the student's improved ability to express himself (Tr. pp. 1774-75, 1778).[31]

Turning to Ironwood's academic program, the education director testified that upon admission, personnel talk to the student and the parents, and review the student's transcript (Tr. pp. 1799, 1806, 1811-12; Parent Ex. A at p. 15). Once the education director determined credit

[30] The hearing record indicated that the student initially used prescription medication to alleviate chronic pain from a back injury; however, prior to his admission to Ironwood, he "became an abuser of it" (Tr. pp. 1773-74).

[31] While I agree with the district's argument that the impartial hearing officer failed to establish by the preponderance of the evidence or cite to evidence supporting his finding that the student's drug use was "inextricably intertwined" with his educational needs and a substantial result of the failure of the district to address his disability, the hearing record as a whole supports that the student's drug use was not the primary focus of the therapeutic services he received at Ironwood (see, e.g., Tr. pp. 1750, 1771-78).

deficiencies, students are individually enrolled in two to four classes that they require to receive their diploma (Tr. pp. 1806, 1816). Students attend academic sessions from approximately 9:00 AM to 1:00 PM with one ten to fifteen minute break (Tr. p. 1810). Students can also receive one to two hours of tutoring in the afternoons (Tr. pp. 1810-11). The academic program at Ironwood is administered by three to four certified high school teachers, who implement pencil and workbook-based curricula provided by Laurel Springs, a distance education provider (Tr. pp. 1799, 1807, 1814; see Parent Ex. A at p. 15). Teachers do not "stand up in front [of the classroom] giving lessons," rather they assist students on a one-to-one basis as they work individually on their coursework (Tr. pp. 1807, 1816). Student work product is sent to Laurel Springs to be graded (Tr. pp. 1807, 1817). The number of students in a classroom varies from five to fifteen (Tr. pp. 1807, 1812-13). According to the education director, Ironwood's education, direct-care, and therapeutic staff "all work together;" resulting in a very quiet, orderly school atmosphere absent of distractions (Tr. pp. 1808-09).

The education director testified that the student received a "fair amount" of individualized tutoring because he was anxious to learn, and learned relatively quickly in that environment (Tr. pp. 1821-22). The education director stated his awareness of the student's IEP, indicating that Ironwood "honored" the recommended accommodations such as, in the student's case, allowing use of a laptop for written assignments (Tr. pp. 1814-15). According to the education director, the student made "a lot of progress" academically, evidenced by his completion of American literature, for which he received semester grades of "A-" and "B+," and American history ("A- both semesters), and improvements in spelling ability (Tr. pp. 1808, 1822; Parent Ex. H). Prior to leaving Ironwood, the student received partial credit for work completed in geometry ("A"), government ("A"), and health classes ("A") (Parent Ex. H). The student also received passing designations in "experiential activities" such as physical education, animal science, art, life skills, and psychology/therapy (id.; Parent Ex. J at p. 3).

After eight months in the Ironwood program, the student left and began attending a college out of state (Tr. pp. 1765-66, 1783-84; Parent Ex. L at p. 1). Although he did not complete the program through Ironwood's graduation ceremony, the clinician testified that the student "was very successful in growing and changing and becoming much more ready to live a healthy life-style" (Tr. pp. 1766, 1781). The hearing record reflected that the student improved his ability to express his emotions, and articulate to the clinician what worked and what didn't work in therapy (Tr. pp. 1748, 1752). As stated above, the student experienced academic success during his enrollment at Ironwood and Laurel Springs (Parent Ex. H). The hearing record as a whole supports the finding that the student's therapeutic program at Ironwood allowed him to access the general education curriculum, facilitated by Ironwood teachers, with the accommodations pursuant to his IEP. Accordingly, I find that Ironwood provided appropriate counseling services to address the student's significant emotional needs, and that such a setting was necessary to enable the student to access the general education curriculum (see Walczak, 142 F.3d at 122, 129; Mrs. B., 103 F.3d at 1121-22).

While I note that the district argues that the impartial hearing officer failed to consider that Laurel Springs was not a special education program designed to meet his unique needs and was not integrally related to Ironwood's therapeutic program, in January 2010 the district determined that the student was no longer eligible to receive special education services as a student with a disability, and going forward only offered program modifications and testing accommodations as

declassification support services. As the district had the opportunity and obligation to evaluate the student, yet failed to do so, I am constrained to rely upon the evaluative data from Ironwood which, for the reasons stated above, amply supports the student's placement there was required due to social emotional needs and that the decline in his academic performance while at the district had been attributable to those needs.[32] In light of the foregoing, a review of the hearing record reflects that the parents met their burden of showing that Ironwood met the student's special education needs, and that he made progress in both his educational and therapeutic programs.

Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003];

[32] When consent to conduct new evaluations is unavailable, a CSE may nevertheless convene to review existing data (34 C.F.R. § 300.300[d][1][i]) and any information volunteered by the parent.

Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

The district argues that the equitable considerations do not support the parents' request for tuition reimbursement because they never sought a district placement subsequent to their unilateral placement of their son at Ironwood and did not provide the district with evaluative information from Ironwood. I disagree. The hearing record establishes that the parents cooperated with the district in developing the student's June 2009 IEP (Tr. pp. 89-90, 905-09; Joint Ex. 9 at p. 4). When the student's attendance, behaviors, and grades again became an area of concern for the parents in November 2009, they requested that the CSE convene to address their concern that the student "ha[d] not been accurately classified" and expressing their desire for further evaluations (Joint Ex. 11A). When the CSE convened in January 2010, the parents sought to have the student admitted to the GO program, in hopes that his expressed desire to attend would spur a turnaround in his behavior (Tr. pp. 933-39; Joint Exs. 8A; 12B at p. 3). It was only when the parents learned of the student's continuing decline that had their son forcibly escorted to Ironwood (Tr. pp. 973-75, 1539-41, 1791-92; Parent Exs. A at p. 1; B at p. 1).

After the student was removed to Ironwood, the parents continued to work together with the district to some extent, although they appeared less confident in the district's ability to meet the student's needs (Tr. pp. 112-13, 116-18, 759; see Joint Ex. 20 at p. 1). Nonetheless, the parents signed a release of information to allow the district to contact Ironwood to procure copies of any evaluations of the student that had been conducted (Joint Ex. 21 at p. 4).

While I find that equitable considerations support the parents' request for reimbursement for the reasons stated above, I also find that the parents indicated that they were no longer interested in having the district provide the student a FAPE by their August 2010 letter (Joint Ex. 22). I find that the parents' refusal of the district's request for consent to evaluate the student and their refusal of a public school placement alleviated the district of its obligation to evaluate the student and offer him a FAPE, by evidencing their intent not to return the student to a district placement (34 C.F.R. § 300.300[a][1], [3]; [c][1], [3]; see J.S. v. Scarsdale Union Free Sch. Dist., 2011 WL 5925309, at *32, *34 [S.D.N.Y. Nov. 18, 2011]). I also find that the district properly documented its attempts to obtain parental consent to the evaluations after the student was removed from the district (Joint Exs. 20-21, 23; see 8 NYCRR 200.4[a][8]). Accordingly, as the parents provided notice to the district of their unilateral placement of the student at Ironwood on April 30 (Joint Ex. 17), and the impartial hearing officer found that it was proper to reduce reimbursement for the student's Ironwood tuition for the parents' failure to provide notice as required by statute (IHO Decision at pp. 39-40), I find that the parents are entitled to reimbursement for the student's tuition costs at Ironwood for approximately three of the eight months the student attended Ironwood, in the amount of $25,125.[33]

Impartial Hearing Officer—Bias

Finally, addressing the district's allegations of bias on the part of the impartial hearing officer, it is well settled that an impartial hearing officer must be fair and impartial and must avoid

[33] It is merely coincidental that the amount of tuition reimbursement awarded is nearly the same amount sought 16 months earlier by the parents in the August 2010 letter offering to settle their claims with the district.

even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 11-074; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090), and must render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

After reviewing the entire hearing record, I find the impartial hearing officer's actions at the impartial hearing did not constitute of evidence bias. I find that the evidence does not support the district's contention that the impartial hearing officer was not impartial or acted in a manner that was inconsistent with the requirements of due process (34 C.F.R. § 300.510[b][2]; see Educ. Law § 4404[2]). I note that impartial hearing officers are specifically granted the authority "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3][vii]; see 8 NYCRR 200.5[j][3][xi][a]). While on occasion the impartial hearing officer became somewhat assertive in his questioning of district witnesses (Tr. pp. 284-92, 640, 669-74, 1355-57), I do not find the impartial hearing officer's questioning of district witnesses to be indicative of bias, and I note that the impartial hearing officer also challenged the father's testimony when he found it to be insufficiently precise (Tr. pp. 53-55). However, I remind the impartial hearing officer of his responsibility to limit the hearing to issues raised in the due process complaint notice and encourage the parties to narrow the number of issues that must be resolved through litigation rather than promote a litigious approach to resolution of disputes (see 8 NYCRR 200.5[j][1][ii]; [3][iii], [xi]).

Conclusion

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's determinations regarding issues not raised in the due process complaint notice, as detailed above, are annulled; and

IT IS FURTHER ORDERED that the impartial hearing officer's decision is annulled to the extent that it ordered the district to reimburse the parents for the student's tuition at Ironwood in the amount of $59,400; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the student's tuition at Ironwood in the amount of $25,125.

Dated: **Albany, New York**
December 5, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER