The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-162

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Katonah-Lewisboro School District

Appearances:
Law Office of Peter D. Hoffman PC, attorneys for petitioners, Jamie Mattice, Esq., of counsel

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, James P. Drohan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Grove School (Grove) for the 2012-13 school year and for the cost of tuition and services during the 2010-11 and 2011-12 school years. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student attended school in the district from September 2003 (kindergarten) through June 2011 (eighth grade) (Tr. pp. 125, 149; Dist. Ex. 5 at p. 1). From the beginning of the 2008-09 (sixth grade) school year through December 2011, the student received services from a private psychologist (Tr. pp. 876-77).[1] In November 2009, the psychologist administered the Gray Oral Reading Test to the student and recommended that the parent have the student referred for a full evaluation (Parent Ex. B).[2] Upon the

[1] The hearing record also indicates that the student received services from a different psychologist prior to the 2009-09 school year (Tr. pp. 777, 876-77).

[2] Although the evaluation was conducted in November 2009, the hearing record indicates that the psychologist did not provide a report to the parents until approximately one year later and the report was not provided to the district prior to an April 2010 meeting (Tr. pp. 794-96, 879-80; Parent Ex. B).

parent's request, the district performed its own reading assessment of the student in November 2009 (Tr. pp. 493-94, 532-33; Dist. Ex. 63).

For the 2011-12 school year (ninth grade), the parents enrolled the student in Soundview Preparatory School (Soundview), a general education private school located outside of the district (Parent Ex. N at pp. 1-3; see Tr. pp. 172, 328-29, 903). The student did not receive any special education services or supports at Soundview (Tr. p. 172).

The student began seeing a private psychiatrist in December 2011 (Tr. pp. 1270-71). In January 2012, the psychiatrist diagnosed the student as having a mood disorder, not otherwise specified (NOS), which was later changed to a diagnosis of Bipolar Disorder, Type II, as well as with a parent child relational problem (Dist. Ex. 66 at pp. 100, 155).[3] The psychiatrist reported that during the 2011-12 school year, the student experienced difficulties with regard to regulating her mood and behavior and completion of activities of daily living related to hygiene, and engaged in behaviors that resulted in a 24-hour emergency room visit, a suspension from Soundview, and loss of privileges at home (Parent Ex. I at pp. 1-2). The psychiatrist prescribed medication for the student and the student continued to participate in psychotherapy sessions with the private psychiatrist from December 2011 through September 7, 2012 (Tr. p. 1278; Dist. Exs. 5 at pp. 1, 7; 7 at p. 1; Dist. Ex. 66 at pp. 95-211).

In March 2012, the parents inquired about the CSE process, and were informed by the district's director of guidance and counseling that the student could only be referred to the CSE if the student was registered and attending school in the district (Tr. pp. 1097-99; Parent Ex. J). In a letter dated May 8, 2012, addressed to the CSE chairperson, the parents requested an "emergency CSE evaluation" for the student (Dist. Ex. 12).[4] The parents also informed the district that the student was diagnosed with a bipolar disorder in December 2011 and was following a treatment plan (id.). The letter alerted the district that the student would not return to Soundview because the parents felt the school was not capable of providing the academic support the student needed (id.). The letter indicated the parents were requesting an evaluation to prepare for the 2012-13 school year (id.).

[3] District Exhibit 66 was originally entered into evidence as a 32-page document consisting of the parent's journal excerpted from a larger document produced by the student's psychiatrist (Tr. pp. 870-71). The parties had originally attempted to submit the entire document into evidence during the second day of the impartial hearing, but were directed by the IHO to remove the portions of the file that were not relevant (Tr. pp. 59-60). Upon agreement, the parties replaced the original Exhibit with a redacted version of the larger 381-page file, consisting of the psychiatrist's file less insurance billings (Tr. p. 876, 1270). However, upon entering Exhibit 66 into the record in its current form, neither the IHO nor the parties renumbered the exhibit and it retained the original page numberings out of 381 pages (Dist. Ex. 66). In addition, the parties attached a three page unnumbered cover letter to the front of the exhibit with the next page being numbered 9 out of 381 (Tr. p. 876; Dist. Ex. 66 pp. 1-3; 9). As this creates difficulty with numbering, references to Exhibit 66 herein will be to the identified page number out of 381, with the first three-pages being referenced as pages one, two, and three. In the future, it would be a better practice for the parties to separate exhibits into their constituent parts and for those exhibits to be numbered in accordance with the number of pages submitted into evidence.

[4] Although the person identified as the CSE chairperson in the parent's May 8, 2012 letter had previously been employed in the district as a CSE chairperson, documentary evidence indicates that at the time of her correspondence with the parents she was the district's special education supervisor, and she will be referred to hereafter as the special education supervisor (Tr. p. 610-11; Dist. Ex. 12; Parent Ex. Q).

The district's special education supervisor responded in a May 18, 2012 e-mail to which was attached the necessary paperwork regarding the student's referral (Parent Ex. Q at p. 1). The special education supervisor advised the parents that a classroom observation of the student was a required component of the initial evaluation process, and inquired as to when the student would be finishing school at Soundview (id.). The parents responded the same day, attaching a signed copy of the parents' consent to evaluate and indicating the parents would inquire about the student's schedule for the remainder of the year (id.; Dist. Ex. 13).

The district initiated the evaluation process and conducted a May 24, 2012 social history, a May 29, 2012 classroom observation at Soundview, a May 30, 2012 educational evaluation, and a June 2012 psychological evaluation (Dist. Exs. 5-8). A CSE convened on July 11, 2012 to determine the student's initial eligibility for special education and related services (Dist. Ex. 1 at p. 1). Participants at the July 2012 CSE meeting included the CSE chairperson, a school psychologist, a special education teacher, a general education teacher, the student's parents, and the student's psychiatrist (id.). Finding the student eligible for special education as a student with an emotional disturbance, the July 2012 CSE recommended the student be placed in an 8:1+1 special class in the "home public school district" commencing on September 5, 2012 with related services of two individual counseling sessions per week (id. at pp. 1, 10, 13).[5] The July 2012 CSE also recommended a weekly psychiatric consult in the classroom for the team and home as a support for school personnel on behalf of the student, provided program modifications and accommodations, and developed a coordinated set of transition activities to facilitate the student's movement from school to post-school activities (id. at pp. 10-12). In addition, the July 2012 IEP indicated the CSE was "searching for a therapeutic day program" for the student (id. at p. 13). In furtherance of this search, the parents provided consent to send referral packets to therapeutic day programs and the CSE indicated that the CSE chairperson would send referral packets to therapeutic day programs (id. at p. 2; see Parent Ex. R; Dist. Ex. 17). The comments section of the summary attached to the July 2012 IEP also indicated that the CSE would contact a BOCES home program to inquire about in-home services to address the parents' concerns about the student's refusal to get out of bed and go to school (Dist. Ex. 1 at p. 2).[6]

The district provided the parents with prior written notice dated July 11, 2012 specific to the CSE determination that the student was eligible to receive special education and related services as a student with a disability (Dist. Ex. 18). By mid-July 2012, the district sent referral packets out to several State-approved day programs in an effort to find an appropriate therapeutic support program for the student (Dist. Ex. 56 at pp. 2-5; see Dist. Ex. 55 at pp. 1-2).

The parents and the CSE chairperson met on July 27, 2012 to discuss the July 2012 IEP and specific concerns the parents had regarding the placement and comments sections of the student information summary attached to the IEP (Tr. pp. 289-90, 301-02, 1105-06; Dist. Ex. 36 at p. 1-2). Also

[5] The student's eligibility for special education programs and related services for the 2012-13 school year as a student with an emotional disturbance is not in dispute (34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]; see Tr. p. 179; Dist. Exs. 1 at p. 1; 3 at p. 1).

[6] Although not defined in the hearing record, BOCES stands for "Board of Cooperative Educational Services" (Educ. Law § 1950).

on July 27, 2012, the district sent a letter to the parents, notifying them that the board of education had reviewed and approved the recommendations made by the July 2012 CSE (Dist. Ex. 2).

Grove informed the parents that the student was accepted to Grove for the 2012-13 school year by letter dated August 2, 2012 (Parent Ex. T). The parents counter-signed the letter acknowledging their understanding of the tuition and terms of acceptance on August 28, 2012 (id.).

The relevant BOCES program notified the district by letter dated August 15, 2012 that the student was accepted to a Therapeutic Support Program-Fragile (TSP-F) located at a public high school and that such program would be a suitable and appropriate special education program for her (Dist. Ex. 58 at p. 1). The acceptance letter indicated the program's decision to accept the student was based on its review of the July 2012 IEP, supporting documentation, and an intake and observation of the student conducted by its school psychologist on August 14, 2012 (id.).[7]

In an August 21, 2012 letter to the district's director of special services, the parents expressed their concerns regarding the July 2012 IEP and prior written notice (Dist. Ex. 36 at pp. 1-2). The parents informed the district that although they rejected the July 2012 IEP, they would continue to cooperate in the placement process (id. at p. 2). The parents described their visits to a number of the day school programs recommended by the district (id. at pp. 2-3). The parents also indicated that in addition to "working through the placement process," they continued to pursue residential school program options on their own and had received acceptance for the student at Grove, where she would attend school beginning September 10, 2012 (id. at p. 3). They parents explained that they were convinced a residential program was the only appropriate option to meet the student's needs (id.). The parents further advised the district that they would continue to cooperate with the CSE in the special education process and requested to know for when the next CSE meeting would be scheduled (id.).

The CSE reconvened on August 28, 2012 for the student's program review, to review responses from the day placements to which the CSE referred the student (Dist. Ex. 3 at p. 1; Parent Ex. GG).[8] CSE participants were the same as those who attended the July 2012 CSE meeting, except the parents and the district each had counsel present and the student's psychiatrist did not attend (compare Dist. Exs. 1 at p. 1, with Dist. Ex. 3 at p. 1). The August 2012 CSE recommended placement in an 8:1+1 BOCES class located in a public school with counseling as a related service (Dist. Ex. 3 at pp. 1, 11, 14).[9] The August 2012 CSE also specified that the student receive before and after school intervention services (BASIS) at home throughout the school year to develop strategies and address the student's unwillingness to get up and ready for school (id. at pp. 2, 11). All other recommendations specific to goals, supplementary aids and services, supports for school personnel, testing and test accommodations, a coordinated set of transition activities, a consultant psychiatrist, and transportation remained the same as those recommended

[7] The hearing record reflects that several of the programs to which the district sent application packets did not accept the student (Dist. Exs. 39; 57 at pp. 1, 3).

[8] I concur with the IHO that the audio recording of the August 28, 2012 CSE meeting is consistent with the account of the meeting described in the August 28, 2012 IEP (IHO Dec. at p. 31; compare Dist. Ex. 3, with Parent Ex. GG).

[9] The August 2012 CSE maintained the same frequency of counseling from the July 2012 IEP, but changed the recommended delivery of the service from two individual sessions per week to one individual session and one session in a group of five (compare Dist. Ex. 1 at pp. 1, 10, with Dist. Ex. 3 at pp. 1, 11).

by the July 2012 CSE (compare Dist. Ex. 1 at pp. 6-13, with Dist. Ex. 3 at pp. 9-14). In addition, the comments in the student information summary attached to the August 2012 IEP indicate that the CSE discussed how a functional behavioral assessment (FBA) and behavioral intervention plan (BIP) are developed and recommended an FBA and BIP to address the student's compliance with getting up and ready for school and staying in school (Dist. Ex. 3 at p. 2).[10] The comments also include a recommendation for staffing for the first ten weeks of the 2012-23 school year to ensure the student did not have unsupervised time during the school day, including supervised lunch and an escort to and from the bus (id. at p. 3). The comments indicated the CSE would reconvene after the first ten weeks of school (or before upon parental request) to review the student's program (id.). The IEP indicated that the parents disagreed with the CSE's recommendation and continued to believe a residential program was necessary to meet their family's needs (id.).[11]

The district provided the parents with prior written notice dated August 28, 2012 indicating that the CSE, with the exception of the parents, agreed that the student's needs could be met by the BOCES TSP-F day program, supported by BASIS (Dist. Ex. 21 at p. 1). The notice documented that the parents were going to visit one more out-of-district program that week, whereby the CSE would reconvene to consider that option, pending parental feedback (id.).

In the weeks following the August 2012 CSE meeting, the parents and the CSE chairperson exchanged a number of e-mails (Parent Ex. U). The e-mail exchange reflects that the district provided the parent with a copy of the student's August 2012 IEP within three days of the CSE meeting (id. at p. 8). Within the e-mail exchange, the parent indicated that their visit to the Clear View School (Clear View) was "fine" and that the school was "a day treatment program for mental illness first and an academic program second" (id. at pp. 6-7 [emphasis in original]). The parents indicated that they remained concerned about the likelihood of the student attending the program on a regular basis and whether the program would have "a comprehensive, integrated approach for addressing [the student's] before school, during school, and after school needs" (id. at p. 6). The parents also notified the district that they had not yet heard from the BASIS program, and felt that they needed to do so before proceeding with the next CSE meeting (id.). On September 5, 2012, the CSE chairperson e-mailed the parent, indicating she was unable to connect with anyone from the BASIS program (id. at p. 5). However, she contacted another provider for students with behavioral needs, Vital Behavior Services (VBS), which indicated that it could meet the student's needs, and gave the parent contact information for the director of VBS (id.). The CSE chairperson further indicated that although Clear View wanted to conduct a second interview with the parents before accepting the student, their representative felt Clear View was a good match for the student and the parents (id.). The CSE chairperson inquired if the parent was willing to have a CSE meeting at the end of the week (id.).

Also on September 5, 2012, the parents reminded the CSE chairperson that the student would begin at Grove on September 10, 2012 (Parent Ex. U at p. 4). The parents also indicated that they would contact

[10] The comments also indicate that the August 2012 CSE recommended one 30-minute session of parent counseling and training per month; however, it is not included in the description of the recommended special education programs and related services (Dist. Ex. 3 at pp. 1, 2, 11).

[11] Although the parents disagreed with the recommendation for a therapeutic day program, the parents agreed to consider the Clear View School—another therapeutic day program—and to reconvene the CSE after completing the referral process (Dist. Ex. 3 at p. 2; Parent Ex. GG).

VBS and possibly BASIS, and that depending on the outcome of those discussions, the parents would determine if they would follow-up with Clear View (id. at pp. 4-5).

In a September 6, 2012 e-mail to the parent, the CSE chairperson responded that she had hoped the parent would try the CSE recommended placement before placing the student privately (Parent Ex. U at p. 4). Later that day, the parents replied indicating that they did not believe the district had offered an appropriate program to meet the student's needs, particularly due to the lack of clarity about the BASIS and VBS programs (id. at p. 3).

In a September 7, 2012 e-mail to the CSE chairperson, the parents indicated that they had been in contact with the BASIS program and VBS (Parent Ex. U at p. 3). The parents requested clarification regarding whether the CSE intended to substitute Clear View for the BOCES TSP-F program on the student's IEP and indicated that if so, the parents were willing to have a CSE meeting the following week in order to secure a formal placement offer from the district (id.). In a September 11, 2012 e-mail, the CSE chairperson indicated that at the close of the August 2012 CSE meeting, the CSE recommended the BOCES TSP-F program as an appropriate placement to meet the student's needs but that the CSE was willing to consider Clear View in light of the parents' concerns that the student required "a more restrictive, therapeutic program" (Parent Ex. U at p. 2). The CSE chairperson further indicated that the CSE could not consider Clear View as an option until the parents complied with Clear View's intake process and Clear View had made a determination of whether its program was appropriate to meet the student's needs (id.).

In an October 1, 2012 letter to the CSE chairperson, the parents explained that they rejected the program recommended in the August 2012 IEP, that they would reject the program even if the BOCES TSP-F program were replaced with Clear View, that the parents believed "a residential therapeutic school is the appropriate option to meet [the student's] needs," and that the parents placed the student at Grove and were seeking reimbursement for Grove from the district (Dist. Ex. 37). The parents concluded the letter by asking when the next CSE meeting would be scheduled, where they could discuss their intent to commence an impartial hearing (id.). The district responded by e-mail on October 12, 2012 indicating that the district believed it recommended an appropriate program and would reconvene the CSE if the parents had new information that they wished to be considered (Parent Ex. U at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated December 10, 2012, the parents alleged that the district failed to offer the student a FAPE for the 2008-09, 2009-10, 2010-11, 2011-12, and 2012-13 school years (IHO Ex. 4 at pp. 9-27). In addition, the parents asserted that going back as far as the 2006-07 school year, the district should have referred the student to the CSE to conduct an initial evaluation (id. at pp. 8-19).[12] The parents asserted that the district failed to comply with its child find obligations and did not fully evaluate the student until May 2012 (id. at pp. 19-20). Specifically, the parents asserted that

[12] Although the parents alleged that the district should have referred the student to the CSE for evaluations during the 2006-07 and 2007-08 school years, the parents did not specifically allege that the district failed to offer the student a FAPE for those school years (IHO Ex. 4 at pp. 8-9). The parents also asserted that the district did not develop a 504 plan for the 2006-07 through 2012-13 school years (id. at pp. 8-27). In addition, although the parents asserted that the student was denied a FAPE for the 2008-09 through 2012-13 school years, the parents only requested relief with respect to the 2010-11, 2011-12, and 2012-13 school years (id. at p. 30).

beginning in the 2006-07 school year, the district was aware of the student's "low self-esteem and anxiety," and that starting with the 2007-08 school year the student exhibited academic difficulties including a drastic decline in grades and a failure to complete homework assignments (id. at pp. 8-9). The parents alleged that although the student performed well in the beginning of the 2008-09 school year, her grades declined gradually (id. at p. 9). The parents asserted that during the 2009-10 school year, the district ignored multiple requests from the parents to have the student evaluated (id. at pp. 12-14). In particular, the parents asserted that they requested that the student be evaluated at a December 1, 2009 parent-teacher conference and at a second conference on April 8, 2010 (id. at p. 12). The parents also asserted that the district should have conducted an FBA and implemented a BIP during the 2009-10 school year due to the student's executive functioning deficits (id. at p. 13). During the 2010-11 school year, the parents alleged that although the district conducted a reading assessment of the student, the district failed to conduct a full evaluation (id.at p. 15). The parents also alleged that the student's psychologist wrote a letter to the district in November 2010 requesting a full evaluation of the student (id.). The parents asserted that beginning in the 2011-12 school year they placed the student at Soundview due to the district's "inaction" and their belief the student needed smaller class sizes and more individualized attention (id. at pp. 16-17). The parents alleged that the student's academic and behavioral performance declined at Soundview beginning in November 2011 and that even after the student was diagnosed with and began taking medication for Bipolar Disorder, Type II, the student's behavioral problems continued (id. at pp. 17-18). The parents further asserted that they again requested an evaluation of the student in March 2012 and May 2012 but were told that the student would not be evaluated until he was reenrolled in the district public schools (id. at p. 19).

Regarding the 2012-13 school year, the parents asserted that the district's proposed placement of the student in a therapeutic day school was insufficiently supportive as the student required a residential placement (IHO Ex. 4 at pp. 20-27). The parents also alleged that the July 2012 IEP and subsequent prior written notice inaccurately indicated the CSE considered and rejected a residential placement (id. at pp. 23-24). They alleged that the July 2012 IEP did not identify the recommendation for a residential placement made by the student's psychiatrist and did not reflect the parent's concerns about the student's academic and behavioral issues prior to the 2011-12 school year (id.). The parents also objected to the change in counseling services from the July 2012 IEP to the August 2012 IEP, asserting that a change in one of the counseling sessions from individual to group was not appropriate and was not discussed with the parents (id. at pp. 26-27).

In addition, the parents asserted that the district failed to locate a placement that could address the student's needs related to school attendance and academic progress, and indicated that the student required a placement with a "highly structured environment" and "a high level of supervision" during and after school (IHO Ex. 4 at p. 25). The parents asserted that the BASIS and VBS programs recommended by the district would have been inappropriate because they would have required transitions from home to school and back to home (id.). The parents also asserted that they were unable to make a determination as to the appropriateness of those programs because the district did not provide them with any information about the programs until after the 2012-13 school year had already begun (id. at pp. 25-26).

The parents further alleged that their placement of the student at Grove for the 2012-13 school year was appropriate and that equitable considerations weighed in the parents' favor (IHO Ex. 4 at pp. 27-30). As relief the parents requested a determination that the IEP for the 2012-13 school year was not appropriate, reimbursement for the district's failure to provide the student with an appropriate education during the 2010-11 and 2011-12 school years as compensatory education, and reimbursement for tuition

and costs—including clinical costs, room and board, and transportation—for the student's attendance at Grove for the 2012-13 school year (id. at p. 30).

The district responded to the parents' due process complaint notice explaining the reasons the district did not accede to the parents' request, the other options considered, the evaluations considered by the district, and the factors relevant to the district's determination (IHO Ex. 5). In particular, the district asserted that it did not violate its child find obligations, that there was no reason to suspect that the student had a disability while attending school in the district, that the program offered in the August 28, 2012 IEP was appropriate and in the least restrictive environment for the student, that Grove was not an appropriate placement, and that the parents did not notify the district of their unilateral placement of the student at Soundview for the 2011-12 school year and did not provide the district with an opportunity to develop an appropriate IEP for the student for the 2012-13 school year (id. at pp. 1-2).

B. Impartial Hearing Officer Decision

The IHO held a prehearing conference via telephone on January 30, 2013, during which the parties discussed the relief requested by the plaintiffs, the scheduling of the impartial hearing and selection of witnesses, and the submission of papers on the parents' motion to strike a portion of the district's response to the due process complaint notice (IHO Ex. 1). After receiving letter briefs from the parties, the IHO issued an interim decision finding that the district's response to the parents' due process complaint notice was sufficient (IHO Exs. 3; 6; 7). Nevertheless, the IHO ordered the district to provide clarification regarding a portion of its response, the parents to specify the specific compensatory education they were seeking, the parties to disclose all documents five-days prior to the next scheduled hearing date, and, if practicable, the parties to enter into a stipulation of facts and a stipulation to agreed-upon exhibits (IHO Ex. 3 at p. 4).[13]

An impartial hearing was convened on March 27, 2013 and concluded on May 31, 2013 after eleven days of hearings (Tr. pp. 1-1502). In a 58-page decision dated July 23, 2013, the IHO, after thoroughly restating the evidence and testimony presented during the hearing, denied the parents' request for compensatory education for the 2010-11 and 2011-12 school years and found that the district offered the student a FAPE for the 2012-13 school year (IHO Decision).

Initially, the IHO denied the parents' claims for compensatory education (IHO Decision at pp. 40-45). The IHO found that the parents could not request relief for the time period prior to December 10, 2010—two years prior to the filing of the due process complaint notice (id. at p. 40). Specifically, the IHO determined that events occurring more than two years prior to the filing of the due process complaint notice—including December 2009 and June 2010 requests by the parents that the district evaluate the student—did not give rise to a claim for compensatory education (id. at p. 43). The IHO then found that the parents made a written request for an evaluation on December 20, 2010 (id.). Although the IHO determined that the district should have evaluated the student in response to the parents' request during

[13] During the first hearing date, counsel for the parents attempted to clarify the parents' position regarding compensatory education and explained the parents were seeking compensatory services for the 2010-11 and 2011-12 school years to make up "for the services [the student] should have received," including psychiatric and psychological services, counseling services, behavioral services, "accessorial [and] supplementary type services" to complement the residential portion of the student's attendance at Grove for the 2012-13 school year, along with reimbursement for services the parents paid for during the 2010-11 and 2011-12 school years, including some of the costs, other than tuition, of the student's attendance at Soundview (Tr. pp. 6-14).

the 2010-11 school year, the IHO found that the district's failure to evaluate the student did not support an award of compensatory education because the hearing record did not indicate that the student was eligible for special education because "her condition did not adversely impact her performance to the extent that she required special services and programs" and the student made progress (id. at pp. 44). For the 2011-12 school year, the IHO determined that the district, as the district of residence, was no longer responsible for child find because the parent placed the student in Soundview, an out-of-district nonpublic school, for the 2011-12 school year (id. at p. 45). The IHO also found that the district should have evaluated the student when the parents requested the district do so in March 2012; however, because the parents were seeking a placement for the 2012-13 school year and an IEP was developed prior to the beginning of the school year, the IHO found that the delay in commencing the evaluation process until May 2012 did not result in a deprivation of educational benefits (id.).

The IHO determined that the August 2012 IEP was appropriate to provide the student with a FAPE for the 2012-13 school year (IHO Decision at pp. 46-51). Initially, the IHO determined that the parents' only procedural challenge to the August 2012 IEP, other than the timeliness of evaluations, was the CSE's failure to conduct an FBA and develop a BIP (id. at pp. 46-47). The IHO found that the CSE's failure to develop a BIP did not rise to the level of a denial of FAPE as the student's behaviors were addressed in the IEP goals, in the recommendation for the school to conduct an FBA, and in the recommendation for the BASIS program (id.at p. 47). The IHO also found that the recommended program provided the student with a FAPE in the LRE (id. at pp. 48-49). Specifically, the IHO found that the CSE reasonably determined that the goals included in the August 2012 IEP could be implemented in a therapeutic day program supplemented by a BIP and the BASIS program (id. 48). The IHO rejected the parents' argument that the student required a residential placement, finding that there was no evidence to indicate the student's conduct outside the school day impeded the student's ability to make progress in a day program (id. at p. 49). In addition, the IHO determined that family therapy was not an area of need that the district needed to address and that, in any event, parent training and counseling was included in the IEP (id.). The IHO found that that the student did not require more than the weekly psychiatric sessions provided for in the IEP and that the IEP met the parents' concerns about the student's safety (id. at pp. 49-50).

The IHO also found that the BOCES program recommended by the district was prepared to and capable of implementing the IEP at the start of the school year (IHO Decision at pp. 49-51). The IHO rejected the parents' concern that they were not able to meet with BASIS prior to the start of the school year, finding that BASIS had the student on its caseload for the start of the year and that the district arranged for VBS as an alternative (id. at p. 49, 50). In addition, the IHO found that the parents prevented the district from offering Clear View as a possible option by failing to complete the intake process (IHO Decision at pp. 50-51).

The IHO denied the parents' request for compensatory education for the 2010-11 and 2011-12 school years and denied the parents' request for reimbursement for the cost of the student's placement at Grove for the 2012-13 school year (IHO Decision at p. 51).

IV. Appeal for State-Level Review

The parents appeal the IHO's July 23, 2013 decision. The parents request reversal of the IHO's findings with respect to the parents' claims for compensatory education for both the 2010-11 and 2011-12 school years. The parents contend that the district's failure to initiate an evaluation of the student upon the parents' multiple requests, and to provide the parents with procedural safeguards notices, constituted

procedural violations which prevented the parent's from participating in the development of an IEP for the student and deprived the student of educational benefits. Regarding the 2010-11 school year, the parents allege that the IHO erred in finding that the student's condition did not adversely impact her performance to the extent that she required special services or programs and in finding that she would not have been classified if evaluated. In particular, the parents assert that the IHO relied too heavily on the student's grades and that the IHO's finding was not based on facts within the hearing record. Regarding the 2011-12 school year, the parents assert that the IHO erred in finding that the district of location, rather than the district of residence, was responsible for child find activities. The parents also assert that the IHO erred in finding the district's delay in commencing evaluations did not cause a deprivation of educational benefits. The parents assert that the delay was ongoing from the prior school year and contributed to the parents' placement of the student at Soundview. The parents also assert that the delay prevented the parents from observing recommended placements, including BASIS, while school was in session during the 2011-12 school year.

The parents next allege that the IHO erred in in finding that the district offered the student a FAPE for the 2012-13 school year. The parents contend that the IHO erred in determining the lack of an FBA and BIP were the parents' only procedural complaint and that the lack of an FBA and BIP did not rise to the level of a denial of FAPE. The parents also assert that the student required a therapeutic boarding school rather than a day program and that the CSE did not have a reasonable basis to depart from the recommendation for a therapeutic boarding school made by the student's psychiatrist. The parents allege that the counseling services offered in the August 2012 IEP were insufficient because they were changed from two individual sessions in the July 2012 IEP to one individual session and one group session. The parents further assert that the student's needs relating to transitioning to and from school could not be met by the BASIS program, and that the parents were not provided an opportunity to observe the BASIS program and assess its appropriateness prior to the start of the school year. In addition, the parents assert that the BOCES program was not capable of implementing the August 2012 IEP because the school had a psychiatrist who provided consultation services only once every six weeks rather than the weekly consultation called for in the IEP, there were too many social/emotional goals for the school to track, and the school did not offer family therapy.

The parents allege that Grove was an appropriate placement for the student for the 2012-13 school year and that equitable considerations weigh in the parents' favor. For the 2012-13 school year, the parents request reimbursement for the cost of the student's tuition at Grove.

The district answers, denying the substance of the allegations contained in the parents' petition and asserting that the IHO was correct in finding that the district did not violate its child find obligations and that that the district offered the student a FAPE for the 2012-13 school year. As an alternative, the district alleges that the parents did not meet their burden of establishing that Grove was an appropriate placement for the student's 2012-13 school year and that equitable considerations should weigh against granting the parents relief because they decided to place the student at Grove prior to the July 2012 CSE meeting.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20

U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; 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 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114;

Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the '"academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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).

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

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

VI. Discussion

A. Scope of Review—Finality of Unappealed Determinations

Neither party has appealed the IHO's determination that the allegations contained in the due process complaint notice relating to events prior to December 10, 2010, including the December 2009 parent/teacher conference and the parents' June 2010 request for information about the evaluation process, are outside the two-year statute of limitations (IHO Decision at pp. 40-43). The parents do assert that the IHO erred "in that she did not determine that [the parents] properly requested an evaluation from [the district] at the December 2009 meeting" (Pet. ¶ 58). However, upon review of the IHO's decision, the IHO found that the parent did make a request for an evaluation at the December 2009 meeting, but

determined it was outside of the two-year statute of limitations period (IHO Decision at p. 43). The parents do not contest the IHO's findings regarding the statute of limitations period on appeal, nor do they assert that either of the exceptions to the statute of limitations should apply (see 20 U.S.C. § 1415[f][3][D]; Educ. Law § 4404[1][d]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). Accordingly, the IHO's determination that the parents' claims regarding events occurring prior to December 10, 2010 are outside of the limitations period and do not give rise to a claim for compensatory education has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Child Find and Parental Referral

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

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] ["School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction."]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services

and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]).

Separate from a district's child find obligations, upon written request by a student's parent, subject to State regulations governing the format of such a request, a district must initiate an individual evaluation of a student (see Educ. Law §4401-a[1], [3]; 8 NYCRR 200.4[a][1][i], [a][2][ii]-[iv], [b]; see also 20 U.S.C. 1414[a][1][B]; 34 CFR 300.301[b]).

1. 2010-11 School Year

Initially, the hearing record supports the IHO's determination that the parents' first request for an initial evaluation of the student within two years prior to the filing of the due process complaint notice occurred on December 20, 2010 (IHO Decision at pp. 43-44).[14] The parents sent an e-mail to the student's teacher and guidance counselor indicating that they had discussed having the student evaluated through the CSE and "are going to request that process to begin now" (Parent Ex. JJ at p. 3).[15] In response the guidance counselor provided the parents with the name of the director of special services and advised the parents to think about how the student might benefit from being classified before putting her "through a lot of testing" (id.). The student's mother testified that she never contacted the director of special services because she was discouraged by the response from the student's guidance counselor (Tr. pp. 815-16). The mother explained that she felt the student was having significant problems and she felt frustrated that she had asked for help many times and the district was not helping (id.).[16] Under these circumstances, the IHO properly found that the parent's December 20, 2010 e-mail constituted a request for an evaluation and the district was obligated to initiate the evaluation process at that time (see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377 at *7-*8 [S.D.N.Y. Feb. 4, 2013]; J.S., 826 F. Supp. 2d at 664).

2. 2011-12 School Year

Having found that the district was obligated to evaluate the student after the parent's December 20, 2010 request, the IHO erred in determining that the district was not obligated to evaluate the student during the 2011-12 school year because the parent removed the student from the district and placed her in an out-of-district nonpublic school. Although the district of location (the district in which Soundview, where the student was unilaterally placed by the parents, was located) is responsible for child find obligations and responsibilities, the district of residence retains the obligation to offer the student a FAPE and to evaluate the student upon a parent's request (see Scarsdale, 2013 WL 563377, at *7-*8; see also Bd. of Educ. v. Risen, 2013 WL 3224439, at *12-*14 [N.D. Ill. June 25, 2013]; Moorestown Tp. Bd. of Educ. v. S.D.,

[14] As the district's obligation to start the process for an initial evaluation began with the parent's request on December 20, 2010, a detailed analysis of the district's child find obligations during the ten days between the parent's request and the start of the limitations period on December 10, 2010 would not provide any meaningful insight into the matter.

[15] The student's mother testified that she forwarded a letter dated November 9, 2010 from the student's psychologist recommending a full evaluation through the CSE team to the district guidance counselor (Tr. p. 796, 892-94, 1021; Parent Ex. G). However, the guidance counselor testified that she had no recollection of the letter (Tr. p. 501).

[16] The hearing record indicates that the parent had previously raised the issue of having the student evaluated in November 2009 and June 2010 (Tr. pp. 789-90; Parent Exs. C at p. 3; D; AAA). In addition, the hearing record indicates that the student had previously been referred for a child study team meeting in December 2009, which would have discussed further steps such as assessments; however, the hearing record contains no indication that the meeting ever took place (Tr. pp. 731-34, 743, 1139; Parent Ex. C at p. 4).

2011 WL 4345433, at *9-*10 [D.N.J. Sept. 15, 2011]). In addition, while it is not a best practice, a parent may request an evaluation concurrently from both the district of residence and the district of location (Letter to Eig, 52 IDELR, 136 [OSEP 2009]; see Risen, 2013 WL 3224439, at *13-*14; J.S., 826 F. Supp. 2d at 665-66). As set forth above, the parents requested an evaluation of the student from the district in December 2010 (Parent Ex. JJ at p. 3). The parents' placement of the student at Soundview after the district failed to respond to the parents' request for an evaluation does not absolve the district of its obligations (R.C., 2013 WL 563377 at *7-*8; E.T., 2012 WL 5936537, at *11), and under the facts of this case the district remained obligated to evaluate the student during the 2011-12 school year.

3. Remedy

Despite the district's failures to initiate the evaluation process during the 2010-11 and 2011-12 school years, the hearing record supports the IHO's determination that the district's failure to conduct an initial evaluation prior to May 2012 was not a sufficient basis for granting the relief requested by the parents (IHO Decision at p. 44). During the hearing, the parents' attorney explained the parents' request for relief during the 2010-11 and 2011-12 school years as a request for reimbursement for services "that the parents paid for . . . that they wouldn't have had to pay for had the district provided [the student] with an appropriate education" (Tr. pp. 11-12). According to counsel for the parents, compensatory education should have included reimbursement for the student's private therapy and that while the student attended Soundview, "there [were] expenses that were attendant to that that are separate from tuition that had to do with special education that would have or could have been provided had the district provided an IEP" (Tr. pp. 13-14). However, the parents' attorney later stipulated that the student did not receive any special education services at Soundview (Tr. p. 172).

a. Soundview

The parents' request for reimbursement for certain non-tuition costs of the student's attendance at Soundview for the 2011-12 school year under the guise of compensatory education is an apparent attempt to avoid the standard that a unilateral placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370). In order to receive reimbursement for a private school placement, parents "bear the burden of demonstrating that their private placement was appropriate" by showing that the private school offered an educational program which met the student's special education needs (Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). 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). However, a private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 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]).

Although the parents submitted a letter, dated March 13, 2011, from the student's psychologist to Soundview indicating that the psychologist felt the student would benefit from being at Soundview due to a "smaller, more structured and nurturing milieu," nothing else in the hearing record indicates that Soundview was an appropriate placement for the student (Parent Ex. EE). In fact, the parents' attorney stipulated during the hearing that Soundview did not offer any special education services (Tr. p. 172).

Additionally, the student's psychiatrist testified that based on his conversations with the student and her parents, he believed that the staff at Soundview did not understand the difficulties associated with the student's disability and did not understand how to modify educational expectancies for the student (Tr. pp. 1340-41; Parent Ex. I at p. 2). The parents also reported that they did not believe Soundview had the academic or therapeutic supports that the student required to be successful (Dist. Exs. 5 at p. 1; 7 at p. 5).

In addition, the hearing record indicates that the student did not make progress at Soundview, and that her academics and attendance declined beginning in November 2011 (Tr. pp. 581, 586-87, 821-23; Parent Ex. MM). Although the student's first quarter grades in her academic classes at Soundview ranged from B to B+, during the fourth quarter the student's transcript indicates that she failed all of her academic classes (Dist. Ex. 11 at pp. 1-2). The student's final grades in her academic classes ranged from failing to C- (Dist. Ex. 11 at pp. 1-2; Parent Ex. S). The parents reported that the student did not complete any homework assignments at Soundview after February 2012 and did not pass a quiz or test after the beginning of the third quarter (Dist. Ex. 7 at pp. 4-5). The hearing record also indicates that the student's absences increased during the 2011-12 school year, with the student missing 21 days and arriving late at least 13 times from October 2011 through the end of the school year (Dist. Exs. 10 at p. 2; 66 at p. 303; Parent Ex. EEE at p. 1).[17] The parents testified that the student did "very poorly" at Soundview (Tr. pp. 836). They also indicated that they would not return the student to Soundview because it was not capable of providing the academic support that the student required (Dist. Ex. 12). Based on the above, the hearing record does not support an award of any of the costs associated with the student's attendance at Soundview for the 2011-12 school year.[18]

b. Compensatory Education

As compensatory education is available as an equitable remedy to make up for a denial of FAPE, consideration must be given as to how the parents' request for compensatory education might make up for the district's failure to evaluate the student upon the parents' request (see Newington, 546 F.3d at 122-23; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]).

The IDEA authorizes "appropriate" relief to be awarded for a denial of a FAPE, including compensatory education or additional services—specifically, the "replacement of educational services that the child should have received in the first place" (Reid, 401 F.3d at 518; accord Newington, 546 F.3d at 123). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded

[17] As a comparison, while the student was in the district during the sixth grade through the eighth grade she was absent for between three and seven days per year (Dist. Ex. 42). It is difficult to determine the exact number of absences the student accumulated while attending school in the district as the district logged absence by period rather than days (id.).

[18] Despite the parents' assertions that they would not have placed the student at Soundview but for the district's failure to comply with its obligations, to the extent the parents seek to punish the district for its failures with relief not related to the student's needs, as noted below neither monetary nor punitive damages are available as relief under the IDEA (Baldessarre v. Monroe-Woodbury Cent. Sch. Dist., 496 Fed. App'x 131, 133 [2d Cir. Sept. 14, 2012]; Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 247 [2d Cir. 2008]; Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 483-86 [2d Cir. 2002]).

to students who are eligible for continued instruction under the IDEA if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008]; see generally R.C. v. Bd of Educ., 2008 WL 9731053, at *12-13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see. e.g., Application of a Student with a Disability, Appeal No. 12-209; Application of the Dep't of Educ., Appeal No. 12-135).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid, 401 F.3d at 524 [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Puyallup, 31 F.3d at 1497). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]).

The IHO found, and I concur, that while the student was in the district during the 2010-11 school year, the student's disability—if she had been classified at that time—did not adversely impact her performance to the extent that she required special services and programs (IHO Decision at p. 44). The hearing record supports the IHO's determination, as the student continued to receive passing grades during the 2010-11 school year while in the district, and during the first half of the 2011-12 school year while at Soundview (Dist. Exs. 11; 43 at p. 3; Parent Ex. H). During the 2010-11 school year, the student also met the proficiency standard on State English language arts (ELA) and science assessments and met the basic standard on the State math assessment (Dist Exs. 44 at p. 5; 45 at p. 5; 46 at p. 1). While the student did exhibit difficulties in homework completion, testimony indicates that those difficulties were being addressed by the district with general education programs and services (Tr. pp. 465-66, 475, 483-85, 530, 546-47, 720, 734-35). For example, the student's ELA teacher invited the student for extra help sessions, both during and after school, for the 2010-11 school year (Tr. pp. 515-16; Dist. Ex. 61 at pp. 3, 5, 7, 8). The district also posted the student's homework assignments online so that the parents could check to

make sure the student was completing her homework and set up a system for the parents to receive weekly updates on the student's progress (Tr. pp. 736-38; 807-09; Dist. Ex. 61 at pp. 1, 4-5). The supports set up by the district were in line with the recommendations contained in the November 2009 private psychologist's report, in which the psychologist opined that the student would benefit from extra help sessions and regular assessments of her progress to ensure she was not falling too far behind (Parent Ex. B at p. 3). The psychologist also reported that based on her assessment of the student, she "did not qualify for school based intervention" (id.). As the evidence in the hearing record indicates that the student did not require special services and programs during the 2010-11 school year and the first half of the 2011-12 school year, an award of compensatory services would not be appropriate to remedy the district's failure to adequately fulfill its obligation to evaluate the student during that period (see Puyallup, 31 F.3d at 1497).

While the student received passing grades during the first half of the 2011-12 school year at Soundview, her academic performance fell off during the second half, as she did not complete any homework assignments after February 2012 and did not pass a quiz or test after the beginning of the third quarter (Dist. Exs. 7 at pp. 4-5; 11). In addition, the student was diagnosed as having a mood disorder, NOS, in January 2012, which was later updated to a diagnosis of Bipolar Disorder, Type II (Dist. Ex. 66 at pp. 100, 155). Consequently, it is likely that the student required special education services beginning in January 2012. Unfortunately, the hearing record is unclear as to what type of services would be appropriate to make up for any deficiency on the part of the school district to provide the student with a FAPE.

As compensatory education, the parent requested services for the 2010-11 and 2011-12 school years including "accessorial type services, supplementary type services" to supplement the residential portion of the student's attendance at Grove for the 2012-13 school year, along with reimbursement for services the parents paid for during the 2010-11 and 2011-12 school years (Tr. pp. 9-12). However, the parents have not requested an award of any specific services and there is no indication in the hearing record as to what might be an appropriate remedy for the district's failure to evaluate the student when first requested by the parents.[19, 20] In addition, to the extent that the parents are seeking reimbursement for the costs of services provided to the student as a claim for compensatory education, there is no evidence in the hearing record of the parents having obtained such services and it is well settled that monetary damages are not available in administrative hearings under the IDEA (Baldessarre v. Monroe-Woodbury Cent. Sch. Dist., 496 Fed. App'x 131, 133 [2d Cir. Sept. 14, 2012]; Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 247 [2d Cir. 2008]; Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir.

[19] Although counsel for the parents indicated that the billing for Grove would break down tuition from separate services such as counseling, psychological services, and behavior services (Tr. pp. 10-11), the only breakdown in the contract is between education, clinical, and residential services (Parent Ex. W at p. 1). In addition, the proof of payment submitted by the parents only indicate payments toward a monthly tuition bill and incidentals, which seems to refer to the student's laundry bill (Parent Ex. DD).

[20] It is possible that tutoring services or another form of academic help in support of the student's current program might have been an appropriate remedy at the time of the hearing as the student was completing some of the same core classes during the 2012-13 school year that she had failed to complete during the 2011-12 school year (Tr. p. 905; compare Dist Ex. 11 at p. 1, with Parent Ex. Y). However, there is no indication that the parents were seeking academic assistance for the student as compensatory education (Tr. pp. 8-14). Similarly, while the student was receiving psychiatric counseling services, the hearing record does not contain evidence that these services were required for educational, as opposed to medical, purposes.

2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; Application of a Student Suspected as Having a Disability, Appeal No. 12-014; Application of a Student with a Disability, Appeal No. 11-091; Application of a Child with a Disability, Appeal No. 05-039). Furthermore, there is no evidence in the hearing record that would support a finding that the services for which the parents seek reimbursement would constitute an appropriate remedy for the district's alleged failure to evaluate the student during the 2010-11 or 2011-12 school years.

C. 2012-13 School Year

1. Special Factors—Interfering Behaviors

The parents assert, contrary to the IHO's findings, that despite the district's knowledge of the student's interfering behaviors, the district failed to conduct an FBA or develop a BIP for the student, resulting in a failure to offer the student a FAPE. Although the August 2012 IEP indicated the student required strategies, including positive behavioral interventions, supports, and other strategies, to address behaviors that impeded the student's learning or that of others, the district did not conduct an FBA or develop a BIP (Dist. Ex. 3 at p. 8). However, under the circumstances herein, where the student's behaviors were properly addressed throughout the August 2012 IEP, the IHO correctly determined that the district's failure to conduct an FBA or develop a BIP did not rise to the level of a denial of FAPE.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 72-73 [2d Cir. 2014]; E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *14 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *9 [S.D.N.Y. Mar. 31, 2014]; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. October 21, 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations provide that "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating that necessary "behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, "[a] student's need for a [BIP] must be documented in the IEP"]).

In developing the student's IEP for the 2012-13 school year, the August 2012 CSE incorporated the evaluative documentation discussed at the time of the July 2012 CSE, including a May 2012 social history, a May 2012 classroom observation at Soundview, a May 2012 educational evaluation, a June 2012 psychological evaluation, along with written and verbal reports from the student's psychiatrist, and input from the parents (Dist. Exs. 1 at pp. 1-9; 3 at pp. 1-4, 7-8; 5; 6; 7; 8; 36 at pp. 1-2; Parent Exs. I; GG).

Specific to the student's behavior, the June 2012 psychological evaluation report indicated the student presented as "amiable' (Dist. Ex. 5 at p. 1).[21] The student willingly reported to the school psychologist's office for the evaluation, and engaged in social conversation and was friendly throughout the evaluation (id.). The student voiced general understanding about the reason for the psychological evaluation, and she presented as pleasant and cooperative during testing periods (id. at p. 1). The evaluator described the student as generally motivated to complete the evaluation and she attempted all presented tasks (id. at pp. 1, 7). Regarding the student's social/emotional functioning, the student's self-report suggested concerns within the domains of the student's attitude to school, attitude to teachers, atypicality, locus of control, social stress, anxiety, depression, sense of inadequacy, somatization, attention problems, hyperactivity, relationship with parents, and self-esteem (id. at pp. 6-8).[22] The August 2012 IEP included these concerns in a description of the student's present levels of performance regarding social development (Dist. Ex. 3 at p. 7). The August 2012 IEP indicated that the student's social development needs included understanding appropriate social behaviors, identifying self-coping strategies, avoiding self-injurious behaviors, and understanding and accepting consequences for her actions (id. at p. 8). In addition, the August 2012 IEP indicated that the student would not be able to participate in regular education programming due to her inability to regulate behaviors, such as non-compliance with adult directives, daily hygiene expectations, and attendance, and non-participation in the classroom (id.). The August 2012 IEP also indicated that the student required strategies to address her interfering behaviors including a BIP, noting that she had "a history of non-compliance with all academic demands during the 11/12 school year as well as adult demands at home," and the comments section of the IEP summary recommended an FBA and a BIP to address the student's "compliance with getting up and ready . . . for school as well as staying in school (Dist. Ex. 3 at pp. 2, 8).

While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). At the

[21] The June 2012 psychological evaluation report indicated that a cross-battery approach involving administration of the Wechsler Intelligence for Children-Fourth Edition (WISC-IV) and selected subtests of the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III) yielded a comprehensive, reliable, and valid picture of the student's true abilities (Dist. Ex. 5 at pp. 7-8). Analysis of cross-battery results indicated the student functioned overall within the average range of intelligence, with vulnerabilities in her ability to process information automatically, or recall information from acquired knowledge quickly and efficiently (id. at pp. 1-2, 7).

[22] The student's self-report of her social/emotional functioning was based on administration of the Basic Assessment Scale for Children, Second Edition (BASC-2) Self Report and an informal interview (Dist. Ex. 5 at pp. 6-8).

time the student was being evaluated, she was attending Soundview, and at the time of the testing the parents had made it clear that they would not be returning the student to Soundview for the 2012-13 school year (Dist. Exs. 5 at p. 1; 7 at p. 5; 12). The CSE chairperson testified that the August 2012 CSE discussed the student's need for an FBA and BIP, but indicated that the TSP-F program needed to wait for the student to enroll in the program in order to conduct an FBA (Tr. p. 193). In addition, the comments contained in the summary of the August 2012 IEP reflect CSE discussion of how an FBA and BIP are developed, and "the necessity for all persons involved, including [the] parents to be a part of the development as well as the delivery of the BIP" (Dist. Ex. 3 at p. 2).[23] As conducting an FBA to determine how the student's behavior related to the student's school environment at Soundview would have little value with regard to her subsequent placement elsewhere, it was not unreasonable for the CSE to indicate in the August 2012 IEP that an FBA would be conducted and a BIP developed after the student enrolled in the recommended program (see 8 NYCRR 200.1[r]; Cabouli, 2006 WL 3102463, at *3; J.C.S. v. Blind Brooke-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. August 5, 2013]). Under these circumstances, the district's decision to wait until the student began attending the BOCES TSP-F program prior to conducting an FBA and developing a BIP did not constitute a denial of FAPE.

In addition, even if an FBA were required prior to the student attending the recommended BOCES TSP-F program, the Second Circuit has explained that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F3d at 190). The failure to conduct an adequate FBA should be treated as a serious procedural violation "because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (id.). In this instance, while the district did not conduct an FBA or develop a BIP, the IHO properly concluded that the district's failure to conduct an FBA, under the circumstances herein, did not render the IEP deficient, as after careful examination the August 2012 IEP appropriately addressed the student's behaviors (A.C., 553 F.3d at 172-73; see C.F., 746 F.3d at 80).

Among other information, the August 2012 CSE incorporated the report offered by the student's psychiatrist during the July 2012 CSE (Dist. Exs. 1 at pp. 1-2; 3 at pp. 1, 3). According to the July 2012 and August 2012 IEPs, the student's psychiatrist reported that along with the student receiving a diagnosis of Bipolar Disorder, Type II, she experienced a significant amount of mood lability and irritability that manifested in temper tantrums, poor attention to activities of daily living, refusal to get out of bed and dress appropriately for weather conditions, and affected her ability to negotiate academic demands (Dist. Exs. 1 at p. 2; 3 at p. 3). The psychiatrist reported to the July 2012 CSE that the student was interpersonally volatile, that medications were at therapeutic levels at that time, and that he highly recommended a therapeutic supportive environment for her (Dist. Exs. 1 at p. 2; 3 at p. 3). The August 2012 IEP indicated the parents wanted the IEP to reflect that the student's psychiatrist recommended a residential educational placement to meet the student's needs (Dist. Ex. 3 at p. 2; see Dist. Ex. 36 at p. 2; Parent Ex. I). The IEP also reflected that the parents disagreed with the CSE's recommendation for a day program and believed a residential program was an appropriate placement for the student (Dist. Ex. 3 at p. 2). As discussed in more detail regarding the recommended BOCES TSP-F program, the CSE recommended BASIS to

[23] In response to the parent's expressed concerns during the August 2012 CSE meeting that due to the cycling nature of bipolar disorder, the student's behavior could be unpredictable from day-to-day, the TSP-F representative indicated the behavior plans at TSP-F were "fluid" (Parent Ex. GG). The TSP-F representative also responded to the parent's question about how the TSP-F program would hold the student accountable for homework completion, indicating that the program would work with the student individually (id.).

address the parent's concerns related to the student's school attendance and her ability to get to school on time (Tr. pp. 200-01, 698-99).

In addition, review of the August 2012 IEP reveals 13 goals that target specific aspects of the student's social, emotional, and behavioral needs (Dist. Ex. 3 at pp. 9-10). The August 2012 CSE also recommended two weekly counseling sessions and a weekly psychiatric consultation, as well as other supports and accommodations for the student, including additional time for classwork to address her difficulty with processing speed and use of a calculator (Dist. Ex. 3 at pp. 1, 11-14). The August 2012 IEP further indicates that the BOCES TSP-F psychologists would collaborate with the student's psychiatrist (Dist. Ex. 3 at p. 2).

During the August 2012 CSE meeting, the parents also expressed concerns about the student leaving the high school campus (Tr. p. 191). However, while the student had threatened to leave the Soundview campus, she had no history of acting on those threats by elopement or running away from home or school (Tr. pp. 192, 1005-06). During the August 2012 CSE meeting, the TSP-F representative told the committee the TSP-F program would address the parents' concern by providing supervision and support for the student to and from the bus, and at all times in the program in order to ensure the student's safety (Tr. pp. 189, 192; Parent Ex. GG). A recommendation included in the comments section of the August 2012 IEP indicated that for the first ten weeks of school the student would be supervised throughout the school day, including lunch and to and from the bus (Dist. Ex. 3 at p. 3).[24] In addition, the TSP-F representative told the August 2012 CSE that the TSP-F program did not have an open campus policy and its students were self-contained in a wing of the public high school, with a monitor at each end of the hallway who tracked students coming and going (Tr. pp. 189-90; Parent Ex. GG).

Based on the foregoing, I find that the district's failure to conduct an FBA or develop a BIP in this case does not support a finding that the district failed to offer the student a FAPE, particularly because the value of conducting an FBA at Soundview would have been limited to the student's functioning in that environment as opposed to in the recommended therapeutic day program, and the August 2012 CSE otherwise identified and addressed the student's behavioral needs (C.F., 746 F.3d at 80; Cabouli, 2006 WL 3102463, at *3).

2. August 2012 IEP

a. BOCES TSP-F and BASIS

The hearing record further supports the IHO's finding that the program recommended in the August 28, 2012 IEP, a therapeutic day program with the support of BASIS, was reasonably calculated to address the student's needs. The parents assert that the student required a residential placement and their attorney stipulated during the hearing that the only challenges to the August 2012 IEP were to the recommendation of a day program as opposed to a boarding school and the "behavior plans and/or behavior modifications" that went along with that type of program (Tr. pp. 1482-83).

[24] The August 2012 IEP indicated that after the initial ten weeks of the school year (or earlier upon parental request), the CSE would reconvene for a program review (Dist. Ex. 3 at p. 3).

A printout from the BOCES website described TSP-F as a program that "addresses the emotional and academic needs of fragile students in an environment that is small, structured and nurturing" (Dist. Ex. 59 at p. 4).[25] The description reflected that TSP-F provided services in accordance with each student's IEP and addressed students' emotional needs (id.). The description also indicated that each student is encouraged to make positive choices with their behavior in academic and social settings (id.). Individual and group counseling is offered per each student's IEP (id.). Other related services such as speech-language therapy, occupational therapy, and physical therapy are available depending on the IEP (id.). In regards to academics, the TSP-F program offers classes that adhere to State curriculum guidelines (id.). Classes are departmentalized with academic assignments appropriate to individual abilities (id.). The website intimates that a team of highly skilled teachers, psychologists, related service providers, other support staff, and administrators support each student's unique learning style and interests (id.). Using a team-based approach, weekly meetings assure continuity across the curriculum, grade levels, and behavioral goals (id.). Students prepare for and take all State assessments (id.). Consistent with this description, the representative of the TSP-F program explained during the August 2012 CSE meeting that the TSP-F program could implement the student's August 2012 IEP, how it would be able to support the student, and what a typical school day looked like (Parent Ex. GG).[26]

In order to address the parents' concerns regarding the student's school attendance and her ability to get to school on time, the August 2012 CSE recommended BASIS be provided to the student (Tr. pp. 200-01, 698-99). The district's director of special services explained that the district had used BASIS to help students with school avoidance behaviors get to school, that it would work in conjunction with the BOCES TSP-F program, and that an outline of the services was provided to the family (Tr. pp. 201, 311-14).[27] The parents were concerned that BASIS would not be appropriate and in particular expressed a concern that the student would become belligerent if a non-family member came to the house in the morning to get her ready for school (Tr. pp. 849-50; 982-85). The student's father also expressed concern that the program was individualized and did not have a formula that is "consistently applied and works in every case" (Tr. p. 984). Although I sympathize with the parents' concerns, the district is not required to a guarantee any particular level of success, but must show that its recommended program was "reasonably calculated to enable the child to receive educational benefits" as of the time it was offered to the student (Rowley, 458 U.S. at 206–07; see R.E., 694 F.3d at 187).

---

[25] The hearing record indicates that the parents' reviewed the description of the BOCES TSP-F program online prior to their intake interview with the school (Parent Exs. NN at p. 2; OO).

[26] The school day in the BOCES TSP-F program consisted of nine periods (Parent Ex. GG). According to the program representative, the only free time the student would have had was during lunch (Parent Ex. GG). However, the student's proposed IEP recommended an escort to and from a supervised lunch (Tr. p. 706; Dist. Ex. 3 at p. 2; Parent Ex. GG). The hearing record indicates the student would have been able to eat with other students in the cafeteria, a classroom, or the psychologist's office (Tr. pp. 679-80, 706; Parent Ex. GG). Lunch was also a time when the student could receive extra help with schoolwork as needed (Parent Ex. GG).

[27] The parents object to the recommendation for BASIS because they were not able to speak with someone from the program prior to September 6, 2012 (Parent Ex. U at pp. 3, 4). However, BASIS was described to the parent's during the August 2012 CSE meeting and the parents were provided an outline describing how BASIS works (Tr. p. 314, 849-50; Parent Ex. GG). The hearing record also indicates that the CSE chairperson authorized BASIS to start as of September 5, 2012 through June 21, 2013, five times per week, individually (Dist. Ex. 41 at p.1). In addition, the district responded to the parents' inability to get in touch with someone from BASIS by providing the parents with contact information for an alternative behavioral program (Parent Ex. U at pp. 3-5).

A document generated by BOCES described BASIS and indicated that the purpose of the program was to assist students and families before and after school hours (Dist. Ex. 41 at p. 2). BASIS offered home-based interventions including supports to assist students with daily living skills, safe transportation to and from school (i.e., getting on/off the bus, and management consultation during transport), direct behavioral intervention or consultation, and supports for students with difficulties attending school (i.e., home visits to facilitate the student getting on/off the bus), and customized services designed to address a student's individualized needs (id. at pp. 2-3).

Consistent with the aforementioned description of BASIS, testimony by the BOCES school psychologist indicated that with district authorization and parental approval, BASIS could provide "tailor-made" services for the student, before and after school hours (Tr. p. 672). In the student's case, BASIS would have a role in assessing goals that targeted the student's school attendance (Tr. p. 673). The school psychologist indicated BOCES could implement the services and goals included on the student's July 2012 and August 2012 IEPs (id.). He noted the BASIS program had a clinician whose "sole responsibility it is to orchestrate, administrate, monitor and do clinical interventions with the BASIS program" (Tr. p. 708).

Based on the above and taking into consideration the parent's concerns regarding the student's school avoidance and other possible at risk behaviors, the evidence supports a finding that the August 2012 CSE's recommendation for an 8:1+1 special class in the BOCES TSP-F program with the support of BASIS could have addressed the student's needs and was reasonably calculated to enable her to receive educational benefits. Although the student's psychiatrist recommended a residential placement, as discussed above the hearing record supports a finding that the student could have received educational benefits in a day program, and the district is not obligated to adopt a private recommendation for different programming (J.C.S., 2013 WL 397594, at *11; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

b. Counseling

The parents argue that the change in the manner of delivery of counseling services from the July 2012 IEP to the August 2012 IEP resulted in a recommendation that was insufficient to meet the student's counseling needs. The July 2012 CSE recommended two 30-minute individual counseling sessions per week (Dist. Ex. 1 at pp. 1, 10). However, the August 2012 CSE recommended one 30-minute individual counseling session per week, and one 30-minute group (5:1) counseling session per week (Dist. Ex. 3 at pp. 1-2, 11). Testimony by the TSP-F school psychologist indicated that students at BOCES TSP-F received one 30-minute individual counseling and one 30-minute group counseling session per week programmatically (Tr. pp. 666, 701). However, the psychologist also indicated that the parents and the district could negotiate "anything extra" (Tr. p. 701). Students at the BOCES TSP-F were provided open-door access to a psychologist, as well as access to psychiatric consultation, in addition to their mandated counseling services (Tr. pp. 190, 666-67; Dist. Ex. 3 at p. 2; Parent Ex. GG). The school psychologist from BOCES TSP-F testified that the teachers at TSP-F were well trained and experienced in working with students with psychological and psychiatric challenges, and were willing to be adaptive and creative to know when a student's emotional needs "trump academic pursuits" (Tr. pp. 695-96; Parent Ex. GG). The representative from the BOCES TSP-F program indicated during her telephone participation in the August 2012 CSE that one of the program's strengths is its flexibility in working with students to "make things work" for students with health demands (Parent Ex. GG).

In consideration of the above, I find that the change in the manner of delivery of one of the student's two weekly counseling sessions from individual to group is not a basis for finding that the district failed to offer the student a FAPE. Overall, based on what was included in the August 2012 IEP as it was explained during the August 2012 CSE meeting, the recommended BOCES TSP-F program, which included a recommendation for counseling as a related service, would have adequately addressed the student's emotional needs and the hearing record does not provide any indication that the student could not receive academic benefit from the counseling services provided.[28]

3. Implementation

Finally, the parents' arguments related to whether the BOCES TSP-F program would be able to implement the student's August 2012 IEP, including the annual goals, weekly psychiatric consultation, and family counseling, must be dismissed for the reasons explained more fully below.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the

[28] Nonetheless, while I find that the student could receive educational benefits from the recommended counseling services, it is unhelpful that the hearing record appears to focus on questions surrounding the structure of the BOCES TSP-F program, rather than how the student's needs prompted this adjustment to the student's program (Tr. pp. 666, 701). However, because the recommendation was still appropriate under the Rowley standard overall to meet the student's needs, this would not constitute a denial of FAPE in any event.

public school program]).[29] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the August 2012 IEP because a retrospective analysis of how the district would have implemented the student's August 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the August 2012 IEP, making the issues raised and the arguments asserted by the parents with respect to the assigned public school site speculative (see Dist. Ex. 36; Parent Ex. U at pp. 3-5). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing, while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [holding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the August 2012 IEP.[30]

---

[29] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[30] While some district courts have found that parents have a right to assess a particular school site, the weight of the relevant authority supports the approach taken here (see P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13 [S.D.N.Y. July 24, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ.,

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

a. Goals

The hearing record controverts the parents' assertion that the BOCES TSP-F program would not have been able to implement the goals included in the IEP because they were told during the intake interview that there were too many social/emotional goals included in the August 2012 to track. The BOCES school psychologist testified that he remembered discussing with the parents that there were many social/emotional goals on the IEP; however, he also testified that he explained it was too many goals for him to track personally (Tr. p. 714). The BOCES school psychologist further testified that the school would be able to track the goals and that other school staff, including the teachers, would track some of the goals (Tr. pp. 715-16). This testimony is supported by the conversations that took place during the August 2012 CSE meeting, during which the BOCES representative informed the parents that the school would be able to implement the August 2012 IEP, including tracking the goals (Parent Ex. GG).

b. Psychiatric Consultation

The parents' argument that the BOCES TSP-F program would not have been able to implement the weekly psychiatric consultation included in the August 2012 IEP is against the weight of the evidence. The BOCES school psychologist testified that the school only had a psychiatrist available for consultation every six-weeks (Tr. pp. 697-98). However, the BOCES school psychologist also testified that the school could provide a weekly psychiatric consultation at an additional cost to the district (Tr. p. 715). Additionally, the weekly psychiatric consultation is part of the August 2012 IEP and the BOCES school psychologist testified that the school would be able to implement the IEP (Tr. p. 673).

2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

c. Family Therapy

The parents assert on appeal that the BOCES TSP-F program would have been inappropriate for the student because it did not include a family therapy component. Initially, the parents' due process complaint notice cannot reasonably be read to include any claim relative to the parents' assertion on appeal that the BOCES TSP-F program does not having a family therapy component (IHO Ex. 4). Accordingly, these claims are not properly raised in this appeal and are outside the scope of appellate review (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d 167, 188-89 & n.4). Additionally, the only references to family therapy during the district's presentation of its case were in response to questions posed by counsel for the parents during cross-examination and cannot be the basis for an argument that the district opened the door to this subject (Tr. pp. 324, 715; see B.M. v New York City Dep't of Educ., 2014 WL 2748756, at *2 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 249-50 [2d Cir. 2012]). In any event, in addition to the weekly psychiatric consultation for the "team and home," the August 2012 CSE recommended parent counseling and training one time per month for 30 minutes (Dist. Ex. 3 at pp. 2, 11).[31] The district's director of special services testified that the August 2012 IEP did not include family therapy, but included family counseling (Tr. pp. 324-25). Accordingly, the hearing record does not support a conclusion that because the BOCES TSP-F program did not include family therapy, the program would not have been able to implement the August 2012 IEP.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that compensatory services are not warranted for the 2010-11 and 2011-12 school years, and that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, it is unnecessary to address the appropriateness of Grove, or whether equitable considerations weigh in favor of granting the parents' requested relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 23, 2013, is modified by reversing that portion which found that the district was not obligated to evaluate the student during the 2011-12 school year.

Dated: **Albany, New York**
August 20, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[31] The August 2012 IEP also indicated that the relevant county mental health single point of access coordinator provided the parents with information about community-based resources that would support home-based concerns, and how to access those resources (Dist. Ex. 3 at p. 2).